

# PURSUING CONSISTENCY IN AN INDIVIDUALISTIC SENTENCING FRAMEWORK: IF YOU KNOW WHERE YOU'RE GOING, HOW DO YOU KNOW WHEN YOU'VE GOT THERE?<sup>1</sup>

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## I

### INTRODUCTION

Sentencing in Australia is founded upon two premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.

While there is an inherent tension between the premises of individualized justice (“individualism”) and consistency (“comparativism”),<sup>2</sup> they both are fundamental to a fair sentencing system. These paradigms are not dichotomous but points at the ends of a spectrum, along which a balance can be struck.<sup>3</sup> In practice, sentencing judges do not act at either extreme. In Australia, the current balance heavily favors individualism over consistency.

In recent decades, common law jurisdictions have developed measures to reduce unjustified disparity in sentencing and generally encourage consistency of approach or outcome in like cases. Unjustified disparity violates fundamental tenets of the rule of law and the right to equality, erodes public confidence in

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1. With apologies to Anthony Doob, *The United States Sentencing Commission Guidelines: If You Don't Know Where You Are Going, You Might Not Get There*, in *THE POLITICS OF SENTENCING REFORM 199* (C.M.V. Clarkson & Rod Morgan eds., 1995).

2. James Jacob Spigelman, *Consistency and Sentencing*, 82 *AUSTL. L.J.* 450, 450 (2008). The problem is an old one. See, e.g., Leon Radzinowicz & Roger Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 *U. PA. L. REV.* 1288 (1979).

3. See Arie Freiberg & Sarah Krasnostein, *Statistics, Damn Statistics and Sentencing*, 21 *J. JUD. ADMIN.* 73 (2011).

the administration of justice, and has costly resource implications. Although the pursuit of this aim is noncontroversial, its manifestations are not. In particular, there is disagreement about the nature of disparity and a paucity of evidence regarding its extent. More problematically, there is a lack of evidence regarding the effectiveness of the measures that have been introduced to eliminate it.<sup>4</sup>

In this article, the competing paradigms of individualism and consistency are compared, the meanings of “consistency” and “disparity” are explored, a sample of the empirical evidence for unjustified disparity is identified, the measures adopted in Australia to encourage consistency are outlined, and the meager evaluative literature that attempts to assess these interventions is discussed.

More and 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. In Australia, ineffectiveness of the measures adopted to encourage consistency may not reflect a failure of the measures themselves, but rather a failure of the predominantly individualist framework in which they operate. The ambivalent attitude of courts of appeal toward the importance of consistency requires review in order to promote fairer sentencing outcomes.<sup>5</sup>

## II

### INDIVIDUALIZED JUSTICE AND CONSISTENCY

Australia has nine sentencing jurisdictions—eight states and territories plus a federal system.<sup>6</sup> Most sentencing occurs at the state level.<sup>7</sup> The High Court of Australia is the highest court in the country, with appellate jurisdiction over all other courts. Each state and territory has its own court hierarchy, culminating in the appeals division of its Supreme Court. Trial divisions of the Supreme Courts hear major criminal matters, mostly murders and some serious drug cases. Most jurisdictions have two levels of inferior courts: County or District Courts hear the majority of serious criminal matters (with juries), and Magistrates’ or Local Courts hear less serious criminal matters (without juries).

The basic framework is that federal, state, and territory criminal legislation creates offenses and prescribes maximum penalties. Criminal statutes sometimes provide guidance regarding the use of certain sanctions by listing,

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4. A problem shared, to varying extents, with comparable jurisdictions. *See, e.g.,* Rodney Engen, *Racial Disparity in the Wake of Booker/Fanfan: Making Sense of “Messy” Results and Other Challenges for Sentencing Research*, 10 *CRIMINOLOGY & PUB. POL’Y* 1139, 1139 (2011) (“[I]t is difficult to comment on the impact of sentencing guidelines on sentencing disparity [in the United States] because there simply is little empirically rigorous research examining the effects of actual policy changes . . . for sentencing practices.”).

5. *See* MICHAEL TONRY, *SENTENCING MATTERS* 195–96 (Michael Tonry & Norval Morris eds., 1996).

6. Different state and federal laws can themselves produce inconsistent outcomes. *See* AUSTL. LAW REFORM COMM’N, *ALRC REPORT 103: SAME CRIME, SAME TIME: SENTENCING OF FEDERAL OFFENDERS* 119 (2006).

7. Arie Freiberg, *Australia: Exercising Discretion in Sentencing Policy and Practice*, 22 *FED. SENT’G REP.* 204, 204 (2010).

without ranking, sentencing purposes and aggravating and mitigating factors, which judges may be required to consider or which may be merely advisory.<sup>8</sup> Within this statutory structure, judicial discretion is regulated by the common law as developed by appellate courts.

The tension between individualized justice and consistency is reflected in the potential difference between a sentence based on the circumstances of an individual case and one based on comparison with similar cases.<sup>9</sup> The sentencing discourse regarding the relationship between individualized justice and consistency is mediated through the concept of judicial discretion, which is regarded as a crucial component of fair sentencing because it enables abstract legal rules to be applied to real-life offenses. The orthodox view holds that a “broad”<sup>10</sup> judicial discretion to choose between sentencing purposes and options is “vital,”<sup>11</sup> because it alone safeguards individualized justice by freeing judges to tailor sentences to the “wide variations of circumstances of the offence and the offender”<sup>12</sup> that are “unique”<sup>13</sup> to each case.<sup>14</sup> On this understanding, broad judicial discretion, individualized justice, and fair sentencing outcomes are directly related. There is a deep “cultural resistance to modification of judicial discretion within the judiciary and the legal profession generally,” a concept that is sometimes couched in terms of judicial independence.<sup>15</sup> This “strong” view of individualized justice is frequently conflated with the notion of fair sentencing.<sup>16</sup>

#### A. The Individualist Approach

The individualist approach is underpinned by certain widely repeated and strongly held propositions:<sup>17</sup>

- Because the discretion entrusted to sentencing judges is of “vital importance”<sup>18</sup> in the administration of criminal justice, it is required<sup>19</sup> that this discretion be “very

8. *Id.* We omit from the following discussion sentencing in juvenile courts where rehabilitative aims are statutorily preferred and are likely to produce more disparate outcomes.

9. See BRIAN J. PRESTON & HUGH DONNELLY, JUDICIAL COMM’N OF N.S.W., RESEARCH MONOGRAPH NO. 32, ACHIEVING CONSISTENCY AND TRANSPARENCY FOR ENVIRONMENTAL OFFENCES 218 (2008).

10. *R v Whyte* (2002) 55 NSWLR 252, 276 (“[A] broad sentencing discretion is essential to ensur[ing] that all of the wide variations of circumstances . . . are taken into account.”).

11. *Lowndes v The Queen* (1999) 195 CLR 665, 672; *R v MacNeil-Brown* (2008) 20 VR 677, 681.

12. *Whyte* (2002) 55 NSWLR at 276.

13. *DPP (Vic) v Arney* [2007] VSCA 126, (Unreported, 12 Jun. 2007) ¶ 14.

14. See AUSTL. LAW REFORM COMM’N, *supra* note 6, at 153. (“Individualized justice can be attained only if a judicial officer possesses a broad sentencing discretion . . .”).

15. George Zdenkowski, *Limiting Sentencing Discretion: Has There Been a Paradigm Shift?*, 12 CURRENT ISSUES CRIM. JUST. 58, 59 (2000).

16. See *Kable v DPP (NSW)* (1995) 36 NSWLR 374, 394 (“If justice is not individual, it is nothing.”).

17. Freiberg & Krasnostein, *supra* note 3.

18. *Lowndes v The Queen* (1999) 195 CLR 665, 672.

19. AUSTL. LAW REFORM COMM’N, *supra* note 6, at 153.

wide<sup>20</sup> within the parameters of the maximum penalty, the limiting principle of proportionality, and any (rare) statutory constraints,<sup>21</sup>

- Although there may be a range of appropriate sentences, there is no single correct sentence,<sup>22</sup>
- Although there might be recurring features,<sup>23</sup> no two cases are exactly alike;<sup>24</sup>
- While statements by appellate courts of principles affecting sentencing discretion can constitute precedents, sentences themselves are not precedents;<sup>25</sup>
- A certain level of inconsistency is acceptable and inevitable.<sup>26</sup>

This paradigm can be divisive because it tends to regard consistency as a threat to the exercise of discretion. Rather than identifying the contribution that each paradigm can make toward fair sentencing, Australian authorities often view individualism and comparativism as incompatible paradigms.<sup>27</sup>

The High Court of Australia<sup>28</sup> has determined that the proper methodology for arriving at an appropriate sentence is an “instinctive” or “intuitive” synthesis<sup>29</sup>—an exercise in which all relevant considerations are simultaneously unified, balanced, and weighed by the sentencing judge.<sup>30</sup> A judge may have recourse to a number of guides, but the most important is the judge’s own intuition regarding the factors pertaining to the instant offense and offender. Because the confluence of these factors is said to be “unique”<sup>31</sup> to each case,

20. *House v The King* (1936) 55 CLR 499, 503 (Austl).

