1992


Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation

Available at: https://digitalcommons.law.yale.edu/ylj/vol101/iss8/14

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Panel 1: History and Structure of the Guidelines

Moderator: Abraham S. Goldstein, Sterling Professor of Law, Yale Law School

Judge Edward Becker, U.S. Court of Appeals for the Third Circuit

The impetus behind the creation of the federal sentencing guidelines arose from widespread concern about increased crime, the perception that tougher sentences would decrease crime, and the recognition of widespread disparity in sentencing. Although the Judicial Conference Committee on Criminal Law and Probation tried to preempt the guidelines with its own program to develop a common law of sentencing, that proposal was too little and came too late. Once the idea for sentencing guidelines took hold, Congress could not resist the hydraulic pressures. Given today’s political reality, it is too late to turn back to the old system, even though that system worked reasonably well, except at the margins.

* The following is a summary of a conference that was held at Yale Law School on February 28-29, 1992. This summary was compiled by the editors of The Yale Law Journal and highlights the prominent themes explored by the conference’s participants. Each summary represents the viewpoint of the particular speaker, though not necessarily the views of the organization with which he or she is affiliated.
The guidelines are fraught with problems. The overwhelming judicial opinion is that they are unduly rigid and harsh, and give too much power to prosecutors. Moreover, the guidelines have created a new form of disparity: instead of treating like defendants differently as the previous sentencing regime did, the guidelines treat offenders with dissimilar offenses and backgrounds similarly. If the guidelines are to serve their purpose, judges should have much more flexibility and built-in injustices must be eliminated. For example, mechanical ratcheting of the offense level for fraud and drug crimes according to the dollar amount involved is unjust. There are better measures of culpability.

Adjustments for acceptance of responsibility and role in the offense should be calibrated on a proportionality theory, rather than by a straight two to four level adjustment. These reductions make a difference at lower offense levels, but not at high levels. Therefore, the current scheme not only discourages pleas but also creates injustice. Although the courts should not be involved in the 5K reduction decision, some measure of unrecognized but bona fide cooperation should be factored into acceptance of responsibility. Often the “little fish” cooperates his heart out but has nothing much to offer. Moreover, present interpretations of “relevant conduct” cast too broad a net.

Although the architecture of the guidelines requires departures for their continued refinement, departure rates vary considerably by region. Some districts have high departure rates, but others are extremely low. Thus, the message of the importance of departures has not gotten out. The courts of appeals have not helped the situation because much of their jurisprudence discourages departures. The Commission’s actions have been discouraging as well. While the guidelines themselves recite the importance of departures, the Commission’s reaction to departures sends the opposite message. For example, when a combination of age and physical condition was recently and sensibly used as a basis for departure in United States v. Lara, the Commission, pursuant to what almost seems a reflexive “plug the loophole” mindset, soon eliminated this possibility.

The guidelines are also too rigid in foreclosing probation, alternative sentencing, and home confinement. Perhaps pending amendments will partially rectify this situation, but more needs to be done, especially in granting more flexibility to consider offender characteristics. The lack of flexibility in the guidelines has forced district court judges into a mechanical jurisprudence. There is a mood of resignation among district judges that needs to be relieved.

Another problem is that fundamental unfairness is built into the guidelines because the rules of evidence do not apply in sentencing. Before the guidelines, judges had discretion to consider inadmissible evidence, but its impact was easily dissipated in light of the total discretion of the sentencing judge.

1. 905 F.2d 599 (2d Cir. 1990).
Under the guidelines, however, such evidence controls a sentence, driving up the range. Under the guidelines regime, evidence only needs to pass a minimal constitutional standard to be admissible, and thus facts found on the basis of such evidence by a mere preponderance (the lowest evidentiary standard) can result in a far higher sentence than the offense of conviction justifies. When the sentencing hearing is the tail that wags the dog of the substantive offense, perhaps due process requires more than a minimum indicium of reliability, and a higher standard of proof, such as clear and convincing evidence, should be applied. Federal Rule of Evidence 1101(d)(3) should therefore be reconsidered.

The Commission performed brilliantly in its study of mandatory minimums and in certain other areas, but it has been listening too much of late to political rhetoric. The Commission should devote more energy to eradicating injustices created by the guidelines and listen more to reports of unfairness. It needs to exercise courage and independent judgment. It should, like other agencies, seek appropriate amendments to its enabling statute. The Commission should ask Congress, for example, to expand the ranges, because Article III judges can be trusted in sentencing matters, at least within limits.

Finally, given their onerous and awesome responsibilities, the Commission members should be full-time Commissioners and the judicial members should be relieved of their judicial duties. Commissioners should be treated statutorily like the Director of the Federal Judicial Center, so that, when a judge is appointed to the Commission, a vacancy is created on the bench, and the Commissioner's position in the district or circuit can be filled. When the term as Commissioner expires, the judge can then return to duty.

In the present climate, there is no hope of getting Congress to agree to "advisory guidelines." While guidelines should be given more of a chance, they can achieve the laudable goals for which they were developed only if their shortcomings are remedied.

Joe B. Brown, former U.S. Attorney, Nashville, Tennessee

The Commission is considering a proposal to allow judges to depart downward for a defendant's substantial assistance in the prosecution of others. This proposal should be rejected. In its preliminary draft of the guidelines in 1986, the Commission proposed fixed amounts of reduction for substantial assistance based on the degree of assistance. Significant information would be worth a twenty-percent reduction; exceptional assistance would be worth forty percent. The Commission did not adopt the proposal, however, because the Commissioners felt they needed more experience and because of the subjective nature of the motion. Albeit for different reasons, the Commission should also reject the current proposal.

