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The framers of the Federal Sentencing Guidelines were right to be concerned about disparity; when similarly situated defendants receive dramatically different sentences, punishment is seen as a matter of judicial whim, not principle, and the criminal justice system loses some of its moral authority. The framers were also right to view Sentencing Guidelines as a helpful tool for achieving greater uniformity. But they were wrong to think that Guidelines should attempt to dictate sentencing consequences in a precise fashion for hundreds of different offense characteristics. As a result of their efforts to ensure additional punishment for nearly every significant way that offenders create incremental harm or danger, we have a notoriously complicated set of Federal Guidelines, far more detailed than any state has adopted. The Federal Guidelines are routinely compared to the tax code, and, like the tax code, have inspired frequent calls for simplification. Although this basic structural weakness of the Guidelines has been overshadowed in recent years by debates over crack cocaine sentencing and the meaning of *Booker*, simplification ought to remain very near the top of the federal sentencing reform agenda.

To be sure, simplification might be accomplished in any of a number of different ways, some of which would be even more pernicious than the existing system. For instance, Guidelines that merely assigned a specific sentence to each federal crime would be much simpler to administer than the current Guidelines but would ignore far too much of the variation among offenders who are convicted of violating the same statutory provision. The existing system is right to focus the sentencing judge's attention on commonly occurring "real-offense" characteristics that serve to distinguish more from less severe instances of the same crime. The problems arise from assigning specific weights to an excessive number of real-offense characteristics.

An excellent model for simplification appeared in these pages not so long ago. Building on a framework for federal sentencing reforms proposed by the bipartisan Constitution Project Sentencing Initiative, a small working group of sentencing experts developed a partial set of model Guidelines, which were published in the June 2006 issue of *FSR*.[1] From the standpoint of simplification, crucial features that differentiate the model Guidelines from the existing Guidelines include the following:

1. Only eleven offense levels on the sentencing grid, instead of the existing forty-three;
2. Wider sentencing ranges associated with each offense level (except at the very top and bottom of the offense level scale); and
3. Fewer specific offense characteristics triggering mandatory adjustments to the offense level.

For purposes of selecting a sentence within the wider ranges, the model Guidelines recommend (or, in some cases, require) consideration of additional offense characteristics.[2] The model Guidelines thus remove the mandatory weight assigned to many characteristics but still ultimately focus the sentencing judge's attention on much the same range of factors as the existing Guidelines. The model Guidelines thus avoid the crude categorizations associated with a charge-offense system or mandatory minimums.

Simplified Guidelines drafted along these lines would offer at least three important advantages over the existing Guidelines. First, the model Guidelines offer greater flexibility to make the sentence fit the crime. The attempt to ensure a more severe sentence for each increment of harm or danger caused by the defendant was misguided from the start. Real-world complexity means that sentence enhancements frequently interact in unexpected ways, with some nonviolent offenses triggering a multitude of small enhancements that result in longer sentences than would be authorized for some serious violent crimes.[3] Moreover, the obsessive focus on incremental harm and danger overshadows more subjective questions of motive and mental state that must play a central role in any morally sound effort to assess the seriousness of a criminal offense.[4] Simply put, our complex Guidelines make it hard to see the forest for the trees. A simplified Guidelines system, including healthy measures of discretion within wide ranges, would more clearly invite sentencing judges to assess specific offense characteristics within an appropriate, big-picture setting.

Second, simplified Guidelines better accommodate due process concerns. Whatever its failings, the *Apprendi* line of

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cases has served to remind us that process matters. Vitally important questions of human liberty turn on what facts are found at sentencing, and (quite apart from constitutional mandate) we owe it to our defendants to find those facts through reliable processes that offer a robust opportunity to be heard. At the same time, it is not administratively feasible to offer the full panoply of criminal procedure protections with respect to every real-offense characteristic that ought to be considered in a sound sentencing regime. The model Guidelines offer an attractive compromise: sentencing facts are distinguished, with the most important (those that determine the range) found using higher procedural protections than are used for the less important (those considered by a judge in determining the sentence within the range). By contrast, in the more complicated system, where a much larger number of facts are capable of moving the range, it is hard to imagine how enhanced procedural protections could realistically be afforded.

Third, a simplified system may more readily resist "factor creep." New sentence enhancements have been routinely added to the Guidelines in response to whatever happens to be the crime du jour, typically at the insistence of Congress and/or the Department of Justice. Although these sorts of amendments contribute to the forest/trees problem discussed earlier, it is hard to resist new enhancements when there are already so many in place, particularly when it is clear that existing enhancements are by no means limited to the most important aggravating circumstances. With a simplified system that gives range-determining effect to only a limited number of the most important considerations, it becomes easier to demonstrate why less important considerations should not be accorded the same status. If the political branches demand some symbolic recognition of a significant new public concern, this can be accomplished by adding factors to the "should consider" category used for determining the sentence within a range.

To be sure, some may argue that the restoration of judicial discretion pursuant to *Booker* has mooted most or all of the claims that might be made in favor of simplification. If the Guidelines are now merely advisory, why concern ourselves with their structure? Yet, as variance rates indicate, it is perfectly clear that the Guidelines continue to matter a great deal in the post-*Booker* world. Indeed, as long as sentencing judges are required to calculate the Guidelines range before exercising discretion, basic psychological principles suggest that this range will have an "anchoring" effect, shaping the final outcome in important, if subtle, ways.[5] In light of this reality, it is still very much worthwhile to get the Guidelines right.

Others may argue that the simplified system would invite too much judicial discretion and thereby return us to the bad old days of rampant disparity. But it is important to remember that the simplified ranges, while wider than the existing ranges, still tend to be much narrower than statutory ranges, meaning that judicial discretion will still fall far short of that exercised in pre-Guidelines days. More fundamentally, as a result of their clumsy and profligate enhancements, the existing Guidelines themselves draw many arbitrary distinctions among defendants—if this is a system of uniformity, then disparity no longer looks quite so bad. A system concerned with its moral authority does little better in choosing arbitrary rules of general application than it does in permitting arbitrary exercises of judicial discretion. A more balanced system that gives greater room for discretion to function in an open, principled manner should inspire more respect over the long run. The model Guidelines provide a framework for just such a system.

Notes

1 The Constitution Project's report on federal sentencing is excerpted at Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World*, 18 FED. SENT. REP. 310 (2006). For a description of the working group's composition and processes, see Frank O. Bowman III, *'Tis a Gift to Be Simple: A Model Reform of the Federal Sentencing Guidelines*, 18 FED. SENT. REP. 301, 303 (2006). In the interests of full disclosure, I should note that I was a member of the working group. It is perhaps also appropriate to note that the working group included practicing criminal defense lawyers but no current (only former) prosecutors. At the same time, there was no systematic effort to reduce sentences across the board, and, in any event, the structure proposed by the working group could be adopted independently of any particular severity judgments reflected in the model Guidelines. *Id*. at 306.

2 The working group was divided as to whether some of these offense characteristics, although not important enough to justify raising the entire range, should nonetheless result in an increase to the bottom of the range (thereby effectively reducing the scope of judicial discretion). *Id*. at 305-6.

3 Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT. REP. 249, 252 (2005).

4 *Id*. at 251.

5 Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) after* Booker, 37 MCGEORGE L. REV. 627, 645 (2006).