

PANEL REMARKS

SENTENCING GUIDELINES: WHERE WE ARE AND HOW WE GOT HERE

JOSÉ A. CABRANES*

It is my great pleasure to preside at this morning's discussion and to make brief introductory comments on sentencing in the federal courts.

The Federal Sentencing Guidelines were created in response to some real inadequacies of the federal criminal justice system. The Sentencing Reform Act of 1984 sought to bring consistency, coherence, and accountability to a sentencing regime deficient in all of these respects.

By consistency, I mean treating like offenders alike. By coherence and accountability, I mean a reasoned system of sentencing, in which judges must explain sentencing decisions with reference to common standards and principles. The means by which the Sentencing Reform Act would achieve these goals were three-fold: first, sentencing guidelines promulgated by an independent commission; second, appellate review of sentencing decisions; and third, abolition of early release or "parole."

In my view, appellate review was an important and genuine accomplishment of the Sentencing Reform Act. Every other important decision by the trial courts is subject to review, at least on an abuse of discretion basis. Why not sentencing?

But the statute did not stop with appellate review. It simultaneously created a commission that could be—and until now has been—composed largely of non-judges and charged that commission with developing and

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implementing a system of complex sentencing rules that would largely supplant the sentencing discretion historically exercised by federal judges.

The question before us today is not whether this system is better or worse than the system of unguided judicial discretion that it replaced. I think that issue is now effectively off the table. The question is whether the present system should be modified or reformed to achieve greater coherence, consistency, accountability, and ultimately, a higher level of justice.

KATE STITH*

The title of our panel is, "Where We Are and How we Got Here." My task is to explain "how we got here," while the rest of the panel will explore where we are—that is, how well or poorly the federal guidelines system is working. The last panel of the day, of course, is "Where Should We Go From Here?" Inevitably, that question is going to be addressed, explicitly or implicitly, throughout the day.

Senator Kennedy introduced in 1977 the bill that would become the Sentencing Reform Act of 1984.¹ Its intellectual progenitor was Marvin E. Frankel, a distinguished federal judge in New York, who, in the early 1970s, had written a scathing attack on judicial sentencing discretion.² Frankel and other liberal reformers conceived of this first version of the Sentencing Reform Act as an anti-imprisonment and anti-discrimination measure. An adjunct to federal criminal code reform, the 1977 bill directed sentencing authorities to consider mitigating or aggravating personal characteristics of the defendant, encouraged alternatives to imprisonment, and recognized significant judicial discretion to depart from administrative sentencing guidelines.³

Senator Kennedy reintroduced his bill in each of the next four Congresses.⁴ As the mood and concerns of the country changed, so did the provisions of this bill. Senator Strom Thurman became a co-sponsor and later on so did Senators Hatch and Biden.⁵ The bill was ultimately enacted in 1984 as part of an

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1. S. 1437, 95th CONG., 1st SESS. (1977).

2. See generally MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

3. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 237-51 (1993).

4. *Id.* at 257-66.

5. Comprehensive Crime Control Act, S. 1762 (98th Cong., 2nd Sess.), Pub. L. No. 98-473, 98 Stat. 1987 (1984).

important criminal measure which included, in other provisions, significant mandatory minimum statutory sentences. Over the course of the four Congresses, the sources of plasticity in the early bill dissipated.

Whatever the early proponents of the Federal Sentencing Guidelines may have expected, the ultimate sponsors of the legislation clearly desired guidelines that were largely binding and sentences that were harsher than past practice. Many provisions of the statutes strongly encouraged certain policy choices that the first Sentencing Commission made, including its deviation from past sentencing practice for most crimes and its determination to issue detailed guidelines.

Since this conference will also consider state sentencing guidelines, it is worth mentioning that the transformation of Senator Kennedy's bill on the federal level is similar to what happened to state criminal justice legislation during these years. One political scientist who studied several states including California and Illinois, described the evolution of sentencing bills during this time as follows: "Due process liberals" initially sought to entice "law and order conservatives" to join with them on the theory that conservatives were equally dissatisfied with the regime of sentencing discretion, albeit for different reasons.⁶

The enticement worked, compromises were made, and in the end, the liberals were hoisted on their own petard. The new sentencing regimes were more responsive to a concern with overly lenient sentences by soft-hearted judges than they were to due process concerns or overall sentencing disparities. Whatever one's view of the wisdom of the Sentencing Reform Act of 1984, the guidelines that were promulgated in 1987, which continue in their essential structure today, are generally consistent with the terms of that statute and with its legislative history.

