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THE SENTENCING GUIDELINES AS A NOT-SO-MODEL PENAL CODE

Gerard E. Lynch*

We are accustomed to thinking about the criminal law, and the procedures for enforcing it, as divided into two separate stages. The first stage—the subject of penal codes and jury trials—concerns the definition of culpable conduct and the adjudication of guilt. The second stage—sentencing—concerns the consequences of conviction for the offender. Only rarely do we acknowledge that the conventional separation of these stages into compartments is highly misleading.

The articles in this Issue of FSR address, in one way or another, the extent to which the concerns of the substantive criminal law and the law of sentencing are in fact closely integrated. To a substantial extent, the federal sentencing guidelines can be seen as a continuation, from a very different philosophical perspective, of the effort to reform the federal criminal code. How successfully do the guidelines accomplish this end?

I. THE MODEL PENAL CODE

We begin with a critical bit of history. In 1951, the American Law Institute undertook the daunting task of creating a model penal code. The MPC was an effort to rationalize and codify the confusing mass of common law, statutes embodying common law terms or principles, and statutes enacted from time to time to reform or supplement the common law. These three sources made up the criminal law of most American jurisdictions at that time.

But as Frank Remington reminds us in his article, a critical issue faced early in the drafting process was the degree of elaboration the code should contain. Within broad categories of anti-social activity—homicide, theft, sexual misconduct—traditional law made numerous distinctions. Murder, for example, was defined as a separate crime from manslaughter, and was divided by most states into separate crimes of first and second degree. How many of these distinctions should be carried over into the new law?

In effect, the issue involved drawing the line between the two stages of criminal law and procedure. Professor Remington points out that the framers of the MPC made a deliberate decision to streamline the categories of offenses. Major levels of culpability, defined in broad strokes, were formally distinguished in the penal code, and recognized in the labels attached to offenders. But most of the finer gradations in culpability, it was agreed, did not need to be reflected in the Code: they concerned only

“treatment or penalty consequences.” Consequently, these distinctions were necessarily relegated to the discretion of prosecutors and judges. The decision to adopt a “simpler penal code ... rather than a more elaborate one” represented a conscious choice for discretion as against prescription with respect to penalties.¹

In opting for discretion over prescription, the Model Penal Code reflected the prevailing sentencing ideology of its time, embracing the rehabilitationist rhetoric and indeterminate sentencing regime that dominated the first half of this century. The sentencing provisions of the MPC are directly influenced by this choice. They adopt a highly indeterminate sentencing regime, leaving very broad discretion to the sentencing judge and to parole authorities, very much a product of their time.

But as Professor Remington’s historical research makes clear, this approach did not merely influence those MPC provisions that explicitly addressed sentencing. Rather, the drafters’ preference for broad sentencing discretion affected the very structure of the Code’s highly-influential substantive definitions of particular crimes. If it had been thought desirable to control judicial discretion in sentencing more rigidly, or to define more precisely the penalties attaching to different kinds of acts, the decision to adopt a “simpler penal code” with fewer categories of offense would likely have been reversed. If matters going only to “treatment or penalty consequences” were not to be left to case-by-case judicial discretion, but were believed capable of legislative determination on the basis of general rules, the MPC’s drafters would have written many more “discriminations that have ultimately treatment or penalty consequences” directly into the Code itself.

Beginning in the mid-1960s, about two thirds of the states revised their penal codes under the influence of the MPC. A massive effort to codify the anarchic mass of federal criminal law along the same lines, however, foundered on the political rocks of the death penalty and the protection of classified information.² Bob Joost’s article ably chronicles the failure of this project. As he points out, comprehensive penal code reform was in large part a victim of congressional procedure. Complex and controversial legislation can be blocked in too many power centers in Congress, and different portions of the penal code reform had too many enemies occupying too many of those centers. Federal penal law remained uncoded, unsystematic and illogical.

II. THE NEXT STEP

By the time the federal penal code reform effort was pronounced dead, a new generation of reformers had turned to sentencing as the next reform project.³ Influenced by Marvin Frankel’s attack on the “lawlessness” of sentencing discretion and disparity,⁴ by despair over the apparent failure of the penal system

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to effect rehabilitation,⁵ and by a resurgent philosophical defense of retribution and "just deserts" sentencing,⁶ reformers concerned themselves less with revising the substantive law of crimes, and more with creating a determinate sentencing regime.

