

Seattle University School of Law Digital Commons

Faculty Scholarship

1-1-1993

Bringing Law to Sentencing

David Boerner

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/faculty>



Part of the [Legislation Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

David Boerner, Bringing Law to Sentencing, 6 *FED. SENT'G REP.* 174 (1993).
<https://digitalcommons.law.seattleu.edu/faculty/714>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.

ABA SENTENCING STANDARDS

BRINGING LAW TO SENTENCING

David Boerner*

When the American Bar Association adopted its first Sentencing Standards¹ in 1968, sentencing in the United States was, to use Judge Frankel's term,² "lawless." Those initial Standards, while firmly committed to indeterminacy and judicial discretion, contained the essential prerequisites for bringing law to sentencing. They recommended that sentencing judges "normally should state for the record in the presence of the defendant the reasons for selecting the particular sentence to be imposed,"³ and called for the "development of sentencing criteria"⁴ and for appellate review of sentences.⁵

When the ABA revisited its Sentencing Standards in 1979, it rejected the statutory determinate sentencing reforms which had been adopted in a number of states in the 1970s and followed the lead of those who advocated reform based on presumptive guidelines developed by a commission. The 1979 Standards retained their commitment to indeterminacy but called for the creation of a "guideline drafting agency . . . empowered to promulgate presumptively appropriate sentencing ranges."⁶ It recommended judges impose sentences "within the applicable guideline range unless . . . a substantial aggravating or mitigating circumstance exists,"⁷ a structure which has become the model for all sentencing reforms enacted since 1980.

The sentencing reform movement, to say the least, has not been free of controversy and the ABA's 1993 Sentencing standards reflect the controversy. The Standards seek to distance themselves from the federal sentencing guidelines—unpopular among judges, lawyers and academics—while simultaneously advocating the adoption of a sentencing reform modeled on the state guideline systems. This is no small feat, one that requires considerably more than merely banishing the word "guidelines" from the lexicon. The problem is that the federal and the various state guidelines systems are structurally very similar. The differences are in their details and in the sentencing policies they seek to implement. The devil, of course, is always in the details, and there is much to criticize in the federal guidelines.

The core of the controversy, however, lies deeper. What makes sentencing guidelines inherently controversial is that they bring law to sentencing.

* Associate Professor of Law, University of Puget Sound School of Law. Professor Boerner participated in drafting Washington's Sentencing Reform Act of 1981 and has served as an advisor to the Washington Sentencing Guidelines Commission since 1981.

Law does not comfortably permit the multiple simultaneous inconsistent resolution of issues. Its hierarchy forces the resolution of issues of sentencing policy—and enforces the particular resolution—and thus makes the fact of resolution clear. This society is not of one mind on what values sentencing should embody and thus the resolution of these disputed issues means the values of some will prevail while those of others will not.

Ironically it is the growing awareness that sentencing guidelines are a remarkably effective means of translating policy judgments into practice that fuels the controversy. As Michael Tonry concludes "[g]uidelines promulgated by commissions have altered sentencing patterns and practices, reduced sentencing disparities and gender and race effects, and shown that sentencing policies can be linked to correctional and other resources, thereby enhancing governmental accountability and protecting the public purse."⁸ Reduced to its essence the controversy is over the wisdom of those "altered sentencing patterns and practices."

There are no new issues in sentencing. Every issue which the various guidelines address was an issue before sentencing guidelines. The difference was that before guidelines the issue was resolved by each individual judge, acting alone, most often silently, without reference to any external standard and without possibility of review. That the same issue, arising in cases before different judges, would be resolved differently was inevitable. Were the issues exclusively those of fact, individual resolution would be inevitable and thus tolerable. But where the issue is whether a particular fact ought to be considered at all or whether it should aggravate or mitigate the sentence, disparity of resolution resulted in disparate sentences, not because the defendants were different, not because the crimes were different, but because the sentencing judges were different.

This core truth—and its unacceptability—underlies the movement to bring law to sentencing. Despite all the sound and fury surrounding the federal sentencing guidelines, the ABA remains committed to this reform. Its 1993 Standards, both structurally, and substantively, are wholly consistent with the fundamental core of the reform project, bringing law to sentencing.

