

The Sounds of Silence: American Criminal Justice Policy in Election Year 2008

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One of the striking features of the 2008 election cycle has been the absence of crime as a national political issue. Nobody has declared metaphorical war on any type of crime, run an ad about the depredations of a parolee, or even promised 100,000 cops. It may simply be that for a country embroiled in two nonmetaphorical foreign wars and deeply nervous about the state of the economy, crime is a second-order concern. It could be that the big drop in crime of all types throughout the 1990s has made the issue seem less pressing. Whatever the explanation, things are awfully quiet out there.

This Issue of the *Federal Sentencing Reporter* was conceived as a vehicle for stirring things up a bit. We asked an array of very smart folks from widely differing political and institutional perspectives to tell us what criminal justice issues America should be thinking about and what should be done about those issues. The twenty-three responses in these pages are not only fascinating individually, but collectively they may suggest one hopeful explanation of the near invisibility of crime as a hot-button issue in this political season. Despite some very real differences of opinion, there are a substantial number of points on which our authors and other serious and informed observers of American criminal justice from across the political spectrum now concur. Electoral politics encourages the magnification of even tiny differences of opinion into titanic battles over principle if one side or the other thinks it advantageous, but political warfare may be less likely where the wise heads of both sides largely agree.

In this introductory essay, I try to identify the big themes, and some general points of agreement and disagreement, so ably discussed by our contributors.

I. The Big Picture—What Works, How Much Is Enough

Running throughout many of the contributions to the Issue is an express or tacit recognition that over the last two decades something went very right. Crime dropped dramatically in the 1990s and has stayed roughly at those lower levels since. But along with gratitude for less crime, many of our contributors share the conviction that America has overused the tools of the criminal justice system by applying its heavy hand to kinds of conduct not truly criminal or by overpunishing even the indisputably blameworthy.

Brian Walsh of the Heritage Foundation argues that the national government has overreached in two ways—by steadily expanding federal criminal jurisdiction to cover crimes that are traditionally the responsibility of state and local authorities, and by criminalizing conduct, particularly business conduct, without requiring proof of criminal intent.¹ Congressman Bobby Scott, chair of the House Subcommittee on Crime, Terrorism, and Homeland Security, levels the more general critique that federal and state governments alike have indulged in an orgy of overincarceration, devoting far too many resources to punishment and far too few to crime prevention and to rehabilitation of those convicted. He is particularly harsh in his criticism of the disproportionate impact of current crime policies on minorities and the young.² Professor Erik Luna of the University of Utah and the Cato

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Institute takes libertarian aim at the drug war he sees as a costly and counterproductive failure, urging that criminal drug laws be abandoned or, failing that, moderated by scaling back aggressive enforcement, shifting resources to prevention and treatment programs, shortening drug sentences in general and eliminating mandatory minimum sentences in particular, and reviving parole systems to provide early release to nonviolent drug offenders.³

One can, of course, caricature these three articles as repetitions of old theme songs. Pro-business conservatives, quiet when poor nobodies are being hustled off to jail by the thousand, hate it when slick rich guys have to do real time. Social liberals are always whining about the woes of minority group criminals and ignoring the misery of their victims. Libertarians just want to indulge, risk-free, in the vices common to the professional classes from which they usually come. Such caricatures not only trivialize sincere, important, and powerful arguments but also miss the larger point that influential thinkers across the political and ideological spectrum are worried about both the growing reach of substantive criminal law and the sometimes undue severity of the punishments it imposes.⁴ Even if the subject matter focus of these concerns is sometimes different—with Republicans perhaps more concerned about overcriminalization and overpunishment of economic crime and Democrats and libertarians in both parties perhaps more concerned about overcriminalization and overpunishment of nonviolent street-level drug offenses—there is much common ground and some room for horse-trading here. Given the volatility of criminal justice politics and the ease with which difficult issues can be reduced to inflammatory sound bites (“Republicans are in bed with corporate crooks!” “Democrats are soft on the fiends selling drugs to your kids!”), each side needs political cover from the other to change laws. From such offsetting political requirements can grow beneficial compromises.

