

DON'T JUNK THE GUIDELINES

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AT LEAST FOR NOW

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The sentencing guidelines have provoked perhaps the greatest outcry of any aspect of the federal criminal justice system. Most judges, defense lawyers, and even many prosecutors despise the guidelines. At times the attacks have bordered on the vitriolic. I will never forget the moment last year when a federal judge (whom I respect deeply) told a guidelines seminar that "young prosecutors have used the guidelines to build their careers on the backs of young black and brown people." Why has there been so much unbridled hostility toward the guidelines, and what should be done about it?

While there have been many complicated academic analyses of the guidelines, the primary criticisms are straightforward: (1) along with mandatory minimum penalties, they produce sentences that are too harsh; (2) they transfer sentencing discretion from experienced, dispassionate judges to young, overzealous prosecutors; (3) they dehumanize the otherwise intensely human process of sentencing; and (4) they discourage plea bargaining, thereby increasing the already huge number of criminal trials. Whether or not these criticisms are valid is beside the point, because more and more people *believe* they are valid. The pressure to do something has become intense.

Most critics favor jettisoning the guidelines altogether in favor of a system in which loose "advisory guidelines" would guide judges in the exercise of sentencing discretion. Such a system would surely remedy, to some extent, the above criticisms. Whether it would accomplish Congress's goal of reducing unwarranted sentencing disparity is another matter.

Reducing unwarranted disparity was the overarching goal of the Sentencing Reform Act. The Senate overwhelmingly endorsed that goal, passing the Act by a vote of 99-1. Any alternative to the guidelines that would undermine the disparity-reduction goal should be considered

carefully, lest we return to the days when two similarly situated defendants would receive vastly different sentences from different judges in the same courthouse. No one wants that.

My own view, as a prosecutor who has practiced under and written about the guidelines, is that the criticisms of the guidelines are based on a limited number of cases that have been extrapolated into a condemnation of the entire system. Sound policymaking requires that we not junk the guidelines based on a few horror stories. The guidelines have been operating for only four years, since *Mistretta*. Commission statistics suggest that the guidelines *are* reducing sentencing disparity, and are *not* significantly reducing the percentage of guilty pleas. Moreover, law enforcement officials cite the guidelines as a significant factor in their ability to smash major drug organizations in recent years. Sentences in the white collar area no longer consist of slaps on the wrist. Wouldn't it be better, then, to allow the guidelines to function for at least a few more years, to allow sufficient time to study their impact based on an accurate and complete database, rather than on a small number of early missteps?

The guidelines are far from perfect. But they are far better than the *ancien regime* of rampant and unpredictable sentencing disparity. Give the guidelines a chance to prove themselves. Continue tinkering with amendments and modifications to eliminate glitches and inequities. Let the development of appellate law run its course.

I personally don't like the guidelines. They have made sentencing hearings long and boring. They have deprived me of the ability to use my own judgment to recommend sentences I think appropriate. And, to add insult to injury, they have subjected me to the charge of "building my career" on the backs of racial minorities. Never mind that I have prosecuted only rich white males for the last few years. Never mind that I would prefer not having judicial criticism leveled at me for a law I had nothing to do with passing. My point is that we should wait until the system has had enough time to operate—at least ten years—before deciding to eliminate it. At least then the decision will be based more on raw information than raw emotion.

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