The Standards make perhaps their greatest contribution by separating the structure of sentencing from the sentencing policies those structures are designed to implement. The failure to make this separation characterizes the acrimonious debate over the federal sentencing guidelines and is, in my judgment, the greatest impediment to continued efforts to bring law to sentencing. Our discourse—and our decisions—will improve if we all focus on the same issues. But the controversy will remain.

Take the debate over whether the defendant's personal characteristics that are not related to the

ABA SENTENCING STANDARDS

offense ought to be relevant in sentencing. The United States Sentencing Commission was making a choice when it proclaimed that most personal characteristics are "not ordinarily relevant in determining whether a sentence should be outside the applicable sentencing range."⁹ The Minnesota Sentencing Guidelines Commission made a similar choice when, exercising delegated legislative power, it declared that "employment" and "Social factors, including: (1) educational attainment; (2) living arrangements at the time of offense or sentencing; (3) length of residence; (4) marital status"¹⁰ were impermissible grounds for departure. So did Washington's Legislature when it declared "The sentencing guidelines . . . will apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant."¹¹

The ABA Standards make a different choice when they recommend "The legislature should authorize sentencing courts, sentencing individual offenders, to take into account personal characteristics not material to their culpability that may justify imposition of a different type of sanction or, in limited circumstances, a sentence of lesser severity than otherwise would be imposed."¹² It would be naive to expect agreement on this issue. Legislatures will undoubtedly resolve it differently. We should not be surprised when sentencing commissions develop guidelines which reflect the values of the legislative bodies which created them. This explains much of the reviled features of current federal sentencing law.¹³ What law demands, and delivers, is that the choice, once made, be respected.

Sentencing guidelines also bring law—and thus constraint—to sentencing in a more indirect way. Every jurisdiction which has implemented presumptive sentencing guidelines has recognized that not every factor which would justify departure can be specified in advance. To accommodate this they have stated the standard for departure in general terms, accompanied it with a non-exclusive list of permissible factors, and authorized the judiciary to develop, in a common-law fashion, other grounds for departure.

The ABA Standards wisely follow this model by proposing that departures be allowed for "substantial reasons."¹⁴ The reporters state that this "is intended to be more permissive than the current federal departure standard, and is modelled after the states that have preserved meaningful judicial discretion under guidelines."¹⁵ While meaningfulness is always in the eye of the beholder, the experience in the guideline states is that this type of standard, while preserving and employing judicial discretion at the appellate level, will ultimately constrain sentencing discretion.

Under the similar "substantial and compelling" departure standard in both Minnesota and Washing-

ton the issue of whether a particular reason is "substantial and compelling" is determined by the appellate court as a matter of law.¹⁶ While this determination inevitably involves judicial discretion, once resolved at the appellate level sentencing judges are bound. Appellate courts in both states have not been reluctant to reverse sentencing judges whose reasons for departure are, in the appellate courts' judgment, inconsistent with the policy articulated by the legislature.¹⁷ This, of course, is the standard conception of the judicial role. Allowing a sentencing judge's "concept of just punishment"¹⁸ to prevail over the appellate courts' determination of the legislature's conception would be lawless.

Once the inevitability of the process of controversy and resolution inherent in the concept of law is accepted, the real work of substantive sentencing reform can begin. While the 1993 Standards do not recommend particular resolutions of all basic policy issues, they do recommend particular resolutions of a number of specific issues which, by focusing attention on the detail, will greatly assist those considering adoption of presumptive sentencing systems.

Consider for example the question of prior criminal history. The 1979 Standards, while obviously intending that prior record be considered,¹⁹ offered no guidance on how that consideration should be given. Undoubtedly reflecting experience with guidelines over the past decade, the 1993 Standards recommend that sentences be enhanced based on the "number and nature of prior convictions and the time elapsed since an offender's most recent prior conviction and completion of service of sentence," and "that 'time periods' should be fixed, 'after which offender's prior convictions may not be taken into account."²⁰

The limitation to convictions follows the lead of all states which have adopted guidelines and rejects the federal guidelines authorization of the consideration of "prior similar adult criminal conduct not resulting in a criminal conviction."²¹ While the Standards identify the relevant factors, they offer no recommendations as to how a sentencing system might "guide sentencing courts to the appropriate weight to be given to an offender's criminal history."²² Here existing guidelines systems provide models to which policymakers may profitably turn as they craft their system.

