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**Letting Guidelines be Guidelines
(And Judges Be Judges)**

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In a prescient *New York Times* op-ed piece entitled “Let Guidelines be Guidelines,” written in response to the Supreme Court’s decision in *Blakely v. Washington*, before certiorari was granted in *United States v. Booker*, Bill Stuntz of Harvard and Kate Stith Cabranes of Yale urged that the best solution for the constitutional crisis facing the United States Sentencing Guidelines would be to treat the Guidelines as *guidelines*, and not as a straightjacket. The Supreme Court evidently took a similar view, deciding in *Booker* that the Guidelines were constitutional only to the extent that they were not mandatory. The recent follow-up decisions, *Kimbrough* and *Gall*, reinforce and extend the holding of *Booker* that district court judges are not bound by the Guidelines, but should impose sentences based on the general criteria set forth in 18 U.S.C. § 3553(a), after giving due consideration to the Guidelines.

Before the cheering starts among district judges, let me renew the plea of Professors Stuntz and Cabranes, only this time from the other direction. Just as “sentencing guidelines” are misnamed when they are treated as narrowly rigid binding rules, so are they misnamed when they cease to guide anyone. In these quick responses to the Supreme Court’s recent decisions, I want to make two points. First, as a matter of substantive sentencing policy, a system of carefully thought-out guidelines that are subject to broad judicial discretion to depart, but accorded respect by the courts and followed more often than not, is a highly desirable system for the federal courts. Second, the existing system approximates such an ideal, but does so as a result not of conscious policy, but of a strange and somewhat accidental confluence of circumstances, in which a moderate and reasonable outcome has resulted from the clash of extreme and ill-considered positions. That haphazard path has left some residue that interferes with an ideally functioning system. Still, we are far better off today than we were under the prior mandatory guidelines regime.

First, then, what do I mean by guidelines that are actually guidelines, and why do I think that is a desirable system for the federal courts? Let us remember why we have guidelines in the first place. The classic text here is Marvin Frankel’s 1973 book on sentencing, *Criminal Sentences: Law Without Order*. The book repays regular

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rereading, because Marvin was a wonderful writer and rhetorician. If his eloquence can be faulted for presenting an extreme picture of sentencing disparity under a fully discretionary sentencing system, I believe his central case cannot easily be disputed. I would distill two lessons from the experience of the pre-guidelines sentencing universe: (1) to the extent that a system of total sentencing discretion for individual judges permits each judge to adopt his or her own philosophy of sentencing, such a system lacks democratic legitimacy and policy coherence; (2) such a system invites excessive and unwarranted disparity, in the sense that offenders who are identical in all meaningful respects may receive radically different sentences depending on nothing more than the judge before whom they appear.

While these lessons should not be overstated, and may not require an extreme response, I don't think they can be gainsaid. The criminal law is designed in large part to control undesirable behavior, by a process of deterrence, rehabilitation and incapacitation. It also seeks to teach values by imposing fair and proportionate punishment on those who violate social rules. But these goals cannot be accomplished if significant actors in law enforcement act at cross-purposes. To take a simple example, it may or may not be a good idea to approach the problem of intoxicating and addictive substances by criminal prohibition and severe punishments. But we cannot have a coherent public policy on narcotics if half the sentencing judges are fighting a "war on drugs" and the other half are pursuing non-punitive rehabilitative treatment options. In a democracy, the legislature or its delegates should decide which policy or combination of policies should be pursued, and judges should follow the policy that is thus adopted. Similarly, the law cannot claim to be fair and just when the same defendant may serve 15 years in prison or receive a short stay in a treatment program depending on the policy preferences of the judge before whom he happens to appear.

