

|| *Preface* ||

What claim does sentencing have in the modern law school curriculum, which already seems filled to capacity? We believe that the law of sentencing has plenty to offer all law students, even those not inclined toward a career in criminal law. This field provides an insightful case study in the dynamics of law reform; requires synthesis of theoretical and practical issues of doctrine, procedure, and policy; and touches deep and abiding issues about the nature and structure of law in society. Sentencing, in our view, illustrates superbly what advanced courses should offer.

Of course, for students interested in a career in criminal law, the law of sentencing creates the central legal framework defining their day-to-day practice. Sentencing outcomes are the true bottom line of criminal law practice, and thoughtful defense attorneys and candid prosecutors regularly state that sentencing rules should be a lawyer's very first consideration in a criminal case. Moreover, because sentencing issues are frequently the focal point of criminal justice policy debates, many lawyers working for the government or for public interest groups engage with sentencing controversies and concerns. Since criminal cases occupy such a large part of the courts' dockets, all judges (and their law clerks) spend a considerable portion of their working days on issues of sentencing law and policy.

A Law Reform Experiment

Criminal sentences involve some of the most severe actions that governments take against their own citizens and residents. Because every criminal conviction results in some kind of sentence, sentencing occurs all the time and involves a huge number of people. Sentences are essential (though often hidden) elements of every substantive crime and every criminal process. Teachers in the first-year criminal law course point again and again to issues that will be resolved at sentencing; they explain that finer gradations or more subtle principles are possible at sentencing than in the rough-cut efforts to define crimes. Teachers of criminal procedure often note that defendants and their lawyers, as well as pro-

secutors, care most about the sentence because it represents the bottom line of all their procedural transactions.

Given the elemental role of sentencing in criminal law and procedure and the large social costs and benefits of criminal sentences, one might expect the law in this area to be highly evolved. In fact, for much of our history there has been very little law of sentencing. While some sentencing principles and punishments are ancient, the body of law that regulates sentences has remained undeveloped and unexamined until recently.

Rules prescribing the punishment for wrongdoers are found in the Bible and in the Koran. The earliest recorded legal codes, such as the Babylonian Code of Hammurabi (c. 1780 B.C.E.), spell out sanctions for various harms. Yet by the late twentieth century, 4,000 years of world civilization had resulted in sentencing systems in the United States (and in many other countries) that reflected only the most rudimentary qualities of law—for most offenses, only broad legislative specification of sentencing ranges, an absence of rules to guide judges in sentencing within those ranges, and actual determinations of sentences made not by judges but by executive release authorities.

Social and legal evolution can occur in the blink of an eye, and that has been the case for the law of sentencing. Since the 1970s, sentencing has undergone a political and legal revolution; it has become an area replete with law. Various kinds of “structured” or “guideline” systems now govern felony sentencing in many states and in the federal system; another intricate body of law now applies to capital sentencing, driven by an ongoing constitutional and policy dialogue between courts and legislatures. The emergence of sentencing law is one of the most dramatic and interesting law reform experiments in American legal history.

Sentencing, Law School, and the Nature of Law

Though young in its details, the law of sentencing wrestles with profound and ancient themes of justice and the nature of law. These themes echo throughout the law: what makes rules and procedures wise, which institutions should design and implement these rules, how much discretion should (or must) be allowed in each case, and what impact the law will have on human lives. This combination of new laws and long-standing problems, of the familiar and the unfamiliar, gives students an opportunity to synthesize many aspects of the lawyer’s art.

Some law students end their first year of studies (or their second) and yearn for more opportunities to confront questions of justice, fairness, politics, and efficiency. Even the most cursory reading of daily newspapers will confirm that sentencing is an area in which all these concepts remain openly in play. Indeed, media coverage of current sentencing debates enriches students’ appreciation of the importance of this field and enables teachers to place current controversies within the enduring theoretical and doctrinal issues of sentencing law and policy.

Advanced courses should move beyond the mastery of doctrines and the already honed skill of reading appellate decisions. Sentencing integrates substantive criminal law with criminal procedure, and it often does so through institutions other than appellate courts. Sentencing law adds a strong dose of a subject not taught in most law schools—criminal justice policy (or criminology). The emergence of a language and grammar for sentencing has made it

possible to explore the substantive, procedural, and policy aspects of criminal justice together in one place in the law school curriculum.