At the same time, however, the Sentencing Reform Act could have been implemented differently. Today's newly appointed Commission has statutory authority to implement the Sentencing Reform Act with less rigidity, less complexity, and a significantly larger nod to the exercise of guided judicial discretion supplemented with appellate review.⁷ Specifically, the Commission is not statutorily compelled (1) to implement such an expansive concept of "real offense" sentencing, (2) to incorporate statutory, mandatory minimum sentences in the way that the current guidelines do, or (3) to require a motion from the government before a court may depart downward for substantial assistance to law enforcement authorities.⁸ And, certainly, the Commission is

6. See Jonathan D. Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U. ILL. L. REV. 231, 236-37; U.S. DEPARTMENT OF JUSTICE, THE IMPLEMENTATION OF THE CALIFORNIA DETERMINANT SENTENCING LAW 24, 29, 31, 45-46 (May 1982).

7. See generally 28 U.S.C. § 994 (1999).

8. See *id.*

not required to proclaim that most individual characteristics of defendants are largely irrelevant to sentencing.⁹

Having recounted, however briefly, "how we got here," let me end my initial remarks by describing in very general terms some broader and important features of the Guidelines.

It seems to me there are three fundamental characteristics of the Federal Sentencing Guidelines which, when taken together, are of great significance not just for criminal sentencing but for the entire system of federal criminal law.

First, we have to understand that the Federal Sentencing Guidelines are not in any sense advisory. They are binding, mandatory rules which may be departed from only pursuant to the rules themselves.

Second, these rules are not determined by elected representatives through the process of legislation, but instead are promulgated by a central bureaucratic agency.

Third, the rules take into account an enormously wide variety of criminal conduct beyond the statutory elements of the offense of conviction.

Putting these three features together means that the Guidelines effectively operate as a criminal code in their own right, supplementing statutory criminal prohibitions. This is a significant change in our common-law tradition.

There are two especially striking aspects of *this* criminal code, as opposed to the federal criminal law of the preceding 200 years. First, this code is remarkably complex. As a practical matter, I wonder whether much of the complexity and detail of the Guidelines is necessary or helpful to the participants in criminal sentencing.

Second, this code is, formally at least, a closed system. I suspect that *actual* criminal sentencing is far more porous than the Guidelines would admit. Surely the Guidelines do not openly acknowledge the extent to which the formal demands of law are inevitably tempered in implementation. I venture to hypothesize that in many cases, in many districts of the country, the formal requirements of the Guidelines are met only on paper, not in reality, because to a large extent the Guidelines have driven underground the adversarial bargaining process and sentencing judges' own efforts to ensure a just sentence.

I hope that the new Commission will thoughtfully reconsider both the complexity and the rigidity of the present Federal Sentencing Guidelines. The

9. See 28 U.S.C. § 994(d) (1994)(stating that the Sentencing Commission may consider age, education, vocational skill, mental and emotional condition, physical condition, employment record, family ties, part played in the crime, criminal history, and "degree of dependence upon criminal activity for a livelihood" in establishing categories of defendants for sentencing purposes).

rule of law cannot prevail unless it is open to the possibility of correction, adjustment, and more complete justice.

JAY P. MCCLOSKEY*

Let me start out by saying that in the District of Maine, where I have been United States Attorney for seven years and an Assistant U.S. Attorney for thirteen years, that we do, in fact, meet the standards of the Guidelines and rarely deviate from the strictures of the Guidelines as found in this little brown book. At least in the District of Maine, there are exceptions, but there are relatively few.

Kate Stith had asked me to speak on the role of the prosecutor pre-Guidelines and post-Guidelines and I think I will start out by briefly summarizing those differences. Prior to the Guidelines, under the old system, prosecutors had discretion to charge the most appropriate offense, to negotiate plea agreements, and to make sentence recommendations that reflected their judgment of the serious and specific facts of the criminal conduct, taking into account the goals of punishment, general and specific deterrence, protection of the public, and rehabilitation of the defendant.

The judges in that system had the discretion to sentence anywhere within the statutory range. Although as we approached 1987, an increasing number of minimum mandatory sentences had started to erode the judges' discretion on sentencing.

Appeals of sentence were relatively uncommon. And prosecutors under the old system spent very little time on sentencing issues, preparing for sentencing, and certainly on sentencing appeals. That is the way it worked from a prosecutor's prospective under the old system.

Under the Guideline System, beginning in November of 1987, this all changed. Prosecutors now spend a great deal of time on sentencing issues, preparing for sentencing, and goodness knows on sentencing appeals. Now, under the Sentencing Guidelines, if the prosecutors are doing it right, they have a responsibility to assure that their charging and plea bargaining decisions do not undermine the Sentencing Reform Act.

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Pursuant to the Justice Department Policy set forth in the United States Attorney's Manual, federal prosecutors should charge the most serious offense that is consistent with the defendant's conduct and is likely to result in a sustainable conviction. They should seek a plea to the most readily provable charge under that first prescription, and prosecutors are not free to recommend or agree to a sentence that is outside the applicable guideline range unless it is based on an appropriate departure from the Guidelines. Prosecutors are supposed to stipulate only to facts that accurately reflect the defendant's conduct, and they should provide all reasonably relevant information to the probation office, who is supposed to check the prosecutor in terms of what is the appropriate guideline.

