1999

The State of Severity

Aaron J. Rappaport
UC Hastings College of the Law, rappapor@uchastings.edu

Author: Aaron J. Rappaport

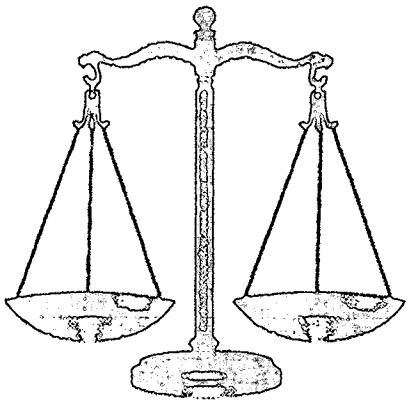
Source: Federal Sentencing Reporter

Citation: 12 Fed. Sent. R. 3 (1999).

Title: *The State of Severity*

The State of Severity

AARON RAPPAPORT
Assistant Professor of Law, University of California, Hastings College of the Law



In the mid-1980s, both the left and right agreed that something was wrong with the federal sentencing system, and that something was excessive judicial discretion. Both sides saw a guideline structure as the antidote, but their perspectives differed markedly. The left was mostly concerned with unwarranted disparity, fearing that judicial discretion allowed similarly situated offenders to be treated differently. The right was worried about excessive leniency, a concern that judges were letting offenders out of prison early. It was from this unusual marriage of reform ideologies that the guideline system was born.

In a sense, the left and the right both got their wishes. As Paul Hofer and Courtney Semisch write, the guidelines inspired both a disparity and severity revolution. With sharp limitations on judicial discretion, sentences became far more uniform and, as we now know, more severe. But if the guidelines reflect both parents' aspirations, one lineage seems more prominent. Much of the writing about the Commission, and many of the Commission's own statements about its mission, have focused on disparity. Reducing disparity has somehow become, as Frank Bowman notes, the Commission's prime directive.

To be sure, there has been some discussion about the severity of certain offense categories (such as white collar crime[1]) or specific sanctions (such as mandatory minimum penalties[2]). But little has been written concerning the general methodology that the Commission used in developing its offense severity and guidelines ranges. Although this Issue does not provide a comprehensive analysis of that difficult subject, it raises some of the basic questions that must be addressed when making severity decisions: What role should sentencing purposes play in determining sentence lengths? Should the Commission defer to public opinion in that analysis? What is the relevance of prison capacity in setting guideline ranges? Our hope is that this Issue will encourage further debate on these and related topics.

I. The Philosophical Approach to Sentencing Severity

"Establishing the proper level of severity," the ABA Criminal Justice Standards state, "is one of the most fundamental issues of criminal justice" – one that lies "at the heart of the growing problem of prison overcrowding ... in the United States."[3] Yet the ABA offers little guidance in making this critical determination, stating that it can do little more than "exhort policy makers to attend to the highest values of civilization and humanity when creating laws that will influence sentence severity."[4] The U.S. Sentencing Commission, however, could not be content with such generalities as it began to draft the initial guidelines; it needed a specific methodology for setting guideline ranges. The Commissioners inevitably asked themselves: On what basis should these fundamental decisions be made?

One natural place to look for an answer is the Sentencing Reform Act (SRA) itself. Although the wording of the Act is hardly free from ambiguity, the language is consistent with at least two different approaches to sentencing severity. One might be called the "philosophical" approach, because it calls on the Commission to justify its decisions based on traditional sentencing rationales of utility or retribution. The SRA expressly directs the Commission to undertake such an analysis,[5] and the original Commission acknowledged the force of that obligation.[6] Nonetheless, the Commission, when promulgating the first guidelines, made no attempt to justify the guideline ranges in terms of utility or retribution. In light of the clear statutory mandate, why did the Commission reject the philosophical approach? Justice Breyer, in an article published while he was on the Commission, offers an explanation.

