

Testimony of Franklin E. Zimring

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The last thing any penal reformer would want to do is to take credit for the changes that have taken place in sentencing and corrections in the U.S. since 1984. The past 25 years (and the decade that preceded them) were a period of unparalleled and unprincipled growth in state and federal prison populations in the U.S. The total prison population in the U.S. has increased more than sevenfold in the past generation and the federal system has grown faster than the states. The largely discretionary federal prisons had always been a less than 10% share of total prison population, but the 2009 federal prison numbers are very close to the total number of prisoners in all systems in 1972.

It is difficult to select a low point in the 30 year ascendancy of mass imprisonment in the U.S. because the number of plausible candidates is large. In the federal system, the war on drugs during 1986 - 1995 deserves special mention, but then so does the period in the late 1990s when prison populations defied gravity by continuing to rise even when crime rates fell.

The epic failure of American law and practice to rationalize imprisonment over the past generation is an unavoidable context in which to consider the past and future of the U.S. Sentencing Commission. What has been the contribution of the Commission and its Guidelines to the problematic proliferation of federal imprisonment? How can the Commission help solve the current morass?

My own thoughts on this topic can be organized as a “good news - bad news” joke. The good news is that the Sentencing Guidelines are not the major cause of the metastasis of imprisonment in the federal system, nor were they singularly pernicious when compared with many state systems over the past 25 years. If the 1984 legislation had not passed the Congress, much of the unprincipled growth in federal imprisonment would have happened anyway.

The bad news, however, is that the structure of the 1984 legislation and substantive decisions by the Commission have contributed to federal mass incarceration in regrettable fashion. My short list of problems this morning includes:

- (1) The undermining of other-than-prison federal sentencing alternatives;
- (2) the abolition of routine late term consideration of altering release dates in long federal sentences;
and
- (3) the proliferation of boxes in federal sentencing grids that both mischaracterizes the reality of sentencing decision - making and encourages the assumption of imprisonment.

Each of these problematic shifts should be addressed in the near future by legislation or Commission action.

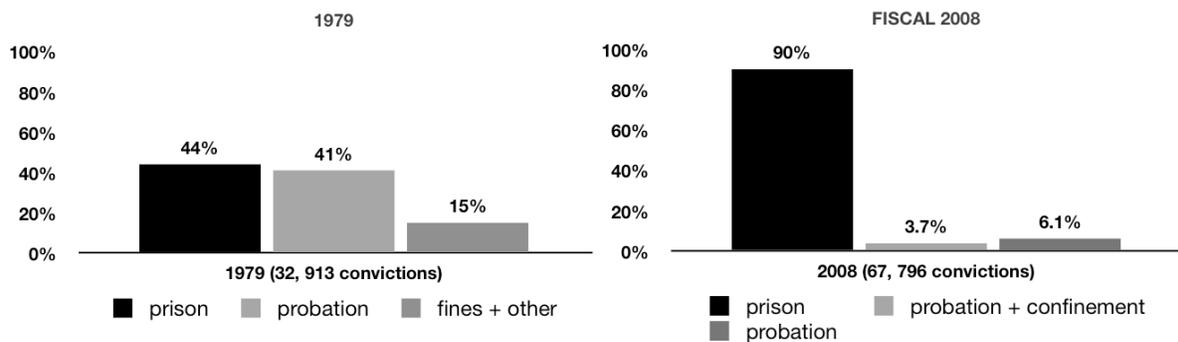
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Non-prison sentences were a common occurrence in federal criminal justice after felony convictions in the 1970s and early 1980s. They have since become an endangered species. I regard the guidelines and their grids as one important cause of this unfortunate drift, and also believe that the emphasis on predictable equality of outcome has worked against parsimony in federal felony convictions at the lower end of the seriousness scale.

Figure 1 compares the sentences delivered by federal district courts in 1979 with those in fiscal 2008.



Figure 1
Federal sentences after conviction, 1979 vs. Fiscal 2008



Sources Bureau of Justice Statistics, sourcebook of Criminal Justice Statistics 1989 at Table 5.21 pages 498-499 (1979); Federal Sentencing Commission, 2008 sourcebook of Federal Sentencing Statistics at Table 16, page 34 (Fiscal 2008)



Prison goes from less than half to more than 90% of all federal convictions. Probation without confinement goes from 4 cases in every ten in 1979 to 1 case in every 16 in 2008. Prison and probation were almost equal partners in the federal landscape of 1979. By 2008, the dominant prevalence of prison was more than 10 to 1.

In an odd sense, a guideline grid cannot be neutral in its effect on the choice between incarceration and non-incarceration outcomes. A grid structure is biased in favor of incarceration because it invites

consequences that are palpable and quantifiable. So unless a grid draws a thick line through a boundary between incarcerative and non-incarcerative categories, or expresses a strong bias against incarceration, or does both, the methodology probably encourages prison in marginal cases. And whether or not that was generally true, few would doubt that was the impact of the federal commission and its guidelines from the start through at least the mid-1990s. On this question; the federal system has much to regret.

Most developed countries regard short terms of imprisonment as suspiciously lacking in crime preventative value and high in cost. I think they are correct.

2

One of the major structural changes in the 1984 Act was the shift of setting time to release from the back end of the correctional process through parole to the front end, when judges sentence. Parole release decision-making was suspicious because it was supposed to be based on predictions of dangerousness or judgments about rehabilitation. But the new federal system did away with routine review of long sentences after an offender had served a large part of his term, and this was not rational.

Because sentencing judges often use prison time as a symbolic currency, because people change (and so do circumstances and governmental priorities) over 15 and 20 year periods, it is rational to have the power to review appropriate release dates for long sentence prisoners - and such a review need not be tied to theories of either rehabilitation or prediction of dangerousness. Some of the prison terms issued in the heights of the federal war on drugs were excessive by almost any civilized standard. To not have a release date reset for 15 and 30 year terms is an act of compound unreason.

To right this wrong, Congress will have to act, but the Commission can and should show Congress the way.

3

The third structural problem with the federal guidelines is the impossible number of separate cells created in the sentencing grid, which is both a problem itself and symptomatic of deep dysfunctions at the core of the current federal system. The multiplication of boxes on the federal guideline grid was motivated in part by a felt need to minimize sentencing disparity. Yet the emphasis on offender characteristics that is necessary to create one of the two multi-section axes in the grid is precisely what the critics of parole had most objected to in prior systems. The price list of punishment outcomes in the current system is more complex than other guideline systems and fundamentally unprincipled. A smaller number of cells and a wider range of sentencing options in each cell would improve the federal system.