Revolution or Evolution: Recent Developments in American Federal Criminal Sentencing

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Revolution or Evolution?
Recent Developments in American Federal Criminal Sentencing
Steven L. Chanenson¹

Good afternoon. It is a distinct professional honor and a personal pleasure to be here at Waseda University Law School.

American Federal criminal sentencing has experienced many changes recently. On paper, at least, it reflects a very different system than it did just a few short years ago. I am thrilled to have the opportunity to discuss these issues with you today.

However, I could not be here today without the hospitality and hard work of my several hosts. Thus, I offer my deepest thanks to Professor Norio Takahashi, Professor Setsuo Miyazawa, Professor Mari Hirayama, Professor Yuji Shiroshita, and Professor Satoru Shinomiya. Furthermore, I am indebted to the Institute of Comparative Law here at Waseda University as well as the Japan Federation of Bar Associations for their generosity.

Background.

For most of the past decade, the Supreme Court of the United States has been actively involved in non-capital criminal sentencing. Through its interpretation of the Sixth Amendment to the United States Constitution, the Court has highlighted the important role of juries as finders of certain facts that are relevant to sentencing. However, the Court has kept the trial judge firmly in control of Federal sentencing while

¹ Professor of Law, Villanova University School of Law; Distinguished Fulbright Lecturer in Law, Xiamen, China (2008-2009). This document is a summary of a lecture delivered at Waseda University Law School in Tokyo, Japan on April 11, 2009. The Fulbright Scholarship Program provided invaluable support for this presentation. I am also grateful to Julia Jacobelli for her research assistance.
The previously rigid demands of the United States Sentencing Guidelines by making those Guidelines "effectively advisory." The resulting judicial sentencing behavior has pleased some people and infuriated others. My hope in this presentation is to provide a brief explanation of these developments and then question where the world of American sentencing – and American criminal justice more broadly – goes from here.

The Importance of Sentencing.

Law professors are often accused of seeing the entire legal universe through the lens of their narrow specialty, thus overinflating its importance. Sentencing law professors are as guilty of this as anyone else, but as Michael Tonry titled one of his excellent books, indeed SENTENCING MATTERS. Sentencing matters in every country because it reflects the awesome power of the state to take away liberty and, in some countries and situations, even life. In America, sentencing is peculiarly important. America incarcerates the largest number of people in the world, according to published reports. According to recently released government statistics, there were more than 2.3 million people in state and Federal prisons and local jails combined as of midyear 2008. This produces a total incarceration rate – the total number of people in custody for every 100,000 U.S. residents – of 762. Sentencing also matters because it is society's way of protecting itself and providing public safety. The goal, as trite as it may sound, is to seek justice.

5 Id.
So how do we try to seek sentencing justice?

A key component is to create a legal framework that encourages appropriate sentencing responses. The American Bar Association has phrased it this way: "The legislature should create a sentencing structure that sufficiently guides the exercise of sentencing courts' discretion to the end that unwarranted and inequitable disparities in sentences are avoided." There can be no doubt that "unwarranted" disparity is a problem that can produce injustices in particular cases and undermine the respect for the criminal justice system generally.

Unfortunately, equality and disparity are neither simple nor self-defining concepts. Superficial equality is easy to achieve. The legislature could pass a law that requires every convicted defendant to serve five years in prison. That is one measure of equality. It is also preposterous. There are differences in the crimes of conviction, differences in the ways crimes were committed, and differences in offenders that do and should matter. As Professor Marc Miller has wisely observed, "Absolute apparent equality can be demonstrably unjust." Indeed, we need to be concerned about "unwarranted" uniformity as well as "unwarranted" disparity.

What makes one case sufficiently similar to or different from another case to justify similar or different treatment can be difficult to articulate. The problem is neither new nor easily solved. Indeed, questions of disparity are among the enduring struggles of criminal sentencing. "One could summarize the entire guideline sentencing movement as just another chapter in an endless struggle to calibrate the unavoidable

7 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, 18-2.5 (3d Ed. 1994).
Revision between efforts to achieve equal justice across cases and those to achieve individual justice in specific cases.⁹

We hope to find a reasonable balance between uniformity and individualization.

