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Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines (Sentencing Symposium)

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**FEAR OF LAW:
THOUGHTS ON *FEAR OF JUDGING* AND THE STATE OF THE
FEDERAL SENTENCING GUIDELINES**

FRANK O. BOWMAN, III*

I have gained this by philosophy:
that I do without being ordered what some do only from fear of the law.
Aristotle¹

I. PREAMBLE

In early November 1999, I dropped into the offices of the United States Sentencing Commission to visit friends and former colleagues. As I chatted my way around the building, I was struck by one recurring motif—on the desk of virtually every office sat a copy of *Fear of Judging*, the vigorous critique of the Federal Sentencing Guidelines by two eminent authors, Professor Kate Stith of Yale Law School and Judge José A. Cabranes of the United States Court of Appeals for the Second Circuit.² Now it may be that I just happened to stop by on the day a box of complimentary copies was delivered to the Commission, but I am inclined to think that the book was on so many desks because *Fear of Judging* has been so widely discussed and so generally well-received in the federal criminal law community. Since my visit to the Commission, the happy accident of my inclusion on a panel at the St. Louis University Sentencing Guidelines Conference moderated by Judge Cabranes and including Professor Stith provided the impetus for a project I had been meaning to undertake for some time – draw together some thoughts about their influential book and about the future of the federal experiment with sentencing guidelines.

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1. DIOGENES LAERTIUS, LIVES OF EMINENT PHILOSOPHERS 463 (R.D. Hicks trans., Howard Univ. Press 1942).

2. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

At the outset, let me lay my cards on the table. I disagree, sometimes quite sharply, with a great deal of what Professor Stith and Judge Cabranes have to say in *Fear of Judging*. I think they take an unsupportably absolutist position in favor of judicial hegemony over federal criminal sentencing. I also think that many of their specific criticisms of the Federal Sentencing Guidelines are unpersuasive, and that their overall dismissal of the Guidelines as a failure is wrong. At worst, the Guidelines are a predictably flawed work-in-progress and a notable improvement over the system they replaced. All that having been said, the warm reception the book has received is well-deserved. It places between two covers a wealth of historical information and policy discussion. Its criticisms of the Guidelines regime (even those with which I cannot agree) are powerfully argued. And the book concludes with a series of suggestions for reform, some of which are worthy of adoption, and all of which require respectful attention.

To understand *Fear of Judging* and the debate over the Federal Sentencing Guidelines requires some familiarity with the sentencing reform movement that led to the adoption of the Federal Sentencing Guidelines in 1987, as well as at least a rudimentary grasp of the structure of the Guidelines themselves.³ For those readers who require an introduction to both subjects, the next section of this Article attempts to provide one. Those already familiar with the Guidelines and their history can skip to Section III, where the discussion of *Fear of Judging* begins in earnest.

II. A BRIEF INTRODUCTION TO THE FEDERAL SENTENCING GUIDELINES

A. *Federal Sentencing Before the Guidelines*

For most of the Twentieth Century prior to the Sentencing Reform Act of 1984 (the “SRA”),⁴ the rehabilitative⁵ or “medical” model⁶ of sentencing

3. For a detailed explanation of all aspects of the Federal Sentencing Guidelines, see ROGER W. HAINES, JR., FRANK O. BOWMAN, III, & JENNIFER C. WOLL, *FEDERAL SENTENCING GUIDELINES HANDBOOK* (West Group 1999). For a general discussion of pre-Guidelines federal sentencing and a more succinct summary of the operation of the Guidelines, see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680-704 (1996) [hereinafter *Quality of Mercy*].

4. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 99 Stat. 1837.

5. See generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981) (discussing the rise and fall of the “rehabilitative ideal”).

6. Michigan purportedly was the first state to adopt a sentencing system based at least in part on a “medical model.” See *United States v. Scroggins*, 880 F.2d 1204, 1207 n.6 (11th Cir. 1989); see also PAMALA L. GRISET, *DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE* 11 (1991) (discussing the “rise of the rehabilitative juggernaut” between 1877-1970, and noting that “[a] medical analogue was frequently invoked.”); ALLEN, *supra* note 5, at 35 (referring to the “medical model” of sentencing). One anonymous prisoner

prevailed in the federal (and state) courts.⁷ The assumption upon which sentencing rested was that, through a combination of deterrence motivated by the unpleasant experience of incarceration and personal renewal spurred by counseling, drug treatment, job training and the like, criminal deviance could be treated like any other disorder. The system recognized, albeit grudgingly, that some defendants were, in effect, “incurable” and thus could only be quarantined through lengthy or life sentences, and that in a few cases a crime was so egregious that the public demand for retribution outweighed rehabilitative considerations.⁸ But the dominant paradigm was rehabilitative. Therefore, sentences were supposed to be “individualized” in the way that medical treatment is individualized, according to the symptoms and pathology of the offender.⁹

Before the Guidelines, federal sentences were also said to be “indeterminate,” a word often used to refer to two different, but related, ideas in the sentencing context. First, an indeterminate sentencing system is one in which a judge sentences a defendant to either a specified term, or to a range of years (e.g., five to twenty), but the number of years the defendant *actually* serves is then entirely in the hands of an administrative body, such as a parole board.¹⁰ For most of the Twentieth Century prior to the Sentencing Reform

wrote in 1911 that the theory of indeterminate sentencing prescribed that the offender should stay in prison “until cured, just as a person suffering from physical disease or infection is sent to a hospital or asylum, to remain for such period as may be necessary for his restoration to health.” LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 160 (1993).

