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Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing

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INTRODUCTION

All sentencing systems make use of information beyond the elements of the offense of conviction. This practice, known generally as "real-offense sentencing," is necessary because of the complexity and variety of criminal behavior and the need to keep criminal statutes relatively simple. Two defendants convicted of violating the same statute may be very different in terms of amount of harm caused, levels of personal culpability, and degrees of dangerousness to the community.

One of the enduring challenges in sentencing policymaking is the need to identify the appropriate structure and scope of real-offense sentencing. What facts beyond the elements of the offense of conviction should have an impact on the defendant's sentence? Should consideration of such additional facts be

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systematized or left to the discretion of individual judges? Should certain types of information be excluded from sentencing decisionmaking, even if they are logically relevant? What process and burden of proof should apply to such fact-finding?

The United States Sentencing Commission adopted a radical policy that requires judges to consider, in a mechanistic way, a great deal of real-offense sentencing information. This policy helped make the Federal Sentencing Guidelines overly rigid and complex and contributed directly to the Supreme Court's decision in *United States v. Booker*[1] to invalidate the mandatory nature of the current Federal Sentencing Guidelines. As Congress and the Sentencing Commission consider the appropriate response to *Booker*, they should dramatically scale back this disastrous approach to real-offense sentencing. Fortunately, good models exist in a number of states with more successful sentencing guidelines.

I. WHAT IS REAL-OFFENSE SENTENCING?

Real-offense sentencing is easier to discuss than to define.[2] In some ways, it is easier to identify what real-offense sentencing is not. It is not its polar opposite: charge-offense sentencing. Pure charge-offense sentencing involves setting a sentence or sentencing range based entirely on the statute of conviction. The consideration of any facts beyond the elements of the offense introduces "real-offense" elements. I will use the term in this broad sense: real-offense sentencing is the use in sentencing of any facts beyond those necessarily found by a jury in reaching a guilty verdict or admitted by a defendant as part of a guilty plea. Real-offense sentencing information can concern the offense or the offender. It can relate to the harm caused by the offense, the defendant's culpability, or background information about the offender.

The principal reason generally cited for employing real-offense sentencing information is that the facts necessary for conviction are generally quite limited. Even in jurisdictions with well-developed criminal codes, criminal statutes tend to be broad in scope. Two defendants convicted of violating the same criminal statute may present vastly different situations. Whether a sentencing decision is being based on retributive or utilitarian purposes, more information than that which is provided in the statute of conviction may be needed. If one is interested in how much harm was caused by a robbery, for example, it is important to know how much money was taken, whether a

1. 125 S. Ct. 738 (2005).

2. *See* David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 408-12 (1993); *see also* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 526 & n.15 (1993) (noting different definitions of real-offense sentencing).

weapon was used, whether injury was inflicted, etc. In assessing the offender's culpability, whether the offender was a leader in the criminal activity or played a very minor role can be a critical distinction. To determine the offender's amenability to treatment or future dangerousness, much personal information is needed, including prior criminal offenses, employment or educational history, and family and community ties. Few if any of these facts are likely to be part of the definition of the offense for which the defendant was convicted. If they are to be considered, then, it must be through fact-finding at the sentencing stage.

Defined in this manner, real-offense sentencing information is potentially limitless. No sentencing process, of course, will inquire endlessly into facts about the offense and offender. First, as noted above, the purposes of punishment that are emphasized by a particular sentencing regime impact the relevance of potential real-offense sentencing information. Pragmatic considerations require that sentencing fact-finding not be unduly time consuming or complicated. Considerations of fairness may argue for limiting the impact of facts not proved to a jury or admitted by the defendant. No system, then, is likely to approach a "pure" real-offense model. The important questions are who decides which real-offense elements are incorporated into sentencing decisions, by what fact-finding process, and with what weight?

