

7-1-2016

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R. Michael Cassidy

Boston College Law School, michael.cassidy@bc.edu

Robert L. Ullmann

Massachusetts Superior Court, ullmann.bob@gmail.com

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Recommended Citation

R. Michael Cassidy and Robert L. Ullmann. "Sentencing Reform: The Power of Reasons." *Massachusetts Law Review* 97, no.4 (2016): 80-83.

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SENTENCING REFORM: THE POWER OF REASONS

by R. Michael Cassidy and Hon. Robert L. Ullmann

A bipartisan consensus against mandatory minimum sentencing appears to be emerging across this country. Even some law enforcement officers and corrections officials now admit publicly that our nation's harsh sentencing practices have resulted in over-incarceration and are ineffective at reducing recidivism.¹ Many judges — including the Chief Justice of our state's Supreme Judicial Court — favor repeal of these laws because they limit and sometimes eliminate judicial discretion.² While numerous bills have been introduced in the Massachusetts Legislature to abolish some current mandatory penalties,³ for reasons discussed below these bills have mostly languished. This essay highlights one potential route out of the legislative logjam.

The rise in mandatory minimum penalties in the early 1980s⁴ reflected, in part, a lack of trust in judges. When a high-profile case ends with a result that is widely criticized, or the danger to the public by certain threatened criminal behavior intensifies, the community tends to become less hospitable to judicial discretion in sentencing. Fear of “liberal judges” letting off violent criminals looms large in the public consciousness.⁵ Yet when crime rates are low and incarceration rates (and resulting financial costs) are high, the public appears to be more receptive to increased judicial discretion in sentencing. The current national swing away from mandatory minimum sentencing toward guided judicial discretion is one end of an “arc” that tends to repeat itself over time.

Various sentencing schemes have flourished in our society throughout history — from open-ended discretion capped at a maximum sentence, to discretion bounded by sentencing guidelines, to mandatory sentencing. In Massachusetts, dozens of crimes carry mandatory minimum sentences (most notably murder,⁶ some sex offenses,⁷ most drug trafficking crimes,⁸ certain robbery and firearms

charges,⁹ and repeat offender DUI¹⁰). But for most crimes, the legislature has set only a maximum sentence by statute, and the judge has discretion to sentence the convicted offender to probation or any term of years below that maximum amount.

Massachusetts established a state Sentencing Commission in 1994 as part of the “truth in sentencing” law.¹¹ The Sentencing Commission published sentencing guidelines for most crimes back in 1998, but these now dusty guidelines are advisory only; they do not have the force of law because they were never formally adopted by the legislature.

The General Court's reluctance to approve sentencing guidelines has occurred during a time of significant changes in the constitutional law of sentencing. In 2000, the United States Supreme Court in *Apprendi v. New Jersey*¹² held that the Sixth Amendment to the Federal Constitution required any fact “[o]ther than the fact of a prior conviction” to be submitted to a jury, and proved beyond a reasonable doubt (or admitted by the defendant), when it increases the penalty for a crime beyond the prescribed statutory maximum.¹³ In 2004, the Supreme Court specifically found that the State of Washington's determinate sentencing scheme violated the Sixth Amendment because it permitted a trial judge to increase a sentence based upon a fact found by the judge by a preponderance of the evidence.¹⁴ Applying this principle one year later in *United States v. Booker*,¹⁵ the Supreme Court invalidated the mandatory nature of the United States Sentencing Guidelines and made the guidelines advisory.¹⁶

In the decade since *Booker*, the Massachusetts General Court has not enacted advisory sentencing guidelines. Accordingly, judges in Massachusetts are not required to follow the 1998 state sentencing guidelines, and they do not have to state their reasons for imposing a sentence out of conformity with the guidelines.

