

Teaching Holistic Sentencing



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On the surface, sentencing guidelines have changed the way teachers introduce their students to sentencing. Before guidelines, with few legal building blocks, teachers necessarily discussed sentencing purposes and principles. After the promulgation of sentencing guidelines, teachers' needs have shifted, into a mode of introducing and manipulating the new sentencing rules. When there are specific rules to apply and when applying them "correctly" takes some practice, this view holds, trying to teach sentencing theory will only distract students or fritter away time on questions already settled.

We believe the separation between the teaching of sentencing rules and the teaching of sentencing principles is a false split. While a person can be *instructed* about sentencing rules and how to apply them to particular facts, any effort to *teach* sentencing requires the "student" (be she a judge, lawyer, probation officer, law school student, or citizen) to consider ideas of justice and process.

When the subject is sentencing guidelines, thoughtful teachers must enable their students to analyze critically some particular guidelines provisions and the system as a whole. Students should have a sense of the historical origins of particular sentencing rules. They should be able to anticipate the likely effects of sentencing rules, identify distinctive responses to recurring sentencing problems, and argue for more just and effective alternatives to the current rules. Finally, they must understand sentencing as an integrated whole, rather than a sequence of parts.

Instruction vs. Teaching

Sentencing teachers from a variety of backgrounds confuse instruction with teaching, especially when teaching about legal systems with detailed rules.

The danger in studying any rule-driven system is that students may think they are learning when they memorize the sentencing rules, or when they practice applying rules to facts, or when they play (as lawyers always play) at the margins of the rules. But standing alone, these exercises are not educational since they treat the fundamental questions of right and wrong, of good and evil, as if they are decided—and decided correctly—and fully incorporated into the rules.

The ability to view things from a critical distance is a key aim of education. A student can evaluate a sentencing system from a critical distance only by

studying the choices made in building the system and the available alternatives. The same point holds true when fairly specific aspects of the guidelines system are the focus of the lesson.

Perhaps the difference between instruction and teaching about sentencing will become clearer in the context of the following question: Is the guidelines manual itself a teaching resource? Maybe. Our first question about any teaching resource—the manual, a computer program like "ASSYST," or a problem set or exercise—is the teacher's goal in using that resource. If the goal of using the Federal Guidelines Manual is to ask about the ease of factual determinations that drive guideline sentencing, or to highlight and critique the highly disjointed process of guideline sentencing calculations, then the Guidelines Manual might be a useful teaching tool.

A teacher might ask a student to apply the Guidelines Manual to a particular set of facts, and then direct the student in that context to consider how the guidelines account for the purposes of punishment, or how they treat offender characteristics (leading to an exploration of the policy statements on offender characteristics), or how the Manual highlights possible departures, or what role it assumes for different users (e.g., prosecutor, defense lawyer, probation officer, or judge). But this is a difficult set of questions for students to discuss when they start within the Guidelines Manual.

If a teacher assumes that applying the Guidelines Manual will alone reveal the deeper assumptions, functions and limits of federal guideline sentencing, then the Manual is a poor teaching tool indeed. Without a proper introduction or context, the use of the Manual may send the wrong message: that learning about guideline sentencing is simply a matter of learning the rules, and then practicing their application. The Manual might suggest a single correct answer in place of the myriad questions about the law and its application that any good educational effort should raise.

If the teacher is to succeed in the enterprise of teaching from the Guidelines Manual, the students must be able to picture some alternative to the choices that the Manual embodies. Often we find it useful to begin by asking the students what aspects of a particular offense, offender, and social conditions they find most relevant to the sentencing decision, and only then to consider what factors the guidelines address. This is the strategy we adopted in our

recently-published criminal procedure casebook for use in law schools, which includes a 120-page sentencing chapter.² Studying sentencing law — like the study of any other topic in the law — requires a framework that exposes the critical choices rather than obscures them. We do not think the federal guidelines themselves provide such a framework.

What is the logical framework of the guidelines? Chapter One comes the closest to revealing the important choices that the Commission and the Congress made, but offers incomplete explanations for those choices and acknowledges the complexity of sentencing only in passing. Most users of the guidelines spend very little time with Chapter One, Part A. Chapter Two measures offense conduct with a point system that seems to come from nowhere; Chapter Three identifies five major “adjustments,” but does not explain why these are handled separately, and why there are only five, or why the impact of each adjustment is also handled in the context of “points;” and so on, including the mysterious and unique sentencing grid.³ These divisions do not identify for readers the recurring issues that all sentencing systems must answer; instead they map out a mechanical process for producing a sentence.

