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Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure

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LOCALIZATION AND TRANSPARENCY IN SENTENCING: REFLECTIONS ON THE NEW EARLY DISPOSITION DEPARTURE

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LOCALIZATION AND TRANSPARENCY IN SENTENCING.
REFLECTIONS ON THE NEW EARLY DISPOSITION DEPARTURE

Michael M. O'Hear

Abstract: A newly authorized "early disposition departure" permits federal judges to reduce the sentences of criminal defendants who plead guilty quickly pursuant to a locally adopted early disposition program. The new departure mechanism provides the first formal mandate in the United States Sentencing Guidelines for "localization," that is, adjusting the sentences of federal defendants based on local circumstances. This paper provides a defense of localization, and suggests that localization may be reconciled with the Guidelines' overriding objective of transparency in sentencing. The early disposition departure provides a model of "transparent localization," but could be reformed so as to offer both more transparency and more localization.

Enacted by Congress in 2003, the "Feeney Amendment" is undoubtedly the most important new federal sentencing statute since the Sentencing Reform Act of 1984 ("SRA"), by which Congress created the United States Sentencing Commission. The SRA required the Commission to implement sentencing guidelines, which dramatically curtailed judicial discretion at sentencing. Two decades later, the Feeney Amendment generated considerable controversy by further restricting judicial discretion. Yet, the Feeney Amendment also addressed many other aspects of federal sentencing besides judicial discretion which are only now starting to come under scrutiny.

This Article concerns one of the most notable, yet most neglected, provisions of the Feeney Amendment: the formal authorization of early disposition (or "fast-track") programs. Such programs offer special

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The statutory language authorizing the implementation of early disposition programs reads:
sentencing benefits to defendants who plead guilty very early in the criminal litigation process; the goal is to encourage pleas that will save the government the time and expense of preparing for trial. What is most remarkable about the new “early disposition departure,” though, is not the explicit sentencing discount for guilty pleas; the Sentencing Guidelines have always included such a discount (albeit in a somewhat different form).5 Rather, the truly striking aspect of the early disposition departure is that this sentencing benefit will be available in only some of the nation’s ninety-four federal judicial districts. In order for the departure to be implemented in a particular district, the United States Attorney’s Office (“USAO”) in that district will be required to define the categories of eligible defendants in advance and to justify the need for its program based on particular local circumstances.6

The early disposition departure thus represents the first explicit authorization in the Guidelines for a process that I term “localization,” that is, the adaptation of federal sentencing laws to meet local needs and values. Localization contrasts with the ideal of national uniformity in sentencing, which would require all similarly situated federal defendants to receive a similar sentence, regardless of where geographically they happen to be convicted. In my view federal sentencing law has long over-emphasized national uniformity and disregarded the very important benefits of localization. Accordingly I am heartened by the basic premise of the early disposition departure. At the same time, the new departure provision (now set forth as section 5K3.1 of the Guidelines) has been implemented in ways that do not adequately respect localization values.

In developing these ideas, this Article proceeds as follows: Part I presents the theoretical case for localization. Part II considers whether localization violates the essential purpose of the Guidelines. Contrary to the views of some observers, the chief objective of the Guidelines regime is not

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5 See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (allowing a two-level decrease for acceptance of responsibility).

6 In order to implement an early disposition departure program, a USAO must obtain approval from the United States Attorney General. For a description of the specific criteria that will be used in reviewing proposed early disposition programs, see Memorandum From Attorney General John Ashcroft, United States Department of Justice, to All Federal Prosecutors (Sept. 22, 2003) [hereinafter Fast-Track Memo]. The Fast-Track Memo is described below in Part III.A.
national uniformity per se, but, rather, transparency in sentencing (reflecting such characteristics as certainty, predictability, and objectivity). Properly structured, localization does not necessarily contravene the transparency objective. Part III describes and evaluates section 5K3.1 and the criteria developed by the Attorney General to implement the new departure. Section 5K3.1 constitutes a new form of "transparent localization" in federal sentencing, but does not go far enough toward either transparency or localization. The Article concludes with reform proposals for section 5K3.1 and preliminary thoughts on adapting this new model of localization to address other problem areas in federal sentencing.

I. THE CASE FOR LOCALIZATION

Localization (tailoring federal sentences to take into account local circumstances), provides at least two significant benefits: it helps bring local values to bear in sentencing local crimes, and it facilitates the adaptation of national criminal justice policies to meet unique local crime-fighting needs. This Part describes the benefits in greater detail below, and then considers whether USAOs and district court judges, if given the opportunity, would tend to localize sentences any more effectively than Washington, D.C.-based institutions like Congress, the Sentencing Commission, and the Department of Justice. This is an important question because, in the absence of any players in the federal system who are meaningfully responsive to local needs and values, localization can never be more than a theoretical ideal.

A. Bringing Local Values to Bear

There can be little doubt that different communities across the country have wildly divergent views as to the severity of different offenses and the proper weighing of different variables in the sentencing calculus. These divergent views manifest themselves in a multitude of contexts. For instance, state penal laws vary widely in their severity. As one commentator has observed with respect to state drug laws:

In New York State possessing slightly less than an ounce of marijuana brings a $100 fine, if it's a first offense. In Louisiana possessing the same amount of pot could lead to a prison sentence of twenty years. In Montana selling a pound of marijuana, first offense, could lead to a life sentence, whereas in New Mexico selling 10,000 pounds of marijuana, first offense, could be punished with a prison term of no more than three years.7

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Reflecting such differences, incarceration rates also vary widely from state to state. While Louisiana, Mississippi, and Texas each imprison more than 700 people per 100,000 residents of the state, six other states imprison fewer than 200 per 100,000. Survey data likewise reveals "strong and consistent" regional patterns in public views of sentencing policy with New Englanders indicating the greatest leniency and Central Southerners the least.