7. Professor Allen notes that “rehabilitation . . . seen as the *exclusive* justification of penal sanctions . . . was very nearly the stance of some exuberant American theorists in mid-twentieth century . . .” ALLEN, *supra* note 5, at 3. See also AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* 83 (1971) (“Despite [its] shortcomings the treatment approach receives nearly unanimous support from those working in the field of criminal justice, even the most progressive and humanitarian.”).

8. For example, both the death penalty and life imprisonment were imposed throughout the period when the rehabilitative ideal dominated American sentencing, yet no one would seriously have argued that the purpose of either type of sentence was rehabilitation of the offender. See Adam Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759, 762-64 (1991) (describing widespread use of death penalty in America throughout Twentieth Century for crimes including murder, armed robbery, rape, and kidnapping); see also Dane Archer et al., *Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis*, 74 J. CRIM. L. & CRIMINOLOGY 991 (1983) (attributing use of death penalty in part to disbelief in rehabilitation).

9. “Individualized sentencing” was embraced as the philosophy of federal sentencing in two Supreme Court cases. See *Williams v. New York*, 337 U.S. 241, 248 (1949) (referring to “[t]oday’s philosophy of individualizing sentences”); *Burns v. United States*, 287 U.S. 216, 220 (1932) (“It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.”).

10. For a discussion of the historical development of parole in Europe and the United States, see REID MONTGOMERY, JR. & STEVEN DILLINGHAM, *PROBATION AND PAROLE IN PRACTICE*

Act, federal sentencing was indeterminate in this sense.¹¹ The judge would sentence the federal defendant to a specific term of years but the percentage of that specific term of years that the defendant would actually spend in a cell was controlled primarily by the United States Parole Commission.¹² The Parole Commission, an executive branch agency, not only created its own guidelines for determining release dates,¹³ but also retained discretionary power to set individual release dates anywhere within the broad parameters dictated by those guidelines.¹⁴

25-32 (1983) and TODD R. CLEAR & GEORGE F. COLE, *AMERICAN CORRECTIONS* 396-99 (2d ed. 1990).

11. In 1910, Congress mandated that each federal prison have its own parole board, constituting the superintendent of prisons of the Department of Justice, the warden and physician of each penitentiary. Act of June 25, 1910, ch. 387, 36 Stat. 819. The parole board of each prison had the discretionary power to release any prisoner who had served one-third of his original stated sentence if the board was satisfied that "there is a reasonable probability that [the prisoner] will live and remain at liberty without violating the laws," and that release "is not incompatible with the welfare of society." *Id.* § 3. The United States Board of Parole, which later became the United States Parole Commission, was created by Congress in 1930. DON M. GOTTFREDSON ET AL., *GUIDELINES FOR PAROLE AND SENTENCING* 2 (1978). The legal powers of the Parole Commission as it existed immediately before the adoption of the Sentencing Guidelines are set out at 18 U.S.C. §§ 4201 - 4218 (repealed 1984). For a general study of the operation of parole decision-making, see GOTTFREDSON ET AL., *supra*.

12. The district court had three options when imposing a sentence of imprisonment: (1) It could impose a sentence under 18 U.S.C. § 4205(a) (repealed 1984), in which case the defendant was obliged to serve one-third of his sentence before becoming eligible for parole; (2) Pursuant to 18 U.S.C. § 4205(b)(1) (repealed 1984), the court could impose a maximum term of imprisonment, but reduce the minimum term required before parole eligibility to less than one-third of the maximum sentence; or (3) The court could fix a maximum term and specify that "the prisoner may be released on parole at such time as the [Parole] Commission may determine." 18 U.S.C. § 4205(b)(2) (repealed 1984). When the court imposed a minimum term under either 18 U.S.C. § 4205(a), or 18 U.S.C. § 4205(b)(1), the Parole Commission retained control over when the defendant would be released after he served the minimum and achieved parole eligibility. In the pre-Guidelines period, "federal courts normally sentenced adult offenders pursuant to" § 4205(a). *United States v. Scroggins*, 880 F.2d 1204, 1207 (11th Cir. 1989).

There was one other factor that was at work in determining the actual sentence length of federal prisoners, a statutory entitlement to so-called "good time" credit of up to nearly one-third of the stated sentence. Before the enactment of the SRA, this entitlement was codified at 18 U.S.C. § 4161 (repealed 1984).

13. The creation of parole guidelines was mandated by 18 U.S.C. § 4203(a)(1) (repealed 1984). For a discussion of the federal parole guidelines and their operation, see GOTTFREDSON ET AL., *supra* note 11, at 22-37. See also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228-29 (1993) (discussing the genesis of the parole guidelines).