To teach and learn about rules, the teacher and the student must be able to step back from the rules and to put them in some context. Whether we teach classes on sentencing generally, or specifically on the guidelines, whether for one afternoon or for one semester, our strategy is to generalize and to compare. We start with a general phrasing of some dilemma that faces any person who must create sentencing rules or set a sentence in a particular case. We then offer students some descriptions of real or hypothetical responses to the general dilemma. The benefits of a “generalize and compare” method are not limited to isolated issues, such as the proper treatment of ten-year-old felony convictions in a criminal history. It can reveal alternative ways of thinking about the most fundamental features of a sentencing system.

Our casebook materials on sentencing address first the question of which institution exercises sentencing authority. Students who know of the different roles one might assign to legislatures, trial judges, appellate courts, and sentencing commissions will later be able to evaluate sentencing rules by asking whether different institutions would produce different rules. Because the sentencing chapter is part of a book on criminal procedure, the chapter explores how the sentencing decision gives the judge an opportunity to revisit many earlier procedural choices, including the prosecutor’s choice of charges, the evidence introduced at trial or guilty plea hearing, and the standard of proof. The chapter closes by

pointing out the expanded range of information available to the sentencing judge, and the most typical categories of information that sentencing systems consider relevant (including information about the offender and about the victim and community). Every system gives the sentencing authority some direction about how to handle this information, and every student of sentencing should understand the most typical directions that the systems give.

One way to move from particular guidelines to a more general perspective on sentencing is to think about institutional roles. What tasks do different institutions play under this set of sentencing rules? We ask students whether they can imagine a system with no role for sentencing judges. They often find this very hard to do (though not so hard to imagine a system with little role for appellate judges). This often leads to a fruitful discussion of one of the most interesting and unexplored aspects of modern sentencing: What do we think a judge is doing, and thinking, when she sentences? These questions typically lead back to insightful discussions of mandatory legislative penalties, and the appropriate degree of rule rigidity in different guideline systems.

Holistic Sentencing

The need to recognize alternatives to current sentencing rules is not the only reason for a teacher to introduce non-guidelines materials along with specific guidelines provisions. Without the ability to generalize and compare, students will miss what in our view remains a central concept in sentencing: that sentencing requires an understanding of the whole, not just of parts.

Before guidelines existed we would start a sentencing class or unit with a case with rich and complex facts. A wonderful example is provided by the sentencing briefs and sentencing opinion in the *Oliver North* case. The prosecution and defense memoranda present a dramatic contrast in their characterization of offenses and offender, and Judge Gerhard Gesell gives a thoughtful assessment of these arguments at the sentencing hearing.⁴ Another example — sometimes paired with the *North* materials — is the decision by Judge Kimba Wood in the Michael Milken case.⁵

But cases are not the only useful starting points. We have taught sentencing by starting with passages from Judge Marvin Frankel’s book *Law Without Order* (1972) (criticizing the pre-guidelines sentencing system), or portions of Hammurabi’s code, or key provisions of the Sentencing Reform Act, or with passages from Wheeler, Mann & Sarat’s book *Sitting in Judgment* (1989) (also about pre-guidelines sentencing practices). In each instance, the starting point gives students an overview of rulemakers,

sentencing judges and advocates at work, without attempting to subdivide the work.

The same types of materials work just as well today in a world of sentencing guidelines. After discussing the sentencing of pre-guidelines offenders such as Oliver North or Michael Milken, we ask how the guidelines would apply to those cases, and whether the guidelines take account of the whole range of factors that sentencing judges traditionally found to be important, or that students believe important. The guidelines era makes this strategy easier in some ways. Guidelines open up the possibility of choosing facts to discuss from among hundreds or even thousands of published district and appellate decisions. Cases can be chosen to highlight particular issues or sets of issues, such as the offender's role in the offense along with the amount of drugs involved.