This insight does not require an end to all discretion. If the same defendant should expect roughly the same treatment at the hands of different judges, *different* defendants, whose circumstances meaningfully differ, should receive different treatment. Any judge—indeed, any law enforcement official—knows that many variations on criminal conduct, and many variations on individual character and circumstances, bear on the fairness and policy value of incarcerating different offenders, and that these variations are too great to be captured in a rigid numerical scoring system. Discretion and judgment are called for to accommodate these differences. Some disparity in sentencing, and some weakening of the overall policy message, are the inevitable results or discretion: judges will inevitably see different cases differently, and they will do so in part based on their policy judgments. Whether I am persuaded to take a risk on an offender's case for mercy or claim that he has changed his ways depends in part on whether he stands convicted of murder or turnstile-jumping, and thus the persuasiveness of a plea of extenuating circumstances is not easily divorced from a policy view with respect to whether, say, crack really is a much worse drug than powder cocaine. But the price of such increased variation seems to me worth paying to achieve individualized punishment, at least provided judges do not use that discretion as a cover for pursuing idiosyncratic policy agendas.

I suspect that a great deal of the disparity found by Frankel in the 1970s was not the result of different judgments by judges about whether the case before them was an aggravated or mitigated case, but by variations among judges in their general sense of severity. Two judges may agree that a particular case is a substantially mitigated instance, but that agreement will be hidden from view if one judge believes that appropriate leniency means probation instead of the usual one year in prison, while another thinks it consists of giving two years rather than the expected five. A guidepost suggesting that two years is the usual sentence, which can be raised or lowered depending on facts about the individual case, serves a useful function in keeping everyone on the same page. And only if such guideposts exist, and are given meaningful respect by judges, can society make the necessary collective decision as to the degree of severity that will best accomplish society's goals.

Hence, *guidelines* are necessary. Not rigid chains, but not flaccid and ignored exhortations either.

Second, how well does the current system approximate that ideal? Well, a lot better than the mandatory system that preceded it. To understand the difference one may need to avoid an unnecessarily binary nomenclature. It is not clear to me that we have gone from a "mandatory" to an "advisory" system. Rigid as they were, the "mandatory" Guidelines were not, strictly speaking, "mandatory" at all. Statutory mandatory minimum sentences are typically close to being truly *mandatory*, although certain exceptions apply even to many of those. But for the most part, a statutory mandatory minimum *must* be imposed where a defendant is convicted of an offense that carries one. The guidelines were never mandatory in this strong sense, since discretionary departures were permitted, and the Supreme Court in *Koon* seemed to tell us that the departure standard was more flexible than many believed. Still, it was fair at a minimum to call the guidelines *presumptive*, in the sense that it was expected that sentences would generally be within the guidelines range, and both the actual message of appellate review of sentences and the atmosphere in which district judges operated tended to define the departure power as limited both in quantity (departures were expected to be a small minority of sentences) and quality (only either specifically-approved categories of case or ones meeting a rather narrow test of unforeseen circumstances qualified). Nor was it clear, at least before the recent decisions in *Gall* and *Kimbrough*, that the new regime would leave the guidelines merely hortatory. *Booker* left somewhat open the question of whether the guidelines would function as weakly normative—i.e., as starting points that ought to be followed absent some case-specific factor that constituted a decent reason for doing something else—or merely as advisory in the sense of "free advice, worth what you paid for it." Rather than a simple dichotomy of "absolutely binding and mandatory" versus "worth thinking about, but merely advisory," there is a spectrum of weights that could be given to guidelines, and the question after *Booker* was how far the Court intended judges to move the system from somewhere close to truly mandatory towards the other extreme of "not worth the paper they are printed on."

While I celebrate the move away from one extreme, I hope that the Court has not moved us too far towards the other. I think the answer will be found not in the words of Supreme Court opinions, but in the collective practice of individual judges.

Although the *Gall* case sets the general standard, it may be *Kimbrough*—in principle merely an application of the broader rule—that in practice tells us more about the Court’s intentions. Like almost all thoughtful practitioners and observers, including the U.S. Sentencing Commission, I can find no rational justification for the 100-to-1 crack to powder ratio. But as a sentencing judge, even after *Booker*, I have struggled with the question of whether I am empowered to (and whether I should) disregard that ratio in imposing sentence in crack cases. On the one hand, the sentence dictated by the ratio will typically treat a minor drug dealer—a defendant essentially indistinguishable from others receiving shorter sentences for other selling quantities of other drugs of similar dollar value and destructive power—as the equivalent of a major narcotics kingpin. That is not justice. On the other hand, if I opt to disregard the guideline because it appears misguided, but other judges do not, we have created exactly the situation I describe above as untenable: one in which *some* crack defendants receive sentences dictated by a harshly punitive policy and others do not, to the detriment of fairness and coherent policy. That is not justice either.