14. The breadth of the Parole Commission's discretion is indicated by the language of the statute, 18 U.S.C. § 4206(a) (repealed), describing its power of parole:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of

Second, the term “indeterminate” is often used (not entirely accurately) to describe the other central aspect of federal sentencing before the Guidelines. The judge had virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction.¹⁵ As long as the judge kept within the statutory range, there were virtually no rules about how he or she made the choice of sentence.¹⁶ There was no limitation on either the type or quality of information a judge could consider at sentencing.¹⁷ A judge could properly receive and consider evidence about the defendant’s troubled childhood, arrest record, acquitted conduct, uncharged conduct, rumored conduct, education, family circumstances, substance abuse problems—or virtually any other factor the judge felt to be important. Moreover, none of this information was subject to filtering by the rules of evidence,¹⁸ and the judge

the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

15. See David Fisher, *Fifth Amendment - Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions*, 83 J. CRIM. L. & CRIMINOLOGY 744, 745 (1993) (“Prior to the passage of the Sentencing Reform Act, federal judges enjoyed extremely broad discretion in sentencing. A judge could impose any sentence she thought proper as long as it did not exceed the statutory maximum.”); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988) (same); Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 677 (1980) (referring to then-extant pre-guidelines sentencing practices and noting that “the court’s [sentencing] discretion nonetheless remains quite broad under most modern statutes”).

16. For example, federal law prior to the enactment of the Sentencing Reform Act of 1984 provided that, as to “any offense not punishable by death or life imprisonment,” the court was free to suspend the imposition of a sentence of incarceration and place the defendant on probation, so long as the judge was “satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby. . . .” 18 U.S.C. § 3651 (repealed 1984).

17. See 18 U.S.C. § 3661 (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”). See also *Williams v. New York*, 337 U.S. 241, 249-51 (1949) (due process allows the judge broad discretion as to the sources and types of information relied upon at sentencing).

18. FED. R. EVID. 1101(d)(3) (Federal Rules of Evidence do not apply at sentencing). This rule was adopted in 1975 as part of the original Federal Rules of Evidence, see Pub. L. No. 93-595, § 3, 88 Stat. 1949 (1975), and thus was in effect both before and after the creation of the Federal Sentencing Guidelines. See also *Williams v. New York*, 337 U.S. 241, 250-51 (1949) (finding due process does not require confrontation or cross-examination in sentencing or passing on probation).

was not required to submit findings of fact. So long as the final sentence was within statutory limits, a court of appeals could not review the sentence.¹⁹

The pre-Guidelines federal sentencing system was indeterminate in both senses of the word because its objectives were primarily (though never exclusively) rehabilitative. At the time of sentencing, the system assumed that judges, expert in the law and the social sciences and seasoned by the experience of sentencing many defendants, would choose penalties that maximized the rehabilitative chances of offenders.²⁰ After sentencing, the assumption was that trained penologists could determine when a prisoner had been rehabilitated²¹ and thus advise the Parole Commission about release dates.²²

19. See *Koon v. United States*, 518 U.S. 81, 96 (1996) (“Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.”); *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (reiterating “the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end”); see also *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983) (“[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.”). Although appellate courts prior to the advent of the Guidelines lacked the power to review the substance, which is to say the length, of sentences imposed by district courts, they retained some ability to review the *process* through which sentences were determined. The outer limits of the district court’s discretion were set by concepts of due process. See, e.g., *Townsend v. Burke*, 334 U.S. 736 (1948) (holding that a sentence based on erroneous factual information violated due process); *United States v. Tucker*, 404 U.S. 443, 449 (1972) (vacating on due process grounds a sentence that relied on prior uncounseled convictions); *United States v. Clements*, 634 F.2d 183, 186 (5th Cir. 1981) (holding that court would “not review the severity of a sentence imposed within statutory limits, but will carefully scrutinize the judicial process by which the punishment was imposed”); *Herron v. United States*, 551 F.2d 62, 64 (5th Cir. 1977) (“The severity of a sentence imposed within statutory limits will not be reviewed.”); *United States v. Cavazos*, 530 F.2d 4, 5 (5th Cir. 1976) (same); *United States v. Espinoza*, 481 F.2d 553, 558 (5th Cir. 1973) (“[The] discretion [of sentencing judges] is not, and has never been absolute, and while the appellate courts have little if any power to review substantively the length of sentences [citation omitted], it is our duty to insure that rudimentary notions of fairness are observed in the process at which the sentence is determined.”). See also *Stith & Koh*, *supra* note 13, at 226 (“For over two hundred years, there was virtually no appellate review of the trial judge’s discretion.”); *Fisher*, *supra* note 15, at 745 (noting that before the SRA there was no appellate review of sentencing decisions).

20. *GRISSET* *supra* note 6, at 1 (discussing the premises of the “rehabilitative regime” and noting that it rested on the assumptions that “case by case decisionmaking should be encouraged; that future behavior could be predicted; that criminal-justice practitioners possessed the expertise required to make individualized sentencing decisions”).

