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JUST DESERTS AND LENIENT PROSECUTORS: THE FLAWED CASE FOR REAL-OFFENSE SENTENCING

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Professor Julie O'Sullivan has undertaken a formidable assignment: defending the "much maligned 'cornerstone'"[1] of the Federal Sentencing Guidelines, the United States Sentencing Commission's decision to adopt a modified "real-offense" sentencing system. Professor O'Sullivan does not shy away from a good fight. She vigorously defends the most controversial aspect of the Guidelines: the requirement that judges in many cases base sentences on uncharged alleged criminal conduct, charges that have been dropped as part of a plea agreement, or charges of which the defendant has actually been acquitted. Indeed, her main criticism of the Guidelines is that the Sentencing Commission has not gone far enough in embracing the mandatory real-offense sentencing.

As one of those who has "maligned" the Guidelines' mandate that judges consider unproven criminal conduct,[2] I nonetheless find much to admire in Professor O'Sullivan's article. Upon reflection, it is rather shocking that it has not been until the Guidelines' tenth anniversary that someone has attempted to offer such a well-developed defense. Then-Commissioner Breyer included a thoughtful, but brief, exegesis on this subject in an early article on the Guidelines,[3] but the Sentencing Commission itself has offered only the slimmest rationale for this fundamental decision.[4] Professor O'Sullivan fills this gap with a thorough and perceptive analysis. She makes probably the best possible case for including what I have called alleged-related offenses[5] in the sentencing calculus.

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1 Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines Modified Real-Offense System*, 91 Nw. U. L. Rev. 1342, 1344 (1997) (quoting William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495, 496 (1990)).

2 *See* David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403 (1993).

3 Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 8-12 (1988).

4 *See* Yellen, *supra* note 2, at 438-45.

5 *Id.* at 411.

In fact, there are at least two important points on which Professor O'Sullivan and I are in agreement. First, we agree that the potential justification for requiring judges to consider alleged criminal conduct for which the defendant has not been convicted is that it may negate undercharging by prosecutors.[6] In a "conviction-offense"[7] system, a prosecutor's selection of charges greatly influences the sentence. By bringing multiple counts, where one might be appropriate, the prosecutor can ensure a harsh sentence. The prosecutor can also produce a lenient sentence by filing charges that understate the seriousness of a defendant's conduct. The Guidelines deal with the first problem—overcharging—through the grouping rules of Chapter 3.[8] Alleged-related offense sentencing attempts to address the second problem, undercharging.

Second, Professor O'Sullivan and I agree that the Sentencing Commission has failed adequately to explain why it requires alleged-related offense sentencing for some crimes, such as narcotics crimes or fraud, but not others, such as bank robberies. The Commission attempts to explain this policy by referring to the fact that the Guidelines determine sentences for the former category of offenses based largely on the amount or quantity involved in the offense, but this explanation is unrevealing.[9] If there is any reason why a defendant should be sentenced as if convicted of an uncharged drug crime but not of an uncharged bank robbery, the Commission has failed to articulate it.[10]

Professor O'Sullivan and I are in sharp disagreement, however, on the implications of these points. She feels that restraining prosecutorial leniency is appropriate, even essential, to the goals of sentencing reform.[11] She also concludes that the Commission's irrational line should be shifted so that all forms of criminal conduct receive the Guidelines' real-offense treatment.[12] I disagree with both of these conclusions and continue to adhere to my belief that alleged-related offense sentencing under the Guidelines is a moral and practical disaster.

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6 *See, e.g.*, O'Sullivan, *supra* note 1, at 1359-60.

7 The more common phrase, "charge-offense" sentencing, is a misnomer: in such a system, the offense of conviction actually determines the sentence.

8 *See* Yellen, *supra* note 2, at 441-44.

9 *See id.* at 438-39.

10 Perhaps even more puzzling is the way the Commission's rules work. As I have noted:

> A second robbery adds two levels, but only if the defendant is convicted of both crimes; [a] second fraud may add nothing even if it results in a conviction, or it may add months or years to the presumptive sentence even if there has not been a conviction on that second count.

