POLICY ESSAY

Mandatory sentencing guidelines: The framing of justice*

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The U.S. Supreme Court's Blakely v. Washington (2004) (hereinafter, Blakely) and U.S. v. Booker (2005) (hereinafter, Booker) decisions surprised and caused considerable consternation among sentencing guidelines advocates. Many descriptions detail the Court’s decisions and their potential effect on the ability of guidelines to constrain judicial discretion (including earlier articles in Criminology & Public Policy; see Bushway and Piehl, 2007; Frase, 2007; Hofer, 2007). In Booker, the Supreme Court preserved the federal guidelines’ constitutionality by moving them from presumptive to advisory. This shift raised concerns that an advisory standard would undermine the guidelines’ ability to reduce sentencing disparity. Wooldredge (2009, this issue) tests the impact of the Ohio Supreme Court’s application of Blakely, with the Booker fix, on Ohio’s sentencing guidelines (State v. Foster, 2006; hereinafter, Foster). In this decision, the Ohio Supreme Court followed the lead of the U.S. Supreme Court in Booker, in which the Court found that the guidelines would be constitutional if they were advisory rather than presumptive. Wooldredge’s pre-post evaluation of the impact of the Foster decision found no major change in sentencing patterns. This outcome is unsurprising given earlier findings that Ohio’s sentencing guidelines had little impact on sentencing disparity. But the cause for little impact was best captured by Wooldredge, Griffin, and Rauschenberg (2005: 863) when they observed “the shift to determinate sentencing guidelines might have had a negligible effect on relationships involving extralegal characteristics simply because these relationships were weak to begin with.” Here, Wooldredge et al. (2005) suggested something worth noting, which is that little extralegal disparity existed preguidelines. But this assessment deals with a state in which the sentencing guidelines were less structured and less presumptive.

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than those adopted in Minnesota and Washington. Even under Minnesota's more structured and more presumptive guidelines, the long-term assessment was disappointing (Frase, 1993). The puzzle, then, is why has the sentencing reform movement yielded such a small impact?

The sentencing reform movement gained momentum from both liberals and conservatives. However, reformers either downplayed or failed to be aware of several issues. First, research tells us that sentencing was not as bad as it was portrayed to be by those who pressed for the need for sentencing guidelines. In part, the culture of the courts had developed an environment of going rates that tended to dampen sentencing disparities within the same courthouse. Second, the normative culture of the court community was resistant to the implementation of guidelines, and the research suggests that this resistance was probably important in the decreasing impact of guidelines in Minnesota and Washington. Third, the structure of guidelines contributed to their marginality.

### The Myth of the Sentencing Scandal


In the 1970s, the sentencing reform movement gained momentum as policymakers framed sentencing as being in “disarray.” Senator Edward Kennedy (1977: 1) expressed the following view:

Sentencing in America today is a national scandal. Every day our system of sentencing breeds massive injustice. Judges are free to roam at will, dispensing ad hoc justice in ways that defy both reason and fairness. Different judges mete out widely differing sentences to similar offenders convicted of similar crimes.

Framing sentencing as Kennedy did seemed to be widely accepted, but this position ignores research that suggests otherwise. First, John Hagan’s (1974) review of sentencing research found only a small relationship between offenders’ extralegal attributes and sentencing decisions. In a later review, Hagan and Bumiller (1983: 32) concluded that “the studies of race and sentencing done over the past decade collectively indicate that the relationship between race and sentence outcome is relatively weak.” Wilbanks’ (1987: 121) later review identified legal variables as more powerful predictors of sentences than extralegal variables, and the race effect is “not substantially significant.”
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But sentencing policy was being framed by data on the extremely disproportionate portion of prison populations that were minorities. This visually reinforced the presumption of racial discrimination louder than the research on sentencing decisions. The media’s widespread reporting of Maurer’s (1999) finding that a black male born in 1991 confronted a 29% chance of being imprisoned during his lifetime created for reformers a presumption of discriminatory sentencing practices. The disproportionate risk of incarceration for black males was an ominous finding, but the judiciary was not the major cause; however, their control of the most immediate decision resulting in imprisonment left them vulnerable to attack.\footnote{Other agendas were embedded in the sentencing reform movement, such as getting tough on crime and controlling prison populations, but always the key purpose was the reduction of sentencing disparity.}

As Wilbanks (1987) observed, preguidelines sentencing decisions were primarily determined by the legal factors of the severity of the offense and prior record. Extralegal factors such as race, age, and gender did affect sentences (Steffensmeier, Ulmer, and Kramer, 1998), but they were not nearly as influential as offense severity and prior record. Thus, preguidelines sentences were not as serious a disparity problem as characterized by reformers. Many sentencing reform efforts failed to consider how serious the disparity problem really was before endorsing the need for guidelines to resolve the problem. Furthermore, policymakers failed to consider whether guidelines might increase the severity of sentences in areas where large minority populations resided and thereby increase minority incarceration rates.