Department of Justice policy also provides that there must be supervisory approval, either by the United States Attorney, which I do in my office for negotiated pleas, or a Criminal Chief or Division Chief. Every single plea that is negotiated in my office, I approve and sign off on. A decision to drop readily provable charges must also be approved at the supervisory level, obviously in larger offices it is not the United States Attorney, but it might be the Criminal Chief or a Division Chief. But if you are going to drop, for example, a 924C charge, it has to be approved at the supervisory level. Contrary to the position of the *Washington Post*, which accused me of dropping gun charges, we do not do that in the District of Maine.¹

If you, as a prosecutor, are going to seek a departure outside Chapter 5, you need supervisory approval. And if you are going to move for a substantial assistance departure, there is a DOJ policy that says the individual assistant cannot do that without supervisory approval.²

There are exceptions to these rules as far as DOJ policy goes. The United States Attorney's Manual provides that, for example, if there were a strain on office resources and proceeding to trial would significantly reduce the number of cases in your office, then you could make exceptions to these rules.

When I came in as U.S. Attorney in 1993, I had a conversation with the Attorney General that ultimately resulted several months later in what is known as the Reno Amendment, which also provides for DOJ policy that allows a prosecutor to make exceptions to the general policy that I just set forth. The Reno Amendment provides:

It should be emphasized that charging decisions and plea agreements should reflect adherence to the sentencing guidelines. However, a faithful and honest application of the sentencing guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized

1. See Mary Pat Flaherty & Roberto Suro, *Reno Criticizes Manipulation of U.S. Sentencing Guidelines*, WASH. POST, Oct. 11, 1996, at A4.

2. Memorandum from Janet Reno, Attorney General, to Holders of U.S. Attorneys' Manual, Title 9 (Oct. 12, 1993), reprinted in 6 FED. SENTENCING REP. 352 (1994).

assessment of the extent to which particular charges fit the specific circumstances of the case are consistent with the purposes of the federal criminal code and maximize the impact of federal resources on crime.³

So, the Reno Amendment allows prosecutors, in certain cases, to make exceptions to what the Guidelines might otherwise require. But the Reno Amendment also provided that in order to do this, the prosecutor again had to get supervisory approval and that the approval had to be documented and made part of the record, so that, to assure consistency and accountability, charging and plea agreement decisions must be made at the appropriate level of responsibility and documented with an appropriate record of the factors applied.⁴

The way that it is supposed to work is that in some instances, under the Reno Amendment, the prosecutor could get an exception to following the Guidelines – say, not charging the highest provable offense – and charge somebody in such a way that the sentence ultimately arrived at is more appropriate for that particular person's role in the conspiracy or role with respect to that particular conduct. This is, I think, what prosecutors were generally concerned about. That is, prosecutors were concerned about the way drug offenses brought very high levels of incarceration, which in certain instances might not be justified.

So, generally speaking, prosecutors had unlimited discretion prior to the Guidelines to charge as they saw fit, to plea bargain as they saw fit, and to make sentencing recommendations as they saw fit.

Under the Guidelines, that role has been greatly restricted but, at least as I read it, there are exceptions to those rules which allow you to fit the particular circumstances of that conduct into a guideline that is more appropriate for that defendant.

3. *Id.*

4. *Id.*

MICHAEL GOLDSMITH*

I want to start by responding to a question that was put to me before the panel began this morning. Someone asked me whether I was bitter over the fact that I was not reappointed to the Commission. Apparently, based on my performance, the Democrats thought that I was far too conservative and the Republicans thought that I was way too liberal. Consequently, I made no one happy, and so here I sit.

Let me acknowledge at the outset that the Guidelines certainly have not been popular. Indeed, recently I did a Lexis search of articles on the Sentencing Guidelines. More than 600 have been written and very few have been favorable. Far more common than any favorable articles are those with titles that contain terms such as, "failure," "mess," "unacceptable," "death," "disease," and "flawed." Judge Cabranes certainly characterized them as a dismissal failure.

Not to be discouraged, I conducted a Westlaw search looking for articles whose terms combined the words "guidelines" and "love." Now you may laugh, but this triggered one response by former commission staffer, now Professor of Law, Frank Bowman. Encouraged by this response, I then searched Westlaw combining the terms "guidelines" and "cheer." This, too, produced a single response, "One Cheer for the Guidelines" by Federal Judge Stewart Dallzell from the Eastern District of Pennsylvania. I was, however, unable to find any other articles entitled two cheers or more cheers for the Guidelines.

The Guidelines certainly have not been popular among the bench or among the academic community. At the same time, I think it is important to recognize that, before the Guidelines were implemented, many defendants trembled at the thought that the law is what the judge had for breakfast.

