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First Principles and Practical Politics: Thoughts on Judge Pryor's Proposal to Revive Presumptive Federal Sentencing Guidelines



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In recent remarks to the American Law Institute, Judge William Pryor recommended abandonment of the post-*Booker* advisory version of the Federal Sentencing Guidelines and adoption of a simplified presumptive federal guidelines system.¹ It will come as no surprise to those who follow federal sentencing debates closely that I find much to admire in his address. I have been making variants of the same argument for the past ten years—as co-reporter to the Constitution Project's bipartisan sentencing initiative,² as a contributor in the Model Sentencing Guidelines Working Group that in 2006 wrote and published a set of simplified *Booker*-compliant guidelines,³ as a witness before the U.S. Sentencing Commission,⁴ and in my private academic capacity.⁵

Without repeating in detail what I have written elsewhere, suffice to say:

First, I agree with Judge Pryor that the post-*Booker* advisory system retains most of the flaws of the system it replaced, while adding new ones.⁶ Moreover, its primary perceived advantage—that of conferring effectively unreviewable discretion on sentencing judges—is not only inconsistent with Marvin Frankel's first principles of sentencing, as Judge Pryor observes,⁷ but taken to its logical extreme is inconsistent with the rule of law itself.⁸ Certainly, the doubtful advantages of the advisory system in its present form are insufficient to justify its permanent retention.

Second, there are a number of constitutionally permissible alternatives to the court-created *Booker* regime. Among these is a system of presumptive, simplified guidelines mapped onto a simplified sentencing grid with broader ranges. This alternative was originally proposed by the Constitution Project,⁹ was later endorsed by Judge William Sessions (then Chair of the Sentencing Commission),¹⁰ and is now championed by Judge Pryor. If properly designed, implemented, and maintained, this system could be markedly superior to the *Booker* structure.

Third, the most daunting problem is not designing a sentencing mechanism better than either the pre- or post-*Booker* guidelines, but ensuring that such a system, however elegantly and expertly crafted, can survive contact with the political system. It seems fair to ask whether a system embodying the features advocated by Judge Pryor could

gain the approval of any Congress resembling the one that will just have been seated when this article appears. Still more to the point, even if such a system could be congressionally enacted, what would prevent it from replicating the experience of the pre-*Booker* guidelines and becoming over time a one-way upward ratchet prescribing ever higher sentences?¹¹

There was a time when I shared Judge Pryor's optimism that a sensible system of simplified presumptive sentencing guidelines could be enacted and could achieve its beneficent ends for a useful period thereafter. I have not yet surrendered the dream, but I confess to increased skepticism. The remainder of this essay will explain my pessimistic turn.

I. Obstacles to Initial Approval

Most of the daily actors and institutional stakeholders in federal criminal justice do not give a fig for first principles. They care about outcomes. Will a new system tend to make sentences shorter or longer, and for what classes of defendant? They care about their personal or institutional ability to influence those outcomes. How much control will they (as judges, prosecutors, defense attorneys, sentencing commissioners, or legislators) have over sentences generally and in particular cases? And some of them care about optics. How will any reform look to voters?

Among defense attorneys, liberal sentencing reformers, many federal judges, important Democratic legislators, the bulk of academic commentators, and a fair number of principled conservatives in and out of Congress, there is general consensus that, pre-*Booker*, the severity of the guidelines coupled with their restrictions on judicial departure power too often produced unduly lengthy sentences. The post-*Booker* transformation, by conferring increased power on judges, has, on average, moved sentences modestly downward.¹² For those who approve of this trend, a primary objection to restoration of presumptive federal sentencing guidelines is that their purpose and effect would be to stiffen federal sentences, or at the least to halt the slow downward drift of sentence lengths for many crime types that began several years after *Booker*.¹³

Therefore, in order for the revival of presumptive guidelines to garner support from what might loosely be

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termed the center-left of the sentencing debate, the guideline rules and ranges would have to be calibrated to permit (even if they did not require) lower sentences than the current guidelines suggest for some significant fraction of federal defendants. Without such a recalibration, those in the center-left will prefer to retain advisory guidelines in anticipation of continued judge-driven erosion of sentence severity.

Of course, both houses of Congress are now controlled by Republicans, as is the Justice Department and the White House. So Republicans could ram through a tough-on-crime guidelines revision with no Democratic support. The prime obstacle to this approach, perversely, is that it is almost impossible to write dramatically simplified guidelines without allowing at least the potential of lower sentences for some significant number of offenders.

