Exploring the Theory, Policy, and Practice of Fixing Broken Sentencing Guidelines

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I. A Basic Theory of Broken Sentencing Guidelines

Some Sentencing Guidelines are broken. To be more complete and to borrow liberally from the Bard, we might say that some Guidelines are born broken, some Guidelines achieve brokenness in application, and some Guidelines have brokenness thrust upon them by the evolution of sentencing law and practice.

The notion that some Sentencing Guidelines are born or become broken should not surprise anyone involved in the development and operation of the Federal Sentencing Guidelines. The first U.S. Sentencing Commission readily conceded that the original U.S. Sentencing Guidelines could not and would not be perfect. As one original Commissioner, now Justice Stephen Breyer, explained, the Commission recognized from the beginning that it would need to “continuously revise the Guidelines over the years” based on what was to be learned from “gathering data from actual practice [and analyzing] the data” to assess how a federal guideline sentencing system could and should be improved.1 The reality of broken Federal Guidelines is confirmed by the fact that the U.S. Sentencing Commission has proposed and Congress has approved 725 amendments to the Federal Sentencing Guidelines during their first two decades. Moreover, though it took a while to figure this out, the Supreme Court in 2005 ultimately determined in United States v. Booker2 that the procedures being used to apply the Federal Sentencing Guidelines were constitutionally broken.

I cannot in this short draft develop a fully detailed theory of broken Guidelines. But I can provide a brief overview of how Guidelines can get to be broken, and can highlight particular provisions of the Federal Sentencing Guidelines that have become broken in various ways. (The problem of broken Guidelines is also present in state sentencing systems, of course, but this paper will give particular attention to federal sentencing dynamics.)

First, some Guidelines are “born broken” because of an inherent design flaw in their creation. I view many of the quantity-driven Guidelines in the federal sentencing system—those provisions in Chapter 2 of the U.S. Sentencing Guidelines Manual that require precise measures of economic loss or drug amounts to assess offense seriousness—as inherently flawed because the precise quantity of economic loss or drugs rarely provides an effective proxy for the true seriousness of an offense or for the true culpability of an offender. Though drug amounts and monetary loss are surely relevant considerations at sentencing for certain crimes, courts and commentators have long noted the peculiar and sometimes pernicious consequences of the disproportionate impact that quantity determinations have on the calculation of Federal Sentencing Guideline ranges.3

Second, some Guidelines “achieve brokenness in application” because of the difficulties courts face in operationalizing what may be generally sensible sentencing rules. I view many offender-oriented Guidelines in the federal sentencing system—those provisions in Chapter 5 of the U.S. Sentencing Guidelines Manual that declare most personal characteristics “not ordinarily relevant” to whether a sentence should be outside the Guidelines—as now broken because district and circuit courts have failed to develop a predictable jurisprudence and have largely avoided principled examination of exactly when a defendant’s personal characteristics should or should not justify a non-Guideline sentence. Both before and after Booker, serendipity more often than sound policy seems to account for whether and just how a defendant prevails when he contends that his family circumstances or his poor health justifies a below-Guideline sentence.4

Third, some Guidelines “have brokenness thrust upon them” because over time the evolution of sentencing law and practice can reveal significant flaws in the application of sentencing rules that may have been initially sound. I view the criminal history guidelines in the federal sentencing system—those provisions in Chapter 4 of the U.S. Sentencing Guidelines Manual that provide an intricate set of rules for categorizing a defendant’s criminal past—as now broken because they have proven ineffective too often at distinguishing among some defendants with different risks of recidivism. In a series of research reports, the U.S. Sentencing Commission has itself documented various problems with the Guidelines’ criminal history rules, though the Commission has not yet engineered or even seriously attempted any significant revision of these rules.5

As suggested before, my goal here is not to provide a comprehensive theoretical taxonomy of broken Guidelines.
or to detail all the provisions of the Federal Sentencing Guidelines that I view as broken. But, as I proceed to outline a set of modern principles for fixing broken Guidelines, it is useful to consider all the different ways Guidelines can become broken and, in turn, to consider dynamically the types of corrective actions that might be justified.

II. A Modern Policy for Fixing Broken Harsh Sentencing Guidelines

My initial assertion—“some Sentencing Guidelines are broken”—should not be considered at all controversial or even fairly debatable. Though prosecutors, defenders, and judges may disagree concerning which particular Guidelines are most broken and just how they should be fixed, all of these stakeholders can point to parts of the system they believe are nonfunctional. What likely is controversial and debatable is my vision of how modern sentencing systems should assess and respond to the unavoidable reality of broken Guidelines. Any systematic effort to improve the Federal Sentencing Guidelines must engage in triage, addressing the most significant problem first. In modern sentencing times, ineffective and unnecessary harshness in the duration of prison terms is a pervasive and pressing problem. Consequently, I contend that the first and perhaps most essential modern priority for any sentencing commission should be to identify and seek an immediate and effective fix for those Guidelines which are broken because of their unjust and/or ineffective harshness.