21. GERARD BRENNAN, NAT’L JUD. COLL. OF AUSTL., *THE HIGH COURT AND THE SENTENCING ENVIRONMENT* 1, 3 (2006).

22. *Markarian v The Queen* (2005) 228 CLR 357, 371; *Bowen v The Queen* [2011] VSCA 67, (Unreported, 11 Mar. 2011) ¶ 73.

23. *R v Olbrich* (1999) 199 CLR 270, 287 (Kirby, J., dissenting).

24. *CW v The Queen* [2011] NSWCCA 45, (Unreported, 22 Mar. 2011) ¶ 131. See *Jenkins v The Queen* (2004) 211 ALR 116, 122 (“The circumstances of cases are infinitely various.”); *Western Australia v Akizuki* (2008) 192 A Crim R 373, 388 (stating that the circumstances of sexual offenses and offenders “are almost infinitely variable”). On the difficulties, and undesirability, of identifying “objective offence seriousness” without taking into account “subjective” or personal factors, see *Muldock v The Queen* (2011) 244 CLR 120.

25. *Hili v The Queen* (2010) 242 CLR 520, 544–45; *Wong v The Queen* (2001) 207 CLR 584, 605; *Bowen* [2011] VSCA 67 at ¶ 73. In a Practice Note issued by the Victorian Court of Appeal in November 2011, the Court stated that when it considered that the reasons for decision contained no new point of principle, that fact would be noted with the consequence that that decision cannot be cited in a subsequent case without leave of the court. SUPREME COURT OF VICTORIA, PRACTICE NOTE 8 OF 2011: DECISIONS MARKED “NO POINT OF PRINCIPLE” NOT TO BE CITED WITHOUT LEAVE (2012), available at [http://www.supremecourt.vic.gov.au/resources/52f3c924-2dfb-48d7-9b0d-ff9a386c6b6d/updated\\_pnote\\_8\\_of\\_2011.pdf](http://www.supremecourt.vic.gov.au/resources/52f3c924-2dfb-48d7-9b0d-ff9a386c6b6d/updated_pnote_8_of_2011.pdf).

26. *Wong* (2001) 207 CLR at 591.

27. *Hudson v The Queen* [2010] VSCA, (Unreported, 9 Dec. 2010) ¶¶ 31–33 (undertaking comparative analysis to identify a sentence in a similar case introduces unacceptable mathematical precision to the instinctive synthesis).

28. The High Court is the final court of appeal for all cases, civil or criminal, state or federal.

29. *Wong* (2001) 207 CLR at 622; *Markarian v The Queen* (2005) 228 CLR 357, 374; *Hili v The Queen* (2010) 242 CLR 520, 539.

30. First enunciated in this form by the Supreme Court of Victoria in *R v Williscroft* [1975] VR 292, 301.

31. *Russell v The Queen* (2011) 212 A Crim R 57, 69.

determining their relative weight and translating that weight into a sentence must be similarly unique. Sentencing is, therefore, more “art than science.”<sup>32</sup>

A necessary consequence of this approach is that the use of “scientific methods”—that is, objective, replicable measurement techniques—is eschewed in Australian sentencing. “[M]athematical precision”<sup>33</sup> is described as inimical to the instinctive synthesis. Further, instinctive synthesis is theoretically incompatible with sentencing “tariffs,”<sup>34</sup> ranges,<sup>35</sup> case comparison,<sup>36</sup> or “starting points,” other than where they might play a role in “informing” the instinctive synthesis<sup>37</sup> or assisting a court in determining which instance of an offense is more serious than another.<sup>38</sup> To give these considerations more emphasis would be to “sentence the person for another crime.”<sup>39</sup> Consequently, it has become accepted as an article of faith that “[t]he method of instinctive synthesis will by definition produce outcomes upon which reasonable minds will differ.”<sup>40</sup>

Another consequence of this methodology is that it conceals, and possibly normalizes, disparity. The latitude given to judges to balance all “unique”<sup>41</sup> considerations means that sentences are “subjective judgment[s,] largely intuitively reached.”<sup>42</sup> Consequently, the reasoning process—specifically, the weight attributed to determinative factors—is not always explicated.<sup>43</sup> This affects the ability to assess empirically whether patterns of offense and offender are routinely treated in the same way. Because there can be no “correct” sentence in any particular case,<sup>44</sup> sentences can be inconsistent within a (potentially vast) margin of error yet still legal.<sup>45</sup>

## B. The Comparativist Approach

Despite the dominance of the individualist approach, Australian authorities have recognized, at least at the level of principle, the importance of consistency

32. KATJA FRANKO AAS, SENTENCING IN THE AGE OF INFORMATION: FROM FAUST TO MACINTOSH 24–26 (2005).

33. *Hudson v The Queen* (2010) 205 A Crim R 199, 207–08. See also *Markarian v The Queen* (2005) 228 CLR 357, 386.

34. *DPP (Vic) v OJA* (2007) 172 A Crim R 181, 195.

35. See *Wong v The Queen* (2001) 207 CLR 584, 611–12; *AB v The Queen* (1999) 198 CLR 111, 121–22, 156.

36. See *DPP (Vic) v Terrick* (2009) 24 VR 457, 475.

37. *FD v The Queen* [2011] VSCA 8, (Unreported, 20 Jan. 2011) ¶ 34; *DPP (Cth) v De La Rosa* (2010) 243 FLR 28, 97, 99.

38. *DPP (Vic) v OJA* (2007) 172 A Crim R at 201–02. See also Freiberg & Krasnostein, *supra* note 3, at 74–75.

39. *AB v The Queen* (1999) 198 CLR at 121.

40. *Hudson v The Queen* (2010) 205 A Crim R 199, 206.

41. *Russell v The Queen* (2011) 212 A Crim R 57, 69.

42. *R v Williscroft* [1975] VR 292, 300.

43. See *Markarian v The Queen* (2005) 228 CLR 357, 403–04 (Kirby, J., dissenting).

44. *Markarian* (2005) 228 CLR at 371; *Lowe v The Queen* (1984) 154 CLR 606, 612

45. See Roger Douglas, *Does the Magistrate Matter? Sentencers and Sentence in the Victorian Magistrates’ Courts*, 22 AUSTL. & N.Z. J. CRIMINOLOGY 40, 50 (1989).

as a guiding value.<sup>46</sup> Sentencing should not be a “multiplicity of unconnected single instances,”<sup>47</sup> and it has been suggested that unjustified inconsistency is contrary to the rule that like cases be treated alike.<sup>48</sup> A frequently cited High Court judgment states that,

[j]ust as consistency in punishment—a reflection of the notion of equal justice—is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.<sup>49</sup>

This is also reflected by sentencing legislation in most jurisdictions that aims “to promote consistency of approach in the sentencing of offenders.”<sup>50</sup>

### III

#### CONSISTENCY

There is no universally accepted definition of consistency in sentencing. The general concept is clear, however: similar offenders who commit similar offences in similar circumstances would be expected to receive similar sentencing outcomes.<sup>51</sup>

Consistency in sentencing takes many forms. It is generally understood to require courts to “apply the same purposes and principles of sentencing, and to consider the same types of factors when sentencing.”<sup>52</sup> Relevant to these issues is the manner in which judges approach and weigh legally relevant factors (such as those that relate to the offense or offender culpability), and the degree to which they are, consciously or otherwise, improperly influenced by extra-legal factors (such as the defendant’s race or gender).

In relation to co-offenders, consistency refers to parity between their sentences. The challenge is identifying the grounds of difference between cases and assigning appropriate weight to these differences.<sup>53</sup>

A distinction is often drawn between consistency of approach and consistency of outcome.<sup>54</sup> The former is a procedural mechanism that obliges a

46. *Lowe* (1984) 154 CLR at 610–11. See also *Postiglione v The Queen* (1997) 189 CLR 295, 301; *Wong v The Queen* (2001) 207 CLR 584, 591.

47. *Wong* (2001) 207 CLR at 591.

48. *MC v The Queen* [2011] VSCA (Unreported, 14 Jan. 2011) ¶¶ 28–31; *R v MacNeil-Brown* (2008) 20 VR 677, 690.

49. *Lowe* (1984) 154 CLR at 610–11 (Mason, J., dissenting). Justice Mason’s opinion has been recently described as the origin of contemporary Australian doctrine on consistency. See PRESTON & DONNELLY, *supra* note 9, at 4. Although His Honour was discussing disparity between co-offenders, the principle has broader application. See *id.*

50. *Sentencing Act 1991* (Vic) s 1(a). See, e.g., *Crimes (Sentencing) Act 2005* (ACT) s 33; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1995* (WA) s 6.

