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A Fresh Look at Offender Characteristics

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EDITOR'S OBSERVATIONS

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In 1996, the Staff of the U.S. Sentencing Commission released a number of Discussion Papers on topics ranging from "Departures and Offender Characteristics" to "Criminal History and Multiple Counts." The documents are part of the Staff's attempt "to facilitate public comment on improving and simplifying the sentencing guidelines." The release of these discussion papers is a welcome development, since it indicates the Staff's openness and willingness to engage in dialogue with the other parties in the sentencing arena about guideline modifications. This Issue is a response to the Staff's implicit invitation to provide constructive criticism and suggest further research to the paper entitled "Departures and Offender Characteristics."

I. Learning from the States' Experimentation with Guidelines

Before it presents "Options for Refinement" of the guidelines, the Staff paper provides some comparative perspectives by delving into a fairly short discussion of offender characteristics, departure standards, reasons for departure, unique provisions, appellate review and departure rates in four state guideline systems—Minnesota, North Carolina, Pennsylvania and Washington. This section on state comparisons triggered commentary from three of our authors. Robin Lubitz and David Boerner provide us with an in-depth view of two of the state guideline systems discussed in the Staff report, and Sandra Shane-DuBow suggests a number of areas of further research to the Staff.

Most striking about the three articles is the diversity between existing guideline systems. While discussions about sentencing guidelines often emphasize the federal system, it is eye-opening and exhilarating to note the impressive difference among state guidelines and between the federal and state systems. Sandra Shane-DuBow, a long-time sentencing consultant, highlights these diversities in examples which indicate how distinctly the same offender characteristics are treated in different guideline systems.

A. Judicial Consideration of Permissible and Impermissible Offender Characteristics

Underlying the differences between guideline systems are divergent assessments of the purposes of sentencing, as well as different value and resource judgments, which are evident in varying approaches to offender characteristics. Robin Lubitz, the Executive Director of North Carolina's Sentencing and Policy Advisory Commission, indicates that North Carolina incorporated only prior criminal history directly into the guidelines, since it was considered the sole offender characteristic relevant in all cases. Judges are then free to consider other offender characteristics in two ways. First, in typical cases, they can factor them in when selecting a specific sentence within the presumptive sentencing range, the first band of discretion. Second, based on explicit findings of aggravating or mitigating factors, judges may impose sentences within a second band of discretion. Departures beyond that second area of discretion, however, are not permitted. In comparison with the federal system, the second band provides greater limitation on the discretion of sentencing judges, but also more guidance on departures. Therefore, it seems to guarantee greater uniformity of all sentences.

Among the statutorily enumerated aggravating offender characteristics in North Carolina are whether the offender held public office at the time of the crime and the crime is related to conduct in that office and whether the offender supports her family. Among the statutorily enumerated mitigating offender characteristics are the offender's age and immaturity, good character, positive employment history, support of her family, and involvement in a substance abuse treatment program. In addition, the appellate courts have recognized the validity of sentences based on other non-statutory mitigating factors.

David Boerner, who helped draft Washington's Sentencing Reform Act and has served as an advisor to that state's sentencing commission for over 15 years, details a very different, much more rigid system. As for offender characteristics, Washington's guidelines deem only an offender's past and present convictions essential in setting a sentence. Judges can consider other offender characteristics solely in determining the precise point within the guideline band prescribed by offense characteristics and prior criminal record. In contrast to North Carolina, Washington's appellate courts have continually rejected departures based on such offender characteristics as age, drug dependency or parental status. The exclusive focus on the crime and the offender's criminal record is reflected in the Washington guidelines' statement of purpose: "The sentencing guidelines . . . apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant."

Jon Sands, a federal public defender from Arizona, describes what he views as an inequity in the federal system based on its unnecessary rigidity with regard to offender characteristics. In his view,

the neutrality provision which was designed to eliminate race-based inequality has proven particularly harmful to Native Americans—an always forgotten group in federal sentencing. He charges that reminiscent of earlier guideline discussions, the draft discussion paper also does not present any relief for Native American offenders as it might by, for example, allowing sentencing judges to consider their race, culture or socio-economic circumstances where relevant in sentencing. Rather, says Sands, some of the proposed modifications and simplifications could further harm Native American defendants in the sentencing process. Sands proposes a guideline amendment that would allow for departures based on the special status of Indians, which is inherent in the particular relationship between the federal government and the tribes. Sands also would like to see culture more generally included in sentencing when "motivation for the offense arises in a unique cultural context." His most ambitious and far-reaching proposal, however, encourages the Commission to study Indian offenses separately, and possibly even to fashion special guidelines for such crimes.

B. Greater Proportionality in Sentencing Non-Violent and Low-Risk Offenders

The guideline systems in North Carolina and Washington both allow for special mitigation for first offenders sentenced for a non-violent offense. Robin Lubitz and the Staff discussion paper mention that in certain limited offense categories and prior record levels, the court may impose an intermediate punishment if it finds "extraordinary mitigation." However, Lubitz also notes that the provision is employed very infrequently.