Let me explain. As Judge Pryor correctly notes, simplifying the federal guidelines would require replacing the current 43-level sentencing table with a much simpler table containing fewer, broader ranges.¹⁴ The least controversial, and therefore most probable, approach to designing such a system would incorporate two premises: First, the seriousness ranking of crimes should stay roughly constant—meaning that defendants who rank at the bottom, middle, or top of the current offense level scale would stay in approximately the same relative positions in the new system. Second, for each class of offenses, the distribution along the offense seriousness scale of sentence lengths prescribed by the guidelines should stay roughly the same. For example, if the sentences prescribed by the current guidelines table for the bottom quartile of drug offenders range from a minimum of zero months (the bottom of the lowest possible sentencing range in that quartile) to a maximum of 72 months (the top of the highest possible sentencing range in that quartile), then the same range of possible sentences should be available to the bottom quartile of drug offenders in the new simplified table.

But a simplified sentencing table based on the foregoing premises will inevitably lower the bottom of the sentencing range for an appreciable fraction of the affected defendants, which in turn reduces the minimum sentence that a judge can impose on those defendants and still be within the guideline range. For a simplistic illustration of why this is so, see Figure 1 comparing two hypothetical sentencing tables, an “old” complex table with eight sentencing ranges, and a “new” simplified table with only four ranges.

If the relative severity rankings of defendants and the sentence severity distributions within offense classifications stay roughly the same from the old to the new system, most of the Figure 1 defendants formerly in Offense Levels 1 and 2 should be clustered in the new, broadened Offense Level 1. Similarly, most defendants in old Offense Levels 3 and 4 should migrate to new, broadened Offense Level 2, and so forth.

Observe that all defendants who fall into the shaded even-numbered ranges under the old complex table would retain the same maximum sentence under the new

Figure 1

Offense Level	Sentencing Ranges (Old Complex Table)	Offense Level	Sentencing Ranges (New Simplified Table)
1	0–6 months	1	0–12 months
2	6–12 months		
3	1–2 years	2	1–4 years
4	2–4 years		
5	4–8 years	3	4–12 years
6	8–12 years		
7	12–16 years	4	12–20 years
8	16–20 years		

simplified table, but would enjoy reduced minimum sentences under the new table. Defendants with the odd-numbered ranges under the old complex table would retain their former minimum sentences under the new simplified table, but be exposed to new higher maximum sentences. Because half of all defendants would receive increased possible maximum sentences while half would receive decreased possible minimum sentences, this result can be characterized as increasing as many sentences as it decreases. However, everyone familiar with federal sentencing patterns is well aware that the within-range sentences imposed by judges cluster overwhelmingly in the bottom half of the applicable range.¹⁵ The distribution might even out slightly if the ranges were widened, but I very much doubt the pattern would change radically. Therefore, the probable result of an ostensibly outcome-neutral simplification of the guideline offense table would be that some significant number of defendants would be eligible for, and ultimately get, lower sentences under the new simpler system than they would have under the old complex one.

Of course, it is theoretically possible to radically simplify the current guideline table while blocking the possibility of a lower guideline minimum for virtually all defendants. To accomplish this end, every box in the new simpler grid would have to set its minimum sentence equal to the highest minimum sentence that any defendant assigned to the new box would have received under the old complex grid. However, this architecture would, of necessity, raise either the guideline minimum, the guideline maximum, or both for most defendants. Figure 2 shows why. The simplified new table in Figure 2 would eliminate the possibility of a lower minimum guideline sentence for any defendant, and would raise both minimum and maximum guideline sentences for all defendants in old Offense Levels 1, 3, 5, and 7.

One can create a variety of hybrid table architectures, but one cannot escape the math. If one cuts the number of offense levels on the sentencing table by more than half, most defendants will probably be assigned sentencing

Figure 2

Offense Level	Sentencing Ranges (Old Complex Table)	Offense Level	Sentencing Ranges (New Simplified Table)
1	0–6 months	1	6 months – 2 years
2	6–12 months		
3	1–2 years	2	2–8 years
4	2–4 years		
5	4–8 years	3	8–16 years
6	8–12 years		
7	12–16 years	4	16–20 years
8	16–20 years		

ranges with lower minimums than they would have under the former system. Adopting an approach like the Figure 2 example to prevent that outcome would require raising the minimum guideline sentence of most defendants, which with the reintroduction of a strongly presumptive guidelines system would mean increasing the actual sentences of tens of thousands of defendants annually. This result might delight the dwindling circle of federal sentencing hardliners. But it would be dismissed out of hand by Democratic legislators and many other interested parties for whom broad ranges giving judges discretion to sentence deserving defendants below current guideline minimums would be the major attraction of Judge Pryor’s proposal.