Certain culinary items suggested light sentences geared toward ehabilitation. For example, eggs over easy, instant oatmeal, Sweet 'n Low,

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Lucky Charms, and Cheerios. But others evoked images of harsher treatment of retribution, deterrence, and incapacitation. For example, hard-boiled eggs, bacon – extra crisp, and especially, Total, Life, or any type of toast. And of course, if the judge had dined on waffles or Fruit Loops, as often seem to be the case, then all bets were off.

So Congress responded to this problem by enacting the Sentencing Guidelines. It is true, as Kate Stith says, that the Guidelines really are not guidelines, they are mandatory in many respects. They are not nearly as tough as mandatory minimums that the Congress has implemented in recent years, however, and I think these mandatory minimums are the source of many of the overly severe sentences that we see in the criminal justice system.

By way of background, I should tell you that when I was appointed to the Commission, I did not offer myself as an expert on sentencing in general or the Guidelines in particular. And in fact, as a practitioner in my consulting practice, prior to my appointment, I more or less specialized in trying to avoid the application of the Guidelines. I found that one way of doing this was by getting my clients, on occasion, to plead guilty to pre-Guideline felonies. So, I would arrive at an arbitrary date before the enactment of the Guidelines, plead the client guilty to a crime committed during that time period, and then the court would have complete discretion. That became a diminishing area of specialty as time went by. But nevertheless, I did whatever I could to avoid the impact of the Guidelines.

I did not try to sell myself as a Guidelines expert. Instead, when I met with those in the administration interviewing me, I essentially said that I was offering a fresh perspective on this. I offered a clean slate in a sense.

In any event, with that in mind, when I was finally appointed I really approached the Guidelines with an open mind and I was surprised. Many of the criticisms that I had read and heard about I felt were over-stated. I did not necessarily reach that conclusion after a month or two on the Commission, but certainly after four years on the Commission I had come to believe that the Guidelines work and that they work quite well.

And indeed, I think in support of that notion, I could cite to a poll conducted by the Federal Judicial Center, a poll of federal judges asking the judges -- among other things -- to evaluate guideline sentencing on a one to five scale with “five” being sentences that are overly severe, “one” being sentences being too light, and “three” being essentially a perfect sentence or as close to perfect as you can achieve. Several hundred federal judges responded to the survey and the mean response of guidelines sentences, in their view, was 3.05. So whatever criticisms we have of the guideline system, fairness of sentence is not a criticism in the eyes of federal judges. And this comes from a group that has been traditionally very critical of the Guidelines for taking away their discretion.

I do not want to get into a long debate about the merits of the Guidelines system at this point. I think that it is true that in the early days of the Guidelines, the first commission focused on those provisions in the statute that had been put there by the “law and order conservatives” and used those provisions to impose sentences that were very severe and also to constrain judicial discretion.

I felt, frankly, that the mandate of the Conaboy Commission was quite different and I can tell you that the Conaboy Commission struggled with ways to return some discretion to the judges. An earlier panelist suggested that the Guidelines really have not been structured in a manner designed to confer additional discretion to the court, and that that could be done by the Sentencing Commission. Well, I think that the Commission, at least between 1994 and 1998, would have been eager to come up with ways to return discretion to the judges in a manner afforded by the statute itself. The difficulty was that the Sentencing Reform Act contained so many constraints that the commission is limited obviously by those constraints and was, therefore, not in a position to return additional discretion to the judges more than it did.

The Conaboy Commission viewed the Guidelines as appropriate and useful. At the same time, I think it is fair to say, that while the Commission did not want to let a judge place his or her thumb on the scales of justice—maybe a pinky was acceptable—something to return some discretion to the court. Indeed, on one occasion, when we met with Senator Hatch, he essentially said to us, “Find some way to give the court some more discretion.” And this coming from a man who, I think it is fair to say, has been skeptical of federal judges’ tendency to impose sentences which he has viewed as being unduly short.

So I think that the Commission has been criticized for not returning discretion in the face of real efforts, by at least the most recent Commission, to do exactly that. The Commission has tried to return discretion and also, frankly, to fight off efforts by the Congress to impose additional mandatory minimums. These minimums have taken the form of legislative directives to the Commission telling it exactly what offense levels to establish for certain offenses rather than letting the Commission itself make an independent determination of what the sentences ought to be.

There was a very big change in the composition of the Commission when the Conaboy group came on and I think they honestly wanted to come up with an approach that was fair and that we would give the courts more discretion to impose appropriate sentences.

The principal difficulty encountered by the Conaboy Commission, which explains in large part why the Commission is where it is today, occurred with our first major policy matter that we addressed in 1995. That matter involved the crack-cocaine policy. The Commission issued a report at the time, unanimously criticizing the 100-to-1, quantity-based ratio between crack and

powder cocaine, under which crack penalties were much more severe than powder penalties.

In the aftermath of that report, the Commission voted 4-to-3 to return the quantity-based ratio from 100-to-1 to 1-to-1, thereby drastically reducing penalties for crack-cocaine.

