JUDGING UNDER THE FEDERAL SENTENCING GUIDELINES

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The Sentencing Reform Act of 1984 sought to bring consistency, coherence, and accountability to a federal sentencing process that was deficient in these respects. Requiring sentencing judges to explain their decisions and permitting appellate review were, in our view,

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genuine accomplishments of the Act. Unfortunately, the potential contributions of these legislative achievements have been arrested by the implementation of a system of complex and rigid sentencing rules devised by an administrative agency in Washington. Here, we discuss two unintended consequences of the Federal Sentencing Guidelines. First, the traditional sentencing ritual has lost much of its moral force and significance. Second, both sentencing judges and appellate judges have been denied the opportunity to develop a principled sentencing jurisprudence.

I. Sentencing Before the Guidelines

A. The Judge's Sentencing Authority

For two centuries, trial judges in the American federal system bore nearly the full burden of achieving a just sentence within the maxima set by statute. While other actors participated in the sentencing process, the trial judge retained ultimate discretionary authority to fashion the sentence. In this century, the judge shared sentencing responsibility with parole officials in cases of imprisonment, but in the federal system the influence of these officials was limited. Federal parole policies required that most federal prisoners serve between one-third and two-thirds of their nominal—that is, judicially imposed—prison sentences. Mindful of the relevant parole parameters, the federal trial judge was able to exercise considerable control over the actual amount of prison time that would be served. Moreover, since the mid-1970s, when federal parole authorities issued their first set of parole guidelines, the impact of parole on the length of prison terms had arguably been more apparent than real. As long

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2 In the larger project from which this article is drawn, we discuss the genesis of the Guidelines, consider their consequences in greater depth, and propose avenues for corrective action.

3 As we explore at greater length in the project from which this article is adapted, federal criminal statutes since the founding of the Republic have generally stated only maximum permissible fines and terms of imprisonment, thus permitting the judge to sentence to any lesser term.


5 Guidelines were issued by the United States Board of Parole in late 1973. See Parole Policy Guidelines, 38 Fed. Reg. 31,942 (1973). Congress reorganized parole in 1976 and re-
as the federal Probation Office's presentence report informed the sentencing judge of the projected effect of parole guidelines on the judge's sentence, the judge was in a position to decide the approximate length of any particular term of imprisonment.

Probation officers also played a substantial role at sentencing, but they facilitated, rather than diminished, the sentencing authority of the court. The probation officer in the federal system is an employee of the judicial branch, and traditionally has acted as a confidential adviser to the court. In the discretionary sentencing era, the officer's most important function was to prepare a presentence report for the judge, a copy of which (with the exception of a confidential sentencing recommendation to the judge) was provided to the prosecutor and to the defense prior to the sentencing hearing. In recent decades, a typical report included summaries of both the prosecutor's and the defendant's versions of the offense, information on the disposition of the cases of codefendants, and information on the application of the parole guidelines to the case at hand. But the largest section of the presentence report dealt with the personal history and circumstances of the defendant: family background, education, military service, work history, criminal record, dependents, and activities (good and bad) in the community. Prior to the implementation of the Sentencing Guidelines, the official instructions to probation officers explained that the presentence report's "primary purpose is to aid the court in determining the appropriate sentence," and required that the report include "[a]n assessment of the problems of the defendant and a consideration for the safety of the community." The final section of the report, not released to either the government or the defendant, contained the probation officer's recommendation to the judge of an appropriate

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6 Prior to 1974, presentence reports were prepared only upon request of the sentencing judge. In 1974, Rule 32(c) of the Federal Rules of Criminal Procedure was amended to require a report in nearly every case, unless the defendant waived its preparation. Fed. R. Crim. P. 32(c)(1) (subsequently amended). Another amendment required disclosure of the report to the defendant upon request. Fed. R. Crim. P. 32(c)(3)(A) (subsequently amended).

sentence. The probation officer’s major threshold recommendation, in many cases, dealt with the issue of whether the defendant should receive a prison sentence or probation. In the event that a period of imprisonment was recommended, the probation officer would suggest a particular term, based in part on the national sentencing statistics available for the offense in question, as well as on the officer’s informed judgment. But the role of the probation officer in sentencing was purely advisory, in both theory and practice.

The pre-Guidelines roles of the prosecutor and the defense attorney at a federal sentence hearing varied widely, but they never approached the significance of the judge’s role. We explore elsewhere the exercise of prosecutorial discretion, both before and during the Guidelines era. For now it is enough to note that in many districts, including those with which we are most familiar, prosecutors generally refrained from recommending a specific sentence to the judge, and the judge would neither elicit nor condone such recommendations. In other districts, prosecutors could and would forcefully argue for a significant term of imprisonment, or they might urge a lenient disposition, perhaps joining in a defendant’s request for a term of probation. In a case where the defendant had provided useful information to law enforcement officials concerning the criminal activities of others, the defense and the prosecutor might each describe to the judge the nature and significance of this cooperation.

Except for the rare occasion in which a judge accepted a plea of guilty and sentenced on the basis of a binding sentence agreement between the parties, the federal sentencing judge exercised extraordinarily broad discretion over the nature and magnitude of the sentence. The judge might, or might not, take into account the

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10 See Stith & Cabranes, supra note *.

11 Fed. R. Crim. P. 11(e)(1)(B) governs both pleas in which the prosecutor promises to “recommend” a sentence and pleas in which the prosecutor agrees not to oppose the defendant’s requests.

12 Although many state systems permit prosecutors and defendants to agree on a particular sentence as part of a plea-bargain, such sentence-bargains were highly unusual in the federal system. The Federal Rules of Criminal Procedure do permit the parties in a criminal case to agree to a specific sentence, which is “binding” if the judge agrees to accept the plea agreement. Fed. R. Crim. P. 11(e)(1)(C). There is general consensus that in federal court, very few cases have proceeded under this rule. See, e.g., United States v. Pimentel, 932 F.2d 1029, 1033-34 (2d Cir. 1991) (noting prosecutorial reluctance to plea bargain based on a particular sentence); John Gleeson, Sentence Bargaining Under the Guidelines, 8 Fed. Sentencing Rep. 314, 316 (1996). There appear to be no statistics delineating the subdivision of Federal Rule 11(e) under which pleas of guilty are accepted, either before the Guidelines or under the Guidelines regime.
defendant's cooperation and adjust the sentence accordingly. The
judge might impose a short sentence of imprisonment combined with
probation, or might impose the maximum jail time permitted by stat-
ute. In theory and in practice, the burden of determining the sentence
fell almost entirely on the trial judge.

This virtually unreviewable authority\textsuperscript{13} was relatively unusual for
a federal trial judge. While many issues that arise in criminal and civil
cases are left to the discretion of the trial judge, most of these issues
are ultimately reviewable by the appellate courts. Only in the prelimi-
nary stages of a civil case—in the management of the discovery pro-
cess and other pretrial arrangements—does a federal trial judge
exercise comparable authority, and even there the judge is guided by
articulated legal principles and standards. The judge’s discretionary
decisions during a trial may be appealed, and possibly reversed if the
judge is found to have “abused” his discretion.\textsuperscript{14} This “abuse of dis-
cretion” standard applies to a variety of rulings that trial judges rou-
tinely make.\textsuperscript{15} What made sentencing authority truly extraordinary

\textsuperscript{13} Callis in 1622 called this \textit{discretio specialis} because the discretionary decision itself “is the
absolute judge of the cause, and gives the rule.” \textit{R. Callis, Upon the Statute of Sewers} 113
(1622), \textit{quoted in} Rosemary Pattenden, \textit{The Judge, Discretion and the Criminal Trial} 4
(1982).

\textsuperscript{14} See \textit{Jack Weinstein et al., Weinstein on Evidence} ¶ 401[01], at 401-08 (1989) (ex-
plaining that “[d]iscretion means that a trial judge has wide scope for decision in situations
where unpredictable, unique and incalculable factors are at work”) (internal quotations
omitted).

\textsuperscript{15} In an early 1980s survey of two volumes of the Federal Reporter, Judge Joseph Sneed of
the \textit{U.S. Court of Appeals} for the Ninth Circuit determined that one-quarter of all federal appel-
late decisions involved matters committed to the discretion of the trial court; the courts ap-
proved the exercise of discretion more than two-thirds of the time. \textit{Joseph Sneed, Trial Court
Discretion: Exercise by Trial Courts and Review by Appellate Courts (Presentation Before the
Judges of the Second Circuit, 1982)} (on file with authors).

The situations in civil and criminal cases in which a federal trial judge exercises informed
judgment subject to appellate review for abuse of discretion are many and varied, and deeply
affect the lives and property of real people. Rule 403 of the Federal Rules of Evidence, for
instance, advises that relevant evidence “may be excluded if its probative value is substantially
outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”
This is a broad and inevitably subjective standard of exclusion, which gives a judge great discre-
tion to weigh the particular circumstances confronted at trial. But the judge’s evidentiary rulings
are appealable and may be reversed if the appellate court finds them to be arbitrary, inexplica-
table, or contrary to binding precedent. In addition to formal evidentiary rulings, the judge must
decide, among many matters, whether to hold hearings of any kind, when to hold an evidentiary
hearing, when to permit or end questioning, when to seal documents from public view, when to
close courtroom proceedings to the public, when to allow the intervention or participation of
new parties, when to permit sketching or television cameras in the courtroom, whether to excuse
jurors or potential jurors, whether and when to hear from amici curiae, when to make on-site
inspections, when to admit a criminal defendant to bail, when to grant a criminal defendant the
opportunity to voluntarily surrender at a prison (rather than be remanded into custody immedi-
ately), whether to sever counts of an indictment, whether to accept the defendant’s plea of
guilty, whether to have an observer or defendant removed for courtroom misconduct, and
whether to reveal the identity of a confidential informant.
was not the broad discretion the judge exercised, but, rather, the fact that the decision was virtually unreviewable on appeal.\textsuperscript{16} The lack of appellate review meant that the unreasonable or inexplicable—or even the bizarre—decision at this stage was beyond correction. In addition, no common standards or principles were articulated to guide the exercise of judgment in sentencing.

B. The Significance of the Sentencing Ritual

We take as an established truth of our constitutional order that the criminal justice system exists not only to protect society in a reasonably efficient and humane way, but also to defend, affirm, and, when necessary, clarify the moral principles embodied in our laws. In the traditional ritual of sentencing, the judge pronounced not only a sentence, but society's condemnation as well. The judge affirmed not only society's need to punish, but also its right to do so. Central to that venerable ritual was the presiding judge's exercise of informed discretion. The judge's power to weigh all of the circumstances of the particular case and all of the purposes of criminal punishment represented an important acknowledgment of the moral personhood of the defendant and of the moral dimension of crime and punishment.

