FOREWORD

A GLOBAL PERSPECTIVE ON SENTENCING REFORMS

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The articles published in this issue of *Law and Contemporary Problems* examine the effects of different sentencing reforms across the world. While the effects of sentencing reforms in the United States have been studied extensively, this is the first symposium that examines the effects of sentencing guidelines and alternative policies in a number of western legal systems from a comparative perspective. This issue focuses on how different sentencing policies affect prison population rates, sentence disparity, and the balance of power between the judiciary and prosecutors, while also assessing how sentencing policies respond to temporary punitive surges and moral panics.

The effects of sentencing guidelines are highly contested and debated among scholars. As a result, there are a number of outstanding questions regarding the actual effects of such guidelines. For instance, do sentencing guidelines transfer sentencing powers from the judiciary to prosecutors? Should the guidelines bear some of the responsibility for the surge in prison population in the United States? Has the lack of guidelines helped Germany constrain its prison population? Do sentencing guidelines help mitigate the effects of punitive surge, or, on the other hand, do they facilitate the punitive effect of moral panics? Do guidelines effect racial and ethnic disparity in sentencing? And how should guidelines be structured?

While previous studies analyzed some of the effects of sentencing reforms, many of those studies focused on the U.S. Sentencing Guidelines. This issue provides a broader insight from a global viewpoint, including studies of England and Wales, Australia, Germany, and Israel. It also gives a post-*Blakely*[1] and post-*Booker*[2] perspective of American sentencing guidelines.

Julian Roberts in his contribution reviews the recent developments in the Sentencing Guidelines in England and Wales.[3] Apart from the United States,

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1. Blakely v. Washington, 542 U.S. 296 (2004).

2. United States v. Booker, 543 U.S. 220 (2005).

3. Julian V. Roberts, *Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 1.

England and Wales have the most developed sentencing guidelines system. However, unlike most American guidelines, the guidelines in England and Wales do not rely on a grid system with a specific presumptive sentence or a narrow sentencing range. Instead, England and Wales promote uniformity of approach by prescribing a sequence of steps for courts to follow when sentencing an offender. In addition, the guidelines allow sentencers wide discretion to depart from them when it is in the interests of justice to do so.

One of the key functions of sentencing guidelines is to constrain both legislators and sentencers from periodic surges of punitiveness. In August 2011, mass riots took place in a number of English cities, creating an unexpected challenge for the English sentencing guidelines. A number of courts held that the offenses were so far removed from conventional offenses that the sentencing guidelines were rendered irrelevant. An early judgment of a lower court outlined new (harsher) "guidelines" for offenders involved in the riots. These unofficial guidelines were immediately followed by a number of other courts.

Although the Court of Appeal criticized Crown Court judges for issuing or appearing to issue new guidelines, it endorsed the position that riot-related offenses are of a nature and gravity not envisaged by the original sentencing guidelines, and that courts could thus be justified in departing from the original guidelines. It therefore seems that the official guidelines did not serve to curtail the punitive effect of the temporary public outcry that followed the riots.

England and Wales represent a useful model for exploring the difficulties sentencing guidelines have in containing novel or unexpected waves of punitive surges. In contrast, the U.S. federal sentencing system shows how, by giving legislators a tool for directly influencing sentencing, guidelines can boost the effects of moral panics on sentencing. Carol Steiker highlights the risks of direct legislative intervention by showing how Congress—unperturbed by the concerns of the sentencing commission and the judiciary—used the sentencing guidelines and statutory mandatory minimums to increase sentences for crack cocaine and child pornography offenses.[4] Steiker discusses how the course Congress dictated did particular violence to the Guidelines' ostensible commitment to ensuring "just punishment." As she explains, the notorious 100-to-1 crack–powder disparity—which had crack offenses triggering the same weight-based penalties as were attached to 100 times as much powder cocaine—resulted in unduly severe sentences falling primarily upon black offenders. It also resulted in far harsher sentences for street-level crack dealers than for the higher-level powder cocaine traffickers who had supplied them. The extraordinary severity of these sentences abated somewhat after the Supreme Court rendered the guidelines advisory, giving some of the sentencing power back to judges, and, in the case of crack, after years of legislative efforts bore

4. Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 27.

fruit. Yet the imprint of Congress's moral outrage on these sentences remains clear, deep, and troubling.