Kimbrough appears to come down solidly in favor of the latter result. The particular sentence in *Kimbrough* was apparently carefully thought out and based on an individuated approach to the case at hand. The Court of Appeals may well have been wrong to see it merely as an effort to impose a maverick independent policy on crack cases, and the Supreme Court’s opinion notes, at the end, the ways in which the sentence was not simply a rejection of Congress’s or the Commission’s policy judgments. Nevertheless, the opinion seems to go out of its way to approve a district judge’s power to give a non-guidelines sentence solely because of disagreement with the policy that the guideline represents.

I’m not sure that this is a good idea, and I hope that judges will be sparing in using such a power. There is reason to believe that they will be. I suspect that a large number, perhaps a majority, of judges believe that the overall sentencing pattern of the guidelines is excessively severe. At least, one could draw that conclusion from the fact that downward departures/deviations from the guidelines have always significantly outnumbered upward departures/deviations, although perhaps this pattern simply means that the guidelines have been more thorough in identifying aggravating circumstances than in recognizing mitigating ones. But I hope and expect that almost no judges will react to *Booker*, *Gall* and *Kimbrough* by announcing that they simply think the guidelines are too punitive and will generally disregard them in favor of a much more lenient regime. Although as a citizen I would welcome a re-evaluation of America’s extremely punitive penal policy (which is unique in the Western world), such a rethinking cannot be accomplished by a random pattern of leniency by some unknown percentage of federal judges.

If judges avoid relying on a *general* policy disagreement with the guidelines’ approach to severity, it may be that the instances of *specific* policy disagreement (at

least on any widespread basis) will be few. The crack guidelines, now somewhat softened by the Commission in any event, are by far the most significant example of a case in which the Guidelines' evaluation of an offense's severity relative to that of other crimes is widely considered way out of kilter. There may, however, be a few other examples. As a matter of sentencing policy, it would make sense to permit appellate courts to scrutinize

sentences that represent departures not simply from a Guideline sentence, but from any reasonable understanding of the legislature's approach to sentencing policy.

My own approach to sentencing will continue to give the Guidelines meaningful weight in sentencing, even where my own inclinations differ, and I hope that most of my colleagues will do the same. After all, the guidelines are, in and of themselves, a factor that the law instructs me to consider. At a minimum, this must mean that there are some cases in which the weight (however strong or slight) given to the guidelines will be the deciding factor. Moreover, the need to avoid undue disparity is another factor to be weighed under § 3553(a), and disparity is more likely to be avoided, other things being equal, if some significant value is placed on following the guidelines. Finally, at least two of the substantive factors to be considered—the need for deterrence and the need for punishment—are factors on which the Commission's putative expertise and national perspective entitle its views to respect. The need for punishment (that is, the retributive seriousness of an offense) is a highly subjective factor, and one on which the social norm is more likely to be reflected by the Commission's views than by my own private opinion. The need for deterrence is an empirical matter, and while the Commission has not distinguished itself for empirical research on this topic, it is better placed to evaluate the need than I, or any other individual judge, can be. My comparative advantage, as a district judge, is in evaluating those factors unique to each individual case that comes before me. But the Commission's advantage is in weighing broad social policy, and responsiveness to democratic political opinion. I should, I believe, give them deference as to the appropriate starting point or typical sentence for the average or typical instance of a given crime.

