

Keynote Address

Sentencing Guidelines: A Need for Creative Collaboration*

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Historians of criminal justice will undoubtedly see great significance in two numbers recorded in this last decade of the second millennium. They will recall with interest that this was the decade in which the total number of lawyers in America reached one million. They will also recall that in the same decade the total number of people in American prisons rose above one million. Of course, there's some overlap between those two totals, but that hardly makes them less interesting.

Einstein taught that God doesn't shoot craps with us humans. And Holmes predicted that the man of statistics would supply the wisdom of future generations. So I wanted to start this talk with those two totals of one million or so and mention some obvious inferences from the convergence in anticipation of the historians of the twenty-first century. I regret to report a total failure. I cannot find what will some day be discovered to have been obvious: the explanation for the coincidence of these numbers.

The more that I have thought about these two numbers over the years, the less correlation of any kind I have been able to discover between the legal profession generally and the so-called system of criminal justice. The only

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relationship I have noticed is a high correlation between our essential ignorance about crime and our willingness to pronounce and prescribe on the subject.

So I have no key insights or scientific principles to help launch tomorrow's deliberations. Instead, I would like to use this time to recall a little familiar history, make a few slightly rueful observations, and offer a couple of possibly hopeful impressions.

To characterize our history and qualities briefly, I note that while members of our profession—both the bar and the bench—know little or nothing about crime, we do know something about law. We know in a crude way the difference between law and fiat. We know a lot about how to formulate rules of general application and how to limit arbitrary discretion.

In that light, it is ironic that for most of this century, with respect to sentencing, we gave free rein to our ignorance and neglected our expertise in the law. We gave lawless power to the judges. Subject essentially to no law, a federal judge could give a bank robber from zero to twenty-five years—or fifty or seventy-five if there were multiple counts—with no review or recourse to anyone except the Parole Commission, which was almost equally unregulated by law except that it saw fit to formulate some explicit and supposedly general “guidelines” (as it called them) for itself.

Everybody knew or should have known how thoroughly lawless that was. We knew, among many examples, that some judges routinely gave the maximum five years to Vietnam war resisters while others routinely ordered probation. Experiments of one kind or another made the same point. Every defense lawyer and prosecutor and prisoner knew that the sentence a defendant got depended on the judge before whom he or she chanced to appear.

In the 1960's and '70's that state of affairs came under increasing criticism. One of the things you may join me in thinking remarkable is that one scarcely heard any *judicial* voice among the critics. Reasonable judges surely knew or should have known the extent of the unbridled power they were exercising. But almost none of them raised questions about that state of affairs.

There is a probable explanation for that. One never encountered any judges who doubted the fair and just and merciful character of their own sentences. The system left each of them free to bestow their beneficence upon defendants appearing before them. Judges might have been disposed from time to time to doubt whether all of their colleagues were equally splendid. Yet if that happened, it did not serve to trigger any expressed doubts about the system. On the whole, the judges felt good—or at least not too bad—about the sentencing function.

The system was relaxed, agreeable, and not strenuous. A judge would read a presentence report the day before sentencing, perhaps meet with a probation officer for a half-hour or so, or dispense with any such meeting, appear on the bench, listen to a little oratory and maybe a few words from the defendant, and then announce the sentence. The sentence might be accompanied by a speech

telling the defendant what a villain he was, or telling her why the judge was being so gentle, or some of each. The whole business might take an hour or two from first to last.

A judge would reserve decision after three days of trial in a \$10,000 tort claims case, and then write an opinion to explain the decision. But judges hardly ever reserved decision about a sentence. And you almost never saw a written opinion about a sentence. For all the wisdom in the pages of the Federal Supplement—ranging from abatement to zoning—nothing appeared there about the thought guiding the discretionary arrival at a sentence of twenty-two years rather than eighteen or twelve or six and one-half.

The judges could be heard from time to time telling of the agonies they suffered over the responsibilities of sentencing. But they bore the anguish stoically. As the poet said, they never asked that the millstone be draped on other necks.

Then along came this idea of a sentencing commission to make rules or guidelines that would confine the discretion of judges. Five years ago, I would have hesitated to stand up anywhere and say that this idea was mine, for fear of exposing the immodesty that I keep trying to conceal. Now, however, I would feel obliged to say this as a matter of required disclosure or confession.¹

The Federal Sentencing Commission (Commission) and its guidelines² have not been winning popularity contests. The basic idea, inaugurated earlier in a few states, seems to have worked tolerably well in places like Minnesota and Washington. But the federal setup has been a target of widespread and bitter attacks, notably by judges and defense lawyers.