1. Timothy Williams, “Police Leaders Join Call to Cut Prison Rosters,” N.Y. TIMES, Oct. 20, 2015, at A1.

2. Staff, “Gants Argues Against Mandatory Minimums for Drug Offenses,” COMMONWEALTH MAGAZINE, March 18, 2015, available at <http://commonwealthmagazine.org/criminal-justice/gants-argues-against-mandatory-minimums-for-drug-offenses> (last visited March 30, 2016).

3. See, e.g., S. 64; H. 1429; H.R. No. 1620 (Mass. 2015).

4. See R. Michael Cassidy, “(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform,” 45 LOY. U. CHI. L. REV. 981, 987 (2014).

5. In a 1977 poll, 74 percent of all respondents said that the courts are “too lenient.” Lawrence Friedman, *Crime and Punishment in America* (1994) (citing Louis Harris, “The Harris Survey” and SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Department of Justice (G.P.O. 1979)).

6. See MASS. GEN. LAWS ch. 265, §1.

7. See, e.g., MASS. GEN. LAWS ch. 265, §§13B½, 13B¾, 22B, 22C, 23A, 23B.

8. See MASS. GEN. LAWS ch. 94C, §32E.

9. See, e.g., MASS. GEN. LAWS ch. 265, §§18, 19; MASS. GEN. LAWS ch. 269, §10(d).

10. See MASS. GEN. LAWS ch. 90, §24(1)(a)(1).

11. 1993 Mass. Acts chapter 432. The provisions creating the Massachusetts Sentencing Commission and setting forth its mandates were later codified in MASS. GEN. LAWS ch. 211E.

12. 530 U.S. 466 (2000).

13. *Id.* at 490. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court made clear that the “statutory maximum” for *Apprendi* purposes is the “maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Id.* at 303 (emphasis original). Because a trial judge was required under Washington law to find additional facts in order to impose a sentence above the mandated “standard” sentence, the court determined that the state sentencing procedures violated the defendant's Sixth Amendment right to have the jury find beyond a reasonable doubt the existence of “any particular fact” that the law made essential to his punishment. *Id.* at 301.

14. *Blakely*, 542 U.S. at 301-03.

15. 543 U.S. 220 (2005).

16. *Booker*, 543 U.S. at 245.

The Massachusetts Sentencing Commission's task until recently has been to collect, analyze and update data about sentencing. Governor Deval Patrick reconstituted the 15-member Sentencing Commission in 2014. Many had hoped that this new and revitalized commission would update the guidelines, address more fully intermediate sanctions and reentry practices, and help shape a consensus among judges, prosecutors and the defense bar that could lead to formal legislative adoption of Massachusetts's long dormant guidelines system. To date, however, that has not happened. The new Sentencing Commission seems to have focused its attention primarily on the mandatory minimum debate to the exclusion of other issues regarding judicial discretion.¹⁷ In order to break a legislative logjam around mandatory minimum sentencing, the commission is now considering recommending a "safety valve" to allow judges to deviate from certain mandatory sentences after making findings of special circumstances, similar to the Federal Drug Safety Valve.¹⁸

The debate over the repeal of mandatory minimum sentences (or "safety valve" relief therefrom) is important. But it appears to have stalled in the current legislative session, primarily because many influential district attorneys and law enforcement officers in Massachusetts are opposed to returning to the days when judges had unbridled sentencing discretion.¹⁹ They point to lower crime rates in Massachusetts²⁰ as evidence that our current sentencing laws are working. Not wanting to appear soft on crime, the legislature appears to have little stomach for fixing something that is not obviously broken.²¹ Without the support of the district attorneys, pending crime bills are unlikely to gain legislative momentum.

We see at least one potential way out of the legislative impasse on repealing mandatory minimum sentences. If judges were required to publicly state the reasons for their sentences in all felony cases,

this critical phase of the criminal justice system would become more transparent. Legislators, those involved in criminal cases, and the public would better understand some sentences which at first blush may appear too lenient or too harsh. In addition, appellate review of these sentences, while remaining highly deferential, would become more meaningful.

