

Two Fronts for Sentencing Reform



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Ensuring “transparency in sentencing” and seeking to eliminate “unwarranted disparity in sentencing” were great sound bites. But they resulted in bad policy because federal sentencing is highly politicized and because the substance of what was made “transparent” is in large measure a set of inflexible, arbitrary, and sometimes bizarre sentencing rules.

In public, policy makers and politicians of all political stripes agree that the current regime of advisory Guidelines plus appellate review for reasonableness is far from ideal. Proponents of greater uniformity are understandably concerned that there will be widespread and unjustified sentence variations in at least some circuits. Proponents of reduced severity, especially for nonviolent crimes, are understandably concerned that the current regime addresses the issue of unwarranted severity only on an ad hoc, hit-or-miss basis—and probably not much at all in some circuits.

In private, there is even more agreement—most importantly, that the Federal Sentencing Guidelines (which sought to avoid “unwarranted disparity in sentencing”) are unreasoned and arbitrary in their treatment of many key factors. Some of the more objectionable structural features of the Guidelines include the specification of many aggravating adjustments without regard to mens rea; a sprawling definition of *relevant conduct* that would perhaps be appropriate were the issue civil, rather than criminal, liability; the persistent double-counting of aggravating facts; the undue sentencing weight accorded to quantity of loss/drugs; and the failure to address true first-time offenders. There is even widespread agreement, off the record, that the Sentencing Commission “should” be encouraged by Congress and the president (including the Department of Justice) to address these issues head-on, perhaps under the general title of “simplification.” At the same time, it is recognized that, politically speaking, this would be very difficult to do. It would require a measure of honest deliberation, bipartisan commitment to the common good, willingness not to engage in political spin, and the capacity to accept political heat that are seldom witnessed either in Washington or on the airwaves and blogs throughout the nation.

In many quarters there is also substantial agreement that the abolition of parole (in order to achieve “truth in

sentencing”) has exacerbated the failings of the Guidelines. Because there is no opportunity either for the sentencing judge to revisit a sentence, as was possible under old Rule 35 of the Federal Rules of Criminal Procedure, or for nonjudicial authorities to review long sentences after the conviction is final, we find ourselves in a situation in which long sentences based on untested assumptions and predictions (often built into the Guidelines) cannot be modified. The need for a process of review is especially great as to sentences imposed when the Guidelines were mandatory, for these sentences may have been imposed without full consideration by a human agent of the purposes of sentencing in the particular case. Even as to sentences imposed under the current regime, the absence of a procedure for assessing when imprisonment has served its purpose effectively means no review at all in districts where waiver of appeal is a condition of the plea agreement. The enormous backlog of petitions for clemency and pardon (the result of many factors, to be sure) is the latest evidence of the error of totally extinguishing the possibility of parole. The continued growth in the cohort of aging, nonviolent federal prisoners is, of course, even more powerful evidence.

I would propose proceeding on at least two fronts, the first requiring political courage and the second requiring political know-how. First, the Sentencing Commission could embark on a project to alter the Guidelines in significant respects, so that recommended sentences are more proportionate to the offender’s personal culpability. I am not suggesting that the Commission implement a grand or theoretically complex rationale for criminal punishment; to the contrary, simplification, common sense, and flexibility should be the watchwords of this project. Most importantly, the Commission should listen to sentencing judges, both in their recorded sentencing decisions and in hearings that the Commission should hold in a courthouse in each of the twelve regional circuits. If it is clear to judges that the Commission has pegged proposed sentences primarily to metrics of personal culpability (such as role in the offense, as opposed to a contingent fact such as change in the stock price), there will be less disparity even under the current regime of advisory Guidelines. It is to be hoped that the Department of Justice in Washington

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("Main Justice") will not reflexively reject every proposal for change. But the Commission, with the support of key leaders in Congress, would have to be prepared to proceed with or without the Justice Department fully on board.

Unfortunately, little headway may be forthcoming on that first front. It is perhaps asking too much of Congress to accede to what inevitably will be seen as an effort to reduce punishment of convicted criminals. It is perhaps asking too much of Main Justice to give up the extraordinary leverage that prosecutors are able to exert under the present set of Guidelines, even as now transmuted into rebuttable recommendations. And having a high-profile public discussion, during a highly charged political season, on punishment of criminals runs the risk of making a bad situation worse.

Hence we need another front. If a more just sentencing system cannot be achieved transparently at the front end, then we need a less transparent, broad safety valve at the back end. Indeed, even were we to have an ideal system of judicial sentencing upon conviction, it makes sense to have a process that allows the possibility of review and reconsideration at some later time, particularly of long terms of incarceration. The reformers and other policy makers who were responsible for the Sentencing Reform Act of 1984 (and who subsequently have sought to force states to adopt "truth in sentencing" rules) have perhaps

forever tarnished the word *parole*. But, whether we call it *parole* or not, is there not political space to give some federal authority the power to expedite an offender's entry into supervised release? A mechanism for early release (especially for those serving lengthy sentences) might be most politically palatable if it is established within the Bureau of Prisons, a nonprosecutorial arm of the Department of Justice. Or perhaps the most appropriate place to repose such authority would be the federal judiciary itself. Whatever agency is enlisted, review of sentences could be on the basis of factors such as the prospects (or lack thereof) for rehabilitation and recidivism, changes over time in social and legislative assessment of the seriousness of the offense, the offender's behavior and achievements in prison, and (in the words of the Sentencing Reform Act itself) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

I am not proposing wholesale early release. I am simply suggesting that sometimes we can see both the offense and the offender more clearly in hindsight. Given the political difficulty at the federal level of establishing front-end sentencing rules that are both transparent and sensible, it is especially unfortunate to eliminate altogether the opportunity for review and reconsideration of a sentence at a later time.