Even if simplified presumptive guidelines could be structured in a way that would not *actually* lower sentences for many defendants, any plausible architecture would inevitably *look* as though that result was possible. And despite the notable recent evolution of many conservatives away from reflexive punitiveness,¹⁶ there remains an influential faction who react viscerally to the idea that any appreciable number of defendants *might* receive lower sentences. The persistence of this instinct was on vivid and regrettable display during the failed effort to secure sentencing reform legislation in the last Congress.¹⁷ Legislation backed by bipartisan coalitions in both the House and Senate that would have made modest changes in mandatory minimum sentences failed when opposed by a tiny number of Republican Senators. This refractory band—prominent among them the new Attorney General, former Senator Jeff Sessions—claimed, loudly but incorrectly, that the bill would cause the release of thousands of violent felons.¹⁸ Despite the support of conservative stalwarts like Senate Judiciary Chairman Charles Grassley (R-Iowa) and Senator John Cornyn (R-Tex.) and major Republican backers like Koch Industries, Republican Senate leadership declined to bring a bill to the floor and Republican House leadership was content to let the matter die.

In sum, unless a simplified presumptive system was structured to make a goodly number of defendants eligible for sentences lower than the current guidelines prescribe,

Democrats would not support it. But if such a system gave official imprimatur to sentences below current guideline ranges for a significant number of defendants, a key faction of conservative Republicans would probably try to block it.¹⁹ Unless the Republican leadership in both houses were to abandon its now-customary policy of refusing to move any legislation that requires Democratic support for passage, I am not sure how one could thread that needle.

Moreover, I suspect that congressional action would be rendered even less likely by the reaction of the bench. Many federal district judges would vocally disapprove of presumptive guidelines, however structured, seeing in them a return to the “bad old days” before *Booker*, and more crassly, as a direct strike at their discretionary authority. They may also be chary of a system that would put more facts to juries, adding time, complication, and additional sources of possible error to jury trials. I agree with Judge Pryor that the risk of unduly complicating jury trials is much overstated,²⁰ but perception may be more powerful than reality in this case.

A good many appellate judges might baulk, as well. While the post-*Booker* world deprives appellate courts of meaningful power over sentencing outcomes, it also relieves those courts of much of the workload created by enforceable guidelines. Although I have not done an empirical study, my work writing the annual revisions to the sentencing treatise I co-author with Roger Haines²¹ suggests that fewer defendants are raising sentencing issues on appeal, and even more importantly, that appellate courts are devoting ever-diminishing amounts of mental energy to resolving the issues that are raised. Questions of guidelines interpretation that would once have called forth pages of carefully reasoned judicial prose are now dismissed in an airy paragraph. I suspect that many busy appellate judges are perfectly happy with matters as they stand.

Many congressmen do not care very much what the judges think, and some would favor presumptive guidelines precisely to cabin judicial authority. But general judicial disapproval would carry considerable weight for many legislators of both parties.

Judge Pryor implicitly suggests that the interested parties might accept a deal in which all or at least many mandatory minimum sentences would be abandoned in return for adoption of presumptive guidelines. He notes that if presumptive guidelines were restored with provisions that made downward departures from presumptive ranges difficult, the rationale for having mandatory minimum sentences would be undercut.²² The idea has been proposed before and makes good sense, but congressional Republicans have never shown any disposition to make that trade in the past.²³ Moreover, Justice Departments under Democratic and Republican administrations have long cherished the leverage conferred by mandatory minimums. I find it hard to conceive that a DOJ headed by Attorney General Sessions would ever agree to abandon so powerful a prosecutorial weapon, or that a Republican Congress would

override the strongly expressed objections of a Republican Justice Department headed by a former senatorial colleague.

The only hopeful caveat I can offer to this pessimistic projection is that a Congress totally controlled by Republicans, unafraid of criticism from the left, and peering down Constitution Avenue at a Republican Justice Department and White House they no longer delight in thwarting might do something surprising. And maybe Judge Pryor himself, because he has immense credibility among conservatives, could carry the project through.

