

Painting a Ship with the Sentencing Commission

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FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS

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KATE STITH AND JOSÉ CABRANES' lucid and passionate attack on the federal Sentencing Guidelines has as its frontispiece a quote from Morris Raphael Cohen: "In the course of time ..., under the social demand for certainty, equity gets hardened and reduced to rigid rules, so that, after a while, a new reform wave is necessary." Cohen's observation is perhaps even more appropriate than the authors realize.

A generation ago, in 1973, the late sociologist Robert Martinson was engaged in preparing his massive scholarly study of prisoner rehabilitation programs for publication in the semi-popular policy journal *The Public Interest*, where his findings were likely to reach a broader and more politically influential audience than they had enjoyed up to that time. After an exhaustive examination of hundreds of rehabilitative schemes and devices, Martinson had found that none of them made much difference in a released prisoner's chances of

committing new crimes. From this finding, Martinson, a humane man, had concluded that rehabilitative efforts in prisons should continue. After all, he reasoned, they did no harm.

As he prepared the *Public Interest* article, however, Martinson became convinced that attempts at prison rehabilitation might not be so harmless. Prisoners diverted to these programs often became eligible for early release once they were judged to be successfully reformed. If, contrary to such judgments, their propensity for criminal activity was actually unchanged, and they got out onto the streets sooner, the result was more crime. It followed that, other things being equal, longer fixed sentences were better for society than short sentences that included botched attempts at rehabilitation.

Since Martinson was an honest man as well as a humane one, that is what he wrote, and this conclusion substantially increased the

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political impact of his article when it appeared in 1974.¹

By the time of Martinson's article, as Stith and Cabranes recount, discontent with judicial discretion in sentencing, which was then relatively broad, had appeared among both liberals and conservatives. The justification for sentencing discretion had come to depend critically on the argument that experts in the science of rehabilitation, rather than laypersons, should have the final say about when to release criminals from confinement. When the "scientific" claims of rehabilitation collapsed, resistance to the attack on judicial discretion collapsed as well. Martinson's article served as an important piece of the cement that bound the liberal-conservative assault coalition together.

In fact, the liberal and conservative complaints against judicial discretion in sentencing were different from and incompatible with one another. Liberals thought judges used their sentencing discretion to bestow unwarranted favor on the rich, the powerful, and the white. Conservatives were unhappy with this same discretion because they thought judges used it to grant unwarranted leniency across the board. Conservatives wanted to be tougher on violent criminals, who happened to be poor, while liberals wanted more punishment for the usual malefactors of great wealth.

The belief that these differences could be reconciled gave us the Sentencing Reform Act of 1984, a living argument for the proposition that when a legislative proposal for large programmatic change garners the support of both conservatives and liberals, you'd better hide the policy silver.

The Sentencing Reform Act abolished federal parole, made sentences more broadly reviewable by appellate courts, and established the U.S. Sentencing Commission – which is

formally in the judicial branch but as a practical matter under the control of non-judges – to set mandatory guidelines for federal sentencing. The Commission declined the opportunity to set forth any large public principles upon which its standards and categories would be based. Instead, it claimed that its standards would merely systematize and equalize the sentencing patterns and norms that federal judges as a whole were already applying. The Commission thus escaped widespread scrutiny of its assumptions.

The Commission pursued its goal of systematization by devising a vast grid – containing 258 compartments, at last count – whose horizontal and vertical axes contain all the factors that may legitimately be taken into account in imposing a federal criminal sentence. These factors relate either to a defendant's offense or to his or her criminal history. Some of the factors are basic determinants of the sentence while others increase or (less often) mitigate it.

This Guidelines regime aims to slay the dragon of unwarranted disparity in sentencing by decreasing the amount of discretion judges exercise. It does so partly by altogether ruling out consideration of some factors that have traditionally influenced sentencing decisions. Most important, the Sentencing Commission's permissible factors do not include any features of the defendant's personal history – even relatively unambiguous facts such as age, let alone messily subjective items like alcoholism or childhood abuse. The unconditional bar follows naturally from the logic of the Guidelines enterprise. Personal circumstances raise precisely the sorts of unquantifiable issues that Congress and the Commission decided that they no longer trusted federal judges to deal with.

