



To Whom It May Concern:

We proudly announce the publication of a special symposium issue of the *Stanford Law Review*, which has been produced in cooperation with the Stanford Criminal Justice Center. This Issue focuses on the future of federal sentencing law and synthesizes the wisdom of the nation's leading experts in the field, who acted with remarkable speed in addressing the most practical and urgent concerns about federal sentencing now confronting the Judiciary, as well as Congress and the Executive. Because these experts provided such valuable insight, the *Stanford Law Review* decided to distribute the Issue in an unprecedented manner to all members of Congress and all federal district and appellate court judges, as well as federal and state sentencing commissions. This Issue, in sum, is a rare contribution from the scholarly world—the publication of which is also a very significant public event. Allow us a brief explanation.

As you may know, the entire federal scheme for sentencing—known as the Federal Sentencing Guidelines—has been shaken and left in limbo by two recent U.S. Supreme Court decisions. In *Blakely v. Washington* (2004) and *United States v. Booker* (2005), the Court held that the constitutional right to a jury trial under the Sixth Amendment applied to many of the factors in the Guidelines. Consequently, a large part of the Guidelines system—conceived by Congress in the revolutionary Sentencing Reform Act of 1984 (SRA)—has been declared unconstitutional; for now, the federal courts are operating under an unstable compromise whereby the Guidelines still function as “advisory,” with no alternative scheme binding judges. The overwhelming consensus of lawyers and scholars is that Congress will soon enact a new sentencing law that will attempt to meet the Court's demands. The nature of the new legislation, as well as its effect on American criminal justice, remains to be seen. Will Congress enact harsh new mandatory minimums for sentencing? Will it offer federal judges greater flexibility—for which many judges have been pleading—to make individualized sentencing determinations? Will the increasingly large federal prison population grow or contract?

The *Stanford Law Review* recognizes the value of assembling the insights of the nation's leading sentencing scholars, in the belief that these scholars can articulate some of the most important lessons learned from modern sentencing reform and offer their knowledge to those responsible for enacting and implementing sentencing laws. Following Robert Weisberg and Marc Miller's introduction to the Issue, authors in Chapter I take a new look at the purposes of sentencing. Michael Tonry addresses the overt and latent functions of sentencing and argues that consistency and process should not be sacrificed for latent functions, such as political gain. Richard Frase considers various punishment theories and puts forward “limiting retributivism” as the theory to follow when reconstructing the system. Albert Alschuler documents the unwarranted disparities that have plagued the federal sentencing system.

Chapter II explores the effect of federalism on sentencing policy and practice. Rachel Barkow highlights why the “federalization” of sentencing is problematic and why Congress should pay close attention to federalism values when considering sentencing policy. Stephanos Bibas tracks the specific reasons for local variation in Guidelines sentencing. He argues that federal sentencing should be uniform at the national level and that local hostility to the Guidelines should not be an excuse for variation.

The authors in Chapter III analyze the structure of sentencing systems. Kevin Reitz surveys the enforceability of various guidelines systems nationwide and argues that the pre-*Booker* system was not as “mandatory” as often portrayed and that the post-*Booker* system is not as “advisory” as may appear. Steven Chanenson looks at the roles of appellate judges and parole boards and argues that Congress should encourage more sentencing discourse from actors who are “above and beyond” the sentencing judge—by encouraging meaningful appellate review and using devices such as extended sentence review.

In Chapter IV, authors evaluate institutional roles within the system. Ronald Allen and Ethan Hastert outline how the executive, judicial, and legislative branches influence the criminal jury's inferential process. They predict that we either have seen, in *Blakely* and *Booker*, or soon will see a retreat of the kind we commonly see when the Supreme Court crosses the line by attempting to regulate the substantive criminal law. Kate Stith and Karen Dunn propose that Congress should abolish the U.S. Sentencing Commission and replace it with, as the SRA had originally intended, a truly independent sentencing agency in the judicial branch. Frank O. Bowman III considers the roles of the rulemakers in sentencing reform. He argues that the system's substantive flaws are due in large measure to the domination of the rulemaking process by the Congress-Justice Department alliance.

Chapter V consists of critiques of specific content rules within sentencing systems. David Yellen argues that Congress should dramatically scale back its approach to real-offense sentencing by looking to state models for direction. Douglas Berman offers recommendations to enable the federal sentencing system to strike a sounder balance, as have many state sentencing systems, in the consideration of offense conduct and offender characteristics at sentencing.

The authors in Chapter VI analyze the role of counsel and critique various institutional roles within the system. Nancy King focuses on the parties' ability to circumvent consistency by bargaining around the rules that structure sentences within Guidelines ranges. She advances several proposals that would strengthen judges' supervisory role in order to promote greater accuracy, transparency, and consistency in federal sentencing. Margareth Etienne considers the roles of prosecutors and defense attorneys in sentencing and argues for the constant calibration of a leveled playing field between prosecution and defense as a necessary part of any successful sentencing structure.

Chapter VII looks at the sanctions themselves. Franklin Zimring examines the history of sentencing policy and practice in the United States and finds only modest hope with respect to likely future developments in the growth prison populations and alternative sanctions. Nora Demleitner notes that nonprison and collateral sanctions should become an integral and effective part of the federal sentencing system.

In the final Chapter, Marc Miller and Ronald Wright argue that Congress should expand the users, uses, and usability of sentencing information, perhaps through the establishment of a national sentencing institute.

In producing this Issue, our goal has been to provide an overview of the current state of American sentencing and to present a variety of perspectives on the issues that Congress will likely have to consider in order to reshape the Federal Sentencing Guidelines. We share it to assist in your own coverage of the political and legal dramas about to unfold, and we hope you will see the distribution of this special Issue as itself a major stage in this civic process.

Inquiries about this Issue may be addressed either to the Stanford Criminal Justice Center (650-724-5786) or to the *Stanford Law Review* (650-723-3210). For more information on the Issue, visit <http://lawreview.stanford.edu>.

Sincerely,

Robert Weisberg
Edwin E. Huddleson, Jr. Professor of Law,
Stanford Law School; and
Director, Stanford Criminal Justice Center

Marc L. Miller
Professor of Law, Emory Law School; and
Ralph W. Bilby Visiting Professor of Law,
University of Arizona Rogers College of Law

Joshua L. Kaul
President, Volume 58
Stanford Law Review

Kari Rosenthal Annand
Managing Editor, Volume 58
Stanford Law Review

Christopher J. Walker
Managing Editor, Volume 58
Stanford Law Review