Yellen, *supra* note 2, at 437.

11 *See* O'Sullivan, *supra* note 1, at 1400-20.

12 *Id.* at 1372.

In the remainder of this Essay, I will respond to some of Professor O'Sullivan's main points and explain where I believe her analysis comes up short. Some of our differences reflect different values and ordering of priorities. Other differences, though, flow from Professor O'Sullivan's mode of analysis and argument. To my mind, she never fully articulates why the purposes of punishment require either something like the Sentencing Commission's version of modified real-offense sentencing, or the more extreme version she apparently favors. She pushes the views of critics of alleged-related offense sentencing to the extreme in an attempt to expose logical flaws, yet fails to subject her own views to the same scrutiny. Most fundamentally, she makes the same mistake that the Sentencing Commission made—pursuing a near-ideal sentencing system when more modest reform would be wiser and less extreme than the current Guidelines.

I. Real-Offense Sentencing and the Purposes of Punishment

Professor O'Sullivan argues that the goals of just deserts and crime control justify increasing sentences for alleged crimes of which the defendant has not been convicted. Neither of these positions, however, withstands scrutiny.

As to just deserts, Professor O'Sullivan contends that consideration of nonconviction conduct is necessary to make sentences accord with the seriousness of the defendant's conduct or the defendant's culpability. However, she never answers the fundamental question: "Just deserts for what?" To most of us, I believe, it is the fact of conviction that justifies the imposition of punishment. I am sure that Professor O'Sullivan would agree that a court should not be able to impose a sentence of imprisonment on a defendant who has not been convicted of *any* offense. This is true even though just deserts calls for the punishment of any offense that the individual has committed. But punishment is only *fair* when it is based on a conviction. How, then, can it be fair to punish a defendant for offenses for which he has not been convicted, simply because he has been convicted of other offenses?

Professor O'Sullivan has two answers. First, she denies that a defendant is actually punished for nonconviction conduct under the Guidelines.[13] This is the Supreme Court's rationale for allowing courts to consider a broad range of real-offense conduct.[14] This legalistic argument, however, is unpersuasive. The fact is that many defendants receive often substantially longer prison terms solely because the sentencing judge believes that the defendant has committed some other crime, for which the defendant has not been convicted. This

[13] O'Sullivan, *supra* note 1, at 1374-76.

[14] *See, e.g.*, Witte v. United States, 115 S. Ct. 2199 (1995).

may not be punishment to the Supreme Court and Professor O'Sullivan, but I think the vast majority of citizens view it as such.

Second, Professor O'Sullivan notes that the Guidelines do not require the sentencing judge to consider all alleged crimes the defendant may have committed, but only that criminal conduct "which is sufficiently related to his conviction conduct to be immediately probative of the seriousness of that conduct."[15] She is right, of course, that the Guidelines limit alleged-related offense sentencing to other offenses "that were part of the same course of conduct or common scheme or plan as the offense of conviction."[16] She fails to explain, though, how such conduct is "immediately probative of the seriousness" of the conviction conduct. That a defendant has engaged in other criminal conduct is certainly probative of the defendant's dangerousness and suggests that prosecutors should consider filing additional charges. But I fail to see what a distinct offense, perhaps separated by days or weeks from the conviction offense, indicates about the conviction offense itself. Unless we are to punish the defendant for all misconduct over the defendant's life, the concept of just deserts should properly focus on the conduct for which the defendant is convicted.

The Guidelines' treatment of acquitted conduct presents this issue in its sharpest form. Logically, the just deserts case for considering acquitted conduct is strong. An acquittal may mean that the jury believed the defendant to be innocent, but it may also mean that the jury simply harbored reasonable doubt. Because sentencing decisions may be based on a preponderance of the evidence, and because evidence not admissible at trial may be considered at sentencing, it is constitutional to consider acquitted conduct at sentencing. Yet it has been my experience that almost every lay person, regardless of political inclination, is shocked to learn that a federal judge *must* increase a sentence based on conduct for which the defendant has been acquitted. I believe the reason for this shock is the intuitive judgment that society's right to punish an individual flows directly from, and is limited by, the conduct for which that individual has been convicted. In Professor O'Sullivan's world (and the Sentencing Commission's), just deserts becomes a free floating rationale not anchored to the legal process of conviction.[17]

Concerns about crime control, the other rationale Professor O'Sullivan considers, are certainly raised by a defendant who has committed crimes beyond the offense of conviction. But these con-

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15 O'Sullivan, *supra* note 1, at 1369.

