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THE REALITY OF GUIDELINES SENTENCING

THE HONORABLE GERALD W. HEANEY*

The principal objective of Federal Sentencing Guidelines was to reduce unwarranted sentencing disparity.¹ Unfortunately, no thorough, impartial study supports the view that this objective has been achieved.

I repeat that there is little or no evidence to support the view that sentencing disparity has been eliminated by the Guidelines. Supporters of the Guidelines point to studies that support the view that *inter-judge sentencing disparity* has been reduced. My quarrel is not with these studies nor with the results they report. Rather, my concern is with the fact that the studies measure only one visible element of sentencing disparity, inter-judge disparity, and ignore the more significant and unwarranted disparities that have been either continued, caused, or exacerbated by unreviewable decisions of law enforcement personnel, probation officers, and particularly prosecutors.

Law enforcement officers determine whether to make an arrest and for what offense. They determine whether they will refer the matter to the state or federal prosecutors. Each decision affects the ultimate sentence the offender will receive. If the matter is referred to a federal prosecutor, he or she then determines whether to charge the defendant, what to charge, and when to charge. Thereafter, the prosecutor determines whether to enter plea negotiations, and if so, the terms of the plea. The probation officers then prepare a presentence report largely based on information obtained from law enforcement's and prosecutors' files and make sentencing recommendations, which are most frequently accepted by sentencing judges. Under the Federal Sentencing Guidelines, these decisions have a far greater impact on time served by a defendant than any decision made by the sentencing judge. Moreover, each decision involves an exercise of discretion, an exercise that can and does dramatically affect the time an offender will serve.²

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1. Other objectives were (a) to ensure that similarly situated defendants received similar sentences, (b) to require a defendant to serve all or nearly all of the sentence pronounced by the court, and (c) to raise sentencing levels for narcotics offenses and some white-collar crimes. In my view, objective (a) has not been achieved, objective (b) has been achieved, and objective (c) has been achieved, particularly with respect to drug offenses.

2. As I noted in my article on the Sentencing Guidelines:
One probation officer explained,

If we truly want to measure whether disparities continue under the Sentencing Guidelines, we have no alternative but to undertake a comprehensive study to determine the impact of Guidelines legislation at every stage of the criminal process. To date, no such study has been undertaken by the Sentencing Commission or any other adequately funded group to determine the extent to which decisions of law enforcement officers, probation officers, and prosecutors have resulted in unwarranted sentencing disparity.³

You'll see any number of presentence reports -- because we put everybody in who is involved and everybody who comes forth in the relevant conduct portion -- if there were a way of adding all those names up, you're going to find a lot of people who weren't prosecuted, maybe because they weren't chargeable in the first place. But that was determined later. Maybe it's because they were cooperating or maybe it's because they just wanted to take the top ten percent of this group of offenders. Usually we don't know why. Maybe it's because they can't get the really bad guy or the bad gal because they haven't been able to develop the information to that point.

Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 191, n.74 (1991) (quoting Interview with United States Probation Office, Nov. 1., 1990, Tr. at 20).

3. As Professor Frank Bowman states in his article on the Guidelines, "The somewhat troubling truth is that the actual evidence on the question of the Guidelines' effect on disparity is scant." Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 716 (1996).

The staff of the Sentencing Commission, with an outside panel of experts, has recently completed a study designed to show (1) disparity created by differences among judges and (2) disparity related to the characteristics of the offender such as gender and race. As expected, the study concludes that the Guidelines have reduced disparity among judges by nearly one-half. This study will be published in the *Journal of Criminal Law and Criminology* in the near future.

A careful study published in the *Journal of Law and Economics* in April 1999 reached a similar conclusion. See James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271 (1999). This study defines inter-judge disparity as "the differences in average nominal prison sentence lengths for comparable caseloads assigned to different judges." *Id.* at 271. The study found the decrease in inter-judge disparity to be concentrated within the violent, weapons, and drug crimes. The study notes:

Despite the importance that the progenitors of the Guidelines placed on interjudge sentencing disparity and our focus on it in this paper, it would be a mistake to equate interjudge sentencing disparity with "unwarranted sentencing disparity" As many commentators have noted, considerable disparity exists in charging policies at various U.S. Attorney's offices in the policies of law-enforcement personnel, and in the manner in which the probation officer conducts an independent investigation of the offense. The Guidelines did nothing to address these sources of disparity.

. . . . Reduced discretion for judges at the end of the process magnifies the importance of decisions made by the prosecutor, probation office, and law enforcement officials. Since the sentence will be determined by what is proven by a preponderance of the evidence under the Guidelines, the prosecutor exerts far more influence over the sentence than she did pre-Guidelines. Similarly, the offender's sentence will directly reflect any disparity between probation officers, because they are the "Guidelines experts"

By giving prior actors (law enforcement officials, probation officers, and prosecutors) more influence over the ultimate sentence, the Guidelines provide opportunities for these earlier actors to pursue their own agendas that did not exist pre-Guidelines

In addition, mean sentence length has substantially increased under the Guidelines.

Id. at 301-02. See also Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569 (1998); A. Abigail Payne, *Does Inter-Judge Disparity Really Matter? An Analysis of the Effects of Sentencing Reforms in Three Federal District Courts*, 17 INT'L REV. L. & ECON. 337 (1997). Payne states:

I provide a comprehensive statistical evaluation of the effect of the uniform Guidelines and mandatory minimum sentence statutes on the sentencing practices in three Federal district courts. I compare case resolution and mean prison terms in the period before and after the adoption of mandatory sentencing and uniform Guidelines. There are four main results: (1) There has been a dramatic shift in plea bargaining, where defendants who used to change their initial plea of "not guilty" to "guilty" now plead guilty initially; (2) there has been a very significant increase in the prison terms for drug offenses (which are not subject to mandatory minimums) and very little change in the prison terms for other offenses (which are not subject to mandatory minimums); (3) the disparity attributable to differences among judges before the sentencing reforms accounts for less than 5% of the total variation in sentences; and (4) the effect of the uniform Guidelines on the variability in sentencing is negligible, but it decreased the level of inter-judge disparity for some but not all of the district courts studied.

