

State and Federal Sentencing Guidelines: Apples and Oranges

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INTRODUCTION

Nearly five years have passed since the federal sentencing guidelines took effect. Since then, almost a dozen states have either enacted sentencing guidelines enabling legislation or have significantly progressed in developing guidelines systems. In enacting their statutes and developing their guidelines, these states have chosen to rely heavily on pre-existing state efforts and have essentially ignored the federal effort. One can attribute this trend in part to state judges, who typically play a significant role in state guidelines efforts. Many of these influential judges appear to share federal judges' widespread antipathy toward the federal product.¹ As a result, states have often overtly rejected

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¹ See, e.g., FEDERAL COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMISSION 133-43 (Apr. 2, 1990) [hereafter FCSC]. Note, in particular, that former Chief Justice Callow of Washington State (a state that has long accepted sentencing guidelines) urges a more dramatic rejection of the federal guidelines than does the full committee. *Id.* at 141-43. In addition to the survey results that the Federal Courts Study Committee reported, the 11th Circuit Sentencing Institute has obtained similar and more recent results. 11TH CIRCUIT SENTENCING INST., JUDICIAL SURVEY REPORT (Nov. 1991) [hereafter JUDICIAL SURVEY] (on file with the *U.C. Davis Law Review*). In a survey of 56 judges attending a workshop for the 11th Circuit in November 1991, nearly three-fourths stated that under the guidelines, a judge's discretion in sentencing was "insignificant." Only one-half thought that disparity had been reduced, and three-fourths stated that prosecutorial control of sentencing had increased. While many would find the reduction

guidelines that resemble the federal effort and have relied instead on prior state efforts as a model.²

One could view this trend as an editorial statement on the part of these jurisdictions, and to some degree it is. Reliance on prior state efforts, however, is not based solely on a negative reaction to the federal guidelines. It is also based on a wide-spread recognition that state guidelines are superior to those on the federal level because of their extended period of use. State guidelines predate those on the federal level by almost a decade. Consequently, state guidelines are more conceptually developed and are easier to apply than the federal guidelines.³ In short, they have had their "break-in" period.

State efforts began at a formal level in Minnesota in 1978. The primary legislative goals in establishing Minnesota's guidelines system were to redistribute sentencing discretion from the parole board to judges and to provide more proportional and uniform sentences. The Minnesota Sentencing Guidelines Commission recognized that they could not meet these goals absent coordination of sentencing policies with correctional policies. Thus, the Commission established a system that balances sentencing policy with the correctional resources which the legislature provides.⁴

Most subsequent state efforts shared goals similar to Minne-

in judicial discretion a positive step by itself, few would be heartened by the combined conclusions that discretion had been transferred from several hundred judges to several thousand prosecutors and that disparity had not been clearly reduced. *Id.*

² For example, at its first meeting on December 10, 1991, in Austin, Texas, the Texas Punishment Standards Commission specifically agreed that they did not want to develop standards that resembled the federal sentencing guidelines system.

³ At least one academic critic has argued that *all* existing guidelines systems are defective. See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991). Alschuler, however, fails to appreciate that the paradigmatic cases which he calls for are essentially contained within the usual case methodology of the state guidelines. Moreover, Alschuler's case for less aggregation is, to some degree, based upon an inappropriate aggregation of state and federal guidelines efforts. For instance, he concludes that guidelines efforts are too expensive, relying exclusively on the cost of the federal effort, a blatantly misleading aggregation. *Id.* at 906; see also *infra* note 30 (comparing United States Sentencing Commission budget with state commission budgets).

⁴ Minnesota accomplishes this balancing system through monitoring, simulation, and impact assessment.

sota's.⁵ For example, both Washington State and Oregon developed legislatively approved guidelines systems similar to Minnesota's.⁶ Pennsylvania, Tennessee, and Louisiana also developed guidelines, leaving some discretion in the parole board's hands yet failing to resolve the issue of where sentencing discretion best lies. In Kansas, the state sentencing commission's guidelines are pending before the legislature. Florida and Michigan are currently revising their earlier guidelines efforts so that they more closely resemble state guidelines systems in Minnesota, Washington, and Oregon. Finally, Texas, South Carolina, North Carolina, and Ohio all have established commissions to develop sentencing standards.