The present downward departure proposal has several flaws. First, it would create added disparity among defendants who are charged under minimum
mandatory statutes. Judges would only be able to grant reductions to defendants who were not under minimum mandatory statutes or whose guidelines ranges were well above any applicable minimum sentences. Second, it would tend to remove the prosecutor from the decision loop because a prosecutor who did not feel that a reduction was warranted would not recommend a specific reduction, thus leaving the departure truly unguided. Third, it would encourage judges who believe the present guidelines are too high to grant reduction in inappropriate cases in order to bring the sentence down to a level the judge feels is “fair.” Finally, it would allow defendants to force their services on the prosecutor in some cases. A defendant who is the leader of a criminal group would not normally be offered the chance to assist against those who are lower in the organization than himself, but this proposal would allow a defense attorney and his client in effect to force cooperation on the government by saying to the judge: “Look, my defendant gave the government all this information and they ignored it. Give us a reduction because we did provide information.”

Currently, a sentence below the minimum can be imposed only on a prosecutor’s motion for reduction. The prosecutor’s motion allows all defendants to be considered for a reduction, even those subject to mandatory minimum sentences. The prosecutor must retain the ability to make the final decision, absent bad faith, on whether to accept offers of assistance.

This substantial assistance motion is a very powerful tool, especially with the high minimum sentences in drug crimes. Prosecutors have the power to introduce disparity into the system through motions for reduction, especially since once the motion is made there is no limit on how far the judge may depart. Prosecutors have a strong trump card in section 5K1.1, and they are in the best position to evaluate a defendant’s assistance. They must, however, use it wisely and fairly or it will be taken away.

In a recent revision of the U.S. Attorneys Manual, the Justice Department required U.S. Attorneys to approve substantial assistance motions and plea agreements at a senior supervisory level in the office and to maintain a record of their reasons for the plea or motion. The Department and the Commission need to continue to review pleas and substantial assistance motions to ensure that they do not undermine the fairness and uniformity the guidelines have brought to the system.

The guidelines are working well, and we should use the amendment process to fine-tune them rather than unnecessarily rewrite them.

---

Prior to the guidelines the exercise of unfettered sentencing discretion frequently resulted in disparate sentences due, in large measure, to the lack of statutory guidance or an instructive common law with respect to the purposes of sentencing. The guidelines help to remedy this problem by providing a sense of structure and symmetry through which the penalty phase of a criminal case can be analyzed with due regard for the purposes of sentencing and weighted factors such as relative culpability, role in the offense, specific offense characteristics, criminal history, and offender characteristics, which are ordinarily relevant.

The current sentencing literature and emerging case law has convinced me that we have come a full circle in terms of the exercise of judicial discretion at sentencing. In 1949, the Supreme Court underscored the broad discretion vested in sentencing judges in Williams v. New York. Criminal sentences could be imposed on the basis of a broad range of information without regard to its admissibility in other proceedings. The discretion contemplated in Williams was based on a rehabilitative model of sentencing. Today, however, the Sentencing Reform Act explicitly rejects rehabilitation, except in the most limited circumstances, and codifies sentencing purposes that are largely retributive, incapacitative, and deterrent. In short, the current statute seeks to further a system of offender accountability.

We are entering a period heralded by the courts’ reacquisition of authority and control over the traditional exercise of sentencing discretion. Through serious reexamination of the guidelines and their enabling legislation, we should seek to take advantage of the structure provided by the Sentencing Reform Act without sacrificing the need to tailor the punishment to fit the offender as well as the offense. To this day, judges and litigants alike grant far too much weight to the guidelines, which perpetuates the self-fulfilling prophecy that courts must strictly adhere to them. Instead, it is incumbent on all members of the court family to ask threshold questions in each case to determine whether the results produced by the guidelines are consistent with the mandate of the Sentencing Reform Act. For example, the guidelines state that the court shall impose a sentence which is sufficient, but not greater than necessary, to achieve the purposes of sentencing. The Sentencing Reform Act therefore incorporates the principle of parsimony favoring imposition of the least restrictive sanction necessary to achieve defined social goals.

The concept of “relevant conduct” is not new. Traditionally, judges have been empowered to consider unadjudicated offense conduct in determining an appropriate sanction. Until now, courts have generally employed an expansive

---

The guidelines are here to stay. Thus, the real question is whether they are fair, rational, and proportional. A careful evaluation of the Sentencing Reform Act provides a favorable answer to this question.

In response to criticism that the guidelines are too harsh, it is important to recognize that the guidelines reflect two kinds of severity. First, the severity of an offense is driven up by mandatory minimums. The Commission has responded to this problem by publishing reports and press releases condemning mandatory minimums as inconsistent with the guidelines' concepts of proportionality and fairness. Unfortunately, however, the Commission cannot reject Congress' proposals. Second, there is severity driven by the guidelines themselves. In fact, the guidelines were patterned after past sentencing practices and thus have preserved the sentencing pattern in place before the guidelines for most crimes. White-collar crimes are an exception because the Commission made a deliberate policy decision to punish white-collar crimes more seriously. Sentences for white-collar crime have increased mostly because the Commission has moved away from probation, which used to be awarded frequently in white-collar cases.
Another important objection to the guidelines is the restriction of the factors considered in sentencing. Congress stated that age, sex, employment, education, community service, and religion should not normally be considered. But Congress did not say that these factors should not lead to departures, and the Commission has stated that judges should depart in atypical cases, stating their reasons for departing. Yet, in spite of this statement, there have not been many departures.

Critics also argue that sentencing under the guidelines is too time-consuming. This is not the case. Civil cases in general require a great deal of time, especially FDIC cases, savings and loan fraud, pollution cases, class actions, and other complex litigation matters. The guidelines do not occupy more time than is warranted by sentencing decisions. Time spent on sentencing is time well spent.