The legislature already requires judges to give reasons for certain felony sentences, but only for some crimes and only under very limited circumstances. Pursuant to Massachusetts General Laws chapter 265, section 41,²² judges sitting in the Superior Court and the District Court jury of six session are required to state their reasons for imposing a sentence whenever a conviction for a felony under chapter 265 does not result in incarceration.²³ The statute does not apply, however, to the many serious offenses penalized in other chapters of the general laws, such as arson,²⁴ armed entry into a dwelling at night,²⁵ witness intimidation,²⁶ illegal sale of large-capacity weapons²⁷ and violation of a domestic abuse restraining order,²⁸ not to mention hundreds of so-called "white collar" felonies.²⁹ Second, the statute only applies if the judge does not sentence the defendant to any incarceration. Even one day in the house of correction relieves the judge of any obligation to state the reasons for his or her decision. Finally, the statute does not apply to district court judges sitting in jury-waived sessions, who impose sentences in thousands of criminal cases each year.

We believe that Massachusetts General Laws chapter 265, section 41 should be expanded to apply to all felony cases regardless of whether jail time is imposed, and irrespective of whether they fall under the ambit of chapter 265. The requirement that judges state their reasons for imposing sentences in all felony cases should apply initially only in superior court, but ultimately, this requirement

17. Brandon Gee, "Sentencing Panel Eyes 'Safety Valve' Proposal," MASS. LAWYERS WEEKLY, Oct. 26, 2015, at 1.

18. 18 U.S.C. §3553(f); see also U.S. SENTENCING GUIDELINES MANUAL §5C1.2 (2015) (setting forth the corresponding safety valve exception in the now-advisory federal sentencing guidelines). To qualify for relief from the applicability of statutory minimum sentences in certain federal cases, five factors must be present: (1) the defendant must have no criminal record or a relatively minor one; (2) the defendant did not use violence or threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager or supervisor of others in the offense, and was not engaged in a continuing criminal enterprise; and (5) the defendant must truthfully provide to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude his/her safety valve eligibility. *Id.* The Supreme Judicial Court has also taken direct appellate review of a case raising the issue of whether a judge has the power to sentence a narcotics offender below the mandatory minimum term required by statute. See *Commonwealth v. Lalaprasad*, Supreme Judicial Court No. SJC-11970.

19. Maria Cramer, "DA Slams Top Judge over Drug Sentences," BOSTON GLOBE, March 17, 2015, at B1.

20. The rate of violent crime per capita in Massachusetts decreased 18 percent between 1988 and 2012. EOPS, *Violent Crime In Massachusetts: A 25 Year Retrospective* (2014). For a comparison of the crime rate per 100,000 for major violent and property offenses in Massachusetts cities between 2001 and 2015, see www.citydata.com/crime/crimeBostonMassachusetts.html.

[citydata.com/crime/crimeBostonMassachusetts.html](http://www.citydata.com/crime/crimeBostonMassachusetts.html).

21. Massachusetts has a lower incarceration rate per capita than many comparable states. *The Sentencing Project: Research and Advocacy for Reform*, available at www.sentencingproject.org/map/map.cfm (last visited Jan. 16, 2016).

22. The statute provides: "In sentencing a person for a violation of any provision of this chapter, the penalty for which includes imprisonment, a judge sitting in superior court or in a jury of six session who does not impose such sentence of imprisonment shall include in the record of the case specific reasons for not imposing a sentence of imprisonment. Notwithstanding any general or special law to the contrary, the record of such reasons shall be a public record." MASS. GEN. LAWS ch. 265, §41.

23. Chapter 265 of the Massachusetts General Laws sets forth various felony and misdemeanor offenses for crimes committed against the person. These offenses range from murder (§1), to rape (§22), to kidnapping (§26), to simple assault and battery (§13A).