II. Reentry

Reentry has recently become such a buzzword in criminal justice circles that one would be forgiven for thinking that America’s prisons had fallen under the jurisdiction of NASA. (“As Prisoner 4673 hurtled back toward his old neighborhood, his heat shield began to slip.”) Joking aside, the term’s newfound popularity signals a growing reconsideration of what happens at the back end of criminal sentences. Throughout the first three-quarters of the twentieth century, most American sentencing systems divided authority over the length and conditions of criminal confinement between judges, prison authorities, and parole authorities. The idea was that convicted criminals, or at least some of them, could be rehabilitated; that judges should take the first cut at prescribing the sentence most likely to achieve that end; and that prison and parole authorities should manage the rehabilitation process and have some control over both the length of sentence and the conditions of release. Deep skepticism that anyone really knew how to rehabilitate offenders led to widespread adoption of determinate sentencing, abandonment of parole as a mechanism for adjusting sentence length after its initial imposition, and a general de-emphasis on preparing inmates for reentering the world at the expiration of their time inside.

The new enthusiasm for reentry has several threads. The first stems from the inescapable reality that all convicted felons, unless they die in custody, eventually return to live among us. There has been a gradual bipartisan acceptance of the view that prisoners who are simply dumped on the street at the conclusion of their terms with no training, no period of transition, and no support structures are more likely to reoffend. These concerns have produced initiatives like the recently passed “Second Chance Act of 2007,”⁵ which provides some federal funding for prerelease drug rehabilitation and vocational training programs and for postrelease supervision; directs the federal Bureau of Prisons to consider giving federal prisoners longer stays in halfway houses; and authorizes funds for a limited test program involving early release of elderly prisoners.⁶ In this Issue, Jonathan Wroblewski, the director of the Office of Policy and Legislation in DOJ’s Criminal Division, describes a special pilot program authorized by the Second Chance Act, the “Federal Remote Satellite Tracking and Reentry Training Program” (ReSTART), that uses electronic monitoring to reduce recidivism among released offenders.⁷ Senator Claire McCaskill (D-MO), an elected state prosecutor before her election to the U.S. Senate, persuasively advocates increased use of “reentry courts,” judicial or administrative bodies that oversee the reentry process, including monitoring, supervision, case management, service provision, and community involvement.⁸ And Isabel Gomez, formerly a Minnesota state judge and now the executive director of the Minnesota Sentencing Guidelines Commission, makes a fascinating proposal for a program that would train and employ prisoners nearing the end of their terms to work on major infrastructure improvement and repair projects.⁹

The second thread of new thinking about reentry arises from the intertwined truths that judges, be they ever so wise, are not perfect decision makers and that defendants, however they appear on sentencing day, can change (for better or worse) while in prison. As Professor Kate Stith of Yale Law School cogently argues, given these realities, it makes a great deal of sense that there should be an opportunity for a second look at sentences.¹⁰ Several of our contributors advocate reviving something like parole.¹¹ I would add that a second look seems particularly appropriate in the case of the very long sentences now so common in both federal and state courts. It will be a rare human being who presents the same balance of societal risks and personal potential at age thirty-five or forty or fifty as he did on sentencing day when he was twenty or twenty-five. Finally, Molly Gill of Families Against Mandatory Minimums argues that the next president should revitalize the pardon power, both as a means of commuting sentences of particularly deserving individuals and as a means of calling attention to overpunishment of certain classes of cases.¹²

III. Evidence-Based Sentencing

Another sign of the turn of the sentencing policy wheel is the rising popularity of so-called evidence-based sentencing. The phrase *evidence-based sentencing* is a small masterpiece of political rebranding. The basic premise is that, contrary to the despairing conclusions of those who abandoned the old rehabilitative model in favor of structured sentencing, some kinds of sentences are better than others at reducing recidivism, we now know a good deal more than we once did about how to match sentence to offender, and we could learn even more if our sentencing systems were set up to collect, analyze, and use data in creating sentencing rules and applying them to particular defendants. In two excellent articles, Judge Michael Wolff of the Missouri Supreme Court and Roger K. Warren of the National Center for State Courts make the case for this appealing approach to sentencing reform.¹³ Amy Baron-Evans's fine discussion of sex offender sentencing includes support for relying on well-designed risk-assessment models in setting sentences for this controversial class of offender.¹⁴