David Boerner writes that the legislature in Washington created an optional sentencing system for sex offenders and non-violent offenders—which includes even drug offenders who have no prior felony convictions and whose offenses involve only a small quantity of drugs—allowing judges to "impose a sentence similar to that authorized for probationary sentences under Washington's former sentencing system." The maximum period of confinement that could be imposed under this discretionary system is 90 days. For sex offenders, imprisonment can be suspended on condition that they participate in a community-based sexual offender treatment program. Sentencing judges are neither required to state their reasons for imposing such an alternative sentence, nor are their decisions subject to appellate review. In addition, for non-violent offenders short prison sentences may be converted to sentences in "work ethic camps." On the other hand, sex offenders whose criminal history indicates that they will pose a future danger to the community can receive upward departures.

The attempts to keep first offenders who have committed non-violent felonies out of prison in these two state systems might be worthy of emulation, or at least careful examination in the federal system. After all, under the current federal guidelines, the offenders who might be granted alternative dispositions in state systems are almost invariably subject to incarceration. A non-custodial solution for low-risk and non-violent offenders could be defended in light of the unique goals that their sentences serve, as opposed to the goals at issue when imposing sentences on high-risk, violent criminals.

II. Sentencing Purposes

Even though the "Options for Refinement" listed in the discussion paper under "Redesign" are rather far-reaching, they are restricted to the topic of offender characteristics and departures. While the suggestions go further than any previously enacted changes to the guidelines, they do not reflect a fundamental reconsideration of the treatment of offender characteristics. Our commentators, however, advocate a reorientation away from the search for technical refinement of the guidelines, and they call for a reassessment of offender characteristics in light of a ranking of sentencing purposes.

Continued uncertainty about the purposes of federal sentencing—retribution, deterrence, incapacitation, rehabilitation—is partly still attributable to the Sentencing Reform Act, which listed those purposes of sentencing without ranking or prioritizing them. As John Kramer notes, the Commission compounded the problem by asserting that, in most sentencing decisions, the just deserts and the crime control models lead to the same or similar results. He argues that this proposition cannot be accurate, especially since unwarranted disparities and the perceived randomness in pre-guideline sentencing might have been due to different judges being guided by different sentencing purposes.

In the state systems, the sentencing commissions or legislatures designated particular sentencing purposes as preeminent. In Washington, for example, the legislature explicitly called for just deserts to be the primary (but not exclusive) goal of sentencing, unless compelling reasons mandate the primacy of other goals. For purposes of its own deliberations, the North Carolina Commission prioritized the purposes of sentencing generally and then distinguished between incarcerative and non-incarcerative sentences. In Pennsylvania, the guidelines are based on just desert principles, but expressly allow for judges to consider different or additional purposes in imposing forms of punishment other than incarceration in the middle two of four sentencing levels.

As Sandra Shane-DuBow remarks, the applicable sentencing philosophy will determine which offender factors may justify departures. As a consequence, she asks the U.S. Sentencing Commission in the course of

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examining state systems to "[i]dentify the underlying purposes and principles of each guideline system" so as to better understand and assess the differences underlying the state guideline models. John Kramer goes even further. He urges the Commission to adopt one specific purpose as the main guide to sentencing in the federal system and to recognize the relevance of other purposes. As a consequence, sentencing courts would have discretion to reprioritize the sentence purpose in individual cases, if appropriate. As Kramer notes, a re-evaluation of the purposes of sentencing "may reveal new findings regarding the effectiveness of rehabilitation, deterrence and incapacitation. . . ." In addition, rethinking the purposes of sentencing might highlight the importance of offender characteristics that have been excluded from consideration in current guideline sentencing.

III. The Wisconsin Task Force Report

This Issue also reprints the report published in December 1996 by the Wisconsin Governor's Task Force on Sentencing and Corrections. The report indicates a radical departure from the public's and most policy-makers' current enchantment with incapacitation as the ultimate goal of sentencing. Rather than focusing on building more prisons as the sole instrument to protect the public and exact punishment, this report presents a novel approach to sentencing which also reconceptualizes the role of offender characteristics. While the Wisconsin report deems the promotion of public safety the supreme policy goal of sentencing, it does not propose to accomplish this goal by traditional means. Instead, the Wisconsin report looks toward "greatly strengthen[ing] the resources for controlling behavior in communities; [] creat[ing] new sentences; and [] abandon[ing] passive methods of supervision of offenders in favor of active ones." Under these proposals, the imposition of such non-custodial sentences will depend largely on the particular offender's characteristics, including his or her motive for offending. The Task Force identified 24 behavioral categories which require different assessment and distinctive responses. With regard to public order offenses, for example, the Task Force distinguished between those offenders who abuse controlled substances, "trouble makers," and those who are developmentally disabled or mentally ill. To decrease the risk these individuals pose to the community in particular places and at particular times, the court is called upon to consider the background of the offenders.

The rethinking of the purposes of punishment and of the role of offender characteristics in the sentencing scheme might hail the start of a new debate about sentencing. All of us in the sentencing field—whether Wisconsin residents or not—should have both an interest and a stake in the implementation of this Task Force report since, as David Boerner remarks, we can only learn from the experimentation that occurs in individual states.