In the adjudicatory stages of a criminal case, the primary actors are the prosecutor and the defense attorney. The prosecutor, in fashioning an indictment and a trial strategy, decides what facts can be proved beyond a reasonable doubt, the manner in which evidence will be presented, and the inferences the jury may reasonably be called on to make. In turn, the defendant and defense counsel decide which charges to contest and how best to contest them. The judge's role at this early, pretrial stage is, in a sense, secondary. If there is a plea of guilty to one or more counts of the indictment, the judge's primary concerns are to ascertain the voluntariness of the plea\textsuperscript{7} and, equally significantly, to ensure that there is a factual basis for a guilty plea.\textsuperscript{18}

In a criminal trial, the judge's role is in some ways even more passive than at a plea hearing. At the trial stage, the judge is significantly constrained by requirements of procedural regularity. There is a clear demarcation of roles among the participants—judge, parties, counsel, witnesses, and jurors. Throughout most of a trial, the judge's role is largely reactive. The most significant judgments are usually those concerning the admissibility of evidence—decisions made on the basis of applicable rules and principles, the particular factual circumstances presented, and the judge's own legal experience. At the end


\textsuperscript{17} See Fed. R. Crim. P. 11(c), (d); Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 21.4(b) (2d ed. 1992).

\textsuperscript{18} See Fed. R. Crim. P. 11(f).
of the trial, the judge instructs the jury on the law, but these instructions are almost invariably drawn directly from relevant appellate opinions and from standard ("pattern") jury instructions. At least in the absence of television cameras, the judge at a criminal trial takes a back seat to the attorneys and witnesses, and at the moment of consequential decision, to the jury.

At a traditional sentencing hearing, however, the complex interplay of various actors, characteristic of the adjudicatory stage, resolved itself into a single axis of tension between the defendant, now convicted, and the judge, robed and seated behind the high bench. No longer serving primarily as an arbiter between the parties, the judge was called upon to exercise the ultimate authority of the state.

Those present at a sentencing proceeding in a federal court (at least in those courtrooms with which we are familiar) witnessed a ritual of undeniable moral significance. It was critical that this proceeding took the form of a face-to-face encounter between individuals. The sentencing judge might have a wide audience: victims, their families and friends, the family and friends of the defendant, the general public, and even the appellate courts that might be called upon to review the judge's presentencing decisions, though not, under the old regime, the decision on the sentence itself. But the judge addressed only one person when imposing a sentence and ordering the entry of the judgment of conviction. The meaning of this solemn confrontation was clear: only a person can pass moral judgment, and only a person can be morally judged.

In emphasizing the human face of justice, we are not blind to the limitations of the traditional sentencing hearing. Human judgment is fallible. Unfortunately, this is a fact of our existence for which there can be no easy technological solution. By replacing the case-by-case exercise of human judgment with a mechanical calculus, we do not judge better or more objectively, nor do we judge worse. Instead, we cease to judge at all. We process individuals according to a variety of purportedly objective criteria. But genuine judgment, in the sense of moral reckoning, cannot be inscribed in a table of offense levels and criminal history categories.

This does not mean that judgment, as we understand it, is a matter of subjective feeling. Judgment proceeds from principles. These principles can and should be stated, rationally discussed, attacked, and defended. The greatest deficiencies of the pre-Guidelines regime

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19 Dorszynski, 418 U.S. at 431-32.
20 See United States v. Davern, 970 F.2d 1490, 1516 (6th Cir. 1992) (N. Jones, J., dissenting) (describing sentencing as "an intensely human process"), cert. denied, 507 U.S. 923 (1993); United States v. Naugle, 879 F. Supp. 262, 265 (E.D.N.Y. 1995) (Weinstein, J.) (stressing "the necessity for human interaction when sentence is imposed. It is then that the judicial system relates most powerfully to the defendant as a person.").
were its failure to provide for review of the decisions of sentencing judges and its failure to ensure that the sentencing judge’s exercise of discretion was informed by authoritative criteria and principles. But it is in the nature of moral and juridical principles that they must be informed by a particular set of facts before they can be applied.\textsuperscript{21} Only a person can perform this task. Anthony Kronman has called this irreducibly human capacity for judgment “practical wisdom” or “prudence.”\textsuperscript{22} It is a trait of character acquired by life experience. It can never be reduced to a body of universal rules.

II. Sentencing Under the Guidelines

The Federal Sentencing Guidelines retained the traditional venue of sentencing while effectively abandoning the substance of the traditional sentencing rite. In place of moral judgment, the Guidelines have substituted bureaucratic penalization. The judge on the elevated bench remains a visible symbol of society’s moral authority, but the substance and meaning of this ancient staging is gone in most cases.

A. The New Role of the Judge

With a far more limited role, the federal trial judge in today’s sentencing ritual has little or no opportunity to consider the overall culpability of the defendant before him. The Guidelines themselves determine not only which factors are relevant (and irrelevant) to criminal punishment, but also, in most circumstances, the precise quantitative relevance of each factor. In 1995, the last year for which information is available, more than forty thousand defendants were convicted and sentenced in the federal district courts of this country.\textsuperscript{23} In each of these forty thousand sentencings, the sentencing judge was required to follow complex and abstract rules and to make minute arithmetic calculations in order to arrive at a sentence. Each step of a sentence calculation under the Guidelines represents what mathematicians call a “minimal pair”: The judge must decide whether a given factor deemed relevant by the Sentencing Commission is present or absent in the case at hand. Each decision step requires the judge to


\textsuperscript{22} Anthony T. Kronman, The Lost Lawyer 41 (1993).

\textsuperscript{23} Fewer than ten percent of these defendants were convicted after a trial; the majority entered pleas of guilty, usually pursuant to plea agreements with federal prosecutors. Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: 1995 Report of the Director 225 (reporting that 46,773 defendants, including corporations and other entities, were convicted and sentenced in 1995; 91\% were convicted by plea of guilty). See also U.S. Sentencing Comm’n, 1995 Ann. Rep. 56 tbl.17 (recording a total of 38,325 cases—apparently including multi-defendant cases—ending in conviction in 1995; all but 8.1\% involved pleas of guilty).
add or subtract points or "levels"—generally no more than two at a
time—that will ultimately determine the sentence of the defendant.

This sequence of minimal-pair decisions offers little opportunity
for judicial reasoning. The judge’s role is largely limited to factual
determinations and rudimentary arithmetic operations. Moreover,
the Sentencing Commission has taken pains to limit sharply the
judge’s authority to depart from the sentencing range that these arith-
metic calculations yield. As we discuss further in Part IV, the Guide-
lines are comprehensive, encompassing many different contexts and
circumstances in which federal crimes may be committed, and absent
approval from the prosecutor, the sentencing judge may depart from
the Guidelines only in an atypical case.24 One judge has recently lik-
ened his role in sentencing to that of a “notary public”;25 another has
likened the sentencing judge’s role under the new dispensation to that
of “an accountant.”26

The hallmark of judging in the common-law tradition is the
judge’s application of general principles to specific facts, a process by
which the general principles are themselves refined, explained, and, in-
deed, reconsidered.27 In sentencing, the Guidelines have minimized
the opportunities and removed the authority for judges to do what
they do best—to reason and to apply general principles of law to par-

24 Under the rules issued by the Sentencing Commission, judges have discretion to depart
from the Guideline range in only three situations. The first is when the prosecution makes a
motion for downward departure on the basis of the defendant’s substantial assistance to authori-
these substantial assistance departures occurred in approximately one-fifth of all cases sentenced,
accounting for nearly two-thirds of all departures (upward or downward). See U.S. SENTENCING
COMM’N 1995 ANN. REP. 89-91 tbl.31.

The second situation is when the Guidelines expressly empower (and even encourage) de-
parture if certain facts are found. See, e.g., U.S.S.G. § 4A1.3 (permitting a judge to depart if
criminal history score calculated under the Guidelines either overstates or understates “the seri-
ousness of the defendant’s past criminal conduct”).

The third situation in which a judge may depart is when there are demonstrable aspects of
the defendant’s criminal behavior or of the defendant’s personal history that (a) warrant a differ-
ent sentence, (b) are not proscribed from consideration by the Guidelines, and (c) are factors
that the Commission did “not adequately take [ ] into account in formulating” the Guidelines. 18
U.S.C. § 3553(b) (1994). The Commission has referred to such cases as falling outside the
“heartland.” See U.S.S.G. §§ 5K2.0; 1A4(b). We discuss this form of departure in Part IV, infra.

SENTENCING REP. 109, 109 (1991) (quoting an unnamed but “well-known and highly respected
jurist”; the author is Chief U.S. Probation Officer, District of Oregon).

26 Ellsworth A. Van Graafeiland, Some Thoughts on the Sentencing Reform Act of 1984, 31

27 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 18-19 (1921) (“[T]he
judge must look to the common law for the rule that fits the case.”); OLIVER WENDELL HOLMES,
Jr., THE COMMON LAW 36 (1881) (“And as the law is administered by able and experienced
men, who know too much to sacrifice good sense to a syllogism, it will be found that, when
ancient rules maintain themselves in the way that has been and will be shown in this book, new
reasons more fitted to the time have been found for them . . . .”).

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ticular circumstances. Instead, the Guidelines require judges to address many quantitative and definitional issues in excruciating detail, while staying away from larger questions relating to culpability and the purposes of criminal punishment. Every hour a judge spends analyzing the Guidelines is an hour that might instead be directed toward application, and thus further refinement and development, of common principles and standards of criminal sentencing. In the course of drafting the Guidelines, the Commission itself may have applied known general principles to exemplary situations, and undertaken thoughtful legal analysis of these situations—but its directives for computing severity levels and criminal history scores under the Guidelines rarely, if ever, reveal this reasoning. The Guidelines have replaced the traditional judicial role of deliberation and moral judgment, which is inherently imperfect with complex quantitative calculations that convey the impression of scientific precision and objectivity. The judge engages not in moral reasoning but in minute parsing of administrative regulations.

B. The New Role of the Probation Officer

At the same time that the Guidelines have greatly reduced the authority and role of the judge, they have enhanced the roles of two other actors in the ritual: the prosecutor and the probation officer. Many critics of the Guidelines have insisted that the new system has, at bottom, simply transferred sentencing authority from the judge to the prosecutor. Wary of this possibility, both the Sentencing Commission and the Department of Justice have sought to limit prosecutorial power to plea bargain around the Guidelines, thereby ensuring the hegemony of the Commission itself. Even so, there is

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29 In the larger project from which this article is adapted, we examine the public record of the Commission’s creation of the Sentencing Guidelines. Suffice it to say here that the Commission has never sought to explain or justify the particular factors it chose as relevant (and not relevant) to sentence severity. See Michael H. Tonry, Sentencing Matters 83-89 (1996).


little doubt that the Guidelines have augmented the authority of the prosecutor relative to that of the judge.32

What is clear beyond doubt is that the role of the probation officer has been transformed. Rather than providing guidance to the court in its exercise of sentencing discretion, probation officers now undertake a kind of preliminary adjudication of all issues made relevant by the Sentencing Guidelines. No longer serving merely as a conduit for the parties to present their respective versions of the offense to the judge, the presentence report today gives a single version—one determined, in principle, by the probation officer herself. The officer then provides her Guidelines calculus—applying the Guidelines to the facts as she finds them and computing a recommended sentencing range. Together, these two functions—independent fact-finding and autonomous Guidelines calculation—make the probation officer the “special master of guidelines facts”33 and the primary enforcer of the Guidelines.