II. Return of the Ratchet?

So let us suppose that I am entirely wrong about the sentencing politics of the next congress and that, against all odds, a sensible, simplified, presumptive federal guidelines system could be designed and enacted into law. Suppose further that this system initially incorporated a sober, balanced approach to sentence severity, one that maintained rough parity with the seriousness levels of the current guidelines while making some offense-specific adjustments, but also gave judges reasonable room to do justice within wider ranges and to depart downward from those ranges in most cases in which they felt it necessary. Even if this Goldilocks ideal could be achieved, the real question is whether it could long survive. What, in short, would prevent the resurgence of all the factors that, over time, made the original federal guidelines a one-way upward ratchet that pushed sentences perennially higher?²⁴

Judge Pryor's answer seems to rely on Congress. He notes correctly that a radically simplified guidelines system would require congressional legislation modifying certain restrictive components of the Sentencing Reform Act.²⁵ He also advocates requiring formal congressional enactment of both the aggravating factors in the initial simplified guidelines and any new aggravating factors proposed thereafter.²⁶ He opines that "requiring Congress to enact aggravating factors . . . would likely deter increases in severity and complexity" because "the cumbersome, bicameral legislative process would make change more difficult than when the authority is delegated to a seven-member commission."²⁷

With the greatest respect to Judge Pryor, his prediction seems to ignore Congress's well-documented, and accelerating, propensity for inserting in bicamerally approved legislation directives to the Sentencing Commission to consider guideline amendments or direct amendments to the guidelines themselves.²⁸ I concede that, if a major guideline overhaul were to pass through Congress, few material amendments would probably be proposed for some period thereafter. The original guidelines enjoyed such a honeymoon in the years after 1987. But just as the original honeymoon ended, so, too, would a second one, at least absent some structural impediment to the seemingly irresistible legislative temptation to raise sentences in response to public outcry over the *crime du jour*.

A simpler guideline system does provide at least some such structural impediments. First, a simple system provides fewer moving parts for legislatures to meddle with. Second, a grid with a small number of wide guideline ranges should deter legislatures from casually mandating offense level increases for commonly occurring crimes since even a single-offense-level increase would cause a dramatic rise both in the sentences of individual defendants and in the inmate load of the Bureau of Prisons. Third, if a simpler system contained provisions that identified nonbinding factors for judicial consideration in setting sentences within range, legislative additions or amendments to such provisions would provide a vehicle for members of Congress to claim credit for "doing something" without significantly unbalancing the guidelines themselves. I confess to finding these structural arguments somewhat more convincing than Judge Pryor's reliance on the procedural drag of bicameralism.

Still, for reasons addressed in the next section, I am fractionally less convinced of my own arguments on this score than I used to be.

III. Hyperpartisanship, Neutral Experts, and the Administrative State

The Federal Sentencing Guidelines are a product of a vision of governance based on a set of assumptions that seem increasingly antique:

That a body of neutral experts housed in a government agency can be trusted to gather data and apply their expertise to drafting and curating rules designed to promote the general welfare. That other government agencies and Congress will accord reasonable deference to agency expertise. That the congressional parties can engage in informed, dispassionate, non-zero-sum negotiations about the shape of the initial rules recommended by such an expert agency, as well as similar negotiations over subsequent modifications of the rules. That congressional leadership will not insist that any successful legislation be supported by all members of the majority party in each legislative chamber, and thus that legislation supported by cross-party coalitions is possible. That an established agency can retain enough of the energy and imagination of its formative period to avoid becoming ossified and reflexively protective of its original designs. That individual members of Congress will not yield, at least not very often, to the perennial, invidious temptation to distort the criminal law for short-term electoral advantage.

But this is not the world we live in. Even in the 1980s when the federal guidelines were first enacted, some of these assumptions were unduly optimistic. But now the very idea of sentencing guidelines—a system of rules designed and tended (even if, as Judge Pryor would have it, not formally enacted) by apolitical experts lodged in an administrative agency—seems out of harmony with the spirit of the present age. Our national politics is all tweeting, trolling, bellowing, and preening. Research, facts, nuance, consultation, compromise, legal and legislative

craftsmanship, the very idea of expertise as essential to governance, are now out of season. If and when they are restored to favor, the prospects of success for Judge Pryor's project may improve. For now, I am not sanguine.