In the face of that vote, in a tight 4-to-3 split (I voted with the dissenters), as you might expect, a very conservative Congress rejected that proposal. And it was a rejection that was not just something that occurred as a matter of law, but as a matter of politics. That rejection constituted a severe rebuff of the Sentencing Commission. Congress no longer trusted the Commission. Frankly, it felt that, if the majority of the Commission could vote to reduce crack penalties to such an extent, the Commission was goofy. And in the aftermath of that vote, the Commission would have to spend considerable efforts trying to re-win the trust of Congress.

I am not sure that it ever succeeded, and indeed I believe that the difficulties that Congress had in installing a new set of commissioners occurred in part because Congress did not trust the Commission. Congress does not even want the Commission, necessarily. They would like to simply have a Commission so that they can say that there is an independent agency, but whenever possible they would like to issue legislative directives telling this group what level to set certain sentencing guidelines.

So, the task facing the new Commission is to rebuild trust with the Congress and to rebuild trust with the criminal justice community. Moreover, I think the word has to get out that the Guidelines, for all the criticism that has been leveled at them, are working rather well.

The federal judges view them to be fair, and beyond that, the Guidelines are not as complex or burdensome as they have been made out to be. When you actually sit and take the time to engage in the intolerable labor of thought, and you read the manual, you realize it is not all that complicated.

THE HONORABLE GERALD W. HEANEY*

The first sentencing institute that I went to was in 1967. And if I remember correctly it was at the site of one of the prisons, I think, in Colorado. At that time, the cry was that judges did not know what they were doing and that judges should give indeterminate sentences, and should leave to the prison authorities and the Parole Commission the decision as to how long an individual would serve under the indeterminate sentence. That was my first experience in the sentencing area.

We have come a long way since that time. Now, I think that I agree with what Michael Goldsmith said: that the principle objective of the Sentencing Guidelines was to eliminate what was categorized as unwarranted inter-judge disparity. Mr. Goldsmith observed that the sentence depended on what the judge had for breakfast.

I do not think that was the case, but even if it were, it is better to depend on what the judge had for breakfast than what the prosecutor had for breakfast. The prosecutor is a political appointee and the judge is a lifetime appointee who, it seems to me, has a greater concern for overall public interests than a prosecutor.

Now, what I want to talk about a little bit this morning is that I do not think that there is any impartial study that supports the view that sentencing disparity in the wider sense has either been eliminated or lessened. Supporters of the Sentencing Guidelines point to those studies that support the view that inter-judge disparity had been eliminated and there may be some merit to that.

My concern, however, is with the fact that these studies measure only one visible measure of sentencing disparity. They ignore the unwarranted disparities that either continue or have grown beyond the reviewable decisions of law enforcement officers, probation officers, and prosecutors.

I think we all know that the first stage of the criminal justice process occurs when the law enforcement officer on the street makes a decision as to who he is going to arrest and what he is going to arrest for. Then, in many instances, the officer also determines whether to refer this case to the state

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prosecutor or to refer it to the federal prosecutor. Often times that decision is based on what he thinks the ultimate outcome will be in the terms of length of sentence.

Now, if the matter is referred to a federal prosecutor, the prosecutor determines what to charge, when to charge, whether to enter into plea negotiations, and if so, the terms of the plea. We have reviewed literally hundreds of decisions since the Guidelines have been in effect and at least, from my view, having reviewed those decisions, I find that there is a good deal of disparity among the prosecutors as to what they charge, when to charge, and particularly who to charge. This is especially true when you have large conspiracy cases where the ring-leader, the person who is most responsible for the conspiracy, gets a lesser sentence than those who are well down the line. The ring-leader gets a lesser sentence because he was the first to realize that if he went to the prosecutor and gave the prosecutor all the information that he or she had, then providing information would result in a lesser sentence. Those well down the line get a longer sentence, however.

I think that one of the first things that we need to do if are going to revise the Sentencing Guidelines is to undertake a comprehensive study to determine the impact of the Guidelines at every stage. This is difficult and will be expensive and time-consuming. I did it with respect to four districts in our circuit and you can read what the results of that were in my article entitled *The Reality of Guidelines Sentencing: No End to Disparity*.¹ I found on the basis of that study that the disparities were at least as great after the Guidelines as they were before; they only appeared at a different level.²

In order to undertake this kind of a study, what you have to do is take a relatively representative group of cases from selected districts in the United States and go back to the original arrest and follow that all the way through to determine whether, in fact, we have really eliminated disparity or whether disparity continues at the levels that it had been before.

I have debated this issue on a few occasions before and the answer to my argument has been that the prosecutors have always had the authority to determine who to charge, when to charge, and what to charge. The prosecutors always did have this authority, but the authority was different early on. At that time, their decisions did not necessarily determine the end result because you had a judge who had to review these decisions – a judge who was insulated from the pressures of public criticism by a lifetime appointment.

