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SOME WORRIES ABOUT SENTENCING GUIDELINES

WILLIAM T. PIZZI*

As a resident of a non-guidelines state and an admitted novice on state sentencing guidelines, I find myself uncertain about the wisdom and the practicality of guidelines. I have to admit to an initial attraction to the idea of a sentencing commission that would have the experience, talent, and time to look at what is happening in sentencing on a statewide basis. A commission that could force citizens, the legislature, and the courts to face some of the hard choices that need to be made if we are to use our limited correctional resources wisely. Kay Knapp's paper¹ convinces me that there is much that a state like Colorado could learn from a comprehensive examination of our sentencing statutes and practices. I also recognize that judges exercise tremendous power in sentencing, that there are problems of widely disparate sentences for similar crimes and similar defendants,² and that guidelines may help alleviate some of the disparities. Starting the task of sentencing a defendant with a clear, empirically-based understanding of what a typical case in the particular crime category looks like³ and then working from that typical case to determine what features of the crime at hand are typical or atypical, may improve the sentencing process considerably.

Nevertheless, I am nervous about starting down the guidelines path. My initial reservation has nothing to do with guidelines per se, but stems from our experience with the criminal justice system's pretrial and trial procedures. When you look at the American legal system, one particular weakness sets us apart from every other western system of law with which I am acquainted: we are procedure addicts. I realize that some prefer to express our obsession with procedures in a positive light. They might rather term it a deep concern for rights that admittedly stresses procedures. But I prefer to be honest—it's an addiction. Procedure for us is like potato chips to some or chocolate to the author—once we start

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1. See Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679 (1993).

2. See MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

3. Knapp, *supra* note 1, at 691-95.

we cannot stop. In that case wisdom tells me, maybe it is better not to start at all. Almost any area that we begin to proceduralize gets lost in a maze of distinctions and subtleties that take us far from our initial purposes. Look, for example, at Fourth Amendment law. The standard treatise on search and seizure⁴ runs to four volumes on that area of procedure alone. Or consider the confessions area—is there anyone who honestly thinks that police officers can possibly understand the implications for interrogation to be drawn from an arrestee's invocation of the Sixth Amendment right to counsel as opposed to the invocation of the Fifth Amendment right to counsel?⁵ And what about jury selection which has blossomed from a rather sleepy little procedure into an ordeal that often lasts as long as an entire trial in other countries and is full of fascinating tactical and legal issues?⁶ And, of course, there is always our system of evidence with its ritualistic incantations, its whispered sidebar conferences, and its subtle limiting instructions to the jury.

I don't question the objectives of any of these areas of law. But the lesson I draw from our pretrial and trial system is that all too often procedures take on a life of their own that end up piling distinction upon distinction until we reach a level of sophistication that itself becomes a problem. With respect to our trial system, the result has been a system that is too complicated, too expensive, and, quite frankly, too fragile⁷ to be used regularly to convict the guilty and acquit the innocent. Both Judge Frankel and Professor Orland in their paper observe that our penal laws are extremely harsh when compared to those in other western countries.⁸ I agree, but would add the additional observation that

4. See WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (2d ed. 1987).

5. Compare *Edwards v. Arizona*, 451 U.S. 477 (1981); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Michigan v. Jackson*, 475 U.S. 625 (1986) with *McNeil v. Wisconsin*, 111 S. Ct. 2204 (1991).

6. See William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 155 ("If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than *Batson*."). See also Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 157-63 (1989).

7. One can probably tell from these criticisms of our trial system that the author is more impressed with Judge Frankel's criticisms of the adversary system and the uncomfortable role of the judge in that system (see MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975)) than with Judge Frankel's work on sentencing (see FRANKEL, *supra* note 2).

8. See Marvin E. Frankel & Leonard Orland, *A Conversation about Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 658, 660 (1993).

our system of criminal procedure is also at an extreme compared to other western countries. I do not think it is purely a coincidence.

