Rethinking the Guidelines:

A Call for Cooperation

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As Clover looked down the hillside her eyes filled with tears. If she could have spoken her thoughts, it would have been to say that this was not what they had aimed at . . . [I]t was not for this that she and all the other animals had hoped and toiled.

— George Orwell¹

The advent of the federal sentencing guidelines and the creation of the United States Sentencing Commission (Commission) has spawned hundreds of writings²—most in protest, few in praise. Professor Dan Freed has now produced, in my judgment, one of the most objective analyses to date.³ As a studied observer of the judicial system, he shows a remarkable understanding of past and present sentencing structures. Commissioners, judges, and most importantly, Congress should heed the lessons of his painstaking analysis. As Professor Freed's article suggests, the imposition of rigid guidelines by an administrative agency on a sentencing system is destined to failure.

Although Professor Freed and others have offered much constructive criticism, my greatest concern is that Congress and the Commission itself will maintain their present attitude that nothing is wrong. The Commission, dignified by the important role delegated to it, appears to feel largely immune from

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1. GEORGE ORWELL, *ANIMAL FARM* 97-98 (Harcourt Brace 1954).

2. *See, e.g.*, FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 135-43 (1990); G. Thomas Eisele, *The Sentencing Guidelines System? No. Sentencing Guidelines? Yes.*, FED. PROBATION, Dec. 1991, at 16; Letter from Judge Lawrence K. Karlton, E.D. Cal., to Editors, *Federal Sentencing Reporter* (Nov. 20, 1991), in 4 FED. SENTENCING REP. 186 (1991); Eugene D. Natali, *The Probation Officer, Bean Counting and Truth in Sentencing*, 4 FED. SENTENCING REP. 102 (1991); Recommendations of the Judicial Conference of the United States to the U.S. Sentencing Comm'n, in 3 FED. SENTENCING REP. 282 (1991); William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENTENCING REP. 339 (1991); Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L.J., Feb. 11, 1992, at 2. *But cf.* Edward R. Becker, *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, FED. PROBATION, Dec. 1991, at 10; Andrew J. Kleinfeld, *The Sentencing Guidelines Promote Truth and Justice*, FED. PROBATION, Dec. 1991, at 16.

3. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

criticism.⁴ I sense that this attitude emanates in part from the Commissioners' misguided reading of their alleged statutory mandate to impose a rigid and harsh sentencing structure without regard to the human cost.⁵ Although they may not intend to do so, some of the Commissioners display little empathy or compassion for offenders as people. They convey a totalitarian mindset reminiscent of a bygone era. As Professor Freed notes, the Commission has rejected constructive criticism from the bench, preferring instead "to show how tough an administrative agency can be in the face of consumer opposition, even when the consumers are Article III judges."⁶

On the other hand, Congress seldom reacts to analytical criticism, preferring instead to focus on politically expedient action. For example, in response to the Judicial Conference recommendation that mandatory minimum sentences be repealed,⁷ Congress enacted legislation providing for additional mandatory minimum guidelines.⁸ The Judicial Conference is the policymaking body of the federal judiciary, and it speaks with a unified and experienced voice in problems affecting it.

4. See, e.g., William W. Wilkins, Jr., *Observations on Judge Heaney's Study*, 4 FED. SENTENCING REP. 145 (1991).

5. This belief is based on the historical fable that the guidelines were authorized to remove all disparity in sentencing, and that, with the passage of the Sentencing Reform Act of 1984 (SRA), the sentencing judge's traditional flexibility and discretion were congressionally repealed. Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988)); 28 U.S.C. §§ 991-998 (1988)). This view entirely misreads the legislative history of the SRA. The Senate Judiciary Committee report emphatically rejected a "mechanistic" role for courts: "The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence of an individual offender, not to eliminate the thoughtful imposition of individualized sentences." S. REP. NO. 225, 98th Cong., 1st Sess. 52 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3235. Professor Freed points out that the Commission's early observations on this point were consistent with the congressional goal of guiding, not eradicating, judicial discretion: "[The Commission's] departure policy generously allowed a sentencer to decide when the guidelines did not fit the needs of a case: 'The controlling decision as to whether and to what extent departure is warranted can only be made by the courts.'" Freed, *supra* note 3, at 1703 (quoting U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 5K2.0 (1992)).

6. Freed, *supra* note 3, at 1720.

7. Judicial Conference Resolution (Mar. 13, 1990), reprinted in U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at G-1 to G-3 (1991).

The operation of these sentencing "floors" is draconian. For example, in a recent case in our court, an 18-year-old man with no prior criminal record was convicted for possession of drugs under 21 U.S.C. §§ 841, 846 (1988). In exchange for \$500, the defendant had agreed to receive a package of drugs through the mail for his friend, and to later return the package to his friend. Upon conviction he received a mandatory minimum sentence of 10 years. In dissent, I wrote:

I add one other commentary. This case involves the conviction of an eighteen-year-old youth, without any prior criminal experience, who made a serious mistake of judgment. He now faces a ten year prison sentence for his immature judgment. If this sentence is carried out, his life will be ruined. His family is devastated. It is difficult for me to believe [that] Congress[,] by its mandatory minimum penalty[,] condones such punitive sanction to a young lad of eighteen. I wonder if Congress knows the injustice it creates by such laws. A civilized society should protest. The President of the United States should grant clemency.

United States v. Caldwell, 954 F.2d 496, 510 (8th Cir. 1992) (Lay, C.J., dissenting).

