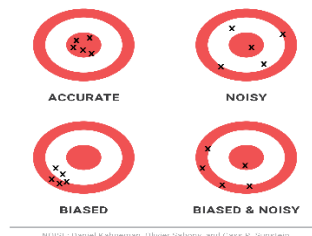


Military Sentencing Under a New Paradigm: Parameter and Criteria Offenses

by CAPT Stephen Reyes

- I. Noise. I'd like to begin our talk today with a brief discussion of noise.
- a. To best explain noise, I'd like to take you to an everyday shooting range where we encounter three targets:



1. Accurate
2. Biased
3. Noise

- b. The reason why I bring up this idea of noise is that in most cases, the primary reason for changes to sentencing such as guidelines or other changes that reduce the sentencors discretion is the reduction of noise, or the desire to reduce unwarranted or inappropriate disparity in sentences in the system. Undoubtedly, this desire is a laudable goal since a noisy system is unpredictable and undermines the perception of fairness
- c. Military sentencing has historically been noisy. If you were to chart awarded sentences by offenses you will likely get a noisy pattern. And military sentencing has undergone some major changes. But in order to better understand the changes and to assess if we have it right and are heading in the right direction, we should start by briefly discussing why the military sentencing scheme is noisy.
- II. Noise by Design: Noise as a by-product and attribute of the System:
- a. Rules Promoted Discretion and Individualized Sentencing.
1. See R.C.M 1001—defines matters in extenuation and mitigation
 1. Wide leeway in E&M, such as, the unsworn statement.
 2. See Article 56/R.C.M. 1002 “sentence to be adjudged is a matter within the discretion of the court-martial.... Adjudge any punishment that achieves the purpose of sentencing, which is:
 1. Nature of the offense; history and characteristics of the accused
 2. Impact on victim
 3. The need for the sentence to: (a) reflect the seriousness of the crime; promote respect for law; provide “just punishment”; deterrence; protect others; rehabilitate; and in some circumstances a return to duty.
 4. Sentencing Philosophies Contradict and Conflict—sentencing philosophies oftentimes conflict since they focus on distinct aims. For

instance, a rehabilitation philosophy is focused on the individual supports the use of indeterminate sentences that are modified depending on the defendant's behavior in prisons. The Criminal Justice System in CA in the 1970s is an example of this type of system.

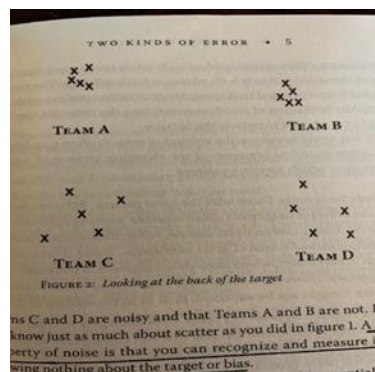
b. Multiple sentencing authorities

1. Members—different composition of rank, experience, and background; and they exist temporarily
2. MJ Alone—judges are just one small part of sentencing, but the reforms are aimed at the MJ.
3. Plea Agreements—the sentence imposed by a plea agreement reflects the agreed upon bargain between that accused and that Convening Authority.
4. Thus, a large percentage of the noise or disparity encountered in the military did not involve military judge sentencing. Consequently, unlike the federal system where the putative criticism was that judges were being arbitrary and therefore needed to be reined in, one cannot make a similar claim about military sentences.

c. Not Uniformed—

1. Service specific preference on what is aggravating or extenuating/mitigating and what offenses are “serious”.
2. Referral Decisions: Lack of uniformity existed and still exists well before the sentencing stage—namely, it occurs during the prosecution decision on what charges should be preferred.

- d. Thus, given these factors, each court-martial was solving different equations and shooting towards different targets—for example when the purpose of sentencing is at times to rehabilitate or in some circumstances to return to service, the question we are asking is highly individualistic. Thus, instead of the diagram above where we know where the bullseye is, we are aiming for different targets and different bullseyes.



See Kahneman, Noise.