The other major limitation that the

¹ Robert Martinson, *What Works? – Questions and Answers about Prison Reform*, PUBLIC INTEREST 22 (Spring 1974).

Commission has placed on discretion in the sentencing system is not substantive but procedural: Commission directives allow a judge to depart from the Sentencing Guidelines only when he or she can justify the departure by explicitly pointing to some specific factor in the case at hand that the Guidelines fail to consider adequately. Since adoption of the Guidelines, federal sentencing jurisprudence, if such it can be called, has upheld this Commission policy for the large majority of cases. The courts have also established a corollary: When a judge does stay within Commission guidelines, the resulting sentence will virtually never be disturbed by an appeals court. Thus,⁷ though the Sentencing Reform Act theoretically expanded the reviewability of sentences, in practice the expansion operates in only one direction.

Have these limitations actually reduced the amount of discretion exercised in sentencing? Any student of organizations could have answered this question in advance. As Stith and Cabranes point out, the hydraulic theory of social organization has proved itself once again in the field of sentencing; discretion hobbled in one place has flowed to another. Policymakers attempted to make sentences depend more faithfully on the nature of the crime committed, but the result has been that the bargaining involved in pleading and sentencing, whether between prosecution and defense or within law enforcement agencies, has simply shifted to the issue of defining the crime.

Other features of the new system have also shifted the locus of discretion. For instance, in the old system, the typical role of a probation officer after a conviction or plea was to present the judge with a sentencing report giving both prosecution and defense accounts of the crime. In the new system, the officer's role is expanded: He or she, in the report to the judge, synthesizes the opposing versions into a single approved account. It is the officer who

then makes the calculation, at least in the first instance, of how the guidelines should apply and what sentence they should generate. By the time the judge gets the matter for consideration, the sentencing decision has been all but made.

Similarly, the new system, though it offers very few approved opportunities to depart from the guidelines, does sanction one type of deviation: It gives explicit permission for a "downward departure," or leniency, where a defendant has given "substantial assistance" to law enforcement authorities. The primary arbiter of whether the assistance has been "substantial" enough is the prosecutor, who, in the new system, must request this type of downward departure before the judge is empowered to grant one.

The first reaction of a civilian to the Commission's 258 elaborate categories is that the new system is, to use the technical term, totally bonkers. Then conscientious self-doubt strikes: This skepticism may just be the layperson's know-nothing resistance to a scheme that is, like many scientific things, necessarily complicated. Or it may be the kind of reactionary tropism that accompanies any shift in power. So it is important to judge the Guidelines first by whether they have accomplished their own goals. This Stith and Cabranes appear to do in good faith. If they have a hard time coming to a conclusion about whether the Commission has done its intended job, it is partly because no one really knows whether the problem the Commission was intended to solve existed in the first place.

The Commission's aim was to eliminate the great disparities, assumed to be unjustified, that existed in federal sentencing. But pre-Guidelines sentences may not have been all that disparate – at least not at the federal level. Good studies of actual federal sentencing before the 1984 Act were notably scarce, and the more sophisticated the studies were, the fewer dubious disparities they found. Thus it

is likely that the federal system, chief object of the Sentencing Act's reform efforts, was among the systems least in need of reforming. Sentencing reformers had chosen to look for their policy keys under the nearest street light.

On the issue of whether federal sentences are less disparate today than they were before the Guidelines, Stith and Cabranes argue that the data are no more definitive. One study finds a reduction in variation, but in a sample too unrepresentative to trust. Another concludes that variation has actually increased.