8. See U.S. SENTENCING COMM'N, *supra* note 7, app. A (listing mandatory minimum statutes).

I. JUDICIAL INACTION

Professor Freed addresses the essential question: What's wrong with the guidelines? However, I would initially like to add to his discussion on how we got here. I contend that the fault lies primarily with the federal judiciary.⁹

The truth is that the federal judiciary, lacking both "the sword" and "the purse," was asleep at the switch. Although it certainly recognized that the pre-guideline sentence structure needed reform, I think the judiciary suffered from a false sense of security. Because sentencing had traditionally been a judicial prerogative, judges thought that no one would ever have the audacity to deprive them of sentencing discretion. More importantly—and perhaps as a result—the federal judiciary essentially ignored the problem until Congress enacted the Sentencing Reform Act,¹⁰ and it became too late to stop the train.

The judiciary's complacency is understandable. It is not the role of the federal judges to "legislate" reform; policy reform traditionally belongs in the hands of Congress. However, there are special reasons, involving separation of powers and the necessary independence of the judiciary, that ought to press the judiciary itself to address courts' management problems. Recent legislative events demonstrate that when judges become apathetic to criticism of their management policies, legislative remedies are bound to follow. Two recent congressional intrusions into the traditional sphere of judicial management illustrate this point. The first occurred when the federal judiciary mistakenly believed the limits of the Due Process Clause sufficiently prevented protracted delay in criminal cases in the federal courts. Congress' belief to the contrary produced the Speedy Trial Act of 1974,¹¹ requiring trial of defendants within seventy days of indictment. Rigid enforcement of this rule inevitably led to preoccupation with criminal dockets and resulting delay in civil trials. The next intrusion was inevitable. Congress passed the Civil Justice Reform Act of 1990,¹² requiring the development of plans to reduce civil justice delay and expense. As Chief Justice Rehnquist stated in an address to the American Bar Association meeting in February of this year: "[Although] [t]hese delay reduction plans will ultimately benefit the courts as well as the Bar and litigants They also add additional management constraints, lessening the traditional freedom of the district judge to manage his or her civil docket."¹³

9. This suggestion is not intended to detract from Professor Freed's observation that the Commission strayed from its original intent, which has been "overwhelmed by the complexity, rigidity, severity, uniformity, and disproportionality of the guidelines and sentences that followed." Freed, *supra* note 3, at 1703.

10. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988); 28 U.S.C. §§ 991-998 (1988)).

11. Pub. L. No. 93-619, 88 Stat. 2076 (codified as amended at 18 U.S.C. §§ 3152-3156, 3161-3174 (1988)).

12. Pub. L. No. 101-650, 104 Stat. 5090 (codified at 28 U.S.C.A. §§ 471-482 (West Supp. 1991)).

13. Chief Justice William H. Rehnquist, Remarks Before the House of Delegates at the American Bar Association's Mid-Year Meeting 18 (Feb. 4, 1992) (on file with author).

The early 1980's saw three important congressional proposals for legislation affecting the federal judiciary: (1) the increase of federal judicial salaries; (2) the creation of a National Court of Appeals; and (3) federal guideline sentencing. Chief Justice Burger supported all three measures. While the Judicial Conference extensively debated and ultimately supported the increase in judicial salaries, it neither contributed to nor commented on important legislation on the National Court of Appeals¹⁴ or guideline sentencing. Those issues were never even placed on the Judicial Conference agenda.¹⁵ This was most unfortunate and the judges of the Conference, including myself, have only ourselves to blame.

Before the passage of the sentencing guidelines, federal judges recognized that parole boards were pushing the outer limits of due process. Many parole board decisions resulted in gross disparity of actual sentences served by individuals sentenced for similar crimes. This created the appearance of arbitrariness in the sentencing process. Beyond occasional reversals and criticisms, however, the judiciary did little to effect change.¹⁶ It did not realize that its failure to act could lead to a congressional cure much worse than the disease itself. Although some judicial councils and individual judges communicated their concerns about sentencing reform to Congress in the early 1980's,¹⁷ the prima-

Recognizing the problem of civil delay caused by abuse of discovery procedure, the Judicial Conference passed amendments to the Federal Rules of Civil Procedure requiring pretrial scheduling conferences. See FED. R. CIV. P. 16(b). If federal judges had enthusiastically implemented this rule as the Conference intended, the Civil Reform Act might not have been passed. Notwithstanding the mandatory language of rule 16(b), many federal district judges feel that early scheduling conferences are a waste of time. Several members of the Judicial Conference supported the passage of 16(b), but insisted that it require the judge to exercise direct control over the discovery process, precluding local rules that permit magistrate control. This provision remains the rule's internal weakness.

14. This measure, proposed in various forms, would have created an intermediate court of appeals between the Supreme Court and the Courts of Appeals. See S. 1529, 97th Cong., 2d Sess. (1982); S. 2035, 97th Cong., 2d Sess. (1982). It provided a solution to an imaginary problem, and many opposed its passage on the ground that it would increase delay and expense in both civil and criminal litigation. See, e.g., Leonard H. Becker, *Intercircuit Panel Not the Answer to Court's Woes*, LEGAL TIMES, July 18, 1983, at 10.

15. In 1981, and again in 1982, I attempted to place the issue of sentencing reform on the agenda of the Judicial Conference for discussion. Chief Justice Burger twice ruled that I was out of order because the issue was new business that had not proceeded through the proper committee. There is no question in the minds of many of the members that discussion of the SRA was not placed on the agenda because the majority of judges of the Conference in the early 1980's overwhelmingly opposed it.