The federal judges, so quiet about sentencing for so long, suddenly came to life—often passionately—following the advent of the Commission. A few dozen district judges and the Ninth Circuit³ found the new Commission unconstitutional—as a violation of the separation of powers or even an undue delegation of powers. The latter position was especially brave in light of the blank check with which the judges had been handling sentencing for so many decades. The result was that until the Supreme Court's *Mistretta* decision at the beginning of 1989,⁴ the guidelines were dead letters in a substantial part of the country. So it pays to have in mind that sessions like the one beginning here tonight are evaluating an experiment that is scarcely three years old, which is not a very long time to deal with evils we have had, one way or another, for centuries.

1. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 118-23 (1973).

2. U.S. SENTENCING COMM'N, *FEDERAL SENTENCING GUIDELINES MANUAL* (1992) [hereinafter U.S.S.G.].

3. *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1251-59 (9th Cir. 1988).

4. *Mistretta v. United States*, 488 U.S. 361 (1989).

Having won only Justice Scalia for the claim of unconstitutionality,⁵ the district judges shifted the attack to other fronts. The whole scheme of Commission and guidelines appears from the sound of things to remain an anathema—probably for a great majority of the federal district judges. Believing that from what I had read and heard, I conducted a small, unscientific survey of my own for the purpose of speaking here tonight. I sent a very brief questionnaire to twenty district judges. The sample is by no means scientific—but it is not grossly unscientific either. A few of the twenty are people I know personally. Most are not. They were picked in a kind of casual, spastic way from here and there—giving them for me a quality that feels random. Nineteen of the twenty responded. I will share the main results with you.

The judges were asked to answer as many as they liked of seven questions simply by checking boxes and then to comment at will in a discursive way. Most settled for checking boxes. A half-dozen wrote interesting commentaries that I will not have time to digest here. Let me just note the numbers from the checked boxes.

Two of the nineteen checked the box inviting the view that the guidelines “have made for a fairer system of sentencing.” But then thirteen say the system has been made “less fair and just.” Next, sixteen say the guidelines “effect unwarranted limitations on judicial discretion.” Eleven say the system would work better if the guidelines were less detailed. Eleven also think the Commission has “made sentencing excessively punitive.” A mildly encouraging total of five say the guidelines “have worked fairly well but can of course stand improvement.” Finally, the largest number, sixteen, agree that the guidelines “have transferred discretion in large measure to the prosecution.”

The specific complaints vary in substance. First, merely to get it off my chest, I mention the widespread objection, reflected in the report of the Federal Courts Study Committee,⁶ that the guidelines system was too time-consuming, increasing by twenty-five percent or fifty percent or more the time required to arrive at a sentence. Given the speedy sentencing habits of the old regime, and without slighting the importance of other things federal judges do, the concern about time is both revealing and discouraging.

But then I want to address some more substantial criticisms by the district judges. Postponing that for just another minute, I realized when I came to this point in preparing this talk that most of what I had covered so far might not sound complimentary to the judges. So I wanted to take care to say that I am not on the whole hostile to judges, that some of my best friends are judges, and that in my present line of work it could hardly pay to select judges as enemies.

Having attended to that critical point, I come to some of the major concerns of the federal judges—which are substantial and relate to troubles that will be

5. *Id.* at 413 (Scalia, J., dissenting).

6. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 137 (1990).

involved in a major part of your conversations tomorrow. I think everyone here knows that the judges find the guidelines excessively harsh and rigid; that they believe there has been too little room left for judicial discretion while too much power has been turned over to prosecutors and others. Knowing that you will be resolving all these complaints tomorrow, I have only a few observations about them tonight.

The guidelines are indeed severe, and the Commission deserves a measure of the blame for that, bearing in mind that Congress is the principal villain in this and other respects. Unfortunately for everyone, the Commission came into being at a time of more than normally punitive sentiment about crime in the federal legislature and elsewhere. But the Commission followed that signal with a regrettable degree of enthusiasm. The Commissioners took up the direction to look at prior average sentences “as a starting point,” but not to be bound by them.⁷ That meant starting with a tradition of criminal sanctions that ranks next to the American states as the harshest in the Western world. Then, instead of mitigating, as I think a rational and courageous stance should have dictated under the power to formulate guidelines “consistent with the purposes of sentencing described in section 3553(a)(2) of title 18,”⁸ the Commission produced guidelines that actually increase the overall severity—taking particular aim at so-called white-collar offenders whom the Commission found (perhaps correctly) to have been treated with undue solicitude.

Whether the particular decision on white-collar crime was useful may be debated. Less debatable is the overall tilt of the guidelines in the direction of prison rather than probation and terms of imprisonment that seem excessive over much of the grids to most observers. Congress also told the Commission that guidelines were to “be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.”⁹ The Commission appears on the whole to have neglected that mandate. It shares with Congress the credit for overfilling the federal prisons to something like 160% of capacity.

