More Than Numbers: A Proposal for Rational Drug Sentences

With the United States Sentencing Commission seriously challenging crack sentences in a recent report and the Department of Justice calling for a thorough reevaluation of the narcotics sentencing scheme, the time is right to ask big questions. This proposal asks and answers one of the biggest—is there a viable alternative to narcotics sentences based almost entirely on the weight of the narcotics at issue? There is such an alternative, and it provides an opportunity to address the problem that underlies not only the crack/powder cocaine 100-to-1 ratio but also the whole of federal narcotics sentencing.

I. The Problem with Weight-Centric Guidelines
Both the mandatory minimums at 21 U.S.C. § 841(b) and the narcotics sentencing guidelines (at § 2D) focus on just two things: the type of narcotic and the weight of narcotic the defendant is charged with possessing, distributing, or manufacturing.

While creating the terms of 21 U.S.C. § 841 in 1986, Congress clearly used the weight of the narcotics at issue as a proxy for the level of involvement of particular defendants, dividing them up between participants, “serious” traffickers, and “major” traffickers. For example, those distributing more than five grams of crack were considered “serious” traffickers and subjected to a ten-year mandatory term, whereas those with more than fifty grams were “major” traffickers facing a five-year term. Dividing them up between participants, “serious” traffickers, and “major” traffickers for example, those distributing more than five grams of crack were considered “serious” traffickers and subjected to a five-year mandatory term, whereas those with more than fifty grams were “major” traffickers facing a ten-year minimum penalty.

This assumption, that the person actually holding the most drugs is the most culpable, ignores lessons that should have been learned from Al Capone. Capone was the key man in liquor trafficking, but he was not driving the truck full of booze. Similarly, those truly responsible for narcotics trafficking, those who create the distribution networks and are key to their success, are not the ones who carry, make, or sell the drugs. These functions are fulfilled by low-level subordinates, whereas those who are essential to the operation and retain much of the profit are the ones who manage financial details and organize the operation.

The problem with using weight as a proxy for culpability has over time become clear. The result is a system that is constructed to give long sentences to those with low-level roles: street-level dealers, couriers, and those with even more minor roles. According to the most recent Sentencing Commission Report, 69.9 percent of those prosecuted for crack cocaine offenses in federal court were those committing these lower-level crimes. Even for powder cocaine the same holds true, with well over half of those prosecuted in federal court being classified as such low-level offenders.

In retrospect, few would dispute that weight is a lousy proxy for culpability. It leads us to lock up lots of unskilled labor in the drug market, while the narcotics trade thrives. Within this system, what the crack/powder 100-to-1 ratio does is exacerbate the underlying problem of using weight as a proxy for culpability. Because powder cocaine is often only cooked into crack by the street-level dealer, the 100-to-1 ratio only amplifies the distortion already built into the system.

II. Solving the Problem
If what we care about is prioritizing the capture of drug kingpins and key men, we need to stop using the false proxy of weight. Rather, we should base the mandatory minimums and the guidelines more directly on the role played by the defendant.

Some may object that the advantage of using weight as a proxy is that it is easy to measure and to incorporate into the system of sentencing. Although that is true, it is also true that we already incorporate role directly into the system, through the role in the offense adjustments contained in Guideline § 3B1.1, which divide the most culpable defendants up into organizers, leaders, managers, and supervisors. Because this section has now been in use for two decades, we have a solid body of case law interpreting the meaning of these terms.

Thus, our current system looks to weight to primarily set the sentence and then tinkers with the result in a much more minor way by considering role in the offense. This is odd, given that weight is being used largely as a proxy for role in the offense. My suggestion is that we flip these around and use the role in the offense as a principal sorting mechanism and weight of narcotics as a way to then adjust the result to differentiate between large and small operations. This reversal should be applied to both 21 U.S.C. § 841(b) and Guideline § 2D.
III. Proposed Amendment to 21 U.S.C. § 841(b)

Amendment of 21 U.S.C. § 841(b) to focus on those most culpable can be accomplished without adding language (other than numbers) not already found in the statute and the guidelines. There are four simple changes in this proposed revision:

1. Mandatory minimums are predicated on proof that the defendant was either an organizer or leader (for the more severe mandatory minimums contained in [b][ii][A]) or a manager or supervisor (for the minimums contained in [b][ii][B]).

2. The penalties ratio between crack and powder cocaine is reduced to 20-to-1, which is accomplished by raising the threshold for crack cocaine. This is a politically feasible goal.

3. The mandatory minimums for those most culpable, sentenced under § 841(b)[ii][A], are increased by 50 percent.

4. Definitions for organizer, leader, manager, and supervisor are provided, taken from the Sentencing Guidelines—proposed paragraph (G) is borrowed primarily from Application Note 4 to Guideline § 3B1.1. Because this definition is drawn from a decades-old guideline, we already have significant case law refining and explaining those definitions.