The sentencing reformers of the 1970s and 1980s, however, failed to see that their project was continuous with that of the MPC, and in significant ways inconsistent with its approach. Instead, they appear to have regarded penal code reform as a completed project—the MPC is still taught in law schools as the culmination of modern thinking on substantive criminal law—and to have seen their effort as limited to the separate second stage of the proceedings: sentencing.

Like their predecessors, the new reformers treated sentencing as a separate and discontinuous stage of the justice system from the definition of crimes or determination of guilt. The idea was to take what judges did at sentencing—after guilt for particular defined offenses had been determined—and to rationalize it. Any implications for the penal code were disregarded.

Federal criminal law in particular posed a further challenge. Because of the failure of code reform, the drafters of the federal sentencing guidelines did not merely face the task of elaborating and refining the broad categories of offense conduct proscribed in the MPC and its state progeny. They were also faced with the task of rationalizing the buzzing confusion of the federal criminal "code," which by then had added to the dense jungle of common-law distinctions and traditional statutes any number of novel genetically-engineered products of the mad legislator's laboratory—RICO, money laundering, carjacking, and a host of jurisdictionally warped variants involving mail, travel and the high seas.

As Bob Joost demonstrates, the resulting guidelines bear all the formal attributes of a penal code. Splitting some offenses into what are in effect multiple degrees (often following the general outlines of the failed Brown Commission proposals), and combining others under the same guideline provision, the guidelines create, in effect, a simplified codification of the behavior criminalized by federal law. By rendering the offense of conviction ordinarily insignificant for sentencing purposes, and replacing the code offenses for these purposes with comprehensive codified guidelines, the new federal sentencing regime to a considerable extent rationalizes and displaces congressionally-enacted criminal statutes.

III. ARE THE GUIDELINES A GOOD CODE?

Once the intimate connection between the sentencing guidelines and penal code reform is understood, two huge sets of questions emerge. One set of questions, addressed in several of the articles that follow, asks how well the Sentencing Commission, considered as a code drafter, has performed its task. It is not surprising, perhaps, that the consensus

of our commentators appears to be, "Not too well." Not perceiving its task for what, in large part, it was, the Sentencing Commission seems not to have gone back to the experience of the ALI, the Brown Commission, and others who had puzzled over questions of penal code reform to learn the lessons to be found there. And so, as Judge Jack Weinstein and Fred Bernstein point out in their article, the guidelines significantly muddle questions of mens rea as applied to factors that can have a dramatic effect on culpability.

To a much greater degree than any state penal law, the guidelines have turned gradations of culpability on rather crude quantifiable factors: the common law's rich stratification of property offenses, for example, is overwhelmed by the importance of the sheer number of dollars stolen; narcotics offenses are graded principally in terms of the quantity of narcotics sold. Yet, unlike many state statutes that make similar distinctions in defining degrees of crime,⁷ the guidelines make a defendant's mental state largely irrelevant to his level of punishment. Professor Remington argues, more fundamentally, that the entire enterprise is misguided, because the MPC drafters were right in the first place to have left these myriad distinctions of degree to discretion rather than rule.

But even accepting the premise that guideline sentencing of some sort is desirable, the existing federal guidelines have weaknesses that stem directly from their failure to address traditional concerns of penal code drafters. Weinstein and Bernstein document a principal problem: the lack of attention to mens rea issues. As they point out, the guidelines totally ignore the question of the level of culpability required with respect to the quantities of narcotics that determine the severity of sentencing in drug cases. This has left courts free to take the extreme position that neither knowledge nor even reasonable foreseeability of the quantities being transported is required in order to augment a drug courier's sentence significantly.⁸

It is not unprecedented for grading distinctions in penal codes to be made based on strict liability elements; even the Model Penal Code, despite its general aversion to strict liability,⁹ contains some grading distinctions that appear not to require culpability.¹⁰ But it is difficult to imagine that guideline drafters who understood their role to be analogous to drafting a general penal code would have failed to define culpability terms, and to make conscious decisions as to the kind of culpability required with respect to aggravating circumstances that can have a substantial effect on the degree of crime.