There is no reason to view these differences of opinion as illegitimate, or even undesirable. One federal judge has offered the following example:

Possession of a firearm by a felon will be viewed markedly differently in Wyoming, where hunting is a way of life, and in the South Bronx, where a felon with a firearm is a threat to the community. Other things being equal, one would expect the citizenry of [Wyoming] to be much more tolerant of the weapons violator than would the New Yorker.

Who is to say that the people of Wyoming are right and the people of New York wrong, or vice versa?

In general, local values of this nature ought to play an important role in federal sentencing. Congress has endorsed "just punishment" as an appropriate purpose of sentencing. But how is a judge to determine what punishment is "just" without reference to community values? Since no objective measure of just punishment exists, public opinion must become the touchstone. The only question is which "public's" opinion ought to control: the opinion of the local public in the community in which the offense occurred, or the opinion of the national public as determined by policymakers sitting in Washington, D.C.?

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8 PAIGE M. HARRISON & ALLEN J. BECK, Prisoners in 2001 U.S. DEP'T OF JUST., OFF OF JUST. PROGRAMS, BUREAU OF JUST. STAT. BULL. (2002), reprinted in 15 Fed. Sent. Rep. 66, 67 (2002). The states with the lowest incarceration rates are Maine (127 per 100,000 residents), Minnesota (132), and North Dakota (161). Id.


12 See Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1, 17 (1998) (noting failure of proponents of "just deserts" theory of sentencing to "produce a convincing, objective way to rank criminal behavior").
In order to maximize overall citizen satisfaction, public choice theory suggests a general preference for local values over national. A nationally uniform sentencing guideline in this area would presumably reflect an average of all citizens' views on the gravity of the offense. This national average would probably leave many citizens unhappy. The people of Wyoming (and many other states) might find the resulting sentences unduly harsh, while the people of New York (and many other states) might find the resulting sentences unduly lenient. By contrast, if each community were allowed to determine for itself what sentence to apply then fewer citizens would feel dissatisfied with the sentences handed down in their local courthouses (which are presumably the sentences that people care about the most).

Indeed, Congress itself seemed to recognize this point when it created the Sentencing Commission in 1984. The Commission was expressly required to consider the relevance of "the community view of the gravity of the offense" when drafting the Guidelines. Unfortunately the Commission did not accept Congress's invitation at the time to incorporate local values into the federal sentencing calculus.

To be sure, local values ought to give way to national values in some categories of cases. Consider, for instance, a securities fraud case involving large numbers of investors spread across the nation (as might be represented by the Enron case). In such a case, citizens across the country would have a legitimate interest in the outcome and might rightly feel aggrieved if any sentence imposed were based on the idiosyncratic local values of the place of prosecution. Other cases of this nature might include terrorism and national security cases, prosecutions of multi-state criminal enterprises, and antitrust cases involving national or international markets.

But the great run of criminal cases involves far more localized concerns: illegal weapons or drug possession, retail drug trafficking, bank robbery, local political corruption, police brutality, low-level frauds, and the like. In these sorts of cases, the people in the communities affected by the crimes have a uniquely compelling interest in the sentences imposed and their views accordingly ought to play a uniquely important role in determining the sentences.

B. Adapting Sentencing Practices to Meet Local Crime Control Needs

"Just punishment" is not the only recognized purpose of punishment; Congress has also mandated that sentences reflect crime control objectives,
represented by such familiar concepts as incapacitation and deterrence. In this context, too, local perspectives may have a unique value. Much as "just punishment" for a particular type of crime varies from one community to the next, so, too, does the optimal crime control strategy. Thus, for instance, where stern sentences might have a salutary deterrent effect in some communities, the same sentences might be counterproductive in others. After all, the prospect of a harsh sentence may discourage defendants from entering guilty pleas. When defendants litigate, they consume scarce judicial and prosecutorial resources, potentially interfering with the apprehension and prosecution of other offenders. In short, from a crime control perspective, the decision about whether to impose harsh or lenient sentences implicates trade-offs. The optimal balancing point may depend on unique local circumstances, such as local crime rates; the relative capabilities and resources of federal, state, and local law enforcement agencies; and the extent and nature of organized gang activity.

By way of illustration, consider the unique circumstances of the so-called "southwest border districts," i.e., the federal judicial districts that lie on the Mexican border from Texas to California. By virtue of their location, these districts experience extraordinarily high levels of illegal immigration and drug smuggling offenses. Given resource constraints, large numbers of these cases might slip through the cracks if prosecutors were unable to secure quick guilty pleas in most cases. Accordingly, in the mid-1990s, prosecutors in the southwest border districts began to offer special "fast-track" sentencing benefits to defendants who pled guilty in a sufficiently prompt fashion. The new policies had a dramatic effect. For instance, the fast-track program in the Southern District of California led to a six-fold increase in annual prosecutions of criminal alien cases between 1994 and 2001. Thus, while strict application of the Guidelines might have been appropriate in other districts with different caseloads or resource constraints, the reduction of sentences through special plea-bargaining practices may have represented a better crime control strategy in the southwest border districts.

Once again, Congress recognized as far back as 1984 that local crime control needs varied and that sentencing practices might have to be adapted to meet local needs. Specifically Congress asked the Commission to consider the relevance of "current incidence of the offense in the community" when drafting the Guidelines. Yet, once again, the Commission declined the opportunity to incorporate localization explicitly into the Guidelines.

19 Id.
C. Responsiveness of Federal Officials to Local Values and Needs

Assuming that local values and needs ought to play an important role in federal sentencing, it is not necessarily clear that United States Attorneys and federal district court judges have the right incentives to be responsive to those values and needs. After all, they are unelected officials, appointed by the President in Washington and lacking any direct accountability on the local level. Would they not tend to have a national, rather than a local, perspective on crime and punishment?