16. Individual judges probably could have done little more than point out the arbitrariness of parole board action, which might then have served as a catalyst for legislative or executive reform. See, e.g., *Harris v. Martin*, 792 F.2d 52, 55 (3d Cir. 1986) (striking as arbitrary parole board practice of "double counting," which justified decision to retain prisoner beyond release range dictated by parole guidelines, using same factor upon which release range was based); *Briggs v. United States Parole Comm'n*, 736 F.2d 446, 450 (8th Cir. 1984) (requiring Parole Commission to conform to guidelines or state reasons for departing from them); *Grattan v. Sigler*, 525 F.2d 329, 331 (9th Cir. 1975) (holding that parole board denied prisoner due process by failing to provide adequate notice or opportunity to challenge increase in offense severity rating). Nonetheless, the Judicial Conference, made up of the 12 circuit chief judges and 12 district court representatives, works through its committees to recommend legislative reform. At least during my 12 years on the Judicial Conference, the Conference never focused on or discussed the parole board's shortcomings.

17. For example, as Chief Judge I wrote to members of the House and Senate Judiciary Committees on behalf of the council of the Eighth Circuit:

ry voice of the judiciary, the Judicial Conference of the United States, remained on the sidelines, watchful but silent.

During the early 1980's, when asked about the status of congressional sentencing reform activities, the Chair of the Committee on Criminal Law and

At the July, 1980, meeting of the Judicial Conference of the Eighth Circuit, the judges of the circuit engaged in extensive discussion of the sentencing provisions of S. 1722 and H.R. 6915, the pending Senate and House bills that would reform the federal criminal code. Several aspects of the sentencing provisions have caused considerable concern among our district and circuit judges. It is not practical in this letter, however, to get into detail about each of the problem areas. They have been pointed out to the Senate and House Judiciary Committees, and alternative provisions have been suggested, by judges who have testified at the several hearings that have been held on the subject of criminal code reform. Now that the bills have passed through the hearing stage and are ready for floor debate, we offer these observations, all of which have been previously voiced to both Judiciary Committees:

(1) The sentencing provisions of the bills call for a substantial reallocation of the sentencing function. Under the present state of the law, if a[n] offender is to be incarcerated, the amount of time he will serve in prison will be determined by the *prosecutor*, who, by choosing the statute under which the offender is to be charged, determines the maximum prison sentence that can be imposed; the *sentencing judge*, who determines the maximum time to be served and sets the earliest parole eligibility date; and the Parole Commission, which determines at what moment, between the earliest statutory parole eligibility date and the maximum term set by the sentencing judge, the offender is to be released. S. 1722 would abolish the Parole Commission and, through the utilization of Sentencing Commission Guidelines, would substantially curtail the sentencing options now available to the sentencing judge. Consequently, the discretion now exercised by the Parole Commission and much of that now exercised by sentencing judges would be transferred to the prosecutor.

The prosecutor already plays a considerable role in the decision as to how long an offender may be incarcerated; the prosecutor selects a statute on which to base the charge and, thus, establishes the maximum possible term of imprisonment, and through the plea bargaining process, he may fashion the sentence actually handed down. Under S. 1722, the prosecutor, having preindictment notice of the precise sentencing guidelines that would apply to the putative defendant[,], would control the sentencing judge's exercise of the very narrow discretion allotted him under the bill [and] could be confident of obtaining a particular sentence. He would simply choose a charge that would produce the desired sentence. We question the wisdom of placing that kind of discretion in the typical Assistant United States Attorney[,], whether or not his exercise of that discretion is supervised personally by the United States Attorney.

(2) The perceived inequities in the treatment of those convicted of street crimes, as compared with white collar offenses, will not, in our view, be corrected by either of the proposed bills. Nor will there be any alleviation of the racial inequities thought to exist under present law. Given the reallocation of the sentencing function so that its exercise rests principally with the prosecutor and given criteria, especially under S. 1722, to be utilized in "categorizing" offenses and offenders, we think the probabilities are that fewer white collar offenders and more of the disadvantaged will go to prison.

Recently, the General Accounting Office made a study of prosecutorial disparity as it relates to sentencing disparity and an in-depth study of the Parole Commission is now underway. The results of this latest study[,], considered in the light of the earlier study and the problem posed by the two criminal code revision bills, will no doubt warrant the consideration of new alternatives in sentencing reform. With this in mind, the judges of the Eighth Circuit, by a vote of 45-to-1, urged that passage of the sentencing provisions of S. 1722 and H.R. 6915 be deferred.

Letter from Donald P. Lay, Chief Judge of the United States Court of Appeals for the Eighth Circuit, to Senator Edward M. Kennedy, Chairman, Senate Judiciary Committee, and Representative Peter W. Rodino, Jr., Chairman, House Judiciary Committee (Aug. 12, 1980) (on file with author).

The response I received from various Representatives and Senators can best be summarized by one letter that noted that our views "are certainly entitled to great weight; after all, it is the judges of this nation who have 'lived with' the present code and would have to contend directly with whatever changes Congress enacts." Letter from Senator Thomas F. Eagleton to Chief Judge Donald P. Lay (Aug. 29, 1980) (on file with author).

Probation Administration, Chief Judge Gerald Tjoflat, informed several of us on the Conference that his committee was monitoring the situation and would keep us informed. The next report to the Conference, however, announced that the Senate had already passed the Sentencing Reform Act and that it was too late for any recommendations for amendment. With all due respect to Chief Justice Burger, I believe the Judicial Conference should have played a more active role than merely monitoring congressional reform. The Criminal Law Committee's principal contribution to the sentencing reform legislation was to encourage Congress to include three members of the judiciary on the Sentencing Commission. Even that effort was not officially approved by the Judicial Conference. Professor Freed charges that the guidelines were passed with little consultative and deliberate process.¹⁸ The blame lies at the feet of a totally apathetic judiciary.