The proper approach to real-offense sentencing cannot be determined in a vacuum. Whether particular information should help determine a sentence depends upon the goals the sentencer is pursuing. An individual judge or a sentencing commission aiming for deterrence or incapacitation will be interested in different information than a sentencer focusing on just deserts. In addition, these questions look different when addressed to a traditional sentencing system marked by broad judicial discretion than to a guidelines system in which judicial discretion is significantly curtailed.

In traditional sentencing systems marked by broad judicial discretion, the answers to these questions are fairly clear, if ultimately unsatisfying. Sentences can be influenced by virtually any information about the offense or the offender. The decisions about what facts to emphasize and how much weight to give to those facts rest with each sentencing judge.[3] There is no guiding sentencing philosophy and usually no meaningful appellate review of sentences. Judges do not have to explain their decisions, and where they explicitly find facts, they may do so based simply on a preponderance of the evidence standard. This does not mean that judges always make great use of this power to consider real-offense elements or that all judges do so in the same way. Real-offense sentencing in a discretionary sentencing system is "sporadic and unpredictable."[4] I have previously referred to this condition as

3. *See* Reitz, *supra* note 2, at 528 ("Nearly every state allows sentencing courts to engage freely in real-offense sentencing as a matter of discretion.").

4. *See* Yellen, *supra* note 2, at 419.

"discretionary or permissive real-offense sentencing."[5]

II. REAL-OFFENSE SENTENCING AND SENTENCING GUIDELINES

When jurisdictions move from broad judicial discretion to structured-sentencing systems, such as sentencing guidelines, they must confront the questions about real-offense sentencing head on. How should sentencing guidelines take account of facts beyond the offense of conviction? There are at least three possible approaches. First, drafters of sentencing guidelines could determine that some facts beyond the offense of conviction are important enough to be incorporated into the calculation of the applicable sentencing range. Second, the guidelines range could be determined largely or entirely based on the offense of conviction, but within the exercise of her discretion in choosing a particular sentence within the authorized range, a judge could be permitted to rely on real-offense factors. Third, judges could be authorized to deviate or depart from the applicable guidelines range based on real-offense factors determined at sentencing. Aspects of each of these approaches are apparent in sentencing guidelines systems in place today across the country.

In addition to the arguments for and against real-offense sentencing noted above, structured-sentencing systems raise particular issues regarding plea bargaining and prosecutorial influence on sentences.[6] In a system of judicial discretion, the charges brought against a defendant determine the statutory maximum but otherwise have limited impact on the sentence imposed. Linking the sentence imposed more closely to the offense of conviction, as all sentencing guidelines systems do, increases the prosecutor's influence on sentences because prosecutors have broad authority to select or reject the charges that might be brought against the offender. In theory, then, a charge-based guidelines system shifts a great deal of sentencing authority to prosecutors. Sentencing commissions have considered whether it is possible and appropriate to counter this enhanced prosecutorial influence by utilizing some version of real-offense sentencing. As will be seen in the next Parts, the states and the federal system have diverged greatly on this key point.

A. *State Guidelines Systems*

State sentencing guidelines emphasize simplicity and do not attempt to incorporate much real-offense sentencing into their structures. Every state sentencing guidelines system, whether presumptive or advisory, determines the

5. *Id.* at 418.

6. I have previously criticized this as a rationale for sentencing guidelines relying greatly on real-offense sentencing. *See* David Yellen, *Just Deserts and Lenient Prosecutors*, 91 NW. U. L. REV. 1434 (1997).

applicable guidelines range largely based on the offense of conviction.[7] Following some version of the model first adopted by Minnesota,[8] state guidelines systems rank statutory offenses in terms of perceived severity. Adjustments are not made based on facts about how the offense was committed or the offender's background. The one significant common exception to this "charge-offense" focus relates to the offender's criminal history. Most state guidelines that employ grids have one axis of the grid that is a measure of the defendant's record of prior criminal convictions. Defendants with longer criminal records receive more severe guideline ranges.