\section*{Court Communities as Context for Sentencing Reform}

The preguidelines quantitative research on sentencing is not inconsistent with the preguidelines qualitative assessments. Studies by Sudnow (1965), Eisenstein and Jacobs (1977), as well as Eisenstein, Flemming, and Nardulli (1988) found that judges and other court actors were embedded in a court community that established normative sentencing patterns. Thus, the work of Eisenstein et al. (1988) dispelled the view of sentencing judges as isolated individuals. This groundbreaking work studied nine counties in three states in the late 1970s and early 1980s. Three counties were in Pennsylvania where sentencing guidelines went into effect in 1982. Eisenstein et al. (1988: 297) concluded the following:

\begin{quote}
The community metaphor helps explain the predisposition that courts display to resist change. Take attempts to increase or decrease the penalties meted out for particular combinations of offenses and defendants’ prior records—that is, going rates. The content of a court’s going rates comes not from an automatic,
invariant mixture of Supreme Court doctrine and the provisions of state sentencing codes. Rather, going rates gradually evolve, shaped by environmental factors and day-to-day decisions by community inhabitants doing their jobs. The result is a routine that cuts the costs of calculation, reduces uncertainty, and helps produce similar outcomes in equivalent cases.

This observation raises two often missed issues in the sentencing reform movement. First, sentencing patterns were not as individually idiosyncratic as critics alleged. Second, preguidelines rules were in effect in the form of going rates for “normal crimes” (Sudnow, 1965). Eisenstein et al.’s (1988) point was not that reforms had no impact; rather, they foresaw, based on their research, significant challenges to the acceptance of guidelines by the court community and the normative patterns of going rates. This finding has important implications for sentencing guidelines and the reluctance to implement them without “adjustments.” Interestingly, an early component of the evaluation of Ohio’s sentencing guidelines involved a survey of judges and other criminal justice actors regarding their reaction to the implementation of the guidelines. One judge in responding to this survey captured the notions of the court community and going rates when he said the following:

It is most likely that, after a period of a few years, those involved in the sentencing phase of criminal justice will simply fall back into familiar patterns. Many judges and prosecutors will never sit down and analyze SB 2 in an attempt to modify current sentencing patterns. Many will avail themselves of those portions that seem most useful for their purposes. Few will acknowledge any [sentencing] factors that would restrict their options. Like all other legislation, it will soon be generally ignored, and those in authority, when asked why a certain sentence was recommended or imposed, will regress to the logic that “we have always done it like this” (Griffin and Wooldredge, 2001: 508–509).

Despite descriptive and broadly defined guidelines such as in Ohio, the gap between past practices and guidelines may be small and thus easier to neutralize. This Ohio judge’s response reflects what seems to have happened in Minnesota, where the guidelines were prescriptive and highly presumptive. As Frase (1993: 337) observed after 10 years of experience under the Minnesota guidelines:

Presumptive sentencing guidelines can reinforce existing norms and encourage system actors to follow them more consistently. Such guidelines can even effect modest changes in existing norms. But any guidelines—whether voluntary, presumptive, or mandatory—are unlikely to permanently alter state and local traditions and the strongly-held beliefs of the officials who control sentencing and releasing decisions.
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Policy Implications

One might conclude that the preceding discussion frames guidelines as unnecessary and that, if implemented, they will be unsuccessful in changing sentencing practices. Such a conclusion is not intended. Rather, the intent is to ensure that guidelines sentencing reform be evidence based and involve monitoring processes in addition to outcomes in the assessment of effects.

Build a Research Foundation

First, many sentencing reforms were based on little research. Once a sentencing commission was formed, then the commission generally collected data from which to build descriptive guidelines such as in Ohio and the federal guidelines and/or to serve as a basis for predicting the impact of the guidelines on prison populations. This was done, however, after a commitment to guidelines was made. Brandon Welsh and David Farrington’s (2005) challenge for evidence-based crime prevention here is extended to evidence-based policy development. This means that states considering such reforms in the future should carefully study current sentencing practices, analyze that data to ensure that guidelines are needed, and then determine where important changes are needed. In many cases, it may be discovered that inappropriate factors such as race (Steffensmeier et al., 1998) play a role in sentencing. No court would argue for the continuation of such practices, and this finding and guidelines that assist the court in curtailing the use of such factors have the potential for great credibility with the court community, assuming discrimination alienates judges and prosecutors who presumably view their decisions as racially neutral.

