

Who Decides Sentences (at the Front End)?

ABA Justice Kennedy Commission Hearings

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Members of the Commission, thank you for your kind invitation to present my views on this panel, and also for reading this written version of some of the ideas I presented during the hearings.

The question for my panel — Who decides sentences at the front end? — is an issue I have addressed at some length in two articles directed more generally to the development and operation of the federal sentencing guidelines. One of my primary themes in these pieces, particularly in the article appearing in the *Stanford Law and Policy Review* entitled *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L & POL'Y REV. 93 (1999), was that the federal Sentencing Reform Act of 1984 actually established a sound institutional structure for sentencing decision-making, but the leading institutional players — Congress, the U.S. Sentencing Commission and the federal judiciary — have failed to play their roles effectively and appropriately within that structure. Specifically, Congress and the U.S. Sentencing Commission have been much too involved in dictating specific sentencing outcomes, while the federal judiciary has, in contrast, been much too uninvolved in influencing general sentencing policy. I conclude the *Stanford* piece by suggesting that this institutional tilt can in large part explain the unduly harsh and costly federal sentencing system that Justice Kennedy so rightly lamented in his August speech to the ABA.¹

¹ My other article develops similar themes with a particular focus on the use of departure authority and the development of departure jurisprudence within the federal sentencing guidelines. See Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21 (2000).

Rather than restate points I have made in my prior writings, I would like to expand the ambit of my analysis in order to suggest what I hope can be an informative and helpful taxonomy for examining the seemingly simple, but often extremely intricate and tangled, question of who decides sentences. Specifically, I urge this Commission to consider and analyze the “Who decides” question across two dimensions: one dimension which distinguishes between who decides *general sentencing policy* and who decides *specific sentencing outcomes*, and a distinct dimension which distinguishes between *who in fact decides* sentencing policy and outcomes and *who should decide* sentencing policy and outcomes. In the tables which appear on the next two pages, I have started to sketch out with some particularity what I mean by examining “Who decides” across these dimensions.²

Critically, I do not want to suggest that the tables below provide a comprehensive or definitive account of these issues — indeed, I do not think the complicated and interconnected institutional dynamics of sentencing decision-making can be reduced to two tables (even tables as dense as those below). I do want to suggest, however, that this Commission can draw many important insights from looking at sentencing reform issues through the analytical lenses I am trying here to develop. Indeed, a principal goal of my efforts is to urge that any examination and assessment of the “Who decides” question be conducted with particular attentiveness to the institutional realities and institutional strengths of different sentencing decision-makers.

² My efforts here draw both inspiration and insight from Kevin Reitz’s thoughtful effort to represent graphically different sentencing structures in *Modeling Discretion in American Sentencing Systems*, 20 LAW & POLICY 389 (1998).

	General Sentencing Policy	Specific Sentencing Outcomes
<p>Who</p> <p><i>in fact</i></p> <p>decides</p> <p>sentences</p> <p>on the</p> <p>front-end?</p>	<p><u>Legislatures</u></p> <ul style="list-style-type: none"> • establishing guiding theories/principles • structuring sentencing institutions and power • defining crimes • establishing grades of crimes • prescribing/proscribing sentencing factors • prescribing/proscribing sentencing options • determining funding and priorities <p><u>Sentencing Commissions</u></p> <ul style="list-style-type: none"> • refining guiding theories/principles • structuring judicial and prosecutorial power • defining offense levels/offender categories • prescribing/proscribing sentencing factors • prescribing/proscribing sentencing options • funding recommendations <p><u>Prosecutors</u></p> <ul style="list-style-type: none"> • general charging policies • general plea policies and practices • basic terms of standard plea agreements • general appeal policies and practices <p><u>Sentencing Judges</u></p> <ul style="list-style-type: none"> • defining any constitutional limits/restrictions • general approach to sentence selection • consistent and directed sentencing decisions • consistent control of sentencing procedures • broad written rulings on sentencing issue(s) <p><u>Appellate Judges</u></p> <ul style="list-style-type: none"> • defining any constitutional limits/restrictions • broad rulings on any sentencing issue(s) • consistent and directed sentencing decisions • standards and approach to review 	<p><u>Legislatures</u></p> <ul style="list-style-type: none"> • enacting mandatory sentencing provisions • establishing rigid sentencing structures • restricting certain sentencing options <p><u>Sentencing Commissions</u></p> <ul style="list-style-type: none"> • restricting judicial and prosecutorial power • rigid definition of offense/offender rules • precisely prescribing sentencing factors • precisely prescribing sentencing options • precisely defining sentencing ranges <p><u>Prosecutors</u></p> <ul style="list-style-type: none"> • specific charging decisions • specific plea methodologies and dynamics • precise terms of actual plea agreements • degree of concern over sentencing outcome • feelings about offense and offenders • creativity in proposals and support thereof • specific appeal decisions <p><u>Sentencing Judges</u></p> <ul style="list-style-type: none"> • ascribing specific sentencing outcomes • degree of deference to recommendations • willingness to circumvent legal structure • feelings about offense and offenders • creativity in interpretations and rulings • willingness to risk reversal <p><u>Appellate Judges</u></p> <ul style="list-style-type: none"> • specific view of certain sentencing issues • particularized approach to review • precise terms of remand