The state guidelines systems that have been most successful in meeting their goals over an extended period have three things in common. First, their policies are realistically grounded in clearly articulated principles regarding both the purposes and goals of a sentencing system. Second, their sentencing policies are easily understandable and functional because they are experientially grounded in the concept of "usual case."⁷ Finally, these states developed all policies with a specific eye toward implementation.

Given the rich history of these state efforts, one would think that the federal system would have modeled them. Yet, in the end, the United States Sentencing Commission essentially ignored the state efforts. One can attempt to retroactively justify this result by noting that the federal criminal justice system and state systems have significant structural and statutory differences. These differences could well have influenced a knowledgeable federal commission to proceed differently than prior state efforts.⁸

In reality, however, the most important difference between the state and federal guidelines did not result from structural or stat-

⁵ See Michael Tonry, *Sentencing Guidelines and Their Effects*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 16, 16-43 (Andrew von Hirsch et al. eds., 1987) [hereafter THE SENTENCING COMMISSION].

⁶ WASH. REV. CODE ANN. §§ 9.94A.010-.910 (West 1988 & Supp. 1992); 1989 Oregon Laws ch. 790, § 87.

⁷ For an elaboration of the "usual case" concept, see *infra* notes 9, 13-22 and accompanying text.

⁸ The key distinguishing factors on the federal level include the following: (1) unique, discretionary, and often symbolic federal jurisdiction over crimes compared with the common-law basis of state crimes; (2) the incoherence of the federal criminal code; and (3) the fiscal freedom enjoyed by the federal government relative to the states.

utory factors; rather, it resulted from a United States Sentencing Commission policy choice. That most important choice was to develop a highly mechanical, "quasi-elemental" basis for federal sentencing guidelines instead of the more principled, conceptual "usual case" basis for state sentencing guidelines.⁹ Many critics contend that the federal guidelines are too rigid, too detailed, or too complicated.¹⁰ This criticism relates directly to a mechanical approach. The adopted mechanical approach is also primarily responsible for transferring so much federal sentencing discretion to the prosecutor.¹¹

Thus, for both structural and policy reasons, the federal guidelines provide no model for states considering or developing sentencing guidelines. The differences between the systems render the federal model inappropriate for state use. Moreover, even if the systems were identical, the federal model is such that it is antithetical to the very goals that cause states to consider guidelines to begin with.¹²

In our view, either structural or policy reasons provide a sufficient basis for states to avoid any consideration of the federal model. The flaws of the mechanistic approach, however, are more fundamental and thus particularly warrant discussion.

I. THE MECHANICAL APPROACH: A CLOCKWORK ORANGE

As noted, state systems have proceeded on the basis of the usual case while the federal system eschews such a notion. A brief description of a state usual case system may be useful.

⁹ Judge Bruce Selya of the United States Court of Appeals for the First Circuit and Matthew Kipp have aptly described this notion as "the heartland": those typical cases that define the mine-run characteristics of an offense." See Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 3 (1991).

¹⁰ For a summary of such criticisms, see FCSC, *supra* note 1, at 133-43; see also Marc Miller & Daniel J. Freed, *The Commission Under Fire: Constructive Advice or Destructive Attack?*, 2 FED. SENTENCING REP. 207-09 (1990).

¹¹ See JUDICIAL SURVEY, *supra* note 1.

¹² States have adopted sentencing guidelines largely as a means to manage previously uncontrolled correctional spending; this is comparable to the rules that states adopt to control welfare and health payments. Conversely, the federal model specifically ignores correctional spending resources on the assumption that Congress will pay any amount the Commission requires.

A. State Guidelines Systems

A state sentencing commission's most important task is to perform a thorough experiential analysis of the state's crimes. This analysis generally takes between six and eighteen months, depending upon the frequency and duration of meetings. The commission examines each crime with respect to the interests the commission seeks to protect, the culpability of the offender, and the type and level of harms involved. What differentiates this analysis from that which occurs in other analyses, such as code revision, is that the commission applies its analysis to the *typical case* of each crime. Obviously, the commission spends much of its analysis discussing the nature of the typical case. This analysis inevitably involves extensive discussions of de facto elements such as offender characteristics,¹³ situational factors,¹⁴ relationship between victim and offender,¹⁵ victim characteristics,¹⁶ type of harm,¹⁷ and level of harm in the typical case.