The enhanced investigatory function of the federal probation officer is reflected in the rules governing presentence reports. When the Guidelines went into effect, the Federal Rules of Criminal Procedure were amended to require preparation of a presentence report in nearly all cases; the defendant no longer had the right to waive its preparation. As recently further amended, the Federal Rules require that the presentence report advise the court as to “the classification of the offense and of the defendant under the categories established by the Sentencing Commission... that the probation officer believes to be applicable to the case.”34 Probation authorities at the Administrative Office of the United States Courts in Washington have provided even more specific directives to officers in the field: they may not “withhold from the court reliable information” even if the prosecutor and defense attorney attempt “by agreement” to “eliminate relevant

32 Although prosecutorial power has been increased in relation to judicial power, it is important to realize that the Guidelines regime has diminished prosecutorial prerogatives in some respects. When prosecutors in the previous era indicted a defendant for a particular offense, they knew that after conviction they might hope to influence the sentencing judge to impose a severe or a mild sentence; now prosecutors know that if conviction is obtained, they have limited authority to attempt to influence the sentence, and that such authority is at its maximum only in the event the defendant provides substantial assistance in the prosecution of others. If the prosecutors faithfully abide by the admonitions of the Sentencing Commission and the Department of Justice regarding plea bargaining and factual allegations at sentencing, their ability to influence the final sentencing range is significantly constrained by the same rules that constrain the judge. We discuss the matter of prosecutorial discretion in the Guidelines era in SRTH & CABRANES, supra note *.


34 FED. R. CRIM. P. 32(c)(2)(B).
The most recent instructions from Washington likewise refer to the “probation officer’s role as the court’s independent investigator.”

It bears recalling that federal probation officers are generally not trained for criminal investigation. One officer has delicately explained that many of the skills required for investigation—including the evaluation of the reliability of information and the credibility of witnesses—“were previously not considered within their province.” In fact, most federal probation officers have been trained in social work. It is therefore ironic, as Sharon Bunzel has observed, that in the new sentencing regime, probation officers need not devote significant attention to who the offender is (and how he came to be that way). The Guidelines render largely irrelevant much of the background information about a defendant as a person, unless the information is so extraordinary that it arguably makes the case “atypical” of the criminal offenses addressed by the Guidelines. And even in the extraordinary case, personal background information about the defendant is never required for the sentencing decision, because departure from the Guidelines is itself never required.

The second, and arguably more significant, function of the probation officer is to apply the law as stated by the Sentencing Commission to the facts that the probation officer finds and reports. Probation officers are now the Guidelines “experts” in the courtroom—trained in Sentencing Commission workshops and remotely guided by its

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36 Id. at 3 (emphasis added); see also Catharine M. Goodwin, The Independent Role of the Probation Officer at Sentencing and in Applying Koon v. United States, 60 Fed. Probation Sept. 1996, at 71.
38 See Piotrowski, supra note 37, at 96.
40 U.S.S.G §§ 5H1.1-5H1.6; 5H1.9-5H1.12.
41 See infra text accompanying notes 133-42.
42 As recognized in the Federal Rules of Criminal Procedure, information in the presentence report about the defendant’s personal history may be of importance to correctional officials. See Fed. R. Crim. P. 32(b)(4)(A) (requiring presentence report to include “information about . . . any circumstances that, because they affect the defendant’s behavior, may be helpful in imposing sentence or in correctional treatment”) (emphasis added).
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manuals, worksheets, and telephone “hotline.”43 The probation officer’s familiarity with the evolving law of Guidelines application is critical because the Guidelines findings and calculations in the officer's presentence report are the inevitable focus of the sentencing hearing under the new sentencing regime.

Guidelines application, however, is, in the nature of things, a species of legal reasoning. Several years ago, the Federal Courts Study Committee, created by an act of Congress to study the future of the federal courts, expressed skepticism as to whether probation officers were appropriate personnel for this task, noting that “[a]lthough district judges have great confidence in the federal probation service, there is a growing concern among judges, prosecutors and defense lawyers that the new sentencing regime imposes on these officers responsibilities . . . for which they may not be particularly well trained or well suited.”44 The degree of legal knowledge required to perform this function is indicated by the fact that several years ago, all federal probation officers were provided training in Westlaw and Lexis, the online computer services for legal research,45 in order to be able to keep abreast of appellate jurisprudence on the Sentencing Guidelines. But it is not clear that mere access to such information can take the place of legal training; one probation officer has noted that “[t]o be really good . . . at [the] task of presentence writing, the probation officer will need to employ a new kind of reasoning—syllogistic—here-tofore foreign to probation work.”46

The independent adjudicatory duties of the probation officer have altered considerably her relationship with the other participants in the sentencing hearing.47 Defense attorneys have explained that

43 The Commission has two sets of worksheets: one set for calculating sentences for individuals, and a second set for calculating sentences for corporations and other organizations. U.S. SENTENCING COMM’N, A GUIDE TO PUBLICATIONS & RESOURCES 31 (1996). As of 1995, the Commission had two telephone “hotlines,” one for judges and probation officers and another for prosecutors and defense attorneys. Both were open between 8:30 a.m. and 5:30 p.m. See id. at 1. The Commission has also made a “variety of exercises, visual aids, and other training materials designed by the Commission’s training staff . . . available to the public.” Id. at 2. There are many other compendiums of Guidelines jurisprudence. See infra note 96.


46 Harry Joe Jaffe, The Presentence Report, Probation Officer Accountability, and Recruitment Practices: Some Influences of Guideline Sentencing, 53 FED. PROBATION, Sept. 1989, at 12; see also Varnon, supra note 45, at 64 (noting “the perception that officers are now making findings of fact and [conclusions of] law which we are not trained or competent to make”).

they are reluctant to speak openly with the probation officer about the defendant, for fear that any revelation might trigger an upward adjustment under the Guidelines. Indeed, "some defense counsel have come to regard the probation officer as a second prosecutor, whose purpose is to review and then raise the guideline calculations of the government." Although many probation officers rely primarily on the prosecutor in drafting the presentence report's version of the offense, prosecutors have an incentive not to be forthcoming with the probation officer when the defendant's agreement to plead guilty has been tendered with the expectation that certain allegations or certain facts will not be considered in the calculation of the sentence.

The probation officer may stand in a quasi-adversarial position even in relation to the judge—or, at the very least, the officer stands, as never before, at arm's length from the judge. To be sure, as a formal matter of law, federal probation officers remain part of the judicial branch of the federal government, and they continue to be appointed by the judges of the district courts. And because of the presumed expertise of the probation officer and the tedious and often mechanical work of computation under the Guidelines, many trial judges are disposed to defer to the officer's judgments over the objection of one

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48 See Jerry D. Denzlinger & David E. Miller, The Federal Probation Officer: Life Before and After Guideline Sentencing, FED. PROBATION, Dec. 1991, at 49, 50-51 (describing how probation officer is seen as a "third adversary" in the courtroom); Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 AM. CRIM. L. REV. 161, 200 (1991) (recounting public defender's description of probation officers as more adversarial than prosecutors in Guidelines regime); Piotrowski, supra note 37, at 98 (noting that when defendants are interviewed by probation officers, their attorneys frequently direct them not to answer questions). As a result, it is now the common (and perfectly understandable) practice of defense counsel to instruct their clients, as well as their clients' relatives and friends, to decline to cooperate with probation officers prior to sentencing, or to do so only if defense counsel is present.

49 Piotrowski, supra note 37, at 97; see also Sarner, supra note 37, at 329 (alleging that "probation officers' version [of offense] too often attributes greater culpability to the defendant").


When probation officers suspect they have been "frozen out" by both defense counsel and prosecutors, they may seek out the federal agents (in the FBI or the Secret Service, for instance) who investigated the criminal case, going behind the backs of the parties in the case in order to ferret out the "actual facts." The investigating agent knows and is "most willing to share" information regarding the full extent of the defendant's participation in an offense. Piotrowski, supra note 37, at 97; see also Bunzel, supra note 7, at 960, 963. Indeed, it has been reported that probation officers may assist law enforcement agents in continuing to investigate the defendant in the interval between conviction and sentence. Piotrowski, supra note 37, at 97. We hasten to add, however, that there is no reason to believe that this practice is widespread.

of the parties.\textsuperscript{53} One judge has explained: "We find ourselves giving probation reports cursory attention because we are usually just checking the probation officer's addition."\textsuperscript{54}

On the other hand, probation officers who vigorously play the role of "guardian of the Guidelines"\textsuperscript{55} may appear to judges to be indistinguishable from a third party in the case. They may appear to be precisely what the Sentencing Commission expects them to be—de facto, though not yet de jure, agents of the Commission, charged with the diligent implementation of a system that is designed to limit the authority of the judge.\textsuperscript{56} That the Probation Office is formally a part of the judiciary is of little solace to the judges; after all, the Sentencing Commission and its bureaucracy are also located, by statutory prescription, "in the judicial branch" of the federal government.\textsuperscript{57} If a party disputes a factual finding made in the presentence report, the judge may eliminate altogether the customary confidential meeting with the probation officer prior to a sentencing. Especially in cases in which there is a likelihood that the probation officer will be required to testify under oath at the projected hearing (requiring the judge, in turn, to resolve disputed issues of fact in part on the basis of the credibility of the probation officer), the judge may feel bound to "decline to meet and talk with the probation officer about the presentence report in an effort to avoid any claims of ex parte communications."\textsuperscript{58} In

\textsuperscript{53} See Cook, supra note 39, at 113; Heaney, supra note 48, at 168-69; Nagel & Schulhofer, supra note 31, at 538.

\textsuperscript{54} Weinstein, supra note 28, at 364; see also United States v. O'Meara, 895 F.2d 1216, 1223 (8th Cir.) (Bright, J., dissenting in part), cert. denied, 498 U.S. 943 (1990).

\textsuperscript{55} The origin of this characterization is obscure, but it has been widely adopted by many commentators, including defense attorneys, see Judy Clarke, Ruminations on Restrepo, 2 FED. SENTENCING REP. 135 (1989), and probation officers themselves, see Gilbert, supra note 25, at 110.

\textsuperscript{56} See Magdeline E. Jensen, Has the Role of the U.S. Probation Officer Really Changed?, 4 FED. SENTENCING REP. 94, 95 (1991) (responding to judges and others who complain about probation officers in the Guidelines era, asserting that probation officers are simply doing their job and that "[i]t is of no use to kill the messenger" when what is really at issue is the "message"—that is, the Sentencing Guidelines).