This charge-offense approach does not mean that real-offense sentencing factors beyond criminal history play no role under state guidelines systems. Most guidelines result in a range of permissible sentences, within which the judge has broad discretion. Here, as in the traditional system, a judge can rely on virtually any factor she deems relevant. There may or may not be a requirement that the judge explain the choice of a particular sentence. In addition, most guidelines systems allow judges to depart from the guidelines in unusual cases. These departures are based on real-offense elements determined at sentencing.[9] On the whole, though, it is fair to say that state guidelines systems are largely charge-based and make only modest use of real-offense sentencing.

B. *Federal Sentencing Guidelines*

The Federal Sentencing Guidelines are dramatically different than all state systems. The U.S. Sentencing Commission adopted a model that incorporates far more real-offense elements than any other structured-sentencing system ever has. The Commission termed this structure a "compromise,"[10] but that characterization is highly misleading. It is a compromise weighted heavily toward real-offense sentencing. For example, each offense Guideline contains numerous "specific-offense characteristics," such as the amount of loss[11] or drug quantity involved in an offense,[12] or the possession or use of a dangerous weapon.[13] In addition, "adjustments" that are applicable to all offenses include

7. For a thorough discussion of state guidelines systems around the country, see Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

8. *See* Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 CRIME & JUST. 131, 138-39 (2005) (describing the Minnesota guidelines).

9. *Id.* at 153-56 (outlining Minnesota case law governing permissible and prohibited departure grounds); *see also* Barr v. State, 674 So. 2d 628 (Fla. 1996) (holding that departure can be based on conduct that could not be separately charged as a crime).

10. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-9 (1988).

11. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2004).

12. *Id.* § 2D1.1(c).

13. *See, e.g., id.* § 2D1.1(b)(1).

the defendant's role in the offense, the criminal's selection of particularly vulnerable victims, and behavior constituting obstruction of justice.[14]

Most dramatically, for major categories of offenses such as fraud and narcotics, the Guidelines call for sentences to be based not just on offenses for which the defendant has been convicted but also on "alleged related" offenses, committed in the same course of conduct or as part of a common scheme or plan.[15] In other words, if the judge concludes, by a preponderance of the evidence, that the defendant committed other related offenses, those other offenses are included in the Guidelines calculation. This determination is true if those related offenses were never charged, if the charges were dropped as part of a plea agreement, or even if the defendant was acquitted of that conduct.[16] Although judges in discretionary systems can take other alleged offenses into account,[17] the federal approach is truly radical. The Federal Guidelines are a mandatory system; a judge applying the Guidelines *must* base the sentence on alleged related offenses. Further, the Guidelines consider alleged related offenses just as much as charges that have resulted in conviction.

The federal approach to real-offense sentencing has been widely and severely criticized as overly complex, rigid, and unfair.[18] It is striking that no other structured-sentencing system has adopted similar policies.

C. *The Impact of* Apprendi, Blakely, *and* Booker

The Supreme Court's line of cases beginning with *Apprendi v. New Jersey*,[19] and extending to *Blakely v. Washington*[20] and *United States v. Booker*,[21] has dramatically altered the sentencing landscape, particularly as it relates to real-offense sentencing. Under these decisions, any fact that has the effect of increasing the maximum punishment to which the defendant is effectively exposed must be found by a jury beyond a reasonable doubt unless admitted by the defendant. *Apprendi* dealt with formal statutory maximums,

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14. *See id.* ch. 3.

15. *Id.* § 1B1.3(a)(2).

16. *See* United States v. Watts, 519 U.S. 148 (1997); Witte v. United States, 515 U.S. 389 (1995). Note that the viability of these decisions, as to the *mandatory* consideration of such information, has been called into question by *United States v. Booker*. *See infra* note 21 and accompanying text.

17. *See* Williams v. New York, 337 U.S. 241 (1949) (upholding a death sentence where the judge relied on an allegation that the defendant had committed multiple burglaries for which he had not been convicted).