Professor Michael Tonry put it well when he observed:

Like all calls for just the right amount of anything, not too much and not too little, a proposal for sentencing standards that are constraining enough to assure that like cases are treated alike and flexible enough to assure that different cases are treated differently is a counsel of unattainable perfection. Nonetheless, that is probably what most people would want to see in a just system of sentencing. . . .¹⁰

How has American sentencing responded to these competing demands?

Oversimplified, Expedited History.

English punishment in the mid-to late-1700s reflected what might be referred to as the tariff system. In its purest form, each offense yielded a particular punishment by operation of law. Although these punishments were evaded in various ways, the sentencing Judge played little overt substantive role in determining a defendant's sentence. A common punishment for various offenses, ranging from murder to theft, was death. This system was extremely uniform at least in theory.¹¹

At least by the 1800s (there is some historical debate about earlier post-revolutionary practice), some American Judges had considerable sentencing discretion. From at least the 1800s until the late twentieth century, Federal Judges had wide discretion to impose sentences within the legislatively imposed statutory maximum

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⁹ NORA DEMLEITNER, ET. AL., SENTENCING LAW AND POLICY: CASES, STATUTES AND GUIDELINES 182 (2d ed. 2007).
¹⁰ MICHAEL TONRY, SENTENCING MATTERS 185-86 (Oxford 1996).
sentence. In this unguided sentencing regime, trial Judges reigned essentially supreme in their courtrooms. Appellate review of sentences was unavailable except in extraordinary circumstances, such as where the sentences imposed were above the statutory maximum or based on overt, invidious discrimination. A jury's verdict of guilt or a defendant's guilty plea authorized a punishment up to the maximum set by the legislature. Within that often vast range, Judges were free to do as they saw fit based on the facts as they (informally) found them.

This unguided sentencing system produced a kind of Wild West of unregulated discretion that, in the words of one commentator during the 1970s, arguably resulted in a "gross disparity in sentencing, with different sentences imposed upon similar offenders who had committed similar offenses by the same judge on different days, different judges on different days, different judges on the same day, and different judges in different jurisdictions."¹² This approach also raised serious concerns about racial bias.¹³

Sentencing reformers mounted a sustained attack on this unregulated sentencing scheme.¹⁴ The result has been a more than 35-year experiment in sentencing reform. One manifestation of sentencing reform has been the introduction of sentencing commissions and sentencing guidelines. Sentencing commissions can be powerful forces for:

"Greater transparency."

¹³ See, e.g., Blakely v. Washington, 542 U.S. 296, 315 (2004) (O'Connor, J., dissenting) ("Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race.") (citations omitted).
More rational sentencing policies.
* Reasonable uniformity of sentences.
* Prediction and control of correctional expenses.
* Political insulation while retaining accountability.
* Building trust between government branches.

Of course, it does not always work out so well.

The main tangible product of a stereotypical sentencing commission is a set of sentencing guidelines. Sentencing guidelines offer the sentencing Judge a sentencing recommendation or frame of reference for the typical case, which is commonly based on the seriousness of the offense (as perceived by the institution creating the guidelines) and the criminal history of the offender. Some guidelines are often described as more "presumptive" or "mandatory" and require the Judge to abide by the recommendations or justify any deviation. Other guidelines are more "voluntary" and allow the Judge to dispense with the recommendations more readily.\(^{15}\)

On the Federal level, the reformist effort to reign in judicial sentencing discretion resulted in a grand compromise of the political right and the political left, known as the Sentencing Reform Act of 1984 ("SRA"). For a variety of reasons, the United States Sentencing Guidelines became substantially "mandatory." Many of the state sentencing guidelines, in contrast, were and are far more "voluntary." Federal Judges followed the Federal Guidelines (or agreed to Government-sponsored leniency) the vast majority of the time. Many of the Judges objected to what they perceived as their lack of discretion, but this is how the system developed.