51. U.K. SENTENCING COUNCIL, ANALYTICAL NOTE: THE RESOURCE EFFECTS OF INCREASED CONSISTENCY IN SENTENCING 3.1 (2011).

52. AUSTRALIAN LAW REFORM COMM’N, *supra* note 6, at 152. See also *Hili v The Queen* (2010) 242 CLR 520, 535–36.

53. Freiberg & Krasnostein, *supra* note 3, at 75.

sentencing judge to follow a prescribed sequence of steps, or to consider prescribed factors in arriving at a conclusion. Within a discretionary framework, this approach assumes that sentences will only ever be “reasonably consistent,” reflecting an acceptance that there is no correct sentence but rather a range of correct sentences, and that this is necessary if sentences are to be consistently proportionate. Without consistency of approach between judges, the search for just sentencing outcomes becomes “at best a lottery, and at worst a myth.”<sup>55</sup>

Consistency of outcome, on the other hand, concerns uniformity of sentence type or quantum. It seeks congruence with a predetermined standard derived from factors deemed legally relevant, with such factors having been allocated a range of predetermined weights by persons or bodies other than the sentencing judge. This type of consistency may be achieved through statistical grids of the type employed by the U.S. federal courts or mandatory sentencing schemes. It embodies assumptions regarding correct sentences for cases that are relevantly similar, which, in turn, requires agreement about the correct identification and weighting of relevant factors. The historical context, and implementation of measures aimed at promoting consistency of outcome indicate that they may have been directed toward increasing the severity of sentences rather than increasing the fairness of sentences.<sup>56</sup>

#### A. Demonstrating Unjustifiable Disparity or Parity

Disparity—the converse of consistency—may be justifiable or unjustifiable. Disparity based on legally relevant differences between offenders is justifiable; disparity based on differences between judges is not. Similarly, sentencing outcomes that are identical but which ignore legally relevant differences are unjustified. The Australian system is vulnerable to interjudge disparity, while rigid guideline or mandatory systems are vulnerable to unjustified parity.<sup>57</sup> Implicit in the concept of *unjustified* disparity is “some notion of a ‘normal’ sentence from which the disparate sentence varies.”<sup>58</sup> The contention that unjustifiable disparity is a significant problem in Australia is not widely accepted by the judiciary and, when accepted, is considered a lesser evil than its remedies.

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54. There are other forms of consistency in the Australian framework. The term can concern the relationship between federal and state sentencing practices where Commonwealth and state offenses are heard in state courts. Consistency may also refer to same-judge disparities. See Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT’L ACAD. SCI. 6889 (2011).

55. See *R. v. Arcand* (2010), 499 A.R. 1 (Can. Alta. C.A.).

56. See PATRIZIA POLETTI & HUGH DONNELLY, *THE JUDICIAL COMM’N OF NEW SOUTH WALES, THE IMPACT OF THE STANDARD NON-PAROLE PERIOD SENTENCING SCHEME ON SENTENCING PATTERNS IN NEW SOUTH WALES* 55–60 (2010); see also Doob, *supra* note 1, at 199, 202, 208, 212.

57. The remainder of this article will focus on the efforts to reduce unwarranted inter-judge disparity.

58. Cyrus Tata & Neil Hutton, *What Rules in Sentencing? Consistency and Disparity in the Absence of Rules*, 26 INT’L J. SOC. L. 339, 354 (1998).

## 1. Methodological Issues

There are various ways of measuring unjustified disparity. The first method involves simulation exercises in which judges provide sentences based on common sets of facts. The second method involves analyzing cases with similar observable characteristics, and attributing residual variation in outcomes to judges.<sup>59</sup> This can be done statistically or by qualitative case comparison. The third method is to deem random caseloads assigned to judges as comparable, allowing average sentencing outcomes to be compared and differences to be attributed to judges.<sup>60</sup>

## 2. Empirical Problems

Although a number of studies have been conducted that appear to demonstrate the existence of various forms of disparity,<sup>61</sup> there is a dearth of conclusive empirical evidence<sup>62</sup> of the nature and extent of unjustified disparity in Australia.<sup>63</sup> This is due partly to the difficulty of conceptualizing and operationalizing the notion of “unjustified disparity,”<sup>64</sup> though this is not an insurmountable problem,<sup>65</sup> as the breadth of American scholarship in this area demonstrates. With rare exceptions,<sup>66</sup> the Australian empirical studies purporting to find unjustified disparity focus only on the specific issues of gender<sup>67</sup> and race—although the number of race-effects studies in Australia are

59. See James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 280 (1999).

60. *Id.* at 271.

61. See, e.g., AUSTL. LAW REFORM COMM'N, *supra* note 6, at 2, 6, 508, 511; DON WEATHERBURN, SENTENCE DISPARITY AND ITS IMPACT ON THE NSW DISTRICT CRIMINAL COURT (1994); Ross Homel & Jeanette A. Lawrence, *Sentencer Orientation and Case Details: An Interactive Analysis*, 16 LAW & HUM. BEHAV. 509 (1992).

62. See AUSTL. LAW REFORM COMM'N, *supra* note 6, at 508.

63. A problem shared, to varying extents, by other comparable common law jurisdictions. See, e.g., Mona Lynch, *Expanding the Empirical Picture of Federal Sentencing: An Invitation*, 23 FED. SENT'G REP. 313 (2011); Ryan Scott, *Inter-judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1 (2010); Jeffrey T. Ulmer, Michael T. Light, John H. Kramer, *Racial Disparity in the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 CRIMINOLOGY & PUB. POL'Y 1077 (2011).

64. Numerous factors are relevant to the sentencing outcome, each of which could legally justify a different sentence for offenders convicted of the same offense. Therefore, the fact that individuals have been sentenced differently does not indicate unjustified disparity. Weatherburn, *supra* note 61, at 5.

65. Social science researchers regularly control for the influence of a variety of different factors. See *id.*

66. A number of studies have been conducted since 1990. See IVAN POTAS, SENTENCING ROBBERS IN NEW SOUTH WALES: PRINCIPLES, POLICY AND PRACTICE (1990); Jeanette A. Lawrence & Ross J. Homel, *Sentencer and Offender Factors as Sources of Discrimination in Magistrates' Penalties for Drinking Drivers*, 5 SOC. JUST. RES. 385 (1992); Homel & Lawrence, *supra* note 61; WEATHERBURN, *supra* note 61; Don Weatherburn & Bronwyn Lind, *Sentence Disparity, Judge Shopping and Trial Court Delay*, 29 AUSTL. & N.Z. J. CRIMINOLOGY 147 (1996); PATRIZIA POLETTI & IVAN POTAS, SENTENCING DRUG OFFENDERS: AN ANALYSIS OF SENTENCES IMPOSED IN THE HIGHER COURTS OF NEW SOUTH WALES: 1 JANUARY 1992 TO 31 DECEMBER 1997 (1999).

67. See, e.g., SENTENCING ADVISORY COUNCIL (VIC), GENDER DIFFERENCES IN SENTENCING OUTCOMES (2010), available at [http://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/gender\\_differences\\_in\\_sentencing\\_outcomes.pdf](http://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/gender_differences_in_sentencing_outcomes.pdf).

“sparse”<sup>68</sup> in comparison to the number of such studies in the United States.<sup>69</sup> There are also studies looking at how intellectual disability<sup>70</sup> and juvenile ethnicity<sup>71</sup> affect sentencing.

While these studies are valuable, more research is needed to answer the broader question of whether—and how much—unjustified disparity exists generally in sentencing. The studies that look at this question<sup>72</sup> are now out of date,<sup>73</sup> and many of these studies examined sentencing only in the lower courts. Although the bulk of sentencing occurs in lower courts, such studies do not include sentences for more serious offenses. Many of the studies reveal different sentence lengths and types for certain offenses. However, disentangling the different causes of variation is a fraught task, and it is probably fair to say that the extent and nature of inconsistency in sentencing in Australia is not well understood.<sup>74</sup>

#### IV

##### MECHANISMS TO PROMOTE CONSISTENCY

Due to persistent criticisms of unjustified disparity,<sup>75</sup> a number of mechanisms to achieve consistency have been introduced in the Australian jurisdictions.<sup>76</sup> These differ in their approach to the task, and in the extent to which they constrain judicial discretion.<sup>77</sup> These mechanisms, singly and in combination, have evoked significant scholarly and political debate about the proper value and scope of discretion in a fair sentencing system.

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68. Besides being fewer, such studies appear less methodologically sophisticated. See Samantha Jeffries & Christine Bond, *Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia's Higher Courts*, 42 AUSTL. & N.Z. J. CRIMINOLOGY 47, 49 (2009) (noting regression techniques used only recently in Australia to explore the effect of indigenous status on sentence).

69. See, e.g., Lucy Snowball & Don Weatherburn, *Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?*, 40 AUSTL. & N.Z. J. CRIMINOLOGY 272, 275 (2007) (discussing research in the United States regarding sentencing disparity).