	Institutional Strengths	Institutional Drawbacks
<p>Who</p> <p><i>should</i></p> <p>decide</p> <p>sentences</p> <p>on the</p> <p>front end?</p>	<p><u>Legislature pros</u></p> <ul style="list-style-type: none"> • politically accountable • democratic • system-wide information gathering • can focus on economic trade-offs <p><u>Sentencing Commission pros</u></p> <ul style="list-style-type: none"> • can be made accountable • can be expert and focused • can be politically insulated • system-wide information gathering • can focus on economic trade-offs • can/should provide written account/defense <p><u>Prosecutor pros</u></p> <ul style="list-style-type: none"> • case-specific <i>offense</i> insights • can be politically accountable • can be democratic <p><u>Sentencing Judge pros</u></p> <ul style="list-style-type: none"> • unique case-specific <i>offender</i> insights • unique appreciation of human realities • system-wide insights over time • can/should provide written account/defense <p><u>Appellate Judge pros</u></p> <ul style="list-style-type: none"> • (muted) case-specific insights • system-wide insights over time • can/should provide written account/defense • collective wisdom 	<p><u>Legislature cons</u></p> <ul style="list-style-type: none"> • “sporadic and impassioned” • politically influenced • no case-specific insights • no written account/defense of decision • limited time and expertise <p><u>Sentencing Commission cons</u></p> <ul style="list-style-type: none"> • not sufficiently accountable (or <i>too</i> politically concerned/responsive?) • no deep case-specific insights <p><u>Prosecutor cons</u></p> <ul style="list-style-type: none"> • biased by representing a position • too politically influenced • can be biased (perhaps unconsciously) • can be idiosyncratic • no deep system-wide insights/concerns • no written account/defense of decision <p><u>Sentencing Judge cons</u></p> <ul style="list-style-type: none"> • limited system-wide insights/concerns • very hard to impact system-wide realities • can be biased (unconsciously) • can be idiosyncratic <p><u>Appellate Judge cons</u></p> <ul style="list-style-type: none"> • limited opportunities for input • skewed system-wide insights/concerns • hard to impact system-wide realities • inefficient (?)

As stressed above, these tables do not provide a comprehensive account of “Who decides” issues. Most obviously, there are a number of other front-end sentencing decision-makers left out of these tables. Specifically, in at least some cases, various other actors can influence at the front-end both general sentencing policy and specific sentencing outcomes in various ways: **crime victims**, through reporting decisions; **police**, through investigation decisions; **defendants and defense attorneys**, through plea bargaining and advocacy decisions; **probation officers**, through investigation and reporting decisions; and even **juries**, through trial and post-trial decisions. I have not incorporated these front-end actors into the tables above primarily because, though sometimes powerful in particular cases, they typically do not and cannot influence general sentencing policy and specific sentencing outcomes nearly as much as legislatures, sentencing commissions, prosecutors, sentencing judges and appellate judges. Nevertheless, I think this Commission could draw many useful insights from working through my taxonomy for these other front-end actors as well, since their actual influence on general sentencing policy and specific sentencing outcomes is sometimes considerable, and their institutional strengths and drawbacks as sentencing decision-makers are normatively interesting.³

In addition, these simplified tables cannot provide a definitive account of “Who decides” issues because of the considerable structural variations in sentencing decision-making in different jurisdictions. Most obviously, some states do not have sentencing commissions or any significant tradition of appellate sentencing review; the mapping of *who in fact decides* sentencing policy and sentencing outcomes in those jurisdictions would obviously look different than the first table above. Relatedly, in most state systems, prosecutors and judges are directly elected and thus are held more

³ The same points could be made about mid-course and back-end sentencing decision-makers. Though not a focal point for my panel, I believe my analytical taxonomy can be usefully applied to the sentencing role and impact of parole boards, correction officials, clemency and pardon boards, and governors and presidents. Most obviously, one institutional strength of all back-end sentencing decision-makers is that they will have information about offenders’ post-sentencing behavior for purposes of trying to predict the likelihood of re-offending.

democratically accountable than appointed prosecutors and judges in the federal system; the mapping of *who should decide* sentences must be attentive to such matters.

Finally, I should highlight that any account of institutional strengths and drawbacks concerning *who should decide* sentencing policy and outcomes is necessarily contestable. Perhaps this reality was most obviously reflected in the divergent views presented to this Commission during the first morning of these hearings: Professor James Whitman on the first panel seem to advocate that sentencing decisions be taken away from democratic institutions, while Professor Paul Rosenzweig on the second panel adamantly opposed the idea of taking these decisions away from democratic institutions. However, I also want to highlight that *how* sentencing decisions should be made seems far less contestable; many witnessed stressed in their testimony that sentencing decision-making should be as open, honest, reasoned and transparent as possible. In this context, I believe it is very important for this Commission to note that different institutions have markedly different abilities and histories when it comes to making sentencing decisions in open, honest, reasoned and transparent ways.

Despite the fact that my tables are in ways contestable and not comprehensive or definitive, I still strongly believe and hope that they are informative and helpful as this Commission works through the challenging and essential question of “Who decides sentences.”

Thank you once again for your time and attention. It would be my pleasure to further assist the Commission as you might see fit. I do not need to tell you how important and valuable your work is, but I do want to make sure you realize that the broad community of persons concerned with sentencing and corrections are profoundly grateful for your efforts.