Only after the federal sentencing guidelines became law in 1987 did the federal judiciary begin to manifest real concern with the policy change. At that time, the Judicial Conference formally requested that implementation of the legislation be delayed pending further study. Congress declined, and the guidelines became law. While I am certain that the Judicial Conference in the early 1980's would have opposed the passage of the guidelines, whether the institutional voice of the Conference would have caused a different outcome is impossible to know. Given the opportunity, I am confident that the Conference would have at least made recommendations to temper the guidelines' harsh effects.¹⁹

Chief Judge Tjoflat, a respected colleague, has long endorsed the concept of guideline sentencing.²⁰ He most recently made these views known in an article for *Federal Probation*:

The sentencing guidelines grew out of the realization that sentencing according to the medical model of rehabilitation had failed. Prison inmates complained that indeterminate sentences with uncertain release dates constituted cruel punishment. Criminal justice practitioners and criminologists declared imprisonment incapable of advancing rehabilitative purposes. Even if imprisonment could rehabilitate, it had become clear that it was impossible to ascertain whether a particular prisoner had in fact been rehabilitated. Reports documented widely disparate sentences for similar offenders convicted of similar offenses.

18. Freed, *supra* note 3, at 1690-91.

19. In those days, the majority of the chief circuit court judges were Johnson appointees from the 1960's who did not endorse the law and order concept we inherited from Nixon, Agnew, and Mitchell. The guidelines, however, reflect the mortmain of the Nixon era.

20. Indeed, Chief Judge Tjoflat testified in favor of guideline sentencing before Congress. *Federal Sentencing Revision: Hearings on H.R. 2013, H.R. 3128, H.R. 4554, and H.R. 4827 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 25-48 (1984) (statement of Gerald B. Tjoflat, chairman of the Committee on the Administration of the Probation System of the Judicial Conference of the United States).

In response to the mounting criticisms of a sentencing system that vested wide discretion in the Parole Commission, Congress established the Federal Sentencing Commission to establish uniform Federal sentencing guidelines. The new guidelines were to assure, among other things, that sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all Federal criminal cases, and that the offender, the Federal personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it.²¹

Judge Tjoflat's article claims that the guidelines leave substantial room for discretionary departure and blames defense counsel for not being sufficiently innovative in suggesting areas of departure. With all due respect, I find Chief Judge Tjoflat's argument illusory. The truth is that the manner in which the Commission structured the guidelines leaves a sentencing judge little margin of discretion to depart from them. Although Judge Tjoflat's views merit respect, they are not shared by the vast majority of federal judges in this country.²²

This lack of support is not surprising. Notwithstanding laudable congressional goals, the guidelines continue to increase the number of men and women incarcerated in our federal prisons, resulting in abhorrent social and economic costs. The guidelines have generally resulted in longer sentences, prolonging the dehumanization of incarceration. Moreover, as Chief Justice Rehnquist has written, the guidelines have greatly increased the burden of the federal courts:

Before, the setting of the sentence within statutory limits was almost entirely in the hands of the trial judge, and it was virtually impossible to appeal against such a sentence. Now, elaborate guidelines are in place, which detail exactly how the sentence in each case shall be computed. . . . These new guidelines mean that a sentencing hearing before a district judge, which might have taken five or ten minutes a decade ago, could take an hour or more today. And the new statute grants both the government and the defendant the right to appeal from the sentence so fixed to the Court of Appeals—a right of which both are taking full advantage. Criminal appeals rose 33 percent in the first year of the Sentencing Guidelines. Overall, criminal appeals have more than doubled in the past ten years. In 1991, 21 percent of the almost 10,000 appeals were of sentence only, and another 44 percent were appeals of both sentence and conviction.²³

21. Gerald B. Tjoflat, *The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel*, FED. PROBATION, Dec. 1991, at 4, 5 (citations omitted).

22. When the Federal Courts Study Committee held hearings on the guidelines, only four of the approximately 270 people who testified supported the guidelines. See Michael Tonry, *Judges and Sentencing Policy—The American Experience*, in SENTENCING, JUDICIAL TRAINING, AND DISCRETION (Martin Wasik & Colin Munro eds., forthcoming 1992); see also Freed, *supra* note 3, at 1684-86, 1719-20.

23. Rehnquist, *supra* note 13, at 15-17.

The guidelines have done nothing more than provide a negative contribution to a serious societal problem. To paraphrase Justice Frankfurter: rigid rules, although they may avoid some abuses, generate others.²⁴ The passage of the guidelines has done just that.

II. A STITCH IN TIME MIGHT SAVE SEVEN COMMISSIONERS

Professor Freed substantiates several salient concerns regarding the implementation of the guidelines. He finds that (1) the guidelines have become unnecessarily rigid and imprisonment policies unduly severe; (2) courts of appeals have contributed to the rigidity of that process by restricting the authority of judges to depart from the guidelines in appropriate circumstances;²⁵ (3) the guidelines have undermined the idea of guided discretion by providing mandatory penalties; and (4) the Commission has typically not responded to proposals by individual judges and the Judicial Conference for flexibility and moderation.

There is little evidence that the Commission will act on its own to make the guidelines more flexible or imprisonment policies less severe. Although the Commission may be an agency of the federal judiciary, it seems to lack supervision from any branch of government, and it reflects the Department of Justice's severe sentencing philosophy. The drug hysteria that has swept across the country has led recent Administrations to endorse the concept of longer sentences and broader incarceration. The Commission members presently reflect this attitude. As the Commission members display an increasingly defiant

24. See *Brown v. Allen*, 344 U.S. 443, 498 (1953).

25. See Freed, *supra* note 3, at 1747 (appellate courts have "curtail[ed] the statutory duty to depart as though it was a sin to venture outside the guideline range").

