The State of the Sentencing Union: A Call for Fundamental Reexamination

JAMES E. FELMAN*

Kynes, Markman & Felman, P.A., Tampa, Florida; cochair of the Sentencing Committee of the Criminal Justice Section of the American Bar Association; former cochair of the Practitioners' Advisory Group to the U.S. Sentencing Commission

Federal sentencing policy is in need of fundamental reexamination. For the first time in our nation's history, more than one in every one hundred American adults is now incarcerated.[1] The United States leads the world in incarceration, both in raw numbers and on a per-capita basis. The United States imprisons its citizens at a rate roughly five to eight times higher than the countries of western Europe and twelve times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are imprisoned here in the United States, even though the United States holds only about 5 percent of the Earth's population. And while these statistics are driven largely by state sentencing policies, federal sentencing policy often serves as a model for the states. The average length of federal sentences has tripled since the adoption of mandatory minimums and the sentencing guidelines. There can be no serious doubt that federal sentencing policy has done its part to contribute to the unprecedented rates of American incarceration. In my judgment there is a pressing need for an across-the-board review of existing penalty severity levels. Understanding that such fundamental change will likely require incremental measures, I suggest below several specific areas in which dramatic and immediate improvement may be made to federal sentencing policy. Each of these steps would be effective first steps toward a more rational long-term sentencing policy for our nation.

I. Eliminate the Crack/Powder Disparity

As I have stated before, I firmly believe that the "100-to-1" disparity in sentences for crack and powder cocaine offenses is simply and profoundly wrong.[2] The crack/powder disparity arises from the Anti-Drug Abuse Act of 1986, which created a 100-to-1 quantity sentencing ratio between crack and powder cocaine, pharmacologically identical drugs. This ratio means that crimes involving five grams of crack receive the same five-year mandatory minimum prison sentence as crimes involving 500 grams of powder cocaine. The ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. Since the enactment of the ratio, research and extensive analysis by the Sentencing Commission and others has revealed that many of the assumptions underlying it are not supported by sound evidence and have resulted in racially disparate impacts.[3] The Sentencing Commission reported that revising the crack cocaine threshold would do more to reduce the sentencing gap between African Americans and Caucasians "than any other single policy change" and would "dramatically improve the fairness of the federal sentencing system."[4] The time has clearly come for Congress to correct the gross unfairness that has been the legacy of the 100-to-1 crack/powder ratio.

II. Expand Alternatives to Incarceration

The federal sentencing system could greatly benefit from increased use of effective alternatives to incarceration, such as drug courts, intensive supervised treatment programs, diversionary programs, home confinement, GPS monitoring, and probation. Incarceration does not always rehabilitate—and sometimes has the opposite effect. Many state criminal justice systems derive great benefit from a variety of alternatives to incarceration, but ever since the advent of the Sentencing Guidelines the federal system has focused almost exclusively on imprisonment. Prior to the Guidelines, more than 30 percent of federal defendants were sentenced to probation without any term of imprisonment.[5] By 2007, that figure had dwindled to a mere 7.7 percent, as 92.3 percent of offenders were sentenced to imprisonment.[6] The data reflect a marked and consistent trend away from the use of alternatives to incarceration.[7] This dramatic curtailment of alternatives to incarceration was not dictated by the Sentencing Reform Act of 1984. Indeed, 28 U.S.C. § 94(j) provides that "[t]he Commission shall 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 a crime of violence or an otherwise serious offense." In view of this statute, as well as the purposes of sentencing set forth in 18 U.S.C. § 3553(a), it is not necessary to imprison 92.3 percent of defendants. In addition to the direct costs associated with these sentences, the negative impact on defendants' prospects for rehabilitation is significant. Even a brief period of incarceration often causes the defendant

Federal Sentencing Reporter, Vol. 20, No. 5, pp. 337–339, ISSN 1053-9867 electronic ISSN 1533-8363
 DOI: 10.1525/fsr.2008.20.5.337.

to suffer loss of employment and family support, two factors likely to promote rehabilitation and prevent recidivism. Federal sentencing policy would greatly benefit from a renewed commitment to alternatives to imprisonment, particularly if coupled with careful data collection and analysis to determine those alternatives that work best for given categories of offenses and offenders.