After amendment, the affected portions would read as follows. The proposed changes to the controlling statute are italicized, whereas those portions being replaced are bracketed:

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(i) In the case of a violation of subsection (a) of this section by an organizer or leader of a narcotics organization and involving—

(ii) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(iii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers;

or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iv) 25 [5] grams or more of a mixture or substance described in clause (ii) which contains cocaine base; . . .

(G) To be considered an organizer, leader, manager, or supervisor of a narcotics organization, that organization must involve five or more participants. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as “kingpin” or “boss” are not controlling. Factors that should be considered include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a narcotics organization. These provisions do not apply to a defendant who merely suggests committing the offense.

IV. Proposed Amendment to U.S.S.G. § 2D1.1

Although not reprinted here, the guidelines would track the changes to the underlying statute by fracturing 2D1.1 into three sections. Through this regrouping, we could distinguish between participants by culpability. These revisions would increase sentences for those most culpable and reduce the sentences for those least culpable.
Part One (2D1.1)
The first new guideline would be identical to the present 2D1.1 but for the following changes:

1. The new 2D1.1 would apply to only organizers and leaders, as defined above.
2. The revised 2D1.1 would replicate the schedule at present-day paragraph (c) but would include only parts 184 of that paragraph. In other words, the schedule would end at 2D1.1(c)(4), thus limiting the application of the guideline to those involved in high-weight trafficking.
3. The base offense levels in paragraph (c) would be increased by 10 percent. For example, a base offense level 30 would become a level 33.
4. A 20-to-1 ratio (rather than 100-to-1) would be established between the penalties for crack and powder cocaine.

Part Two (2D1.2)
The second part of the trio (presumably, a new 2D1.2) would address the second most culpable group, managers and supervisors. It would be identical to the present 2D1.1 but for the following changes:

1. The new 2D1.2 would apply to only managers and supervisors, as defined above.
2. The revised 2D1.2 would replicate the schedule at present-day paragraph (c) but would include only parts 187 of that paragraph. In other words, the schedule would end at 2D1.2(c)(7).
3. A 20-to-1 ratio (rather than 100-to-1) would be established between the penalties for crack and powder cocaine.

Part Three (2D1.3)
The third part of the new narcotics guidelines would apply to all other participants. It would be identical to the present 2D1.1 but for the following changes:

1. The revised 2D1.1 would replicate the schedule at present-day paragraph (c) in full, save for the two changes described below.
2. The base offense levels in paragraph (c) would be reduced by 10 percent. For example, a base offense level of 20 would become a level 18.
3. A 20-to-1 ratio (rather than 100-to-1) would be established between the penalties for crack and powder cocaine.

V. Application to Facts
How would these changes affect case law? Let’s consider the impact on two hypothetical cases, one that involves the leader of a conspiracy and another that addresses a street seller.

First, consider a man who was the true kingpin of a powder cocaine conspiracy involving several people. He is the organizer of this conspiracy, directing the logistics of the flow of cocaine and taking much of the profits from the operation. There are ten kilograms of cocaine which can be proven. Under the existing law, assuming no criminal history and no acceptance of responsibility, he would face a guideline range of 121 to 151 months of incarceration, with a mandatory minimum sentence of ten years. Under the new law, he would face a guideline range of 168 to 210 months, with a mandatory minimum of fifteen years.

Now consider a man at the other end of this chain, an easily replaced street seller who is caught with seven grams of crack cocaine that started out as powder bought from the kingpin’s organization. Under the current law (and the same assumptions), he would be facing sixty-three to seventy-eight months of incarceration with a five-year mandatory minimum—about half what the kingpin faces. With the changes outlined above, his guideline range would be twenty-one to twenty-seven months, with no mandatory minimum term.

Thus, the effect of these changes would be to create much more separation between those most culpable and those least culpable in a given chain of distribution. We would then be incapacitating those who truly make a difference, whereas sentences for those less culpable would come closer to those terms commonly found in state courts.

VI. To Knead Hard or Soft
In Aristotle’s On Rhetoric, the Greek master offers a tiny story that reflects the feeling many of us have had about narcotics sentencing: “... as the man said to the baker when asked whether he should knead the bread hard or soft, ‘What? Can’t it be done right?’”

For too long, we have tinkered with numbers and locked up minor participants rather than making the system as a whole right. In 1986 Congress was right and foresighted in trying to concentrate on incapacitating those most culpable for narcotics crimes. Their mistake, hindsight shows, was in assuming that weight of narcotics was a proper and whole proxy for such culpability. We now have the chance to correct that error, focus drug sentencing on those who are most culpable, and try to do better.

Notes
3 ARISTOTLE, ON RHETORIC 270 (George A. Kennedy trans., 1991).