The judiciary's construction of policy statements as binding law serves as a paradigm for such critique. The Commission exalts uniformity to obviate disparity, yet it allows departure for a defendant's "substantial assistance," only when the prosecutor makes a motion for such a departure. See U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 5K1.1 (1992) [hereinafter U.S.S.G.]. Thus, the prosecutor's unfettered, unchecked, and possibly arbitrary discretion is seldom placed on the table for review. This practice results in less consistency in the sentencing process than when the sentencing judges evaluated "substantial assistance" in all cases.

In *United States v. Kelley*, No. 90-1027, 1992 U.S. App. LEXIS 1445 (8th Cir. Feb. 5, 1992) (en banc), the Eighth Circuit considered the Sentencing Commission's authority to prohibit courts from awarding sentence departures for substantial assistance in the absence of a government motion. A six-to-five majority held that policy statements such as § 5K1.1, which need not be submitted to Congress for approval, were as binding on courts as the guidelines themselves. Writing for the majority, Judge John R. Gibson concluded that "[n]othing could be more contrary to Congress' intent in providing for the Sentencing Guidelines than to permit the courts to second-guess the Commission" because its approach "was simply not the best way to handle the problem at hand." *Id.* at *23.

In dissent, Judge Heaney professed dismay at the majority's insistence on restricting the authority of the district court:

The guidelines' enabling legislation does not require a motion, and Congress has not approved the motion 'requirement' as part of a binding guideline. . . . We should recognize the motion 'requirement' for what it is: a procedural anomaly that the Sentencing Commission grafted onto an advisory policy statement intended to provide guidance for the courts.

Id. at *42 (Heaney, J., dissenting).

attitude toward judicial input, the courts of appeals and district courts may begin to interpret the Commission's guidelines as inconsistent with congressional intent.

Professor Freed points out some of the more salient instances in which the Commission has failed to maintain its legislative faith. For example, 28 U.S.C. § 994(e) requires the Commission to minimize the likelihood that the federal prison population will exceed the capacity of federal prisons. Far from complying with this mandate, the Commission's policies have contributed in part to an increase in the federal prison population from 42,000 in 1987 to a projected 72,000 in 1992.²⁶ This increase stems in part from the Commission's virtual elimination of probation as an alternative sanction. The Commission's own study predicted that, under the guidelines, the probation rate would fall from approximately 42.4% to 18.9%.²⁷ As Professor Freed observes, the "guidelines contain[] a presumptive sentence of imprisonment for every felony in the *United States Code*."²⁸ Furthermore, the Commission's mandatory relevant conduct provisions, which prohibit courts from sentencing only on charged offenses, have substantially increased the sentence range for all offenders. In light of these policies and the resulting boom in the prison population, it is difficult to perceive how the Commission has in good faith complied with legislative intent.

The Eighth Circuit recently considered whether the Sentencing Commission exceeded its statutory authority by mandating consideration of relevant conduct that had never been the subject of a criminal trial.²⁹ Writing for the majority in *United States v. Galloway*, Judge Bright stated:

According to the [legislative history], subsection 991(b)(1)(B) underscores the major premise of the sentencing guidelines: the need to avoid unwarranted sentencing disparity. Consistent with this objective, the subsection establishes two factors as "the principle [sic] determinants of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity that should be avoided unless it is warranted by other factors." Under the statute, these factors are: (1) the prior records of offenders; and (2) the criminal conduct for which they have been found guilty.

The relevant conduct guideline promulgated by the Commission strays far from this goal. The guideline requires increased penalties for unconvicted conduct no matter how minor the offense of conviction

26. U.S. SENTENCING COMM'N, *supra* note 7, at 112-17.

27. *Id.* at 113 (citing U.S. SENTENCING COMM'N, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 68 tbl.2 (1987)).

28. Freed, *supra* note 3, at 1706. The Commission's anti-probation policies also conflict with the congressional goal of sparing first-time offenders imprisonment, as expressed in 28 U.S.C. § 994(j) (1988).

29. *See* *United States v. Galloway*, 943 F.2d 897 (8th Cir. 1991), *vacated & reh'g en banc granted*, No. 90-3034EA, 1991 U.S. App. LEXIS 27316 (8th Cir. Nov. 20, 1991). *But see* *United States v. Miller*, 910 F.2d 1321, 1326-28 (6th Cir. 1990) (uncharged conduct related to offense of conviction can be utilized in determining base offense level under guidelines).

may be in proportion to the unconvicted offenses at issue. This requirement has caused considerable and widespread concern in both sentencing and reviewing courts. Indeed, since its promulgation, courts have repeatedly struggled with the tendency of the relevant conduct provisions to dwarf the actual count of conviction. . . . [T]hese compounded sentences are not occasional aberrations, but predictable consequences of the relevant conduct provisions now in effect. As such, these provisions violate Congress' explicit instruction that the Commission, as its *primary* task, seek to equalize sentences between defendants *found guilty* of similar conduct.