\(^{15}\) "Mandatory" and "voluntary" are quite imperfect descriptions. See, e.g., Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 STAN. L. REV. 155, 157 (2005) (noting that these terms "have never been wholly adequate to capture the continuum of possibilities for the design of sentencing systems," and that no contemporary system is either purely mandatory or purely advisory [voluntary]); Steven L. Chanenson, The Next Era of Sentencing Reform, 54 EMORY L. J. 377, 384 (2005) ("In broad strokes, sentencing guidelines can be either 'presumptive' or 'voluntary,' although there can be many variations under these labels.").
The United States Sentencing Guidelines also rely heavily on judicial fact-finding to calculate the appropriate guideline. A key issue involves determining which facts the Judge is called on to decide. What conduct should the sentencer consider? Is it only the offense of conviction? Is it every bad thing the offender ever did? Is it some balance between the two?

The Federal guidelines include what is called the "relevant conduct" provision, which for our limited purposes today tells Judges to consider other acts similar to the offense of conviction even if the government never charged the defendant with those acts or the jury acquitted the defendant of those acts.\(^\text{16}\) Indeed, the Government need only prove relevant conduct to the Judge by a preponderance of the evidence. This approach required substantial post-conviction fact-finding, including concerning such questions as the amount of money stolen or drugs sold. The use of this kind of fact-finding, especially because it is done at the relatively low, preponderance of the evidence level, has been the subject of extensive judicial and scholarly criticism.\(^\text{17}\)

Furthermore, we must ask who should do the fact-finding in this Guidelines system that was initially largely "mandatory." The system was designed to have the Judge engage in this kind of fact-finding. Yet, surprising constitutional developments were around the corner.


Dramatic Supreme Court Decisions.

Over a five-year span, the Supreme Court gave new life to the Sixth Amendment concerning the jury's role in determining certain sentencing facts - facts that had previously been decided by a Judge. The Sixth Amendment provides, in relevant part, that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." 18

Absent a defendant's guilty plea, juries must generally find all factual elements necessary for conviction beyond a reasonable doubt. Starting in the late 1990s, the Supreme Court issued several opinions exploring the sentencing dimensions of this idea. In Apprendi v. New Jersey, the Supreme Court held that every fact that increases a defendant's maximum potential sentence, other than the fact of a prior conviction, must be admitted by the defendant or proven to a jury beyond a reasonable doubt. 19 In Apprendi, a hate crime law increased the statutory maximum from ten to twenty years if the Judge determined that the crime was committed with the intent to intimidate on the basis of, among other things, race. The Supreme Court held that the jury had to make this factual determination about racial animus because it increased the statutory maximum. The lower courts, in the wake of Apprendi, limited this holding to the traditional, legislatively enacted statutory maximum. However, the possibility existed that the Supreme Court would take it further. Would, for example, the Supreme Court extend Apprendi and invalidate the Federal Sentencing Guidelines which also relied on judicial fact-finding, but within the traditional, legislatively enacted statutory maximum?

18 U.S. Const. amend. VI.
In 2004, the Supreme Court decided *Blakely v. Washington* and expanded *Apprendi* by redefining the term "statutory maximum."\(^{20}\) It is no longer just the maximum potential punishment established by the legislature. The *Blakely* Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."\(^{21}\) The Court went on to state that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings."\(^{22}\) As such, the *Blakely* Court reversed that defendant's sentence because the Judge made factual findings to increase the Guidelines sentence despite the fact that the sentence was still below the maximum potential punishment authorized by the Washington state legislature.

Near pandemonium followed. The lower Federal courts were divided over what would happen to the Federal Sentencing Guidelines. The Supreme Court decided the fate of the Federal Sentencing Guidelines in *United States v. Booker*.\(^{23}\) The Court produced a fractured decision with six opinions, including two, almost dueling 5-4 majorities. One majority, written by Justice Stevens, can be viewed as the "merits majority," while the other majority, written by Justice Breyer, can be viewed as the "remedial majority." Only Justice Ginsburg voted for both majorities, and she wrote no opinion to clarify her rationale.