Commission members who have extensive courtroom experience almost always come to a consensus regarding what constitutes the typical case of a particular crime. The picture drawn of the typical case for each crime is generally very rich, and is based on extensive experience. The picture is essentially a paradigmatic case, albeit a special paradigmatic case in that it also represents the modal case.¹⁸

Once the commission identifies a typical case, it analyzes the case according to factors deemed important in assessing its seri-

¹³ These characteristics include chemical dependence, unemployment, and youth.

¹⁴ Examples of situational factors include a drug sale by a user or seller, a credit card or check theft where the retailer fails to run a credit check, and an embezzlement with a betrayal of trust.

¹⁵ Relevant relationships between victim and offender include acquaintances, relatives, or strangers.

¹⁶ Relevant victim characteristics include vulnerability and precipitation.

¹⁷ These harms include emotional, economic, and physical harms.

¹⁸ A state commission's focus on the modal case differentiates state efforts from Professor Alschuler's approach, which calls for the development of paradigmatic cases that can be used to develop sentence benchmarks. See Alschuler, *supra* note 3, at 939-49. The focus on modal cases has allowed states to conduct impact assessments, simulate outcomes, and otherwise plan for implementation and coordination with correctional resources. This planning function is very important to state legislatures and has become a primary motivating factor for developing structured sentencing at state and local levels.

ousness—interests protected, culpability, type and extent of harms. The commission then ranks the offenses according to the seriousness of the typical case relative to the typical cases of other crimes.

In some instances there are too few cases prosecuted to identify a typical case. These usually remain unranked. For other crimes, there are two or more typical cases. These can often be differentiated without great complication.¹⁹ The criteria for making these kinds of differentiations are generally two-fold: (1) the sentencing judge must easily establish proof; and (2) the differentiation must cover a significant number of cases. Most commissions rely on relatively few differentiations that are not already reflected in their criminal codes.

The presumptive sanctions that are developed are designed for the typical case. Atypical cases are subject to departure²⁰ from the presumptive sanction. Aggravating and mitigating factors articulated in state guidelines systems tend to be conceptual rather than elemental.²¹ It is the judge's duty to determine whether the case presented falls within the purview of a typical case or outside that purview. That judgment is subject to appellate review, often resulting in a substantial and on-going body of case law regarding the nature of cases relative to one another.

States developed their sentencing guidelines around the concept of the usual case because the range of behavior covered in

¹⁹ One example of such differentiation is assault of a victim under 12 years of age and 12 years or over. Victim age is not a difficult factor to prove, and it helps to differentiate child abuse cases from other assault situations. Another example is burglary, in which an underlying offense of theft is differentiated from other underlying offenses (most typically robbery, sex offenses, and assault). Proof must be established regarding the felony underlying the unlawful entry. As such, differentiating on that basis for sentencing purposes is relatively easy.

²⁰ A "departure" is a judicial decision to depart from the presumptive sentence. Departures may be specifically authorized (for example, if the crime was unusually heinous, the judge may depart from the crime's presumptive sentence) or they may be permitted but not specifically authorized (for example, a court may depart from any presumptive sentence, subject to appellate review).

²¹ For example, determinate sentencing codes frequently include specific elements such as use of a weapon, serious physical injury, aid by an accomplice, or other factors. Under state guidelines, however, aggravating and mitigating factors are more conceptual, such as a particularly vulnerable victim, an aggressive victim, a passive offender, or an offender's gratuitous cruelty in perpetrating the crime.

most crime definitions is very broad. Presumptions based on a usual case methodology allow guidelines to be superimposed over existing classification schemes while making appropriate distinctions between typical and atypical cases.²²

B. The Federal Guidelines

Unlike state commissions, the United States Sentencing Commission did not incorporate a usual case methodology into the federal guidelines.²³ Instead, the Commission adopted a “minimal” or “base case” approach.²⁴ This approach assigns a point value to the barest elements of the offense that must be shown for a conviction. Points are then either added to reflect aggravating factors or occasionally subtracted to reflect mitigating factors. In effect, this approach is more mechanical and less conceptual than the usual case approach that state commissions use. This