While formal local controls may be missing, there is nonetheless good reason to believe that these local actors are substantially more in tune with local values and needs than are policymakers in Washington. At the most basic level, federal judges and prosecutors do not ride a national circuit; they live in the same communities in which they work, and they must necessarily develop a sense of the opinions and circumstances of those communities. Additionally while they do not themselves hold political office, they are selected through a process in which local political leaders (especially the local United States Senators) often play a prominent role. This helps to ensure that federal judges and United States Attorneys have views that are in line with those of the local political establishment. Moreover, once appointed, United States Attorneys are subject to ongoing influence from their legislative patrons, which may be exercised, for instance, through congressional hearing powers. Finally United States Attorneys (and perhaps, much less frequently federal judges) may harbor political ambitions of their own, nicely illustrated by Rudolph Giuliani's rise from United States Attorney to Mayor of New York City. The politically ambitious United States Attorney will have special incentives to conform office practices to local values and needs.

Indeed, even in the pre-Feeney federal sentencing system, which gave no explicit endorsement for localization, there is good reason to believe that local actors adapted the Guidelines to meet local values and needs. The original fast-track departures in the southwest border districts may be the best example, but additional data suggest even more widespread and systematic localization. Indeed, by some estimates, fast-track programs were ultimately adopted in as many as one-half of the nation's judicial districts. More generally federal sentences under the Guidelines have varied substantially from one district to the next. For instance, researchers have found important inter-district differences in policies and practices relating to

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21 For a discussion of the mechanisms by which federal prosecutors are made accountable to legislators, see Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 U.C.L.A. L. Rev. 757 789-93 (1999).
23 O'Hear, National Uniformity, supra note 9, at 745-47
"downward departures" from the sentencing ranges prescribed by the Guidelines. Based on their influential analysis of drug sentencing patterns over the last 10 years, Professors Frank Bowman and Michael Heise provocatively suggest that, "in place of a single uniform national sentencing system, the guidelines have created a network of separate local and regional systems, in each of which the front-line sentencing actors have established a distinct "equilibrium" as to "the commonly occurring issues in Guidelines application." In short, localization is likely already a well-established feature of federal sentencing. The next Part, however, will suggest some legitimate concerns with the current state of affairs.

II. LOCALIZATION AND THE PURPOSE OF THE FEDERAL SENTENCING REGIME

Localization may be an appealing objective for federal sentencing, but it is surely not the only appealing objective. Indeed, one objection to localization is that it runs contrary to what one court has called the "theoretical underpinnings" of the Guidelines: that is, the promotion of "uniformity among federal courts [across the nation] when imposing sentences for federal crimes." This claim, however, overstates the centrality of national uniformity to the federal sentencing regime. In lieu of national uniformity this Part will suggest that the real animating principle of federal sentencing should be seen as transparency. Using transparency as the chief criterion, this Part will then evaluate federal sentencing practices focusing particularly on the fast-track programs.

A. Federal Sentencing Reform: One View of the Cathedral


26 United States v Snyder, 136 F.3d 65, 69 (1st Cir. 1998).

27 I borrow this phrase from Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV 1089 (1972). In offering one view of their subject, Calabresi and Melamed acknowledged the value of alternative views: their article was "meant to be only one of Monet's paintings of the Cathedral at Rouen. To understand the Cathedral one must see all of them." Id. at 1089 n.2 Similarly, I acknowledge that other persuasive accounts of federal sentencing reform are possible. The point of this Section is not to provide a single, comprehensive theory of federal
In order to understand the "theoretical underpinnings" of the Guidelines, there can be no more authoritative source than Judge Marvin E. Frankel's celebrated indictment of pre-Guidelines sentencing, Criminal Sentences: Law Without Order. Frankel's book, widely credited with developing and promoting the concept of a sentencing commission possessing law-making authority has been called the "cornerstone" of the federal sentencing reform efforts in Congress in the 1970s and 1980s. Indeed, Senator Edward Kennedy himself – the principal sponsor of the bill in 1984 that created the Commission and authorized the Guidelines – has called Frankel the "father of sentencing reform."

Frankel's book grew out of his experiences as a federal district court judge in the era of indeterminate sentencing. Under this regime, judges imposed sentences within broad ranges, typically extending from probation up to a statutory maximum term of imprisonment. With virtually no appellate review of sentences, district court judges exercised vast discretion. A parole board would ultimately set the actual release date of prisoners, but within constraints determined by the judge's sentence. The sentencing judge thus played a crucial role in determining the magnitude of criminal punishments, but operated with little guidance from either the legislature or the appellate courts.

Lying at the heart of his critique, Frankel argued, in the strongest terms, that the indeterminate system violated bedrock rule of law principles:

> [O]ur laws characteristically leave to the sentencing judge a range of choice that should be unthinkable in a "government of laws, not of men."

> [T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.

Frankel emphasized that this system deprived defendants of the ability to anticipate what punishments they would receive:

\[\text{sentencing, but to demonstrate that there are alternatives to common accounts that emphasize national uniformity, and that these alternative views are at least as persuasive.}\]


\[30\] Id.

\[31\] Id. at 225-26.

\[32\] Id. at 226-27 In general, release dates could not occur before one-third, or after two-thirds, of the sentence imposed had actually been served. Id. at 227

\[33\] FRANKEL, supra note 28, at 5.
[F]ederal trial judges, answerable only to their varieties of consciences, may and do send people to prison for terms that vary in any given case from none at all up to five, ten, thirty or more years. This means in the great majority of federal criminal cases that a defendant who comes up for sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between.

Defendants and their lawyers are able to anticipate within broad ranges in a fair number of cases. It is unlikely that the convicted murderer will be freed on the spot—though he may be. There are cases (depending on the judge) in which probation is a good bet, though not a sure thing. But the law as it is written, and as it operates upon hapless defendants, is not significantly more knowable or predictable than the unregulated sentencing provisions indicate on their face.  

