

Why a Sentencing Symposium?

By Andrew E. Taslitz

Decades ago, there was little real “law” of sentencing. Within maximum and minimum statutory limits, judges had wide discretion to do what they liked. What guidance there was came from the general purposes of the criminal law—such concerns as rehabilitation, retribution, and deterrence. Sentencing options were slim, generally incarceration or probation. Procedural protections for the accused were likewise few, with the jury rarely playing any role. Victims had little independent voice, serving largely as trial witnesses for the prosecution. Sentencing disparities for similar conduct by similar offenders plagued the system, and racial bias, while spoken about by activists and academics, was rarely a serious concern of those governmental actors involved in the sentencing process. (See generally MARC MILLER & RONALD WRIGHT, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION: CASES, STATUTES, AND EXECUTIVE MATERIALS* 591-604, 630-32, 664, 672-81, 686 (2d ed. 2005)).

That was then. This is now: complex sentencing guidelines routinely raising factual and legal disputes in even run-of-the-mill cases, an expanding role for the jury in finding facts relevant to sentencing, reduced judicial discretion replaced by increased prosecutorial discretion, victim impact statements, the rise of corporate and other organizational sanctions, and a growing awareness of race-based differences in sentencing severity. Retribution looms large as a guiding principle, but the sheer costs of incarcerating massive numbers of citizens has prodded creativity about sentencing alternatives and a renewed concern in some quarters with rehabilitation. The United States Supreme Court has recognized that the Sixth Amendment right to a jury trial extends to fact-finding at sentencing in mandatory guidelines regimes, with the trend in the states being to embrace this expansion of the citizens’ role rather than to accept merely advisory guidelines or return to the guidelines-free past. Sentencing developments affect every other stage of the system, for example, altering the goals and strategies of plea negotiations, the incentives for defendants to assist the police in criminal investigations of purportedly more culpable suspects, and the early consideration of alternatives to the traditional criminal process. Sentencing law has become such a bulky tangle of conflicting statutory and doctrinal strands that law schools increasingly offer classes on the sub-

ject and CLE courses in the area abound. (See *id.* at 604-20, 626-27, 630-32, 634-53, 658-60, 662-64, 667-69, 672-89; see generally AMERICAN LAW INSTITUTE, *MODEL PENAL CODE REVISION: SENTENCING* (Discussion Draft 2006).)

This symposium issue seeks to highlight for readers many of the practice and law-reform concerns raised by the new world of sentencing. No single issue can do more than scratch the surface of this complex area of the criminal law, but we have chosen to focus on a range of high-profile subjects of interest to neophytes and seasoned practitioners alike. **Tamar Meekins**, for example, considers the effect of the rise of specialty courts on sentencing practice. Meekins addresses both the benefits and risks of a client’s pursuing processing in such courts, as well as discussing a series of basic lessons from those courts of use to defense attorneys in planning for sentencing hearings in the traditional criminal process. **Barry Boss and Nicole Angarella** guide readers through the strategic minefield created by the *Blakely* and *Booker* decisions for negotiating guilty pleas in federal cases. **Eugene Illovsky** undertakes a similar task for corporate counsel faced with deciding whether to accept corporate deferred prosecution agreements or to proceed to trial and how to negotiate effective agreements on a client’s behalf. **Ronald Wright** examines how prosecutors make, and how defense counsel can affect, the decision whether to proceed with prosecution in state or federal court, a single decision that can have major implications for the sentence ultimately to be served by a client. And I [**Andrew Taslitz**] address what lessons the innocence movement has to teach practitioners and law reformers concerning sentencing fact-finding, focusing on overcoming racial bias at sentencing as my major example.

Today, practitioners must give sentencing planning as much attention as trial preparation, perhaps, more—given that sentencing agreements are at the core of most plea negotiations, and the vast majority of criminal cases are resolved by pleas. It is the hope of the *Criminal Justice* magazine editorial board that this symposium will help our readers in better realizing this aspiration.

Andrew E. Taslitz is the symposium editor for this issue of the magazine, as well as the former chair and a current member of the editorial board. He is a professor at Howard University School of Law in Washington, D.C.