\textsuperscript{57} 28 U.S.C. § 991(a) (1994). For the legislative history of this provision, see Stith & Koh, supra note 1, at 280 & n.363. As explained there, this characterization of the Sentencing Commission as an "independent commission in the judicial branch" remained unchanged as the bill that became the Sentencing Reform Act of 1984 was considered and modified in four different Congresses between 1977 and 1984. The terms for appointment of the Commission were altered significantly during this time. Compare S. 1437, 95th Cong. (as introduced May 2, 1977) (providing for appointment of nine-member sentencing commission designated by U.S. Judicial Conference) with 28 U.S.C. § 991(a) (1994) (Sentencing Reform Act of 1984 providing for seven-member commission, with all members appointed by President and confirmed by Senate, three Commissioners to be federal judges chosen by the President "after considering" a list of six names submitted by the Judicial Conference, with all Commissioners removable for "cause").

\textsuperscript{58} Cook, supra note 39, at 113. The new role of the probation officer in a system where the judge's discretionary authority has been so diminished may actually have the effect of reducing the probation officer's real influence over the sentencing outcome. In the pre-Guidelines era,
addition, many judges at plea hearings will routinely give defendants a Miranda-style explanation of the role of the probation officer, including an admonition that anything they say to a probation officer can be used against them at sentencing.

It is not surprising, in these circumstances, that federal judges increasingly reject the probation officer’s Guidelines calculations in favor of a sentence or sentencing range that the parties jointly recommend as part of a plea bargain. To be sure, a judge who is disposed to follow a plea agreement that the parties have reached may be put in an awkward position when a probation officer formally reports that the agreement is grounded on allegedly inaccurate or incomplete statements of offense conduct that distort Guidelines calculations. In response, some judges have directed probation officers to limit their investigations to the facts as stipulated by the parties, while others have viewed a sentencing agreement between the parties as a legitimate alternative to the sentencing outcome that would likely be calculated under the Guidelines in the absence of the agreement. Even though the judge is never legally bound to sentence in accordance with a plea agreement, there may be good reasons for doing so in the Guidelines regime. Elsewhere, we examine in some detail the matter of sentence bargaining under the Guidelines, which has been called the “dirty little secret” of the Guidelines era. For now, we merely note the important fact that in a large number of federal courtrooms in the Guidelines era, it may not matter very much that a judge

the officer could through his insights and perspectives about the defendant significantly influence the judge’s exercise of discretion. In the present era, the probation officer too often is reduced to seemingly rote application of sentencing rules.

59 See Bowman, supra note 50, at 306 (chief probation officers report in survey that, in most cases, sentencing judge defers to plea agreement).
60 See Goodwin, supra note 36, at 71.
62 The plea agreement may be in the form of a “recommendation” or may be “binding” on the judge. Compare Fed. R. Crim. P. 11(e)(1)(B) (recommendation of sentence) with Fed. R. Crim. P. 11(e)(1)(C) (specification of sentence). However, even the plea agreements that purport to “bind” the judge will be binding only with judge’s permission. See supra note 12. If at the time of sentencing and after reviewing the presentence report, the judge rejects a “binding” plea bargain, the defendant is permitted to withdraw the plea. See Fed. R. Crim. P. 11(e)(3), (4).
63 See Stith & Cabrantes, supra note *.
64 Tony Garoppolo, Fact Bargaining: What the Sentencing Commission Has Wrought, 10 Crim. Prac. Man. (BNA) 405, 405 (Oct. 9, 1996) (asserting that the “widespread use of fact bargaining, and the lying to the court that is inevitable with the frequent use of such bargaining, is the dirty little secret in the prosecution of federal criminal cases”); see also Alexander Bunin, Whose Facts? Counterpoint to Probation Officer’s View on Fact Bargaining, 10 Crim. Prac. Man. (BNA) 477, 477 (Nov. 6, 1996) (taking issue with Garoppolo on grounds that (1) fact bargaining does not occur in all districts, and (2) probation officers may not have the “true facts”).
is formally pronouncing the sentence. The sentencing range is largely
determined either by the probation officer applying the Sentencing
Guidelines, or by the parties themselves through a plea agreement
that includes stipulations that will yield predictable results under the
Guidelines.

C. The New Ritual

The sentencing proceeding itself has been recast from a discre-
tionary into a formal adjudicatory process, in which the court makes
findings of fact that translate into sentencing requirements under the
Guidelines. By largely eliminating from the sentencing proceeding
the power of any individual to consider the circumstances of the crime
and of the defendant in their entirety and to form a judgment on that
basis, the Guidelines threaten to transform the venerable ritual of sen-
tencing into a puppet theater in which defendants are not persons, but
kinds of persons, abstract entities to be defined by a chart, their con-
crete existence systematically ignored and thus nullified. The judge
who conducts the sentencing is now, by design, little more than the
instrument of a distant bureaucracy. Like the law in Kafka's para-
ble, the real power of the court has receded into an impenetrable
state agency, nearly inaccessible to the courtroom observer. The de-
fendant may implore the court to consider the full circumstances of his
crime and his humanity, but the judge generally is not permitted to
consider most of these circumstances in sentencing. Indeed, the range
of attitudes and gestures we commonly associate with sentencing—
defiance or contrition on the part of the defendant; vengeance or for-
giveness on the part of his victims, condemnation; admonition, or for-
bearance on the part of the judge—become strangely inappropriate,
even cruelly farcical in this setting.

Without moral authority, neither mercy nor moral condemnation
are possible. Under the Guidelines, mercy, by which the full applica-
tion of the law is relaxed in furtherance of the law's ends, has been
rendered largely obsolete. Without the possibility of mercy, however,
rigid adherence to the law cannot express severity of judgment. No
moral judgment can be expressed at all.

The result is that the sentencing hearing often takes on the spirit
of the Guidelines themselves: the hearing has become dry, compli-
cated, mechanistic, and frequently incomprehensible to courtroom ob-
servers, including the parties. The discussion centers on "base levels,”
"points,” “scores,” “categories,” and other Guidelines jargon. A re-
cent article in The Washington Post captured the terms of discourse at
a sentencing hearing under the Guidelines:

65 Franz Kafka, Before the Law, in The Complete Stories and Parables of Kafka 3
"The court finds that the base offense level is 20," the judge began. "Pursuant to Guidelines 2K2.1(b)(4), the offense level is increased by two levels [to 22] . . . . The Court notes that the criminal convictions . . . result in a total criminal history category score of 18. At the time of the instant offense . . . the defendant was serving a parole sentence in two causes of action. And pursuant to Sentencing Guidelines 4A1.1(D), 2 points are therefore added. The total criminal history points is 20. And according to the Sentencing Guidelines Chapter 5, Part A, 20 criminal history points establish a criminal history category of 6 . . . [As a result] the guideline range for imprisonment is 84 to 105 months."

Nothing so dramatically illustrates the transformation of the sentencing hearing under this new regime than those cases in which, after thirty or forty minutes of discussion in this double-speak, the sentencing judge realizes that parties and spectators in the courtroom are staring ahead in dazed numbness, having lost all sense of what is happening. That is when the judge feels bound to pause, to try to reassure courtroom observers, in comprehensible language, that the principal interlocutors in the courtroom do indeed understand what they are talking about, and that what is going on, though perhaps unintelligible to them, is indeed honest and fair. This is sometimes an awkward and embarrassing moment for the judge, who must try to explain a proceeding that may appear as arbitrary to the judge as it does to the observer in the courtroom.

The observer who comes to the contemporary federal courtroom to witness the passing of judgment on a member of the community—to observe the drama of catharsis, appeals for mercy, appeals for severity, and the reasoned judgment that takes all of this into account—is sorely disappointed. That observer finds in today's federal courtroom precious little discussion of the human qualities of the victim or the defendant, of the inherently unquantifiable moral aspects of the defendant's crime, or of the type of sanction that would best achieve any of the purposes of sentencing. The "purpose" of sentencing in the new regime, it will be learnt, is nothing more and nothing less than compliance with the Sentencing Guidelines. This state of affairs reflects fundamental features of the Guidelines and suggests that they have succeeded in doing what many of their proponents wanted them to do. The sentencing reform movement of the 1970s sought to take the judge, as such, out of the sentenc-

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67 The only time that a visitor is likely to see the judge exercise the sort of discretion that one associates with traditional sentencing is in the very last stage of the sentencing hearing, when the judge is called upon to set the precise point within the (twenty-five percent) sentencing range permitted under the Guidelines; only at this stage may a witness observe the judge exercise the discretionary authority that historically characterized criminal sentencing.
ing process as much as possible and to replace discretionary, case-by-case judgment with the "objective" determinations of experts. The federal Sentencing Guidelines as they are now constructed seek not to augment but to replace the knowledge and experience of judges. This quixotic attempt to eliminate "inter-judge disparity" by curtailing judicial discretion has meant the virtual elimination of moral judgment from the sentencing process. This most disturbing failure of Guidelines sentencing is thus the inevitable consequence of the dogged pursuit of a single objective. Reduction of inter-judge disparity is certainly a worthwhile goal for sentencing reform. But it is a complex goal, and myopic focus on this objective has created a system that too often ignores other important values of criminal sentencing and punishment.

Many judges are not at ease operating within such a system, and some may be sorely tempted to manipulate their Guidelines calculations to avoid the results called for by the Guidelines. When the Guidelines’ mandated sentencing range seems inadequate or too harsh, the judge may be tempted to reconsider factual “findings” in order to alter the Guidelines calculation, or tempted to devise a basis for departure that may be largely irrelevant to culpability in the case at hand, but at least may pass muster in the Court of Appeals as a permissible basis for imposing a sentence different from the one prescribed by the Guidelines’ sentencing calculus. One judge has recently described how his fact-finding and Guidelines application at sentencing hearings varies with the extent to which the prosecutor seems disposed to appeal the sentence, explaining that “the best departures” are “the ones that aren’t appealed.” Another judge responded to a survey about the Guidelines by noting with disgust: “[T]he Guidelines... have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring the law in an effort to achieve a just result. All under the banner of ‘truth in sentencing’!” Many other judges are loathe to attempt maneuvers around the Guidelines, viewing such manipulation as a lawless exercise of unsanctioned power. In any event, the prospect of appellate review constrains the ability even of willing judges to use the pretense of fact-finding to exercise sentence discretion sub silentio.

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68 See Marvin E. Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER 113-14 (1972); Stith & Koh, supra note 1, at 228-29.

69 1995 Crim. L. Rep. (BNA) 1518 (quoting Wayne R. Anderson, United States District Judge for the Northern District of Illinois); see also Gleeson, supra note 12, at 315 (a district judge, formerly a federal prosecutor, arguing that judges should welcome bargains that agree to a compromise Guidelines range because it “conserves judicial resources at both the district and appellate levels”).