Frankel contrasted this sentencing system with the norms found elsewhere in the law which seek to provide citizens with more meaningful advance notice of the consequences of their actions:

In most matters of the civil law while our success is variable, the quest is steadily for certainty predictability, objectivity. The businessman wants to know what the tax will be on the deal, what the possible “exposure” may be from one risk or another. His lawyer may predict more or less successfully. But what no businessman wants (if he is honest) is a system of “individualized” taxes and exposures, depending upon who the judge or other official may turn out to be and how that decision-maker may assess the case and the individual before him.  

Frankel’s triumvirate of “certainty predictability objectivity” – the norms around which he built his influential reform proposal – will be referred to here, for shorthand’s sake, as “transparency.

Frankel saw transparency as not only an essential component of the rule of law – and thus integral to our most fundamental notions of justice – but also as an important contributor to the rehabilitation of prisoners:

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34 Id. at 6.
35 Id. at 10.
The absence of any explanation or purported justification for the sentence is among the more familiar and understandable sources of bitterness among people in prison. Philosophers have agreed for ages on the ideal that the person suffering punishment should be guided to understand and, in the ultimate hope, realize the justice of the affliction. Our practice of terse dispositions is at the opposite pole. The splatter of varied sentences, with the unexplained variations left to be seen as random or worse, nourishes the view that there is no justice in the law.

The prevalence of this resentful outlook is attested by prisoners themselves, by attentive jailers, and by other students of the subject. More than one writer has taught that the hope of rehabilitating offenders is blighted at the inception by this rankling sense of injustice.

Frankel's ideal of transparency in sentencing seemed to possess several distinct features. First, sentences should be based on a set of guidelines ("a detailed chart or calculus") identifying the set of relevant considerations and the weight to be given each. Second, the guidelines should be amenable to objective application; at sentencing, distinctions should not be made among defendants "unless they can be justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyncratic ukases of particular officials." Third, defendants and others should have the opportunity to "persuade or enlighten" the judge as to the application of the guidelines. Fourth, sentencing decisions should be explained; "[s]ecret decisions bear no credentials of care or legitimacy." And, fifth, sentences should be subject to meaningful appellate review (which is, of course, greatly facilitated by the development of detailed sentencing guidelines).

These five objectives (detailed guidance, objective criteria, hearing rights, public explanation, and appellate review) were ultimately embodied (to a greater or lesser extent) in the 1984 law that produced the Commission and the Guidelines. Indeed, in the statute Congress - echoing Frankel - mandated that the Commission, in promulgating the Guidelines, pay "particular attention" to providing certainty and fairness in sentencing.

36 Id. at 42-44.
37 Id. at 113.
38 Id. at 11.
39 FRANKEL, supra note 28, at 113.
40 Id. at 49, 108.
41 See id. at 84-85, 113.
Thus, the Guidelines were to categorize offenses and offenders, and to establish narrow sentencing ranges applicable to each, leaving comparatively little unguided discretion to the sentencing judge. For purposes of creating the categories, Congress identified eighteen specific criteria that the Commission might take into account. For purposes of applying the Guidelines (once drafted), Congress required that a presentence investigation report (PSIR) be prepared by a probation officer in each case, and that the report be shared with the defendant in advance of sentencing, presumably to ensure that defendants would have a fair hearing on issues raised by the PSIR. Congress further required that the sentencing court “at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.” Finally Congress provided for appellate review of sentences, including their conformity with the Guidelines. There should be little surprise that while Frankel later expressed some discomfort with the way the Commission implemented the Congressional scheme, he initially welcomed the 1984 law as a “promising experiment.”

Thus far, I have presented the case that transparency and the rule of law not national uniformity ought to be regarded as the overarching purpose of the Guidelines system. At the same time, it must be acknowledged that there is a relationship between national uniformity and transparency a truly uniform national sentencing system in which similarly situated defendants all across the country would receive similar sentences for similar misconduct would likely be marked by a high degree of transparency. It is difficult to imagine anything approaching national uniformity in the absence of detailed, objective guidelines and searching appellate scrutiny of sentences. Thus, a system that strove to achieve national uniformity above all else would likely advance the cause of transparency at the same time, even if only incidentally.

However, while national uniformity might be one way to achieve transparency it is not the only way. For instance, we might imagine a system in which each district adopted its own local sentencing guidelines, much as each district presently has its own set of local rules of procedure. Such local guidelines might be as detailed and objective as the current Federal Guidelines, or perhaps even more so, thereby providing all parties with ample predictability and certainty in sentencing. Indeed, in the real world, local guidelines might deliver considerably more transparency than national guidelines. Local guidelines might be better adapted to local needs

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44 28 U.S.C. §§ 994(c)-(d).  
and values, and local prosecutors and judges might be less inclined to try to circumvent them.\footnote{Some scholars have found circumvention to be common under the current system in at least some districts. See, e.g., Schulhofer & Nagel, supra note 24, at 1292. Circumvention effectively supplants the written Guidelines with the idiosyncratic preferences of judges and prosecutors, thereby raising substantial transparency concerns.}

In any event, the central point here is that our current system is not premised on national uniformity. Frankel was concerned with bringing the rule of law to sentencing; he did not identify national uniformity as an end in and of itself, or even as a preferred means to the end of transparency. Nor did Congress, in bringing Frankel’s vision to life, seem to place any particular emphasis on national uniformity. Quite the contrary Congress authorized the Commission, when drafting the Guidelines, to take into account such local considerations as “community view of the gravity of the offense” and “current incidence of the offense in the community.”\footnote{28 U.S.C. § 994(c)(4), (7) (2000).} Indeed, Congress went so far as to authorize the Commission to modify the Guidelines with respect to particular defendants based on the community view of the gravity of the offense.\footnote{28 U.S.C. § 994(s).}

To be sure, along with certainty and fairness in sentencing, Congress also emphasized the reduction of “unwarranted sentencing disparities” as a central purpose of the Guidelines.\footnote{28 U.S.C. § 994(f).} Proponents of national uniformity rely on this language in claiming statutory support for their position.\footnote{See, e.g., Snyder 136 F.3d at 68-69.} Yet, properly understood, the language is merely question-begging. When is a sentencing disparity “unwarranted”? When two similarly situated defendants are sentenced differently in different districts based on genuine differences in community values or crime-fighting needs, can we truly call the disparity “unwarranted”? The statute provides no explicit answer to this question, but sections referencing community views and circumstances at least implicitly suggest a response in the negative.