It is true that the Commission needs to do more work. The Commission should study recidivism, study criminal justice theories, and determine where it has erred in promulgating the Sentencing Reform Act. When evaluating the effectiveness of the guidelines, it is important to remember that the public, not the judiciary, is the ultimate consumer of the sentencing guidelines.

PANEL 2: SENTENCING AND THE WAR ON DRUGS

Moderator: Kate Stith, Professor of Law, Yale Law School

Judy Clarke, former Federal Public Defender; Partner, McKenna & Cuneo, San Diego, California

The sentencing guidelines are an unmitigated disaster. In the past four and a half years, seven versions of the guidelines have been published, with 434 amendments. There are over 2200 published opinions on guideline issues as well as amendments responding to many opinions. The circuits have developed splits in many areas. Keeping current or even reasonably educated is a nightmare.

Disparity has increased under the guidelines. Under the pre-guidelines regime, the sentence a client could expect depended in large part on which judge she had. With the guidelines, it depends on which prosecutor, which probation officer, which judge, and which circuit. A recent First Circuit case illustrates the problem. Two similarly situated defendants were sentenced at separate hearings. The government proved a certain level of relevant conduct at the first hearing, and a twenty-seven month sentence resulted. At the second defendant's hearing, the government was substantially better prepared, and proved a greater quantity of drugs were involved, resulting in a guideline range
of 89-108 months. The district judge decided to equalize the sentences at twenty-seven months, and the government appealed. The First Circuit reversed, however, and so the second similarly situated defendant received a much longer sentence than the first defendant because the government’s quality of proof changed.

The Commission blames many of the guidelines’ problems on mandatory minimums. Yet, it decided to lock into mandatory minimums as floors for guideline sentencing ranges. If the Commission really believed the minimums were unfair and inappropriate, it could have made the minimums the guideline ceilings. The Commission should prescribe the sentences it deems appropriate, and let Congress take the heat for unduly harsh minimums.

Guideline sentences for drug crimes are driven by quantity. For sentencing purposes, the quantity of drugs is determined by the preponderance of the evidence standard. Therefore, many defendants face sentences based on conduct for which they have been acquitted. Drug enforcement agents are trained about the guidelines so that they know what evidence to collect. Negotiated amounts can increase sentences, and many times undercover agents suggest the amount. Defendants in state courts are advised not to file certain motions or the state prosecutor will send the case to federal court. One federal judge thought this practice was unfair and sentenced the defendant according to state law, but courts of appeals have not sustained this reasoning.

Another significant problem with the guidelines is their terrible racial impact. A Los Angeles judge recently commented that “young white male prosecutors are making their careers on the backs of black and brown defendants.” Statistics compiled by the Federal Judicial Center reflect increased racial disparity in sentencing for drug offenses with or without mandatory minimum penalties. Mandatory minimums have driven the increase in racial disparity, but the guidelines also play a role. The Commission needs to take responsibility for this racial disparity and change it.

The Commission continues to dehumanize the sentencing process. One circuit upheld a departure for a homosexual defendant based on the difficulty he would face in prison and another granted a departure based on the defendant’s military record. The Commission then amended the guidelines to take away such authority, stating that physical problems and military record are not relevant in sentencing. The Commission should trust life-tenured judges more and prosecutorial discretion less. Judges should exercise greater discretion; they should take advantage of their authority and refuse to abdicate to unfair guideline sentences.

The guidelines should be abandoned. Disparity under them is terrible; sentences are too harsh; and the guidelines themselves are ridiculously complicated. We should consider the more rational reforms of sentencing institutes, appellate review, and requiring statements of reasons for sentences.
Stiff sentences for drug offenses are part of a comprehensive federal strategy for combating the evils of drug trafficking. In the Anti-Drug Abuse Act of 1986, Congress explicitly adopted a "market-oriented" sentencing approach that directly tied the punishment to the quantity of the drug actually distributed. By predicing punishment on the amount of drugs, rather than the defendant's role in the offense, Congress reasonably determined that the punishment should reflect the harm to society caused by the drugs distributed by a particular defendant—a harm that is demonstrably greater as the amount of drugs increases.

Although others believe that mandatory minimum sentences are incompatible with the guidelines, they actually substantially further the goals of the sentencing guidelines. These minimums set important baselines for guideline sentences that reinforce the concepts of certainty and predictability of punishment. By requiring mandatory minimum penalties for certain egregious crimes, Congress has sent a clear and concise message that no excuses are acceptable from those who commit the crimes that are most detrimental to society.

Drug trafficking is a crime of violence. Minimum mandatory sentences serve the important public policy goal of enhancing public safety by ensuring that dangerous offenders are incapacitated for substantial periods. The enactment of tough federal statutes for drug-trafficking offenses reflects a determination on the part of Congress and the President to commit federal law enforcement resources to combating violent crimes in those areas in which the federal government has concurrent jurisdiction with the states.

Some critics argue that a prosecutor's discretion to charge defendants with crimes that have mandatory minimum sentences violates due process or somehow arrogates the powers of the judiciary to prosecutors. Yet the prosecution has always had the discretion to seek indictments for multiple levels of crime with varying degrees of punishment. The existence of mandatory minimum sentences merely adds teeth to the prosecutor's decision; it does not change the nature of that decision. More importantly, the allegedly enhanced prosecutorial discretion is mostly illusory. In all but exceptional cases, such as those in which the defendant has provided substantial assistance to the government, federal prosecutors are required to charge the most serious readily provable offense. Thus, the Justice Department's policy supports the guidelines' goal of reducing sentencing disparity by ensuring that, absent extraordinary circumstances, like offenses are charged with like crimes that have like penalties.