24. See MASS. GEN. LAWS ch. 266, §1.

25. See MASS. GEN. LAWS ch. 266, §14.

26. See MASS. GEN. LAWS ch. 268, §13B.

27. See MASS. GEN. LAWS ch. 269, §10F.

28. See MASS. GEN. LAWS ch. 209A, §7.

29. See, e.g., MASS. GEN. LAWS ch. 266, §30 (larceny), §35A (mortgage fraud); §53 (embezzlement by bank officer or employee); §56 (embezzlement by broker or agent); §58 (embezzlement from voluntary association); §67 (false entry in corporate records); §67B (false claims to commonwealth); §5 (uttering forged instrument); MASS. GEN. LAWS ch. 268A, §2 (bribery of public official).

should apply to all felony cases in all courts.³⁰ Given the much higher volume of district court felony cases, and the fact that the most serious crimes are prosecuted in superior court, limiting the requirement initially to superior court seems sensible. The legislature recently has taken this approach with regard to attorney-conducted *voir dire*.³¹

Sentencing is one of the most profound powers bestowed upon a public official. The primary reasons why judges should explain how they exercise this awesome power — promoting transparency in government and preventing the arbitrary or discriminatory exercise of governmental authority — seem compelling to us. Defendants who will be spending years of their lives behind prison walls, victims who fear the day when the perpetrators will be back on the street and citizens concerned about public safety all deserve an explanation for the particular sentence that a judge will impose.

Sentencing is a very difficult and emotion-laden task. It requires balancing multiple considerations and sometimes contradictory interests. The Massachusetts Sentencing Commission's Report to the General Court in 1996³² recognized four primary purposes to be achieved in criminal sentencing: retribution ("just desserts"), deterrence, incapacitation and rehabilitation.³³ The enabling statute of the Federal Sentencing Commission recognizes the same penological objectives.³⁴ While one or more of these goals has gained scholarly prominence at different points in our nation's history, many observers believe that each has a valid role to play in fashioning an appropriate sentence. What "mix" of considerations will be appropriate in a given case may vary with the circumstances of the offense, the criminal history of the defendant, and the interests of the victims and the public.

It is anomalous that judges sitting in Massachusetts criminal cases do not already have to give reasons for the sentences that they impose. Massachusetts judges are required to give reasons on the record for many of their most significant decisions, including holding a defendant without bail based on dangerousness grounds,³⁵ expanding the time before trial under the Speedy Trial Act in the interest of justice³⁶ and revoking probation.³⁷ It is thus surprising that judges can exercise their most sweeping authority — the power to deprive a convicted defendant of his or her liberty for an extended

period of time — without any explanation for their decisions.

For those judges who routinely state on the record their reasons for imposing a sentence, our proposed amendment to chapter 265, section 41 would result in little or no change. For the many other judges who sometimes give reasons for their sentences, an expanded statute would require that they more routinely perform a task that already intuitively makes sense to them. Of course, for those judges who rarely if ever explain the reasons for their sentences, an expanded statute would be an unwelcome sea change.

Judges who refrain from publicly announcing the reasons for their sentences offer two principal explanations for that practice. First, sentencing is a complex and nuanced task. For experienced judges, sentencing involves a complex set of factors honed over many years that includes comparison to a large number of similar previous cases. Asking these judges to give reasons for their sentences is like asking an experienced artist to explain the placement of each brush stroke on a canvas. But even the most skillfully and carefully crafted sentence fails to satisfy the important public goals of transparency and ensuring non-arbitrary decision-making if no reasons are given for the sentence. Moreover, the very process of forcing oneself to articulate the most important reasons for a decision helps ensure that the decision is being made for valid reasons that can withstand public scrutiny. Highly regarded judges tell us that the process of writing down their reasons for imposing a sentence has on occasion caused them to revise their thinking and fashion a better sentence.

The other reason frequently offered by judges for not publicly announcing the reasons for their sentences is that the net effect of this process will be wasted judicial resources on meritless appeals in which the failure to mention one valid reason for sentencing, or taking out of context one phrase uttered by the judge, will invalidate the sentence. These judges envision spending countless hours carefully choosing each word, time that could better be spent on the scores of other important matters that judges handle each day. We have two responses to this objection.