70 Weinstein, supra note 28, at 365 (quoting unnamed judge in the Eastern District of New York) (ellipsis and emphasis in original).
III. The New Jurisprudence

A. Guidelines Fact-Finding: Complex, Obscure, and Prolonged

The judicial fact-finding required by the Guidelines is both tedious and difficult. Little may hinge on the issue in dispute because the existence of a particular aggravating or mitigating circumstance may ultimately have little effect on the length of a sentence. Yet many minor factual distinctions are often exceedingly difficult to resolve because they are complicated or ambiguous. Finally, the sheer number of factual issues made relevant by the Guidelines is extraordinary. There are literally hundreds upon hundreds of definitional terms and factual specifications that sentencing courts may be forced to apply, and about which appellate courts must generate innumerable, dense opinions. The primary significance of the elaborate jurisprudence spawned by the Sentencing Guidelines is that it aids in implementing this particular set of rules—in much the same way that rulings of administrative law judges in the Social Security Administration implement their particular legal regime, or that rulings of Internal Revenue Service officials implement the federal tax regime.

In many other areas of the law that have become exceedingly technical or that require a particular expertise, Congress has created specialized tribunals. These include courts or administrative agency tribunals on the trial or appellate level dealing with social security entitlements, federal taxes, patents and copyrights, and bankruptcies. Criminal sentencing has not been removed (yet) from the federal courts of general jurisdiction. Although a bureaucracy in Washington writes the rules, their application is left to the federal courts.\footnote{It is generally recognized that the judges of the federal district courts and the courts of appeals are “generalists.” See Report of the Federal Courts Study Committee, supra note 44, at 121.} And there are many such opinions; two-thirds of all criminal appeals in the federal system involve Guidelines issues.\footnote{See Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: 1995 Report of the Director 53 (recording 10,162 criminal appeals filed in fiscal year 1995, 8731 involving defendants sentenced under the Guidelines; four-fifths of those cases involved claims under the Guidelines); see also U.S. Sentencing Comm’n 1995 Ann. Rep. 136 & n.1 (recording total of only 6863 cases involving appeals by defendants sentenced under the Guidelines; 65% of these involved claims about the Guidelines).}

As an illustration of the nature of judging under the Guidelines, consider the distinction between “minor” and “minimal” participation in a crime. The Guidelines provide that the defendant’s numerical offense level should be reduced by two points if the defendant was only a “minor” participant in the offense, but by four points if the defendant was a “minimal” participant.\footnote{U.S.S.G. § 3B1.2 (1995).} Unless the prosecution and defense have agreed in advance to accept the probation officer’s char-
acterization, one party is likely to object to the characterization in the presentence report. Even when the parties have agreed, the judge may be doubtful about the proposed characterization. In these cases the judge must make a decision on this arcane issue, although, in practice, many judges will simply adopt the probation officer’s finding. Once the trial judge renders a decision, the distinction between “minor” and “minimal” participation becomes the business of the federal courts of appeals. There exist literally hundreds of appellate opinions on permutations of this distinction—a distinction that is relevant only for applying the Federal Sentencing Guidelines. There are appellate opinions, for instance, on whether a sole participant in a crime may qualify for one or the other of these reductions; whether either reduction applies when the other participants were undercover agents; whether the adjustment is to be applied on the basis of the defendant’s role in the offense of conviction only, or on the basis of all the activities that constitute relevant conduct; when drug couriers qualify for one or the other adjustment; whether drug “steerers” or middlemen qualify for one or the other adjustment; and whether the defendant qualifies simply because of doing less than the other participants, even if the defendant did as much as most offenders usually do.

The set of appellate opinions on the distinctions between “minor” and “minimal” participants is only one of many possible examples of the extraordinary effort that is required to implement the Sentencing Commission’s detailed mandates. Other issues that have become the subject of detailed discussion and analysis in the sentencing courtroom and in trial and appellate case law include:

74 A Westlaw search on Sept. 15, 1996, found 869 cases reported on this distinction alone.
75 See, e.g., United States v. Costales, 5 F.3d 480, 484-88 (11th Cir. 1993); United States v. Caballero, 936 F.2d 1291, 1299 (D.C. Cir. 1991).
76 Compare United States v. Speenburgh, 990 F.2d 72, 74-76 (2d Cir. 1993) (no, but departure by analogy may be made) with Costales, 5 F.3d at 486 (no, and departure also is not available).
77 Compare United States v. Valdez-Gonzalez, 957 F.2d 643, 648-50 (9th Cir. 1992) (permitting adjustment to be applied on basis of role in offense of conviction only) with United States v. Webster, 996 F.2d 209, 210-11 (9th Cir. 1993) (overruling Valdez-Gonzalez because new amendment to Sentencing Guidelines stated that adjustment for role in offense is based on relevant conduct).
78 See United States v. Lopez-Gil, 965 F.2d 1124, 1131 (1st Cir. 1992); United States v. Rossy, 953 F.2d 321, 326 (7th Cir. 1992).
79 See United States v. Mustread, 42 F.3d 1097, 1103-05 (7th Cir. 1994); United States v. LaValley, 999 F.2d 663, 666 (2d Cir. 1993).
80 See United States v. Lopez, 937 F.2d 716, 728 (2d Cir. 1991) (holding that defendant’s role should be compared to that of the “average participant” in such a crime); United States v. Thomas, 932 F.2d 1085, 1092 (5th Cir. 1991) (holding that it is not enough that defendant participated “less” than other defendants).
—Which annual edition of the Guidelines Manual is to be applied at a sentencing, the manual in effect on the date of sentencing or the manual in effect when the crime was committed? Which of these editions should be used when crimes were committed over a span of several years?81
—What is the difference between “leadership” and “managerial” roles in a crime (which require different upward adjustments)?82
—How should a sentencing court calculate the weight of drugs when they are mixed with other ingredients or superimposed on other materials?83
—How should a court calculate the weight of marijuana when it is seized as dry leaf, as opposed to seizure as a living plant (roots and all)?84
—How should a court estimate drug quantity when no drugs are seized but the defendant has been convicted of conspiracy to deal in drugs?85
—For each of the nineteen crime categories listed in the Guidelines, how much planning constitutes “more than minimal planning”? When is such planning by others attributable also to the defendant?86
—Where the offense level is increased for “more than minimal planning,” is it also appropriate to apply the upward adjustments for having had a “leadership” or “managerial” role in the offense? What about the upward adjustments for “use of a special skill,” or for “concealment”?87
—How many acts constitute “repeated acts” (a question that arises in various factual settings)?88
—In order to apply the upward adjustment for an “unusually vulnerable victim,” is the court required to find that the defendant intentionally selected his victim on this basis, or simply that the defendant actually knew of the vulnerability, or should have known of the vulnerability?89
—In making upward or downward adjustments for “role in the offense,” should the court consider the role of the defendant in relation to the role of other actual participants in the offense at hand, or in relation to the role of a hypothetical average participant in such a crime?90
—Should the upward adjustment for “abuse of trust” apply only when the defendant had a relationship of trust with victims, or also when the

82 See Guideline Sentencing Outline, supra note 81, at 65-70, 73-74 (summarizing in brief, abbreviated form the holdings of numerous recent cases).
83 See id. at 29-32.
84 See id. at 33-35.
85 See id. at 37-39.
86 See id. at 56-59.
87 See id. at 65-67, 68-70 (role), 80-82 (special skill), 87-88 (concealment).
88 See id. at 57-58.
89 See id. at 59-61.
90 See id. at 73.
defendant had such a relationship with others, such as nonvictim share-
holders, constituents, or employers?91
—When and how should the court “group” multiple counts of conviction
on firearms offenses (and how should the court account for timing, pur-
pose, place, and types of weapons used)?92
—When should money laundering and fraud counts be “grouped” under
the Guidelines’ multiple-count rules?93
—Does a burglary constitute a “crime of violence” for purposes of ap-
plying the upward adjustments that are mandatory in the sentencing of
“career offenders”?94
—How do the terms “crime of violence” and “controlled substance of-
fense” in Guidelines section 4B1.1 differ from “violent felony” and “se-
rious drug offense” in the federal statute relating to enhancement of
sentence for defendants previously convicted of such crimes?95

For the uninitiated, the most powerful evidence of the tedious-
ness and complexity of sentencing in the Guidelines regime would be
provided by a perusal of one of the many compendiums of appellate
sentencing case law and other Guidelines updates published by both
the Sentencing Commission and the Federal Judicial Center, as well as
by academic and commercial enterprises.96 These summaries—often
listing in the briefest form the holdings of thousands of cases—are
necessary, of course, because no federal judge, prosecutor, probation
officer, or defense counsel could possibly have the time to read and
make sense of the appellate sentencing opinions that may be relevant
to a particular case. The compendiums are a monument to the effort
that federal judges across the nation have devoted to applying the
often unexplained, if not arbitrary, rules promulgated by the Sentenc-
ing Commission—an effort which, lamentably, is squandered in the
obscure.

91 See id. at 76-78.
92 See id. at 97.
93 See, e.g., United States v. Mullens, 65 F.3d 1560, 1564 (11th Cir. 1995).
94 See GUIDELINES SENTENCING OUTLINE, supra note 81, at 122-23.
96 Examples are GUIDELINE SENTENCING OUTLINE, supra note 81, the “Guideline Grape-
vine” printed semi-annually by the Library of the United States Court of Appeals for the Second
Circuit, and the Vera Institute’s quarterly journal, Federal Sentencing Reporter. Leading trea-
tises on the Federal Sentencing Guidelines include ROGER C. HAINES, JR., ET AL., FEDERAL
SENTENCING & FORFEITURE GUIDE (3d ed. 1996) and THOMAS W. HUTCHINSON & DAVID YEL-
(1) the Guidelines Manual, incorporating all amendments to the Guidelines, (2) an Annual Re-
port which summarizes important case law developments, as well as providing data on sentenc-
ings, (3) a pamphlet entitled “Selected Guidelines Application Decisions,” (4) another entitled
“Amendment Highlights,” (5) a looseleaf entitled “Most Frequently Asked Questions About the
Sentencing Guidelines,” and (6) an on-line newsletter “GuideLines: News from the U.S. Sen-
tencing Commission” (http://www.ussc.gov/news.htm).
Indeed, the weighty volumes of Guidelines jurisprudence notwithstanding, a federal court rarely has the opportunity to address issues of just punishment in the context of the case at hand. Neither the trial courts nor the appellate courts have much occasion to address questions concerning the appropriate form of punishment (the choice between probation and imprisonment, for instance) or the appropriate length of punishment in a particular case. In the explosion of case law on federal sentencing, there is almost no discussion of the purposes of sentencing generally or in the specific case—almost no articulated concern as to whether a particular defendant should be sentenced in the interests of general deterrence, rehabilitation, retribution, or incapacitation. There is usually no reference to the nonquantifiable losses or pain suffered by victims of the offense; no mention of the experience, character, values, community and military service, or life accomplishments and failures of the defendant; no mention of the sentences received by codefendants. There is almost no mention of these matters because, under the Guidelines, judges are simply not allowed to take them into account (barring “extraordinary” or “atypical” circumstances) in pronouncing the defendant’s sentence.97