Mandatory minimum sentences are unique weapons in the prosecutor's arsenal. Because the only statutory exception to minimum punishments for drug offenses is for defendants who provide "substantial assistance" in the prosecu-
tion of other drug criminals, mandatory minimums provide a powerful inducement for a defendant to cooperate and provide information to law enforcement.

Congress enacted mandatory minimum sentencing statutes and the sentencing guidelines to address three problems: sentencing disparity, misleading sentences that were shorter than they appeared as a result of parole and unduly generous "good time" allowances, and inadequate sentences in critical areas, including crimes of violence and drug-trafficking offenses. The guidelines and mandatory minimum sentences were specifically designed to limit judicial discretion and to require judges to impose sentences that conformed to Congress' determination of the seriousness of a particular crime.

In the current climate of pervasive violent and drug crime, we need a strong federal, state, and local commitment to prosecute and to punish those who commit the most serious offenses. We need to carry out Congress' message that egregious criminal behavior should not be tolerated. Mandatory minimum sentencing provisions and sentencing guidelines are key components of an effective system of punishment and incapacitation. We must work to improve their applications, not abandon them.

Harlan W. Penn, Associate General Counsel for Legislative and Correctional Issues, Federal Bureau of Prisons

The Bureau of Prisons' role in the sentencing process is essentially to execute court orders that result from the sentencing guidelines and the give and take of adversarial criminal prosecution. Defendants sentenced to imprisonment under the guidelines are committed to the custody of the Bureau of Prisons. In addition, those placed on probation may spend some time in the custody of the Bureau of Prisons or reside in a community corrections facility of the Bureau of Prisons.

Under the Sentencing Reform Act of 1984, the Bureau of Prisons must consider a variety of factors when making decisions regarding inmates. For example, when determining the place of imprisonment, the Bureau considers prison resources, the nature and circumstances of the offense, the history and characteristics of the offender, any statement of the sentencing court concerning the purposes of the sentence or recommending a type of correctional facility, and any pertinent policy statement from the Sentencing Commission. Thus, the Sentencing Commission's actions and the courts' discretionary recommendations extend beyond the imposition of a sentence to the execution of that sentence.

These changes in the sentencing structure have placed new burdens on the Bureau of Prisons. For example, a specific statutory mandate for drug treatment

applies to Sentencing Reform Act inmates. The need for such treatment is evidenced by the fact that fifty-one percent of all admissions have a recent history of substance abuse or dependency, and forty-four percent of that group indicate a desire for treatment. In response, the Bureau is implementing several program initiatives emphasizing mandatory education and voluntary counseling. Comprehensive and pilot programs are focused on those nearing release with transitional services available post-release.

Two other factors contributing to an increased burden on the Bureau of Prisons are new laws with mandatory minimum terms of imprisonment and the reduction of probation under the sentencing guidelines. For example, in 1985, fifty-seven percent of those convicted of income tax violations were placed on probation. This was projected to fall below ten percent under the new sentencing laws. The percentage of drug offenders receiving probation fell from twenty percent in 1985 to seven percent in 1989. Among those who are sentenced to prison, the average length of time served has risen in several offense categories. Robbery went from 44.8 months to 78.0 months under the new law. Drug offenses went from 23.1 months to 28.0 months.

These changes in the use of probation and the imposition of longer real time sentences have produced an accelerated growth in the Bureau of Prisons inmate population. The inmate population, which was 53,347 at the end of 1989, today approaches 66,000 inmates housed in sixty-eight institutions. These institutions are currently being operated at 145% of design capacity. Several programming and management challenges result from this population level. To limit inmate idleness, additional programs are being implemented where inmates work on military bases, national forests, and other federal projects. Educational programs have been enhanced, and English as a Second Language is a part of the curriculum. These programs are actually mandated by statute. Significant expansion of existing and new institutions requires additional staff recruitment and training. On a management level, some have observed decreased incentives for good behavior from inmates because of the reduced amount of sentence reduction available for forfeiture in the disciplinary process. On the other hand, the reduced sentence disparity and increased certainty of release date have tended to lessen a source of frustration in the inmate population.

Chief Judge Judith N. Keep, U.S. District Court for the Southern District of California

The debate over the guidelines is somewhat like the debate over abortion in that both sides can claim the moral high ground. Regardless of morality, however, the guidelines have proven ineffective.

Criminal problems are not uniform, but the guidelines fail to account for this fact. Crime varies by geographic area. Hence, a uniform application of criminal law is not desirable because uniformity allows the largest common denominator to control. In the Southern District of California, for example, the number of prosecutors has tripled during a period in which the number of judges has remained substantially the same—largely as a result of demands of the war on drugs. The district has a particular problem because of the dense populations on both sides of the border in the San Diego/Tijuana area. As conditions in Mexico have deteriorated, there has been a resurgence of drug importation over the border. In the Southern District of California, random customs checks of cars annually result in the seizure of tons of drugs, and 63,000 thousand illegal aliens are arrested each month. Some of them are criminals posing as migrant workers. The border area is also characterized by dangerous border chases and a recent wave of “kamikaze dashes” in which groups of would-be immigrants race across the border into oncoming freeway traffic, knowing that the authorities will not be able to apprehend them all. If high-speed chases or kamikaze border crashes are a problem in only one district, they will not receive appropriate guideline treatment.

Yet judges have no control over available resources. The number of cases in the Southern District is overwhelming the judiciary, but the U.S. Attorney for the district believes he must be vigorous in prosecuting border violations, seeking conviction above all. The Commissioners who write the guidelines have no obligation to make the system work.