It is from knowledge of our addiction to procedure and past experiences with procedures that were also initially simple and straightforward that I end up being nervous about the guidelines movement. We do not have a light touch when it comes to procedure. I realize that advocates of state guidelines take great pains to distinguish their efforts from the complex and rather mechanistic federal model.⁹ They assure us that state guidelines systems usually leave judges with more discretion than is available to federal judges and usually permit departures from the guidelines more easily than is true in the federal system. But even if those claims are accurate, procedures in our system too often gather their own momentum and take us down sideroads from which it is sometimes hard to find our way back. One fear I have is that guidelines will lead to more and more pressure to turn sentencing into an adversary, trial-type hearing. Perhaps we have already reached that point or, more accurately, assumed that point. Lost in the debate over which aggravating factors¹⁰ must be *proven by the government* at the sentencing hearing and by what standard of proof,¹¹ is the changing nature of sentencing itself that is assumed. Unlike our trial system, which is a battle between the adversaries with the judge playing a neutral and passive role, sentencing has always seemed to be highly inquisitorial in nature. It is the judge, working through probation, who develops the background facts on the offense and the offender. It is the judge who runs the sentencing proceeding. It is the judge to whom and with whom the defendant speaks prior to sentencing. And, finally, it is the judge who has the obligation to impose a sentence that is fair and just. Judicial responsibility for sentencing does not necessarily change just because a jurisdiction has guidelines (or requires a judge to explain and justify a sentence or permits appellate review). But, the more I read of the guidelines literature and read discussions about the prosecutor's burden of proof at sentencing, the more I see the nature of the sentencing

9. See Knapp, *supra* note 1, at 679-81; Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679 (1992).

10. See, e.g., *United States v. Ekwunoh*, No. 91-684, 1993 U.S. Dist. LEXIS 434, at *11 (E.D.N.Y. Jan. 14, 1993) (government must prove at sentencing that the defendant was aware of the amount of drugs he possessed, even though knowledge of the amount is not an element of the crime of possession).

11. See, e.g., Steven M. Salky & Blair G. Brown, *The Preponderance of Evidence Standard at Sentencing*, 29 AM. CRIM. L. REV. 907 (1992) (arguing that due process should require proof of aggravating factors by clear and convincing evidence).

process and the responsibility of the sentencing judge as being thrown into some confusion by guidelines.

Because I have a high respect for the civil law tradition in which judges are active factfinders and have the responsibility for deciding both guilt and any sentence, I am comfortable with the strong role that judges have traditionally been assigned at sentencing and would be reluctant to see that role altered significantly.¹² I think it is very important in a system that is highly adversarial that at some point the judge address the defendant directly and take responsibility for the sentence imposed, whether it be under a guidelines system or not.

There is another concern that I have about sentencing guidelines. I am concerned about the attempts to change the culture of plea bargaining by placing limits on plea bargaining in guidelines jurisdictions. If I understand Kay Knapp's paper, which makes reference to limits on plea bargaining in some of the guidelines jurisdictions,¹³ these jurisdictions limit prosecutors to what seems to be "charge" bargaining. This would permit the parties to agree to a plea of a lesser included offense and hence a lower sentencing range, but would not permit "sentence" bargains that would guarantee a defendant a certain sentence within the range set out for that offense. This effort to restrict prosecutors to charge bargaining troubles me. I am not an advocate of plea bargaining for its own sake; I admire the way European countries have worked to limit plea bargaining. But I start from the premise that plea bargaining in state systems is inevitable in our tradition. And if we are going to have plea bargaining, I prefer that the system be honest about what it is doing. I prefer that prosecutors and defense attorneys be open with judges about what they are proposing and why they are proposing it. I realize that guidelines systems still permit plea bargaining, but there are cases in which a prosecutor may wish to have a defendant plead to a more serious offense with a guaranteed sentence rather than have a defendant plead to an offense that is not a fair description of the crime committed.

Charge bargaining has been the norm in the federal system for some time. But I draw a sharp distinction between the federal system and a state system, like Colorado's, in terms of the cases

12. I would not be at all reluctant to see the range of our criminal penalties at sentencing significantly narrowed and the level of punishment in general significantly reduced.