B. The Insignificance of Guidelines Jurisprudence

Even those issues that are potentially of lasting significance become, within the confines of the application of the Sentencing Guidelines, trivial and inconsequential. Three aspects of the Sentencing Guidelines help to ensure their lasting insignificance. First, the Sentencing Commission almost never explains the reason behind a particular Guidelines rule. Second, in its rules, the Commission has chosen to invent new terms, and it has altered the meaning of well-established ones. Third, the Commission has been notably reluctant to permit the courts to participate in the elaboration of the rules and principles it promulgates. It is emphatically true, of course—and we have no intention of suggesting otherwise—that the now-discarded system of fully discretionary sentencing, under which sentences could not be reviewed by appellate courts, did not permit the judicial development of

97 See U.S.S.G. § 5K2.0 (Commentary to Policy Statement); §§ 5H1.1-5H1.6, §§ 5H1.9-5H1.12 (listing factors and circumstances that are irrelevant in most cases). See also United States v. Ives, 984 F.2d 649, 650-51 (5th Cir. 1993) (stating that disparity among co-defendants not relevant); United States v. Arjoon, 964 F.2d 167, 170-71 (2d Cir. 1992) (holding that disparity among unrelated cases is not relevant); United States v. Frazier, 979 F.2d 1227, 1231 (7th Cir. 1992) (remanding where sentencing court had sentenced to probation on the ground that there was “nothing to be gained” by imprisonment); United States v. Bruder, 945 F.2d 167, 173 (7th Cir. 1991) (en banc) (holding that Guidelines’ reduction for “acceptance of responsibility” already takes into account defendant’s rehabilitative efforts post-arrest); United States v. Carpenter, 914 F.2d 1131, 1135-46 (9th Cir. 1990) (holding that disparity among codefendants is not relevant).
sentencing principles and standards. *But neither does the Guidelines regime.*

1. The Guidelines as Diktats.—Largely unencumbered by the requirements of the Administrative Procedure Act, the Sentencing Commission has not explained its actions or its intentions—beyond the conclusory statements of its “Resolution of Major Issues” in the Introduction to its Guidelines Manual. The rules issued by the Commission, whether termed “Policy Statements,” “Guidelines,” or “Commentary,” simply assert that some particular circumstances call for adjusting sentence length, while some other circumstances do not. Neither in proposing particular guidelines nor in ultimately promulgating them does the Commission explain why it is doing what it does. The Commission writes the Guidelines, but others—judges, prosecutors, probation officers, and defense attorneys—must implement them and, when called upon in the performance of their duties, defend them.

As a result, the Guidelines are simply a compilation of administrative diktats. A set of unexplained directives may warrant unquestioning obedience if they are thought to constitute divine revelation or its equivalent (the Ten Commandments come to mind), but this is not a common occurrence in human affairs—at least not in democratic societies. The Commission’s primary argument in support of its Guidelines is implicitly an argument from authority—that is, the authority for these rules rests on the Commission’s authority to issue

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98 The Sentencing Reform Act required that the Commission publish proposed amendments and receive comment on them prior to final promulgation. Sentencing Reform Act, 28 U.S.C. § 994(x) (1994). The statute did not, however, impose any of the myriad other procedural requirements that govern most other federal agencies. It was not until the summer of 1996 that the Commission proposed rules to govern its own internal practices and procedures. See 61 Fed. Reg. 52,825 (Oct. 8, 1996); 61 Fed. Reg. 39,493 (July 29, 1996). As one noted administrative law scholar has explained:

The commission does not have a regularized process for accepting or responding to petitions for the issuance of new guidelines. Its advisory committees do not hold open meetings, and the commission’s own open meetings have not been the locus for all serious policy decisions. . . . Perhaps the most glaring shortcoming in the federal [sentencing] commission’s process is its “statement of basis and purpose” for final guideline amendments. While most rulemaking agencies provide thorough explanations of their final rules, including the factual evidence supporting the rule, and respond to important comments from opponents, the Commission’s explanations for its final guidelines are strikingly terse and conclusory.

them. The Commission's reluctance to explain itself to the public thus leaves us with a set of rules promulgated and enforced *ipse dixit*-because the Commission says so. In the absence of some reasoned explanation for a particular rule, it is difficult to understand, much less defend, the rule. Unless there is reason to believe that the Commission has some unusual capacity to discover important or eternal truths, its argument from authority leaves the Guidelines with little or no independent validity or legitimacy.

2. *New Concepts, New Confusion.*—A second reason that the Federal Sentencing Guidelines are unlikely to have lasting significance is that the Sentencing Commission has so often chosen to define or apply terms differently from the way they are defined in the substantive criminal law, and even to invent entirely new concepts. Many of the terms employed by the Guidelines appear, at first glance, to embody or restate principles that traditionally are relevant to a determination of criminal liability. But on closer examination, or a review of their application over time, it becomes clear that the terms are used in idiosyncratic ways or in ways that are unknown both to the substantive criminal law and to the law of evidence.

For example, the Guidelines define "obstruction of justice" for the purpose of a sentence enhancement differently—indeed, much more broadly—than do the federal statutes defining the crime of obstruction of justice. Our criminal law has long punished obstruction of justice, and over the centuries, courts and legislatures have altered the precise contours of this crime. There is no reason to suppose that the current definition in federal law could not be improved upon, or that the current definition is necessarily the best definition for all purposes. It would undoubtedly be possible for a sentencing commission, or sentencing courts and appellate courts, to reinterpret the concept of obstruction of justice in a manner that would improve our understanding of the sort of obstructive conduct that deserves to be considered in sentencing decisions. Such thinking about this behavior and its punishment would begin with an explanation of why—and to what extent—a defendant's sentence for a particular crime ought to be enhanced because of the defendant's additional conduct of obstructing justice. Only then would rulemakers be ready to propose a definition of obstruction of justice for sentencing purposes. Yet there is no evidence that the Sentencing Commission has ever attempted any such inquiry. At the same time, because it has adopted a comprehensive codification of the meaning of obstruction of justice in its Guidelines and has decided the precise point value this behavior is

“worth” in calculating the defendant’s sentencing range, the Commission has effectively preempted the federal courts from undertaking this sort of inquiry.

Perhaps the most extraordinary conceptual invention of the Commission is the idea of “relevant conduct”—an idea whose significance looms large in the new sentencing regime. The concept, as it happens, is novel. Its scope is broader, for example, than the scope of the familiar evidentiary concept of “common scheme or plan,” broader than the scope of “accomplice liability” in the criminal law, and different from that of “conspiratorial liability.” Courts have had a difficult time deciphering and applying the Guidelines’ principle of “relevant conduct,” with the result that it has been applied in different ways by the various district courts and courts of appeals across the country. The Commission itself found it necessary to amend its relevant conduct rules on no fewer than five occasions in a six-year period.

In light of the Sentencing Commission’s notable reluctance to offer explanations for its various rules, and its decision to adopt new meanings for traditional common-law terms, it is not surprising that conflicting interpretation and confusion have characterized the efforts of the courts to apply the Guidelines. In one two-week period in 1996, for instance, three different appellate panels gave three different answers to the question of how to calculate a sentence for a witness con-

100 See, e.g., FED. R. EVID. 404(b) (“Evidence of other crimes ... may ... be admissible [to prove] motive, opportunity, intent, plan ... .”). Conduct that constitutes a “common scheme or plan” with the offense of conviction is one type of “relevant conduct” under the Guidelines. See U.S.S.G. § 1B1.3(a)(2). The term “common scheme or plan” (and the related, but differently defined, term “same course of conduct”) are defined in the application note 9 to the same guideline.

101 See, e.g., 18 U.S.C. § 2 (1994) (extending criminal liability not only to the primary actor, but also to one who “aids, abets, counsels, commands, induces, or procures,” or “wilfully causes” the crime). The Guidelines include as one type of relevant conduct, “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant” that occurred “during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” U.S.S.G. § 1B1.3(a)(1)(A).

102 See, e.g., 18 U.S.C. § 371 (1994). The Guidelines include as one type of relevant conduct, “all reasonably foreseeable acts and omissions of others in furtherance of” criminal activity “jointly undertaken” with the defendant. Jointly undertaken criminal activity is further defined as “a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.” U.S.S.G. § 1B1.3(a)(1)(B) (1995).

103 See GUIDELINE SENTENCING OUTLINE, supra note 81, at 1-7, 18-19. A Sentencing Commission staff discussion paper on the relevant conduct Guideline reported in 1995 that the Commission’s “training staff has found that the relevant conduct guideline has been among the most troublesome for application and that the guideline’s application has been very inconsistent across districts and circuits.” U.S. SENTENCING COMM’N, DISCUSSION PAPER: RELEVANT CONDUCT AND REAL OFFENSE SENTENCING 5 (1995).

victed of criminal contempt for refusing to testify at a trial.\footnote{18 U.S.C. § 401 (1994).} The Guidelines provision on criminal contempt (section 2J1.1) directs the sentencing court by a cross-reference to another section of the Guidelines Manual (section 2X5.1), governing “other offenses” not specifically addressed in the Guidelines. The latter provision, in turn, directs the court to apply “the most analogous offense guideline.” In the three appellate cases involving recalcitrant witnesses, one panel concluded that the most analogous guideline was that pertaining to “failure to appear by a material witness” (section 2J1.5, with a base offense level of six);\footnote{United States v. Ortiz, 84 F.3d 977, 980 (7th Cir. 1996) (decided on May 24).} a second panel concluded that the “obstruction of justice” guideline (section 2J1.2, with a base offense level of twelve) was most appropriate;\footnote{United States v. Versaglio, 85 F.3d 934, 949 (2d Cir. 1996) (decided on June 3).} the third panel concluded that the proper guideline was that pertaining to “misprision of a felony” (section 2X4.1, with a base offense level between four and nineteen depending on the underlying felony).\footnote{United States v. Cefalu, 85 F.3d 964, 969-70 (2d Cir. 1996) (decided on June 4).} The second and third panel opinions were issued only one day apart, by two different panels of the same court of appeals. And if that were not quite enough, these two panels were, coincidentally, reviewing two different sentencing decisions by the same district judge in the same prosecution. The result was that one appellate panel told the district judge he was wrong to use the “misprision of a felony” guideline to sentence a recalcitrant witness convicted of criminal contempt, while another panel of the same court told him one day later that he had been right to do so.\footnote{Ultimately, the district judge was affirmed in both cases. After the opinions in Versaglio and Cefalu were issued, the defendant sought rehearing in the former case, while the government sought rehearing in the latter case. Both panels reconsidered the issue, and, three months later, the Versaglio panel withdrew its judgment and opinion, and issued a new decision consistent with Cefalu. United States v. Versaglio, 96 F.3d 637 (2d Cir. 1996) (on rehearing).} Confusion of this sort has contributed to erosion of confidence in the system of criminal sentences and spawned the small industry devoted to the compilation and explication of the case law under the Guidelines.