The goals of the guidelines are noble, but the guidelines themselves are unworkable because a defendant necessarily has an incentive to plead, and plea bargaining leads to disparities. The ultimate disparity, however, arises from not prosecuting at all, which the increasing caseload has necessitated. We will never achieve uniformity in sentencing as long as the states retain their police power. The discretion of the prosecutor and probation officer under the guidelines is worse than judicial discretion ever was. The current system is therefore more unjust than the prior system. Prisoners serving twelve years or more will never have a chance in society. We must ask which is worse: a few judges giving unduly harsh sentences, or a system in which all judges must do so? Judges do not miss power for power’s sake, but for the ability to sentence justly.

Gerald B. Tjoflat, Chief Judge, U.S. Court of Appeals for the Eleventh Circuit

Two issues have arisen in this panel: the effect of the war on drugs on society and problems with the sentencing process. These two issues are separate and distinct problems.

The Eleventh Circuit recently spent thirty minutes hearing oral argument in a personal injury case in which a six-year-old struck a four-year-old in the eye in a K-mart store, and the four-year-old’s mother was seeking to hold K-
mart liable for the injury. It is mind-boggling to compare the time spent in that case to the time spent in determining whether to sentence someone to twenty years in prison. We have lost our perspective when we complain about the time spent on sentencing decisions.

The former sentencing system did not require judges to state their reasons for a sentence even though judges must give reasons for nearly every other dispositive decision they make. A rational judicial system requires nothing less than justification for sentencing decisions as well. The present guidelines system provides benchmarks for sentencing. Most of the complaints about the guideline scheme focus on what the Commission has done with its mandate, not on whether we should have a rational sentencing scheme with appellate review.

Practitioners are woefully undereducated about the guidelines. They must educate themselves because judges cannot be required to perform the roles of the adversaries. Unfortunately, lawyers are not examining the areas of possible departures. By focusing extensively on the characteristics of defendants, lawyers have overlooked possible departures based on the nature of the offense. Lawyers need to bring to the court's attention the areas in which judges have the authority to depart. Reasonable departures would lead to fair sentences, not unwarranted disparity.

Lawyers have also failed to litigate burden of proof issues. In every area of the law, the greater the sanction that might be imposed, the greater the burden of proof we require. This sliding scale should apply to sentencing. If a given fact is going to ratchet a sentence up many levels, the required burden of proof should be greater than the standard of proof for a fact with little effect on a sentence. Lawyers should appeal the use of aggravating facts to increase a sentence when such facts have not been established according to an appropriate standard of proof. Enhancing a sentence with inadequately proven facts violates due process.

One further observation. The substantive sentencing law should be simple and uncomplicated. This means that the Commission should refrain from amending the guidelines and policy statements, unless amendment is absolutely necessary. In short, the Commission should let the law settle a bit.
The guidelines have put an end to the judge's discretion. Instead, they have enhanced the power of the prosecutor. The factors that count for the guidelines are factual issues, and the prosecutor is more or less the master of the facts in a criminal case. The prosecutor knows more about the legally provable facts than anybody else, and the prosecutor has legal control over what facts will be asserted. However, it is not the case that the prosecutor has the same discretion, or as significant discretion, as judges had under the ancien régime. By moving the locus of the discretion, the guidelines have changed the nature of the discretion, the constraints under which it is exercised, and the issues with which that discretion will be concerned.

The discretion accorded to sentencing judges under pre-guidelines law was explicitly and intentionally sentencing discretion. Its purpose was to determine the appropriate sentence for the particular individual convicted of a crime; it was clearly correctional and punitive. In contrast, the prosecutor's discretion under the guidelines regime is intimately bound up with the traditional charging discretion of the prosecutor, a discretion that has its own logic and purposes. The prosecutor is not expressly or overtly entrusted with any discretion at all over sentencing; rather, he is given the authority to charge or not to charge particular offenses, to assert or omit particular facts or arguments. While the
power to influence sentencing does not disappear because it is not expressly acknowledged, there is a critical difference between having acknowledged, authorized, and legitimated discretion and having covert discretion. Prosecutors are not only interested in obtaining a particular sentence for the defendant; they are also interested in making a formal record of the results of governmental investigations.

A prosecutor today, under the guidelines, may have the effective power to reduce a sentence by underselling the charge, but such an act may well be at odds with the prosecutor's other objectives in determining the charges. This intrinsic distinction between overt and covert sentencing discretion profoundly affects the nature of the decision that will be made. The guidelines have done more than merely shift the locus of the discretion to a different decisionmaker; they have turned the nature of decisionmaking from a pure sentencing decision into something else.

The prosecutor is not free to dispense mercy at will. The judge has the power to thwart unwarranted leniency, to order the prosecutor to put on facts, and to reject a plea agreement. According to the guidelines, a judge may only accept a plea agreement if she is convinced that the sentence is within the applicable guidelines range or if "the agreed sentence departs from the applicable guideline range for justifiable reasons." In other words, a judge is not supposed to approve a plea bargain unless the agreed-upon sentence is a guideline sentence. We have not yet seen judges moving against prosecutorial seizure of authority, but the tool is there.

More importantly, the issues that will principally determine the prosecutor's choice will often have more to do with the strength of the prosecutor's case than with abstract arguments of justice and mercy. Although some prosecutors, gauging appropriate sentence length by what they are used to, find the guidelines draconian, future prosecutors will inevitably come (as will future judges) to internalize the guideline sentences as presumptively correct. While circumstances will occasionally warrant overt or covert departures, the most significant motivator of agreement will be the existence of bona fide factual disputes about the applicable facts (both as to guilt and guidelines issues), the perceived likelihood of success in proving one side of the dispute version, and the resources necessary to be expended to accomplish that. To move the sentence up imposes costs on the prosecutor that were not borne by a judge sentencing under a non-guidelines regime—costs that the prosecutor might well choose not to bear. This is indeed an inevitable part of a guidelines system. By making the sentence turn on specified factual and legal issues, the guidelines invite the prosecutor and defense lawyer to estimate the likelihood of prevailing on the merits of those issues and consider the expected value of the sentence in light of those estimates. In such an atmosphere, what is likely to drive leniency is

not considered judgment about appropriate sentences (whether right or wrong), but judgments about whether compromise is forced by the strength of the prosecutor's litigation position.