21. *JAMES Q. WILSON, THINKING ABOUT CRIME* 171 (1975) (“The indeterminate sentence . . . is expressive of the rehabilitation ideal: A convict will be released from an institution, not at the end of a fixed period, but when someone (a parole board, a sentencing board) decides he is ‘ready’ to be released.”).

22. For a discussion of how social scientists advising the Parole Commission designed and tested statistical models in order to generate predictions about the risk of recidivism for potential parolees, see *GOTTFREDSON ET AL.*, *supra* note 11, at 41-67.

In the 1970s and 1980s, the rehabilitative model of sentencing fell into disfavor in state and federal courts for a variety of reasons,²³ including rising crime,²⁴ mounting evidence that prisoners were not being rehabilitated,²⁵ and increasing concern that indeterminate sentencing produced unjust disparities between similarly situated offenders.²⁶ The collapse of the rehabilitative model and a fortuitous alignment of political forces from the congressional right and left produced the Sentencing Reform Act of 1984, and three years later, the Federal Sentencing Guidelines.²⁷

B. *The Federal Sentencing Guidelines*

The Federal Sentencing Guidelines²⁸ are, in a sense, simply a long set of instructions for one chart—the Sentencing Table.²⁹ The goal of guidelines calculations is to arrive at numbers for the vertical axis (Offense Level) and

23. For a more complete discussion of the fall of the rehabilitative model and the rise of the Federal Sentencing Guidelines, see Bowman, *Quality of Mercy*, *supra* note 3, at 686-89.

24. See Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1079 (1992) (noting that during the 1970s “the perception that crime rates were out of control led some officials to demand surer and stiffer sanctions against criminals as a means of preventing crime”).

25. See Nemerson, *supra* note 15, at 685-86 (“In part, the massive professional and academic disillusionment with the therapeutic model stems from the simple practical inability of the criminal justice system to reform serious offenders effectively through incarceration.”); Andrew von Hirsch, *Recent Trends in American Criminal Sentencing*, 42 MD. L. REV. 6, 11 (1983) (“[N]o serious researcher has been able to claim that rehabilitation routinely could be made to work for the bulk of the offenders coming before the courts.”); see also Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991) (urging that rehabilitation be revisited as a dominant rationale for criminal sanctions).

26. One of the first and most influential critics of pre-Guidelines sentencing on the ground of unjustifiable sentence disparity was Judge Marvin E. Frankel. He said of the indeterminate sentencing system in the federal courts that, “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.” MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973) [hereinafter FRANKEL, *CRIMINAL SENTENCES*]; see also Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 23 (Gov’t Printing Office 1967) (finding sentencing disparity to be pervasive); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *CORRECTIONS* 142 (Gov’t Printing Office 1973) (same); Peter B. Hoffman & Barbara Stone-Meierhoefer, *Application of Guidelines to Sentencing*, 3 LAW AND PSYCH. REV. 53, 53-56 (1977) (describing criticisms of then-extant sentencing practices on the ground of “unwarranted sentencing disparity”). Peter Hoffman later became the principal draftsman of the Federal Sentencing Guidelines.

27. Probably the best historical description of the genesis of the SRA and the Guidelines is Stith & Koh, *supra* note 13.

28. U.S. SENTENCING GUIDELINES MANUAL (Nov. 1998).

29. U.S.S.G., Ch. 5, Pt. A (1998).

horizontal axis (Criminal History Category) on the Sentencing Table grid, which in turn generate an intersection in the body of the grid. Each such intersection designates a *sentencing range* expressed in months. For example, a defendant whose offense level is 26, and whose criminal history category is I, is subject to a sentencing range of 63-78 months.³⁰

The Criminal History Category on the horizontal axis of the Sentencing Table is a rough effort to quantify the defendant's disposition to criminality, which is reflected in the number and nature of his prior contacts with the criminal law.³¹ The Offense Level on the vertical axis of the Sentencing Table is a measurement of the seriousness of the present crime. The offense level customarily has three components: (1) a "base offense level," (2) a set of "specific offense characteristics," and (3) additional adjustments under Chapter Three of the guidelines. The base offense level is a seriousness ranking based purely on the fact of conviction of a particular statutory violation. For example, all fraud convictions carry a base offense level of 6.³² The "specific offense characteristics" are an effort to categorize and account for commonly occurring factors that cause us to think of one crime as worse than another. They "customize" the crime. For example, the Guidelines differentiate between a mail fraud in which the victim loses \$1,000 and a fraud with a loss of \$1,000,000.³³ A loss of \$1,000 would produce no increase in the base offense level for fraud of 6, while a loss of \$1,000,000 would add eleven levels and thus increase the offense level from 6 to 17.³⁴

Chapter Three of the Guidelines provides additional adjustments to the Offense Level. These adjustments include increases in the offense level based on factors such as the defendant's role in the offense,³⁵ whether the defendant

30. U.S.S.G., Ch. 5, Pt. A (1998). By statute, the top end of the range can be no more than 25% higher than the bottom end. 28 U.S.C. § 994(b)(2); U.S.S.G., Ch. 1, Pt. A (1998). For discussion of the "25% rule," see Bowman, *Quality of Mercy*, *supra* note 3, at 691 n.49, 712-13; see also *infra* note 129 (discussing effect of "25% rule" on efforts to simplify the Guidelines).