Did the Supreme Court get this balance right? While I'd be the last to invite closer scrutiny by appellate courts of my sentencing judgments, and while I appreciate the Supreme Court's vote of confidence in district judges, I think that appellate review of reasonableness of sentences can play a valuable part in this process, and I suspect that the Court, perhaps dismayed by the appellate courts' tendency to go beyond the "abuse of discretion" standard for reviewing departures announced in *Koon*, may have gone too far in emphasizing the limited role of appellate review. If an ideal sentencing system tries to limit disparity to that which is the inevitable cost of a reasonable method of discretion, appellate review of sentences that appear to go off the reservation is an important component of that system. If we are going to let (district) judges be judges, and trust them to exercise the necessary discretion with sensitivity to the need for coherent sentencing policy, so we should let (appellate) judges be judges as well, performing *their* traditional function of reining in excess and gradually developing a "common law" of what is and is not sensible.

Judging the efficacy of the post-*Gall* regime will not be easy. Oversimplified analysis will be common, and it is well to be forewarned about some of it. First, the number or percentage of non-guideline sentences is not a fair or useful measure of “disparity.” To treat it as such is to assume the substantive perfection of the Guidelines. Disparity means treating similarly situated persons differently, and not all offenders who fall within the same guideline are in fact similarly situated. More sophisticated studies of disparity, which carefully examine the individual facts of particular cases, will be necessary to determine whether an increase in non-Guidelines sentences reflects increased disparity, or simply the identification of relevant differences – a question that calls for reasoned policy judgments and not merely statistical analysis. Moreover, disparity also means treating different cases the same. Absent truly demanding inquiry into particular cases, we cannot easily know whether the rates of outside the guideline sentences are too high, or not high enough.

Second, we need to recognize that some disparity is the price of necessary discretion. There are costs either way. We would have no “disparity,” in the sense in which the word is used by guideline fundamentalists, if every offender, regardless of crime or character, received the same sentence. The federal Guidelines, of course, do a far better job of discriminating cases than that. But whatever guidelines do not capture—and the Guidelines capture almost nothing about individual character and circumstances—must be the preserve of discretion. Eliminating discretion imposes a price that is too often ignored when deploring the disparity that accompanies meaningful discretion.

Third, we ought to be more sophisticated about the kinds of disparities that inevitably exist in a federal system. Different regions and communities differ in their needs and values, and I have never fully understood why Frankel’s arguments against judge-to-judge disparity can be uncritically extended to district-to-district disparity. I can’t think of a rational defense of a system that encourages me to sentence based on my policy preferences and the judge in the next courtroom to sentence based on her directly opposite philosophy. But our federal system assumes that the criminal law, which is for the most part left to the will of the several States, will be differently enforced in Texas and in Vermont. It is no answer to say that the *federal* courts represent a single sovereignty. That may well be so for matters of distinctly national import. But for many federal crimes, federal law enforcement serves largely as a backup to local priorities. Federal uniformity simply translates into unjustified federal-state disparity if low-level drug dealers or firearms possessors or small-scale grifters are sentenced in federal court in ways that are radically different from their treatment in state courts. Such a system is especially unfair to the extent that unfettered discretion in prosecutorial and police choices govern who will be subject to which regime. A sensitive application of local values is not the same thing as an individual judge’s rejection of democratically-adopted public policy.

Determining whether trial judges are complying with such complex approaches to individual cases, and making such subtle distinctions, is not a matter of simple bean counting. It is also a question on which appellate courts, seeking to draw subtle

distinctions between sensitive individuated sentencing judgments and simple policy unorthodoxy, can have valuable input.

Finally, let me say one word about the rather strange view of constitutional law that has resulted in the downfall of the guidelines. From the standpoint of sentencing policy, the federal courts are in a better place today than we were before *Booker*. From the standpoint of constitutional law, however, we have arrived here by a very strange route. I find it difficult to dispute Justice Alito's demolition of the premises of *Blakely* and *Booker*. Certainly, from an originalist perspective, it is difficult to deny that the framers anticipated that judges would, at least in some cases, exercise a discretion that would inevitably be based on a broader view of the facts than those that the jury found. Moreover, sentencing law suggests the limits of a simplistic textual originalism—the Framers cannot have had any very specific or thoughtful understanding of what the jury trial right meant with respect to judicial sentencing discretion, because such discretion in cases of serious crime was rather a novelty at the time they did their framing. Asking what the Framers would have thought of sentencing guidelines is not very different from asking what they would have thought of electronic surveillance: the relevant technology was simply not a part of their world.

