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Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines

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Professor Frase, thank you for providing such a rich structure for our discussion today.[1] My own remarks will be brief, underscoring several of the issues you raised and adding a few more. First, the core concepts you came back to time and again were these: *simplicity*, *flexibility*, *balance*, and *multiple alternatives*. Certainly, these are the lessons we have learned from the federal experience; unfortunately, we learned the hard way, by trying to implement and make sense of a guideline system that is deficient in each of these respects.

Another lesson I think we have learned from the federal experience is that it is a major mistake to construct a system of guidelines whose primary structural objective is to minimize inter-judge sentencing disparity. That was the central goal of both Congress and the Sentencing Commission, and a recent empirical study (of which I was a co-author) suggests that the guidelines have reduced this form of disparity significantly.[2]

But at what price? There are many sources of unwarranted sentencing disparity besides that deriving from the identity of the judge. The annual reports issued by the Sentencing Commission reveal significant inter-district and inter-circuit disparity. There is also significant disparity in charging, plea and downward departure policies among U.S. Attorneys offices, and there is great variation in law enforcement policies and approaches, and among probation offices in conducting pre-sentence investigations. Moreover, minimizing unwarranted disparity (from whatever source) should not be the only value pursued in constructing a system of sentencing guidelines. We want sentences that are, in the end, reasonable. And we want them to be arrived at through a reasoned process.

There is one area in which both the federal system and most state systems may be inadequate. Nearly all proponents of guidelines have tended to see

1. Editor's note: *See* Professor Frase's comments, 44 ST. LOUIS U. L.J. 425-46 (2000), in this issue.

2. *See* James M. Anderson, Jeffrey R. Kling, & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271 (1999). In this study, we assumed that judges in the same district have the same types of cases, over the course of several years, because of random case assignment. The study compared the average sentences of judges within a district both before and after the implementation of the Federal Sentencing Guidelines. We found that between 1986 and 1993 average sentences increased from approximately 26 months to approximately 38 months, and that the expected difference in sentence between any two judges in the same district (that is, inter-judge disparity) fell from approximately five months to approximately four months.

reduction-of-disparity as the antithesis of individualized sentencing. The idea is: If we are to achieve less disparity, we must also have less individualization of sentences. But I wonder if there is not a role for Guidelines that are helpful in true individualization of sentences. Could we have Guidelines that really help the judge structure his or her discretion? Could we have Guidelines that help the judge have a better sense of which defendants will be most amenable to rehabilitation, for instance, or which at least let the judge know how cases like the one at bar have been sentenced by other judges in the state?

On the federal level, judges were actually provided some of this information in pre-sentence reports in the pre-Guidelines era. Now, judges are not told how similar cases are generally sentenced; the only guidance given to the judge is in the form of the rules of the Guidelines themselves. And these rules, contrary to popular belief, are for the most part *not* based on pre-Guidelines sentencing practices in the federal courts.

Moreover, even this "guidance," though that is not really the right word, is not provided in a significant number of cases. On average, twenty percent of all federal sentences are left to the sole discretion of the federal judge, and her decision is essentially unreviewable. These are the cases in which the government has made a motion for a downward departure due to the defendant's cooperation in the prosecution of others. I have never understood why there is not at least some advisory guidance for the judge in these situations. Basically, either the sentence is inflexibly rule-bound, or bound by no rules at all. Surely there is a better way.

How do these various lessons apply to the State of Missouri? First, it seems to me that before any presumptive Guidelines are constructed, you also must ask: What are the problems that we want Guidelines to address? Is the big problem disparity? What are the sources of this disparity? Are there other problems that could be either reduced or exacerbated through a guidelines system?

You also would want to consider the role of *all* of the institutions in the criminal justice system, not just sentencing judges. What, if anything, should be the role of parole? Might appeal on an abuse-of-discretion basis be sufficient to avoid the occasional bizarre sentence and excessively harsh or lenient sentences? Can the Missouri appellate courts play a role in constructing a common-law of sentencing, as Maine is doing? What about prosecutorial authority in Missouri? How are prosecutors appointed? At what level is prosecutorial policy made? Let me stress that there is no single "right" system of sentencing guidelines. Every state has a different legal culture and different needs.

I also venture to say that there is no single "right" sentence in any case. It may be important in a pluralistic society to recognize that nobody has the only good answer; this would imply a sentencing system that requires reason and reasonableness but allows some variation. "Disparity" may be a pejorative

way of describing an inevitable characteristic of a pluralistic democracy that has a variety of power points and checks and balances in its criminal justice system.

Finally, I come back to my first piece of advice: *simplicity*. In the criminal law more than any other area of the law, I would argue, it is important that the meaning and working of the law be understandable to all citizens. If you look at our substantive criminal law in this country, you will see that much of it is pretty simple. It is almost "Thou shall not do this." Likewise, if there are to be presumptive sentencing Guidelines, then they also should be comprehensible to the victim of crime and his family, to the defendant and his family and to the individuals in the community who seek justice. "Simplicity" is important not simply to make guideline-sentencing easier for judges and defense attorneys and prosecutors. Comprehensibility is an essential component of the rule of law itself.