IV. Federal Crime Policy

A. The U.S. Department of Justice

The most important institution in the federal criminal justice system is the United States Department of Justice. Wielding the sprawling federal criminal code, the Department can prosecute virtually any kind of crime committed in the United States, in its territories, or, in many instances, abroad. Its reach extends from the dingiest back alleys to Wall Street and the halls of government. It is the one American institution with the power to challenge virtually any person, state or local government, or economic combination.¹⁵ I say this meaning no disparagement of either Congress or the federal judiciary. But the courts adjudicate only the cases the Department brings. They can check prosecutorial power, but they cannot wield it. And Congress, despite its nearly plenary power to make criminal laws, cannot require the Department to enforce them, nor, despite its budgetary and oversight powers, can it do very much to control the Department's priorities or its conduct.¹⁶

In addition to its raw prosecutorial muscle, the Department exerts an immense amount of what would in foreign affairs be called soft power. It is a source of funds, through grants and sharing of forfeiture proceeds, to local and state law enforcement agencies. Its data gathering and analysis arm, the Bureau of Justice Statistics, has, at least until recently, been the primary source for reliable apolitical empirical data on federal and state criminal justice operations.¹⁷ At the federal level, the Department's expertise, command of the facts, and position as the legal voice of the executive branch give it immense influence in Congress. As Laurie Robinson, formerly assistant attorney general for the Office of Justice Programs, explains in her terrific article, the Department can exert a powerful organizing and leadership role with state and local authorities (and in her view should reassert itself in that role).¹⁸ Above all, a long and proud tradition of competent, impartial, principled professionalism had, at least until recently, conferred upon the Department and the lawyers who spoke for it an unmatched moral authority.

The Justice Department has been gravely damaged over the past few years. This is not the place for a full recounting of its injuries. The list is both long and familiar. The core problem is the progressive politicization of an institution whose ethos, sense of mission, external image, and practical effectiveness depend on the idea that the pursuit of justice is a calling that transcends party politics.

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Although the Department remains full of professionals who live by that creed, its recent leadership has too often behaved as though the Department of Justice and the law itself are merely instruments of partisan conflict or extensions of presidential power. The result is frayed relations with Congress and the judiciary and a level of mistrust of the Department's motives and candor that I have never seen in the nearly thirty years since I took my first legal job in the Criminal Division.

The first and paramount criminal justice priority for the next administration, Republican or Democrat, should be to restore faith in the integrity, impartiality, and professionalism of the Justice Department. A Justice Department that possesses and exhibits these qualities can be a powerful partner in any number of initiatives to improve the criminal law. A Department without them can only be an impediment.

In this Issue, Sam Buell, now a professor at Washington University and formerly a respected member of the DOJ Enron Task Force, argues with extraordinary cogency that the Justice Department needs to do some hard thinking about its mission and methods. He notes that the power and deference the Department has long enjoyed were conferred by legislators and judges who relied on federal prosecutors to exercise their authority with restraint, but warns that both may be at risk because "the executive branch, in recent years, [has pursued] legal positions that depart from preexisting norms."¹⁹ He urges the Department to refocus its efforts on "the acute problems for which its awesome powers are uniquely suited and away from wasteful oversanctioning of relatively unthreatening actors and behaviors."²⁰

Three other distinguished commentators make more specific recommendations relating to the Justice Department. David Debold and Kyle Barry argue for adoption of guidelines governing the Department's negotiation of nonprosecution and deferred prosecution agreements for corporations.²¹ John Wesley Hall, president of the National Association of Criminal Defense Lawyers, makes a passionate plea for grand jury reform, largely in order to check what he sees as prosecutorial abuse of that institution.²²

B. Federal Sentencing

As any reader of this publication will know, federal sentencing law is now something of a mare's nest. In *United States v. Booker*, the Supreme Court declared the Federal Sentencing Guidelines unconstitutional and immediately resurrected them in an advisory form.²³ Objectively, the post-*Booker* world ought to be deeply unsatisfactory to practically everybody.