According to Breyer, a majority of the original commissioners recognized that both utilitarianism and retribution suffered from major methodological flaws. Under a utilitarian theory, a sentencing commission must undertake a cost/benefit analysis: A given quantum of punishment will be justified if its benefits (principally in terms of reduced criminal activity) outweigh its cost. But, says Breyer, these determinations could not be made because "the empirical work with respect to deterrence ... could not provide the Commission with the specific information necessary to draft detailed sentences with respect to most forms of criminal behavior."[7] Simply put, cost/benefit studies were not available, or were not sufficiently reliable, to offer a guide to setting guideline ranges.

Retribution suffered from equally serious problems. Under the leading retributive theory of "just deserts," punishment should be "scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less blameworthy, he should receive less punishment, regardless of the danger that he may pose to the public and the need to deter others from committing similar offenses."[8] The problem, Breyer said, was that desert theory offered no principle for translating sentiments about culpability into a specific quantum of punishment. As a result, any such determination suffered from an "inherent subjectivity."[9] In the end, the Commission concluded that it lacked a reliable method for assessing either theory of punishment, and so it pursued neither.

Breyer's reasoning is hard to fault, for the practical and theoretical obstacles that stood in the way of implementing the philosophical approach were real and significant. Whether they are insurmountable, however, is a matter of debate. At least with respect to utilitarian theory, the Commission's criticism was principally pragmatic in nature, reflecting a lack of reliable cost/benefit studies. Since the Guidelines were enacted, however, new efforts have been made to determine whether prison pays. The results of these studies remain controversial.[10] Nonetheless, if accurate cost/benefit models are developed, the Commission would be obligated to reconsider its rejection of the philosophical approach. In the meantime, the Commission's statutory duty is clear: To do all it can to promote research into the costs and benefits of punishment, in an effort to "measur[e] the degree to which the sentencing ... practices are effective in meeting the purposes of sentencing... ."[11]

II. The System-Wide Approach to Sentencing Severity

[W]ith scarce correctional resources, the system-wide approach can be viewed as marking the outer limit for severity decisions ...

An alternative to the philosophical approach might be called a "system-wide" approach to severity decisions. This strategy consists of two general steps. First, it requires a sentencing commission to assess the total capacity of the prison system (the capacity requirement). Second, it calls on the commission to rank, in a principled manner, the relative severity of various offense categories and to allocate prison capacity accordingly (the prioritization requirement). Admittedly, this approach is not ideal. As the ABA Standards suggest,

> the ideal conception of such sentences should not be determined by presently available resources... . Clearly, for example, the conception of proper sentences should not be formulated to fill existing prison beds or probation capacities... . Similarly, if the best policy judgments lead to the conclusion that some part of the sentencing system is not meeting important goals, policy makers should not have to live within the artificial ceiling of existing resources.[12]

Nonetheless, in the context of a system with scarce correctional resources, the system-wide approach can be viewed as marking the outer limit for severity decisions, so that "[o]nce appropriations decisions are made, and until they are altered, all actors within the system must seek to operate within established funding limits and to deploy finite resource in the most advantageous manner possible."[13]

Does the SRA support a system-wide approach? And, if so, did the Commission adopt that methodology? The following sections, which focus on the capacity and prioritization constraints respectively, address these questions.

A. The Capacity for Punishment

Section 994(g) of the SRA states that "the sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed

the capacity of the Federal prisons, as determined by the Commission."[14] As several commentators have argued, this provision requires the Sentencing Commission to take into account the federal prison capacity when formulating its guideline sanctions.[15] Of course, the SRA is not unambiguous in this regard: Section 994(m) suggests that criminal sentences have, in the past, been too lenient, and it directs the Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."[16] Nonetheless, sections 994(g) and 994(m) are not irreconcilable.[17] Read together, the provisions would permit the Commission to raise sentences to meet the directive of section 994(m), so long as the agency makes appropriate reductions in other criminal sentences to ensure compliance with the capacity constraint of section 994(g).