The Approach of This Book

The promulgation of the federal sentencing guidelines has interested many scholars, and courses and seminars on federal sentencing have been developed at a number of schools. But the highly complex and visible federal sentencing system turns out to be only one slice of a much larger pie. The rapid emergence of sentencing as an area of law has created legal flux and remarkable variety. Drawing from a rich background, the book presents the common themes and trends in this field of law, looking to its practical, political, social, and historical roots. We do not focus on a single system or jurisdiction, but rather try to capture the central issues and elements for all systems in all places.

This book has no separate sections for guideline versus indeterminate sentencing, state versus federal systems, or domestic versus foreign systems. Nor are constitutional issues segregated into a separate unit. This is because lawyers do not think about all of the constitutional doctrine together. Instead, they think about stages of the process, and how various sources of law—constitutional and otherwise—have some bearing on a particular stage. Throughout the book, we draw on the most relevant examples from three distinct sentencing worlds: guideline/determinate, indeterminate, and capital. The examples from structured guideline jurisdictions—the dominant modern sentencing reform—occupy the center of attention. There is simply more “law” in a determinate system than in an indeterminate one, and more explicit discussion of what remains implicit in the older, discretionary systems. Because the federal system is so well funded and closely critiqued, the book devotes thorough attention to that system, but it features several key state systems as well.

We also examine capital punishment materials from time to time. Although detailed coverage of capital sentencing merits a full course and a full book in its own right, we focus here on the revealing comparisons between capital and noncapital sentencing practices.

Organization and Selection of Materials

An introductory unit surveys the social purposes (Chapter 1) and social institutions (Chapter 2) at work in the sentencing area, and then presents a case study—the creation of sentencing guideline regimes—showing how the legal system regulates the exercise of sentencing discretion (Chapter 3). After this introduction, the volume follows an intuitive organization that tracks the basic sequence of decisions made in criminal sentencing. The book first reviews the basic “inputs” to the sentencing decision: Chapter 4 weighs the importance of the crime and its effects, and Chapter 5 considers the background of the offender. Chapter 6 reviews the distinctive procedures that shape how judges and others evaluate these sentencing inputs, both before and during the sentencing hearing. Finally, Chapter 7 explores the most expensive and visible “output” of sentencing: the prison system. The published volume closes with an exploration of alternatives to the current historical and international anomaly of high incarceration rates in the United States.

We view this printed volume as the “hub” that covers the core themes for most law school sentencing courses. This hub also supports several “spokes” that range out into related topics. Students can visit the online website for this book, www.sentencingbook.net, to explore these additional themes and to cover more ground in the field. At various points along the way in the printed text, we refer to more in-depth coverage of topics that a reader can find on the website. In addition, the “spokes” include extended topics that readers may treat as additional chapters in this book. The website chapters include cases, statutes, and guidelines dealing with nonprison punishments (Chapter 8) and the patterns of race, gender, and class that emerge in sentencing outcomes (Chapter 9). The website also discusses punishment choices that arise in institutional settings other than the criminal trial court. Chapter 10 looks at alternatives to criminal sentences, and Chapter 11 highlights the important judicial and executive review that can occur after sentences are imposed.

Our principal materials — both in the hub of the published volume and the spokes of the online topics — come from many sources, reflecting the many institutions that shape and apply sentencing law. The U.S. Supreme Court makes occasional forays into the noncapital sentencing realm, but it leaves the great majority of the legal questions for others to address. We blend decisions from the U.S. Supreme Court, state high courts, and the federal appellate courts, along with a sprinkling of cases from foreign jurisdictions and supranational tribunals.

State cases carry substantial weight in this book, since well over 95 percent of criminal defendants are sentenced in state court and many of the most interesting modern sentencing reforms have occurred in the states. The amazing variety among state systems also allows instructive class discussions about the sentencing choices available.

We do not reprint only appellate judicial opinions as principal materials. We often use statutes or guideline provisions to lay out the common choices made by those who try to change sentencing practices. Reports and data from sentencing commissions and other agencies also help set the scene. To keep track of the options and to prevent our celebration of variety from obscuring core concepts, we strive in the notes to tell readers what the most common practices are in various U.S. jurisdictions. The principal materials usually explain (and often embody) this majority position, but we also underscore it in the notes. To the extent possible in an emerging field of law such as sentencing, we estimate in the notes how often a lawyer is likely to encounter a given practice in American jurisdictions.