The defendant "won" in *Booker*. However, the root complaint of the defense community and many academics about the pre-*Booker* Guidelines was that they bound judges into an overly rigid structure that generated unduly harsh sentences. The conventional wisdom was that this injustice would surely be remedied, or at least ameliorated, if district judges were given greater sentencing discretion. But it hasn't happened, at least not in any statistically measurable way. Between January 2005, when *Booker* declared the Guidelines advisory, and September 2007, the average federal criminal sentence actually *increased*.²⁴ The reasons for this rather surprising development are not entirely clear,²⁵ but what is plain is that the sentencing levels generated by the current federal sentencing structure are quite resistant to marginal fiddling with degrees of judicial discretion. Defense lawyers may now have more room for exercising their advocacy skills at sentencing, but it is by no means clear that their clients get much real benefit from their virtuosity.

The Justice Department, the loser in *Booker*, is plainly not altogether pleased with the current state of affairs. The pre-*Booker* Guidelines gave prosecutors substantial leverage in plea and cooperation negotiations, unprecedented ability to influence sentencing outcomes through control of Guidelines facts, and an across-the-board increase in sentence lengths. *Booker* threatens these institutional gains. Even if most judges now seem to be following the Guidelines most of the time, there are regions of the country where that is emphatically not the case and, from the government's perspective, there is every reason to fear that allegiance to the Guidelines will gradually fade. In this Issue, John Richter, U.S. attorney for the Western District of Oklahoma and chair of the Attorney General's Advisory Subcommittee on Sentencing, expresses concern about the resurgence of interjudge sentencing disparity and seems to be urging adoption of some (unspecified) revision of the advisory system to address this concern.²⁶ Bill Otis, a former assistant U.S. attorney, makes an even more heartfelt case against *Booker* and the increase of unfettered judicial sentencing discretion.²⁷

Judges, it is true, now have more of the discretion they said they needed. Yet, as we have seen, they don't seem to use it very much. And in many cases, they are still hemmed in by mandatory minimum sentences. Moreover, they are still bound to go through the whole complex fact-finding,

Guidelines-application rigmarole they have always professed to dislike before they get to exercise their discretion.

Pre-*Booker*, academic observers noted that the Guidelines had become a one-way upward ratchet because Congress consistently urged or commanded the Commission to raise penalties in response to the national *crime du jour* or the electoral needs of particular members.²⁸ But in the pre-*Booker* world, responsible legislators, at least, were checked by the knowledge that Guidelines adjustments necessarily produced real sentence increases across the board to virtually all covered defendants. In the post-*Booker* universe, not even that modest check remains. Micromanaging congressmen proposing yet another two-offense-level increase for spitting on a federal sidewalk can salve any incipient pangs of legislative conscience with the thought that judges will redress any case-specific injustices by exercising their expanded sentencing discretion. It seems probable that Congress will, on a congenially bipartisan basis, continue to bloat Guidelines sentencing levels whenever electorally convenient.

Yet despite what seem to be ample grounds for general discontent among defense lawyers, prosecutors, judges, and the professors who watch them, there appears to be only modest momentum for thoroughgoing reform. The reasons for this ennui are various but boil down to this: Those who did not like the pre-*Booker* Guidelines (generally defense lawyers, academics, and many judges) think the current advisory system is marginally better than what they had and they are afraid that a fundamentally new system would be worse than what they've got. Those who liked the pre-*Booker* Guidelines (primarily the Justice Department) think the current advisory system is worse than what they had, but not as bad as it might have been, and they are afraid that a fundamentally new system would be worse than what they've got. In short, nearly everybody who knows the most about federal sentencing simultaneously dislikes the status quo and is afraid to change it.

What are the preconditions for breaking this stalemate? First, we need new leadership at the Justice Department. It does not much matter whether the new crew is Democrat or Republican so long as they recognize two points: (1) that while punishing criminals, and sternly punishing serious criminals, is an important goal of criminal justice, *more* punishment is not *always* the answer to every criminal justice question, and (2) that the executive is only one of three coordinate branches of the federal government and it is unhealthy for prosecutors to exert too much power over the criminal process.