Part of the pattern of excessive severity is the Commission’s relatively cursory and mechanical handling of mitigating factors. Congress listed, for varying reasons, a variety of offender characteristics that it decreed should be taken into account as grounds for departure from the guideline ranges only when relevant. The list includes age, education, family ties and responsibilities, mental and emotional condition, and a number of others.¹⁰ The Commission responded by prescribing that most of these factors “are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline

7. Sentencing Reform Act of 1984, 28 U.S.C. § 994(m) (1988).

8. *Id.*

9. 28 U.S.C. § 994(g).

10. 28 U.S.C. § 994(d).

range,"¹¹ and simply let it go at that. Unfortunately, that cryptic announcement said that factors the judges had long been accustomed to consider are now "not ordinarily relevant,"¹² leaving the judges at large to figure out when *extraordinary* circumstances might make it appropriate to take the old concerns into account. After all the months of study—including presumably the experience of the sentencers—the Commission produced substantially nothing to identify the terrain left for what was now "not ordinarily relevant."

With that omission, the Commission put largely outside the pale a variety of factors that sentencing judges have treated over the years as mitigating circumstances. The results have included some evasion or warping of the guidelines—by judges along with prosecutors and defense counsel. They have also included some departures that have been disallowed by the courts of appeals. More than one circuit—tending to read the words "not ordinarily relevant" to mean "never or hardly ever relevant"—have used this aspect of the Commission's work to enhance the rigidity that has the district judges chafing. I will mention this problem of restricted departures in some concluding thoughts.

There are more complaints about the Commission's work that have some merit. I omit them from my remarks with confidence that they will be covered amply by the judges and others in attendance tomorrow. You will also be agreeing that much of the severity for which the Commission is being damned is actually a congressional product. Everybody is tough on crime these days. Nobody is able or willing to press for some of the expensive measures that might lower the crime rate. So Congress responds with more and more mandatory minimums and more and more draconian sentences. The Commission takes some of the heat for that, and to this extent the criticisms are excessive.

However the blame should get apportioned, it is pretty clear that the sentencing ranges are found by and large to be excessive by the federal judges, who have not been thought generally to be too tender hearted in the past and probably do not deserve, or merit, that kind of characterization today. As the Commission reports, when you leave aside the downward departures authorized at the instance of the prosecutors—another dubiety worked out by Congress—the departures reported by the Commission appear to run three or four below the guidelines range to every one above. This is an important part of the data that ought to be moving the Commission as it proceeds to revise and improve its product.

Let me mention some of the remedies that have been suggested—and perhaps one or two that I would support—for the troubles that have been generated by the Commission and its guidelines.

11. U.S.S.G., *supra* note 2, ch. 5, pt. H, intro. cmt.; *id.* §§ 5H1.1-.11.

12. *Id.*

First, there is of course the option of scrapping the whole business and returning to the pre-Commission regime of judicial discretion and indeterminate sentences. A number of judges and others would favor this approach. Judge Cabranes, who holds court near here, is basically in this school. The old ways, he says, have been proved after all to be the best ways. The only concession he would make is that maybe it was not a bad idea to provide for appellate review of sentences, which, as you know, essentially did not exist in the federal courts until the Sentencing Reform Act became effective in 1987. Apart from that concession, Judge Cabranes would go back to what he deems the sound and tested principles, which he traces in essence back to biblical times.

Judge Cabranes' views, and his reasons for them, were set forth in the *New York Law Journal* in a piece under a modulated title: "Sentencing Guidelines: A Dismal Failure."¹³ In that article, he denounces as phony the idea of "scientific" sentencing, which he describes as one of the claims supporting the Commission-guidelines arrangement. (I am driven to say in passing that I don't recall any claim that the guidelines were any more "scientific" than any other system of rules to govern judges and the rest of us.) Be that as it may, Judge Cabranes makes a passionate plea for the good old days of "humanistic" sentencing as against the "mechanistic" scheme of the 258-box grid produced by the Sentencing Commission. And he produces some horror stories, notably from drug cases, to show how bizarre and cruel the guidelines can be.

There are undoubtedly horror stories—under the guidelines as under the pre-guidelines system. Judge Cabranes cites the case in which the Supreme Court upheld a guideline measurement by which sentences for selling a given amount of LSD can vary enormously depending on the weight of the blotter paper or sugar cubes with which the drug is mixed.¹⁴ If that isn't entirely ridiculous—and a Supreme Court majority vouches that it is not—it certainly raises some questions about the principles of penology on which Congress has acted and the Commission has proceeded.

So without documenting the thought more thoroughly, and without trying to measure the fair share of the blame to which Congress is entitled, I am prepared to accept the position of Judge Cabranes and others that the guidelines do indeed produce some outlandish results, with tragic consequences for a number of unlucky defendants. I acknowledge too that Judge Cabranes, who was an exuberantly negative respondent among the twenty judges I polled, is an earnest and deeply troubled critic. Nevertheless, I think he and a fair number of other judges are mistaken in their proposal that the five-year-old system of Commission and guidelines should be scrapped and that we should return to the older days, if not quite biblical, when every well-intentioned judge was free to fix a sentence in the exercise of unruly discretion. Experience teaches, too,

13. Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L.J., Feb. 11, 1992, at 2.

