What should Congress and the U.S. Sentencing Commission do in the wake of the Supreme Court’s decision in United States v. Booker? They should lead a public discussion to reevaluate the wisdom of the policy judgments embodied in the Federal Sentencing Guidelines.

The sentencing debate following Booker has centered on what procedures and institutions ought to be engaged in sentencing. Commentators and legislators have asked whether sentence determinations are best left to the discretion of individual judges or whether a mandatory sentencing scheme enacted through legislation is necessary. The most prominent feature of the debate has been whether judicial discretion has led or will lead to too many sentences imposed outside of the Guideline range or to disparate sentences among offenders. But the debate has neglected an important predicate: whether adherence to the Federal Sentencing Guidelines, as presently formulated, is desirable. It is important that this issue be evaluated prior to any legislative Booker “fix,” because such a fix will almost certainly involve the enactment of (and, thus, the reaffirmation of) the Guidelines.

When Congress passed the Sentencing Reform Act of 1984, the Act was hailed as an important victory for sentencing equality. Sentencing decisions had previously been the near-exclusive province of the sentencing judge, and those determinations were essentially unreviewable. The Sentencing Reform Act created the United States Sentencing Commission and empowered the Commission to draft the Federal Sentencing Guidelines. The Act left many policy decisions, including the appropriate range of punishment for various offenses within statutory limits, to the Commission and required the Commission to establish Guidelines that met the four traditional justifications for criminal punishment: retribution, deterrence, incapacitation, and rehabilitation. Congress directed the Commission to “ascertain the average sentences imposed” “prior to the creation of the Commission,” in order to use those averages as a starting point for the Commission’s independent development of sentencing ranges reflecting the four traditional punishment theories. Congress also directed the Commission to “consider,” inter alia, “the community view of the gravity of the offense” and “the public concern generated by the offense” in setting sentencing ranges. Federal sentencing policy in general, and the Guidelines in particular, has largely failed to implement these goals.

Because it was unable to agree on a particular punishment theory, the Commission declined to adopt guidelines that reflected a comprehensive sentencing policy. It has since been explained that the Commission, in an attempt to compromise, decided to set sentence lengths, “by and large,” in accordance with “typical past practice.” However, the Commission’s adherence to past practice was far from uniform. For one thing, the Commission elected to increase sentences for various offenses, and the “categories of offenses, for which the Commission conceded it purposely deviated from past practice . . . actually far outnumber the remaining categories of cases.” For another thing, the Commission’s methodology of determining “past practices” with respect to relevant conduct has also been criticized as unreliable—a criticism made more credible by evidence indicating that average sentences for offenders have increased since the adoption of the Guidelines.

In order to fulfill its statutory obligation to consider the community view of the gravity of the offense and the public concern generated by the offense, the Commission contracted with two outside researchers, Peter Rossi and Richard Berk, to study public opinion on sentences for federal crimes. Their report revealed that several aspects of the Guidelines, such as how to treat repeat offenders and how to account for an offender’s greater economic gain in sentencing decisions, were inconsistent with public opinion. Perhaps the most noticeable deviation from public opinion Berk and Rossi identified involved the Guidelines’ harsh sentences for drug offenses:

"There seems to be little support in public opinion for especially severe sentences for drug trafficking and little support for singling out crack cocaine for special attention. Drug trafficking was treated by the [survey] respondents as one of the most severely punished crimes we examined, but the median sentences fell far short of current prescribed levels. Our respondents’ median sentence topped out at about 12 years, even for defendants with four prior prison terms. Current law commonly calls for sentences two to four times longer."
Especially severe sentences for drug trafficking are not solely attributable to the Commission. In 1986, prior to the promulgation of the Guidelines, Congress passed the Anti-Drug Abuse Act, which imposed high mandatory minimum sentences for crack-related offenses involving small amounts of drugs and imposed the same mandatory minimums for crimes involving one hundred times the amount of powder cocaine. This legislative decision resulted in one unit of crack being treated, for sentencing purposes, as the equivalent of one hundred units of powder cocaine. But the Commission’s decisions regarding relevant conduct exacerbated the harsh effects of the 1986 legislation.16

The severity of drug sentences is troubling not only because it appears that present sentencing policy may be irredeemably entrenched—it persists despite years of criticism7—but also because public opinion does not support these harsh sentences. From a utilitarian perspective, it is important for sentencing practices to conform to public opinion because, as several studies have revealed, without the support of public opinion, the criminal law is less effective at deterring crime.18 From a retributivist perspective, the appropriate form and magnitude of punishment that results from criminal activity must be in proportion to the gravity of the offense and should thus arguably be the subject of public deliberation. Also, to the extent that Congress’s sentencing policy determinations reflected in the Anti-Drug Abuse Act do not reflect public opinion, those policy determinations are suspect because, aside from the fact that Congress is a majoritarian body (and, thus, presumably reflects democratic preferences), there is little reason to prefer congressional sentencing policy decisions over the sentencing policy decisions of the judiciary, the traditional sentencing decision makers.