In theory, a capacity constraint it designed to encourage "conscious and responsible decision making" by both legislators and commissioners. In a fully utilized prison system, the capacity constraint forces a sentencing commission to "set priorities in allocating limited and expensive prison resources;"[18] a commission can only increase sentences for one offense category by reducing sentences for others. A capacity constraint does not preclude legislators from increasing prison space. But it means that "responsible public officials should be prepared to find the funds required to pay for the facilities that they believe public safety concerns require."[19] By forcing legislators and commissioners to confront the costs of their decisions, the capacity constraint helps ensure that sentencing decisions are made deliberately and by design.[20]

1. The Commission and the Capacity Constraint

To the extent that the Commission has acknowledged a capacity constraint at all, it has largely been in passing. For example, in developing its initial guideline ranges, the Commission indicated that it would base sentences on the average sentence imposed by judges for similar offenses in the past.[21] The Commission implied that one advantage of relying on past practice data was that the guidelines would not deviate significantly from current capacity constraints. As the Commission stated:

> Using the empirical "averages" ... had a significant benefit: it enabled the Commission to be informed of the likely impact of its discretionary decisions, even before a formal prison impact study had been prepared. This made it possible to give due consideration to penal resource requirements, as directed by [the SRA], throughout the process of the guideline development ...[22]

Nonetheless, the Commission has never viewed the capacity constraint as a binding obligation. Thus, the Commission may have used past practice as a "starting point," but it quickly left that point behind, raising sentences for a swath of different crimes, including civil rights violations, certain white collar offenses, and violent offenses.[23] It also increased drug sentences above the levels mandated by the passage of mandatory minimum penalties. All in all, "the categories of offenses for which the Commission conceded that it purposely deviated from past practice – drug cases, fraud and white collar cases, and cases involving threatened and actual violence" far outnumber the remaining categories.[24] The Commission might have managed to observe the resource constraint had it also imposed reductions in punishment to partially offset the designated sentencing increases. But it did not make such an attempt.

By forcing legislators and commissioners to confront the costs of their decisions, the capacity constraint helps ensure that sentencing decisions are made deliberately and by design.

2. Measuring Severity

Two recent studies provide a detailed assessment of the increase in sentencing severity due, in part, to the Sentencing Commission's guideline decisions over the past 15 years. The first, by the Bureau of Justice Statistics ("BJS"), was published in July 1999.[25] The second, by Commission staff Paul Hofer and Courtney Semisch, is published for the first time in this Issue. Both reports emphasize the dramatic increase in sentences under the guidelines. As Hofer and Semisch state:

> Actual prison terms served by offenders began to increase in FY1988, the year of guideline implementation, and continued to do so as more offenders became subject to the SRA, the abolition of parole, and the mandatory minimum penalties enacted in the mid-1980s. Recent years have seen a slight tapering downward. But federal offenders sen-

tenced in 1998 will spend about twice as long in prison, on average, as did offenders sentenced in 1984."

Although most crime categories experienced a significant increase in severity, the changes differed in their timing and magnitude. For example:

- *Violent offenses.* Time served for violent crimes began climbing after the enactment of the guidelines and continued to do so until 1993, when it "began to fluctuate slightly at about 90 months, 50 percent higher than in 1984."[26]
- *Drug Offenses.* The average time expected to be served by drug offenders in 1992 "was almost three times longer than it had been in 1984—a radical shift of policy in less than a decade.... A slight decrease in recent years (due most likely to increases in the rate of downward departures and use of the mandatory minimum "safety valve") ... has reversed only a fraction of this increase."[27]
- *Firearms.* Firearm sentences began climbing before the guideline implementation, but sentences increased dramatically beginning in 1991. "By our estimates, expected prison time nearly doubled from almost 20 months in 1984 to nearly 40 months in 1990. Then through the 1990s we see a steep and steady climb to another 30-month increase."[28]
- *Immigration.* According to the BJS, sentences for immigration offenses increased dramatically after the sentencing guidelines were amended on November 1, 1991. Between 1986 and 1991, average time served increased from 3.6 moths to 4.6 months. Following the amendments, average time served increased to 15.1 months in 1997.[29]
- *Property Offenses.* This class of offenses is one of the few that did not witness a significant increase in severity for offenders sentenced to prison. Overall, sentences for property offenses remained largely constant, falling slightly from 18.4 months average time served in 1986 to 17.8 months in 1997.[30]

The ultimate effect of the Commission's policy changes, along with the enactment of mandatory minimum statutes, was a massive increase in the federal prison population, which grew from 38,156 prisoners in 1986, to 98,944 in 1997.[31] According to the BJS, "almost two-thirds of the increase in the Federal prison population can be attributed to the increase[d] time to be served by Federal offenders."[32]

According to the BJS, "almost two-thirds of the increase in the Federal prison population can be attributed to the increase[d] time to be served by Federal offenders."