III. The Problem with Noise

- a. Sentencing Lottery--Unconscious Bias
- b. Disparity undermines Perception of Fairness and Trust

- IV. Noise Reduction Military Justice Review Group Report. See [REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I - LEGISLATIVE RECOMMENDATIONS \(osd.mil\)](#)
 - a. Military Judge Alone Sentencing for all non-capital offenses
 - b. Proposed the use of sentencing parameters, but
 - c. Phased Approach
 - 1. Proposed Creation of Board to establish interim guidance
 - 2. Board studies sentencing outcomes for next 4 years to establish more comprehensive guideline
 - 3. MJA 2016—implemented segmented sentencing, but did not fully adopt MJ alone or sentencing parameters. Public Law No. 114-328
- V. Noise Reduction: NDAA 2022
 - 1. MJ alone sentencing
 - 2. Uniform Application
 - 3. Created Sentencing Parameters & Criteria Board
 - 4. Lack of Statutory Direction
 - 1. Compared to Sentencing Reform Act—28 USC § 991—"provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process[.]"
 - 2. MJRG—"the goal is to limit inappropriate disparity within a system that will largely maintain individual sentencing and judicial discretion in sentencing." MJRG Report at 1301.
- VI. NDAA, contd
 - a. Requirements for Sentencing Parameters
 - 1. Typical violation of the offense, considering...
 - 2. Severity of the offense
 - 3. Look to Similar Federal Guideline/other guidelines
 - 4. Military-specific sentencing factors
 - 5. Sufficiently broad to allow for individualized consideration.
 - 6. No less than 5 no more than 12
 - b. Criteria Offenses: The nature of the offense is indeterminate and unsuitable for categorization; and there is no similar criminal offense under the laws of the United States or the laws of the District of Columbia.
- VII. Criteria Offenses. See App. 12D, MCM 2024.
- VIII. Parameter Offenses. See App.12C, MCM 2024

- IX. Parameters Applied
 - a. Applies to Offenses after 27 Dec 2024.
 - b. Applies to Confinement only
 - c. MJ must sentence within the confinement range, unless MJ finds specific facts that warrant a sentence outside of the range
 - 1. Compare to 18 USC 3553-“exists circumstances of a kind or to a degree not adequately taken into consideration by the Sentencing Commission”
 - d. Plea Agreements
 - 1. MJ is bound by plea agreement, but if it deviates from the offense range can reject if plainly unreasonable
 - 2. Parameters cabin the MJ discretion, but no such limitations placed upon OSTC or Convening Authority. Compare RCM 705 with RCM 1002

- X. Parameters: Rational & Critiques
 - a. Not Federal Guidelines
 - b. Broad
 - 1. Lack of Concise Data
 - 1. Historically used Non-segmented sentencing so could not disaggregate one offense from the other.
 - 2. No clear way to recreate what the sentencor found to be relevant aggravation or E/M evidence or what sentencing philosophy was most important.
 - 3. Unlike the Federal System, which was solely judge based, the data reflects different bodies with distinct aims when it comes to sentencing.
 - 2. Limit Noise without injecting bias or unfair advantage/disadvantage
 - 1. Did not want to increase severity of offenses—But See White Collar Crime in the Federal System.
 - c. RECOGNIZES: Acceptance of Discretion as an Attribute vs. Fear of Judging: Are the parameters meant to guide or replace judgment.
 - d. RECOGNIZES: Phased Approach Argued by MJRG
 - e. What about other Noisy areas in sentencing?

- XI. Future
 - a. Under NDAA must measure the effectiveness of the parameters and recommend changes
 - b. Initial Goals: Application and Consistency

References:

DANIEL KAHNEMAN, OLIVER SIBONY & CASS SUNSTEIN, NOISE (2021)
 KATE STITH & JOSE CABRANES, FEAR OF JUDGING (1998)
 Judge Andrew Effron, Report of the Military Justice Review Group Part I (Dec. 22, 2015)
 National Defense Authorization Act 2022
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 Rules for Courts-Martial 705, 1001, 1002 Manual for Courts-Martial (2024 ed.)
 App. 12, Manual for Courts-Martial (2024 ed.)
 18 USC §3553
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