As a matter of constitutional law, I tend to agree with Justice Alito, and with the basic position of the *Blakely* dissenters, that a reform that reduces the power of individual judges to operate their own sentencing systems at the expense of the legislature's power to set policy does not necessarily implicate the jury's fact-finding powers any more than a discretionary sentencing system does. On the other hand, the right to a jury trial clearly exists in some tension with legislative control of sentencing. Like other forms of legislative control of substantive criminal law (see the cases dealing with presumptions or affirmative defenses), legislative power to *shift* critical moral elements from the definitions of offenses (where a jury must make the finding beyond a reasonable doubt) to the sentencing phase (where they can be found without a jury by a lesser standard) risks undermining the jury's role.

A stark constitutional jurisprudence that purports to leave no room for judicial judgment must choose between absolute, and equally unpalatable, alternatives. Either the legislature has total power to define "offense elements" and "sentencing factors" (raising the specter of a crime of "offensive endangerment" that lets a jury decide only that some minimal species of assault has occurred, with the judge to decide all questions of the defendant's intent or the seriousness of the intrusion—in effect, whether the defendant was guilty of reckless endangerment, rape, negligent homicide or murder), or a jury trial is required on every fact that could possibly matter to a reasonable sentencer (raising the specter of infinitely-complex jury trials, or of judges disabled from considering at sentencing significant facts about a case that have never been thought to differentiate different levels of crime or to be within the fact-finding province of the jury). Justice Scalia's apparent conclusion that *any* appellate review of sentencing potentially undermines the jury trial right, because the appellate judgment would create (horror of horrors!) binding precedent that some sentences are *wrong* for reasons other than that they exceed the legislative sentence for the facts

found by a jury is an example of such extremism. Although the majority in *Gall* and *Kimbrough* do not endorse that view, I fear that their apparent skepticism about any meaningful appellate review of the substantive reasonableness of sentences has been influenced by it.

The only sensible resolution of the tension, it seems to me, is for the Supreme Court to accept the constitutional responsibility to decide when the legislature, in the guise of sentencing reform, has genuinely undermined the *values* that inhere in the jury trial right. Telling those judges who (for whatever unusual reasons) didn't "get it" that sentences should ordinarily be higher where a defendant exploited a vulnerable victim—a policy on which most judges always acted in imposing discretionary sentences—does not undermine the right to a jury trial because it leaves the judge to decide whether the victim was vulnerable without a jury's help. Allowing appellate review of reasonableness threatens neither the right to a jury trial nor the necessary discretion of trial judges to individualize sentencing. Neither do sentencing guidelines that provide some meaningful guidance and have some actual influence on sentences.

However, setting three different levels of punishment for drug dealers depending on the nature and quantity of the drug, with different maximum and mandatory minimum sentences, is not a mere matter of defining "sentencing factors," as some appellate courts, misled by *McMillan*, held in the pre-*Apprendi*, pre-*Booker* world. Telling the difference is a matter of judgment, based on a reasoned judicial understanding of the role of the jury trial and a fair appreciation of American tradition, and there will be cases on which reasonable judges will disagree, based in part on their individual "philosophies." Moderate, conservative judges like Justices Stewart, Powell, and O'Connor recognized that such line-drawing is a part of the constitutional judicial role, and avoids the extremes of hyper-deference to the legislature on the one hand or a literalism that prevents the legislature from adopting meaningful sentencing reform without paying an impossible procedural price on the other.

As Professor Stith and Judge Cabranes wisely reminded us, proponents of a rigid guideline system were afraid to let sentencing judges be judges; the Supreme Court has perhaps transcended that fear. The Court still seems to fear letting appellate judges perform their traditional function; I hope that restrained, judicious review of sentences outside the mainstream will prove that this fear is also overstated. The constitutional philosophy of a number of Justices professes a deep fear of any line-drawing by the Court itself. Perhaps we should not be afraid to let Supreme Court justices be judges, too.