Rather than eliminate disparity, I think that the principle effects of the Sentencing Guidelines have been two-fold. First, as I have mentioned, the Guidelines enhance the discretion of law enforcement officers, prosecutors, and probation officers in the sentencing process and diminish the discretion of

1. 28 AM. CRIM. L. REV. 161 (1991).

2. *Id.* at 187-90.

the district judge. Perhaps most importantly, they confine many more offenders to prison for longer periods of time.

You can debate whether this is bad or not, but the facts are that our federal prison population has increased from about 43,000 in 1987, when the Guidelines were approved, to about 106,000 in 1998, and since that time have grown significantly.³ During this same period, the average sentence has increased by more than two-and-a-half years. These increases, as those who are practitioners know, have been driven by three factors: (1) the dramatic increase in sentencing for drug offenders, particularly crack-cocaine, (2) the mandatory minimum sentences for violent offenders and persistent drug offenders and importantly, (3) the elimination of probation as an option for non-violent, first-time drug offenders.

Now this is one thing that I have never been able to understand. Every study that has been conducted – whether it is a study that Judge Thomas Eisele conducted over a period of ten years in Arkansas where he followed up every person that he had placed on probation, or the studies of the parole commission itself – have concluded that first-time drug offenders who have been imprisoned are five times more likely to recidivate than comparable offenders placed on probation. These first-time drug offenders represent a huge percentage of the young, black males who are now serving time in our federal prisons.

As the raw numbers of federal prisoners has increased, so too has the percentage of black male inmates. They now represent approximately 40% of the Nation's federal prison population, even though they only represent 12% of our population.⁴ I think that statistic cries out for a careful study to determine why that is so. My view is it has been largely driven by the number of young, black males who have been convicted of possession with intent to distribute crack-cocaine. Drug offenders, as you now know, represent 60% of all inmates in federal prisons and black males constitute more than 45% of those confined for those offenses.⁵

It is only a matter of a few years until the Congress of the United States is going to take a look at one aspect of this problem: the huge number of aging inmates. Now, it may not come during my lifetime, but you can be sure that within a very few years you are either going to have Congressional legislation or other action which will say that when inmates reach a certain age, if there is a finding by the prison authorities that they are not a danger to the community, those prisoners will be released. It is not going to have anything to do with

3. FEDERAL BUREAU OF PRISONS, QUICK FACTS (2000).

4. *Id.* See also U.S. Census Bureau, *Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin* (released Dec. 23, 1999) <<http://www.census.gov/population/estimates/nation/intfile3-1.txt>>.

5. See FEDERAL BUREAU OF PRISONS, QUICK FACTS (2000).

whether this is wise; but it is rather a cost matter. And so we send those men and women, mostly men, back to the state where they become wards of the state and move on to our welfare system or become homeless.

In closing, I certainly do not share the view that discretion should be eliminated from the sentencing process. As long as you have human beings dealing with other human beings, there is going to have to be some discretion in the system and the question is: to what extent should the various players in the system exercise discretion.

Realistically, it will always be shared. In my view, however, the judge, the true neutral in the sentencing process, must be given more discretion than he or she has under the Guidelines as currently written.

THOMAS HUTCHISON*

Let me start off by saying that before the Sentencing Reform Act took effect nearly half of all offenders sentenced had their punishment determined by a guideline system that took into account their criminal history and the severity of the offense. It was a grid that is similar to, but not as complex as, the grid in the back of the Sentencing Guidelines book. That grid was administered by the United States Parole Commission. The effect of the Sentencing Reform Act was to move the guideline decision from the end of the punishment process to the beginning of the punishment process. There were consequences that flowed from that change and Judge Heaney has pointed out some of those consequences. There has been a shift in the relative power, for some of the participants in the system.¹

The Sentencing Reform Act was a delegation to the Sentencing Commission by Congress of congressional power over sentencing. Congress could enact guidelines, but I think that Congress wanted to distance itself from the process. For one thing, most members of Congress do not view themselves as being elected to sit down and go through pre-sentence reports to determine what sort of factors ought to go into imposing sentence. They want to focus on broad public policy issues. The Sentencing Committee was to be a body of experts who would fine tune and craft guidelines that were detailed and that were intellectually honest and consistent—tasks that Congress, itself, did not want to undertake.

Unfortunately, almost after enacting the Guidelines system, Congress made the task of the Commission more difficult by enacting mandatory

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1. Editor's note: See Judge Heaney's comments, 44 ST. LOUIS U. L.J. 398-401 (2000), in this issue.

minimums. That presented the Commission with some questions. In the drug area, where mandatory minimums are based on quantity? If the Commission is going to have a drug guideline for trafficking offenses that is based on quantity, does the Commission ignore entirely the Congressional views of severity as expressed in the mandatory minimums and craft guidelines that it thinks appropriate and let the mandatory minimums override the Guidelines if the Commission's view of severity does not coincide with Congress's view? Or does the Commission take the Congressional numbers and work them into the Guidelines? The consequences of the latter might be much higher sentences than the Sentencing Commission, left to its own devices, might have come up with.