70. See, e.g., Judith Cockram, *Justice of Differential Treatment? Sentencing of Offenders With an Intellectual Disability*, 30 J. INTELL. & DEVELOPMENTAL DISABILITY 3 (2005).

71. See, e.g., PATRICIA GALLAGHER & PATRIZIA POLETTI, SENTENCING DISPARITY AND THE ETHNICITY OF JUVENILE OFFENDERS (Helen Cunningham ed., 1998).

72. E.g., WEATHERBURN, *supra* note 61; Weatherburn & Lind, *supra* note 66, at 147–65.

73. A possible exception is SENTENCING ADVISORY COUNCIL, SENTENCING OF SERIOUS VIOLENT OFFENCES AND SEXUAL OFFENCES IN QUEENSLAND (2011), which found no indication of a systemic problem with consistency in Queensland but noted that further research is needed to obtain better measures of consistency.

74. A problem shared in comparable jurisdictions, see U.K. SENTENCING COUNCIL, *supra* note 51, at 1.3 (The extent and “nature of inconsistency in sentencing is not understood in great detail.”).

75. And, in some cases, consistent criticisms of perceived leniency.

76. The size of the jurisdiction affects the operation of, and necessity for, these mechanisms. In relation to intrastate variations, smaller states with fewer judges are likely to develop an informal culture based on physical proximity which contributes to consistency. In larger states the role of formal mechanisms in promoting consistency is heightened.

77. WEATHERBURN, *supra* note 61, at 16.

### A. Appellate Review

The breadth of the sentencing discretion is theoretically counterbalanced by appellate review, a process that can promote consistency in two ways: first, as a check on individual sentences in lower courts; and second, as a means of correcting the course of sentencing practices by providing guidance to sentencing judges via statements of policy or principle. However, the ability of appellate review to fulfill both purposes has been significantly hindered by self-imposed limitations that privilege individualism over comparativism, and thus consistency in sentencing.<sup>78</sup>

In Australian sentencing, “consistency is sought to be attained largely through the unifying effect of appellate review,”<sup>79</sup> through the court hierarchies, beginning with state courts of appeal and culminating in the High Court of Australia. The reality, however, has been that “since their inception, [courts of criminal appeal] have adopted a very conservative stance” to guiding sentencers.<sup>80</sup> This has limited what was intended to function as the major check on broad discretion.

By statute, both defense and prosecution have the right to appeal sentences.<sup>81</sup> Appellate courts have developed an extensive sentencing jurisprudence, as well as principles to guide appellate intervention. While appeal of less-serious sentences is *de novo*, higher sentencing courts have the final say on findings of fact and are given a “wide measure of latitude” by appellate courts, which will overturn sentences only where there is evidence of legal error.<sup>82</sup> Otherwise, they will not substitute their discretion for that of the sentencing judge. There are two basic types of error.<sup>83</sup> The first type is specific, or legal, error—for example, acting on an erroneous principle of law or considering irrelevant matters.<sup>84</sup> The second, and more common, type of error is for non-specific error, occurring when sentences are “manifestly excessive” or “manifestly inadequate” despite no apparent error in the reasons for sentence.<sup>85</sup>

78. There are many reasons why appellate review alone is inadequate for providing guidance, including the limited range of cases and the lack of resources to consider thoroughly a wide range of matters.

79. RICHARD G. FOX & ARIE FREIBERG, *SENTENCING: STATE AND FEDERAL LAW IN VICTORIA* 31–33 (Trischa Baker ed., 2d ed. 1999). See Michael Kirby, *Sentencing Reform: Help in the Most Painful and Unrewarding of Judicial Tasks*, 54 AUSTL. L.J. 732, 741 (1980).

80. Richard G. Fox, *Controlling Sentencers*, 20 AUSTL. & N.Z. J. CRIMINOLOGY 218, 226 (1987). See Andrew Ashworth, *Techniques of Guidance on Sentencing*, CRIM. L. REV. 519, 528 (1984).

81. FOX & FREIBERG, *supra* note 79, at 13.101. GEORGIA BRIGNELL & HUGH DONNELLY, *JUD. COMM’N OF N.S.W., CROWN APPEALS AGAINST SENTENCE* (2005), available at [http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph27/mono27.pdf/at\\_download/file](http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph27/mono27.pdf/at_download/file).

82. *House v The King* (1936) 55 CLR 499, 504–05. See also VICTORIAN PARLIAMENT LAW REFORM COMM., *DE NOVO APPEALS TO THE COUNTY COURT* 7–9 (2006), available at <http://www.parliament.vic.gov.au/.archive/lawreform/inquiries/County%20Court%20Appeals/final%20report.pdf>.

83. Sarah Krasnostein & Arie Freiberg, *Manifest Error: Grounds for Review?*, 36(1) AUSTL. B. REV. 54, 56–57 (2012).

84. See *R v Taylor* [1958] VR 285, 289.

85. See *Wong v The Queen* (2001) 207 CLR 584, 605; *Dinsdale v The Queen* (2000) 202 CLR 321,

Here, error will be inferred only if the sentence is outside the appropriate range, assessed primarily in terms of the case before the court, not in relation to other cases. The original sentence must be obviously<sup>86</sup> or egregiously<sup>87</sup> outside the range. Appellate courts therefore give sentencing courts a “wide measure of latitude.”<sup>88</sup>

This latitude is reinforced by the determination of Australian appellate courts that consistency is not “numerical equivalence,”<sup>89</sup> but rather “consistency in the application of the relevant legal principles,” which is not capable of “mathematical precision.”<sup>90</sup> However, scrutiny of the application of those principles is hampered by the “instinctive synthesis” methodology and the prohibition on its alternative, termed “two-stage sentencing”—sentencing based on a “notion of a mathematical norm,” above or below which a sentence might be adjusted based upon aggravating and mitigating factors.<sup>91</sup> Consequently, the reasoning process underlying the initial sentence follows a largely inscrutable “instinctive reaction,”<sup>92</sup> manifested in statements that “it is an unwarranted assumption that all of the relevant factors which bore upon the imposition of . . . sentences can be identified and weighted.”<sup>93</sup> By limiting the role of external comparators like ranges and comparable cases, and by supporting a fairly opaque reasoning process, appellate courts have limited their ability to ensure consistency.

An individualist approach inhibits the provision of authoritative guidance to sentencing courts because it holds that the primary role of an appellate court is to rectify error in a particular case, not lay down explicit principles.<sup>94</sup> In contrast, a comparativist view promotes a public policy role for the court in ensuring appropriate consistency in sentences imposed within that jurisdiction.<sup>95</sup> The dominant understanding of individualism has resulted in appellate courts generally declining the task of overtly setting standards. They usually do so only by identifying whether a particular sentence was manifestly inadequate or excessive, leaving sentencing courts to infer an appropriate sentence from their (often limited) discussion of the matter or from previous appellate cases which indicate, in the (ostensibly) infinite variety of circumstances, which possibly relevant sentences were or were not appropriate.<sup>96</sup>

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86. *Hanks v The Queen* [2011] VSCA 7 (Unreported, 19 Jan. 2011) ¶ 22.

87. *DPP (Vic) v Oversby* [2004] VSCA 208 (Unreported, 18 Nov. 2004).

88. *See Russell v The Queen* (2011) 212 A Crim R 57, 68.

89. *Hili v The Queen* (2010) 242 CLR 520, 526.

90. *Hudson* (2010) 205 A Crim R 199, 207.

91. *AB v The Queen* (1999) 198 CLR 111, 120–22; *Markarian v The Queen* (2005) 228 CLR 357, 377–80.

92. *DPP (Vic) v Terrick* (2009) 24 VR 457, 475.

93. *Hudson* (2010) 205 A Crim R at 207.

94. FOX & FREIBERG, *supra* note 79, at 1053–54.

95. *See* AUSTL. LAW REFORM COMM’N, *supra* note 6, at 513; Ashworth, *supra* note 80, at 525.

96. *See, e.g., Police (SA) v Cadd* (1997) 69 SASR 150, 165; *Kovacevic v Mills* (2000) 76 SASR 404 (noting the undesirability of courts setting sentencing standards).

A comparativist approach to appellate intervention would, by contrast, identify ranges for various categories of offenses and types of offenders in various sets of typical circumstances. It would also identify a way of approaching and weighing these circumstances, providing needed assurance that relevant factors would be routinely approached—and would be seen as approached—in a consistent manner. This would honor the fact that one of the major functions of a court of criminal appeal is to achieve consistency and certainty by “minimizing disparities of sentencing standards, while leaving a fair margin of discretion to sentencing judges.”<sup>97</sup> Instead, there has been a general disinclination by appellate courts to resolve the majority of questions, except to say that there “are no golden rules.”<sup>98</sup>

## B. Provision of Sentencing Information to Primary Judges

Another mechanism to promote consistency in the individualized Australian framework is the provision of sentencing information. This assists judges by placing at their disposal “the collective experience of the judiciary,”<sup>99</sup> in the hope that consistency is just a question of “better informing the sentencing discretion.”<sup>100</sup> Information takes various forms—including ranges, statistics, comparable cases and databases—each of which indicates “current sentencing practices” and gives judges the “means to ascertain whether the manner in which he or she sentenced was consistent with that of other judges for similarly situated offenders.”<sup>101</sup> Understandably, judges usually want to know what other judges have done in similar cases, and do not set out to impose disparate views of sentencing policy.<sup>102</sup> However, this approach is largely voluntary and judges are not obligated to use the information in any particular way, or to use it at all.