\section*{B. Transparency and Federal Sentencing Before Feeney}

Despite the promise that Frankel saw in the 1984 law, the Guidelines regime has not fulfilled expectations of delivering transparency in sentencing. One problem—largely lying beyond the scope of this Article—is the complexity of the Guidelines. While Frankel endorsed the concept of detailed, objective guidance, he did not foresee the possibility that they might be too much of a good thing. In practice, the Guidelines frequently require the sentencing court to conduct fact-finding on a multitude of distinct sentencing criteria (e.g., drug quantities, role in the offense, use of a gun). As the contingencies multiply each with its own particular effect on the...
applicable Guidelines range, the predictability of the sentence to be imposed evaporates.

Transparency has also been undermined by two other aspects of the Guidelines that bear more directly on the concerns of this Article. First, the Guidelines left charging and plea-bargaining largely untouched.\(^{56}\) Thus, while judges are now subject to detailed guidance in determining a sentence, prosecutors have broad discretion in determining the offense of conviction, which establishes the statutory parameters within which a sentence must be imposed and constitutes the starting point for Guidelines analysis. Moreover, while the Guidelines, in theory mandate “real-offense” sentencing (sentencing based on the defendant’s actual conduct, not the offense of conviction),\(^ {57}\) prosecutors are not likely to undermine their own plea deals by seeking a sentence that goes beyond the scope of the offense of conviction. Indeed, in conjunction with plea-bargaining, prosecutors may agree with defendants to a set of stipulated facts upon which the sentence will be based.\(^ {58}\) Additionally in plea-bargaining prosecutors may agree to make, or at least not oppose, a motion to depart downward from the applicable Guidelines range (about which more will be said shortly). In short, prosecutors have considerable power to control how cases are sentenced, particularly the great majority of cases that are resolved by way of plea-bargaining. That power, however, is subject to none of the transparency constraints otherwise emphasized in the Guidelines; there is no binding guidance on plea-bargaining and no meaningful judicial review to ensure that it is conducted in an even-handed manner. Where defendants were once subject to the whims of the judge at sentencing, they are now subject to the whims of the prosecutor.

Second, the Guidelines created an ill-defined departure mechanism that empowered judges to sentence outside the prescribed range in two different circumstances: (1) when the government moves for departure on the ground that the defendant “has provided substantial assistance in the investigation or prosecution of another person who has committed an offense”\(^ {59}\) and (2) when “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that prescribed.”\(^ {60}\) Because it is premised on a government motion, the substantial assistance departure puts considerable sentencing power into the hands of prosecutors, where it may be exercised in an uncontrolled and unpredictable manner. Because of vagaries in the standards governing both forms of departure, different

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\(^{56}\) See, e.g., Breyer, supra note 12, at 30. “The Guidelines seek to change existing plea bargaining practices only slightly. *Id.*

\(^{57}\) U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(b).

\(^{58}\) U.S. SENTENCING GUIDELINES MANUAL § 6B1.4(a).

\(^{59}\) U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

\(^{60}\) U.S. SENTENCING GUIDELINES MANUAL § 5K2.0.
prosecutors and judges have interpreted the scope of the departures powers quite differently. Overall, departures have become increasingly common, amounting to more than one-third of all cases. Moreover, once the court decides to grant a departure, the Guidelines say hardly anything about the appropriate scale of the departure. Before the Feeney Amendment, appellate review was subject to the deferential abuse of discretion standard. Thus, the departure mechanism has also likely worked to undermine the transparency in sentencing envisioned by Frankel: it is hard to say in advance whether it will be available in any given case, and, if so, how great a benefit it will provide to the defendant.

The pre-Feeney fast-track programs illustrate some of the issues. Set up by prosecutors, these programs would provide some special benefit (such as a departure motion or a favorable charge bargain) to specified categories of defendants for a quick plea. While judges could reject the deal, they almost never did so because of their interest (shared with prosecutors) in resolving cases quickly. Thus, prosecutors really controlled the administration of the fast-track benefits. While USAOs may have developed detailed guidance on when the benefit should be given, the system lacked at least three hallmarks of a transparent sentencing regime: public explanation, public hearing opportunities, and outside review of the key decisions. In particular, the prosecutor’s decision to deny a fast-track benefit to a particular defendant could be made in secret without any sort of an appellate process.

Deeper transparency problems lay at a programmatic level. USAOs were not subject to guidance with respect to when it was appropriate to adopt a fast-track program, or what might be included in such a program. The public had no right to be heard in the process of developing a program. No explanation was required of the decision to adopt (or not adopt) a program, and no outside review was available to determine if the decision was adequately justified. Indeed, an adopted program might have been inconsistent at a fundamental level with the Guidelines themselves. Thus, fast-track programs justifiably gave rise to public perceptions of the very lawlessness in sentencing to which Frankel objected.

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61 O'Hear, National Uniformity, supra note 9, at 746-47
64 For a thorough assessment of the fast-track programs, see Laura Storto, Getting Behind the Numbers: A Report on Four Districts and What They Do “Below the Radar Screen” 16-34 (2001) (unpublished manuscript on file with the author).
65 Id. at 26.
In short, the fast-track programs, perhaps the quintessential form of pre-Feeney localization in federal sentencing, fell short of the transparency ideals embodied in the Guidelines system. They point to the need for formal localization mechanisms within the Guidelines themselves, mechanisms that operate in a manner that is transparent from the perspective of defendants and the public at large.