13. See Knapp, *supra* note 1, at 694-95.

that are prosecuted and the way prosecutorial discretion is exercised. The federal system is very conservative in terms of the cases that it chooses to prosecute. By and large, if the prosecutors in the federal system don't have an overwhelming case, they do not file charges. You can do that when the victim is the United States and when the crimes are overwhelmingly nonviolent. But when you are dealing with crimes where there are victims, especially the sorts of violent crimes that are all too common in local prosecutors' offices—homicides, rapes, aggravated robberies, and the like—a prosecutor cannot refuse to file criminal charges in this conservative fashion. You cannot tell the parents of a young child who was kidnapped and brutally raped that you are not going to file charges against the perpetrator because there is a *Michigan v. Jackson*¹⁴ problem with the perpetrator's confession, or because you are worried that the child's identification is impeachable because she is young and wears thick glasses. The prosecutor has to file in these sorts of cases and do the best he or she can, which will usually mean getting the best plea bargain that can be worked out. Maybe the prosecutor has to promise a given sentence at a substantial discount from the sentence that would be imposed if the rapist were to be convicted at trial. There is no doubt that the sentence may be less than the defendant deserved, but that is the nature of plea bargaining.

My concern with restricting the ability of prosecutors and defense attorneys to negotiate a plea bargain in a case like the rape case I have hypothesized is partly a belief that state systems need such flexibility. But it is also my belief that restricting the plea bargaining ability of the parties leads to dishonesty in the system. What seems to happen is that the prosecutor and the defense lawyer try to achieve the same result as they would under sentence bargaining by being very careful how the charge is described to probation or to the court, or by failing to provide certain information to the court in order to achieve a specific sentence under the guidelines system.¹⁵ I think that keeping the

14. 475 U.S. 625 (1986). In *Jackson*, the Court suppressed the confession of a defendant who had been given *Miranda* warnings and made incriminating statements at a point in time after he had been arraigned and had asked for Sixth Amendment counsel, because any waiver of his right had been waived. *Id.* at 636. The Court ruled that the courtroom request for Sixth Amendment counsel brought the case "by analogy" within the purview of *Edwards v. Arizona*, 451 U.S. 477 (1981), which forbids the police from trying to reinterview a suspect who has once asked for counsel. *Jackson*, 475 U.S. at 636.

15. Ms. Knapp's paper details some of the problems in guidelines jurisdictions as

judge uninformed of the nature of the plea bargain and working "around the judge" to achieve a specific sentence is exactly opposite of the way that plea bargaining and sentencing should be taking place. I much prefer a system in which a prosecutor is honest about what the defendant did, what the plea bargain is, and what the reasons are for the plea bargain. If the judge objects, the judge can ask to see the police reports, push for changes in the bargain, or even reject it. But if the judge accepts it, the judge is at least prepared to address the crime honestly and is not basing his or her sentence on information that everyone else in the courtroom knows to be inaccurate.

I realize that I am probably the only academic who would argue in favor of more power for prosecutors in guidelines jurisdictions.¹⁶ But my point is not about power so much as it is about honesty in the system. I believe that how a judge takes a plea, how a judge talks to the prosecutor and the defense attorney in discussing the plea, and how a judge talks with a defendant when laying a factual foundation for the plea is connected with how a judge talks with a defendant at sentencing. If a guidelines system has an effect on the candor with which prosecutors and defense attorneys talk with judges during plea discussions, and if judges pull back from "knowing too much" in order to achieve plea bargains that even the judges desire (though not permitted under the guidelines), that, to me, would be a serious detriment to a guidelines system. I would be interested in hearing more about the relationship between sentencing guidelines and the plea bargaining culture in jurisdictions that have adopted sentencing guidelines.

advocates try to get around limitations on plea bargaining. See Knapp, *supra* note 1, at 694-95.

16. A fairly common complaint about guidelines systems is that the prosecutor gains considerable power. This is because the way a case is charged—which is controlled by the prosecutor—can directly translate into a specific sentence. See, e.g., Stephen C. Rathke, *Plea Negotiating Under the Sentencing Guidelines*, 5 *HAMLIN L. REV.* 271, 279-84 (1982) (observing that under Minnesota sentencing guidelines system prosecutors have more power than they had previously).