31. See U.S.S.G., Ch. 4 (1998) for the rules regarding calculation of criminal history category. The basic unit of measurement in this calculation is prior sentences imposed for misdemeanors and felonies.

32. U.S.S.G. § 2F1.1(a) (1998).

33. U.S.S.G. § 2B1.1(b)(1) (1998) (reflecting an increase in offense level of 2 for a theft of \$1,000 and increase of 13 for a theft of \$1,000,000).

34. The amount of the "loss" is not the only specific offense characteristic for fraud offenses. Section 2F1.1 also provides adjustments for the specific offense characteristics of "more than minimal planning." U.S.S.G. § 2F1.1(b)(2), the use of "sophisticated means" to commit the fraud; U.S.S.G. § 2F1.1(b)(5), jeopardizing the soundness of a financial institution; U.S.S.G. § 2F1.1(b)(7), and other factors.

35. U.S.S.G. § 3B1.1. The defendant's offense level can be enhanced by either 2, 3, or 4 levels depending on the degree of control he exercised over the criminal enterprise and on the size of that enterprise.

engaged in obstruction of justice,³⁶ commission of an offense against a government official³⁷ or particularly vulnerable victim,³⁸ and the existence of multiple counts of conviction.³⁹ There are also possible reductions in offense level based on a defendant's "mitigating role" in the offense⁴⁰ or on so-called "acceptance of responsibility."⁴¹

A unique and controversial aspect of the Guidelines is "relevant conduct."⁴² The Guidelines require that a judge calculating the applicable offense level and any Chapter Three adjustments must consider not only a defendant's conduct directly related to the offense or offenses for which he was convicted, but also the foreseeable conduct of his criminal partners.⁴³ In addition, the judge must consider the defendant's own uncharged, dismissed, and (sometimes acquitted) conduct⁴⁴ undertaken as part of the same transaction, common scheme, or plan as the offense of conviction.⁴⁵ The primary purpose of the relevant conduct provision is to prevent the parties (and to a lesser degree the court itself) from circumventing the Guidelines by charge bargaining or manipulation.⁴⁶

36. U.S.S.G. § 3C1.1. Obstruction of justice includes conduct such as threatening witnesses, suborning perjury, producing false exculpatory documents, destroying evidence, and failing to appear as ordered for trial. See U.S.S.G. § 3C1.1 cmt. n.3.

37. U.S.S.G. § 3A1.2.

38. U.S.S.G. § 3A1.1 (creating an enhancement where a victim was selected based on "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation" and in the case of a victim "unusually vulnerable due to age, physical or mental condition").

39. U.S.S.G., Ch.3, Pt. D.

40. U.S.S.G. § 3B1.2 (1998) (allowing decreases in offense level of 2 or 4 levels if defendant found to be a "minor participant" or "minimal participant" in the criminal activity).

41. U.S.S.G. § 3E1.1 (1998) (allowing reduction of 2 offense levels where defendant "clearly demonstrates acceptance of responsibility," and 3 offense levels if otherwise applicable offense level is at least 16 and defendant has "assisted authorities in the investigation or prosecution of his own misconduct" by taking certain steps). Despite the euphemism "acceptance of responsibility," § 3E1.1 is nothing more nor less than an institutionalized incentive for guilty pleas.

42. U.S.S.G. § 1B1.3. For a thorough discussion of the relevant conduct concept, see HAINES, BOWMAN & WOLL, *supra* note 3, at 101-17.

43. U.S.S.G. § 1B1.3(a)(1)(B) (1998).

44. A judge may consider acquitted conduct if the government proves its occurrence at sentencing by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148 (1997) (finding that sentencing court not barred from considering acquitted conduct by jury's verdict because burden of proof at sentencing is preponderance of evidence, rather than the trial standard of beyond a reasonable doubt).

45. U.S.S.G. § 1B1.3(a)(2) (1998).

46. See William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990). For further discussion of the use of charge bargaining to circumvent Guidelines rules, see *infra* notes 186-202 and accompanying text.

