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Is “Relevant Conduct” Relevant? Reconsidering the Guidelines’ Approach to Real Offense Sentencing

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THE HONORABLE HARLINGTON WOOD, JR.*

I am part of the old school: pre-Guidelines sentencing district judges. You know, when this all started, we were referred to as “the problem.” No doubt there was some disparity in sentencing. It was almost unavoidable because all crimes, defendants, communities, judges, and other circumstances are different. But we did not realize we had done such a bad job of sentencing in those days until we heard all the noise from Washington: it was loud and it was strong. I am not confident, however, that the new experts, no matter their good intentions, could reliably measure the disparity that they are talking about. In those early days, my judicial colleagues and I viewed sentencing as a most solemn judicial responsibility. We were dealing face to face with human beings and their lives. We were trying to follow the law using our experience, our judgment, and our discretion, in an endeavor to be fair. That, no doubt, led to some troubling disparities, but they were not disparities mandated by some unseen faces.

My views have developed over the years, being on both sides of the counsel table in the federal court and on the district bench. Today, sentencing judges do not have quite the same responsibility over people’s lives that we had. It is now more a matter of categories, points, graphs, departures, mandatory sentencing, and all that. I have one colleague who refers to this business as “that green-eyeshade business.” Today’s judges, except within narrow limits, are mere conduits of sentencing decisions made by faceless persons who profess to have come up with all the right answers for almost all situations. It seems to me we have only cured one type of disparity in exchange for another. The next step would be to computerize it all.

It is hard for sentencing judges these days to be charged with any significant disparity in view of the mandatory minimums, and also because the credit for any disparity that there may be belongs to the Sentencing Commission, the prosecutors, and other non-judges. One interesting case from the Seventh Circuit, *United States v. Zendeli*,¹ had what we felt was an unconscionable disparity. Last year there were two successive opinions in this case, and it was not the fault of the district judge. He characterized the required sentences between each of the defendants as being absolutely “out of whack,” and he would not do it. So he said, “We’ll let the Court of Appeals

* United States Circuit Judge for the Seventh Circuit (1976-); United States District Judge for the Southern District of Illinois (1974-1976).

1. 180 F.3d 879 (7th Cir. 1999) and 195 F.3d 314 (7th Cir. 1999).

straighten it out." That is one reason we are here. We agreed with him, but there was nothing we could do about it either. The outcome really depended on mandatory sentences, the charging decisions of the U.S. Attorney, and the plea-bargaining. Fortunately, after our first opinion, the U.S. Attorney came to our assistance and dismissed several counts and brought the sentences down more within reason. I hope the U.S. Attorney saw then how it should be handled in the future to avoid new disparities. The judges had no discretion to alleviate the problem. They were absolutely bound by the actions of others, all non-judges.

I did not realize why I was opposed to the Sentencing Guidelines – and I am – until I read *Fear of Judging*² and Professor Yellen's article in the 1993 issue of the *Minnesota Law Review*.³ In 1991, Chief Justice Rehnquist appointed me along with eight other federal judges from all over the country to the Long-Range Planning Committee for the Federal Courts. After several years of studying all aspects of the federal courts, we filed a report in which the Sentencing Guidelines were one of the matters considered. One problem, in the view of that committee, was that the disparities originally complained about have been replaced by new disparities – disparities born of uniformity. Offenders are as different as their crimes, but often they may be treated the same, which creates a new breed of disparity. I think if *Fear of Judging* and Professor Yellen's article had been in existence when we filed our report, we would have attached those publications as exhibits in support of our own views.

But today judges are learning to live with the Guidelines and doing their best to apply them, as far as they can understand them, and not quarrel with them. Even though I do not know her views about the Guidelines, I am encouraged by the appointment of Circuit Judge Diana Murphy as chairperson of the new Sentencing Commission.⁴ She is known and respected from coast to coast. Also, Judge Ruben Castillo from the Northern District of Illinois, highly regarded in the Seventh Circuit, has been named to the new Commission.

Since the Guidelines were adopted in 1987, my court has had about 2,000 Guidelines appeals. The Ninth Circuit, the largest circuit, has heard over 4,000. To my amazement, I find that I contributed to Guidelines jurisprudence by writing the first opinion on relevant conduct in our circuit. I cannot assure you, however, that I really understood what I was doing. There have been 140

2. KATE STITH & JOSE CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURT* (1998).

3. David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993).

4. Editor's note: See Judge Murphy's comments regarding the Sentencing Commission, 44 ST. LOUIS U. L.J. 279 (2000), in this issue.

other opinions to date on relevant conduct; every judge on our court has had a say about it. My feeling is that our Sentencing Guidelines jurisprudence will not have a long-lasting life and that is just as well.

I have been particularly concerned about other relevant conduct issues, such as the use of charges of which a defendant was acquitted, criminal conduct with which the defendant was never charged, or criminal conduct which was dropped as part of a plea bargain. The burden of proof for sentencing purposes is lower, and no grand or petit jury has had a say. Relevant conduct is now more controlled by the U.S. Attorney and the probation office, as I see it, not by the judges. Also, plea-bargaining can be dangerous, as evidenced by *Zendeli*.

It is quite true that, prior to the Guidelines, we did take into consideration relevant conduct, but more in human terms, considering each defendant and the circumstances of the defendant and the crime as a whole. I think we almost always explained to the defendant where that sentence came from and what was involved and why. I heard the explanation this morning from one of the pro-Guidelines speakers that some of the disparities from the pre-Guidelines district judges must have been because we were all on Fruit Loops.⁵ I do not think there were any Fruit Loops in those days, but there are now. We district judges just did our best, based on our own experiences and the law, endeavoring to be fair and to tailor the sentence to that particular defendant.

One thing the Guidelines do not consider are the characteristics of the particular defendant. For example, rehabilitation was considered pre-Guidelines. I have seen it work beautifully and am very proud of the successful rehabilitations we were sometimes able to accomplish. And I believe military service is not now considered. I cannot see myself giving a defendant who had been awarded the Medal of Honor the same sentence I might give to another defendant in a similar situation. Under the Guidelines, the Medal of Honor recipient would have to be sentenced, as I see it now, the same as someone who had not served his country at all.

You can tell I am from the old school, as I said, and I do not apologize for it. Where this is all going to end I do not know, but I hope the solution will possibly be like that set out in *Fear of Judging*, that gives a district judge more judicial discretion, guided by advisory – not mandatory – principles, and requires the judge to give some explanation for the sentence. Either party can then seek appellate review.

5. Editor's note: See Professor Michael Goldsmith's comments, 44 ST. LOUIS U. L.J. 394, 395 (2000) in this issue.

It is a complex, controversial area, and I cannot begin to know all the answers. This occasion offered by the Saint Louis University School of Law for all of us to get together and exchange views, has, I am sure, been most helpful to all of us.