Notes

- ¹ William H. Pryor, Jr., *Returning to Marvin Frankel's First Principles in Federal Sentencing*, 29 Fed. Sent'G Rep. 95–103 (2017).
- ² The Constitution Project, *Sentencing Initiative: Recommendations for Federal Criminal Sentencing in a Post-Booker World* (2006), <http://www.constitutionproject.org/wp-content/uploads/2012/11/310.pdf>. Also published in 18 Fed. Sent'G Rep. 310 (2006).
- ³ Frank O. Bowman, III, *'Tis a Gift to Be Simple: A Model Reform of the Federal Sentencing Guidelines*, 18 Fed. Sent'G REP. 301 (2006) (describing the model sentencing guidelines authored by Nora Demleitner, Michael O'Hear, Steven Chanenson, Mary Price, Beverly Dyer, and myself that appears in multiple parts in the same issue of *FSR*).
- ⁴ Testimony of Frank O. Bowman, III, Hearing Before the U.S. Sentencing Commission (Feb. 16, 2012), http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120216/Testimony_16_Bowman.pdf.
- ⁵ See, e.g., Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 Fed. Sent'G Rep. 356 (2012). See also, Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal Forum 149 (an early, and overly complicated, effort to outline simplified post-Booker guidelines).
- ⁶ See Bowman, *Nothing Is Not Enough*, *supra* note 5, at 356–61 (detailing the deficiencies of the post-Booker advisory guidelines system).
- ⁷ Pryor, *supra* note 1, at 97.
- ⁸ See Frank O. Bowman, III, *Fear of Law: Thoughts on "Fear of Judging" and the State of the Federal Sentencing Guidelines*, 44 St. Louis U. L.J. 299, 319–25 (2000) (discussing the lawlessness of purely discretionary sentencing systems); Frank O. Bowman, III, *Debauch: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. Chicago L. Rev. 367, 436–441 (2010) (discussing how the Booker line of cases weakens the rule of law in sentencing proceedings).
- ⁹ Constitution Project, *supra* note 2.
- ¹⁰ William K. Sessions, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & Pol. 305 (2010).
- ¹¹ Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1340 (2005).
- ¹² Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 Houston L. Rev. 1227, 1235–50 (2014).
- ¹³ *Id.*
- ¹⁴ The Constitution Project and the Model Sentencing Guidelines Working Group suggested that a simplified table contain no more than roughly ten offense levels.
- ¹⁵ See, e.g., U.S. Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics tbl. 29 (2016) (reporting that 48% of all defendants sentenced within range in FY 2015 were sentenced at the guideline minimum, and an additional 23.2% were sentenced in the lower half of the range). Moreover, even in cases where judges sentence below the applicable range, the sentence tends to be fairly close to the bottom of that range.
- ¹⁶ A good example is the rise of the conservative sentencing reform group, Right on Crime. See <http://rightoncrime.com/>.
- ¹⁷ For a general discussion of the failed effort to secure sentencing reform legislation in the 114th Congress, see Frank O. Bowman, III, *Good Enough to Be Getting On With? The State of Federal Sentencing Legislation, December 2015*, 28 Fed. Sent'G Rep. 105 (2015).
- ¹⁸ Michelle Ye Hee Lee, *Fact Checker: Sen Tom Cotton's claim that sentencing reform bill would release "thousands of violent felons"*, Wash. Post, Feb. 8, 2016, https://www.washingtonpost.com/news/fact-checker/wp/2016/02/08/sen-tom-cottons-claim-that-sentencing-reform-bill-would-release-thousands-of-violent-felons/?utm_term=.311ee765cf1f.
- ¹⁹ Indeed, I suspect that the majority of congressional Republicans would reflexively oppose any bill that could be characterized as giving sentencing relief, however modest, to large numbers of federal defendants.
- ²⁰ Pryor, *supra* note 1, at 98.
- ²¹ Roger W. Haines, Jr., Frank O. Bowman, III, and Jennifer C. Woll, *Federal Sentencing Guidelines Handbook* (2016).
- ²² Pryor, *supra* note 1, at 98.
- ²³ Moreover, I think it reasonable to infer that, even if Republicans could be sold on the idea that the restoration of presumptive guidelines should be coupled with the abandonment of mandatory minimum sentences for all but the most serious offenders, they would nonetheless insist on retaining the linkage between the length of guideline sentences and the sentence lengths now required by the mandatory minimum statutes. In short, I can (just barely) imagine them agreeing to a trade that abandoned mandatory minimums in return for instituting presumptive guidelines. I cannot imagine them also agreeing to reduce the minimum sentences of presumptive guideline ranges below the minimums now required by statute.
- ²⁴ Bowman, *Failure*, *supra* note 11, at 1319–20, *passim*.
- ²⁵ Pryor, *supra* note 1, at 98. The most notable restriction on guidelines architecture in the SRA is the so-called 25% rule, requiring that the top of any guideline range be no greater than 25% higher than the bottom of the range. *Id.*
- ²⁶ Pryor, *supra* note 1, at 98.
- ²⁷ *Id.* at 100.
- ²⁸ See, e.g., Frank O. Bowman, III, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 Ohio J. Crim. L. 373 (2004) (detailing congressional interventions in economic crime sentencing).