Congress, over the years, not only proposed and frequently enacted mandatory minimums, but also has started to enact directives of varying sorts for the Commission. Some of the directives were general, for example, to consider certain factors. Some of them were far more particular, for example, to enhance by a certain number of levels for certain kinds of conduct. I think that Professor Goldsmith has correctly stated that one of the serious problems confronting the new Commission is its relationship with Congress.²

The relationship between the Commission and Congress is a two-way street. The leadership of both parties in both Houses has to be educated about how the Guidelines work and what the Commission is seeking to accomplish. And the leadership, on both sides of the aisle, in both Houses, has to be responsible and restrain some of the more hot-headed members of the body from enacting laws that are not sound public policy.

I think that Commissioner Goldsmith is correct that the crack episode damaged the Commission's credibility with the Hill and that relationship is going to have to be repaired.

I do not share Professor Goldsmith's view, however, of how judges made sentencing decisions before the Guidelines came into effect. I do not think the freakish way that he described was typical. In fact, I think, it was just the opposite.

Judges were thoughtful in their imposition of sentences. But, I think it also undeniable, and certainly Congress found it undeniable, that the result of having – at the time the Sentencing Reform Act was passed and enacted into law – over 500 independent decision-makers led to what Judge Heaney has called “inter-judge disparity.”³ Congress was interested in eliminating that disparity but not in eliminating discretion entirely. Congress wanted to leave some room for discretion, and the issue is how much room has been left. I

2. Editor's note: *See* Professor Goldsmith's comments, 44 ST. LOUIS U. L.J. 394, 397 (2000), in this issue.

3. Editor's note: *See* Judge Heaney's comments, 44 ST. LOUIS U. L.J. 398, 398 (2000), in this issue.

think the early Commission was perceived as wanting to discourage departures. Every time a court would depart, it seemed, there would be a proposed amendment addressing that departure ground and saying it was no longer a basis for departure.

If the new Commission wants to encourage judicial discretion and to give greater room for judges to exercise judgment (as Judge Heaney points out, judges are appointed for lifetime and given a great deal of power), the Commission ought to be encouraged.

I was not encouraged to hear Mr. McCloskey's description of prosecutorial discretion when he said his office rarely deviates from the strictures of the Guidelines.⁴ To me that is not the exercise of discretion; that is the antithesis of discretion. To say that there is no gun case that could ever arise in his district that would not be something that you would plea bargain over means, to me, that you are not exercising discretion, but you are declining to exercise discretion.

My bottom line is that the Commission's first task is to repair its relations with Congress so that Congress can be educated into more constructive modes of legislating in the crime area rather than in some of the directions it has gone in the past.

4. Editor's note: *See* Mr. McCloskey's comments, 44 ST. LOUIS U. L.J. 391, 391 (2000), in this issue.

FRANK O. BOWMAN, III*

The Federal Sentencing Guidelines were created with two broad goals in mind. One, of course, was to reduce unjustified sentencing disparity, and that was accomplished in two ways. The first was to reduce the scope of front-end judicial discretion through the creation of guidelines. The second, which I think Tom Hutchison touched on,¹ was to eliminate altogether the discretion of penological experts in the parole commission at the back end of the punishment process.

The second, and quite express goal of both the Congress and the Commission in enacting the Sentencing Reform Act and subsequent Guidelines was to raise penalties in two areas. The most obvious and most often discussed being drug-related crime, and the second being white-collar crime. I am not going to talk about white-collar sentences today other than to say that, in my own view, the impetus to raise white collar sentences over their historical levels was a good idea. Indeed, I think a strong argument could be made that even under the Guidelines white-collar sentences are often, if not always, still too low.

In any event, the interaction of these two objectives, reducing disparity and raising sentences in these two areas, created a remarkable system, which, in many ways has worked rather well. I may be one of the few academics in America who likes the Guidelines, but I think that, when viewed dispassionately, the Guidelines were and remain a remarkable, if imperfect, achievement. Even so, I think the second goal of the Guidelines, raising sentences, has in many ways frustrated the first goal, which is to reduce disparity.

An old girlfriend of mine had a favorite expression: "Let's speak the truth and shame the Devil." Let's do that. The simple truth is—and I say this as a

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1. Editor's note: See Mr. Hutchison's comments, 44 ST. LOUIS U. L.J. 402, 402 (2000), in this issue.

career prosecutor before I came to the academy—drug sentences, or at least many drug sentences, are too dang high. I say that not as somebody who is in favor of legalizing drugs. I say that as somebody who spent a long time as an Assistant U.S. Attorney in Miami. I prosecuted a lot of people for dope and put them in prison and did so with a sense of profound satisfaction. But the fact is that many drug sentences are too high. It is possible to justify such sentences on moral grounds on the claim that anyone who engages for profit in the drug trade is deserving of retribution at a very high level. But even if you take that view, if you look at the other goals of sentencing, the utilitarian goals of sentencing that have to do with deterrence or incapacitation, the level of many sentences that we impose for drugs under the federal guidelines simply can not be justified.