There are three major methods of providing information to sentencing judges: sentencing ranges, sentencing statistics, and sentencing information databases.

### 1. Sentencing Ranges

The High Court of Australia has stated that there is no single correct sentence, but rather a range of permissible sentences.<sup>103</sup> The concept of “range”

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97. *R v Allinson* (1987) 49 NTR 38, 39 (Sup. Ct. N.T.); see also *R v Green* [1986] 2 Qd R 406, 410.

98. *R v Geddes* (1936) 36 SR (NSW) 554, 555 (N.S.W. Ct. Crim. App.).

99. *Wong v The Queen* (2001) 207 CLR 584, 591; *R v Bangard* (2005) 13 VR 146, 148.

100. Geraldine Mackenzie, *Achieving Consistency in Sentencing: Moving to Best Practice?*, 22 U. QUEENSLAND L.J. 74, 78 (2002).

101. John C. Richter, *Déjà Vu All Over Again: How Post-Booker Sentencing Threatens Equal Justice Under the Law*, 20 FED. SENT'G REP. 340, 340 (2008).

102. See Gerard Lynch, *Sentencing: Learning from, And Worrying About, The States*, 105 COLUM. L. REV. 933, 940 (2005); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1370 (2005).

103. *Lowe v The Queen* (1984) 154 CLR 606, 612; *Pearce v The Queen* (1998) 194 CLR 610, 624; *Markarian v The Queen* (2005) 228 CLR 357, 371.

implies scope for discretion, but also that this scope is not unlimited.<sup>104</sup> A “range” is generally regarded as an “historical fact”<sup>105</sup> that may broadly identify a sentencing “overview” or “trend”<sup>106</sup> and therefore assist a court in imposing a sentence that is more likely to be consistent with similar cases. Sentence ranges may be provided by the defense, the prosecution, or developed by the courts themselves. For some judges this goes too far in restricting discretion. They have rejected such a concept, arguing that the intuitive synthesis approach “implies an absence of a necessary relationship between one case and another.”<sup>107</sup> For judges who accept the concept of range, albeit with reservation, it can serve as a “yardstick”<sup>108</sup> against which proposed sentences may be examined.<sup>109</sup> However, a sentencing judge who refers to the range as a “starting point” or “benchmark” sentence must take care not to employ a “two-stage” reasoning process which is inimical to the instinctive synthesis methodology and thus fall into appealable error.<sup>110</sup> This is because it is “wrong in principle” to start anywhere except with a full consideration of all relevant factors in a particular case.<sup>111</sup> To elevate only certain considerations or factors, like the range of comparable sentences, is regarded as distorting the reasoning process.<sup>112</sup>

## 2. Sentencing Statistics

In relation to sentencing, statistics may provide indications of general trends.<sup>113</sup> They can provide a quantitative aspect to inform the qualitative aspects of case comparison, helping to ensure consistency in the instant case. However, they are generally treated with reserve and the courts have hedged their use by numerous caveats relating to the nature of the offense under consideration, sample size, counting rules, and others.<sup>114</sup> Statistics have also been criticized because they can never provide information about the particular reasons for judgment in a particular case.<sup>115</sup>

The underlying antipathy to social science data in the courts has limited their utility in identifying patterns of sentencing in commonly occurring crimes

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104. *DPP (Vic) v Terrick* (2009) 24 VR 457, 475.

105. *R v Lawson* (1997) 142 FLR 323, 324.

106. *Spiteri v The Queen* (2011) 206 A Crim R 528, 539.

107. *DPP (Vic) v OJA* (2007) 172 A Crim R 181, 195.

108. *DPP (Cth) v De La Rosa* (2010) 243 FLR 28, 98; *R v Way* (2004) 60 NSWLR 168, 192.

109. *R v King* (1988) 48 SASR 555, 557 (a sentencing standard or range is a general guide although it is not rigid); *R v JO* (2009) 24 NTLR 129, 147.

110. See, for example, the warning given in *R v Bartel* [2008] SASC 289 (Unreported, 31 Oct. 2008) ¶ 14.

111. *Wong v The Queen* (2001) 207 CLR 584, 611–12.

112. *Id.*

113. For further discussion of statistical resources in Australia, see Freiberg & Krasnostein, *supra* note 3.

114. See Freiberg & Krasnostein, *supra* note 3.

115. Nor do they identify individual judges. See, e.g., *Hili v The Queen* (2010) 242 CLR 520, 535.

where there are sufficient cases and circumstances to permit legal conclusions about what is unjustifiably disparate and what is not.

### 3. Sentencing Information Systems

Sentencing information systems or databases utilize information technology to store, and facilitate targeted access to, the qualitative and quantitative forms of information discussed above.<sup>116</sup> The systems do not indicate how this information should be used, but the “availability of the information might in itself promote consistency.”<sup>117</sup> Thus, databases preserve discretion by informing the decisionmaking process rather than determining the outcome.<sup>118</sup> However, they can help avoid unjustified discrepancies if judges use the information to produce individualized sentences that are also consistent with outcomes in similar circumstances.

Although the idea of information databases is not new,<sup>119</sup> they have become an extremely efficient technological reality relatively recently. However, few are in operation. Databases in Canada and Scotland are no longer operating. Explanations for their demise have included lack of (judicial) support for the system.<sup>120</sup>

New South Wales (NSW) has one of the oldest and most successful sentencing databases—the Judicial Information Research System (JIRS)—a subset of which is the Sentencing Information System (SIS). Frequently cited,<sup>121</sup> JIRS provides information about sentencing patterns that can be analyzed precisely in relation to such factors as age and prior convictions. Recently, an Environmental Crime Sentencing Database has also been established in NSW.<sup>122</sup>

There are other examples of Australian sentencing information systems. In 2007, a database modelled on JIRS was established in Queensland. The Commonwealth Sentencing Database provides courts exercising federal jurisdiction with information about current sentencing law and practices. A database of sentencing practices is being established in Tasmania to “support judicial decision making, research and policy making.”<sup>123</sup>

Development, implementation, and access to sentencing databases in Australia have been ad hoc. This may, in part, be attributable to cost and perceived difficulty of use. There is also the potential threat to individualism

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116. See Neil Hutton, *Sentencing, Rationality, and Computer Technology*, 22 J. L. & SOC'Y 549, 554, 558–59 (1995).

117. *Id.* at 561.

118. See AUSTRALIAN LAW REFORM COMMISSION, *supra* note 6, at 11.

119. See, e.g., Anthony N. Doob & Norman W. Park, *Computerised Sentencing Information for Judges: An Aid to the Sentencing Process*, 30 CRIM. L.Q. 54 (1987); Norval Morris, *Sentencing Convicted Criminals*, 27 AUSTRALIAN L.J. 186, 200 (1953).

120. ANTHONY DOOB, *SENTENCING AIDS: FINAL REPORT* (1990); Hutton, *supra* note 116, at 561.

121. See, e.g., *Blackwell v The Queen* (2011) 208 A Crim R 392, at ¶ 116; *Bombardieri v The Queen* (2010) 203 A Crim R 89, at ¶ 14.

122. See PRESTON & DONNELLY, *supra* note 9.

123. *Current Projects*, SENTENCING ADVISORY COUNCIL (TAS), [http://www.sentencingcouncil.tas.gov.au/current\\_projects](http://www.sentencingcouncil.tas.gov.au/current_projects) (last updated June 15, 2012).

that arises from the erroneous belief that the databases usurp discretion by providing an “answer,” when they only provide raw data. A potential threat also arises from a suspicion that the accessibility of raw data will reveal a record of sentencing practices and outcomes that may make existing disparity more evident.