IV. INSTITUTIONAL IMPLICATIONS

My own primary concern, however, is with a second set of questions, institutional and procedural rather than substantive. If the Sentencing Reform Act represents a reversal of the MPC's preference for

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discretion, that decision may be unwise, but it is surely within Congress' power to make. The tension between rule and discretion will always be with us, and the balance point between their respective virtues and vices will never be stable. The pendulum has swung before, and it will swing again. But if Congress wants a penal code that, unlike Wechsler's, opts for elaboration and prescription over simplicity and discretion, doesn't it have the obligation to write one, rather than to farm out its work to an unelected commission? And if crimes are to be divided into more rather than fewer degrees, shouldn't defendants have the traditional right to have a jury of their peers decide the level of their guilt?

As both Bob Joost and Jim Felman point out, the guidelines are no real substitute for an effective penal code reform. While the guidelines render the offense of conviction largely irrelevant for sentencing purposes, Joost reminds us that prosecutors, judges and juries nevertheless must still struggle with a host of archaic and arcane distinctions among the confused and overlapping statutes that the Brown Commission was trying to eliminate, with significant costs to efficiency and fairness. And as Felman persuasively demonstrates, in some areas the awkward fit between guideline simplification and statutory overbreadth can cause remarkably unjust results that would surely be avoided by judicial discretion. Statutes such as those prohibiting money laundering require substantive overhaul; the guidelines inadequately address the fact that the statutes simply cover too broad a range of conduct. Moreover, by eliminating judicial sentencing discretion, they compound the resulting injustices.

We live, as we all recognize, in an administrative state, in which Congress does and must delegate all manner of technical policymaking responsibility to administrative agencies. But the distinctions being written into law by the Sentencing Commission are not technical matters of how many parts per million of particulate matter are necessary to render the air unfit to breathe. The substantive criminal law concerns some of the most fundamental, and least specialized, questions to be decided in any society, and if it is deemed important to specify more precisely the shades of society's condemnation of different species of crime, is that not a matter for the democratic process—for public legislation, rather than anonymous regulation?

As Bob Joost reminds us, federal penal code reform failed because the legislative process involved too many procedural hurdles for a truly comprehensive criminal code bill to pass. Yet the guidelines (and their periodic amendments), which accomplish as a practical matter an equally sweeping restructuring of substantive criminal law, swept through Congress without a vote, because under the Sentencing Reform Act of 1984 guidelines become law unless Congress enacts legislation to veto them. The

Supreme Court, long since retired from any effort to create an effective delegation doctrine, brushed off the argument that the Constitution *required* more active congressional involvement,¹¹ but a delegation that is constitutional is not necessarily responsible.

Perhaps this concern is naive: watching Congress' biennial exercise in finger-painting a "comprehensive crime bill" to tout to their constituents does not inspire one to stand firm for the principle that these folks should play a larger role in sentencing policy. But whether or not Congress would do a better job, making federal criminal law is Congress' job to do.

My second concern, however, is anything but theoretical. By retaining a penal code built for broad discretion while sponsoring the creation of a more rigid and prescriptive code of sentencing, the guideline regime has pushed what are now perceived to be critical issues of culpability into a second-string fact-finding process. Accepting a rehabilitationist sentencing policy, Professor Wechsler and his colleagues necessarily relegated sentencing decisions into a world of discretion and loose fact-finding.¹² But if today's conventional wisdom rejects Wechsler's approach, and seeks a "just deserts" prescriptive penal code that draws more moral distinctions and leaves less to social scientific guesswork, why mustn't the jury—the traditional voice of the community for passing moral judgment on citizens—decide, by the conventional standard of proof beyond a reasonable doubt, the moral category into which a defendant should be placed?

I do not mean to say that no fact relevant to punishment can be found by a judge. A penal code far more elaborate than the MPC could still leave room for many even finer distinctions that might well be left to less rigorous fact-finding. But as Felman points out, the criminal code on which the guidelines are superimposed leaves vast ranges of culpability within a single offense, and vast ranges of treatment alternatives to the sentencing authority. Absent the rehabilitationist philosophy, the code would never have looked like that. If that philosophy is to be rejected, and a different set of rules created for the sentencing stage, it should be recognized that this change of policy has profound consequences for the way the laws themselves should be written, and for the procedural rules that implement those laws. Failing to see these consequences, Congress has lazily declined to rewrite its laws, and the courts have blindly applied procedural precedents decided in a different universe.

