

THE ORIGINAL U.S. SENTENCING GUIDELINES AND SUGGESTIONS FOR A FAIRER FUTURE

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I. INTRODUCTION

Thank you very much. It is terribly nice for me to be here at Hofstra. Thirty years ago, as the original Sentencing Guidelines were going into effect, I spoke here to highlight some of the key compromises we as Commissioners reached in writing them. Ten years later, in 1998, I revisited the Guidelines at the Roman L. Hruska Institute in Nebraska to discuss their history and to offer my recommendations for discussion following a decade of their application. I am here today to commemorate the history of the original Sentencing Guidelines, and to again offer my suggestions to Congress, the Department of Justice, and to the current United States Sentencing Commission.¹ While much has changed since the Guidelines were considered in those speeches, my suggestions remain the same.

II. HISTORY

When Ken Feinberg and I were working on sentencing for Senator Ted Kennedy, we were trying to find ways to reform sentencing disparities that would be totally unopposed. Although the original Guidelines may not have been perfect, there was nonetheless not much opposition to them until they were released. Prior to that, sentencing reform was called for by Marvin Frankel, Jon Newman, and various

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† These remarks were adapted in part from a presentation given by Justice Breyer at the Roman L. Hruska Institute, published as *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180 (1999). The transcript of Justice Breyer's address has been lightly footnoted and styled for publication by the Board of Editors of the *Hofstra Law Review*, any errors herein should be attributed solely to us.

1. See *infra* Part III.

others; it was a great idea.² In the beginning, there were many facts and figures that showed great discrepancies in sentencing by federal judges. They showed, for example, that if you were black and in the South and you robbed a bank, your sentence on average was thirteen months more than if you were white, or not in the South.³ There was also a study performed in the Second Circuit in which judges were asked to sentence hypothetical defendants, and it produced wild discrepancies.⁴ The data highlighted what Marvin Frankel and others used to say: if the sentence does not depend on the judge, if it just depends on the crime and the person, why are judges assigned by lottery?⁵

Ultimately, the Guidelines were developed because we wanted two things: one was greater fairness (I note “-er” not “-est”), not perfect fairness, but increased fairness where people would be treated more alike.⁶ So, eliminating these discrepancies was one objective. The other goal was to promote honesty in sentencing. It used to be such that a federal judge would appoint her sentence for twenty years and then the Parole Commission would cut it to seven. Aware of this, the judge, then annoyed, would sentence the next defendant to sixty years so it would only be cut to twenty, but that time the Parole Commission fooled her and only cut it to thirty. For whatever it was, it was not straightforward in the federal system. The original Sentencing Commission sought to bring more fairness and more honesty into the sentencing process.

It is a much more difficult job writing Federal Guidelines than one might think. The states generally do not have that many criminal statutes. Early on, for example, we discovered that Washington State had about a hundred separate criminal statutes. The federal government has at least seven hundred and counting. The difference is that states tend to follow the Model Penal Code approach, which matches certain behaviors to crimes: “You have a behavior? It’s a crime. *This* behavior is *this* crime.” Federal law does not necessarily follow that framework, because a lot of the statutes are jurisdictional in nature. Consider the Travel Act.⁷ Many different kinds of behaviors violate the Travel Act, but there is a federal hook for jurisdiction. Consider also, for example, the Hobbs

2. See generally MARVIN E. FRANKEL, CRIMINAL SENTENCING: LAW WITHOUT ORDER (1972); Jon O. Newman, *A Better Way to Sentence Criminals*, 63 A.B.A. J. 1562 (1977).

3. *Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary, H.R.*, 100th Cong. 676-79 (1987) (testimony of Ilene H. Nagel, Commissioner, U.S. Sentencing Comm’n).

4. ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FED. JUDICIAL CTR., THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 5 (1974).

5. See FRANKEL, *supra* note 2, at 12-25, 69-86.

6. Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 13 (1988).

7. Travel Act of 1961, 22 U.S.C. §§ 2121-2124 (2012).

Act.⁸ There are many statutes at the federal level that cover wide ranges of behavior, and the Guidelines were written to cover behaviors, not statutes. To write them for statutes would have been easy: “violating *this* statute results in *this* sentence.” But doing so would have turned all of the power over to the prosecutor. That would have been a problem.