²² The focus on the usual case results in emphasizing de facto as well as de jure elements. De facto elements are not as clearly articulated or specifically defined as de jure elements. Nonetheless, de facto elements are often very relevant to the sentencing decision and too subtle to build into a sentencing scheme in a more mechanical way. Thus, they are conceptually built in through the notion of usual case. This approach relies upon the judgment and experience of the sentencing commission to incorporate de facto elements into the sentencing guidelines. The approach also relies on the judgment and experience of the trial and appellate courts to incorporate de facto elements into specific sentences. Thus, the usual case approach results in guidelines that are relatively simple to use and are conceptually rich. The approach also invests judges with sentencing discretion in a meaningful fashion.

²³ In addition to failing to incorporate a usual case methodology into the guidelines, the Commission similarly failed to incorporate de facto elements or build upon the judgment and experience of commissioners and trial and appellate courts.

²⁴ The Commission was handicapped in looking at the usual case notion because only four of its seven original members had any “hands on” experience with sentencing in the field. Of these four, one had significant experience in the 1950s and the other three had relatively brief and narrow exposures in more recent years. Some would argue that, even with appropriate membership, the Commission would have had to define a federal usual case which might vary dramatically from district to district. The person selling a kilo of cocaine in Fargo, North Dakota, may properly be described in closing arguments as a “kingpin,” while in Miami that same person would be a “mule.” Of course, many states have equivalent variations, especially those in border areas, and the problem has not proven to be unmanageable.

approach also enhances the power of the prosecutor in sentencing.

In this “bare bones” structure, the prosecutor may or may not choose to present evidence to show the presence of aggravating factors. This decision may dramatically affect the guidelines sentence. Prosecutors, however, have always engaged in such conduct. “Swallowing the gun” is a phrase of art. Nevertheless, in the past, the prosecutor’s decision to “swallow the gun” as a trade for a plea simply lowered the maximum available sentence. Under mechanistic guidelines, conversely, the prosecutor’s refusal to present evidence of weapon use in a crime might dramatically reduce the actual time served. In the usual case scenario, the typical elements are presumed. Thus, for the prosecutor to swallow the gun in a bank robbery case, she must affirmatively misstate the facts—a far different matter than simply failing to come forward with the evidence.

One can defend a mechanistic approach on the basis of precision. Yet the existence of precision in the federal guidelines is neither proven nor provable. Precision involves both a specific and correct answer to a problem. Specificity alone is inadequate. A digital clock is specific, but if it is not accurately set, its very specificity is not a virtue; rather, it is a vice because specificity, by appearing to avoid the need for caution, may mislead the observer. Unlike the digital clock, an analog clock always requires the exercise of caution because the observer must always translate the position of the hands into some generalized statement of the time. The observer is thus conscious of subjectivity with the analog clock; the digital clock, on the other hand, seems to assert objective truth.

Proponents of the federal guidelines argue that because the guidelines end up with a sentencing range (for example, twenty-four to thirty months), they more closely resemble the analog clock than the digital. In fact, the mechanistic steps which lead to that range are the source of the difficulty. A decision about an imprecise and subjective factor such as the role in the offense leads to a specific, or digital, result. That specific result—rightly or wrongly—in turn may raise the lower end of the guidelines range by many months. A range existing above that lower end is of no value if the lower end is based upon an imprecise but specific calculation.

Under the mechanistic model, every possible element of every possible offense must be considered and either included or

excluded in every sentencing decision. Such an approach starts with simple elements that achieve enormous complexity very quickly. That complexity drains the time and energy of every actor in the criminal justice system.²⁵ When contrasted with a successful state system, one can literally weigh the results. The 1991 version of the federal guidelines manual is 440 single-spaced, 8.5-inch by 11-inch pages long—much larger than the criminal code itself. It also contains an appendix with an additional 254 pages of new amendments²⁶ for a grand total of nearly 700 pages weighing 3 pounds, 9 ounces. In comparison, the 1991 version of the Minnesota sentencing guidelines and commentary takes up precisely 73 pages (many of which are not single-spaced) and weighs in at 10 ounces.²⁷