III. The Feeney Amendment's Early Disposition Departure

Localization existed prior to the Feeney Amendment, but lacked structure and clear authorization in the Guidelines, and developed in a somewhat secretive and unsystematic manner through departures, plea-bargaining and charging practices, and a myriad of case-by-case Guidelines application decisions. Viewing this messy and opaque state of affairs, members of Congress might reasonably reach the conclusion that Frankel's ideals of the rule of law had been seriously compromised. Passage of the Feeney Amendment seems to represent, among other things, an attempt by Congress to enhance the transparency of federal sentencing.

Indeed, many of the most notable features of the Feeney Amendment can be explained with reference to this objective. First, the Feeney Amendment seeks to rein in prosecutorial discretion in plea-bargaining – one of the great pieces of unfinished business left from the 1984 law. In particular, the Attorney General is asked to adopt new policies and procedures to "ensure that Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law."67 Second, the Feeney Amendment also imposes new restrictions on the ability of district courts to employ the departure mechanism. Not only are departures now subject to de novo review in the courts of appeal,68 but the Commission has also been directed to amend the Guidelines to reduce the frequency of departures.69

Of greatest interest for present purposes, though, the Feeney Amendment also attempts to bring the local fast-track programs within the Guidelines structure by creating a new early disposition departure. It is here that the Feeney Amendment most clearly grapples with the challenge of reconciling localization and transparency. Accordingly this Part begins with a description of early disposition departure, both as it has been established in the statute and as it has been implemented thus far by the Sentencing Commission and the Department of Justice. Next, this Part will evaluate the early disposition departure as a model for transparent localization.

67 PROTECT Act § 401(l)(1).
68 PROTECT Act § 401(d)(2).
69 PROTECT Act § 401(m)(2)(A).
A. The New Departure

In terse language, the Feeney Amendment authorizes an up to four-level "downward departure" for defendants who plead guilty pursuant to an authorized early disposition program.\(^7\) While denominated a "departure, the new provision differs from the Guidelines' pre-existing departure provisions (sections 5K1.1 and 5K2.0) inasmuch as the magnitude of the departure is subject to an explicit cap (the defendant's "offense level" is reduced by up to four levels\(^7\)). Additionally the departure is not automatically available in all districts. Rather, the departure will only be available in districts that adopt an early disposition program and obtain approval for that program from the United States Attorney General.\(^7\) Thus, the Feeney Amendment provides, for the first time, a clear basis in the law for the locally initiated fast-track programs. At the same time, by capping benefits at four levels and requiring Attorney General authorization, the Feeney Amendment subjects the fast-track programs to much greater centralized control.

While the Feeney Amendment mandated creation of the new departure, Congress left it to the Sentencing Commission to make the particular Guidelines amendments necessary to implement the departure. Thus, the Commission has promulgated new section 5K3.1, which largely tracks the statutory language in authorizing a downward departure of not more than four levels.\(^7\) Departure requires a motion from the government made pursuant to an authorized early disposition program. The Commission provided no additional guidance for the new departure. For instance, while the Commission suggested that the sentencing court will have discretion in deciding whether to grant a departure ("the court may depart"), the Commission did not provide a standard to govern this exercise of discretion.\(^7\) Nor did the Commission identify any particular circumstances in which the court might appropriately deny a government motion. Likewise, other than capping the departure at four levels, the Commission did not offer any guidance as to the proper magnitude of departure.

The Attorney General offered his own set of implementation principles for "fast-track" departures in his memorandum to all U.S. Attorneys dated September 22, 2003 (the "Fast-Track Memo").\(^7\) These principles will play a crucial role in determining what effect section 5K3.1 ultimately has, because Attorney General authorization is a necessary

\(^{70}\) PROTECT Act § 401(m)(2)(B).

\(^{71}\) Under the Guidelines, a defendant's sentencing range is determined based on a combination of the defendant's offense level and the defendant's criminal history. The actual effect of reducing the offense level by four depends on the initial offense level and the criminal history, but may amount to several years' imprisonment in some cases.

\(^{72}\) PROTECT Act § 401(m)(2)(B).

\(^{73}\) U.S. SENTENCING GUIDELINES MANUAL § 5K3.1.

\(^{74}\) Id.

\(^{75}\) Fast-Track Memo, supra note 6.
prerequisite to granting an early disposition departure. Pursuant to the Attorney General's Memo, in order to obtain authorization to operate an early disposition program, a USAO must demonstrate that:

(A) (1) the district confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited "fast-track" basis would significantly strain prosecutorial and judicial resources available in the district; or (2) the district confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases;

(B) declination of such cases in favor of state prosecution is either unavailable or clearly unwarranted;

(C) the specific class of cases consist of ones that are highly repetitive and present substantially similar fact scenarios; and

(D) the cases do not involve an offense that has been designated by the Attorney General as a "crime of violence."\footnote{\textit{Id.} at 2.}

The Fast-Track Memo also identifies certain features that will be required of all authorized early disposition programs. In order to qualify for departure, for instance, the defendant will have to plead guilty "within a reasonably prompt period after the filing of federal charges."\footnote{\textit{Id.}} Additionally the defendant must agree to a factual basis that accurately reflects the offense conduct and must also waive Rule 12(b)(3) motions, appeals, and post-conviction challenges under 28 U.S.C. § 2255.\footnote{See \textit{id.} at 3. An exception to the § 2255 waiver is permitted for claims of ineffective assistance of counsel.}