By constraining the judge's sentencing discretion, guidelines and mandatory minimum sentences have enhanced the prosecutor's influence over the sentence. But to say that this has somehow shifted the judge's sentencing discretion to a different actor (who may or may not be less wise in its use) is an oversimplification. What the prosecutor now has is a discretion significantly different, more complicated, and more constrained than the discretion formerly exercised by judges.

Steven M. Salky, Partner, Zuckerman, Spaeder, Taylor, Goldstein & Kolker, Washington, D.C.; Chairman, ABA Sentencing Guidelines Committee

From the viewpoint of most defense attorneys, the federal sentencing guidelines have marked a step backward in the imposition of fair and just punishment. Regardless of whether or not the guidelines have served the cause of justice, it is undeniable that defense attorneys feel robbed of power as a result. Three primary reasons explain this phenomenon.

First, the process has been dehumanized because offender characteristics and situational factors have been largely removed from consideration at sentencing. Defense attorneys under the old system had significant control over the presentation of the human dimensions of the case and, as a result, were often able to influence the outcome. With the elimination of human factors from sentencing and, to a large extent, plea bargaining, this typical form of advocacy has been lost. Second, the ability of the courts to impose creative sentences has been virtually eliminated. While there is authority to depart, the approved grounds for departure are so narrow that they eviscerate the defense attorney's power to persuade the court to adopt a creative alternative sentence. Third, there is no doubt that the guidelines have increased the power of the prosecutor. This increased power is most evident when it comes to cooperation, the primary escape valve from the otherwise harsh mandatory minimum sentencing system being adopted by Congress. The defense attorney is somewhat superfluous when the defendant is cooperating, and cooperation has become the primary manner in which defendants avoid harsh sentences.

This is not to say that there are not avenues for effective advocacy under the guidelines. Because the factors that will determine the sentence all relate to the client's conduct and the harm intended or caused, and because the weight such factors carry can be identified with specificity, fact bargaining remains critical. Fact bargaining has always been a critical part of the system, but its importance is elevated in a system where judicial discretion is narrow. Now more than ever before, the defense attorney's focus must be on persuading the prosecutor.
Federal probation officers agree that their role in the sentencing process has changed significantly under the guidelines. There is no consensus, however, on exactly how the role has changed and whether those changes are positive or negative.

The primary duty of the probation officer in the sentencing process is to prepare the presentence investigation report and make a recommendation to the court for sentencing. Prior to the guidelines, probation officers compiled their information by obtaining details of the offense from the U.S. Attorney's file, interviewing the case agent, and interviewing the defendant. The body of the probation officer's report consisted of information about the defendant's prior record and social history. The officer generally attempted to understand the defendant and his reasons for involvement in the offense, and tried to arrive at a prognosis for the defendant's ability to rehabilitate. The report was then submitted to the sentencing judge. The probation officer would meet with the judge prior to the sentencing hearing to discuss the report and the officer's recommendation. The probation officer's power in this process lay in her ability to influence the judge with respect to the outcome of the sentencing.

The implementation of the guidelines has decreased the sentencing judge's discretion in sentencing. This reduction has in turn diminished the probation officer's role by reducing the officer's ability to influence the outcome of the sentence. In addition, the guidelines have altered the presentence report, negatively affected the probation officer's ability to obtain information relevant to sentencing, and significantly increased the amount of time needed to complete an investigation. Probation officers report difficulty in gaining access to the U.S. Attorney's file and even greater difficulty in getting information from defendants. Defense attorneys are reportedly advising their clients against full cooperation and often will not allow them to discuss the offense with the probation officer due to a concern that the client might provide information that could result in a higher guideline range. Consequently, the probation officer is left with a version of the offense that is less complete than in pre-guidelines cases and a social history that is severely lacking. Unfortunately, the failure to provide this type of information can result in a more severe sentence because the defendant's story is never presented to the court, and the officer has no personal information about the defendant on which to base a recommendation for downward departure.

The current presentence reports reflect our present sad state of affairs. Prior to the guidelines, the presentence report provided an assessment of the entire individual, including personal characteristics. The guidelines place greater emphasis on the offense behavior and the individual's prior criminal record and minimize individual characteristics. The guideline range is calculated on the
offense behavior and the criminal record before any personal information about
the defendant is presented. Personal characteristics are considered relevant only
for departures, and probation officers tend to believe that departures are permit-
ted in very few cases. Officers hesitate to make departure recommendations on
untried grounds due to inexperience and uncertainty, and judges are similarly
reluctant to follow departure recommendations for fear of being overturned.

Although the guidelines have changed the probation officer's role in the
sentencing process and in some ways have diminished the officer's power, most
probation officers approve of the guidelines. Learning how to fashion an
appropriate recommendation for a sentence has always been one of the most
difficult tasks for officers. Guidelines that consider relevant information and
then provide a sentencing range make the officer's task easier. Officers agree,
however, that judicial discretion with options for departure is necessary for a
fair guidelines system. Individual characteristics and offender needs are crucial
to sentencing decisions. In addition, probation officers need full cooperation
and participation by the defendant and defense attorney during the presentence
investigation in order to present the court with a balanced report and to provide
any and all information that might warrant a departure.