What we have found unworkable is to begin with the cold and conforming words of particular guideline provisions, dry and out of context. In our experience, the study of sentencing requires that the entire offense, offender, and social context be brought into play. This is what sentencing judges or parole authorities do whenever sentencing rules leave them with such choices. The fact that sentencing rules are difficult to teach in isolation reflects something deeper about sentencing itself: Sentencing is a holistic process.

Sentencing is a holistic process even when a system such as the federal guidelines tries to dismember it. In some respects, the structuring of all sentencing guidelines (both state and federal) makes it difficult to see the bigger picture, the nature of the sentencing judgment in each case. But many of the federal guidelines — including the sentencing grid — do not reveal the logic underlying their design, and thus go farther than other structured systems in obscuring the holistic nature of the sentencing process. When guidelines obscure the connections between different stages in the sentencing process and the larger purposes they are serving, they pose a risk for teachers. Guidelines dissociated from their purposes act like quicksand, miring students in the complicated language of a provision, or in the progression from one step to the next in the sentencing rules, and the students may find it hard to escape.

Do not misunderstand us. Sentencing guidelines are not inherently evil. They present a great opportunity for teachers of sentencing. Guidelines generate many appellate decisions, still a mainstay of legal education. They also create a vocabulary and a structure for talking about timeless issues in sentencing. Sentencing guidelines have sharpened the understanding of such central issues as the kinds of information that should be considered at sentencing

("relevant conduct"), the credit, if any, that should be given to offenders who help the government ("substantial assistance"), and the proper discount, if any, that should be given to defendants who plea bargain. Thus, sentencing guidelines can be either a focal point or an obstacle to real learning about sentencing.

Great teaching should aim for more than just placing current rules in context: it should always include the idealist's twist. There may be no perfect sentencing system. But some systems are better than others, and what is better at one point or in one place may not be so in another. Students who can compare should also be able to evaluate, and to identify the criteria that make some choices better than others.

Although teaching about sentencing should address ideal rules and outcomes, it need not create or endorse a comprehensive package of reforms. A teacher will often pick one target of reform to include as part of any educational effort, perhaps guided by the specific interest or suggestions of those who wish to learn. The goal of teaching is not to answer all questions, but to illuminate how questions can be answered. We consider efforts to teach sentencing to be a success whenever the students leave with a sense of their own capacity to work effectively within a system, as well as their capacity to assess and change the rules and the process over time.

The Teaching Function of Sentencing Judges

Effective teaching of sentencing is not the exclusive domain of law professors. The essence of teaching is built into the function that a judge performs every time she sentences. The judge has the task of bringing the offender, the attorneys, and everyone else associated with the case to understand how the relevant sentencing rules do (or do not) lead to a just sentence. In doing so, the judge ought to connect the sentencing in the particular case to general aims of sentencing and to the functioning of the entire criminal justice system.

Any perceived or functional split between the rules to be applied and the principles justifying a particular sentence is especially pernicious when judges craft a sentence under the federal guidelines. A sentencing judge is not asked merely to identify and apply the proper sections from the Guidelines Manual. Statutes, tradition, and justice direct the judge to talk about sentencing reasons rather than to instruct about sentencing rules.

Sentencing is not merely one among many stages in the criminal process: it is the culmination of that process. Sentencing — with or without guidelines — involves a more nuanced assessment of the crime than the simple determination of guilt or innocence. It requires a reassessment of the charges

filed, the proof available to prove the charges, and the manner in which guilt was determined. It requires an evaluation of any assistance the offender has provided to the government as part of the resolution of the immediate case. Sentencing also calls on the court to move beyond the events during the investigation and adjudication of the case, consider the offender's behavior and character beyond the offense of conviction, and consider facts (such as community sentiment and punishment resources) having nothing to do with the particular offender or the particular offense. In short, the sentencing judge does far more than attach a sanction to a case. The sentencing process produces both a deep understanding of the specific offender and offense and a broad understanding of the legal and social context in which the sentencing decision occurs.

In the Sentencing Reform Act (SRA), Congress did not try to simplify the notion of sentencing for the federal system. (Congress knows how to simplify, and has done so through numerous mandatory minimum sentences.) Instead, it tried to convert unarticulated and discretionary decisions into decisions structured by legal rules, where sentences would be articulated in each case, and subject to appellate review. If anything, Congress created a *more* complex system, since it added a new administrative structure and institution — the Sentencing Commission — into the sentencing process.