All existing systems employ variable weights but the federal guidelines focus on the length of the prior sentence. Minnesota, Oregon, Louisiana and Pennsylvania focus on the severity of the crime for which the offender was previously convicted and Washington and Louisiana consider both the severity of the crime of conviction and its similarity to the current conviction. Similarly, while all systems except Pennsylvania and Louisiana provide that at least some prior convictions are not considered after the passage of some period of time, they vary widely in

ABA SENTENCING STANDARDS

what length of time is appropriate and in whether there are any prior convictions which must always be considered.

The point is not that any particular resolution is best, but that resolution of issues on this level of detail is inevitable in every sentencing. There are arguments for each particular resolution. Are there any arguments for the multiple simultaneous inconsistent resolutions that are inevitable in a system which leaves resolution of the issue to the unguided discretion of the sentencing judge?

Of all the issues of sentencing reform, none is more important than breaking our single-minded focus on a term of incarceration as the primary sentence. Existing guidelines describe presumptive sentences almost exclusively in terms of imprisonment. While some systems authorize the use of alternative sentences, the dominate message of existing guidelines is that only imprisonment is punishment.

Here the ABA Standards offer a significant advance. The Standards describe in considerable detail the range of sanctions they recommend that legislatures authorize. Their recommended sanctions are the building blocks with which one could construct a sophisticated and sensitive sentencing system and thus they will be of considerable assistance. The Standards do not, however, take the necessary next step and address the complex but essential question of interchangeability. The standards call for the sentencing commission to "direct sentencing courts to the types of sanctions and severity of sanction" which are "presumptively appropriate"²³ but offer no guidance as to how this vital but maddeningly difficult process is to be performed.

Any system concerned with defining and reducing unwarranted disparity must grapple with the concept of interchangeability. Modest starts have been made in some guideline systems but much heavy lifting remains. As Norval Morris' and Michael Tonry's path-breaking book *Between Prison and Probation* makes clear, this issue is laden with value judgments but its promise is enormous. Morris and Tonry understand that at the core of this project is the inherently political task of developing "a system of interchangeable punishments that the state and the offender would regard as comparable in their punitive effects on him."²⁴ No system of "intermediate" or "alternative" punishments can be successfully implemented or maintained if it is perceived as unjust by the public. I say the public, not judges, lawyers or academics, because that is where political power ultimately resides in a popular democracy.

My experience with sentencing teaches me that the public has a deep, perhaps pre-rational, commitment to equal treatment. While I agree with Morris and Tonry that "precise equivalency . . . is in practice unattainable and is in theory undesirable,"²⁵ the

burden is on the proponents of "rough equivalence" to persuade the public and their surrogates, legislatures and "intermediate agencies," that the resulting sentences are just in both the individual case and between cases.

The meta-message of sentencing reform over the past quarter century is that law can come to sentencing and that when it does it will bring its partner—politics. While expertise is indispensable, public acceptability is the cornerstone upon which the success of any sentencing system will depend.

The federal sentencing guidelines, reviled as they are by the "experts," have proven as stable as their state analogs. No presumptive sentencing system has been repealed or even structurally modified in any significant way. The reason, I suggest, is that the public, acting through their elected representatives, see those guidelines, and the sentences imposed pursuant to them, as roughly just.

That those sentences are considerably harsher than most who read this journal, including this author, see as just is, to put the matter bluntly, irrelevant. 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. The experience in Minnesota and Washington, progressive states generally regarded as having the most successful guidelines systems, teach that while those systems were effective at restraining the growth of prison populations when that was the policy of those states, they were equally effective at implementing policy judgments that more punitive sentences were appropriate. The analogy is that of the sea-anchor, effective at keeping the ship heading into the wind, but entirely subject to sea changes.