These figures, of course, do not tell us how much of the change in severity was due to Commission rulemaking, and how much was due to other factors, such as statutory changes, changes in the seriousness of criminal activity, or changes in judicial attitudes towards sentencing. For Hofer and Semisch, the fact that "severity for many crimes increases, often sharply, at the same time that new mandatory minimum penalties, guidelines, and guideline amendments were implemented suggests that these are a primary, if not *the* primary, cause of the trends we describe."[33] The authors encourage further research to isolate the effect of the guidelines on sentencing severity.

A recent report by Cindy Alexander, Jennifer Arlen, and Mark Cohen offers one of the few efforts to address this research challenge. The study, which is published in this Issue, examines the severity of white collar sentences imposed over the past 15 years; it seeks to identify the specific effect of the guidelines on criminal fines for corporate crimes. Using a regression analysis, the authors find that the guidelines have been responsible for a 320% increase in criminal fines. However, the research also suggests that the guidelines have not significantly affected the *total* sanctions imposed on corporate offenders—which includes both the criminal fines and non-fine sanctions (such as restitution). The finding is unexpected. Since criminal fines constitute a significant portion of total sanctions, one would expect an increase in the former to result in an increase in the latter. The authors speculate that judges may have reduced the magnitude of non-fine sanctions to compensate for the increase in criminal fines.

3. Contrasting State Experiences

If capacity constraints are designed to force policy makers to "face up to the programmatic and financial implications of the sentencing politics they adopt,"[34] the first Commission preferred to deliberate in the dark about existing resources. Not only did the Commission increase sen-

tences with little apparent concern for prison capacity, but "detailed prison impact assessments were not completed until after the new guidelines had been submitted to Congress."[35] The Commission's neglect of the capacity requirement might be contrasted with the experience of numerous states that are subject to similar provisions, which require or strongly encourage a match between sentencing policy and available resources. According to several observers, these provisions have succeeded modestly in restraining prison growth, at least in the short term.[36] One might wonder why the federal constraint, in contrast to the constraints in these other jurisdictions, has proved so porous.

One answer is that the federal constraint is ambiguously drafted and can easily be interpreted as advisory, rather than binding. The statute does not require the Commission to ensure that resource constraints are respected; it simply tells the commission to "minimize the likelihood" that it will exceed capacity.[37] A more significant factor, however, may simply be politics. Fiscal realities suggest that a resource constraint will prove far more effective at the state than federal level. Given limited local resources, a state sentencing commission can expect some political support for acting in a fiscally responsible manner. Indeed, some state commissions were enacted with the specific intent of bringing resources under control. By contrast, federal correctional resources are often treated as though they are unlimited, and the political calculus is nearly entirely in favor of increased severity. Under such circumstances, the effect of a resource constraint will be more tenuous and will depend more on the Commission's commitment to the capacity requirement in the face of the inevitable political pressure to increase sentence severity. The original Commission, confronted with a particularly heated law-and-order climate, chose to ignore the resource constraint entirely.

B. Prioritizing Offense Severity

The second step in the system-wide approach calls on the Commission to prioritize offenses according to their perceived seriousness. Most sentencing commissions observe this step whether or not they adopt a capacity constraint. For example, the federal commission, which certainly did not embrace such a constraint, effectively ranked crimes by assigning them a "base offense level," a grade that reflected a judgment about their relative seriousness. The difficult question is not *whether* the Commission should prioritize offenses, but *how* to do so.

The SRA is relatively clear on this point. It says that the Commission's rankings should be based on past practice, but that the agency can deviate from that ranking so long as the departure is "consistent with the purposes of punishment."[38] The statute thus anticipates that the Commission will articulate a purpose-based reason for its modifications. The Commission itself seemed to acknowledge that obligation in 1986.[39]

One might wonder why the federal constraint, in contrast to the constraints in these other jurisdictions, has proved so porous.