16 U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) (1995).

17 There is another reason to reject consideration of acquitted conduct. Professor O'Sullivan and I agree that alleged-related offense sentencing is justified, if at all, by the need to negate prosecutorial leniency. Whenever the government *has* pursued a charge against the defendant, there has been no "leniency," even though the defendant has been acquitted.

cerns are present regardless of whether the nonconviction offenses are closely related to any offenses for which the defendant has been convicted. Under the Guidelines' approach, which Professor O'Sullivan endorses, a defendant convicted of a narcotics offense automatically receives a harsher sentence because of a related drug sale, but a robbery or other unrelated violent crime for which the defendant has not been convicted does not affect the guideline range. I fail to see the logic of this distinction, except that considering all alleged offenses committed by the defendant would be even more unwieldy and unfair than the current system.

II. Real-Offense Sentencing and Prosecutorial Discretion

As noted above, Professor O'Sullivan and I agree that, although the Sentencing Commission did not express it very clearly, the main reason the Guidelines require judges to consider alleged-related offenses is to negate the effect of charging and bargaining decisions by the prosecutor. Because of my concern with the unfairness of punishing a defendant for criminal conduct without a conviction, I probably could not be persuaded that alleged-related offense sentencing is appropriate. Fairness issues aside, however, I believe that to support the Commission's approach, Professor O'Sullivan must establish that: (1) without alleged-related offense sentencing, prosecutorial leniency will significantly increase *unwarranted* disparity; (2) the Department of Justice is incapable of effectively regulating its own prosecutors to avoid inappropriate undercharging; and (3) alleged-related offense sentencing will succeed in erasing much of this unwarranted disparity. To my mind, she proves none of these points.

The first issue is largely speculative. Professor O'Sullivan does concede, though, that prosecutorial efforts to manipulate the Guidelines appear to be fairly minimal.[18] Even assuming that Professor O'Sullivan is correct that prosecutors are more likely to promote leniency through charging decisions than through guidelines' "fact bargaining,"[19] she has not demonstrated that inappropriate prosecutorial leniency is, or would be without alleged-related offense sentencing, an especially serious problem. I am also unconvinced that to the extent leniency may be a problem, the Department of Justice cannot more effectively regulate charging decisions.

Finally, alleged-related offense sentencing neither ends prosecutorial leniency, nor eliminates unwarranted disparity. Prosecutors have a variety of ways to reward favored defendants. These

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18 *See* O'Sullivan, *supra* note 1, at 1413.

19 *See, e.g.*, O'Sullivan, *supra* note 1, at 1418. Note, however, that a recent survey of probation officers finds that plea agreements frequently fail to reflect the "real" facts of a case. *See* David Yellen, *Probation Officers Look at Plea Bargaining and Do Not Like What They See*, 8 Fed. Sentencing Rep. 339 (1996).

include charging offenses with low statutory maximums and filing substantial assistance motions. The relevant conduct rules are so bizarre and often irrational that they frequently heighten, rather than lessen, disparity.[20] And apart from prosecutorial leniency, many other sources of disparity and unreasonable uniformity remain under the Guidelines. In particular, the Guidelines' excessive reliance on quantity-based specific offense characteristics, a central component of the modified real-offense sentencing system Professor O'Sullivan defends, dramatically undercuts efforts at proportionality.[21] The problem is not just that the Guidelines require consideration of alleged-related offenses, but that the Guidelines focus so much on factors that are only loosely correlated with culpability. The relevant conduct rules exacerbate the problems caused by this flawed quantity-based system.