Churchill was right, of course, when he said almost a century ago, "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country."²⁶ We have the sentences we have because we have chosen to have them. Presumptive sentencing guidelines give us the means to transform our values concerning sentences into practice, they help in assuring that those values are evenly applied, but they cannot transcend our values. We live in a punitive time and thus we have punitive sentences.

Those of us who believe in less punitive sentencing policies have much work to do, and most of that work, like most politics, is local. In Judge Frankel's words it is time to "fall to and work."²⁷ While what takes place in federal courts is important, sentencing is overwhelmingly a state concern and thus most of the work will take place in state capitols, not on the banks of the Potomac. The ABA knows this and that is why it continues on its now quarter-century struggle to bring law to sentencing. Its work will be of a great benefit as the project of bringing an end to "lawlessness in sentencing"²⁸ inevitably continues.

ABA SENTENCING STANDARDS

FOOTNOTES

¹ Standard Relating To Sentencing Alternatives and Procedures, American Bar Association Project on Minimum Standards For Criminal Justice, Approved Draft, 1968.

² Marvin E. Frankel, *Lawlessness In Sentencing*, 41 U. Cinn. L.R. 1 (1972).

³ Supra note 2 at §5.6(a)(ii).

⁴ Id. at Part VII (via sentencing councils, judicial institutes and orientation of new judges)

⁵ Standards Relating To Appellate Review of Sentences, American Bar Association Project on Minimum Standards For Criminal Justice, Approved Draft, 1968.

⁶ Standards Relating To Sentencing Alternatives and Procedures, American Bar Association Project on Standards For Criminal Justice, Approved Draft 1979, Standard 18-3.1(a).

⁷ Id. at Standard 18-3.1(b).

⁸ Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 Univ. of Colo. L. R. 713 (1993).

⁹ 1992 Guidelines Manual, § 5H1.1-.12.

¹⁰ Minn. Sent. Guidelines II.D.2. The choice is described in Dale G. Parent, *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines* 127 (1988).

¹¹ RCW 9.94A.340.

¹² 1993 Standard 18-2.6(b).

¹³ See Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. R. 223, 284 (1993). They conclude that "our examination of the statute and its legislative history demonstrates, we believe, that, by and large, the Commission has implemented the Sentencing Reform Act in a manner consistent with legislative intent . . .

it is clear that Congress desired a significant degree of rigidity and harshness in the sentencing guidelines."

¹⁴ 1993 Standard 18-4.4(b)(iv).

¹⁵ Kevin R. Reitz and Curtis R. Reitz, *The American Bar Association's New Sentencing Standards*, supra at 169 fn. 1.

¹⁶ *State v. Nordby*, 723 P.2d 1117 (1986); *State v. Bellanger*, 304 N.W.2d 283 (1981).

¹⁷ See e.g., *State v. Hodges*, 70 Wn.App. 621, 626, n.4 (1993) "Clearly there was logic and compassion in the sentencing approach taken by the trial judge. However, until the Legislature authorizes the use of non-offense related factors, such factors cannot be relied upon to justify an exceptional sentence."

¹⁸ Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines*, 101 Yale L.J. 1681, 1726 (1992).

¹⁹ Standard 18-5.1(d)(ii)(B) (1979) calls for pre-sentence reports to contain "a full description of any prior convictions or juvenile adjudications of the offender;"

²⁰ Standard 18-3.5(b).

²¹ 1992 Guidelines Manual § 4A1.3(e) (policy statement). The statement does provide that "a prior arrest record itself should not be considered under § 4A1.3."

²² Standard 18-3.5(c).

²³ Standard 18-4.4(b).

²⁴ Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments In Rational Sentencing System* 93 (1990).

²⁵ Id. at 31.

²⁶ Leon Radzinowicz and Roger Hood, *A History of The English Criminal Law*, Vol. 5, 774 (1986).

²⁷ Marvin E. Frankel and Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. Colo. L.R. 655, 663 (1993).

²⁸ Supra note 3.