In finding that determinate sentencing schemes may violate a defendant’s jury trial right, Booker and Blakely can be read as underscoring the value of public involvement in sentencing. Yet the subsequent debate has focused only on sentencing uniformity, never touching on whether the content of the Guidelines has public support. The Commission’s decisions not to articulate a comprehensive punishment theory and to deviate in important respects from past sentencing practices highlight the need for a public discussion of substantive sentencing policy. It is most important to reevaluate those aspects of federal sentencing policy that conflict with public opinion—such as the sentences for drug offenses, which make up approximately 30 percent of all federal crimes.19 To that end, Congress and the Commission should inform the public of the various issues that affect sentencing, identify major areas of disagreement, and then solicit opinions from a wide range of groups and individuals. Only after a public dialogue on the policy judgments embodied in the Guidelines can federal sentencing practices achieve the legitimacy that is necessary under both deterrence and retributivist theory.

In addition to facilitating that public dialogue, the Sentencing Commission needs to serve a further, important role: It must act as a clearinghouse for more types of information. While the Commission is to be commended for its prompt efforts to release sentencing data after the issuance of Booker, the data it releases provides only a quantitative comparison of sentences within and outside of the Guidelines.20 This data is of no value in assessing the qualitative issue of whether individual defendants are being sentenced in a manner that most citizens would find acceptable and appropriate. The data does not include details about specific cases,21 nor does it provide the explanations for the non-Guideline sentences that almost certainly accompanied the district courts’ imposition of judgment. Those explanations would properly form the basis of the beginning of a public sentencing discussion, and because sentencing opinions are many in number and often unpublished, it is difficult for an informed sentencing discussion to take place if the Commission does not disseminate this information—information that the Commission already collects.

Practitioners and commentators also have an important role to play in the sentencing dialogue. When criminal sentences are discussed in the abstract, voters will often support lengthy imprisonment in order to be “tough” on crime. But when informed of specific facts associated with a case, studies show that people often believe a shorter sentence is warranted.22 This suggests that the narratives of individual defendants may influence public opinion about the appropriate length of criminal sentences. Practitioners and commentators should participate in the dialogue to provide this information to the public so that this humanizing effect is reflected even when sentencing decisions are made on an abstract level.

The decision in United States v. Booker has obvious procedural implications for criminal sentencing. But the rush to provide a procedural “fix” ignores the reality that the Sentencing Guidelines reflect neither past practices nor public norms with respect to some offenses. Because public opinion is especially important in the area of criminal sentencing, criticisms of the Sentencing Guidelines should be taken seriously, and a public discussion about sentencing policy should occur. Any attempt to provide a Booker “fix” in the absence of such a discussion will perpetuate a sentencing system that does not reflect the moral judgments of society.

Notes


10 STITH & CABRANES, supra note 4, at 60-61.

11 Id. at 61.

12 Id. at 63.


15 Id. at 80.

16 The 1986 legislation set mandatory minimum; the Commission “exacerbated the legislation’s effects” “through the relevant conduct provisions, applying the mandatories to offenders not actually convicted of the predicate offenses.” Michael Tonry, The Functions of Sentencing and Sentencing Reform, 58 Stan. L. Rev. 37, 45-46 & n.23 (2005).

17 The Sentencing Commission has twice recommended to Congress that it revisit the crack/cocaine disparity, see U.S. Sentencing Comm’n, Special Report to the Congress: Cocaine and Federal Sentencing Policy, in 10 Fed. Sent. Rep. 184 (1998), and several district courts have attempted to use their new discretion under Booker in order to impose sentences for crack cocaine that are less draconian, see Pamela A. MacLean, Crack the Code: After “Booker,” Judges Reduce Crack Cocaine Sentences, Nat’l L.J., Oct. 3, 2005, at 1. Both the First and Fourth Circuits have reversed such decisions. United States v. Pho, 433 F.3d 53 (1st Cir. 2006); United States v. Eura, 440 F.3d (4th Cir. 2006).


20 Post-Booker sentencing data available at http://www.ussc.gov/bf.HTM.


22 “When asked about sentencing in the abstract, citizens report a desire for harsher penalties, but when presented with detailed descriptions of cases, these same citizens often suggest more lenient penalties. . . .” Adriaan Lanni, Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?, 108 Yale L.J. 1775, 1780-81 (1999) (collecting sources); see also Rossi & Berk, supra note 14, at 40 (noting that although the crime itself “may dominate” sentencing preferences, those preferences are “responsive to other information about the crime and the criminal when included” in survey descriptions).