Not only is that true in the abstract, and from the personal perspective of the defendants who have to serve these sentences, but high drug sentences have some very important systemic effects on the guideline system. These systemic effects are numerous. We do not have time to discuss them all. I want to touch on only two.

The first of them is that because drug sentences are so very high, a system which actually gives a fair amount of sentencing discretion to judges in the abstract turns out to be a system, that as it is really applied, does not *feel* to judges like it gives them any real discretion. There are lots of reasons why this is true, but the most obvious one is this: the Guidelines create a system in which the top of any guideline sentencing range is twenty-five percent higher than the bottom. Now twenty-five percent of the sentence is, in theory, a pretty big range within which judicial discretion could roam. The problem, at least in the drug area, is that the sentences generated by the Guidelines are so high that judges are rarely going to give anything other than the bottom of the range. Therefore, a system which nominally says to the judge, “You’ve got the same amount of discretion that you had before the Guidelines to set twenty-five percent of this sentence,” makes judges feel that they do not have any discretion at all.

The other distorting effect of high drug sentences is that they distort the behavior of other non-judicial actors in the system. I particularly want to mention how high drug sentences tend to distort the behavior of prosecutors. Now, I disagree with much that Judge Heaney has said about prosecutors and their role. I do not take anywhere near as dim a view of the actions and the role of prosecutors in the current system as he does. But I would agree with him to this extent: it is certainly true that prosecutors are in many ways the central actors in the Guidelines system. Prosecutors are central actors in the system because the system presumes that they will act as the fair and honest stewards of this system. This means that the prosecutors will not cheat, and they will actually follow the nominal policies set out by the Department of

Justice and not fudge. It means that they will not fact bargain – they will not fool around outside the rules.

The trouble is, of course, that there are a lot of incentives for prosecutors to want to bend the rules. The incentives derive in part from the fact that prosecutors have their own case management problems and that they sometimes have weak cases. There are all kinds of reasons why prosecutors may not want to follow the letter of the Guidelines system, including the sense that, as Jay McCloskey said, sometimes sentences are too high and prosecutors want to mitigate them.

Therefore, you have a situation where sentences for drugs are very high and, at the same time, prosecutors have a bunch of competing reasons why they may want to fudge a little bit. When the sentences are so high, there is no reason for prosecutors to defend every lineament of the system because they know that even if they fudge – even if they fudge a lot – the defendant is still going to be doing a whole bunch of time. Therefore, there is no reason for prosecutors to fight hard to hold the system together, to hold everybody's nose to the grindstone. Sentences that are too high remove prosecutors' incentives to perform the role that the system demands they perform.

The result is, I think, that the Federal Sentencing Guidelines are not working as designed. In hundreds of ways all of the actors in the system are circumventing them. And I think there is some statistical evidence to suggest that. Departure rates are climbing. U.S. Sentencing Commission statistics show, for example, that over the last five years, the overall departure rate has been climbing by about one percent a year.² About twenty percent of all cases in the federal system involve a substantial assistance departure,³ and in some districts such as the District of Arizona, non-substantial-assistance departures are as high as sixty-one percent.⁴ Those are only the overt ways in which people are moving around the system. There are all kinds of covert ways as well. There is an awful lot of maneuvering going on.

A lot of discretionary maneuvering at every level by all actors, both inside and outside the nominal parameters of the system, poses some interesting problems, both for the defenders of the system – people like me – and for the severe critics of the system. For the defenders of the system, the question becomes: How do you justify or defend a system designed, at least in part, to prevent disparity in which disparity is concededly present? All kinds of disparities are happening out there. How do you defend a system when it is not meeting its described goal?

2. UNITED STATES SENTENCING COMMISSION, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 51, Fig. G (1999).

3. *Id.*

4. *Id.* at 55, tbl. 26.

For the critics of the system, on the other hand, the pervasiveness of discretionary manipulation of Guidelines rules presents another sort of dissonance that I think they have not adequately dealt with. That is, when your complaint is that the system is too rigid – that there is not enough exercise of discretion – what do you say about the fact that the system is actually evolving towards one in which there is all kinds of play at the joints, both formally and informally? This, I think, is the central dilemma that the new Commission faces. How do you deal with a system that does not operate as it is described to operate? What do we do about a system that is devolving from one that is supposed to be very, very tightly jointed into one that is much more loosely jointed? Is that a good thing? Is that a bad thing? Indeed, given that many of the mechanisms, local understandings, and evasive maneuvers now prevalent across the country exist in the form they do precisely in order to remain below the surface of the record, how does one even accurately describe the system as it now exists? And once having described it, what should we do about it?