Congress gave judges more than just the obligation to find facts and then mechanically apply the sentencing rules in particular cases. It reaffirmed a role judges were already playing with respect to sentencing: the role of teachers.

In what ways are judges teachers? First, just as before the guidelines, the sentencing judge teaches the offender, and any member of society who cares (victims, the press, scholars) about the notion of just punishment. The judge does this by assessing the complete mix of factors relevant to sentencing, and then articulating a reasoned sentence. Second, just as before the guidelines, judges have a teaching role with respect to Congress. While of course judges previously had to stay within typically broad statutory sentencing ranges, they also had the ability to comment — in opinions or in judicial institutes or through the judicial conference or directly to legislators — about the fairness of the system.

Under the SRA, Congress handed to an administrative agency (the Commission) its legislative powers to structure sentencing more closely. It articulated and affirmed the responsibility of judges who apply and interpret sentencing rules to assess the complex mix of factors relevant to sentencing. It also added a new teaching obligation: Judges are now obliged to assess, on an ongoing basis, the guidelines and the

guidelines system, and to educate the Commission about its ways — especially when those ways are badly misbegotten.

The judges' obligation to judge the guidelines along with each offender comes from several different sources. Judges have an obligation as a general matter of constitutional law to assess the validity of both the SRA and the guidelines. They may not enforce guidelines or statutes that conflict with some higher source of law. Judges also have an obligation to review the legality of guideline provisions within the framework of the SRA as a general matter of general administrative law.⁶ The Sentencing Reform Act explicitly directs judges to assess the guidelines in every case when considering departures. A judge cannot assess whether, in the familiar language of 18 U.S.C. §3553(b), "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," unless the court assesses what the Commissioners considered, and how well they considered it.

But these are minor and formalistic points compared to the essential and inherently educational role that judges continue to play in selecting the sentence in individual cases. The sentencing judge mediates between general standards and the demand for uniformity on the one hand, and the complexity of most cases and the need for individualization on the other. This is a teacher's role, and any discussion that denies that role is both demeaning and unwise.

The Teaching Mandate of the Sentencing Reform Act

For some reason all students — especially law students, but the problem is much more pervasive — do not like to read or muse on the language and meaning of statutes and rules. Perhaps it is because of lawyers' training which still focuses, overwhelmingly, on cases, and especially appellate caselaw, as the mode of law-making and legal discourse. Nonetheless, we encourage readers to consider the statutory text which follows and which, we believe, supports the obligation of judges to assess the guidelines on an ongoing, case-by-case basis.

In 18 U.S.C. §3553, Congress envisioned judges sentencing based on an independent baseline derived from their own personal, nuanced, multi-factored assessments of each case. The guidelines form only a part of the full range of factors that the judge is to consider. Section 3553(a) is one of the leading candidates for the "most-ignored-statutory-provision-of-the-year award." (It is a perennial contender.) Section 3553(a) provides:

Factors to be considered in imposing a sentence. — The court shall impose a sentence suf-

ficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission. . . that are in effect on the date the defendant is sentenced. . .
- (5) any pertinent policy statement issued by the Sentencing Commission. . . ;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

To drive home the point that sentencing judges are to consider all relevant factors, Congress retained the pre-guidelines understanding, previously codified, of the range of information that judges could consider at sentencing. Note that in the following provision, relevance is defined not by an agency but by judicial logic, shaped by the information in the pre-sentence report and the arguments of lawyers. 18 U.S.C. §3661 provides:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

The obligation of judges to judge the guidelines is mirrored in statutory provisions requiring the Commission to consider what judges say. As the Commission notes in its introduction to the guidelines, it was “established as a permanent agency to

monitor sentencing practices in the federal courts.” USSG §1A. The Commission has devoted its monitoring activities to the sorts of quantitative measurements of judicial practices that it relied upon to draft the original guidelines. In its introduction to the guidelines the Commission noted that “experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.”

Congress took a broader view of the kind of information the Commission would receive and consider, and it assumed that judges would be a prime source of that information. In 28 U.S.C. §994(o) & (w), Congress provided:

- (o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission’s guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission’s work. . .
- (w) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed. . . a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

Section (o) is a formal invitation for comment by representative groups, an invitation taken up by many of these groups over the years.⁷ Section (w) is an invitation to all judges to report to the Commission on the wisdom and function of the guidelines in each case.