Nonetheless, the Commission ultimately ignored this mandate too. When the Commission promulgated its Guidelines, it offered only the most limited sort of explanation for its modifications to past practice,[40] and it did not refer to sentencing purposes as justification at all.[41] Although the Commission raised the topic of sentencing purposes in its *Supplementary Report*, it did so only to affirm that it that it would not adopt a single theory of punishment,[42] and to assert broadly that the guidelines were consistent with both retributive and utilitarian theories of punishment.[43]

Barbara Meierhoefer, in her article, offers a notable illustration of the Commission's refusal to address sentencing purposes, focusing on the Commission's deliberations concerning the drug guidelines. The principal challenge facing the Commission in this task was to incorporate the mandatory minimum statutes into the guidelines system. Meierhoefer notes that the Commission decided to set the guidelines for offenders subject to mandatory minimum statutes at levels that typically exceeded the minimum penalty. Moreover, the Commission determined that it would also increase the sentences for offenses involving *less* than the mandatory amount, in order to prevent sharp discontinuities in the drug sentences. In effect, the mandatories pulled up the entire guideline range for drug offenders.

Meierhoefer argues that a purpose-based analysis would have led the Commission to adopt lower guideline ranges for most drug offenders. She acknowledges that, under her proposal, an offender would sometimes be subject to a guideline range that fell below the applicable mandatory penalty. In those cases, the mandatory minimum statute would trump the guidelines. To be sure, this result might lead to increased disparity, as offenders guilty of dis-

tributing similar drug amounts might receive different sentences (depending on whether or not they were charged under a mandatory statute). But, asserts Meierhoefer, the added disparity would be justified because it would ensure that offenders who are not charged with mandatory sentences, or who are convicted of less than the mandatory amount, would receive a more appropriate sentence. Meierhoefer's proposal will appeal to those concerned that the federal system allocates a disproportionate amount of prison resources to drug offenders.[44]

1. Using Purposes to Rank Offenses

The Commission's refusal to consider purposes in ranking offenses may seem, at first, to be consistent with its rejection of the "philosophical approach" to sentencing severity. After all, if sentencing purposes can not tell us anything useful today about the proper magnitude of a given sentence, how can they tell us anything about the relative seriousness of various offenses? But arguably sentencing purposes are more reliable in making relative judgments about offense seriousness than absolute ones. That is to say, one might readily agree that murder is a more serious crime than assault, without being able to say whether murder should properly receive 10 or 20 or 30 years in prison.[45] Similarly, even if one cannot say whether a distributor of crack should receive 5 or 10 years in prison under a utilitarian calculus, one might still conclude that, on a relative basis, sentences for crack and powder cocaine should be roughly aligned.

John Kramer, in his article, offers an illustration of how one state commission used a purpose-based approach to rank its offense categories. The Pennsylvania sentencing commission sought to prioritize sentences based on a modified just deserts model. It made its initial ranking based on an intuitive assessment of culpability, and then tested its results against general principles thought to indicate offense severity. Although the Commission compared its ultimate rankings with past practice data, it used that information as a final check on its conclusions rather than a starting point. Kramer does not offer the Pennsylvania system "as the ideal," but as an illustration of a principled approach to severity decisions.

2. Sentencing Severity and Public Opinion

If the first Commission did not consider purposes of punishment in developing its offense severity rankings, what drove its decision-making? To read the Commission's own explanations, "politics" appears to be the agency's overriding concern. The Commission claimed that its "pragmatic" approach would reflect "an amalgam of views, and provide for sentences that are reasonably consistent with most of those views."[46] More specifically, basing decisions on past practice would ensure that sentences were roughly in line with what judges and legislators had done in the past, reflecting practices that "the community believes, or has found over time, to be important from either a moral or a crime-control perspective."[47] Moreover, by increasing sentences for certain crimes – such as white collar crimes – the Commission would satisfy Congressional concerns that, "in many cases, current sentences do not accurately reflect the serousness of the offense."[48] In this sense, the Commission's approach was designed in significant part to ensure the political viability of the guidelines by appeasing important interest groups, including Congress and the public.