First, we are not advocating that the Appellate Division change its highly deferential approach toward reviewing superior court sentences.³⁸ Second, in decades of superior court judges giving reasons for their sentences in thousands of cases, only a handful of

30. Federally, District Court judges are mandated by statute to state in open court their reasons for imposing a particular sentence. *See* 18 U.S.C. §3553(c) ("[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence..."). Federal trial judges also must reduce their statement of sentencing reasons to writing and attach it to the judgment and conviction. 18 U.S.C. §3553(c)(2).

31. *See* MASSACHUSETTS SESSION LAWS, chapter 254 of the Acts of 2014.

32. Massachusetts Sentencing Commission, *Report to the General Court*, available at www.mass.gov/courts/docs/admin/sentcomm/sentencing-comm-report-to-the-general-court-96.pdf.

33. *Id.* at 4.

34. 18 U.S.C. §3533(a).

35. MASS. GEN. LAWS ch. 276, §58A.

36. MASS. R. CRIM. P. Rule 36(b)(2)(f).

37. *See* *Commonwealth v. Fay*, 379 Mass. 498, 504 (1980).

38. Upon petition of the defendant, Superior Court sentences are subject to review by the Superior Court's Appellate Division, which consists of three judges appointed by the chief justice of the Superior Court. MASS. GEN. LAWS ch. 278, §§28A-28C. However, this statute does not require that either the sentencing judges or the Appellate Division give reasons for their decisions, and the statute contains no standard of appellate review. In fiscal year 2015, 295 defendants appealed 676 sentences to the Appellate Division, resulting in 11 sentences being reduced and four sentences being increased. TRIAL COURT STATISTICS, FY 15.

comments have led to reversals, and these comments usually reflected reasons for imposing a sentence that should not have been part of the sentencing process.³⁹ In those few instances where the line between proper and improper comment seems nebulous, judges will simply have to avoid disfavored phrases.⁴⁰

In most public opinion polls, the judiciary scores higher in public trust than the other two branches of government.⁴¹ Yet public distrust over judicial discretion in sentencing persists. We are confident that this state's conscientious judges take sentencing seriously, and that there are compelling, valid reasons for most sentences they impose. Forcing those reasons "out into the open" will increase not only transparency and public understanding of the sentencing process, but also public trust. Over time, as public understanding increases, the legislature's resistance to repealing mandatory

minimums may erode. Even if expanding chapter 265, section 41 to cover all felony cases fails to achieve this lofty goal, it will have been the right thing to do.

R. Michael Cassidy is professor of law and faculty director at the Rappaport Center for Law and Public Policy at Boston College Law School.

Hon. Robert L. Ullmann is an associate justice for the Massachusetts Superior Courts.

The authors are very grateful for the capable research and editorial assistance of Kathryn Ball, Boston College Law School Class of 2017.

39. See, e.g., *Commonwealth v. Coleman*, 390 Mass. 797, 806 (1984) (trial judge "may not consider a defendant's alleged perjury on the witness stand in determining the punishment..."); *Commonwealth v. White*, 48 Mass. App. Ct. 658, 663 (2000) (remanding case for resentencing where judge increased sentence because he believed past sentences were inadequate); *Commonwealth v. Howard*, 42 Mass. App. Ct. 322, 327 (1997) (remanding for re-sentencing where judge gave as one reason for sentence that "Athol area seems to have more than its share of child abuse cases and a large number of young shiftless men

who have little or no regard for the personal or property rights of others").

40. We do not fully understand why it is improper to impose a sentence in part to "send a message" to a particular community, see *Commonwealth v. Mills*, 436 Mass. 387, 402 (2002), when deterring criminal conduct by others is a valid goal of sentencing, see *Commonwealth v. Donahue* 452 Mass. 256, 264 (2008). However, it seems easy enough to avoid that disfavored phrase.

41. See GALLUP POLLS, "Trust in Government" survey, available at www.gallup.com/poll/5392/trustgov.aspx.