Just as a characteristic feature of pre-Guidelines sentencing was the nearly unfettered authority of the judge to set the initial sentence, the defining characteristic of the Guidelines regime is its systematic restraint of judicial sentencing discretion. Once a district court has determined the final Offense Level on the vertical axis and the Criminal History Category on the horizontal axis, the Sentencing Table designates the sentencing range. The judge retains effectively unfettered discretion to sentence *within that range*.⁴⁷ However, by design, the Sentencing Reform Act and the Sentencing Guidelines make it very difficult to “depart,” that is, to impose a sentence above or below the designated sentencing range. In order to depart, the judge must justify the departure on the record by referring to factors specified in the Guidelines as appropriate grounds for departure.⁴⁸ Alternatively, the judge must find “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”⁴⁹ Moreover, except in unusual circumstances, the Guidelines specifically *exclude* from consideration for purposes of departing outside the Guideline range most of those factors such as age, employment record, or family ties that judges formerly used to “individualize” sentences.⁵⁰

III. THE ROLE OF JUDGES IN CRIMINAL SENTENCING: PHILOSOPHER KINGS OR SLAVES OF THE MACHINE?

Fear of Judging is really two books. The first of them is a cogent and forceful, if not always convincing, critique of the Federal Sentencing Guidelines, which culminates in a series of serious, sophisticated, and often desirable, proposals for reform of the existing guidelines system. The other book, which surfaces at intervals throughout the first one, is far less persuasive,

47. U.S.S.G. § 5C1.1(A) (1998) (“A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.”).

48. See U.S.S.G., Ch. 5, Pt. K (1998) (detailing the approved grounds for upward or downward departure).

49. This language appears in the Guidelines’ enabling legislation, 18 U.S.C. § 3553(b), and is repeated in the Guidelines themselves, U.S.S.G. § 5K2.0 (1998).

50. Chapter 5, Part H of the Guidelines lists factors the Commission determined to be “not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.” These include age, § 5H1.1; educational and vocational skills, § 5H1.2; mental and emotional conditions, § 5H1.3; physical condition, § 5H1.4; history of substance abuse, § 5H1.4; employment record, § 5H1.5; family or community ties, § 5H1.6; socio-economic status, § 5H1.10; military record, § 5H1.11; history of charitable good works, § 5H1.11; and “lack of guidance as a youth,” § 5H1.12. In theory, most of these factors nonetheless can justify a departure, but such a departure is permissible only where the excluded factor is present to a degree so unusual that the Commission would not have anticipated its impact and thus did not “adequately [take it] into consideration,” 18 U.S.C. § 3553(b), when formulating the Guidelines.

apparently the fruit of a mesalliance between post-modernist skepticism of the very idea of rational legal rulemaking and a near-mystical vision of individual judges as the sole legitimate dispensaries of moral judgment in criminal law. This second book-within-a-book produces a second and final set of proposals, this time not for reform of the Guidelines framework, but for the authors' vision of an ideal sentencing system. Revealingly, their ideal would bestow upon the federal judiciary even greater control over sentencing than it enjoyed before the advent of the Guidelines.

The final section of this Article will address Professor Stith's and Judge Cabranes' detailed critique of the Federal Sentencing Guidelines and their thoughtful proposals for guidelines reform. But to confront Stith and Cabranes squarely, one must first address the second of the two books they entwined in this single volume: their argument for absolute judicial supremacy at sentencing. Those who have reviewed the book to date, either for journals or for book jacket blurbs, have often been Guidelines critics themselves, eager to praise a book-length attack on a system they dislike.⁵¹ Perhaps for that reason, the basic claims about the nature of the sentencing process and the role of judges that Stith and Cabranes make here have passed largely unexamined.⁵² To the reader not predisposed to agree with the book's disparagement of the Federal Sentencing Guidelines, the authors' underlying views about criminal punishment and the enterprise of judging are, on close reading, likely to come as something of a surprise. In fact, Stith and Cabranes' arguments for judicial sentencing hegemony are at once so sweeping, and at points seem so wide of the mark, that in the course of writing a philippic against the Guidelines they have provided a powerful illustration of precisely why sentencing guidelines were originally conceived and remain desirable.

51. See, e.g., *Sentencing Guidelines*, 73-AUG FLA. BAR J. 81 (1998) ("The authors reveal the banality, artificiality, incomprehensibility, arbitrariness, and complexity of guidelines sentencing as well as the evasion and hypocrisy that the guidelines have encouraged." (quoting Prof. Albert W. Alschuler)); Susanne Brody, *Book: Fear of Judging, Sentencing Guidelines in the Federal Courts*, 35-APR TRIAL 81 (1998) (TRIAL is the journal of the Association of Trial Lawyers of America. Susanne Brody is a Federal Defender in the Southern District of New York.); Suzanne Garment, *Painting A Ship With the Sentencing Commission*, 2 GREEN BAG 2d 435 (1998).

52. A partial exception is Ronald F. Wright, *Book Review: Rules for Sentencing Revolutions*, 108 YALE L.J. 1355 (1999). Professor Wright condemns the Federal Sentencing Guidelines with even greater rhetorical vigor than do Professor Stith and Judge Cabranes, likening them to a "Reign of Terror." *Id.* at 1355. However, he observes that Stith and Cabranes make a somewhat misleading use of history to give broad judicial sentencing discretion a better pedigree than in fact it enjoys. *Id.* at 1358-61. For more on this point, see *infra* notes 53-82 and accompanying text.