The merits majority held that *Blakely* applies to the Federal Sentencing Guidelines. Central to that holding was the premise that the Federal Sentencing

\(^{21}\) *Id.* (emphasis in original).
\(^{22}\) *Id.*, at 303-04 (emphasis in original).
Guidelines were “mandatory and imposed binding requirements on all sentencing judges.” If the Guidelines were simply advisory, the merits majority wrote, then the sentencing Judge would not have to find any facts before imposing a sentence above the Guidelines. Yet the Guidelines were mandatory in the view of the Court, and sentencing Judges were required to find facts. In the *Booker* case itself, the jury just convicted the defendant of possessing with intent to distribute more than 50 grams of the illegal drug crack cocaine. However, the Judge found – by a preponderance of the evidence – that the defendant actually possessed an additional 566 grams of crack cocaine about which the jury never heard.

The Supreme Court accordingly held that the then-existing, “mandatory” Federal Sentencing Guidelines violated the Constitution. The task of outlining what was to follow fell to the remedial majority. Justice Breyer, writing for the remedial majority, held that the proper remedy would be to remove the mandatory parts of the underlying legislation, the Sentencing Reform Act of 1994 (SRA). Thus, the remedial majority declared that the Federal Sentencing Guidelines were “effectively advisory.” In other words, the *Booker* remedial majority maintained the Federal Sentencing Guidelines and judicial fact-finding, but made those Guidelines (for which the facts are found) “effectively advisory” in order to keep the system constitutional. In doing so, the remedial majority chose to sever or remove the mandatory portions of the SRA instead

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24  543 U.S. at 233 (merits majority).
25  *Id.*, at 235.
26  543 U.S. at 245-46, 259 (remedial majority).
27  *Id.*, at 245.
of requiring a jury to make all of the factual findings as the remedial dissent would have preferred.\(^2\)

In other words, Judges remain at the center of American Federal sentencing. The Court freed the Judges from the stricter application of the Guidelines, but did not return them to the Wild West either. Judges must still “consider” the Guidelines; follow the dictates of the purposes provision of the Sentencing Reform Act; give written reasons for their sentences if they diverge from the Guidelines; and be subject to appellate review, although now based on a review standard of “unreasonableness.”\(^2\)

*Blakely* and *Booker* created many disruptions to sentencing in the Federal and state courts. While certain States needed to alter their sentencing statutes to comply with *Blakely*, the Supreme Court’s *Booker* decision left the Federal system with a working and constitutional sentencing structure. To date, the United States Congress has not exercised its authority to change the *Booker* Court’s modified system, although it can do so as long as it respects the Sixth Amendment requirement that juries find facts that are necessary for higher sentences.

Since *Booker*, the Supreme Court has reinforced its basic conclusions in several subsequent cases.\(^3\) It is now quite clear that because of the continued role for judicial fact-finding, the Federal Sentencing Guidelines cannot be mechanically followed as “mandatory.”

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\(^2\) 543 U.S. at 272-74 (Stevens, J., dissenting as to remedy).

\(^2\) See, e.g., id. at 259-65 (remedial majority) (citations omitted).

So Now What?

The Supreme Court of the United States has removed Federal trial Judges from the relatively strict control of the formerly more “mandatory” United States Sentencing Guidelines. Indeed, some view this line of cases as freeing the sentencing Judge from years of servitude to unfairly rigid, overly severe Guidelines.

How would we expect sentencing statistics to look today? No doubt, some people would expect Judges to behave almost as though the Guidelines never existed. That has not been the case.

There certainly have been changes with more sentences imposed both above and below the now-advisory Guideline recommendations. Yet, almost 60% of the cases are still sentenced within the range recommended by the United States Sentencing Commission.31 If one adds the more than 25% of cases where sentences that are more lenient are recommended by the prosecution, the Judge basically does what the Commission or the prosecution wants 85% of the time.32 During a particularly strict and more “mandatory” era of the Guidelines shortly before the Court decided Blakely, that number was 94.1%.33

Some people see this current sentencing pattern as evidence of judicial wisdom while others see it as judicial cowardice or rampant judicial leniency. These numbers may change, of course, as a new generation of Judges joins the bench, and the current Judges feel more comfortable with their expanded discretion. Yet, the legal

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31 United States Sentencing Commission, Final Quarterly Data Report Fiscal Year 2008 Tbl. 1 (Released March 24, 2009).
32 Id.
"earthquake"\(^{34}\) that *Blakely* and then *Booker* brought has not resulted in dramatic changes in practice so far.