18. *See, e.g.*, Reitz, *supra* note 2; Yellen, *supra* note 2. For one of the few scholarly defenses of real-offense sentencing under the Federal Guidelines, see Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 (1997).

19. 530 U.S. 466 (2000).

20. 124 S. Ct. 2531 (2004).

21. 125 S. Ct. 738 (2005).

while *Blakely* and *Booker* extended this rationale to many determinate guidelines systems. In *Blakely*, the Court invalidated a sentence above the normal range under Washington State's guidelines. In *Booker*, the Court "cured" the Federal Guidelines' constitutional infirmity by declaring the Guidelines to be advisory rather than binding.

The impact of these decisions on real-offense sentencing varies greatly. There is no effect on traditional systems of judicial discretion; the Court expressly noted that where broad judicial discretion is granted by law, judges can continue to sentence based on any factors they deem relevant. Advisory guidelines systems are also unaffected. *Blakely* and *Booker* only address guidelines systems that have the force of law. The states with presumptive guidelines systems are impacted only modestly. For now, at least, the one real-offense element commonly incorporated into state guidelines calculations—criminal history—need not be proven beyond a reasonable doubt. Upward departures from presumptive guidelines ranges must now be based on facts presented to a jury or admitted by the defendant, but contested upward departures are relatively rare in state guidelines systems. Some states are already dealing with this by empanelling juries when there are disputed facts that might lead to an upward departure.[22]

The federal system has been more dramatically changed, as the Federal Guidelines are now advisory, at least formally. The real-offense components of the Guidelines remain highly influential, though, since judges are required to continue to calculate the Guidelines range as they had done so before and "consider" the resulting range. If Congress opts to make the Guidelines binding again by authorizing the use of juries to resolve factual disputes, the real-offense components of the Federal Guidelines could continue, although with a different process and a higher burden of proof. It is also important to note that, again at least for now, the Court has not disturbed the ability of judges to find facts that establish a minimum sentence, either by guideline or by statute.[23] Unless the Court reverses course,[24] guidelines that are "topless"[25] are

22. *See* KAN. STAT. ANN. § 21-4718(b)(2) (2005) (authorizing Kansas courts to present disputed aggravating facts to juries).

23. United States v. Harris, 536 U.S. 545 (2002) (upholding, over an *Apprendi* challenge, the use of judicial fact-finding to impose mandatory minimum sentence); *see also* Spero v. United States, 375 F.3d 1285, 1286 (11th Cir. 2004) ("Whatever other effect the Supreme Court's recent decision in *Blakely v. Washington* . . . may have, it does not undermine the validity of minimum mandatory sentences, at least not where the enhanced minimum does not exceed the non-enhanced maximum.").

24. *Harris*, like *Apprendi*, *Booker*, and *Blakely*, was a 5-4 decision. Justice Breyer, a member of the *Harris* majority and a dissenter in *Apprendi*, acknowledged that the two decisions were in tension but reiterated his hope that the Court would reverse *Apprendi*. *See Harris*, 536 U.S. at 569-72 (Breyer, J., concurring). Now that *Apprendi* has been solidified in *Booker* and *Blakely*, the Court may revisit *Harris*.

25. For a discussion of "topless" guidelines, see Frank O. Bowman, III, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with*

constitutional, and real-offense sentencing fact-finding can continue as it had in the past.

Clearly, the Supreme Court has not abolished real-offense sentencing. In fact, it has barely disturbed it for many jurisdictions. Every jurisdiction, then, will have to continue to grapple with the appropriate role for real-offense sentencing. In the Conclusion of this Article, I will lay out a few principles that should guide this consideration.

CONCLUSION: SOME BASIC PRINCIPLES

This Conclusion offers some thoughts on the proper use of real-offense sentencing information, regardless of whether a sentencing system utilizes judicial discretion, advisory guidelines, or presumptive guidelines.