What we wanted to do was to take power away from the prosecutor and to have the sentence imposed roughly reflect what was, in fact, the behavior that underlay the crime and the characteristics that underlay the offender. The Commission wound up not doing too much from the perspective of offender characteristics because there were a lot of disagreements between the Commissioners. This was because we knew what the offender’s conviction record was, which correlated with an increased tendency to commit future crimes. In addition, the second-most correlative factor was the offender’s arrest record. The Guidelines were written such that punishment would increase based on the offender’s prior convictions—that is, the past conviction would represent a circumstance of the current sentence. A recidivist offender has special reason to understand the wrongfulness of the later crime; a recidivist is yet more likely to engage in future crimes, and a recidivist is less likely to be rehabilitated. We looked for other correlations, but we struggled to determine which other characteristics should be used. The result was a decision to leave the other characteristics out of the sentencing determination.

Next, we proceeded to figuring out the length of the sentence, namely whether it should be based on the charged offense, real offense, or some modified third approach. One Commissioner, Paul Robinson, was determined to make every sentence turn on what the real behavior was to the ninth degree. He came up with a complex plan, very nearly employing advanced mathematics. The Commissioners and our advisors reacted negatively, as did the judges we discussed the plan with. After convening with Chairman William Wilkins, the decision was made to move in a different direction.

Gradually, this different approach was worked out, and it was referred to as “Draft X.”⁹ Commission staff members David Lombadero and Peter Hoffman were highly involved with it, and Draft X became the amalgamation of former parts into which other aspects were melded. Eventually it was this draft which evolved into the first Guidelines Manual.¹⁰ First, data from previous cases was used to conform Draft X

8. Hobbs Act, 18 U.S.C. § 1951 (2012).

9. Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1206-09 (2017).

10. Commissioner Michael Block and I sat down, and the key moment in my own psychology occurred when he pointed out quite clearly to me that God doesn’t tell us what the right sentence is.

to typical past practices in sentencing. Research Director William Rhodes had amassed data from 10,000 real cases, which included information on what the offender's crime was, the offense of conviction, past behavior to the extent it was included in presentence reports, and what happened thereafter, including sentence length.¹¹ Those 10,000 cases were available on computers and there were about 90,000 others on file. Therefore, pretty reliable data existed as to: (1) what really happened to people over the preceding years; and (2) what were the factors that the judges really used in sentencing defendants. The aim was to build Draft X to mirror what had actually been happening in federal courts, and then to modify it based on the observable irrationalities. Each change was discussed as a modification, and each modification was debated between the Commissioners: should we or should we not depart from what the history tells us federal judges have by and large actually been doing?

Since neither the charged offenses nor real offenses could realistically be used, the Commission developed a concept called "real relevant offense" which required incorporation on a crime-by-crime basis.¹² As an illustration, when someone commits a drug crime, the Guidelines do not count the money that he stole in determining his sentence, because that factor is far distant from what the defendant is being accused of; it is fairly subjective. The relevant conduct, bit-by-bit, was one of the harder things to work out, but it was eventually agreed upon. It was not perfect by any means; it was a set of human beings trying to make a rough approximation of what kinds of things should or should not be taken into account in sentencing for this kind of a crime, and that can be very discordant.

Following the debates and compromises we made, this later version, a revised copy of Draft X, was approved by the Commission by a six-to-one vote on April 11, 1987.¹³ The later version had taken the comments from previous drafts into account, and we toured it with judges around the country.

III. SUGGESTIONS

The suggestions I made in 1999 at the Roman L. Hruska Institute remain just that: suggestions. Today, I again offer one for

There is nothing that would tell us exactly how a person who has done a wrong thing should be punished, and therefore we should not worry too much about being crude, nor worry too much about trying to get it exactly right, which was impossible. In the end, the goal was to try to reduce the unfairness in the system.

11. Breyer, *supra* note 6, at 7.

12. Newton & Sidhu, *supra* note 9, at 1259.

13. *Id.* at 1207.

the Congress, one for the Justice Department, and one for the Sentencing Commission.