Judge Vincent L. Broderick, U.S. District Court for the Southern District of
New York

While the guidelines have taken some power away from judges, judges still
retain ultimate power over sentencing. Spectators at New York Knicks games
in the late 1960's used to chant: "Defense! Defense! Defense!" Today's mes-
sage for sentencing judges is: "Depart! Depart! Depart!" Departures are the
lifeblood of the sentencing guidelines process.

This message needs to reach four audiences. First, the Commission. The
Commission needs better information and better guidance on how to develop
the guidelines. Second, the courts of appeals. They are likewise in need of
education. They need to learn more about the power and the duty of district
judges to depart. Third, district judges. District courts must exercise their
departure power, and when they do depart, they need to explain their reasons
adequately. Fourth, defense counsel. Defense attorneys must learn to present
arguments for departures. Federal defenders know and understand the guide-
lines, and they are beginning to chart out the statutory underpinnings of the
guidelines and the implications these have for arguments.

Another group that the guidelines significantly affect is probation officers.
The Commission has made a very conscious effort to change the role of the
probation officer. While probation officers have a much more difficult and
technical role under the guidelines, they are still an arm of the court and should
help the court in reaching sentencing decisions.
The guidelines have downplayed characteristics that judges found relevant in the past, such as family, employment, and community ties. Under the guidelines, these factors are no longer considered "ordinarily relevant." They may not seem relevant in the abstract, but for each particular defendant, they are extremely relevant. They affect the defendant's prison assignment and the information available to the probation officer for the supervisory phase.

The guidelines have not effected any real shift in power, but they have changed the roles of the players in the sentencing process. Each of these players needs to learn to work with, through, and around the guidelines better.

**PANEL 4: THE FUTURE OF THE GUIDELINES**

**Moderator:** Stanton Wheeler, Ford Foundation Professor of Law and the Social Sciences, Yale Law School

**Judge Nathaniel R. Jones,** U.S. Court of Appeals for the Sixth Circuit

The guidelines represent incursions into constitutional protections. Before the 1970's, the number of black and minority Article III judges was minuscule. In fact, before the Kennedy Administration, there was only one black Article III judge. Kennedy and the Presidents who followed him, especially President Carter, added many minority judges to the bench. As a result of these changes on the bench, the minority community began to change its perspective on the law, seeing it as an instrument for promoting equality rather than an obstacle to equality. The judiciary was becoming more sensitive to problems of race and the law.

Unfortunately, the guidelines have stripped judges of their ability to consider human factors in sentencing. The role of the judge has been marginalized. Instead of judicial discretion, the guidelines have placed tremendous discretion in the hands of investigative agents, prosecutors, and probation officers—often people with hardly any real life experience. The rationale and justification for the guidelines was to rid the system of disparity, partly in order to close the sentence gap between the poor and the affluent. Instead, they have created a multimillion dollar bureaucratic nightmare. We delude ourselves if we think that the guidelines have brought uniformity to the sentencing process and ended disparity. Indeed, one of the consequences of the guidelines has been an acceleration of the incarceration rate of minorities and the poor. Presently, one quarter of black males from twenty to twenty-nine years old are either in prison, on probation, or on parole. This is a higher proportion than the percentage of black males in college.
The constitutionality of the guidelines is doubtful. Although the Supreme Court addressed the separation of powers issue in Mistretta, it has not yet considered due process and confrontation issues. The guidelines may be unconstitutional on these grounds. The guidelines are also ill-conceived, ill-drafted, and ill-advised. Rather than trying to make sense out of them, courts should strive for a principled way to raise the constitutionality of the guidelines, and force the Supreme Court to address these issues directly.

Until these constitutional arguments are addressed, courts of appeals should insist that district judges exercise the discretion they have. Judges should set forth reasons for departing and should do so when appropriate. If district courts did this, we could at least mitigate the extreme injustice occurring under the guidelines.

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit

The value of the guidelines has not yet been proven. We hear a profusion of assertions as to what the guidelines do and don’t do, but we lack data on which to make sensible judgments. Because of the political climate, we will have to live with the guidelines, and therefore the most profitable tactic is to think about what reforms to undertake. We should direct our concerns to the Commission, which has a broad mandate under a flexible (and somewhat contradictory) statute.

It is more useful to ask the Commissioners to change the guidelines than it is to demand the abolition of them. The Commission has recently proposed for comment an amendment to the current provision that only the government may make a motion for departures based on the defendant’s cooperation. Congress said that there must be a government motion for cooperation departures below mandatory minimums, but did not set this requirement for other cooperation departures. Yet Congress did instruct the Commission to take cooperation into account in general, so it was at least content with permitting departures for cooperation without a government motion, except in cases of mandatory minimums. The Commission should carry out the intent of Congress to rectify this unwarranted imbalance of power. Doing so would be a clear demonstration that the Commission is truly, as its authorizing statute contemplates, “an independent commission in the judicial branch.”

One fundamental mistake was the Commission’s attempt to fashion a uniform mechanism for determining sentences according to every detail of a crime. This “incremental immorality” theory is lunacy. For example, the guidelines table for sentencing drug crimes sets two to three grams at level twenty, three to four grams at level twenty-two, four to five grams at level twenty-two.

---

twenty-four, and so on. Every two levels adds a year in jail. This system is ludicrous because the number of grams a defendant happens to possess at the moment of arrest has nothing to do with her morality or culpability. Similarly, a thief who commits a typical larceny has no idea how much he is stealing when he commits the crime, but is punished according to the amount of money involved, although his intent was simply to take whatever money he found. The sentence distinctions up and down the drug table and the monetary table are ridiculous.