Given the statutory provisions and legislative history, we now conclude that the Commission exceeded its authority under the enabling legislation in drafting subsection 1B1.3(a)(2) of the relevant conduct guideline to encompass the unconvicted criminal conduct at issue in this case. We hold the provision unenforceable insofar as it permits offenders to be systematically penalized for factually and temporally distinct property crimes that have neither been charged by indictment nor proven at trial.³⁰

At this writing, however, the Eighth Circuit has vacated Judge Bright's opinion in *Galloway* and the matter was heard en banc in January of this year.³¹

Far from the intended goal, the Commission's use of relevant conduct has promoted greater disparity in sentences. The plea bargain, which traditionally reduced relevant conduct severity factors, now breeds uncontrolled disparity. As Professor Freed notes, the "the relevant conduct guideline *reduces* visibility and candor in sentencing."³² At a recent sentencing institute for the Second and Eighth Circuits, Professor Michael Tonry reported that due to the inherent unfairness of the relevant conduct standard, no state considering sentencing guidelines has adopted it as a basis for sentencing, implementing instead the charged offense standard. Tonry further stated that based on his studies, no other country has ever adopted relevant conduct as the applicable standard.³³ If relevant conduct is indeed the "cornerstone" of the federal guidelines, as Chairman Wilkins has claimed,³⁴ it is a weak and crumbling foundation indeed.

I do not think that we can look to Congress for any immediate changes in the legislation that created the Commission. There is no question that by enacting mandatory minimum sentences, Congress undermined the vision of

30. *Galloway*, 943 F.2d at 903-04 (citations and footnotes omitted); see also *Miller*, 910 F.2d at 1329-30 (Merritt, C.J., dissenting) (arguing that relevant conduct guidelines promulgated by Commission exceed scope of enabling legislation).

31. 1991 U.S. App. LEXIS 27316 (8th Cir. Nov. 20, 1991).

32. Freed, *supra* note 3, at 1714.

33. Professor Michael Tonry, Remarks at the Sentencing Institute for of the Second and Eighth Circuits (Mar. 4, 1992).

34. See William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

guided discretion embodied in the Sentencing Reform Act.³⁵ My lack of faith in congressional reform is particularly profound in an election year, when Congress will once again bend over backwards to avoid appearing "soft" on crime. Recent attempts to pass legislation that would effectively bar habeas corpus in federal courts illustrate the current mood.³⁶

Although the Commission has thus far ignored proposals for flexibility and moderation, it now appears to be considering amendments to the guidelines in response to recommendations of the Judicial Conference.³⁷ Some of these amendments address the very concerns Professor Freed raises in his article.

For example, amendment 29 would give the district courts greater flexibility to impose sentences other than imprisonment.³⁸ One of the recommended options would expand the availability of probation and provide for split sentences.³⁹ Amendment 35(C) requests comment on the issue of whether courts should consider conduct for which a defendant has been acquitted in determining the offense level, or whether they should consider such conduct only in determining where to sentence within a guideline range.⁴⁰ Amendment 35(A), as suggested by the Judicial Conference, encourages the government to disclose all guideline-relevant facts and circumstances to a defendant prior to the entrance of a plea.⁴¹ This practice would inevitably introduce greater fairness into the process and significantly reduce the number of appeals.

I hope that these new amendments will also provide greater flexibility for the district courts to exercise discretion in making downward departures. For example, amendment 33 would broaden the discretion of the sentencing judge to depart downward or upward when certain offender characteristics are present.⁴² Amendment 26 would give the sentencing court more authority to consider the *nature* rather than the *number* of prior offenses when considering whether to depart from the guidelines.⁴³

While I do not intend to address each of the proposed amendments, I note approvingly that all of these amendments seek to provide the district courts with greater latitude to give probation to offenders for whom the likelihood of

35. See Freed, *supra* note 3, at 1752.

36. Pending legislation in the Senate would bar any federal habeas proceeding if a "full and fair" proceeding on the same claim existed in the state court. See, e.g., S. 2305, 102d Cong., 2d Sess. § 205 (1992). Although habeas corpus has nothing to do with crime prevention, it is viewed by some Senators and by the Department of Justice as providing an unwarranted vehicle for criminals to challenge their convictions. The possibility that these individuals might have been convicted by an unconstitutional process or represented by incompetent counsel does not sway those politicians who seek only to present a certain image to their constituents. The lay public tends not to appreciate such constitutional issues, and any effort to provide criminals fundamental procedural rights is often misunderstood as being "soft" on crime.

37. See U.S. Sentencing Comm'n, Sentencing Guidelines and Policy Statements for Federal Courts: Notice, 57 Fed. Reg. 90 (1992) (proposed Jan. 2, 1992).

38. *Id.* at 109-11.

39. *Id.* (second option).

40. *Id.* at 113.

41. *Id.* at 112-13.

42. *Id.* at 112.

43. *Id.* at 106-07.

recidivism is low and to impose longer sentences on persons with very serious criminal records. The difficulty with some of the proposed amendments is that the Commission wants to achieve this commendable goal by creating additional inflexible directives rather than by giving the district courts the discretion to act in individual cases.

More specifically, the amendments do not adequately address the concept of intermediate punishment. Professor Freed, like criminal justice scholars Norval Morris and Michael Tonry,⁴⁴ urges the adoption of intermediate punishments for persons who do not need to be placed in penitentiaries.⁴⁵ Various states are now beginning to recognize the ineffectiveness of past policies of incarceration without accompanying rehabilitation efforts. Several states have already recognized that intermediate punishments can save a great deal of expense without sacrificing the necessary deterrent to crime.⁴⁶ In fact, the most successful strategy for persuading states to better employ alternatives for harsh imprisonment, according to a friend of mine who was formerly the director of a Southern prison system, is the Archie Bunker approach: never explain to legislative officials how the plan will benefit prisoners by encouraging rehabilitation; simply point out that by using the proposed means of punishment the taxpayers will save a great deal of money. In the long run, this may be the only way politicians and the public will endorse attempts to improve our entire system of penology.