III. Reform Mandatory Minimum Penalties

The sentences dictated by the many and varied congressionally enacted mandatory minimum sentences are also a large part of the reason for the threefold increase in the length of the average federal sentence since 1984. It is difficult to improve on the observations made by Justice Kennedy at his 2003 address at the annual meeting of the American Bar Association, when he stated, "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences." He continued that "[i]n too many cases, mandatory minimum sentences are unwise or unjust." As Justice Kennedy observed, mandatory minimum sentences routinely result in excessively severe sentences. Mandatory minimum sentences are also frequently arbitrary, because they are based solely on "offense characteristics" and ignore "offender characteristics." Because they trump the Sentencing Guidelines, mandatory minimum sentences often distort the proportionality sought to be achieved by the Guidelines. And because the mandatory minimums often require a sentence in excess of that called for by the Guidelines, they are a significant source of unwarranted severity. Repeal of mandatory minimum sentences, or alternatively rendering them advisory in keeping with the now advisory Guidelines, would be a dramatic improvement in federal sentencing policy.

IV. Data Collection and the Role of the United States Sentencing Commission in an Advisory System

While the United States Sentencing Commission's ability to dictate specific sentences in individual cases has been weakened by the now advisory status of its Guidelines, the Commission's importance in the collection, analysis, and dissemination of sentencing data is now greater than ever. Under advisory Guidelines, district courts are empowered to consider a much richer mix of information in sentencing. District courts are now free to craft much more individualized sentences in light of the particular circumstances of specific defendants. But to do so and be affirmed on appeal, district courts must give specific and detailed *reasons* for their sentencing determinations. It is for this reason that there has perhaps never been a better time for the study of sentencing policy than now. The reasons given by district courts, if collated, analyzed by the Commission, and then disseminated by the Commission, can give rise to the most expansive wealth of sentencing data and jurisprudence in our nation's history. Trends in sentencing considerations can now be recorded with detail. Success or failure with differing sentencing options involving otherwise similar offenders and offenses may now be documented and analyzed to a degree not previously possible. The Sentencing Commission is ideally situated and qualified to receive, collate, analyze, and help us all learn from sentences imposed under the advisory system. The future of federal sentencing policy will be markedly improved if the Commission is committed to this empirical role and is provided the resources needed to carry it out. The Commission should also be as free with its data as is possible so that scholars and policy makers can benefit from this new wealth of sentencing reasons and analysis. The district courts must be committed to learning from and understanding the decision-making processes and reasoning of their brethren, and the Sentencing Commission can readily serve as a repository of such information. The greater access individual judges have to the reasoning of their fellow judges, the more unwarranted disparities in their results can be avoided. This is not a new role for the Commission, but it is a role that may make its efforts more important than ever in the furtherance of rational and sound federal sentencing policy.

V. Conclusion

In light of the unprecedented and accelerated trend in sentencing severity over the past twenty years, I believe a fundamental reexamination of American sentencing policy is in order, beginning at the federal level. Eliminating the crack/powder disparity, expanding the uses of alternatives to incarceration, and reforming mandatory minimum sentences are obvious first steps toward improvement. Over the longer term, however, significant improvement could also be achieved by careful collection and analysis of sentencing data in individual cases by the United States Sentencing Commission. District courts imposing sentences above or below the advisory Guideline range will be required to give detailed reasons explaining why such sentences were deemed appropriate. The careful work of our federal judiciary, engaged in the consideration of unique offenses and offenders, may serve as a compelling evidence-based road map to learn how to imprison only those we must.

Notes

* This paper is not submitted on behalf of either the American Bar Association or the USSC's Practitioners' Advisory Group; however, the suggestions in Parts I and II reflect the policy of the PAG and the suggestions in Parts I, II, and III reflect the policy of the ABA.

1 The Pew Center on the States, *One in 100: Behind Bars in America 2008* (2008). *See also* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, NEW YORK TIMES (April 23, 2008).

2 *See, e.g.*, Testimony of James E. Felman on behalf of the American Bar Association before the Subcommittee on Crime and Drugs, Committee on the Judiciary, United States Senate, Washington, D.C., February 12, 2008.

3 *See* U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002); U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007).

4 U.S. Sentencing Commission, FIFTEEN YEARS OF GUIDELINE SENTENCING 132 (Nov. 2004).

[5] *Id.*, at 43, Fig. 2.2.

[6] U.S. Sentencing Commission, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Fig. D & Table 12.

[7] The percentage of defendants sentenced to imprisonment has increased nearly every year for which data are available on the Commission's Web site:

2007:	92.3%
2006:	92.5%
2005 post-*Booker*:	92.1%
2005 pre-*Booker*:	91.9%
2004 post-*Blakely*:	91.0%
2004 pre-*Blakely*:	91.3%
2003:	91.0%
2002:	90.9%
2001:	91.2%
2000:	90.6%
1999:	89.6%
1998:	89.0%
1997:	87.0%
1996:	88.1%
1995:	86.4%

For 1998–2007: U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (1998–2007); for 1995–98: http://www.ussc.gov/linktojp.htm.