II. THE FEDERAL CRIMINAL JUSTICE SYSTEM: A NOVEL ORANGE

Given the policy choice to proceed with a mechanistic methodology, it was axiomatic that the federal sentencing guidelines would be complex. It was also clear that by placing sentencing discretion in the hands of the prosecutors, the guidelines would be readily subject to circumvention. This policy choice alone renders the federal guidelines unsuitable as a resource for state guidelines development. But, as noted, other factors at work make any federal effort—brilliant or bizarre—essentially unsuitable as a model for either implementing or evaluating state efforts. A brief discussion of these differences should serve to put the federal guidelines effort in a more appropriate context.²⁸

²⁵ In the Bureau of Prisons Survey, more than 80% of the respondents concluded that the federal guidelines demanded more hearing time. See JUDICIAL SURVEY, *supra* note 1, at question 15. A similar result (90%) was obtained by the Federal Courts Study Committee. See FCSC, *supra* note 1, at 137.

²⁶ See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL App. C (Nov. 1991) [hereafter U.S.S.G.].

²⁷ See MINNESOTA SENTENCING GUIDELINES COMMISSION, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY (1991) [hereafter MINNESOTA GUIDELINES AND COMMENTARY].

²⁸ For a more elaborate discussion of these differences, see Kay A. Knapp & Denis J. Hauptly, *U.S. Sentencing Guidelines in Perspective: A Theoretical Background and Overview*, in THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 3, 3-18. (Dean J. Champion ed., 1989).

A. Money

The first factor that makes the federal guidelines a poor model for state systems is money. Money comes into play in two areas. First, substantive guidelines policy is the primary determinant of corrections resource needs, including prison beds, probation officers, and program slots. States neither print money nor operate large discretionary programs that can be cut to finance correctional increases. As such, state commissions scrutinize substantive guidelines policies with correctional resources in mind. Any increases in correctional costs must be justified in terms of clear benefits. If the legislature does not wish to build more facilities or the people reject bonds for such facilities, state commissions must adjust sentences to meet reality. In contrast, the federal government prints money. Consequently, front door coordination of sentencing policy with correctional resources is less pressing at the federal level.²⁹

The second area in which money plays a role is in funding a sentencing commission and implementing guidelines. The United States Sentencing Commission has a budget that is twenty to thirty-five times greater than the budget for state efforts.³⁰ No

²⁹ Should the federal government ever seriously address deficit reduction, however, the federal situation will begin to resemble that of the states. Meanwhile, states will never resemble the current federal situation.

³⁰ The United States Sentencing Commission will spend in excess of \$9,500,000 in fiscal year 1992 and will have somewhat more than 108 employees. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1992 pt. 4, at 1196-97 (1991). By contrast, the Minnesota Sentencing Guidelines Commission will operate on a budget of \$250,000 in fiscal year 1992 with 4.5 employees. While there are significant differences in logistical problems and in caseload, the federal agency covers about 30,000 sentenced offenders per year. U.S. SENTENCING COMM'N, ANNUAL REPORT, tbl. E (1990). This table shows 29,011 offenders sentenced under the guidelines in Fiscal Year 1990 (the 1991 report has not been published). Thus, the United States Sentencing Commission spends roughly \$315.00 per person sentenced while Minnesota covers about 9000 offenders and spends \$27.50 per person sentenced. Conversation with Debra Dailey, Director, Minnesota Sentencing Guidelines Commission (Dec. 28, 1991). Similarly, the Pennsylvania Commission monitors approximately 50,000 offenders sentenced each year with 10 employees and a budget of \$480,000 (\$9.60 per offender sentenced). Conversation with John Kramer, Director, Pennsylvania Sentencing Commission (Jan. 4, 1992). Washington State monitors approximately 16,000 sentenced offenders with 5 full time equivalent staff and an annual budget of \$319,000 (approximately \$20.00 per offender). Conversation with Don Moore,

state is likely to ever spend anywhere near the amount that the federal government has spent on guidelines development. Nor is it likely that any state would consider spending the funds necessary for training and hiring new judges and probation officers to implement guidelines as complex as the federal system's. In short, no state would likely consider guidelines as complex as the federal guidelines because it could not afford to do so.