Second, the institutional players need to be convinced that reform is politically possible and reasonably likely to yield a revised federal sentencing system that improves on the post-*Booker* regime and does not markedly disadvantage any of the institutional actors. Professor Michael O'Hear makes a powerful case that the outlines of a system meeting these requirements have already been laid down in the work of the Constitution Project Sentencing Initiative and the follow-up to that work by the Model Sentencing Guidelines Working Group.²⁹ Paul Hofer, former Special Projects Director of the U.S. Sentencing Commission, offers a less ambitious but nonetheless compelling proposal—suggesting that the Congress pass legislation giving the Sentencing Commission permission to restructure and simplify the current advisory Guidelines to bring them in line with what Hofer conceives to have been the original objectives of the Sentencing Reform Act.³⁰

C. Federal Legislation

Finally, we are honored to welcome Senator Patrick Leahy (D-VT), chairman of the House Judiciary Committee, and Congressman Lamar Smith (R-TX), ranking member of the House Judiciary Committee, to our pages. Senator Leahy discusses the Innocence Protection Act of 2004 and other more recent initiatives he has sponsored to employ DNA and other advanced forensic evidence to catch the guilty and exonerate the innocent in both state and federal courts.³¹ Congressman Smith urges new legislation to combat cybercrime, particularly focusing on issues of record retention.³²

V. Conclusion

We hope the many thoughtful contributions to this special election issue stimulate debate, if not on the campaign trail, then among those who will be responsible for making new policies in 2009. Sometimes silence betokens not indifference, but creative ferment biding its time.

Notes

¹ Brian Walsh W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 FED. SENT. REP. 295 (2008).

² Robert C. "Bobby" Scott, *Tougher Criminal Penalties vs. More Crime Prevention Funding*, 20 FED. SENT. REP. 299 (2008).

³ Erik Luna, *Drug Détente*, 20 FED. SENT. REP. 304 (2008).

. . . nearly everybody who knows the most about federal sentencing simultaneously dislikes the status quo and is afraid to change it.