My policy proposal here is informed by fundamental concerns about the injustice and inefficiencies of modern mass incarceration in the United States. A recent report from the Vera Institute of Justice provides a basic accounting of America’s modern eagerness for locking up its populace:

Between 1970 and 2005, state and federal authorities increased prison populations by 628 percent. By 2005, more than 1.5 million persons were incarcerated in U.S. prisons on any given day, and an additional 750,000 were incarcerated in local jails. By the turn of the 21st century, more than 3.6 million living Americans had spent time in a state or federal prison—nearly 3 percent of the U.S. population.6

The overall population of incarcerated individuals nationwide hits record highs nearly every year, and sophisticated projections suggest that the extraordinary number of persons locked behind bars is likely to continue to increase in coming years.7

The unprecedented growth in U.S. imprisonment is especially stunning when placed in a global perspective. A far higher proportion of American adults are imprisoned than in any other country; our incarceration rate—which is nearly 750 individuals per 100,000 in the population—is now roughly five to ten times the rate of most other Western industrialized nations:

The U.S. imprisons significantly more people than any other nation. China ranks second, imprisoning 1.5 million of its much larger citizen population. The U.S. also leads the world in incarceration rates, well above Russia and Cuba, which have the next highest rates of 607 and 487 per 100,000. Western European countries have incarceration rates that range from 78 to 145 per 100,000.8

The realities of modern mass incarceration—combined with my view that our nation’s historic commitment to protecting individual liberty and limiting government power should prompt extreme concerns about excessive terms of imprisonment—lead to the conclusions (1) that unduly harsh Guidelines are the type of broken Guidelines now most in need of fixing, and (2) that sentencing commissions now need to become persistently proactive in fixing broken harsh Guidelines and in making sure fixed Guidelines benefit as many individuals as possible. Let me here repeat a key point: my suggested modern policy for fixing broken Guidelines is specifically and intentionally attendant to modern crime and punishment realities. If crime rates were generally on the rise and modern incarceration rates were historically low, a sensible priority for sentencing commissions might be to identify and seek to fix those Guidelines that are broken because of their unjust and/or ineffective leniency. But a converse reality now defines modern crime and punishment: crime rates are generally on the decline and modern incarceration rates are historically high. Consequently fixing broken harsh Guidelines should be a defining priority for modern sentencing commissions. (Though there are reasons to believe that increased rates of incarceration have played some role in reduced crime rates, sophisticated research strongly suggests that other factors have also played a predominant role in crime reductions and that incarceration rates could be drastically reduced without any reduction in public safety.)9

Turning specifically to the federal sentencing system, the U.S. Sentencing Commission has two decades of sentencing experiences and sophisticated research to help it identify which broken harsh Guidelines should be fixed (and fixed with all deliberate speed). Though I cannot in this paper develop a fully detailed account of all the broken harsh Federal Sentencing Guidelines that may merit fixing, I can provide a brief overview of how the Commission can and should develop a dynamic fix-it agenda in the wake of the twenty years of federal sentencing experiences.

First and foremost, pre-Booker downward departures patterns and post-Booker variance patterns provide a ready-made accounting of those Guidelines that judges consider problematically harsh. Early proponents of Guideline sentencing systems expected reasoned departures from suggested sentences to play a fundamental part in Guideline revisions.10 Disappointingly, the Federal Sentencing Guidelines over the last two decades have rarely “codified” many of the judicially suggested reasons for reducing Guideline sentences.
Second, the U.S. Sentencing Commission has commissioned a number of public and judicial surveys concerning sentencing views and attitudes; these studies provide an informative and astute assessment of which Guidelines seem both to the public and to judges as unduly and unnecessarily harsh. Similarly, various public policy groups have issued reports and commissioned surveys that effectively document which Guideline provisions have proven to be most broken because of their unjust and/or ineffective harshness.

Last but certainly not least, the U.S. Sentencing Commission’s staff has itself completed an impressive array of research reports and data analyses throughout the last two decades. These Commission research efforts effectively document the significant increase in the overall severity of federal sentences during the Guidelines era. These research efforts also suggest a significant number of Guidelines that, in operation, produce unexpectedly and undeservedly harsh sentences for many types of offenses and offenders.

There are, of course, various ways one might seek to identify broken Guidelines in state and federal sentencing systems and various different modern policy approaches one might adopt for how best to fix broken Guidelines. But, as explained above, the troublesome realities of modern mass incarceration inform my view that unduly harsh Guidelines are the type of broken Guidelines now most in need of fixing. And because of its national presence and prominence, I would urge the U.S. Sentencing Commission to lead the way with a proactive agenda focused on fixing broken harvest Federal Sentencing Guidelines.