While Steiker demonstrates how guidelines can lead to excessively severe sentences, Dan Richman uses a very different class of cases to show how guidelines can push judges to give due attention to national policy concerns and to resist undue solicitude for the defendants before them.[5] In the United States, federal cases involving high-end white collar defendants are relatively rare, but they attract considerable attention and test the system's ability to navigate difficult waters of social inequality and political economy. Recounting the recent history in this area, Richman suggests that the system has yet to find a balance. Although a key aspect of federal sentencing reform was to ensure that the social background of these offenders would not enable them to avoid prison sentences—a goal that Congress soon intervened to promote in its usual heavy-handed way—the post-*Booker* world has seen a return to discretion and, sometimes, striking leniency.

Compulsory and quantitative guidelines regimes, similar to the pre-*Booker* U.S. guidelines, may restrain judicial sentencing discretion—but at a high cost. In a bid to ensure consistency, the sentencing guidelines rely heavily on quantifiable factors. After all, if the numeric rigid guidelines rely on vague terms, discretion resurfaces when those terms are interpreted. However, when "just deserts" is the underpinning principle of sentencing, quantifiable factors are not always the most important consideration in determining the punishment. Steiker and Richman demonstrate how the extensive reliance on quantifiable factors in the U.S. Sentencing Guidelines often results in an arbitrary distribution of sentences. As Steiker highlights, relying on the weight of cocaine in the drug offense context or on the number of images in the child pornography context leads to obscure allocation of sentences. After all, the weight of the drugs and the number of child pornography images are weak proxies for the culpability and dangerousness of offenders. Similarly, Richman highlights that the heavy reliance on the loss created by the white collar crime (or on the gain to the offender) leads to a "substantial likelihood that a preliminary quantifiable task will distort the larger qualitative project in which it is embedded."[6] Finally, Steiker and Richman discuss how the problems with the American federal guidelines can be avoided by other jurisdictions.

One of the enduring questions emanating from the sentencing guidelines research is whether the U.S. Sentencing Guidelines have reduced unwarranted sentencing disparities based on the offender's race, ethnicity, and gender. Reducing these disparities through sentencing guidelines is problematic, partly because the disparities emerge from decisions taken at pre-sentencing stages. Cassia Spohn, in her contribution, analyzes data on drug-trafficking offenses in three U.S. district courts to examine whether the effects of the offender's race,

5. Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 53.

6. *Id.* at 70.

ethnicity, and sex are mediated by whether the offender was detained prior to the sentencing hearing or given a substantial-assistance departure, and whether the effects of the offender's race and ethnicity are conditioned by the offender's sex.

Spohn finds that an offender's sex directly affects all three outcomes. Male offenders receive longer sentences than female offenders, probably because men are associated with danger, threat, and culpability. On the whole, males are also disadvantaged at earlier stages in the process: they are more likely to be held in custody and less likely to receive a substantial-assistance departure.

Spohn's results also illustrate that an offender's race and ethnicity have both direct and indirect effects on sentencing, but also that these effects are confined to male offenders. Black offenders and Hispanic offenders are sentenced more harshly than white offenders because they are more likely than white offenders to be detained prior to the sentence hearing. Among female offenders, race and ethnicity does not affect sentence severity either directly or indirectly. Spohn concludes that the combination of race, ethnicity, and sex triggers attributions of dangerousness and threat in the minds of judges and other criminal-justice officials.

Although the U.S. Sentencing Guidelines have received much attention and criticism, only two percent of criminal cases in the United States are handled by the federal system. The sentencing regimes of the fifty states have attracted much less attention. Kate Stith, in her contribution, examines the history and operation of sentencing in Washington State, an earlier leader in the development of sentencing guidelines in the United States.[7] A number of goals motivated Washington's presumptive-sentencing-guidelines reforms, including a desire to combat unwarranted sentencing disparities, to create greater transparency and uniformity in the sentencing process, and to promote a punitive philosophy of "just deserts." However, there is an inherent tension between the ideals of just deserts and uniformity on the one hand, and the practical reality of limited resources on the other. For instance, reducing disparities in Washington by confining judicial discretion to "exceptional cases" led to an increase in incarcerated offenders. With limited resources, and unable to accommodate such an increase in the prison population, Washington decided to expand the discretion of trial judges to impose more non-prison sentences.

Washington's thirty years of presumptive sentencing guidelines have yielded mixed results. Stith highlights that Washington's system, unlike the federal sentencing guidelines, has managed to avoid skyrocketing sentences and has curtailed prosecutorial control over sentencing. Yet Washington's sentencing regime is not without its own weaknesses. Like the U.S. Sentencing Commission, Washington has implemented arbitrary measures of compliance in measuring its success, while largely ignoring covert forms of sentencing disparity. Meanwhile imprisonment rates and prison costs continue to rise. Still,

7. Kate Stith, *Principles, Pragmatism, and Politics: The Evolution of Washington State's Sentencing Guidelines*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 105.

as of 2008, Washington spends less per person than other states on its prison and corrections costs, and it imprisons fewer of its convicted offenders.