CONCLUSION

Professor Freed's article should serve as a blueprint for reevaluating the guidelines. The Federal Courts Study Commission and the ABA would greatly benefit from studying Freed's article. While other outstanding studies have contributed much to the debate,⁴⁷ Freed's article offers the most useful com-

44. See NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990).

45. Freed, *supra* note 3, at 1707, 1751.

46. See, e.g., MORRIS & TONRY, *supra* note 44, at 65-68 (discussing Delaware's system of intermediate punishments); *id.* at 180-86 (discussing programs of "intensive probation" in Georgia, New Jersey, and Massachusetts); Governor Michael N. Castle, Address at the National Institute of Justice Conference on Intermediate Punishments (Sept. 6, 1990), in *Conference Focuses on Filling the Void Between Prison and Probation*, NAT'L INST. JUS. REPS., Nov.-Dec. 1990, at 2, 3 (discussing Delaware); ALA. R. CRIM. P. 26.8 ("Judges should be sensitive to the impact their sentences have on all components of the criminal justice system and should consider alternatives to long-term institutional confinement or incarceration in cases involving offenders whom the court deems to pose no serious danger to society."); Lawrence A. Bennett, *Californians Support Community Punishment*, AM. JAILS, Mar.-Apr. 1991, at 44, 44-45 (indicating popular support for intermediate punishments for less serious offenders).

47. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals? Empirical and Case Law Analysis*, 40 EMORY L.J. 393 (1991); Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1 (1991); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L.

pendium of the guidelines' inherent problems. Legislative change is slow and not always certain. Until radical reform occurs, "[t]he army that America is marching into its prisons and jails"⁴⁸ will continue to grow, and only the Commission and the courts can provide real hope for change.

Yet, a conflict presently exists between the Commission and the judiciary. This problem stems from the diffuse and amorphous body of judges speaking in different voices. A striking number of judges have opposed the guidelines. In fact, over 200 district judges held the SRA unconstitutional.⁴⁹ Some of the Commissioners have reacted with indignation and responded with hostility towards the entire judiciary, including the Judicial Conference. The Judicial Conference cannot, of course, speak for each and every district and circuit judge in the United States, but it does provide the appropriate forum for structured judicial input into policy considerations. Congress, and more importantly the Commission, should heed the Conference's recommendations.

In March of this year, the Second and Eighth Circuits met under the auspices of the Federal Judicial Center, a specialized body within the Judicial Conference, at a Federal Sentencing Institute. The conference included panels of judges, Commissioners, lawyers, and law professors. The panelists agreed that, for the Sentencing Reform Act to serve the public good, a new spirit of cooperation between federal judges and the Sentencing Commissioners must emerge. It is on this basis that I conclude my commentary with an open letter to the United States Sentencing Commission.

* * * *

To The Commission:

This letter was written shortly after my attendance at the Sentencing Institute for the Second and Eighth Circuits held in Lexington, Kentucky. To arrange the conference, Second Circuit Chief Judge Jim Oakes and I, in my capacity as the Chief Judge of the Eighth Circuit, appointed knowledgeable and dedicated judges from both of our circuits to a planning committee. This committee included Vincent Broderick, district judge from the Southern District of New York, Judge Jon Newman from the Second Circuit, Chief District Judge Edward Filippine from St. Louis, and Judge Gerald Heaney of the Eighth Circuit. The committee organized the Institute to evaluate the successes and failures of the federal sentencing guidelines. In addition to federal judges and members of the Commission, scholars such as Professors Dan Freed and Michael Tonry, United States probation officers, and outstanding lawyers attended. During the conference, a Commissioner complained that the Institute

REV. 1 (1991).

48. Alschuler, *supra* note 47, at 951.

49. U.S. SENTENCING COMM'N, 1989 ANNUAL REPORT 11 (1989).

should be confined to teaching judges how to apply the guidelines rather than serving as a forum to allow judges and others to discuss weaknesses of the guidelines. I mention this criticism because, in the eyes of many, it suggests that the Commission considers itself immune from constructive criticism.

As the meeting progressed, many of the Commissioners expressed their disdain for the views of certain members of the federal judiciary. One Commissioner openly accused the judiciary of being arrogant. He claimed that Congress took away the sentencing discretion of federal judges because they could not be trusted in the sentencing process. At the same time, however, many judges challenged the Commissioners' attitudes and criticisms of the federal judiciary. It appears to many of us that the Commission is not interested in receiving input from the federal bench. Similarly, many judges seem to have stopped listening to the Commission. Inevitably, if these confrontational views continue, the guidelines are doomed to utter failure.

While it is true that many judges seek outright repeal of the Sentencing Reform Act, these same judges recognize the statute as a political reality resulting from a studied analysis made by Congress, and they still desire to improve the guideline sentencing system to benefit the public good. This can only be achieved, however, by mutual cooperation between the judiciary and the Commissioners. A polarized confrontation between the Commission and the judiciary is not a productive solution. The Commission should realize that, although many judges are not happy with the guidelines, they are not lawless individuals, and they will apply the law to the best of their ability. At the same time, the federal judiciary needs to realize that the responsibilities of the Commission are difficult and time-consuming, and that while a perfect sentencing formula is perhaps unattainable, the Commission is striving for it in good faith.