14. *Chapman v. United States*, 111 S. Ct. 1919 (1991).

that tacking appellate review onto the old system did not and would not make an appreciable difference—though it was and would be better than nothing.

I offer a debatable analogy. Imagine a time when people got together and contrived to replace a benevolent dictator with a system of lawmaking by democratically elected legislators. Imagine then that the elected legislature proceeded to enact a raft of rotten laws as rules. Would you want to return to the benevolent dictator? Maybe. But most of us who live in these parts would say no.

Now I know the analogy is imperfect. But we lawyers spend our lives reasoning from one imperfect analogy to another, and the process at its best works tolerably well. The Sentencing Commission is not too utterly remote from the Congress. All its rules are subject to approval or veto or revision by the Congress. Like everything, that has its limits. Congress has sexier things to worry about than sentencing guidelines. That, after all, accounts for the use of a Commission in the first place. And so it goes.

In any event, fortunately in my view, there does not appear to be majority support for Judge Cabranes' abolitionist position. A second proposal, advanced by the Federal Courts Study Committee in 1990, would make the guidelines advisory rather than mandatory.¹⁵ This idea has had heavier support than abolition, but was ultimately rejected by the Judicial Conference. I think the Judicial Conference was right. Again, if we are to have meaningful rules of law to measure sentences—just as we have for measuring taxes and pension rights—they ought to be *rules*, not merely advice.

But that leaves the harder question of inflexibility, the subject of the wide complaints that have considerable merit. Some day, if and when we come closer to the vision of the ideal, the claim for more flexibility should cease to have merit. Under the statute as it stands, the top of a guidelines range can exceed the bottom by twenty-five percent. Discretion to order a sentence of anywhere from twelve to fifteen years looks ample—and more than ample. If the guidelines were more solidly formulated—including more factors that are now omitted, especially in mitigation, and leaving the escape valve for departures—there would be no good reason for additional flexibility.

But that may still be a distant future. Meanwhile, let's acknowledge that the young experiment calls for all the deliberation and dialogue we can muster. The judges on the firing line are the ones who will ultimately make or break this effort. Their pressures to depart below the guidelines should be received more hospitably, at least for the long time being, by both the Commission and the appellate courts. As I have mentioned, and as scholars have noticed, the courts of appeals have been notably narrow in their allowance of departures. That may be the right approach some day, but it is highly doubtful just now. Both the Commission and the courts of appeals should be responding more

15. FEDERAL COURTS STUDY COMM., *supra* note 6, at 135-36.

positively to the pressures from trial judges to increase their authority to mitigate.

As a compromise, my suggestion is ultimately that the power to depart *below the guidelines* ought to be more generously measured, certainly in these early years of the experiment. There is an ancient principle—not yet overruled, and I hope never to be overruled—that doubts in matters of criminal law ought to be resolved with a disposition toward lenity. That disposition is not rampant these days—with all the voices in the streets and on the bench shouting for the death penalty and other useless weapons in the war on crime.¹⁶ But it remains a fair and appropriate legal principle for the dark subject of crime and punishment. Mitigating departures ought to be presumed to be valid.

I cannot help mentioning at the end that the Commission has done little or nothing about the hardest problem of all: it has not advanced the education of Congress, or any of us, about what we mean to achieve, and what we may in fact achieve, as we continue to mete out long prison sentences. That may still be too tall an order for any person or group in our present state of ignorance. Still, the Commission ought to be helping us grope toward a philosophy. One hopes it will embark soon on that effort.

But for now we ought at least to keep in mind the pervasiveness of our ignorance. We still scarcely know what we're doing, or why we're doing it, when we inflict punishment for crime. We are certainly far from agreement on what we *claim* to be doing. In that light, we ought to remember that punishment is an evil, and that we mean to be doing the least possible harm. Statistics are worth mentioning again. We have over a million prisoners and the highest crime rate in the Western world. The Commission, the courts, and the scholars, working together, can improve our statistics and move us toward a civilized law of sentencing. I wish you all creative success and satisfaction in undertaking to contribute to that effort.

16. Shortly after the session at which this address was delivered, the Supreme Court quelled some of my pessimism by reaffirming the principle of lenity—and in a sentencing context at that. Though there was some disagreement as to the scope and application of the principle, it was broadly reaffirmed. *United States v. R.L.C.*, 60 U.S.L.W. 4234, 4238 (U.S. Mar. 24, 1992) (plurality opinion); *id.* at 4239-40 (Scalia, J., concurring, joined by Kennedy & Thomas, JJ.).