Recognize and Work with the Court Community

Second, the guidelines writing process has lost it way since Frankel’s (1973) admonition that sentencing lacks sufficient constraint on discretion. The policy of the guidelines being highly presumptive, such as the initial sentencing guidelines in Minnesota and Washington, sets in motion the potential for a significant backlash because these guidelines attempted to impose tight constraints on the courts.\(^2\) The key enforcement mechanism of guidelines is through appellate review. However, it does not take long for local courts to realize that sentences are infrequently appealed when

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2. The concept of degree of presumptiveness rather than the “mandatory” versus advisory concept is preferred because it allows for a continuum rather than the dichotomous category, and it avoids the misuse of the term “mandatory,” which generally refers to mandatory minimums.
agreements are reached between the defense and the prosecution (Frase, 1999). During a meeting with a judge in my early career as executive director of the Pennsylvania Commission on Sentencing, several members of the county public defender’s office stopped by. When told the focus of the meeting, one defender exclaimed, “Guidelines will make little difference in this county. On one case we will give in to a special request from the DA’s office, and on another, they will help us out.” As this comment suggests, presumptiveness may be a paper lion in guidelines compliance. Once the minimal risk of appeal is realized, a change from presumptive to advisory guidelines is likely to have minimal impact.

**Complexity**

Another policy challenge faced by guidelines advocates is the delicate balance between complexity and simplicity. The complexity-simplicity decision has significant implications for the credibility of the commission and its guidelines. The first commission-based guidelines were developed in Minnesota almost 30 years ago. Minnesota’s guidelines served as the model for many states. With 10 levels of offense gravity to capture offense severity, they represent a relatively simple approach. On the other extreme are the U.S. sentencing guidelines with 43 offense levels and much greater complexity in how offense behavior is distributed along these offense levels. The complexity of the federal guidelines, although intended to cope with the complexity of federal prosecutions and to reduce the opportunity to charge bargain, effectively gave more advantages to prosecutors (Stith and Cabranes, 1996). This complexity of the federal guidelines was detailed by Ruback (1998) when he calculated the number of combinations in the robbery guidelines and found more than 4,032 combinations of robbery and more than 18 million combinations when combined with acceptance of responsibility, victim-related adjustments, and role-in-the-offense factors.

Both Minnesota and the federal guidelines present serious public policy concerns if thoughtful, rational sentencing is the goal. Minnesota’s guidelines reduce the complexity of sentencing to a simple ranking of offenses. But this simple ranking oversimplifies the range of offenders that prosecutors and judges face. Each offense label is left to stand for this diversity of offenders with different degrees of culpability. One way of dealing with the simplicity of the measure is to provide wider sentencing ranges (such as in Pennsylvania), but wider ranges allow for greater undefined discretion or press the court community to “adjust” the guidelines through departures and manipulation. However, the federal guidelines created a level of complexity that was impossible for the commission to review carefully to ensure similarly defined offenses were ranked similarly. In
developing the measure of offense severity, commissions need to be cautious of both extreme simplicity and extreme complexity. Either approach can threaten the credibility of the commission and the acceptance of the guidelines both short term and long term. The court community will filter the measure and adjust the guidelines to find justice and fairness as it views it.

**Be Patient and Move Slowly**

Fourth, the guidelines process is evolutionary. The development of going rates evolves over time and the acceptance of credible guidelines requires patience. The court community will be more comfortable with departures when guidelines fail to comport with what seems reasonable, and it will conform when the result seems reasonable. An interesting line of research examined the anchoring effects of providing a benchmark to the court, and that is effectively what sentencing guidelines are intended to do. Birte Englich’s (2006) research suggests that, to the degree that the guidelines are the beginning point for the sentencing determination, they will anchor the decision. Englich’s studies with prosecutors and judges found that, even when the number was given at random, it affected judges’ decisions. This result suggests that the guidelines will influence sentencing, particularly for those offenses rarely confronted in court and for which the court community does not have a going rate.

**Conclusion: Sentencing’s Focal Concerns**

Finally, sentencing is complex, and those involved in guidelines development should be reminded of Jack Kress’s (1980: 9) observation that sentencing presents a challenge to the court:

> Sentencing judges want to reach just determinations—that is, to sentence each defendant fairly and properly. To do this, they seek to individualize each sentencing decision, assuring that the punishment fits the criminal as well as the crime. But there is also an overall equity dimension to sentencing, a desire to seek equal justice under law. These goals of equity and individualization are each primary, yet they conflict in theory; whole justice may only be achieved by a finely formed synthesis of these concepts.

Kress’s observation captures in part the focal concerns theory of decision making (Kramer and Ulmer, 2009; Steffensmeier et al., 1998). Focal concerns theory argues that judges focus on blameworthiness of the offender, community safety, and practical considerations in determining the appropriate sanction. These focal concerns mesh and conflict with guidelines. Blameworthiness is partially captured in the offense severity measure, and criminal history provides some assessment of risk to the community.
Moreover, guidelines that incorporate prison capacity constraints consider capacity as a practical consideration. Space does not permit a consideration of how well various guideline systems incorporate adequate assessments of focal concerns, but the literature tells us that each focal concern is important in decision making. Such a consideration would provide a balance sheet against which to assess when courts are likely to view the guidelines as failing to consider important factors.

References


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