Why did the Commission adopt these overly refined tables? There are three possible reasons. First, the Commission may have followed Paul Robinson's theory that a defendant should receive some extra punishment for every degree of wrongdoing. This theory justifies differential punishment in the criminal system as a general matter, but minute application of the theory is absurd. Second, the Commission may have responded to the pressure of statisticians to avoid discontinuities in sentencing. A smooth table of sentencing gradations avoids discontinuities. Yet discontinuities can also be solved by allowing greater sentencing ranges rather than by mandating incremental sentences. Third, the Commission responded to Congress' demands about the breadth of sentencing ranges. Congress stated that the top of a range can be no more than twenty-five percent above the bottom of the range. The statute says nothing, however, about the structure by which to reach the range. The Commission should have trusted judicial discretion to adjust modifications that lead to an applicable sentencing range. Too much discretion risks taking us back to the evils of the pre-guidelines system, but we can and should find a place for discretion between the two poles of unfettered discretion and no discretion.

Two further issues that the Commission should revisit include the count of conviction and relevant conduct. These factors matter above all else in sentencing. Characteristics of the offender, other than criminal record, are substantially ignored under the guidelines. Similarly, the guidelines' approach to measuring relevant conduct is seriously flawed. It measures all relevant conduct against the same scale, whether or not the defendant has been tried and convicted for the conduct. This is bad penology and bad morality. It is a rigid and cumbersome approach that understandably frustrates district judges.

These concerns do not, however, mean that we should abandon the guidelines. We should instead advise the Commission to reduce the rigidity of the guidelines system. The system should be made simpler and more flexible. A reformed system of guidelines could be better than the old system of unfettered discretion. We should undertake the research and analysis necessary to make sensible reforms.
Although we do not have enough data to make an informed judgment about the effectiveness of the guidelines in reducing sentence disparity, the anecdotal evidence and the limited statistical evidence we do have are worth our attention. There are many horror stories under the guidelines that are just as bad as those told to illustrate the deficiencies of the prior system.

There are two problems with the guidelines. First, discretion under the guidelines is frontloaded, rather than distributed throughout the system. Police and prosecutors now exercise the bulk of discretion available within the system, and there is no effective review of the ways that they exercise their discretion. On the other end, the guidelines severely restrict judicial discretion. Parole, which was available to smooth out some of the disparities resulting from judicial excesses, has been abolished. “Good time,” administered by the Bureau of Prisons, used to account for one-third to nearly one-half of sentences, but has been slashed to fifteen percent of most sentences.

Prosecutors and enforcement agencies are not loath to exercise their newfound power, sometimes with disturbing results. For example, drug enforcement agents can structure undercover deals in ways that will affect the elements of a case. An undercover agent may insist upon a deal with a small supplier of cocaine for five rather than three kilos, which results in a guideline increase of about four years for a defendant with no previous record. Similarly, an agent can arrange for drug deals near schools, leading to increased sentences under mandatory minimum laws. Unchecked prosecutorial discretion can also have severe racial impact. A recent series of massive “schoolyard” busts in Los Angeles resulted in over ninety indictments. All except one defendant were black or Latino.

A second problem is that there is no real way to correct unfair or inappropriate sentences (as opposed to illegal sentences) after they are imposed. Sentences within the guidelines are presumptively legal, even though they may discriminate unfairly among codefendants, or may result from slanted or biased presentence reports, or may not take into account significant cooperation by a defendant. Sentences are also much longer, both in years imposed and in time served, than they were prior to the guidelines. Our federal prisons are filling up with more and more prisoners with longer and longer sentences. A twenty-year-old first offender with a sentence of thirty years (or more) is no longer a rarity. Average sentences in the federal system have increased from twenty-six to sixty-seven months over the past few years.

We will come to regret our reliance on long sentences. Our present rate of incarceration will have severe implications for our society. We are creating, through long terms of imprisonment, a disabled and infantilized class of people who will have severe problems adjusting to the free community when they are
released. Time in prison is not making people more useful, more caring, or more likely to treat other people fairly and honestly. Moreover, people in prison are not really "removed from society." They are connected to families, friends, church groups, and other organizations. They live in daily contact with their keepers, whose ranks are also growing. In short, they are us and we are them.

Judges should be brought back into the picture. Judges have historically determined what due process means. Even though limited by guideline restraints, judges should decide what evidentiary standards to apply, determine methods of factfinding and find facts (especially facts about cooperation), and supervise and set limits on prosecutorial discretion.

The Commission should cut the guidelines loose from mandatory minimum sentences. Guidelines and mandatories are incompatible sentencing methods, and the Commission should decide for itself what appropriate punishments should be. The Commission should also commence research about what time in prison does to people. If we could better understand the damage done by incarceration, we would better know how to balance the harms of incapacitation against its assumed benefits to society.

Judge Vincent L. Broderick, U.S. District Court for the Southern District of New York

I support the Judicial Conference position to work to make the guidelines effective. While I have every confidence that we will be able to make them effective, this effort will require a great deal of attention.

One potential problem with the guidelines is that they have produced an increase in long prison terms. Supervised release of these prisoners will be very burdensome. It will also be difficult for the system to reform the guidelines because prisoners will want to be resentenced under more lenient standards, and there will be a rush of habeas writs for this purpose. Clarifying the guidelines will be a terrible production and will become a big area for litigation.

The Commission's proposed amendments, such as the amendment to allow the defense to move for reduction based on cooperation, are not necessarily the Commission's own recommendations. Some are from the Department of Justice, some are from defense counsel, and some are from the Judicial Conference. The proposal to permit substantial assistance departures without a government motion is a good one, but it is not one of the amendments suggested by the Judicial Conference. The amendments proposed by the Judicial Conference over a year and a half ago are crucial to making the guidelines effective. They include a proposal to provide further opportunities for probation at lower levels and other similar adjustments. If the Commission acts on these proposals, we will have reason to be hopeful about continued cooperation between the Commission and the judiciary. This cooperation is necessary to improve the guidelines.