3. The Hegemony of the Sentencing Commission.—The massive effort of both trial and appellate courts to make sense of ambiguities, inconsistencies, and gaps in the Guidelines is of little lasting value to the bar, the bench, or the public. This is so because the Commission has gone out of its way to make it clear that it alone will determine the scope and application of concepts employed in the Sentencing Guidelines, regardless of any teachings of the substantive law of crimes or the experience of federal and state governments in elaborating the criminal law. The Commission’s adamant refusal to share interpretive
authority with the judiciary accounts, in part, for the complexity of the Guidelines. The Commission deliberately employed minute quantitative distinctions in the Guidelines precisely in order to minimize the opportunity for sentencing judges to make discretionary judgments.\textsuperscript{110} The Commission has also sought to minimize opportunities for the appellate courts to contribute their perspectives on the meaning of key Guidelines principles and terms. When the courts of appeals have interpreted provisions of the Guidelines in ways that would enhance the authority of district judges to exercise their informed judgment, or differed among themselves in interpretation of particular language in the Guidelines, the Commission has almost invariably responded by promulgating a “clarifying” amendment to bring the appellate courts back into line—thereby cutting off any possibility of longer-term judicial development of sentencing law.\textsuperscript{111} According to a staff report, the Commission by 1994 had issued twenty-nine such amendments.\textsuperscript{112} As one federal appeals judge (a former chief federal prosecutor in New Jersey) has explained, “the Commission, through the amendment process, is now performing with respect to the guidelines essentially the same role that the Supreme Court plays with respect to the interpretation of other federal laws.”\textsuperscript{113} Unlike the Supreme Court, however, the Commission does not seek to explain or justify its resolution of conflicts.\textsuperscript{114} The Supreme Court has welcomed the Commission’s effort to reduce circuit conflicts,\textsuperscript{115} a practice that regrettably also

\textsuperscript{110} The Commission proceeded on the assumption that the Sentencing Reform Act prohibited any exercise of judicial discretion beyond the choice of the final sentence within the Guideline range. See Catharine M. Goodwin, Background of the AO Memorandum Opinion on the 25\% Rule, 8 FED. SENTENCING REP. 109 (1995) (reporting that Commission was convinced that the Sentencing Reform Act’s “25\% Rule,” see 28 U.S.C. § 994(b)(2), applied to entire guideline-calculation process, thus requiring that the Guidelines define the exact degree of each sentencing factor warranting an additional one-point adjustment in offense level or criminal history score).

\textsuperscript{111} See William W. Wilkins, Jr. & John R. Steer, The Role of Sentencing Guideline Amendments in Reducing Uwarranted Sentencing Disparity, 50 WASH. & LEE L. REV. 63, 74-75 (1993). There may be much merit in not attempting to resolve circuit conflicts as soon as they arrive. The merits of “percolation” rather than immediate resolution of inter-circuit conflicts were noted by the FEDERAL COURTS STUDY COMM., supra note 44, at 124. Such an approach permits different circuits to try out different resolutions of an ambiguous or difficult area of law and permit several circuits to consider such an issue before it is definitively resolved.


reduces the role of the appellate courts and the Supreme Court itself in giving meaning to the Guidelines.

It is perhaps ironic that the most coherent and sensible jurisprudence under the new sentencing regime concerns not application of the Guidelines, but a certain type of departure from the Guidelines. Although the Commission has insisted that certain factors may never be a basis for departure (including the defendant’s socio-economic status), has discouraged departure on other bases (including the defendant’s disadvantaged background or military or civic service), and has specifically encouraged departure for yet other reasons, it has not sought to address exhaustively or comprehensively all the possible grounds for departure from its Guidelines. This has afforded the courts a limited role in determining the factors that are relevant to a just sentence, both generally and in specific factual contexts. In the chapter on departures, the Guidelines list eleven grounds warranting an upward departure from the calculated Guidelines sentence, and five grounds supporting a downward departure. Additionally, the guidelines on criminal history and on obstruction of justice, among others, specifically note that further adjustment (beyond the points specified in the Guidelines instruction) may be warranted if especially mitigating or aggravating circumstances are found. Some of these Commission-identified grounds for departure are derived from, and are closely analogous to, concepts that have long played an important role in determining substantive criminal liability—including mens rea, self-defense, duress, justification, and diminished capacity. Moreover, in a break with their usual approach, the Guidelines do not quantify the precise effect that the presence of one of these factors should have on the defendant’s sentence. Rather, the Guidelines leave to the sentencing judge in the first instance, and to the appellate court on review, the task of fleshing out the meaning and the significance for punishment in each of these circumstances. Appellate opinions explaining, limiting, justifying, and applying these Commission-identified grounds of departure are among the most thoughtful and significant of the genre. These decisions discuss issues of culpability.

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116 U.S.S.G. §§ 5K2.1-5K2.8, 5K2.15.
117 Id. §§ 5K2.9-5K2.13.
118 Id. § 4A1.3.
119 See id. § 3C1.2 application notes 2 & 6.
120 Several guidelines in Chapter 2 of the Guidelines Manual, which instructs the sentencing court on how to calculate the defendant’s “base offense level,” also explicitly or implicitly invite departures on particular grounds. See, e.g., id. § 2A6.1 application note 1 (noting that the “Threatening Communication” guideline deals with wide range of conduct and that “[f]actors not incorporated” expressly may be a basis for departure).
122 See, e.g., United States v. Merritt, 988 F.2d 1298, 1305-11 (2d Cir. 1995) (permitting upward departure for defendant’s “profound corruption and dishonesty” and “fraudulent manipu-
bility and just punishment in the particular case, often drawing upon the substantive criminal law as it has developed in statutes and at common law through the years.

Both sentencing judges and appellate courts have contributed a coherent sentencing jurisprudence primarily with respect to this limited set of "guided departures." With respect to departures that are based on a circumstance specifically countenanced by the Commission, appellate courts have often been bogged down by consideration of a threshold issue: whether the ground cited by the trial court as a basis for departure has already been factored into the Sentencing Guidelines. As we discuss in the next Part, the case law here is thus speculative and trivial, addressing not whether a particular circumstance is relevant to just sentencing, but simply whether the Sentencing Commission can be said to have already considered the particular circumstance. That is, most jurisprudence concerning departure from the Guidelines, like most jurisprudence concerning application of the Guidelines, is useful for only one purpose: interpreting the Federal Sentencing Guidelines.

IV. THE PRIMACY OF THE SENTENCING COMMISSION AFTER KOON

Some observers have expressed the hope that the Supreme Court's recent decision in Koon v. United States may permit both sentencing judges and appellate courts to consider fundamental issues of culpability and just punishment in deciding whether there should be a departure from the Guidelines. In Koon, the Court unanimously

123 We use the term "guided departure" to refer to all instances where the Commission identifies a ground that may be an appropriate basis for departure, upward or downward. The Commission itself uses this term more narrowly—to refer to those few instances in which the Guidelines both identify a ground for possible departure and recommend the amount of a departure through precise quantitative specification or by cross-referencing another guideline. See U.S.S.G. § 1A4(b) (discussing "guided departures").


adopted the notion that the Sentencing Guidelines govern “heartland” cases, and that judges may depart in cases outside the “heartland.” The “heartland” concept had appeared only in a single sentence in the introductory chapter of the Guidelines when they were issued in 1987, but in 1994 a reconstituted Commission added a new paragraph expressly recognizing the concept in the chapter of the Guidelines governing departures.

Potentially more significant than its embrace of the “heartland” concept, *Koon* held that departures should be reviewed by appellate courts under an “abuse-of-discretion” standard. Moreover, *Koon* seems to suggest that sentencing courts will be given significant deference when they decide to depart; it says, for instance, that “the district court retains much of its traditional discretion,” and that “[a] district court’s decision to depart from the Guidelines . . . will in most cases be due substantial deference.” A cursory reading of the Court’s decision in the *Koon* case may reinforce the media’s misimpressions of the decision—that the Supreme Court has appeased district judges by giving them more discretion and mollified circuit judges by relieving them of much of the burden of Guidelines appeals.

Yet despite *Koon*’s expansive dicta regarding the scope of sentencing court discretion, federal appellate courts have not generally recognized the decision as granting sentencing judges greater departure authority. In *Koon*’s wake, many circuits have continued to

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126 U.S.S.G. § 1A4(b) (“The Commission intends the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case . . . the court may consider whether a departure is warranted.”).

127 The new language of section 5K2.0 provides: “An offender characteristic or other circumstance that is not ordinarily relevant . . . may be relevant to [departure] determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the ‘heartland’ cases covered by the guidelines . . . .” In accompanying commentary, the Commission said that it “believes that such cases [justifying departure on the basis of ‘ordinarily’ not relevant characteristics] will be rare.”

128 116 S. Ct. at 2035.
129 Id. at 2046.
131 Chief Judge Richard Posner has noted that *Koon* did not mention, in its recitation of the statutory requirements for departure, the requirement that departure be “consistent” with the broad goals of criminal punishment listed in 18 U.S.C. § 3553(a)(2) (1994). United States v. Pullen, 89 F.3d 368, 370 (7th Cir. 1996). Whether this lack of citation by the Supreme Court is properly characterized as “reject[ing] this limitation on sentencing discretion,” as Judge Posner asserts, see id., or whether *Koon* only inadvertently failed to quote this language, will have to await further clarification. In any event, it would be strange, to say the least, for the Supreme Court to purport to authorize judges to depart in ways that defeat the statutory purposes of sentencing. It also may be noted that Judge Posner does not appear to read *Koon* as increasing departure authority in any other way. Id. at 371-72.
subject departures to close scrutiny. The truth is that Koon itself is a puzzling decision; its pronouncements on the extent of deference due to sentencing judges are difficult to reconcile with the reasoning and holdings stated elsewhere in the decision.

In our view, a thorough and candid assessment of Koon compels the conclusion that the decision has not changed matters significantly, and perhaps not at all. Surprisingly, neither the "heartland" concept nor Koon's articulation of an abuse-of-discretion standard provides a relaxation of the rigidities of the Guidelines regime. This is so because Koon leaves intact the major obstacle to meaningful judicial participation in criminal sentencing: the prevailing interpretation of the provision of the Sentencing Reform Act prohibiting departure on grounds already "adequately" considered by the Commission. The Supreme Court in Koon followed the lead of the federal courts of appeals in treating any consideration by the Commission as, ipso facto, a thorough and candid assessment of Koon.