The Commission's approach was designed in significant part to ensure the political viability of the guidelines by appeasing important interest groups ...

A study by Richard Berk and Peter Rossi, excerpted in this Issue, lends support to this conclusion. The authors conducted an extensive public opinion survey that compared the sentences preferred by the public with those imposed by the guidelines. Berk and Rossi found that, for a small number of crimes, the guideline sentences differed from the public's own estimates of just punishment.[49] But they found that such deviations were the exception, not the rule. While individual respondents varied in their responses, the average sentence chosen by respondents was closely aligned with the corresponding guideline sentence. Berk and Rossi conclude:

> [T]he U.S. Sentencing Commission tried to write sentencing rules that would be acceptable to the federal judiciary, the federal prosecutors, the criminal defense bar, and other stakeholders concerned. The end result was a set of guidelines that were also close to the general public. The commission may not have had convergence as its ultimate goal, but the ways in which the commission went about writing the guidelines assured that the guidelines converge on those views.[50]

To some commentators, the Commission's lack of political independence is one of its greatest failings. As Michael Tonry states, "most proponents of guidelines have seen its one-step-removed-from-politics character as a great strength ... The U.S. Commission, by contrast, made no effort to insulate its policies from law-and-order politics and short-term emotions."[51] One might view the Commission's refusal to address sentencing purposes as both a symptom and a cause of its political sensitivity.

Certainly, the agency's failure to consider purposes is a symptom of its vulnerability to political pressure. Addressing sentencing purposes would have required the Commission to articulate potentially controversial views about the goals of the sentencing system and their ramifications for sentencing policy. As an infant agency in a volatile political climate, the Commission saw silence on sentencing purposes as a prudent and perhaps necessary step for ensuring the guidelines' survival.[52]

But the Commission's refusal to discuss sentencing purposes is also a *cause* of its feebleness. Sentencing purposes provide the Commission with the only grounds upon which to take a stance independent of public opinion or political pressure. Moreover, only by appearing to act on principle can the Commission gain the prestige in the public's eye necessary to withstand political pressures. By failing to articulate its principled reasons for punishment, the Commission helped to undercut its independence and authority.

4. Severity, Disparity, and the Purposes of Punishment

Maintaining silence on sentencing purposes imposes other costs, as well. It also exacerbates disparity. This is true because of the unusual structure of the guideline system itself.

The Guidelines are a set of rules promulgated by the Commission, but implemented by the federal courts. These rules limit the discretion of the courts over sentencing, but also permit the courts to depart from these general rules in exceptional or unusual cases. How is a court to know when to apply a rule and when to depart? Ultimately, the only way to make that determination is to know the rationale for the rule; that is, how the rule serves the purposes of punishment. Without guidance from the Commission on what the purpose is, courts invariably interpret the rule as they see fit, resulting in inconsistent applications.

John Kramer, in his article, offers an illustration. He observes that, under the robbery guidelines, "use of a weapon, the degree of injury, the dollar loss and type of institution victimized," are all relevant in determining the offender's sentence. However, the Commission has not explained

> how valid are each of these factors as indicators of deterrence, incapacitation and retribution and how do they work together in the aggregate. To cite one notable example, the Commission failed to specify what it attempted to measure through dollar loss... . By failing to specify in the guidelines what factors such as dollar loss are measuring, the Commission made it difficult for the court to assess how well the measure works in a particular case at serving sentencing goals. The Commission could have reasonably argued that the amount of loss generally reflects the amount of planning (culpability) and the amount of loss to the victim (victim injury). But if it had addressed the issue, it probably also would have had to admit that some part of the loss may in some cases be fortuitous rather than reflective of culpability. Acknowledging such a possibility would have provided judges greater opportunity to depart in order to accurately represent the offender's culpability or dangerousness... .[53]

By failing to articulate its principled reasons for punishment, the Commission helped to undercut its independence and authority.