III. A Practice of Making Fixed Guidelines Apply Retroactively

As briefly mentioned above, I contend not only that sentencing commissions now should be persistently proactive in fixing broken harsh Guidelines but also that commissions should seek to make sure fixed Guidelines benefit as many individuals as possible. If and when a sentencing commission identifies and then fixes any Guidelines deemed broken because of their unjust and/or ineffective harshness, defendants previously sentenced under the broken Guidelines should generally be able to receive the benefit of the fix. Principles of equal justice and sentencing parsimony both strongly suggest that, as a general rule, not only future defendants but also past defendants ought to get the benefit of any and all Guideline fixes. In other words, all fixes to broken harsh Guidelines that serve to reduce applicable sentences can and always should be presumptively and broadly retroactive absent compelling reasons for limiting who benefits from the fix.

Helpfully, recent experiences in the federal sentencing system with a major Guideline revision highlight the ability for modern sentencing systems to effectively and efficiently implement retroactively a (long-needed) broken Guideline fix. This fix involved, of course, the Federal Sentencing Guidelines for crack and powder cocaine offenses, an issue that has engendered controversy and criticisms for decades. Specifically, a dozen years after it started issuing detailed research reports documenting that the 100-to-1 crack/powder ratio was unjustified and unfair, the U.S. Sentencing Commission in 2007 was finally able to amend its Guidelines to reduce applicable sentencing ranges for crack offenses. The Commission lowered the base offense level for all crack cocaine offenses by two levels, which served to reduce—but only partially and less than the Commission had previously urged—the disparity in drug crack/powder quantities triggering particular Guideline sentencing ranges.

Notably, while few questioned or publicly resisted the Sentencing Commission’s efforts to ensure that federal crack sentences were somewhat more just in the future, significant controversy erupted over whether the fixed Guidelines should be applied retroactively to benefit defendants who had previously been sentenced under the broken harsher crack Guidelines. During public hearings, the Department of Justice argued aggressively that giving retroactive effect to the fixed Guidelines could adversely impact public safety and would create many practical difficulties. In opposing retroactivity, the Justice Department made much of the fact that a very large number of incarcerated defendants might benefit from the new Guidelines and a good number of prisoners previously sentenced for crack offenses under the broken Guidelines might be eligible for immediate release. (According to the Commission’s research, nearly 20,000 defendants might be eligible for reductions under its fixed Guidelines and well over a thousand of these defendants might be eligible for release right away if the new Guidelines were made immediately retroactive.) The Justice Department apparently saw no problematic irony in arguing that it was now unwise and dangerous to give retroactive effect to fixed crack sentencing provisions because the injustices wrought by the broken crack Guidelines were still impacting so many still-imprisoned federal defendants. But many members of the judiciary and public policy groups expressed vocal and public support for retroactivity, arguing in various ways that principles of equal justice and sentencing parsimony justified allowing previously sentenced defendants to benefit from this Guidelines fix.

In December 2007, the Sentencing Commission officially and unanimously voted to give retroactive effect to its amendment reducing penalties for crack cocaine offenses. As explained in a policy statement issued with its decision, the Commission provided for retroactivity of the crack amendment to become effective four months later on March 3, 2008, in order to give courts and others impacted by this decision an extended period to prepare for the administrative issues implicated by the large number of incarcerated defendants who might be eligible for a sentence reduction under the fixed crack Guidelines. In its policy statement, the Commission stressed that federal district judges were, after
considering various factors, to make the ultimate determination of whether an incarcerated offender should receive a reduced sentence and how much his sentence should be lowered within the limits set by the Commission. The Sentencing Commission’s nuanced and conscientious policy statements implementing its retroactivity decision appeared to address effectively the public safety and administrative concerns voiced by the Justice Department.

In the wake of the Sentencing Commission retroactivity decision, the Sentencing Commission and practitioners effectively focused on the varied practical issues involved in implementing the new crack Guidelines retroactivity. In early 2008, the Commission convened special meetings in some federal districts to foster and facilitate better communication about crack retroactivity among all federal sentencing participants; for these meetings, the federal defenders produced memoranda providing suggestions for how the fixed crack Guidelines could and should be applied retroactively. And in February 2008, the federal Bureau of Prisons circulated a letter to all federal district judges that provided a prison administrator’s perspective on how best to structure and make effective orders for reduced sentencing terms.

In part because of all the preparations by the Sentencing Commission and practitioners, the federal criminal justice system appears to have handled smoothly and effectively the various administrative challenges posed by making retroactive a Guideline fix that impacted nearly 10 percent of the entire federal prison population. Despite “sky-might-fall” concerns expressed by the Department of Justice, federal prosecutors in many districts have readily acknowledged how well the federal justice system has handled the process of retroactively fixing past broken sentences.

IV. Conclusion
Modern crime and punishment realities suggest how to react to the essential reality of broken Sentencing Guide-lines: the central priority for modern sentencing commissions should be to identify and seek an immediate and effective fix for those Guidelines which are broken because of their unjust and/or ineffective harshness.

Notes
8 Id. at 1.