Central Themes in This Book

The book returns regularly to five major themes:

1. *Variety and change.* There is no single law of sentencing but rather many laws of sentencing, providing varied answers to a range of similar problems. This variation is apparent both across jurisdictions and within jurisdictions over time. Why are there different answers to similar questions?
2. *Multiple institutions.* One of the most striking aspects of sentencing is the variety of participants, both in lawmaking and in application. These

- participants include not only the top officials within each branch of government, but also various lower-level actors and institutions. Thus, we highlight distinctions between the roles of sentencing judges and appellate judges, spotlight the role of prosecutors, and consider the special role of sentencing commissions, parole boards, and probation officers. We continually ask students to compare decision makers both descriptively and normatively: when does it (and when should it) matter whether judges or legislators make a certain type of decision?
3. *Purposes and politics.* Sentencing and punishment serve many different purposes — some explicit and others implicit, some philosophical and others practical and perhaps base. We repeatedly ask students to consider the connections between specific sentencing rules and the purposes, politics, and practicalities of criminal justice.
 4. *Impact and knowledge.* Modern sentencing law sometimes invokes the optimistic belief that knowledge and research can form a sound basis for creating and improving legal systems. Experience tempers the perhaps naïve hope for empirically grounded reform. Still, the materials in this book aim to identify the effects of sentencing practices on the work of judges and attorneys and on defendants of different social groups.
 5. *Discretion and equality.* A major theme of sentencing across systems has been the need to individualize sentences to account for relevant variations among convicted offenders. At the same time, one of the major goals of modern sentencing reform has been to regulate the discretion of those who sentence and punish individuals, with the aim of reducing or eliminating unjust disparity. Of particular concern here are sentencing disparities based on race, class, or gender. We believe it is impossible to assess properly any aspect of criminal justice in the United States, including sentencing, without explicit and steady attention to issues of social inequality.

Each of these larger lessons attends to the nature of law. The dramatic construction of a new field over a relatively short time — although a field replete with links to ancient puzzles and problems — provides a special kind of clarity into these deeper themes.

The Fourth Edition

This new edition reflects widely noted and dramatic shifts in constitutional sentencing law along with a host of significant changes in law and policy at the federal and state levels. This edition also reflects our education as teachers and editors as we have taught sentencing courses and heard from teachers around the country about which cases and materials have proved most effective in the classroom and which less so.

The pressures for change in sentencing policy and practice come from many directions. The United States Supreme Court took a dramatic turn in constitutionalizing aspects of charging, crime definition, and punishment through the *Apprendi-Blakely* line of cases. These cases have had widely varying

impacts in different jurisdictions, but even if most systems find ways to accommodate these decisions, or if in the end the federal constitutional mandates of *Apprendi* and *Blakely* are watered down, these cases have become a pervasive part of sentencing discussions. This constitutional sentencing revolution demands explicit attention — at times in passing, at times as a focal point — throughout this volume and prompted the production of a second edition of this casebook.

The world-leading levels of imprisonment in the United States have drawn increasing attention in states confronting the “bill due” for so much punishment. After a number of Republican governors took over states with pressing budgetary problems, a new movement labeled “Right on Crime” began to advocate for GOP elected officials to explore alternatives to incarceration for a range of less serious offenders. Now, it seems, it is no longer politically foolish to resist the “tough on crime” mantra that had been a campaign staple for decades, and it now seems in some jurisdictions some politicians can generate more positive buzz from discussing the need to send few offenders to prison rather than more.

Most sentencing commissions have established a role as a steady voice for punishment moderation and sound policy. In particular, the commissions have reminded legislatures and executive branch agencies of the prospects for rational and cost-effective punishment. They seem to have blunted some of the more extreme policies that tend to result from public and political debate uninformed by bureaucratic expertise.

All of these pressures for change combine to produce a dramatic field of study. We have developed this second edition with the continuing sense of intellectual challenge, real-world demands, and drama that led us to produce the first one.

Our Hopes

Sentencing has blossomed into one of the most provocative and revealing areas of the law. It has become a powerful entry point into the workings of the law itself and into the nature of our social order. We wrote this book in the belief that the study of sentencing will be valuable to all lawyers and law students, not only to those with a commitment to criminal justice practice and policy.

For sentencing law to become not only an illustration of the striking change taking place in the law but a model of legal reform and justice as well, the sentencing arena is in desperate need of excellent lawyers, well-informed legislators, and knowledgeable commissioners. We hope that some of those who study sentencing will be ready and willing to join the fray and work to produce better systems and greater justice.

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