B. Code

The vast majority of states have enacted variations of the Model Penal Code. While this fact presents some problems,³¹ the Model Code is a tidy and relatively consistent structure. The federal criminal code, on the other hand, is simply the worst in the United States, if not in the world. It is a hodgepodge of inconsistent, archaic, overlapping, poorly drafted, and sometimes downright silly provisions.³² Imposing any sentencing structure on top of a statutory structure that no one defends is a nearly hopelessly complex task.

Model Penal Code states have a simpler problem. These states must consciously break away from the Code's severity classifications and must add the richness of detail that the Code conspicuously lacks. These tasks, however, are feasible. In contrast, devising orderly sentencing guidelines for a disorderly federal code is a daunting task. That task becomes much more difficult when one opts for a mechanistic model such as the federal guidelines in which each concrete situation has a guideline developed for it. The chaotic federal code could have been handled much more simply with a conceptual model superimposed over the statutory complexities. Such an overlay would treat conduct that was conceptually similar in similar ways. But even this type of model could not fully compensate for the undue complexity of the federal code. This is so because the endless federal variations allow

Director, Washington Sentencing Commission (Jan. 4, 1992); see also Kay A. Knapp, *Organization and Staffing*, in THE SENTENCING COMMISSION, *supra* note 5, at 117-24. This massively greater expense has not been shown to have yielded better results. See *supra* note 1; see also Michael Tonry, *Are the U.S. Sentencing Commission's Guidelines "Working Well"?*, 2 FED. SENTENCING REP. 122, 125 (1989).

³¹ One problem, for example, is that the Model Penal Code sentencing classifications are designed for indeterminate, rehabilitation-oriented sentencing systems.

³² See S. REP. NO. 553, 96th Cong., 2d Sess. 3-5 (1980).

different nominal descriptions of essentially the same conduct in so many ways as to confound even the most diligent drafter. For instance, it is entirely possible to prosecute the same drug transaction as a drug offense, a racketeering offense, a tax offense, a general conspiracy offense, a perjury offense, and so forth. Each of these options will vary a significant sentencing factor (such as maximum sentence or mandatory minimum) under the code itself and will lead to a variation in base offense level under the guidelines. The conceptual approach makes the game harder to play, but the artful prosecutor will still be able to play often enough to damage the operation of the system severely.

C. Discretion

Essentially all federal prosecutions are discretionary in the sense that almost every federal crime constitutes a state crime as well.³³ The opposite, however, is also true. Given the vast scope of federal "commerce clause" criminal statutes, essentially all nontraffic state offenses also violate a federal statute. Thus, federal prosecutors have an extraordinary amount of room to pick and choose. From the vast universe of crime, they can select those crimes which they wish to prosecute knowing not only that they have the authority to do so, but also that states will typically prosecute the cases they choose not to.³⁴ The federal code structure compounds this broad discretion and allows prosecutors, once they have decided to prosecute, to choose among many statutes (with different maximum penalties and different guidelines) covering the same conduct. Thus, their discretion affects not only charging, but dramatically affects sentencing as well.

In contrast to federal prosecutors, state prosecutors face cer-

³³ The major exceptions are customs offenses and immigration offenses.

³⁴ One federal judge has very aptly described the situation by stating that "[w]here there are many criminal violations but only a few can be chosen for prosecution, the prosecutor invades the province of the lawmaker. The inevitable result is a public perception that the process is unfair." Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 127 (1987).

Miner's article is piercingly terse. In terms that are difficult, if not impossible, to dispute in good faith, it argues that the federal role in criminal justice has been badly perverted. Chief Justice Rehnquist has recently voiced his own concerns about the "federalization" of homicide provisions, a notion that he describes as "inconsistent with long-accepted concepts of federalism." WILLIAM H. REHNQUIST, THE 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (Dec. 1991).

tain imperatives. If they turn down an assault case, no one else is going to prosecute that case. On the other hand, if they decide to prosecute, they usually have only one statute under which to do so. Moreover, if an individual citizen or group of citizens finds a prosecutor's decision offensive, that prosecutor is locally and politically accountable for it.