- ⁴ Concern over both overbroad criminal law and excessively punitive sentencing policy surfaces repeatedly in the contributions to this Issue. See, e.g., Samuel W. Buell, *Time for a Twenty-First-Century Justice Department*, 20 FED. SENT. REP. 326 (2008) (discussing overbreadth of federal criminal jurisdiction and noting widespread concern about large prison populations); Roger K. Warren, *The Most Promising Way Forward: Incorporating Evidence-Based Practice into State Sentencing and Corrections Policies*, 20 FED. SENT. REP. 322 (2008) (citing survey of state supreme court justices and reporting widespread concern over excessive use of incarcerative punishments); James E. Felman, *The State of the Sentencing Union: A Call for Fundamental Reexamination*, 20 FED. SENT. REP. 337 (2008); Dan Small, *The Swinging Pendulum: A Tale of Two Cases*, 20 FED. SENT. REP. 352 (2008) (contending that federal white-collar sentencing has swung from underpunishment to overpunishment).
- ⁵ The Second Chance Act of 2007, H.R. 1593, Pub. L. No. 110-199 (2007).
- ⁶ *Id.*
- ⁷ Jonathan J. Wroblewski, *ReSTART, GPS, Offender Reentry, and a New Paradigm for Determinate Sentencing*, 20 FED. SENT. REP. 314 (2008).
- ⁸ Claire McCaskill, *Next Step in Breaking the Cycle of Reoffending: A Call for Reentry Courts*, 20 FED. SENT. REP. 308 (2008).
- ⁹ Isabel Gomez, *Pursuing Public Safety—A Loose Fish in the Sea of Criminal Justice*, 20 FED. SENT. REP. 310 (2008).
- ¹⁰ See, e.g., Kate Stith, *Two Fronts for Sentencing Reform*, 20 FED. SENT. REP. 343 (2008).
- ¹¹ For example, Senator McCaskill's support of reentry courts includes employing such bodies in systems that have parole boards or other parole-like institutions. McCaskill, *supra* note 8.
- ¹² Molly M. Gill, *Clemency Today, Reform Tomorrow*, 20 FED. SENT. REP. 318 (2008).
- ¹³ Michael A. Wolff, *Lock 'Em Up and Throw Away the Key? Cutting Recidivism by Analyzing Sentencing Outcomes*, 20 FED. SENT. REP. 320 (2008); Warren, *supra* note 4.
- ¹⁴ Amy Baron-Evans, *Still Time to Rethink the Misguided Approach of the Sex Offender Registration and Notification Act*, 20 FED. SENT. REP. 357 (2008).
- ¹⁵ See Frank O. Bowman, III, *Somebody Has to Cry Foul*, AMERICAN LAWYER (August 2008), available at <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1202423715425> (arguing that substantial federal prosecutorial power is necessary to counteract corporate power in an age of deregulation).
- ¹⁶ Congress has the theoretical power to do all sorts of things to bring the Department to heel, from holding hearings to withholding funding to enacting detailed directives. As a practical political matter, virtually none of these tools are likely to be wielded, or if wielded, to accomplish more than marginal effects.
- ¹⁷ There is reason to be concerned that the current administration has both underfunded and politicized the data collection and analysis function of BJS.
- ¹⁸ Laurie Robinson, *Federal Leadership in Addressing Crime: MIA for Eight Years*, 20 FED. SENT. REP. 329 (2008).
- ¹⁹ Buell, *supra* note 4, at 327-28.
- ²⁰ *Id.*
- ²¹ David Debold and Kyle C. Barry, *Consistency in Non-prosecution and Deferred Prosecution Agreements: A Lesson from the World of Federal Sentencing*, 20 FED. SENT. REP. 331 (2008).
- ²² John Wesley Hall, *A Fairer and More Democratic Grand Jury System*, 20 FED. SENT. REP. 334 (2008).
- ²³ *United States v. Booker*, 543 U.S. 220 (2005).
- ²⁴ The mean sentence for all federal defendants (counting probation as zero months) increased from 46.3 months in the pre-*Booker* portion of FY 2005 to 51.8 months in FY 2007. The mean sentence for all federal defendants who received a sentence of imprisonment increased from 53.9 months in 2005 to 60.4 months in 2007. Compare U.S. SENTENCING COMMISSION, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbls. 13, 14 (2006), with U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbls. 13, 14 (2008).
- ²⁵ See Frank O. Bowman, III, *The Year of Jubilee ... or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System after Booker*, 43 HOUSTON L. REV. 279 (2006) (offering some tentative explanations of the post-*Booker* increase in average sentence length).
- ²⁶ John Richter, *Déjà Vu All Over Again: How Post-Booker Sentencing Threatens Equal Justice under the Law*, 20 FED. SENT. REP. 340 (2008).
- ²⁷ William Otis, *Priority for a New Administration: Restore the Rule of Law in Federal Sentencing*, 20 FED. SENT. REP. 345 (2008).
- ²⁸ See, e.g., Frank O. Bowman, III, *The Failure of the Federal Sentencing System: A Structural Analysis*, 105 COLUMB. L. REV. 1315 (2005).
- ²⁹ Michael M. O'Hear, *Guidelines Simplification: Still and Urgent Priority Post-Booker*, 20 FED. SENT. REP. 347 (2008). The report of the Constitution Project Sentencing Initiative and the work of the Model Sentencing Guidelines Working Group appear in Volume 18, No. 5 of the FEDERAL SENTENCING REPORTER, and are summarized in Frank O. Bowman, III, *'Tis a Gift to Be Simple: A Model Reform of the Federal Sentencing Guidelines*, 18 FED. SENT. REP. 301 (2008).
- ³⁰ Paul J. Hofer, *The Reset Solution*, 20 FED. SENT. REP. 349 (2008).
- ³¹ Patrick Leahy, *Using DNA and Forensic Science to Catch the Guilty and Protect the Innocent*, 20 FED. SENT. REP. 354 (2008).
- ³² Lamar Smith, *The New Challenge of Cybercrime*, 20 FED. SENT. REP. 356 (2008).