One of the key reasons countries introduce sentencing guidelines is to reduce judicial discretion and unwarranted disparities in sentencing among the judiciary. However, it is highly debatable whether the U.S. Sentencing Guidelines in particular achieve this objective. Many researchers argue that, while judicial disparities may have been reduced, the guidelines shift sentencing power to prosecutors, and as a result disparities resurface through unfettered prosecutorial discretion. This is a key concern for other jurisdictions which are considering enacting sentencing guidelines. Following such concerns, Hagit Turjeman, Gideon Fishman, and I examine data from Israel to assess whether sentencing guidelines are likely to transfer sentencing power from judges to prosecutors in the Israeli system.[8] The data analyzed includes sentencing outcomes for offenders convicted of aiding illegal aliens.

Contrary to our hypothesis, we found that prosecutors did not gain direct sentencing power from the guidelines. In fact, judges were often willing to depart from harsh guidelines even when they were supposed to be bound by them and when prosecutors asked them to follow the guidelines. The severe guidelines might have had an effect on defendants, leading them to believe that they should plea bargain with the prosecutors. But when defendants did not bargain they managed in most cases to convince the court not to follow the harsh guidelines, even if prosecutors objected to the requested downward departure. The findings question whether sentencing guidelines in Israel can achieve their goals. After all, not only are prosecutors able to circumvent such guidelines but so too are the courts.

Determinate sentencing reform has gained much prominence in the United States but has not obtained similar influence in other western legal systems. Ely Aharonson's article focuses on the reasons for this.[9] After illustrating the differences in sentencing policies among the United States and other common law and continental European jurisdictions, Aharonson explores the political and institutional factors shaping cross-national differences in the regulation of sentencing discretion.

Aharonson explains that America relies on determinate sentencing laws to curtail the exercise of discretion, to ensure a consistent and restrictive approach to sentencing, and to ensure that severe sentences are ordered by judges. Determinate sentencing models of legislation were not widely adopted outside the United States because of the different structural conditions shaping the processes of criminal lawmaking and the institutional processes of reviewing sentencing decisions.

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8. Oren Gazal-Ayal, Hagit Turjeman & Gideon Fishman, *Do Sentencing Guidelines Increase Prosecutorial Power? An Empirical Study*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 131.

9. Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 161.

Unlike the United States, other Western countries try to insulate sentencing policymaking from populist pressures due to a commitment to the values of individual sentencing. One of the major differences between the U.S. Sentencing Guidelines and other Western sentencing systems is that in many European jurisdictions the constitutional doctrines of proportionality and human dignity limit sentence severity, while in the United States sentences only need to meet the minimal threshold of avoiding "cruel and unsusual punishment."

The doctrines of proportionality and human dignity described by Aharonson are among the founding principles of sentencing policies in Germany, as Tatjana Hörnle describes in her contribution.[10] Germany has no sentencing guidelines, but rather uses sentencing policies to guide judges in making their decisions. Despite the sentencing-guidelines discourse emerging across the world, according to Hörnle, reform is not on the political agenda in Germany. The penal code in Germany prescribes general upper and lower sentencing limits for offenses. These limits leave a wide spectrum of possible sentences in most cases. In spite of concerns that wide judicial discretion could result in significant sentence disparity, Germany has not made any attempt to curtail such discretion.

Hörnle argues that the German sentencing system as it is, without any sentencing guidelines, works rather well overall. Providing a short overview of available statistical data, Hörnle concludes that sentencing in Germany appears to be fairly consistent, not too disparate, and moderately severe. One explanation for this phenomenon is that the appointment procedure for judges is neutral and meritocratic. Also, legal education has ensured that German judges have a deep-rooted and strong commitment to the value of proportionality and justice and equal skepticism about deterrence through harsh sentences.

Hans-Jörg Albrecht provides additional insights and potential explanations for the stability of German sentencing practices and sentencing outputs in the last four decades.[11] In the late 1960s German legislators gave priority to day fines, which are fines that correspond to the defendant's income and the severity of the offense. Day fines replace almost all sentences of up to six-months imprisonment. Since the late 1960s four out of five criminal sanctions imposed are day fines.

Another method of curtailing sentence severity is to exclude incapacitation as a consideration in sentencing. Germany has adopted a two-track system of criminal sanctions: criminal punishment (which requires a finding of guilt and the determination of a fine or a prison sentence proportionate to the offense) on one track, and rehabilitation and protection of public security on the other.