Some matters are left to the discretion of the USAOs. For instance, each qualifying USAO may determine the magnitude of the departure (up to four levels), or choose to leave the question to the sentencing judge.\footnote{See \textit{id.}} Alternatively the USAO may employ charge-bargaining in its fast-track program, so long as the resulting sentence reductions are "commensurate with" the authorized downward departure.\footnote{\textit{Id.} Charge-bargaining contemplates a promise by the prosecutor to dismiss (or not file) some charges in return for an agreement by the defendant to plead guilty to less serious charges.}
B. Evaluation: Section 5K3.1 and Transparent Localization

The Feeney Amendment seems to bring new transparency to fast-track programs. At the most basic level, giving explicit authorization to fast-track sentencing addresses perceptions of lawlessness, that is, the persistent sense that fast-track programs violate the spirit, if not the letter, of the Guidelines regime. Furthermore, at a programmatic level, the Feeney Amendment and its implementing documents also bring a new measure of transparency. In particular, the Attorney General's Fast-Track Memo offers guidance for the first time on when a fast-track program may appropriately be adopted, and requires an explanation for such a program at the time of its proposal.

Section 5K3.1 may thus be viewed as something of a model for localization within the Guidelines regime. The early disposition departure demonstrates the political viability of bringing local circumstances and values to bear in an explicit and meaningful way in determining federal sentences.

At the same time, the new departure falls short of our transparency ideals in several important respects. Broadly speaking, section 5K3.1 replicates one of the basic errors of the Guidelines regime by placing too much power in the hands of prosecutors and permitting that power to be exercised without public explanation or external review.

Consider the uncertainties facing a defendant in a district that has an approved early disposition program. Even assuming that the program has clear, detailed, objective criteria, the prosecutor ultimately determines how and if, those criteria will be applied in any given case. Defendants have little assurance that the criteria will be applied in an even-handed manner. Defendants have no right to be heard on the applicability of fast-track, no right to an explanation if the prosecutor refuses to make an early disposition motion, and no right to judicial (or other external) review of the prosecutor's decision.

Even if the defendant wins a motion from the prosecutor, considerable uncertainty remains. Section 5K3.1 provides that a judge "may" grant the motion, but the judge need not do so. While judges will presumably defer to prosecutors in most cases, the uncertainty remains, exacerbated by the absence of any guidance from any source as to what may justify the denial of an early disposition departure motion. Will the judge be expected to conduct an independent inquiry into whether the defendant has complied with the terms of the early disposition program? Will the judge have discretion to deny a departure because the resulting sentence would violate the judge's view as to what a just sentence would be?

Similar uncertainties surround the magnitude of the departure. Section 5K3.1 indicates that a departure may be as much as four levels, but does not offer any guidance as to how much a judge should depart within the range of one to four (which, depending on the case, may result in a swing of
several years of imprisonment for the defendant). Prosecutors may or may not make a recommendation in this regard, and the judge may or may not accept such a recommendation if it is made. And, if the final sentence imposed leaves the defendant disappointed, it is not clear how a defendant could obtain meaningful appellate review in the absence of any real legal standards to apply in the Section 5K3.1 determination.

Uncertainties also plague section 5K3.1 at the programmatic level. While the Feeney Amendment and the Fast-Track Memo are to be applauded for bringing some transparency to the process of creating fast-track programs, important gaps remain. Most fundamentally the public lacks any ability to participate meaningfully in the process, such as the familiar notice and comment procedures in administrative law. Moreover, while USAOs must justify proposals to initiate an early disposition program, there is no requirement that decisions not to make a proposal be justified. The public has no formal mechanism to prompt local consideration of a section 5K3.1 program, and no way to be assured otherwise that the local USAO has given due consideration to the possibility of adopting such a program. In short, the transparency (such as it is) works asymmetrically: the procedural safeguards apply only to the adoption of a program, not to the refusal to adopt a program.

Furthermore, if the process created by the Attorney General may be criticized as inadequately transparent, it is equally subject to criticism as insufficiently supportive of localization. In particular, the Attorney General has been unduly restrictive in the criteria adopted for early disposition programs. For instance, the Fast-Track Memo suggests that such programs should be limited to “exceptional circumstances,” although the statute contains no such limitation. In pre-Feeney practice, early disposition programs were routine, not exceptional, and Congress has not indicated that it wished to change that practice. Other criteria (no crimes of violence, highly repetitive fact patterns, etc.) likewise lack a clear justification and may result in unnecessary limitations on the ability of USAOs to adapt federal sentencing local circumstances.

C. Improving the Early Disposition Departure

To some, the preceding comments may suggest that section 5K3.1 strikes an appropriate balance: if the provision can be criticized from both a transparency and a localization perspective, then it avoids going too far in either direction. However, such a response wrongly assumes that transparency and localization are in zero-sum balance. This Section suggests that there may be ways to improve the early disposition departure such that it is both more transparent and more respectful of localization values.

\[\text{Fast-Track Memo, supra note 6, at 2.}\]
Beginning at an abstract level, we might ground the analysis in a basic procedure/substance distinction. Transparency values are essentially about procedure (i.e., how the sentence is determined), while localization is fundamentally concerned with substance (i.e., what the sentence is, in relation to local values and circumstances). While the precise boundaries between substance and procedure are admittedly imprecise, the conceptual distinction may nonetheless help better define what aspects of the early disposition departure should be subject to nationally uniform federal standards and what aspects should be put in the hands of local actors. Specifically the federal government (in the form of Congress, the Commission, and/or the Attorney General) should act to enhance the transparency of the procedures relating to early disposition departures (at both the programmatic and case-specific levels). This would work to reduce the substantive constraints on the ability of local actors to design and implement their own early disposition programs. A more specific reform agenda is outlined below.

1. **Provide for Greater Public Participation in Program Creation**

Part I of this article presented the case that the various USAOs are likely responsive to local values and circumstances. At the same time, that responsiveness can only be enhanced if the public has an opportunity to participate in important decisions like the creation of an early disposition program. Moreover, such participation will help to reassure the public that the USAO is acting in a principled manner based on clear criteria when it implements (or chooses not to implement) an early disposition program.