A. *A Critical Look at the Case for Judicial Hegemony Over Criminal Sentencing*

Fear of Judging's argument for sweeping judicial sentencing discretion rests on two pillars – first, the claim that such discretion has been a dominant feature of European and Anglo-American criminal law for centuries, and second, the argument that only fully discretionary judicial sentencing permits the exercise of “moral judgment” in the punishment of criminals. Neither claim withstands careful scrutiny.

1. The Argument from History

Chapter One of *Fear of Judging* is a summary of the history of sentencing theory and practice in America and Europe since roughly the 1700s. The plain (and pretty plainly avowed) objective of the historical tour is to legitimate wide-ranging judicial sentencing discretion by showing that it has been the customary norm for centuries. Hard as they try to bend fractious facts to the template of their advocacy, the authors do not make a convincing case.

A complete review of sentencing theory and practice from the 1700s onward is beyond the scope of this Article, but one assertion can be made with confidence. The single consistent tendency over approximately the past three centuries about the role of judges in setting criminal sentences has been the absence of any consistency. At some times, in some places, judges have had near-monopolies on the sentencing function. At other times, and sometimes in the same places, judges have been mere executors of decisions made by legislatures or juries.

For example, it is true that early English judges often enjoyed considerable sentencing latitude.⁵³ On the other hand, the English also invented and developed the institution of the jury, a body which sometimes participated in the sentencing phase of criminal cases. For example, English manorial courts of the Sixteenth and early Seventeenth Century dealt with a melange of civil and criminal matters, including on the criminal side thefts and affrays.⁵⁴ The judge of the court was the steward (or in borough courts, the mayor).⁵⁵ However, the finder of fact and the sentencing authority was a jury consisting of local peasant landholders.⁵⁶ The customary punishments were “amerccements,” or monetary penalties, imposed either by the jury case-by-

53. JOHN BRIGGS ET AL., CRIME AND PUNISHMENT IN ENGLAND: AN INTRODUCTORY HISTORY 73-86 (describing wide array of punishments imposed by English judges between 1500 and 1800) (1996); *id.* at 231 (describing broad sentencing discretion of English judges in 1800s).

54. *Id.* at 38-42.

55. *Id.* at 39.

56. *Id.* at 40.

case, or in some jurisdictions, from a schedule of amercements embodied in a court by-law promulgated by the jury.⁵⁷

In America, which Professor Stith and Judge Cabranes portray as a bastion of judicial sentencing supremacy since earliest times, jury sentencing was the norm rather than the exception in the states of the young republic.⁵⁸ Indeed, jury sentencing was a characteristically American response to perceived excesses on the part of royalist judges in England and the colonies.⁵⁹ Jury sentencing was common throughout the 1800s. Professor Ronald Wright estimates that “as many as half of the states during the nineteenth century granted the criminal jury the power to set the sentence after reaching a guilty verdict in a non-capital case,” and he points out that additional jurisdictions allowed juries to recommend a sentence to the court.⁶⁰ Although jury sentencing became less common as the Nineteenth Century passed into the Twentieth,⁶¹ as recently as 1960, roughly 25% of all states had jury sentencing for non-capital felonies.⁶² In 1990, the institution of jury sentencing for non-capital crimes existed in eight states,⁶³ and even today Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia maintain the practice.⁶⁴ As for capital crimes, since 1976, the Supreme Court has strongly encouraged, but does not require, jury participation in the sentencing process as a matter of

57. *Id.* at 40-41.

58. Adriaan Lanni, *Jury Sentencing In Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1790-91 (1999) (“Jury sentencing in noncapital cases was a colonial innovation. In most, states, jury sentencing was introduced almost immediately after entry into the Union and was included in the state’s original criminal code.”).

59. *Id.* at 1791; Charles O. Betts, *Jury Sentencing*, 2 NAT’L PAROLE & PROBATION ASS’N J. 369, 370 (1956); H. M. LaFont, *Assessment of Punishment – A Judge or Jury Function?* 38 TEX. L. REV. 835, 836-37 (1960); Craig Reese, Note, *Jury Sentencing in Texas: Time for a Change?* 31 S. TEX. L. REV. 323, 325 (1990); Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 970-71 (1967); Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1155 (1960) [hereinafter Note, *Statutory Structures*] (“[J]ury sentencing in this country is said to be a reaction to the harsh penalties imposed by royal judges in England and in the colonies, and the early distrust of government power.”)

60. Wright, *supra* note 52, at 1373-74. See also FRIEDMAN, *supra* note 6, at 247-48 (describing jury sentencing in Tennessee in cases between 1855 and 1885).

61. *Id.* at 1374.

62. Note, *Statutory Structures*, *supra* note 59, at 1154, 1154 nn.136-37 (citing jury sentencing statutes in thirteen states).

