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Federal Sentencing Can Be Made More Just, If the Sentencing Commission Wants to Make It So

My guess is that most informed observers of the U.S. Sentencing Commission are pessimistic, or at best only mildly hopeful, that the commission's newly appointed members can do much to improve the federal guidelines. I disagree. There are grounds for optimism. The reconstituted commission can make the guidelines much better. The enabling legislation required none of the guidelines' worst features — the excessive detail and rigidity, the 43-level grid, the relevant conduct provisions, the over-emphasis on imprisonment, among others — and the new commission has authority to reconsider and variously revise, repeal, and replace them.

The important question is not whether the new commission can greatly improve the guidelines, but whether it will. That will depend on whether the new commissioners want to make a difference and whether the new chair is prepared to provide strong leadership. The new commission has considerable advantages: a large staff and ample resources, permissive legislation, an entirely new set of members, and a federal judiciary that would support many sensible, humane changes. Of course, there are challenges: inertia, staff resistance to change, and the cynicism of modern crime control politics. If the new commission decides at the outset that no meaningful changes are possible, none will be made. If, however, the new commission accepts that the current guidelines too often produce unjust and arbitrary results, and sets out to improve the quality of justice in the federal courts, it has a fighting chance of succeeding. This comment assumes that the new commission will decide to try, and suggests that it can learn from five major mistakes made by the initial commission.

First, the initial commission chose not to act as a specialized administrative agency somewhat insulated from day-to-day political pressures, but instead to view the Department of Justice and conservative members of Congress as its primary constituency and to adopt policies sought by that constituency. This was effectively a rejection of the primary rationale offered by Judge Marvin Frankel and others for creation of a sentencing commission in the first place. The argument was that sentencing, like any other legal proceeding affecting liberty and property interests, should be subject to rules (in contrast to the perceived need for ruleless individualization under indeterminate sentencing), but that legislatures are not institutionally well-situated to develop sentencing rules. Their attention spans are short, issues come in and out of fashion, staff turnover is high, and short-term political pressures often result in simplistic knee-jerk responses to complicated problems. Judge

Frankel urged creation of an administrative agency that could develop subject matter expertise, a cadre of specialist staff, an institutional memory, and a policy approach. If the new commission is to do more than preside over the current guidelines and make minor incremental changes, it will need first to become the kind of independent administrative agency it was meant to be.

Second, the initial commission succumbed to a form of hubris not uncommon to Washington and decided that federal sentencing is unique and that nothing useful could be learned from the sentencing commissions then operating in various states. This was a great pity because lessons could have been learned from the successful commissions in Minnesota, Washington, and Oregon, and avoidable problems could have been foreseen from the more troubled experiences of early commissions in Pennsylvania, Florida, and New York. The successful states realized early on the importance of working closely with judges and other practitioners and bringing them into the guideline development process. This meant, among other things, that the guidelines in those states incorporated sound understanding of problems they were likely to encounter, and that judges and others were prepared to accept the bona fides of the new system and to attempt to work with it. By contrast, federal judges were not well-integrated into the federal development process and the results included widespread judicial hostility to the guidelines and numerous decisions declaring them unconstitutional. On a more mundane (but crucially important) technical issue, Washington State's commission considered but then rejected a grid resembling the federal 43-level grid because they foresaw (from earlier parole guidelines experience) judges' aversion to something that looked so mechanical and arbitrary and because they foresaw the high rates of application error it would engender. Finally, most commissions worried about the effects of guidelines on plea bargaining and considered adoption of real offense (relevant conduct) sentencing as a solution, but rejected it. Had the initial commission drawn on the state experiences, and recruited staff from those commissions, it would have been able to make much better and better-informed policy choices. If the new commission is to succeed, it will recognize that federal agencies can sometimes learn from the states and make staffing and policy-development choices accordingly.

Third, the initial commission did not see the federal judiciary as a major constituency, and as partners,



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and as a result failed to win judges' support for the guidelines. The evidence for judicial hostility to the guidelines looks to me incontrovertible. The open rejection of the guidelines in the pre-*Mistretta* case law is one example. The open hostility between commission members and federal judges in sentencing institutes in the late 1980s and early 1990s is another. The various Federal Judicial Center surveys of judges' views showing that large majorities want the guidelines repealed or fundamentally overhauled is a third. The ongoing manipulations and evasions of the guidelines by judges and prosecutors in many district courts is a fourth.