A. *Simplicity*

The various state guidelines systems have all opted for simplicity. Only a few of the many factors that might be relevant to sentencing are included in the guidelines calculation. The rest is left to the sound exercise of judicial discretion. In contrast, the Federal Sentencing Guidelines are highly complex, incorporating an elaborate version of real-offense sentencing. There is a broad consensus among professional and academic observers that the complexity and rigidity engendered by the federal "relevant conduct" approach, combined with an overemphasis on quantifiable factors, have failed.[26] The more modest goals of state sentencing guidelines result in a workable system that achieves considerable consistency but allows appropriate individualization of sentences based on real-offense factors.[27]

It is true that charge-offense guidelines result in a great deal of sentencing authority being shifted to prosecutors. However, it is far from clear that the federal approach does better in this regard. All that real-offense guidelines do is protect against prosecutorial leniency or undercharging.[28] If this is a problem

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Blakely v. Washington, 16 FED. SENT'G REP. 364, 367 (2004).

26. Recently, a bipartisan group sponsored by the Constitution Project and co-chaired by former Attorney General Edwin Meese and former Deputy Attorney General Philip Heymann (for which Professor Frank Bowman and I serve as co-reporters) released a set of principles that criticizes the Federal Guidelines. *See* Constitution Project, Principles for the Design and Reform of Sentencing Systems (2005), http://www.constitutionproject.org/si/Principles.doc (last visited Sept. 13, 2005); *see also* AM. COLLEGE OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED (2004), http://www.actl.com/pdfs/SentencingGuidelines_3.pdf (last visited Sept. 13, 2005); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005).

27. *See* Steven Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 386-90 (2005).

28. For a discussion of prosecutorial complicity in Guidelines "evasion," see Nancy J.

that requires attention, it is better addressed through prosecutorial charging guidelines than through real-offense sentencing guidelines.[29]

B. *Transparency*

A great failing of how traditional sentencing systems deal with real-offense sentencing is their opacity. If a guidelines system is going to leave judges considerable authority to inject real-offense components into sentencing, either through selection of a sentence within the authorized guidelines range or through a departure sentence, it is important that this be done in a transparent way. Regardless of the sentencing mechanism, judges should be required to explain their sentences. This will further due process at sentencing, enable appellate courts to develop appropriate common law sentencing principles, and provide feedback to commissions that will be useful in refining guidelines.

C. *Criminal Conduct*

One particular form of real-offense sentencing deserves special mention. One of the most unseemly aspects of the Guidelines is the fact that defendants are sentenced based on other alleged offenses for which they have not been convicted. After *Booker*, of course, this practice will no longer continue in the same way. However, the now-advisory Guidelines contain the same provision. As most sentences continue to be imposed within the applicable Guidelines ranges, this provision still has a significant effect on sentences.

A sounder, fairer policy would be that Guidelines ranges not be enhanced for conduct that could be the basis for a separate criminal charge. It is one thing to consider facts about an offense for which the defendant has been convicted. It is quite another to allow the government to bypass the trial or plea bargaining process but still obtain the sentencing "benefit" of the alleged criminal conduct. Several states already prohibit consideration of such conduct,[30] and it would be wise for the Federal Guidelines to be revised in this manner as well.

King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293 (2005) (in this Issue).

29. *See* Memorandum from John Ashcroft, Attorney General, Department of Justice, to All Federal Prosecutors, Regarding "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing" (Sept. 22, 2003) ("[I]f readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. Likewise, federal prosecutors may not 'fact bargain,' or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing."). For an insightful discussion of prosecutorial guidelines, see Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087 (2005).

30. *See, e.g.*, FLA. R. CRIM. PRO. 3.701(d)(11); MINN. STAT. ANN. § 244 app. II.D.103 (2005) ("[D]epartures from the guidelines should not be permitted for elements of alleged offender behavior not within the definition of the offense of conviction.").