There is ground for hope that the Sentencing Commission might begin to do a better job of penal code drafting. Critical articles (like those of Joost, Felman and Weinstein & Bernstein in this issue) will point out practical or moral flaws in its structuring of particular offenses; the commissioners themselves will recognize the rigidity of some of their catego-

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ries;¹³ perhaps the Commission might even reconsider the degree of discretion that can safely be allowed to judges, and treat departures by concerned district judges as useful advice rather than as signs of rebellion.

But I am more pessimistic about the procedural and institutional issues. Congress has shown no inclination to take penal code drafting seriously; its only involvement in the process seems to be to expand federal criminal jurisdiction, create unnecessarily duplicative crimes and double the odd penalty. And far from recognizing that at least some types of sentencing factors are too important to be left to sentencing procedure, the federal courts seem inclined to reduce even distinctions that *are* created legislatively, and that affect not merely guideline ranges but maximum and mandatory minimum sentences, to mere "sentencing factors" that can be decided by judges, on hearsay evidence, by a preponderance of the evidence standard.¹⁴

Perhaps a growing recognition that the work of the Sentencing Commission is more than just setting guideposts for discretion, but in large part constitutes the creation of a new federal criminal code, will force more and more of us to ask whether it is wise, or even constitutional, to take the most fundamental moral ordering performed by law away from our most democratic institutions—Congress and the jury.

FOOTNOTES

¹ See the remarkably prescient dialogue between Herbert Wechsler and Jerome Michael unearthed by Professor Remington and discussed in his article.

² See National Commission on Reform of Federal Criminal Law, Study Draft—Federal Criminal Code, and associated workpapers (1970).

³ The federal penal code effort stands at the cusp of the two phases of reform. As Bob Joost points out, the Brown Commission had adopted the traditional sentencing

approach of the MPC. But by the time that bills incorporating its recommendations were actually introduced, they incorporated proposals for sentencing guidelines. These proposals, representing the dawn of a new phase of reform, were the only part of the code bills eventually to become law.

⁴ Marvin Frankel, *Criminal Sentences: Law Without Order* (1972).

⁵ Robert Martinson, What Works?—Questions and Answers About Prison Reform, [Spring 1974] *Public Interest* 22 (1974), a powerfully influential article that answered its title question with the simple reply, "Nothing."

⁶ See in particular, Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (1976).

⁷ See, e.g., *People v. Ryan*, 605 N.Y.S. 2d 253 (1993).

⁷ See *United States v. DeVelasquez*, 28 F.2d 2 (2d Cir. 1994), discussed in Weinstein & Bernstein, *infra*.

⁸ See MPC §§2.02(1), 2.02(3), 2.05.

⁹ See, e.g., §221.1(2) (burglary graded higher "if it is perpetrated in the dwelling of another at night"; no culpability apparently required with respect to whether the building constitutes a dwelling or it is "night" within the technical definition in the statute.)

¹⁰ *United States v. Mistretta*, 488 U.S. 361 (1989).

¹¹ The *locus classicus* for the connection between rehabilitationism, indeterminate sentencing and casual fact-finding procedures is *Williams v. New York*, 337 U.S. 241 (1949).

¹² The Commission has several times indicated some dismay about its rules for classifying drug offenders, has already introduced some greater flexibility into those rules (see §2D1.1, application note 16), and may yet alter the basic quantity-driven scheme.

¹³ See, e.g., *United States v. Cole*, 32 F.3d 16 (2d Cir. 1994) (immigration offenses; aggravating factor interpreted as sentencing factor rather than as creation of separate degree of crime); *United States v. Reyes*, 13 F.3d 638 (2d Cir. 1994) (nature and amount of controlled substances not an element of the offense of distribution); *United States v. Monk*, 15 F.3d 25 (2d Cir. 1994) (same rule as to possession offense under 21 U.S.C. §844).