Cases that do read Koon as increasing discretion to depart include United States v. Sablan, 114 F.3d 913 (9th Cir. 1997) (6 to 5 en banc panel) (holding that appellate court must deferentially review extent of departure); United States v. Galante, 111 F.3d 1029 (2d Cir. 1997) (permitting downward departure on basis of defendant's family responsibilities). See also United States v. Beasley, 90 F.3d 400 (9th Cir. 1996) (concluding that Koon had overruled circuit law that required two-part departure inquiry—legal questions under de novo standard of review, and factual questions under "clear error" standard; then conducting inquiry consistent with both Koon and circuit's previous standards), and United States v. Joost, 92 F.3d 5, 7 (1st Cir. 1996) (upholding upward departure on the basis specifically identified by Commission as warranting upward departure; but also citing the deference language of Koon).

See, e.g., United States v. Barber, 93 F.3d 1200, 1204 (4th Cir. 1996) ("In sum, where the conduct in question is either typical of the offense of conviction or irrelevant to that offense, the district court must accept that the Commission has implicitly taken that conduct into account—insofar as Guidelines philosophy permits it to be taken into account at all—and thus eliminated such conduct as grounds for departure"); United States v. Rybicki, 96 F.3d 754, 758 (4th Cir. 1996) ("While we review this ultimate departure decision for abuse of discretion, . . . if the court's departure is based on a misinterpretation of the Guidelines, our review of that underlying ruling is de novo."); see also United States v. Charry Cubillos, 91 F.3d 1342 (9th Cir. 1996) (ordering remand on departure, holding that under Koon district court must make inquiry into "structure and theory of Guidelines" and bear in mind Koon's repetition of Commission's expectation that departures on grounds not invited by Commission will be "rare"); United States v. Lewis, 90 F.3d 302, 304, 306 (8th Cir. 1996) (citing Koon for proposition that departure relied on error of law and thus was "by definition" an abuse of discretion); United States v. McNeil, 90 F.3d 298 (8th Cir. 1996) (declining to give deference to district court's decision that criminal history calculation was not adequate); United States v. Taylor, 88 F.3d 938 (11th Cir. 1996) (affirming upward departure on grounds specifically identified by Guidelines as possibly warranting upward departure; quoting Koon at length without suggesting it had changed effective standard of review); United States v. Weinberger, 91 F.3d 642, 644 (4th Cir. 1996; United States v. Weise, 89 F.3d 501 (8th Cir. 1996) (ordering remand over partial dissent on ground that Koon requires more deference to district court than recognized by majority).

See 116 S. Ct. at 2046 (asserting repeatedly that the Guidelines leave district courts with "much" or a "substantial" portion of their "traditional . . . sentencing discretion").

See 18 U.S.C. § 3553(b) (1994) (permitting judge to depart on own motion only if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission").
adequate" consideration.135 Because no second-guessing of the Commission is permitted, sentencing judges and appellate courts are denied authority to consider the arbitrariness of any rule in the Guidelines themselves. In the words of one recent decision by a federal appellate court, Koon does nothing to alter the rule that "[a] sentencing court may not depart from an otherwise applicable guideline range simply because its own sense of justice would call for it."136 The question of whether the applicable Guidelines calculation or sentencing range produces justice in a particular case is not open for consideration either by sentencing courts or appellate courts.

In the wake of Koon, as before Koon, the main question on appeal of a departure continues to be whether the Sentencing Commission had already taken into account the circumstances that the sentencing judge has identified as warranting departure in the particular case.137 And the sentencing court's answer to this question—whether the Sentencing Commission has already considered these factors—is not subject to deferential review. To be sure, at one point Koon states that district courts have "an institutional advantage over appellate courts" in deciding questions such as "[w]hether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way."138 Yet in unpacking this complex inquiry, Koon gave deference to the sentencing court only on the question of which factors are present in the case at hand, not on the question of whether the Commission had already taken that factor adequately into account—that is, not on the question of what constitutes the "heartland" case. Indeed, Koon explicitly reaffirmed the rule that reviewing courts should consider de novo (that is, without deference) the "legal conclusions" that a district court makes in asserting departure authority, and reminded that "[a] district court by definition abuses its discretion when it makes an error of law."139

135 See 116 S. Ct. at 2052-53 (stating that because Commission already took factor into account, sentencing court "abused its discretion" by considering that factor).
136 Barber, 93 F.3d. at 1203.
137 See supra note 124 and accompanying text.
138 116 S. Ct. at 2046-47.
139 Id. at 2047. See also id. at 2047 ("The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.").

Moreover, in Koon, the Court quoted at length and adopted as its own the multi-pronged inquiry that then-Judge Breyer had set forth in United States v. Rivera, 994 F.2d 942 (1st Cir. 1993). In deciding whether to depart, Judge Breyer had written, the sentencing judge should consider:

(1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case?
(2) Has the Commission forbidden departures based on those features?
(3) If not, has the Commission encouraged departures based on those features?
(4) If not, has the Commission discouraged departures based on those features? . . . .
Koon makes clear that the reviewing court must defer to a departure decision only if the circumstances identified by the district judge take the case out of the "heartland" (that is, if the circumstances have not already been factored into the Guidelines).\textsuperscript{140}

As it happens, the Sentencing Commission has already considered, and the Sentencing Guidelines have already factored in, many if not all circumstances that are arguably relevant to criminal sentencing; this micro-management is one of the Guidelines' most notable features. The Guidelines have done so by prohibiting altogether the consideration of some factors\textsuperscript{141} and by specifying the weight to be accorded other significant factors depending on the degree to which they are present.\textsuperscript{142} The Guidelines are, as Congress intended them to be, comprehensive,\textsuperscript{143} and Koon makes clear that judges may not depart because they disagree with these comprehensive sentencing instructions. Judges may not depart because they disagree with the weight the Guidelines give to a circumstance in the typical case, or simply because they disagree with the Commission's prohibition of consideration of certain factors.

Moreover, with respect to commonly occurring circumstances that are not explicitly addressed by the Guidelines, Koon teaches that the benefit of the doubt must be given to the Commission; it must be assumed that the Commission has already taken the matter into ac-

\textsuperscript{140}Id. at 949, quoted in 116 S. Ct. at 2045. All but the first of these are entirely legal, not factual, inquiries. The Supreme Court went on to quote Rivera's further language concerning factors "unmentioned" in the Guidelines: "[(S)] [T]he [sentencing] court must consider[ ] the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole' [to] decide whether [the factor] is sufficient to take the case out of the Guideline's heartland." 116 S. Ct. at 2045 (quoting 994 F.2d at 949). Consideration of "structure and theory" surely suggests a largely legal inquiry.

\textsuperscript{141}See, e.g., U.S.S.G. §§ 5H1.4 (excluding alcohol or drug dependence as reason for downward departure), 5H1.10 (excluding race, sex, national origin, creed, religion, and socio-economic status), 5H1.12 (excluding lack of guidance as a youth and disadvantaged upbringing) (1995).

\textsuperscript{142}Among the prominent factors thus considered by the Commission are the presence or absence of a criminal record, the defendant's role in the offense, the quantity of harm, and whether the defendant has accepted responsibility for the crime. See also U.S.S.G. §§ 5H1.1 (age ordinarily not relevant), 5H1.2 (educational and vocational skills ordinarily not relevant), 5H1.5 (employment record ordinarily not relevant), 5H1.6 (family or community responsibilities ordinarily not relevant); 5H1.11 (military, civic, charitable, or public service ordinarily not relevant).

\textsuperscript{143}See United States v. Weinberger, 91 F.3d 642, 644 (4th Cir. 1996) ("Given the comprehensive sentencing structure embodied in the guidelines, 'only rarely will we conclude that a factor was not adequately taken into consideration by the Commission.'") (quoting pre-Koon Fourth Circuit cases); see also Stith & Koh, supra note 1, at 246-47.
After *Koon*, as before, the fundamental question of whether the Commission has taken a particular circumstance into account is not only a *legal question* on which no deference is due the trial judge; it is also a question that must be addressed in a highly abstract and speculative way. The real question is not whether the Commission actually took some factor into account, but rather, whether the factor is rare enough to overcome a presumption that the Commission has indeed taken it into account.

*Koon* thus leaves sentencing courts approximately where they were: with departure authority only in cases that are "atypical" in ways neither *proscribed* from consideration by the Sentencing Commission nor *already considered* by the Commission. *Koon* also leaves appellate courts approximately where they were: with supervisory responsibility to invalidate departures based on anything other than the "atypicality" of the case at hand. There is no room to question the reasonableness of the Commission's judgments about just punishment in the "typical" (or "heartland") case, and no room to review any determination the Commission has made regarding the proper, or improper, grounds for departure from the Guidelines ranges.

The hegemony of the Sentencing Commission remains intact.

V. Conclusion

The traditional sentencing ritual reflected our society's belief that the justification of punishment rests ultimately on a moral judgment about an individual. The new regime inadvertently mocks the moral premises upon which the traditional ritual was based, while denying both sentencing judges and appellate judges the opportunity to develop a principled jurisprudence. As one supporter of the present regime has explained, "The whole point of the guidelines was to hem in district courts with a set of rules created by the Commission and enforced by the courts of appeals." In order for this regime of comprehensive sentencing rules to function effectively, the defendant must be reduced to an "inanimate variable" in an equation; the probation officer must operate as the "special master" of Guidelines facts; the sentencing judge must weigh the crime according to the Sentencing Commission's calculus; and the role of the courts of ap-

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144 116 S. Ct. at 2052 (stating that a factor relied on by the sentencing court "is to be expected . . . so we conclude these consequences were adequately considered by the Commission").

145 See United States v. Pullen, 89 F.3d 368, 371 (7th Cir. 1996) ("The Supreme Court in *Koon* emphasized the primacy of the Commission over the courts in determining the proper grounds for departures from the guidelines ranges.").


peals is simply to police the sentencing judges. Without principled foundation or application, the awesome power of the state to inflict suffering is wielded as an exercise in bureaucratic regularity for which no one, ultimately, bears responsibility.

Justice has sometimes been represented by the blindfolded icon, *Justicia*. This ancient metaphor is appropriate for adjudication. In deciding guilt or innocence, it ought not to matter whether the defendant is rich or poor, nor whether the defendant has erred in the past, or suffered unusual disadvantages, nor even whether the defendant is likely to break the law again. The decision on guilt or innocence is properly blind to these circumstances, blind to everything but the question of whether the defendant's actions and accompanying mental state instantiate the abstract features specified in a criminal statute. The character of this determination is represented by the icon's scales. Essentially a matter of weighing evidence and determining facts, the process of adjudication has more in common with scientific than with moral reasoning.

But *Justicia* usually is depicted also holding a sword, representing not the power to determine guilt or innocence, but the power to punish. Before that power is exercised, before the sword is raised, *Justicia* must raise the blindfold. When it comes to the imposition of punishment, the question is always one of degree. The need is not for blindness, but for insight, for equity, for what Aristotle called "the correction of the law where it is defective owing to its universality," and this can only occur in a judgment that takes account of the complexities of the individual case.

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150 See Curtis & Resnik, *supra* note 149, at 1728 (quoting Professor Robert Cover: "The temptation to raise the blindfold may be . . . the temptation to see—to overcome the elusiveness of indirection.").