Individual members of the initial commission will, of course, deny that they purposely excluded the judiciary and judicial views from the guidelines process. Some commission members in the early days were genuinely perplexed at the widespread and outspoken judicial opposition. I have no complete explanation for why the initial commission so completely failed to incorporate judges into the guideline development process. Partly, I suspect, it was a consequence of fundamental management failures in the commission. The guidelines development process was poorly organized and, within the commission, contentious, and there may simply not have been time or energy to engage judges in the process except as passive reactors to drafts. Partly, it was a result of the failure to draw on state guidelines experience and therefore to realize how crucial judicial participation and support (or at least acquiescence) were to successful guidelines systems. And partly, it was probably a product of lack of recent hands-on knowledge of federal sentencing within the commission. Only one of the initial commissioners had sentenced federal offenders in the preceding quarter century and he had done so only for a few years. Failures of the past, however, are much less important than lessons for the future. The lesson for the new commission is that major changes are much more likely to succeed if they draw on the experience and views of federal trial judges.

Fourth, the initial commission overlooked fundamental jurisprudential differences among various stages of the criminal justice system, and made it difficult or impossible for judges openly to satisfy the distinctive responsibilities of the sentencing stage. Different things matter, and appropriately influence decisions, at different stages. The initial commission, to the contrary, most notably in the relevant conduct rule and its elaboration, attempted to create a system in which the same considerations (those encompassed in the defendant's "actual offense behavior") should guide decisions at every stage. This is a mistake. Although prosecutors in their charging, bargaining, and dismissal decisions, and judges in their adjudication and sentencing decisions, are all charged to achieve the conviction and punishment of the guilty and the acquittal or dismissal of the innocent, the nature and balance of

appropriate considerations varies. Whether the defendant can raise an affirmative defense, for example, and if so successfully, need not be resolved by the prosecutor at the charging stage. These things are decisive at the adjudication stage, and their likelihood and probability may be relevant at the bargaining stage. And in most jurisdictions, defense claims that do not support a defense at the adjudication stage (such as imperfect self-defense, actual but legally insufficient provocation, mental defect or disability short of insanity), are commonly considered appropriate grounds for mitigation at the sentencing stage. The initial commission appears to have forgotten that justice to the individual offender is the unique and ultimate goal at the sentencing stage. The guidelines, to the contrary, indicate that the defendant's age, mental state and condition, physical state including drug and alcohol dependence, family responsibilities, and other matters that most judges deem relevant to decisions about deserved and appropriate sentences, are "not ordinarily relevant." This is especially ironic because no one would fault a prosecutor for deciding what offense to charge, or what plea to accept, on precisely those grounds. By forgetting that the sentencing stage is different from other stages, the initial commission denied to judges the authority to do the job that they uniquely are charged to perform. Much of current evasion and manipulation of guidelines occurs because judges believe sentencing is a human process, not a mechanical one, and a just result is often more important than one that faithfully reflects the guidelines. The lesson for the new commission is self-evident.

Fifth, perhaps a different way to make the preceding point, the initial commission, which often claimed that "equality in sentencing" and "reduction in sentencing disparity" were its aims, got the concept of equality wrong. Any respectable theory of equality has two parts: first, to treat like cases alike, and, second, to treat different cases differently. The guidelines in many ways, and particularly in the relevant conduct and individual offender circumstances provisions, go to lengths to honor the equality principle but largely ignore the difference principle. Since in real life the differences between cases are often as important to judges (and others) as their similarities, this is a fundamental failure. No ethical person, but especially no ethical judge, is comfortable behaving unjustly, and in the long run a sentencing system that regularly asks judges to impose unjust sentences will fall. The new commission can either preside over the atrophy of the current guidelines, or work to reconstitute them in ways that improve, not diminish, the quality of justice in federal criminal courts.

If the new commission has the will, it can do much to improve the guidelines within its current enabling legislation. It can abandon the relevant conduct provisions and move to an offense-of-conviction

system like every other guidelines system. With abolition of relevant conduct sentencing, any need for the current excruciatingly detailed provisions on offense characteristics and for the 43-level grid will disappear and these can be greatly simplified. The new commission can revive the statutory provision (§ 994(j)) that directed the commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of an offense of violence or an otherwise serious offense;" the initial commission willfully nullified this provision by defining as "serious" many property offense that previously resulted in nonprison sentences. The new commission can repeal policy statements in sections 5H1.1-5H1.6 that forbid judges in most cases to take account in sentencing of ethically important differences in offenders' circumstances. And so on. I have offered these and other suggestions before elsewhere, in more detail, and so have others. If the new

commission decides to try to improve the guidelines, it should look for ideas in many places.

Pessimists will warn the new commission away from idealism and institutional ambition. Current crime control politics are symbolic, not substantive, they will say, and posturing politicians will shoot down any sensible or humane changes you propose. Maybe. However, sensible and humane changes are being made in many states, and the empirical evidence is weak for the proposition that state politicians are made of qualitatively better stuff than federal politicians (the converse is also true). More importantly, if the force of inertia takes hold and the new commission thinks small, federal courts will remain afflicted by the federal guidelines. If the new commission tries great things, and fails, the federal courts will be no worse off and foundations will have laid for the changes that some day will be made. And maybe an ambitious new commission will succeed.