The authors then ask a more unsettling question: Even if we concede that the Guidelines have reduced variation, have they furthered the underlying policy goal of reducing "unwarranted" variation? This second question can not be answered by resort to gross numbers. Instead, it requires that we make political and moral judgments about what factors do and do not "warrant" consideration when a judge passes sentence.

It is here, in the making of these necessary moral judgments, that Stith and Cabranes find the Guidelines not just ineffective but deeply offensive. The ground of the authors' disapproval is not that the Guidelines are too harsh on defendants or too dismissive of the possibility of rehabilitation. Stith and Cabranes make no claims for the superiority of the rehabilitative model. The authors worry less about what the Guidelines do to criminals than about what the new system does to the rest of us, by morally truncating judges' decisions as they perform one of the most important functions by which a society defines itself.

The truncation takes place in several ways. First, the Guidelines' choice of factors that are to be considered "relevant" to a sentence is not defensible. It simply omits considerations, such as elements of a defendant's personal history, that a proper moral calculus would include. Further, even were it possible to make good arguments for the Guidelines' inclusion of some factors and exclusion of others, the

Commission has not chosen to advance such arguments. Because it has not done so, it has made impossible the kind of open discussion, challenge, and self-correction needed to produce a sound collective moral choice in a democratic polity.

Next, the system created by the Guidelines systematically denigrates the very idea of moral judgment. It creates perverse incentives for judges, guaranteeing them a trouble-free professional existence for following the Guidelines despite any disagreements they may have but threatening them with controversy for acting on those doubts. In addition, the new system has taken pieces of what used to be the discretion of the judge, the quintessential public exerciser of moral judgment, and parceled out those pieces to law enforcement personnel who exercise this discretion less openly and with more partiality.

Finally, the new system has created a due-process nightmare. Prior to the Guidelines, it was established that sentencing judges could take into account not just the offenses to which a defendant had pled or of which he had been convicted but also other kinds of information about his criminal behavior. In the Guidelines era, this type of judicial discretion has survived. But under the new system, a judge can not simply take the extra information aboard and make a discretionary decision about how to use it in sentencing. Instead, the judge must process this information according to the Guidelines' standards and categories. The result is that defendants, to an unprecedented extent, have their sentences increased on the basis of wrongdoing that is neither pled to nor proved in court.

Though Stith and Cabranes do not reach the point, it is probably no accident that the Guidelines, which describe their sentencing categories in such precise, meticulous detail, are the same Guidelines that reveal such vast and obvious moral holes at their center. One is reminded of the Vonnegut character, embodi-

ment of absurdity, who solemnly announced, "The Captain is gone; the crew is gone. I am here, and I am painting the ship."

Stith and Cabranes do not advocate scrapping the Guidelines system, though it is hard to imagine they would be sorry to see it evaporate. There are two reasons for their restraint. One is prudence: The Guidelines are not going anywhere any time soon. Too large a bureaucracy has grown up to enforce them, and the process of trying to erase them would cause too much disruption. The other reason follows from the logic of their criticism of the Guidelines: If what we want from a sentencing system is reasoned moral consideration, the old system had its own failings. The virtual unreviewability of sentences was one such failing; not requiring judges to give reasons was another. In these respects, the authors do not want to go back to the old days.

Instead, they make several of what they characterize as modest recommendations.

Judges should have more discretion in dealing with the information about a defendant's conduct that they receive outside the plea or trial process. The government should be required to inform defendants during plea bargaining about what it will urge the sentencing judge to do after the plea is entered. And the Judicial Conference should rouse itself to take more vigorous action in response to the Guidelines problem.

In fact, these recommendations are not so modest: They would restore to federal judges much of their ability to trump the Guidelines' specific rules. For this reason, despite the widespread criticism that the Guidelines now face, it is probably too much to expect such changes in the foreseeable future. Instead, the chief use of such criticism may be to provide a cautionary tale for the next group of comprehensive reformers who think that their ideas can escape the corrosive rigidification foreseen by Morris Raphael Cohen. 