In sum, while Professor O'Sullivan believes that the Guidelines effectively constrain prosecutorial discretion,[22] and that this effort is necessary to the goals of sentencing reform,[23] I continue to see alleged-related offense sentencing as a blunderbuss—a crude, often ineffective, way of addressing an overstated problem of prosecutorial leniency.[24]

III. Conclusion

The heart of my disagreement with Professor O'Sullivan is my view that alleged-related offense sentencing reflects an unduly narrow focus on eliminating disparity, to the exclusion of other worthy goals of sentencing reform. At times Professor O'Sullivan appears to believe that faithfully attempting to reduce disparity is what gives the federal sentencing system legitimacy. There are, however, a number of other important considerations that she slights. The appearance and reality of fairness is essential. I have seen no convincing evidence that prosecutorial leniency is likely to have a dramatic negative effect on the public's view of the fairness of the criminal justice system, or that alleged-related offense sentencing would address those concerns. State sentencing commissions (every one of which has rejected alleged-related offense sentencing) and most of the public are more troubled by the unfairness of punishing defendants for nonconviction

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20 *See supra* note 10; *see also* Yellen, *supra* note 2, at 434-37.

21 *Id.* at 451-52; *see also* Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992).

22 *See* O'Sullivan, *supra* note 1, at 1360 (stating that relevant conduct rules will "in a great many if not most . . . cases, substantially reduce the effect of prosecutorial charging or plea bargaining choices").

23 *Id.* at 1400-20.

24 *See* Yellen, *supra* note 2, at 445-54.

conduct than with the ability of prosecutors to influence sentences downward through charging and plea bargaining decisions.[25]

Rejecting alleged-related offense sentencing requires recognizing that any sentencing system will be far from perfect. It is always possible to imagine a more perfect system, but the pursuit of perfection often has adverse consequences. I believe that Professor O'Sullivan, like the Sentencing Commission, has fallen into this trap. She unwittingly acknowledges this by referring to "accurate" sentencing.[26] There is no such thing as "accurate" sentencing; there are only sentences that are more or less just, more or less effective. Nothing in the recent or distant history of sentencing reform suggests that anything approaching perfection is attainable. But there is ample evidence that shooting too high and overselling the success of reforms has often a serious downside. The Guidelines have shown that there are things worse than disparity: rigidity, extreme severity, irrationality.

I suggest, as have others, that sentencing reform should proceed more modestly. A guideline system based on the offense of conviction, with moderate adjustments for facts about the offense and the offender that do not constitute other crimes, combined with a reasonable amount of guided judicial discretion and meaningful appellate review would probably improve greatly on the current guideline system.[27] At a minimum, the Sentencing Commission should dramatically scale back the effect of nonconviction conduct, as has long been advocated by Chief Judge Jon Newman of the U.S. Court of Appeals for the Second Circuit.[28]

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25 To take another example, I am far more concerned with the societal effects of the unjust 100 to 1 sentencing ratio of crack to powder cocaine than I am with the prospect of prosecutors securing lower sentences for some offenders. Unlike Professor O'Sullivan, I trust that prosecutors will not knowingly let dangerous offenders back on the streets with an unjustly short sentence, and I am willing to allow them to mitigate the effects of today's often excessively harsh sentences.

26 *See* O'Sullivan, *supra* note 1, at 1405.

27 Thus, I refuse to climb into the box Professor O'Sullivan tries to impose on critics of alleged-related offense sentencing. I reject her contention that anyone opposed to this practice must also logically oppose consideration at sentencing of *any* nonconviction conduct, such as the defendant's role in the offense or the amount of money taken in a fraud or robbery. As I have argued before, these are legitimate factors, provided they are relied on in moderation, so that the "tail" of nonconviction factors does not "wag the dog" of the underlying conviction. *See* Yellen, *supra* note 2, at 459-65. Similarly, I reject her argument that because Congress has decided to criminalize certain conduct, that conduct is particularly relevant, even essential to sentencing. In my view, such conduct is relevant to sentencing only if it has been proved by the standard applicable to criminal convictions.

28 *See* United States v. Concepcion, 983 F.2d 369, 394-95 (2d Cir. 1992) (Newman, J., concurring).