Unlike state prosecutors, the only significant constraint on federal prosecutorial discretion is the number of Assistant United States Attorneys allocated to a district, essentially a budgetary matter. While there are occasional efforts to control federal prosecutors at a national level,³⁵ these are often rebuffed, and all lack an effective enforcement mechanism. Indeed, the Department of Justice has sent out memoranda effecting the policy against accepting plea bargains that fail to accurately describe the offense.³⁶ The first of these memoranda told federal prosecutors that, among other things, they should not make false statements to federal judges.³⁷ A second memorandum followed that consisted of quotes from the previous memorandum, invoked presidential authority, and specifically referred to the necessity of not pleading people out of mandatory firearms counts.³⁸ Nonetheless, despite the extraordinary invocation of presidential authority, the United States Sentencing Commission reports that the Assistant United States Attorney "swallowed the gun" forty-five percent of the time in mandatory sentencing situations during 1990.³⁹ There are some areas, such as intent of the actor, where

³⁵ See Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310 (1978).

³⁶ See *infra* notes 37 & 38.

³⁷ See Memorandum of Dick Thornburgh, United States Attorney General, to Federal Prosecutors (Mar. 13, 1989 (16 months after guidelines went into effect)), reprinted in GERALD T. MCFADDEN ET AL., FEDERAL SENTENCING MANUAL, app. 11B, at 11-87 to -93 (1990).

³⁸ See Memorandum of Dick Thornburgh, United States Attorney General, to Federal Prosecutors (June 16, 1989).

³⁹ U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 57 (Aug. 1991). Moreover, other Commission data show that in at least 17.5% of the cases studied, federal prosecutors dropped mandatory sentencing counts already found to have been based on probable cause by a grand jury. See U.S. SENTENCING COMM'N, *Executive Summary* to 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 81 (Dec. 1991). Unless these prosecutors are going to the grand jury before a

“difficulty of proof” is an acceptable excuse in a large percentage of cases. Such an argument regarding the presence of a gun, however, is credible only in a small percentage of cases.

Obviously, neither an effective audit nor sanction policy exists for violating these memoranda. Nor could such a policy exist, given the political and administrative independence of the ninety-five United States Attorney offices and the insurmountable difficulties in gathering information necessary to police such practices.⁴⁰ This reality largely explains the variation in perception between the Commission, which reports a relatively high reduction in disparity, and judges, who believe that disparity remains a major problem. If plea bargains often involve deliberate factual distortions, the data will show little reported disparity; the participants, however, will relate rampant actual disparity.⁴¹ Transferring to unaccountable federal prosecutors this enormous sentencing discretion on top of their already vast charging discretion creates a disturbing concentration of power.⁴² No matter how one feels about an individual prosecutor or the federal criminal justice system in general, that level of concentration is one that few would regard as appropriate.⁴³

The all-encompassing nature of the federal criminal code has another unusual effect. Because of certain territorial jurisdictions such as military bases, national parks and forests, and Indian res-

thorough study of the case, it would seem that these cases were reduced for case disposition, not evidentiary purposes.

⁴⁰ Indeed, it would appear that the Department has a policy of allowing even Assistant United States Attorneys to authorize evasion of the guidelines because of such mundane matters as workload pressures. See Letter of Joe B. Brown, United States Attorney (M.D. Tenn.), *Response to Owen Walker*, 2 FED. SENTENCING REP. 126, 126-27 (1989).

⁴¹ For a similar conclusion, see Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 164-65 (1991).

⁴² One federal prosecutor has written that the Thornburg strictures on prosecutors “parallel . . . the new strictures on judges.” See Thomas E. Zeno, *A Prosecutor’s View of the Sentencing Guidelines*, FED. PROBATION, Dec. 1991, at 31, 33. Such a statement is simply inexplicable in light of the fact that a defendant has no appeal from a prosecutor’s charging discretion and no range within which that discretion must be exercised.