The provision of sentencing information to promote consistency is premised on the hope that disparity arises “from lack of systemic knowledge.”<sup>124</sup> Once equipped with the information, judges are still free to interpret and apply it as they wish, and the existing research shows that they will do so “in manners consistent with their own schemas.”<sup>125</sup> This context of relatively unbridled discretion means that the provision of such information may, on its own, be “inherently insufficient” to reduce unwarranted disparity.<sup>126</sup>

### C. Judicial Training and Education

The same underlying rationale of promoting consistency extends to the use of judicial training and education. Judicial education is “not a novel idea in Australia.”<sup>127</sup> While there are numerous programs annually, no single agency carries responsibility for judicial education.<sup>128</sup> Programs are voluntary and include orientation for new judges as well as specific courses for judicial continuing education, including sentencing workshops. The voluntary nature of such programs, and the fact that “[i]nterest in judicial education has been slow to develop in Australia” can be viewed as a symptom of the individualist framework, which places a premium on unfettered discretion entrusted to those deemed wise enough to know how to wield it.<sup>129</sup>

The Judicial Commission of New South Wales, established in 1986, is an independent statutory agency and part of the judicial branch. First listed among its functions is assisting courts in achieving consistency in sentencing—although it has no legislative power to do anything that could be construed as limiting sentencing discretion.<sup>130</sup> To meet that objective, it “provides relevant information online, undertakes original research and publishes material on sentencing.”<sup>131</sup> Foremost among these publications is the sentencing database<sup>132</sup> and the Sentencing Bench Book, a regularly updated source of sentencing

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124. See Homel & Lawrence, *supra* note 61, at 534.

125. See *id.*

126. See WEATHERBURN, *supra* note 61, at 16.

127. Susan C. Kenny, *Judicial Education in Australia*, 13 LEGAL EDUC. DIG. 8, 8 (2004).

128. *Id.*

129. See Peter Underwood, *Educating Judges What Do We Need?* 14 LEGAL EDUC. DIG. 25, 10 (2006).

130. JUD. COMM'N OF N.S.W., <http://www.judcom.nsw.gov.au> (last visited Sept. 9, 2012). See WEATHERBURN, *supra* note 61, at 16.

131. JUD. COMM'N OF N.S.W., *Research and Sentencing*, <http://www.judcom.nsw.gov.au/research-and-sentencing> (last visited Sept. 9, 2012).

132. See discussion *supra* Part IV.B.3.

information designed to assist judges on the ground.<sup>133</sup> The Bench Book “serves one of the principal functions of the Commission—the promotion of consistency in sentencing.”<sup>134</sup> Similarly, the Judicial College of Victoria, established in 2002, publishes the Victorian Sentencing Manual.<sup>135</sup> Regularly updated, the Manual is a practical guide to sentencing intended to “promote consistency of approach by sentencers in the exercise of their discretion.”<sup>136</sup>

As with sentencing information, reasonable minds can differ as to the efficacy of judicial education and training in reducing unjustified disparity. This is especially so in the absence of evaluative studies to shed light on the matter.

#### D. Presumptive and Mandatory Sentences

Whereas appellate review and judicial information have been judicially generated methods of achieving consistency, presumptive and mandatory sentences are political responses to disparity, as well as leniency. In Australia, the vicissitudes of politics (rather than concerns about unjustified interjudge disparity) have driven the introduction of such measures. However, as these steps fill a policy vacuum, it is reasonable to assume that the reluctance of appellate courts to promote their own sentencing standards may have contributed towards such measures.<sup>137</sup>

Mandatory restrictions on sentences for certain violent and sexual offenders exist in Victoria and Queensland.<sup>138</sup> More prescriptive mandatory sentencing, however, usually takes the form of minimum sentences of imprisonment that escalate with each subsequent offense. The mandatory minimum periods are not long by international standards (between fourteen days and one year), and where they are or were in operation, they did not appreciably add to the prison population due to their brevity and infrequent use.<sup>139</sup> At the federal level, certain forms of the offense of people smuggling require a court to impose a sentence of either imprisonment of at least five years (with a minimum non-parole period of three years) or eight years (with a minimum non-parole period of five years).<sup>140</sup>

In 2003, presumptive sentences for certain offenses were introduced in New South Wales in the form of standard non-parole periods (SNPPs).<sup>141</sup> This was

133. JUD. COMM'N OF N.S.W., *EQUALITY BEFORE THE LAW: BENCH BOOK* iii (2006) <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/foreword.html> (last updated April 2011).

134. *Id.*

135. See JUDICIAL COLL. VICTORIA, *VICTORIAN SENTENCING MANUAL*, <http://www.judicialcollege.vic.edu.au/publications/victorian-sentencing-manual> (last updated Dec. 11 2012).

136. *Id.* (Introduction).

137. Freiberg & Krasnostein, *supra* note 3, at 91.

138. See, e.g., *Penalties and Sentences Act 1992* (Qld) s 401; *Sentencing Act 1991* (Vic) pt 9A; *Criminal Code Act 1913* (WA). Less restrictive jurisdictions do not make these regimes mandatory. See, e.g., *Sentencing Act 1997* (Tas) div 3; *Criminal Law (Sentencing) Act 1988* (SA) s 20B.

139. Freiberg, *supra* note 7, at 207.

140. See *Migration Act 1958* (Cth) s 236B.

141. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A–B; Kate Warner, *Sentencing Review*

the first Australian jurisdiction to enact a defined term SNPP scheme, a form of legislative guidance geared toward increasing the consistency—and severity—of sentences. In most Australian jurisdictions, a sentence of imprisonment has two main components: the “head” or maximum term (the period beyond which a person cannot be held in custody), and a minimum (the non-parole period, prior to which the person is not eligible for parole consideration).<sup>142</sup> The period between the head sentence and the non-parole period is the parole period.

SNPPs were never mandatory, as courts could depart from them in cases outside the middle range of seriousness or where relevant factors were present.<sup>143</sup> The High Court, however, recently held that SNPPs are not even presumptive and that the appropriate place to start in formulating a sentence remains the instinctive synthesis method, requiring courts to “take into account the full range of factors in determining the appropriate sentence for the offence.”<sup>144</sup> Among the various factors, courts may consider the maximum penalty and the SNPP as “two legislative guideposts.”<sup>145</sup> However, the SNPPs were only “a circumstance” that said little about the appropriate sentence for a particular case.

Three other Australian jurisdictions have a form of SNPP scheme—South Australia, Northern Territory, and Tasmania. Two others, Queensland and Victoria, have foreshadowed the introduction of forms of SNPPs or baseline sentences, though both appear to be concerned more with perceptions of leniency than disparity.<sup>146</sup>

### E. Guideline Judgments

Guideline judgments of the type common in the United Kingdom<sup>147</sup>—albeit created by appellate courts rather than a commission or council—were another mechanism introduced in Australia to achieve consistency. Guideline judgments attempt to do so by structuring sentencing discretion. This can occur in a number of ways. Using the example of the case before the court, a guideline judgment can articulate sentencing principles, identify broadly relevant mitigating or aggravating factors, discuss the relevance of different sanctions to an offense or provide relevant ranges. Nonbinding guideline judgments

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2010–11, 35 CRIM. L.J. 284, 285 (2011).

142. Parole is generally not available in relation to shorter sentences—for example, those under one year.

143. See *R v Way* (2004) 60 NSWLR 168, 184, *overruled by Muldrock v The Queen* (2011) 244 CLR 120, 131.

144. *Muldrock* (2011) 244 CLR 120, 132. The decision may have the same effect as the *Booker* decision in relation to sentencing guidelines in the United States, but for different reasons.

145. *Id.*

146. See GERALDINE MACKENZIE, QUEENSLAND SENTENCING ADVISORY COUNCIL, MINIMUM STANDARD NON-PAROLE PERIODS: FINAL REPORT (2011); NARELLE SULLIVAN & DONALD RITCHIE, VICTORIA SENTENCING ADVISORY COUNCIL, BASELINE SENTENCING REPORT (2012).

147. See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 32, 37 (5th ed., 2010).

promote consistency while preserving judicial discretion. These functions are now, however, mostly academic in Australia.

Guideline judgments had a brief and unspectacular life before being rendered effectively moot by the High Court.<sup>148</sup> In Australia, as in the United Kingdom, no statutory foundation was needed for this power—courts of appeal were always able to develop guidelines as they deemed them necessary and appropriate. However, a number of jurisdictions statutorily authorized their use.<sup>149</sup> In 1998, the New South Wales Court of Criminal Appeal began issuing guideline judgments to improve consistency in sentencing.<sup>150</sup> The court delivered seven such guideline judgments, each a “mechanism for structuring discretion, rather than restricting discretion.”<sup>151</sup> However, this was seen as a move too far down the path of comparativism. The High Court held that prospective guideline judgment might be unconstitutional because courts cannot generally deal with points of law that may not be the subject of a dispute.<sup>152</sup> Some members were also concerned that a guideline, which identifies a range of results rather than a reasoning process, passes from the judicial to the legislative.<sup>153</sup>

One member of the majority noted that in issuing the guideline judgment, the court

was clearly motivated by the laudable aim of removing the badge of unfairness (inconsistency), so far as that was possible and consistent with evaluative decisions made by judicial officers . . . . The purpose of ‘guideline judgments’ is to replace informal, private and unrevealed judicial means of ensuring consistency in sentencing with a publicly declared standard.<sup>154</sup>

Despite critical remarks about guidelines in the majority decision, there was some support for guideline judgments in an appropriate case.<sup>155</sup> The risks of wrongly identifying such a case have, however, effectively ended that form of judicial guidance.