Congress might have removed judges from the

sentencing process altogether. It might have issued a comprehensive set of narrow, mandatory penalties, and directed a fact-determining agency (let's call it the U.S. Probation Office or perhaps the U.S. Parole Commission — an agency that already knew how to develop and apply guidelines) to fit convicted offenders within the rigid structure. Similarly, it might have delegated administrative rulemaking authority only to create such a rigid system. Or it might have left judges in the process only as fact-finders. The fact that Congress rejected these more limited roles for judges, and especially for sentencing judges, should underscore the importance of the teaching functions of judges under the SRA.

Conclusion

Most federal judges have not acted in accord with these statutory obligations as we read them. They have not formally assessed the guidelines on an on-going, case-by-case basis. We would have judges embrace more fully their teaching role; we fear that too many judges have concluded, happily or sadly, that the guidelines relieve them of sentencing responsibility, when in fact the statute added to their responsibilities.

Our argument about the role of judges as teachers, however, does not turn on the persuasiveness of our statutory interpretation. We would make a similar argument about the role of judges as teachers based on tradition and the nature of sentencing decisions even if these statutory provisions did not exist. We believe that judges engage in the kind of process we suggest, though in a rougher fashion, whenever they write or say or think "this sentence is not just." We believe the judge acts as teacher whenever she explains why a sentence is just or unjust.

Notes

¹ ASSYST is an acronym for Applied Sentencing System. The ASSYST program that provides a structured set of queries to assist with guideline application. A copy of the software is available from the internet site of the U.S. Sentencing Commission. The URL for the Commission's home page is <<http://www.ussc.gov>>, and the address for the ASSYST software is <<http://206.6.118.10/ASSYST.HTM>>. It is worth noting that the U.S. Sentencing Commission ceased its work on ASSYST because even the target audience—U.S. Probation Officers—did not find it very useful. There is nothing wrong with using technology to teach about sentencing. A creative teaching exercise could use technology as an intellectual engine. A teacher might ask students how they would write a computer program to be used by defenders, prosecutors, probation officers, or trial or appellate judges. Would they write one program, or a different program (or versions) for each group?

² Marc Miller & Ronald Wright, *CRIMINAL PROCEDURES: CASES, STATUTES AND EXECUTIVE MATERIALS* (Aspen Law & Business 1998) (formerly Little, Brown & Company). See <<http://www.crimpros.com>>.

³ We have both tried our hands at understanding the great complexity of the guidelines in general, and the grid in particular. Compare

Ronald Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617 (1992); with Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587 (1992).

⁴ Reprinted in Marc Miller & Ronald Wright, *CRIMINAL PROCEDURES: CASES, STATUTES AND EXECUTIVE MATERIALS* pp. 1608-1618 (1998).

⁵ *United States v. Michael Milken*, 3 Fed. Sent. R. 158 (1990) (Wood, J.)

⁶ Ronald Wright, *Sentencers, Bureaucrats and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1 (1991).

⁷ The Judicial Conference has submitted many reports and recommendations to the Sentencing Commission. See, e.g., Testimony of Vincent L. Broderick (S.D.N.Y.) and Mark Wolf (D. Mass.) for the Criminal Law Committee of the Judicial Conference of the United States Before the U.S. Sentencing Commission, March 22, 1993, 6 Fed.Sent.R. 76 (1993); Statement of Vincent L. Broderick, Chair, Committee on Criminal Law of the Judicial Conference of the United States, and Mark L. Wolf, Chair, Subcommittee on Sentencing Guidelines and Procedures before the U.S. Sentencing Commission, February 25, 1992, 4 Fed.Sent.R. 319 (1992); Statement of Hon. Vincent L. Broderick, Chairman, Committee on Criminal Law & Probation Administration of the Judicial Conference of the United States and Hon. Mark Wolf, Chairman, Subcommittee on Sentencing Guidelines and Procedures before the U.S. Sentencing Commission, 3 Fed.Sent.R. 276 (1991); Recommendations of the Judicial Conference of the United States to the U.S. Sentencing Commission, 3 Fed.Sent.R. 282 (1991).