At a minimum, public participation should include notice and comment rights in connection with the Attorney General’s consideration of whether to approve a proposed program. More ambitiously the public could have a role in the USAO’s consideration of whether to propose a program (and, if so, the consideration of how the program would be structured). Either way, in order to assure some measure of respect for the public’s role, the decision-making agency should provide a public explanation for its decision to authorize (or not to authorize) an early disposition program, and address significant issues arising from the public comment process.

2. **Refocus AG’s Criteria for Program Approval**

Consistent with localization values, early disposition programs should be approved by the Attorney General when they can be justified by reference to local circumstances. There is no good reason to decree *a priori* that such programs will be "exceptional." If USAOs can routinely justify

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82 Fast-Track Memo, supra note 6, at 3. “These programs are properly reserved for exceptional circumstances.” *Id.*
early disposition benefits in light of local values and crime-fighting needs, then routine they should be. Likewise, the Attorney General should eschew program criteria that would serve, without good reason, to limit the flexibility of USAOs in designing programs that actually address local circumstances. The prohibition on including crimes of violence within early disposition programs might amount to just such an artificial constraint. Because of the particularly high levels of public concern surrounding violent crime, one imagines that USAOs would not generally wish to provide special sentencing benefits to violent offenders. But if a USAO nonetheless chose to include some categories of violent crime within an early disposition proposal, that proposal should not be rejected out of hand.

The Attorney General's criteria should instead focus the attention of USAOs (and interested members of the public) on what really matters in this context: would the proposed early disposition benefit facilitate the prosecution of federal offenses that would otherwise not be prosecuted at all (or at least not be effectively prosecuted)? And, would the benefit still allow for a sufficiently high level of punishment in light of community values? Assuming both questions are answered in the affirmative, there should be a strong presumption in favor of approving the proposal.

3. **Require Clear Objective Departure Criteria**

To obtain approval, an early disposition program should define precisely what a defendant is required to do in order to gain the early disposition benefit. The program should also define the magnitude of departure available in each type of case covered by the program. Leaving defendants in doubt as to such important matters would give rise to just the sorts of perceptions of arbitrariness in sentencing that were of such concern to Frankel.

4. **Remove the Prosecutor's Role as Gatekeeper**

The early disposition departure should not require a prosecutor's motion. Prosecutorial decision-making is a black box; without required explanation or review such decision-making contravenes the transparency ideal. Instead, the judge should have the final say in determining whether the defendant has complied with the requirements of the early disposition program. If these requirements are satisfied, then the departure should be granted. Judicial decision-making is preferable to prosecutorial decision-

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83 One additional consideration may be whether the proposal encompasses categories of offenses that are more genuinely national than local in nature. Such offenses (national security crimes, international drug trafficking enterprises, frauds on national securities markets, and the like) should be excluded from early disposition programs because the public choice justification for localization in those cases is relatively weak.
making because of the established requirements of due process in the courtroom, explanation of the sentence, and appellate review

This reform would reduce, but by no means eliminate, prosecutorial discretion in implementing the section 5K3.1 departure. For instance, the prosecutor might choose to charge a case so as to remove it from the scope of the early disposition program. Relatively weak counts might be added to the indictment, and then dismissed once the time has passed for the defendant to comply with the terms of early disposition program. Judges should have the authority to inquire into complaints of prosecutorial manipulation of this nature, and to depart downward where such a remedy is necessary to correct a manifest injustice.

IV CONCLUSION

De facto localization has likely been a persistent feature of federal sentencing. For the first time, though, the Guidelines have now incorporated a form of de jure localization through Section 5K3.1. De jure localization is preferable to de facto because it is more consistent with the transparency ideals that undergird the Guidelines. Section 5K3.1 thus represents an important and underappreciated breakthrough in federal sentencing law.

At the same time, section 5K3.1 (and the Fast-Track Memo necessary for its implementation) does not go far enough. Because it leaves too much unreviewable discretion, exercised outside of public view in the hands of prosecutors, the public cannot be assured that the new departure mechanism will be implemented in a consistent, principled manner. Because the Attorney General has adopted unnecessarily restrictive review criteria, few districts may have the ability to adopt early disposition programs that would help to adjust federal sentences to local realities. This Article has suggested a number of reforms to address these deficiencies.

Whether reformed or not, the successes and failures of section 5K3.1 should be monitored carefully in the coming years. The provision may prove to be a helpful model for focused, transparent localization in other areas of the Guidelines. Perhaps most urgently, the substantial assistance provision requires significant restructuring. Section 5K1.1 has been implemented quite differently from district to district. This de facto localization raises important transparency concerns. Substantial assistance has been plagued by perceptions of arbitrariness and bias in its application. Reform might involve the development of clear, objective, nationally uniform standards; however, this approach would likely be resisted in many districts. Such a reform would not only be difficult to enforce, but (to whatever extent the new standards were successfully implemented) would hinder the ability of

84 “De facto localization” refers to the real-world fact of localization, as noted above in Part I.C. “De jure localization” refers to a formal recognition of localization in the law.

85 MAXFIELD & KRAMER, supra note 24, at 15.
local actors to adapt sentences to meet local circumstances. Instead of the nationally uniform approach, a better reform strategy might be to adopt the section 5K3.1 model. Each district would be given the opportunity to develop its own substantial assistance standards through an open, deliberative process, subject to review by the Attorney General to ensure compliance with the basic goals of section 5K1.1 and the ideals of transparent sentencing.

Proponents of the Guidelines regime have often acted as if that regime were fundamentally incompatible with localization. The Feeney Amendment has wisely rejected that position. Yet, the new section 5K3.1 departure is only a starting point in the process of bringing a new transparent localization to federal sentencing.