## F. Statutory Frameworks

Another mechanism for achieving consistency is sentencing legislation. Generally, these frameworks are the result of policy projects, and are therefore different from the “knee-jerk” legislative responses that produce mandatory or presumptive sentences. However, the frameworks have been subject to ad hoc

148. See *Wong v The Queen* (2001) 207 CLR 584.

149. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36–42A; *Sentencing Act 1995* (WA) s 143; *Sentencing Act 1991* (Vic) pt 2AA; *Criminal Law (Sentencing Act) 1988* (SA) s 29A.

150. The first guideline judgment concerned the offense of dangerous driving occasioning bodily harm. Other guidelines have dealt with armed robbery, drug trafficking, breaking and entering, and guilty pleas. See Mackenzie, *supra* note 100, 85–89.

151. *R v Jurisic* (1998) 45 NSWLR 209, 221.

152. *Wong v The Queen* (2001) 207 CLR 584, 615, 632. See also Arie Freiberg & Peter Sallmann, *Court of Appeal and Sentencing: Principles, Policy and Politics*, 26 L. CONTEXT 43, 66 (2009).

153. *Wong* (2001) 207 CLR at 619.

154. *Id.* at 618.

155. Mackenzie, *supra* note 100, at 88. See *Wong* (2001) 207 CLR at 644.

amendment as a result of these same electoral pressures, and are vulnerable to similar criticisms as mandatory or presumptive sentences.

Since the 1980s, all Australian jurisdictions have attempted to provide the courts with a coherent legislative sentencing framework.<sup>156</sup> These laws are not rigid codes, but provide only general guidance to courts through broad sentencing principles, purposes, and a range of sentencing options—particularly intermediate sanctions.<sup>157</sup> Elements of this approach are seen also in the United Kingdom (albeit where they exist alongside more detailed guidelines),<sup>158</sup> Canada,<sup>159</sup> and New Zealand.<sup>160</sup>

The nonprescriptive nature of these Acts, taken together with the reluctance of appellate courts to offer principled guidance, results in a “free-for-all” approach to the purposes of punishment.<sup>161</sup> The phrase belongs to Andrew Ashworth, who, when discussing the rationales of sentencing in the English context, argued that the desire to maintain sufficient discretion to individualize sentences does not adequately rebut the argument for bringing the rule of law as far into sentencing as possible.<sup>162</sup> Instead, the legislation reflects the case law that “[t]he purposes of punishment are manifold and each element will assume a different significance not only in different crimes but in the individual commission of each crime.”<sup>163</sup> For this reason, broadly framed legislative schemes reinforce the high individualism of the courts.

### G. Sentencing Councils

The final mechanism to promote consistency is the establishment of sentencing councils. Four states have done so: New South Wales (established 2003), Victoria (established 2004), Queensland (established 2010, and disbanded by a newly elected conservative government in 2012), and Tasmania (established 2010). South Australia has also announced that it plans to establish a sentencing council.<sup>164</sup> These bodies have a range of functions that vary

156. See *Crimes (Administration of Sentences) Act 1999* (NSW); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1997* (Tas); *Sentencing Act 1995 and Sentence Administration Act 1995* (WA); *Sentencing Act 1995* (NT); *Penalties and Sentences Act 1992* (Qld); *Sentencing Act 1991* (Vic); *Criminal Law (Sentencing) Act 1988* (SA).

157. *Id.*

158. See *Criminal Justice Act, 2003*, § 142 (Eng.); Ashworth, *supra* note 147, at 76–78.

159. *Criminal Code*, R.S.C 1985, c. C-46, 718 (Can.).

160. *Sentencing Act 2002*, s 7 (N.Z.); see Julian V. Roberts, *Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application*, 4 *CRIM. L. REV.* 264 (2008) (comparing the degree of guidance regarding statutory sentencing factors between various common law jurisdictions).

161. ASHWORTH, *supra* note 147, at 76–78.

162. *Id.* at 76. On the other hand, a consequence of elevating one purpose, such as desert or retribution, may be unjust parity. A single or dominant purpose may also reduce the opportunity to innovate with such as procedures as restorative justice or problem-oriented courts such as drug courts.

163. *R v Williscroft* [1975] VR 292, 299–300.

164. South Austl. Att’y Gen. Dep’t, *Call for Expressions of Interest for Membership to the Sentencing Council of South Australia*, ATT’Y GEN. DEPARTMENT (Oct. 25, 2012), <http://www.agd.sa.gov.au/newsroom/news/news-archive/2011-news-archive> (accessed by searching for sentencing council in the news archive).

between states, but usually include promoting consistency through the creation, collection, and dissemination of data.<sup>165</sup> In Australia, the councils promote public confidence in the sentencing system by informing and engaging the public in the development of sentencing policy.

Sentencing councils also conduct specialized research used by both the government and the courts. Each council is concerned with improving the quality and dissemination of sentencing information. For example, the Victorian Sentencing Advisory Council provides information in the form of "Sentencing Snapshots," which are brief statistical summaries of sentencing practices for the most commonly heard offenses. As of June 2011, 113 Snapshots have been published, which have been cited over 100 times by the Court of Appeal.<sup>166</sup> The Council also publishes a series on current sentencing practices for individual offenses.<sup>167</sup> By generating and promoting access to empirical data, each council is implicitly concerned with promoting a comparativist approach to sentencing.

## V

### EVALUATING SUCCESS

Each of these mechanisms has been relied on to reduce the conscious or unconscious use of broad judicial discretion in a manner that produces unjustified disparity. But if the evidence of the extent of unjustified disparity is limited, then that for determining the success of the various mechanisms employed for reducing it is negligible. The sentencing literature is replete with material articulating the reasons for, and descriptions of the means to achieve consistency.<sup>168</sup> But whether for methodological, financial, or political reasons, the evaluative literature is, for the most part, lacking.

The exceptions are evaluations, all conducted by the Judicial Commission of New South Wales (NSW), of the impact in the state of NSW of guideline judgments and SNPPs. The few evaluations of guideline judgments demonstrate that during their short life they successfully achieved greater consistency.<sup>169</sup>

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165. See AUSTL. LAW REFORM COMM'N, ISSUES PAPER 29: SENTENCING OF FEDERAL OFFENDERS 201 (2005).

166. There are no data as to how often they are cited by sentencing judges and how they have been used.

167. See, e.g., FELICITY STEWART & GEOFF FISHER, VICTORIA SENTENCING ADVISORY COUNCIL, AGGRAVATED BURGLARY: CURRENT SENTENCING PRACTICES (2011), available at [https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/aggravated\\_burglary\\_current\\_sentencing\\_practices\\_0.pdf](https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/aggravated_burglary_current_sentencing_practices_0.pdf).

168. For example, a 2005 inquiry into promoting consistency stated that "the main issue is how sentencing consistency could be better promoted, and as such it is not necessary to determine the extent to which sentencing is actually inconsistent, but only to identify impediments to consistency which currently exist and how consistency could be better promoted." N.S.W. SENTENCING COUNCIL, HOW BEST TO PROMOTE CONSISTENCY IN THE LOCAL COURT 23 (2005).

169. See LYNNE A. BARNES & PATRIZIA POLETTI, SENTENCING ROBBERY OFFENDERS SINCE THE HENRY GUIDELINE JUDGMENT (Angela Damis & Rowena Johns eds., 2007); LYNNE A. BARNES, PATRIZIA POLETTI & IVAN POTAS, SENTENCING DANGEROUS DRIVERS IN NEW SOUTH WALES:

Studies in 2002 and 2003 evidenced increased consistency in sentences for dangerous driving and armed robbery,<sup>170</sup> respectively. The 2002 study assessed whether the dangerous driving guideline had reached its goals of correcting “an unacceptable level of inconsistency in the sentences” and raising sentences to reflect community expectations.<sup>171</sup> By comparing sentencing patterns for cases decided three years before and three years after the guidelines were promulgated, the study found “greater consistency of result in the sentences” after the guideline judgment as well as “a clear and discernible increase in the severity of penalties.”<sup>172</sup>

The 2003 exploratory study of the impact of the guideline judgment for robbery found that it had increased the consistency and severity of relevant sentences.<sup>173</sup> This was confirmed by a larger study in 2007.<sup>174</sup>

The last evaluative study of the effectiveness of guideline judgments in promoting consistency was a 2005 analysis of the impact of the guideline on the driving offense of high-range prescribed concentration of alcohol (PCA). Analyzing sentencing patterns for the offense before and after the guideline, it found that the guideline, “together with the research and educational programs leading up to it,” increased sentence severity and consistency for high-range PCA offenses.<sup>175</sup>

These evaluations showed that the guideline judgments successfully responded to informed public opinion regarding the need to increase severity and consistency of sentencing for certain offenses. The mechanism is now effectively defunct, however, as the High Court has confirmed that the Australian emphasis on individualization represents not only an inherent mistrust of United States Federal Sentencing Guidelines<sup>176</sup> and Minnesota-type guidelines, but a suspicion of English-style guidelines—and, in fact, guidelines of any type.<sup>177</sup> This is because, broadly speaking, the only “starting point” should be all the particular circumstances of the case before the court. To begin elsewhere—for example, with the presumption of a certain range—is to ignore

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IMPACT OF THE JURISIC GUIDELINES ON SENTENCING PRACTICE (2002); Lynne A. Barnes & Patrizia Poletti, *Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in R v Henry*, 26 SENT’G TRENDS & ISSUES 1, 11 (2003); Patrizia Poletti, *Impact of The High Range PCA Guideline Judgment on Sentencing Drink Drivers in New South Wales*, 35 SENT’G TRENDS & ISSUES 1 (2005). All of these reports were published by the Judicial Commission of New South Wales.