Id. at 338. Payne also states:

The results raise two issues that should be considered before enacting any further reforms that limit judicial discretion or increase prison time served. First, given that inter-judge disparity represents a small portion of the total variation in sentences, we must question whether sentencing reforms enacted to reduce this form of disparity is worth the severe reduction in judicial flexibility that necessarily results from such reforms. Second, given that more defendants are receiving positive sentences and that the prison terms served are longer, is the cost to detain these defendants outweighed by a greater deterrence of criminal behavior or other societal benefits?

Id. at 358.

Jeffery Standen, writing in the California Law Review, concluded:

In the shadow of the Sentencing Guidelines, traditional plea bargaining will soon be an historical curiosity. When judges controlled sentences, prosecutors and defense counsel bargained within a predictable range of judicial sentencing outcomes. They still bargain today, except that now the prosecutor, not the judge, decides in which range the bargaining will occur. Thus the prosecutor, through his charging decisions, has the power to determine the possible sentence. The outcome of the bargaining game is fixed before the first ball is thrown.

It was predictable that an attempt to control the discretion inherent in the criminal justice system by trying to eliminate one facet of it . . . would have the harmful consequence of merely concentrating its exercise in the hands of another actor. The Guidelines transfer the power of the judge to the prosecutor. . . .

. . . . It would be better to accommodate and disperse the discretion that ineluctably inheres in any body of statutes that must, for the sake of completeness, describe conduct in ways that overlap, than to live with a system of criminal justice that, in the name of eliminating discretion, enables those hired to prosecute criminals also to judge them.

I concede that a study of the nature suggested would be expensive, time consuming, and very difficult. Undoubtedly it would, but necessary nonetheless. Some would argue that such a study is unnecessary because law enforcement officers and prosecutors have always had the authority to make the kind of decisions they presently make.⁴ They have, but circumstances have changed. Law enforcement has always determined whether to arrest, for what, and to who to refer the offender. Moreover, prosecutors have always determined what to charge and when to charge and whether to consummate plea agreements with offenders and the scope of the agreement. In the pre-Guidelines era in the federal system, however, the decisions of prosecutors were always subject to review by a judge, who is largely insulated by the pressures of public criticism by a lifetime appointment.

The principal effects of the Sentencing Guidelines have been twofold: First, to enhance the discretion of law enforcement, prosecutors, and probation officers in the sentencing process and to diminish that of the district judge; and second, to confine many more offenders to prison for longer periods of time. Specifically, the number of federal prisoners has increased from about 41,000 in 1987 to more than 118,000 in 1998. During this same period, the average sentence has increased in length by at least 2½ years and sentences for some crimes have increased by many more years than that. The increased numbers are driven in a large measure by three factors: dramatic increases in sentences for drug offenders; mandatory minimum sentences for violent offenders and persistent drug offenders; and eliminating probation as an option for

Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1537-38 (1993).

David Robinson, writing in the Washington University Law Quarterly, concluded:

Guidelines are premised on a mistaken notion that the largest problem in federal sentencing is disparity in the sentences judicially imposed on different defendants, not in erecting a system that is rational and just. Further rigidities have been added by enactment of harsh mandatory minimum statutes, most importantly in the drug enforcement area. . . . Open-ended prosecutive discretion should be ended and substantial discretion of federal judges restored.

David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881, 912 (1996).

4. Professor Bowman states:

[W]hat Guideline critics are complaining about is the possibility that prosecutors will manipulate sentences downward, by charging less than the most serious provable offense or withholding incriminating evidence from the court. . . .

There are two basic responses to this critique. First, prosecutors undoubtedly do, through charging decisions and plea bargains, sometimes seek, or agree to, lower than the maximum possible sentences. They have always done that. With respect to charging decisions, the Guidelines themselves do not even attempt to limit the historical practice. Indeed, it is difficult to imagine a system which could eliminate prosecutorial charging discretion.

Bowman, *supra* note 3, at 726-27.

nonviolent, first-time drug offenders. The latter notwithstanding studies that show first-time drug offenders who are imprisoned are five times more likely to recidivate than comparable offenders placed on probation.

As the raw number of federal prisoners has increased, so too has the percentage of black male inmates. They now represent nearly 40% of the prison population even though they only represent 12% of the nation's population. The increase in the black prison population has been largely driven by the numbers of young black males who have been convicted of possession with intent to distribute crack cocaine. Drug offenders now represent nearly 60% of all inmates in federal prisons and black males constitute more than 45% of those confined for these offenses.

Another impact of the Sentencing Guidelines and mandatory minimum sentences is now being felt. Increasingly we have large numbers of elderly inmates who are in poor health. The cost of imprisoning these inmates is increasing dramatically because of the medical care they require. Already there is talk in congressional circles of enacting legislation that would permit prison authorities to release older inmates with health problems before the expiration of their terms. I predict this legislation is inevitable and will result in older prisoners who are very little risk to society being released and returned to their homes or communities with little ability to find work or care for themselves. They will eventually become wards of the state.

In closing, I certainly do not share the view that discretion should be eliminated from the sentencing process. To the contrary, discretion is necessary to achieve justice and fairness. The question rather is who and to what extent will the various players in the system exercise discretion. Realistically, discretion will always be shared. In my view, however, the judge, a true neutral in the sentencing process, must retain substantial control over the sentence that will be imposed.