Examples can easily be multiplied. The point, however, is not that the Commission must identify an overarching and comprehensive sentencing philosophy at once. It is that whenever possible, the Commission should identify the rationale for specific guidelines. Doing so will help ensure that the Guidelines are applied in a coherent and consistent manner.

III. Conclusion

One of the primary goals of the Sentencing Commission is to develop a rational and principled guideline system that operates with some insulation from public pressures. Both the capacity constraint and the prioritization constraint advance that goal by imposing a much needed discipline on the Commission's sentencing decisions. The capacity constraint requires

commissioners and legislators to confront the costs of their actions. The prioritization constraint requires the Commission to make principled decisions about sentencing matters.

As this introductory essay suggests, the Sentencing Commission ultimately observed neither constraint. Not surprisingly, the result has been a guideline system influenced more by public opinion than sentencing purposes, more by drift than deliberation. It may be that the political pressures for greater severity at the federal level are too intense, too volatile, for the Commission to maintain any real independence from public opinion. As David Boener has said, "the hope, and it could never have been more than a hope, that sentencing commissions would serve to blunt the raw force of public opinion now appears naive."[54] And perhaps that is true. But, then again, you never know until you try.

Notes

[1] *See, e.g.* Barry Boss, *Do We Need to Increase the Sentencing in White Collar Cases? A View From the Trenches*, 10 FED. SENT. R. 124 (1997).

[2] *See, e.g.*, U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

[3] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE: SENTENCING xx & 28 (3rd ed. 1994) (hereinafter "ABA Standards").

[4] *Id.*

[5] *See* 28 U.S.C. § 994(f) ("The Commission, in promulgating guidelines ... shall promote the purposes" of punishment).

[6] *Principles Governing the Redrafting of the Preliminary Guidelines*, reprinted in Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 47 (the Commission will "insure that all sentences imposed will fulfill the purposes of sentencing mandated by Congress. ").

[7] *Id. See also* Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT. R. 180, 181 (1999) (discussing the Commission's initial severity decision).

[8] U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 15 (1987) (hereinafter "Supplementary Report").

[9] *See* Breyer, *supra* note 6, at 16 ("[a]lthough the guidelines motivated by a just deserts rationale would be cloaked in language and form that evoke rationality, using terms such as "rank order of seriousness," the ranking would not, in substantive terms, be wholly objective.").

[10] *See, e.g.*, Peter J. Hofer and Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980–1998*, 12 FED. SENT. R. 12, n.19 & 20 (1999) (discussing recent controversies).

[11] 28 U.S.C. § 991(b)(2). *See also* 28 U.S.C. § 991(b)(1)(C) (The Commission should establish policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.").

[12] ABA Standards 18–2.3.

[13] *Id.*

[14] 28 U.S.C. § 994(g).

[15] *See, e.g.*, Richard S. Frase, *Lessons of State Guideline Reforms*, 8 FED. SENT. R. 39 (1995).

[16] 28 U.S.C. § 994(m).

[17] *But see* David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L. Q. 881, 909 (1996).

[18] Frase, *supra* note 15, at 40.

[19] MICHAEL TONRY, SENTENCING MATTERS 193 (1996).

[20] *See generally* Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 10 FED. SENT. R. 46, 49 (1997).

[21] Supplementary Report at 16.

[22] *Id.* at 19.

[23] KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING 58 (1998).

[24] *Id.* at 61 (drug, robbery, firearm and white collar offenses alone total 63% of all federal cases in 1997).

[25] BURUEAU OF JUSTICE STATISTICS, TIME SERVED IN PRISON BY FEDERAL OFFENDERS 1986–97 (1998) (hereinafter "BJS Special Report").

[26] Hofer and Semisch, *supra* note 10, at 17.

[27] *Id.* at 16.

[28] A significant factor in the post-1991 increase, the researchers suggest, "was likely the major revision to the firearms guideline, USSG § 2K2.1, which was promulgated by the Commission with an effective date of November, 1, 1991, near the beginning of fiscal year 1992." *Id.*at 17.

[29] BJS Special Report at 5.

[30] *Id.* at 6. In reality, the severity of sentences for property offenses probably increased. Under the guidelines, an increasing number of offenders who would have previously received probationary sentences, instead received short prison terms. This change would tend to drag down the average sentence of those sent to prison.