170. BARNES, POLETTI & POTAS, *supra* note 169; BARNES & POLETTI, *supra* note 169, at 11.

171. BARNES, POLETTI & POTAS, *supra* note 169 at summary. *See also R v Jurisic* (1998) 45 NSWLR 209.

172. BARNES, POLETTI & POTAS, *supra* note 169 summary.

173. BARNES & POLETTI, *supra* note 169.

174. *Id.* at 148.

175. Poletti, *supra* note 169, at 18.

176. Introduced for the purpose, *inter alia*, of “avoiding unwarranted disparities among defendants with similar records who have been found guilty of criminal conduct.” 28 U.S.C. § 991(b). *See Ulmer, Light & Kramer, supra* note 63.

177. Freiberg, *supra* note 7, at 210.

the proper “instinctive synthesis” in a way that “distorts the already difficult balancing exercise which the judge must perform.”<sup>178</sup>

The only other evaluative study of a mechanism introduced to promote consistency concerned SNPPs.<sup>179</sup> Comparing nearly five years of SNPP sentencing data to data from before SNPPs were introduced, it found that the scheme “generally resulted in a greater uniformity of, and consistency in, sentencing outcomes,”<sup>180</sup> and confirmed increased severity.<sup>181</sup> Importantly, however, it found that “it is not possible to conclude that the statutory scheme has only resulted in a benign form of consistency or uniformity whereby like cases are being treated alike and dissimilar cases differently . . . it is not possible to tell whether dissimilar cases are now being treated uniformly in order to comply with the statutory scheme.”<sup>182</sup> Thus, although consistency increased under SNPPs, it has not been demonstrated that these sentences were consistently fair.

While useful, these evaluations are of limited scope. With one exception,<sup>183</sup> they look broadly at consistency using aggregate data rather than specifically investigating the extent of *unjustified* disparity.<sup>184</sup> While the former indicates the spread of sentences, the latter study would establish whether differences were justified by asking whether (a) measures of offense seriousness and (b) offender characteristics were being treated consistently. This further inquiry is essential given that variation within the permissible boundaries does not equate to “relevant inconsistency or impermissible disparity.”<sup>185</sup>

The lack of research into unjustified disparity in Australia has “allowed the existence of unwarranted disparity to be the subject of continuing skepticism.”<sup>186</sup> However, absence of evidence is not evidence of absence.<sup>187</sup> Data that indicate whether unjustified disparity exists and how successful the mechanisms for

178. *Wong v The Queen* (2001) 207 CLR 584, 611–12.

179. See POLETTI & DONNELLY, *supra* note 56. This was preceded by a preliminary study comparing guilty plea rates for offenders sentenced before and after the SNPP was introduced. See Hugh Donnelly & Patrizia Poletti, *Guilty Plea Rates for Offenders Sentenced Before and After the Standard Non-Parole Period Legislation*, 19 JUD. OFFICERS BULL. 34 (2007).

180. POLETTI & DONNELLY, *supra* note 56, at 15–18, 60.

181. *Id.* at 60.

182. *Id.* at 60–61.

183. BARNES & POLETTI, *supra* note 169, at 68, 149 (looking at, in addition to data on ranges, the ways in which judges articulated sentencing purposes and assessed the variations in the objective and subjective features of the case).

184. BARNES, POLETTI & POTAS, *supra* note 169, at 14 (comparing sentencing patterns); Barnes & Poletti, *supra* note 169 (comparing aggregate sentencing trends only for robbery offenses); Poletti, *supra* note 169, at 4 (finding insufficient data to determine whether the offense was an example of an ordinary case or one where the moral culpability of an offender was increased; nevertheless, the study assumed that the overall nature and quality of offenses did not significantly vary between periods); Poletti & Donnelly, *supra* note 56, at 60–61 (admitting the study is inconclusive regarding whether the increased consistency is a product of treating dissimilar cases differently).

185. Spiegelman, *supra* note 2, at 450.

186. Zdenkowski, *supra* note 15, at 59.

187. See MARTIN REES, *OUR COSMIC HABITAT* 28 (2001).

promoting consistency have been are needed in order to ascertain whether sentencing in Australia is systematically fair.<sup>188</sup>

In technical terms, the evaluative task is considerable. It first requires a way of determining amounts of unjustified disparity prior to the implementation of the measure introduced to address it. As we have attempted to demonstrate, it is difficult enough to measure disparity, let alone unjustified disparity. Measures of unjustified disparity can themselves be problematic. Early evaluative problems of the U.S. Federal Sentencing Guidelines were exacerbated because the Guidelines introduced a new model of sentencing.<sup>189</sup> Certain assessments<sup>190</sup> ignored this to their detriment, using an inappropriate test of disparity that compared sentences before and after the Guidelines—which was like “comparing apples to oranges.”<sup>191</sup> These assessments used “variation from the guideline” as the only measure of unjustified disparity, instead of asking whether similar offender characteristics were being treated similarly.<sup>192</sup> This was because the Guidelines, and mandatory sentences, made such considerations largely moot. Any evaluation of the mechanisms introduced in Australia must be mindful of such problems.

The measures of unjustified disparity can be problematic in another way. Many of the U.S. evaluations have been concerned with the application and effect of the Federal Guidelines, rather than whether the sentences handed down were appropriate and fair. Although both considerations are valuable, they are not the same. The Guidelines emphasize the primacy of offense characteristics and criminal history. However, in Australia, a broader range of contextual considerations is fundamental to notions of fair sentencing that rest on the belief that offense seriousness is a function of offender culpability determined heavily by subjective offender characteristics and the harm caused. Therefore, future evaluations must incorporate this qualitative data to assess whether disparity is justified or not.

Evaluative studies must also be alert to the dangers of unjustified consistency. Consistent sentence outcomes do not necessarily indicate justified parity.<sup>193</sup> Evaluations must be sensitive to this equally undesirable result.<sup>194</sup>

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188. See *Wong v The Queen* (2001) CLR 584, 591; Hutton, *supra* note 116, at 554.

189. Under the pre-*Booker* Guidelines, previously crucial factors pertaining to the offense and the offender were effectively excluded from judicial consideration.

190. See U.S. GEN. ACCOUNTING OFF., SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED (1992); U.S. SENTENCING COMM’N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING (1991), reprinted in 5 FED. SENT’G REP. 126 (1992). See also Anderson et al., *supra* note 59, at 271, 280; Doob, *supra* note 1, at 199.

191. Anderson et al., *supra* note 59, at 271, 280; Doob, *supra* note 1, at 199, 234.

192. Doob, *supra* note 1, at 199, 234–35.

193. *Id.* at 271.

194. See Anderson et al., *supra* note 59.

## VI CONCLUSION

Common law sentencing has always struggled to reconcile the principles of individualized justice and consistency. In Australia, the emphasis on individualism places it at one end of the spectrum. The U.S. federal experience of mandatory grid sentencing prior to *Booker* highlights the dangers of too-strongly restricting judicial discretion. The relatively recent decisions of the U.S. Supreme Court have seen the law move closer to the center.<sup>195</sup> Individualism and consistency do not present an “either–or” proposition, but are rather matters of degree.<sup>196</sup> The various experiments with structured discretion around the common law world provide a rich source of ideas for achieving consistency.<sup>197</sup> The modern challenge is not to find new ideas, but to determine which of the current ones are effective in doing what they purport to do. Only when these measures are rigorously evaluated will we know whether we have arrived at our destination.

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195. This has been seen in U.S. Supreme Court decisions re-investing federal judges with a degree of individualized sentencing discretion, although not to the same extent as the pre-Guidelines era. See *United States v. Booker*, 543 U.S. 220 (2005); see also *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Rita v. United States*, 551 U.S. 338 (2007). Illustrating the dialectic nature of this debate, research is now divided on whether increased discretion has increased racial disparities in sentences. See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *YALE L.J.* 1420, 1496 (2008); Richter, *supra* note 101, at 340–42.

196. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 228 (2d ed. 2009); Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A 20 Year Retrospective*, 12 *FED. SENT'G REP.* 69 (1999).

197. See Miller, *supra* note 102, at 1351–52 (concluding that state sentencing reform appears more successful, principled, popular and consistent than the U.S. federal guidelines).