**Thoughts for An Uncertain Future.**

It has been almost five years since the *Blakely* case and more than four years since the *Booker* case. Are we approaching a new "normal"? Will the so-called compliance numbers for the Federal Sentencing Guidelines remain roughly the same? If so, what does that mean? What should it mean?

The United States Congress has the ability to make changes to the Federal sentencing system. To date, it has neither acted nor shown much interest in doing so. Again, does that reflect Congressional wisdom or something less noble? If it chooses to act, should Congress try to keep the Judges at the center of the system or enlarge the fact-finding role (at least) for juries?

So much of this talk and so much of the recent legal scholarship has been about sentencing procedures. There is a good reason for this. Sentencing procedures are fundamental to achieving whatever sentencing goals we may have. Furthermore, it would be strange not to explore an area where United States Supreme Court has in recent years issued so many opinions about which actors (i.e., Judge or jury) may find what kind of sentencing facts. Yet, are sentencing procedures all that matter? Are there larger issues that we cannot see if we are focused solely on the mechanics of sentencing, no matter how crucial those mechanics may be?

There are other, comparatively rarely asked questions about sentencing. There are questions about sentencing severity and the proper uses of the criminal law.

Remember that America is the world leader in incarceration. Is that the right policy? In general? In particular?

Perhaps Americans will start to talk more about these vital -- and vexing -- questions. The global financial crisis has put enormous fiscal pressures on the individual American states. Despite the unfortunate and at times excessive academic focus on the Federal sentencing system -- a sin of which I am also guilty this afternoon -- most American prisoners are incarcerated by the various state governments. These states, unlike the American Federal government, generally must achieve a balanced budget every year and corrections costs are a large part of those budgets. The current crisis is prompting some states to think deeply about their sentencing choices, including who goes to prison and for how long.

One of the United States Senators from Virginia, Jim Webb, has also been working to shine a light on the broader issues of American sentencing and corrections.

For me, it is particularly interesting to mention Senator Webb while speaking in Japan about sentencing and corrections. Senator Webb has recently written:

Twenty-five years ago, I went to Japan on assignment for PARADE [Magazine] to write a story on that country's prison system. In 1984, Japan had a population half the size of ours and was incarcerating 40,000 sentenced offenders, compared with 580,000 in the United States. As shocking as that disparity was, the difference between the countries now is even more astounding -- and profoundly disturbing. Since then, Japan's prison population has not quite doubled to 71,000, while ours has quadrupled to 2.3 million.

With so many of our citizens in prison compared with the rest of the world, there are only two possibilities: Either we [Americans] are home to the most evil people
on earth or we are doing something different—and vastly counterproductive. Obviously, the answer is the latter.\textsuperscript{35}

Senator Webb is calling for "a major nationwide recalculation of who goes to prison and for how long and of how we address the long-term consequences of incarceration."\textsuperscript{36} He has introduced the National Criminal Justice Commission Act of 2009 that would establish an expert group to conduct a "top-to-bottom review" of the entire criminal justice system with one goal being to produce recommendations that would "[r]e-focus incarceration policies to reduce the overall incarceration rate while preserving public safety, cost-effectiveness, and societal fairness."\textsuperscript{37}

Only time will tell whether Senator Webb's proposal will become a reality and, if so, whether it will result in broad changes or just another special report that gathers dust on the library shelf.

Without this proposal, or something at least as bold, American Federal sentencing seems likely to continue to experience more of an evolution than a revolution despite the remarkable shifts in Supreme Court sentencing law.

Whether evolution is to be preferred to revolution remains an open question.

Thank you!


\textsuperscript{36} Id.

\textsuperscript{37} http://webb.senate.gov/email/fincardocs/FactSheet.pdf.