[31] Although the prison population has skyrocketed, officially reported measures of federal prison crowding have declined since 1987—from 173% in that year to 127% in 1998. *See* BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 1987 (1988); BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 1998 (1999). This change can be explained by the massive prison building efforts that have been undertaken in the last 15 years at the federal level.

[32] BJS Special Report at 9.

[33] *See* Hofer & Semisch, *supra* note 10, at 18. In an early study, the Commission tried to identify the independent effect of the guidelines on the increase in severity (as opposed to the effect of mandatory penalties). It concluded that the guidelines themselves accounted for 72% of the projected 6.7% increase in time served. *See* U.S. SENTENCING COMMISSION, 1989 ANNUAL REPORT 66 (1990).

[34] TONRY, *supra* note 19, at 61.

[35] *See* Frase, *supra* note 15, at 39.

[36] *See* Frase, *supra* note 15, at 40 (citing studies); TONRY, *supra* note 19, at 61 (discussing Minnesota, Washington, and Oregon experience).

[37] 28 U.S.C. § 994(g).

[38] *See* 28 U.S.C. § 994 (m).

[39] *See Principles for Redrafting Guidelines*, in Breyer, *supra* note 6, at 50 ("Present practice will not be treated as dispositive, but when the departures are substantial, the reasons for departure will be specified.").

[40] For example, as Kate Stith and Jose Cabranes note, the Commission justified raising sentences for violent crimes by stating that "the Commission was convinced that they were inadequate." And it justified the increase in white collar sentences by referring to Congress' statement that, "in many cases, current sentences do not accurately reflect the seriousness of the offense." *See* STITH & CABRANES, *supra* note 23, at 60–61.

[41] Stith and Cabranes point out that this practice of denial with regard to sentencing purposes continues to this day: "Nowhere in the forest of directives that the Commission has promulgated over the last decade can one find a discussion of the rationale for the particular approaches or definitions adopted by the Commission; nor can one find any efforts to justify the particular weights it has elected to assign to various sentencing factors." *Id.* at 56.

[42] The Commission explained that choosing one theory of punishment as predominant "would be inconsistent with the Sentencing Reform Act, which refused to accord primacy to any single purpose of sentencing." Moreover, "[c]hoosing a single theory or even predominant approach was unnecessary because ... the different philosophies are generally consistent with the same result." Supplementary Report at 16.

[43] *Id.* at 17.

[44] Drug offenders constituted 60% of the federal prison population in 1996. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1996 (1999). In addition, 72% of the increase in the federal prison population between 1986 and 1997 was due to increasing numbers of drug offenders serving time in prison. Of this amount, "three-quarters results from increases in time served, due to the combination of increasing use of imprisonment instead of alternatives, lengthening sentences imposed, and the greater proportion of imposed sentences that are actually served." BJS Special Report, Tables 5 and 7.

[45] *See* FRANKLIN ZIMRING, SCALE OF PUNISHMENT xii ("While desert theorists are concerned with what they call ordinal proportionality, that is, the determination of the rank order of punishments to be used for crimes of different seriousness, the quantum of punishment suitable for a specific type of crime is left an open question.").

[46] Supplementary Report at 17.

[47] *Id.*

[48] *See* STITH & CABRANES, *supra* note 23, at 60.

[49] The most dramatic difference was for the distribution of crack cocaine. Where respondents gave an average sentence of 10 years in prison, the guidelines imposed an average sentence for the same crime of 22 years.

[50] *See* PETER H. ROSSI AND RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 210 (1997).

[51] TONRY, *supra* note 19, at 63.

[52] *Cf.* Supplementary Report at 16 (Affirming that any decision affording primacy to one sentencing purpose "would have diminished the chance that the guidelines would find the widespread acceptance they need for effective implementation.").

[53] *See* John Kramer, *Offense Severity: Complex Choices*, 12 FED. SENT. R. 37, 38–9 (1999).

[54] David Boener, *Bringing Law to Sentencing*, 6 FED. SENT. R. 174 (1993).