⁴³ To our knowledge only one federal judge who has not been a Commission member has ever written an article favorable to the federal guidelines. Even that author confessed to being “troubled by the way [they] shift sentencing control from judges to prosecutors.” See Statement of Judge Kleinfeld in Andrew J. Kleinfeld & G. Thomas Eisele, *The Sentencing Guidelines: Two Views from the Bench*, FED. PROBATION, Dec. 1991, at 16, 19.

ervations, the federal code contains the whole range of common-law crimes. These types of crimes, however, are very rare in the federal system.⁴⁴ Because offenses such as assault with intent to kill are rare in the federal system and, when prosecuted federally, are likely to be extreme cases, the guidelines in these areas are essentially symbolic.⁴⁵ As such, setting the penalties at very high levels is of no systemic significance, despite its significance to the individual statistic, and may even be inappropriate.⁴⁶ In other words, a state's "typical" case is probably quite different from the federal experience.⁴⁷

⁴⁴ For instance, in statistical year 1990 there were 176 homicide cases brought in the federal system, barely one-third the number of murders in Washington, D.C. in 1991 alone (489). See ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, BOOK ONE, tbl. D-2 (1990); Gabriel Escobar, *Man Allegedly Shoots Wife, Self at D.C. Office*, WASH. POST, Jan. 1, 1992, at C4.

⁴⁵ Meanwhile, in states, such offenses are daily realities in every courthouse. As such, state guidelines must be aimed at the usual case. For example, federal prosecutors may decline to prosecute bank embezzlements of less than \$2500 (a standard policy in the early 1980s). Thus, the "typical" federal bank embezzlement case may be very serious, and the guidelines, accordingly, may assume a level of seriousness that does not match typical state experience. In contrast, state prosecutors would be hard-pressed to decline any prosecutable case of bank embezzlement that a bank presented to them.

⁴⁶ Though, even here, there is room for doubt. Federal law permits the imposition of the death penalty for drug-related homicides. 21 U.S.C. § 848(e) (1988). According to one major legal publication, federal prosecutors have sought the death penalty in only 7 out of 3900 cases where such a prosecution might have been brought. Edward Frost, *Arbitrary Prosecution?: Alleged Drug Kingpin Challenges Constitutionality of Federal Death-Penalty Law*, 78 A.B.A. J. 30 (1992). Because the Department of Justice was the primary supporter of the death penalty addition, one must assume that the Department considered the death penalty inappropriate in the remaining 3893 cases.

⁴⁷ Ironically, and quite relevant to the discussion of a mechanistic approach, the federal guidelines for embezzlement are vastly more detailed than state guidelines. The federal guidelines start with embezzlements of \$100 or less and then add points in 21 separate gradations as amounts embezzled exceed that figure. This is the equivalent of a digital clock that displays seconds. See U.S.S.G. § 2B1.1. The Minnesota guidelines, in contrast, group all embezzlements under \$2500 in the same category and allow structured discretion to deal with the distinctions. See MINNESOTA GUIDELINES AND COMMENTARY, *supra* note 27, § IV. It is doubtful that the federal government has ever prosecuted an embezzlement involving less than \$100 even where the money taken is from itself. Certainly a bank embezzlement involving less than \$100 does not invoke a federal interest.

CONCLUSION

Given the mechanistic nature of the federal guidelines and the three structural factors discussed above, any state effort is likely to be significantly distinct from the federal effort. States do not have the money to finance complex sentencing systems or to build vastly larger prison systems. State codes are in much better shape than the federal code and thus allow for easier drafting of guidelines. Moreover, state prosecutors typically do not have the essentially unrestrained charging discretion of federal prosecutors. Finally, there is a long history of state independence from federal influence in this area.

Because the federal government has always been a minor player in criminal justice and because its jurisdiction has been largely arcane, it has never played a lead role in substantive criminal law matters. States occasionally look to the federal government for examples in other areas of policy,⁴⁸ but they have not looked to the federal government for substantive criminal law advice. The federal government is too remote and too minor a player to serve as a model. Its problems are different in nature, and its solutions depend on having resources that states could not even imagine.

The federal government has substantially expanded its role in the criminal law during recent years. However, in the sentencing area, at least, states show no signs of breaking with their own tradition. State problems are different. State processes are different. State solutions are different. As such, state guidelines are, and likely will remain, different.

⁴⁸ For example, states might look at federal safety regulations or housing standards.