The Sentencing Reform Act was not designed to serve the Commission or the judiciary, but the public good. The Act addresses the basic purpose of criminal sentencing, the deterrence of crime, by directed measures affecting both incapacitation of the offender and retribution for the crime committed. A scheme to punish individuals with isolated incarceration is of little consequence, however, if a harsh and rigid sentencing process fails to deter crime and results in rising public costs. Yet, one Commissioner at the Institute announced that the young age of an offender should not be regarded as a mitigating factor in sentencing, since youths between the ages of eighteen and twenty-five rank highest in recidivism. He reasoned that, by giving young persons long prison terms, we cut down on recidivism. One member of the Department of Corrections asked me: "Doesn't he know that after ten years in prison, a young person returning to society is nonfunctional?"

My chief concern is that the Commission's disregard of the judiciary's opinions overlooks the fact that, under the SRA, federal district judges must still provide individualized sentencing. Congress did not intend sentencing to

be, as some misguided judges now view it, a mechanical process.⁵⁰ The district judge, not the Commission, is still the key figure in the sentencing process, and if the judge loses confidence in that process, the entire system is doomed to chaos. If the Commission believes that the SRA sought to deny judges individualized sentencing authority, it is wrong. The guidelines were not intended "to eliminate the thoughtful imposition of individualized sentencing."⁵¹

At the Institute, several Commissioners expressed the belief that a uniform sentencing system cannot incorporate extensive departure provisions. I submit that this position misreads congressional history. The notion that flexibility cannot coexist with disparity fails to recognize the gross disparities that have resulted under the severe, rigid sentencing structure of the present guidelines.

Guideline sentencing must deal with the diversity of human nature. If the Commission continues to maintain that allowing the guidelines to consider individual differences among offenders will foster unwarranted disparity, it will only widen the breach between the Commission and the judiciary. Such a view not only contradicts congressional intent, it denies the empirical knowledge of federal district judges who confront diversity daily in the sentencing process. Judges must be given as much flexibility as possible to carry out sentencing policies. If both the Commission and the judiciary heed Professor Freed's objective analysis, perhaps the future will be brighter.

Apparently, the Commission's philosophy of criminal sentencing is to shape the sentence to the crime, rather than to the offender. This policy directly contradicts Congress' desire to maintain individualized sentencing. I believe that some day we will reinstitute the policy that a sentence should attempt to rehabilitate an offender as well as prescribe his punishment.⁵² The guidelines' myopic focus on the period of incarceration has created a sentencing system that not only totally ignores the human degradation that can occur through long and unjust mechanical sentences, but also is bound to fail.

Although many Commissioners are convinced that they are carrying out the intent of Congress, I hope that you will heed the discourse provided at the Institute, demonstrating that most harsh and rigid guidelines lack congressional

50. S. REP. NO. 225, *supra* note 5, at 52, reprinted in 1984 U.S.C.C.A.N. at 3235 (guidelines should not be imposed in "mechanistic fashion").

51. *Id.*

52.

By eliminating rehabilitation as an imprisonment goal, Congress has determined that incarceration is an inappropriate way to "cure" a convict of his or her criminal tendencies. Prisons, however, have their costs, not only for the maintenance and housing of inmates, but also in the toll they take on the lives of those incarcerated. Prisoners lose their jobs and may lose family and community support; those who are exposed to prison brutality no doubt lose a great deal more. To the extent that these circumstances isolate an inmate and deprive him or her of healthy economic or social opportunities upon release, the probability of a return to criminal activities increases. Rehabilitation is directed to reducing that probability.

Karle & Sager, *supra* note 47, at 440.

mandate. Rather, as Professor Tonry pointed out in his remarks, much of the rigidity results from choices made by the Commission.⁵³

For example, the Commission, by defining many offenses that traditionally received probation as "serious,"⁵⁴ has distorted the statutory presumption against incarceration for first offenders not convicted of a crime of violence or an otherwise "serious" offense.⁵⁵ The Commission has also established, as a matter of choice, that the section 5K1.1 policy statement, allowing departures for substantial assistance, becomes effective only upon the motion of the prosecutor.

The use of the relevant conduct standard was also solely the choice of the Commission. As Professor Tonry reported, this standard has been rejected by all state sentencing commissions and every foreign country that has considered it.⁵⁶ Another non-statutory choice of the Commission involves the complicated forty-three-level grid. Most states have established grids with six to twelve levels.⁵⁷ The more complicated and mechanical the process becomes, the more foreseeable it is that human error and gross disparity in sentencing will result. Thus, it is difficult to perceive the need or desire for such a complex process.

The Commission also chose not to devise guidelines for fines or other nonincarceration sentences, except in a few minor cases and for organizational offenders. Lacking congressional mandate, it is difficult to understand why the Commission has not considered intermediate alternatives between prison and probation.

There are many other areas of misdirected Commission choices, such as the incorporation of mandatory minimum sentences within the guidelines, that are not congressionally mandated. I believe that all these choices highlight the need for greater discourse and cooperation with the judges who must carry out the process. Moreover, many learned and interested persons remain satisfied that a choice exists between outright repeal of the guidelines and living with them as they now exist.

In conclusion, let me say that it is my sincere wish that further polarization between the Commission and the judiciary come to an abrupt halt. In its place I hope that mutual studied discourse between the two groups can,

53. See Tonry, *supra* note 33.

54. See U.S.S.G., *supra* note 25, ch. 1, pt. A, intro. 4(d).

55. See 28 U.S.C. § 994(j) (1988).

56. Tonry, *supra* note 33.

57. See, e.g., MINNESOTA SENTENCING COMM'N, MINNESOTA SENTENCING GUIDELINES, *reprinted in* MINN. STAT. ANN. § 244 app. at 413 (West Supp. 1992) (10 levels).

in the public interest, lead to guidelines more humane and acceptable to all parties concerned.