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10. Tatjana Hörnle, *Moderate and Non-Arbitrary Sentencing Without Guidelines: The German Experience*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 189.

11. Hans-Jörg Albrecht, *Sentencing in Germany: Explaining Long-Term Stability in the Structure of Criminal Sanctions and Sentencing*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 211.

The second track helps to restrain the use of more-severe criminal punishments. Because judges are aware that protective measures can be implemented before an offender is released, they avoid imposing longer sentences for incapacitation purposes. Hence, Albrecht concludes, the two-track system helps to ensure a balance between punishment, rehabilitation, and protection of the public from harm, without boosting sentences.

Academics have undertaken countless studies on the constraints and uncertainties characterized by sentencing policies and practices. Leslie Sebba takes an introspective look at such studies and presents a skeptical view of the conclusions formed from empirical research on sentencing.[12] He reviews the conceptual and methodological issues arising in the course of sentencing research and the evaluation of sentencing reforms, and argues that the complexity of the sentencing process results in insurmountable difficulties for sentencing research. There are innumerable variables operating at both the micro and the macro levels, often affecting both the sentencing process and the outcome of its reforms.

Sebba discusses the multiplicity of variables potentially impacting a sentencing decision (whether directly or indirectly) and the potential interactions between them, together with questions relating to the legitimacy of such variables in light of competing sentencing aims. These issues undoubtedly contribute to a lack of uniformity in the findings of evaluative research in this area. Given the many imponderables of sentencing reform and sentencing research, Sebba concludes that it is difficult to rely on such research when making policy decisions.

There is an inherent tension between individualized sentencing and consistency. Many U.S. jurisdictions give more weight to consistency, while German sentencing is much more individualized; meanwhile, England and Wales have taken a middle ground. As Sarah Krasnostein and Arie Freiberg show, Australia favors individualized sentencing over consistency.[13] The High Court of Australia has stated that there is no single correct sentence for each offense; instead, there may only be a range of permissible sentences.

Other high court judgments also emphasize the need to ensure that sentencing is tailored to individual cases. For instance, an attempt to implement a type of presumptive-sentence regime in New South Wales failed when the High Court held that this type of presumptive sentence could only be considered as a "circumstance" that has little effect on the sentences that should be imposed.

However, measures have been implemented to increase consistency in sentencing in Australia. One of the measures, for instance, is sentencing

12. Leslie Sebba, *Is Sentencing Reform a Lost Cause? A Historical Perspective on Conceptual Problems in Sentencing Research*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 237.

13. Sarah Krasnostein & Arie Freiberg, *Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 265.

information, including official sentencing statistics and sentencing information systems, providing judges with qualitative and quantitative data about sentences. The authors conclude by stating that better quantitative and qualitative data are needed to understand the extent of unjustified disparity as well as the effectiveness of the measures introduced to minimize it.

With all contributors exploring the changes that need to be made to sentencing across different Western legal systems, Mandeep Dhami, in her contribution, explores what she considers to be missed opportunities in revising the sentencing guidelines in England and Wales following the introduction of the new Sentencing Council in 2010.[14] She argues that the new guidelines should have placed more emphasis on psychological understanding of human judgment and decision making, on the experience of guidelines development, and on sentencers' own views about the guidelines.

To ascertain the views of sentencers, Dhami conducted a survey of a sample of Crown Court judges. The survey examined their views on the old sentencing guidelines and how they could be improved. From the findings, Dhami concludes that the sentencing guidelines need to be more comprehensive and easy to follow, use less text and more numerical information, provide a full list of the aggravating and mitigating factors relevant for a specific offence, and be more detailed in several other respects. Ultimately she argues that improving the structure and format of guidelines can help develop a standardized, holistic document that better achieves the goals of sentencing guidelines.

The articles in this issue are the outcome of a conference on sentencing reform that was held at the University of Haifa, Faculty of Law in February 2011. The conference and this issue address the effects of sentencing reforms from a global perspective, relying mainly on empirical research. The result is, as in most such attempts, incomplete. But we did come closer to answering some of the pressing questions—though only to find out that many new questions hide behind the answers to the old ones. It seems that sentencing, a topic that has been the focus of academic debate for centuries, will continue to attract this much needed attention for centuries to come.

14. Mandeep K. Dhami, *Sentencing Guidelines in England and Wales: Missed Opportunities?*, 76 LAW & CONTEMP. PROBS., no.1, 2013 at 289.