My suggestion for Congress is to stay out of sentencing. The Sentencing Commission was created as a preferable version of the Parole Commission, and was essentially tasked with building an American version of the English system of “tariffs.”¹⁴ Tariffs were developed to roughly categorize the kinds of sentences that would be imposed for certain kinds of behavior, but they were not written in stone. This idea, shadowed by the Guidelines was thought to be: “Judge, you have a typical case? Apply the guideline. Judge, you have an atypical case? *Depart*.” The trial judges would give their reasons, and the courts of appeals would review them. The Commission would collect what the courts of appeals say, and therefore there would be an iterative process where these Guidelines could and would improve over time.

That iterative process was what was supposed to happen as the Commission and the Guidelines matured. It did not happen very much in practice, but now it is happening again because of *Apprendi*¹⁵ and *Booker*.¹⁶ *Booker* said the Guidelines are really voluntary and included some language to determine whether the judge should make a departure within the guideline or declare a variance. Really those words are describing the same action, so I often wonder why judges do not simply depart in the unusual case. The introduction to the Guidelines is very nearly the same as it was when introduced in 1988, and points out that the Commission had not considered every possible nuance in every case, and therefore in an unusual case, it invites the judge to depart.¹⁷ Then, the court of appeals will look at it, and should defer to the district court insofar as it pertains to the individual. But, if the trial judge believes he can write a better guideline from his bench without any information, than the Commission can from its offices, with its staff, and with more information, maybe the court of appeals should defer a little bit less.

Congress fundamentally influences sentencing through its imposition of mandatory minimums. For one thing, statutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development in part through research, of a rational, coherent set of punishments. Mandatory minimums will sometimes make it impossible for the Commission to adjust sentences in light of factors that its research shows to be directly relevant, such as the amount of a drug involved in a crime. In addition to

14. FRANKEL, *supra* note 2, at 10.

15. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

16. *United States v. Booker*, 543 U.S. 220 (2005).

17. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM’N 2016).

many other problems with mandatory minimums, they have been driving the drug-related Guidelines, and I sympathize with the Commission's awkward situation given that circumstance. Moreover, they do not give the judge the opportunity to say, "Look this guy did transport forty tons of cocaine across the international border, but it was somebody who was lying on the dock somewhere and the real offender just dragged him to the cab and said, 'Here's forty bucks, take it across the line.'" Here, the mandatory minimum takes away flexibility, which should not be laid at the feet of the Guidelines. Congress also influences the Guidelines by including add-on language to its statutes, which influence the percentage-increases designed by the Commission to proportionately increase or decrease sentences. Because the Guidelines increase imprisonment terms by greater lengths at higher levels, congressional add-ons distort the functioning of the system as designed.

The person who has the greatest political impact in this area is the Attorney General of the United States, and no one else. Therefore, the second recommendation is that the Department of Justice align itself with the Sentencing Commission. To accomplish this, there must be staff in the Department of Justice willing to spend four, five, or ten years understanding sentencing and understanding the Guidelines. It would ideally be at least one or two people with a voice on the Commission, to be exercised in the long-term interests of the Sentencing Guidelines. This means rationality, which means that there must be a staff voice representing the Department of Justice, backed up by the Attorney General. The issue has to be rationality, and the people who can do it have to be the staff of the Justice Department.

My final suggestion, one for the Commission, is simplification. Simplification is important and everybody knows that. But, it is a question of bringing it about, which is hard to do. After all, one of the reasons that first edition is as long as it is, is because there are so many federal crimes and each one must be listed and keyed to specific behaviors. Any crime at the individual level does not make the Guidelines particularly lengthy, until add-ons are considered at which point it becomes a mess. Simplification therefore becomes in part a technical job. Every add-on removed provokes the enemy here, called the legal mind. I think the economist Michael Block was right when he said, "Don't make so many distinctions, keep it simple."

By coincidence, I made roughly the same recommendations to the Roman Hruska Institute nineteen years ago, and nothing happened. But discussion of suggestions for improvement, whether my own suggestions or those of others, is necessary. Hope springs eternal, and there we are. That is the same thing.