63. See Reese, *supra* note 59, at 328-29.

64. See ARK. CODE ANN. § 16-90-107(b)(1) (Michie 1997); KY. REV. STAT. ANN. § 532.055(2) (Banks-Baldwin 1997); MO. ANN. STAT. § 557.036 (West 1997); OKL. STAT. ANN., art. 22, § 926.1 (West 1997); TEX. CODE CRIM. P. ANN. art. 37.07 § 2(b) (West 1997); VA. CODE ANN. § 19.2-295 (Michie 1997).

constitutional law.⁶⁵ All but five states that provide for capital punishment give juries a role in the penalty phase.⁶⁶

In Eighteenth and Nineteenth Century American criminal courts, even when the judge rather than the jury passed sentence, his discretion was often tightly constrained by legislative mandate.⁶⁷ As Professor Ilene Nagel has observed, “up through 1870, legislators retained most of the discretionary power over criminal sentencing,” and they often prescribed the period of incarceration for each offense “with specificity.”⁶⁸ Stith and Cabranes do not dispute the relative rigidity of Eighteenth and Nineteenth Century practice in many states,⁶⁹ yet they seem to find in it no inconsistency with their thesis that history provides a pedigree for judicial sentencing supremacy.

In fairness, when read carefully, *Fear of Judging*'s historical claims for an unbroken tradition of judicial sentencing discretion are limited to the federal courts, where jury sentencing never gained a foothold outside the capital

65. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court spoke approvingly of the jury's role in deciding on the death penalty. “Jury sentencing has been considered desirable in capital cases in order ‘to maintain a link between contemporary community values and the penal system – a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’” *Id.* at 90 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1986), quoting *Trop v. Dulles*, 356 U.S. 100, 101 (1958)). However, in *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), the Court held that there is no constitutional requirement of jury participation in capital sentencing.

66. *Spaziano v. Florida*, 468 U.S. 447, 463 (1984) (noting that “30 out of 37 jurisdictions with a capital sentencing statute give the life-or-death decision to the jury, with only 3 of the remaining 7 allowing a judge to override a jury's recommendation of life”). States that now give judges the sole responsibility for capital sentencing include Arizona, ARIZ. REV. STAT. § 13-703 (1997); Colorado, COL. REV. STAT. § 16-11-103 (1999) (three judge panel); Idaho, IDAHO CODE § 19-2515(c) (1999); Montana, MONT. CODE ANN. § 46-18-301(1) (1999); Nebraska, NEB. REV. STAT. § 29-2520 (1999). See generally Nancy Jean King, *The American Criminal Jury*, 62 LAW & COMTEMP. PROBS. 41, 45-46 (1999).

67. Benedict S. Alper & Joseph Weiss, *The Mandatory Sentence: Recipe for Retribution*, 41 FEDERAL PROBATION 15, 18 (1977), reprinted in *PENOLOGY: THE EVOLUTION OF CORRECTIONS IN AMERICA* 309, 315 (George C. Killinger et al., eds. 1979) (“During the period following the American Revolution, the role of the courts was reduced to the application of legal sanctions evenhandedly to the guilty, regardless of individual circumstances.”).

68. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892 (1990).

69. In a footnote, Professor Stith and Judge Cabranes write: “Proponents of mandatory sentencing guidelines have been reluctant to acknowledge the long history of judicial sentencing discretion in this country.” See STITH & CABRANES, *supra* note 2, at 9 n.1. They then cite passages from Ilene Nagel's work (including the language quoted *supra* in the text accompanying note 68) that describe federal and state sentencing practices prior to 1870 as placing significant restraints on judicial discretion. Yet, having quoted Professor Nagel, Professor Stith and Judge Cabranes present no evidence refuting her, at least insofar as state practice is concerned. Instead, they simply narrow the focus of the argument by discussing only federal practice.

context⁷⁰ and judges have maintained more authority over time than has been true in the states.⁷¹ But this is fudging for a variety of reasons. First, for a century and more after the American Revolution, the federal courts had virtually no role in criminal law enforcement. There were few federal judges⁷² or federal criminal laws.⁷³ There were no federal prisons until 1895.⁷⁴ The action was in state courts.⁷⁵ Federal criminal law did not become a significant

70. Federal juries have long had a role in capital sentencing. *See, e.g.,* Brady v. United States, 397 U.S. 742 (1970) (discussing federal kidnaping statute, 18 U.S.C. § 1201(a), as it existed in 1959, which prescribed the death penalty “if the verdict of the jury should so recommend”).

71. Chapter One of *Fear of Judging* is titled “Sentencing Reform in Historical Perspective,” and its discussion ranges from the philosophy of continental law reformers such as Montesquieu and Cesare Beccaria, to a series of state criminal justice reform movements, to the development of federal parole. STITH & CABRANES, *supra* note 2, at 9-37. Nonetheless, the authors’ specific assertions about the history of judicial sentencing power are far more limited than the chapter’s title or its scope would imply. For example, the chapter’s opening sentence is: “From the beginning of the Republic, *federal judges* were entrusted with wide sentencing discretion.” *Id.* at 9 (emphasis added). Later language is similarly guarded.

72. In response to the Judiciary Act of 1789, President Washington appointed thirteen district judges, one judge for each of state of the new union. DWIGHT F. HENDERSON, COURTS FOR A NEW NATION 27-28 (1971). Although judicial districts multiplied within states and as new states and territories were added to the country, the number of federal judges remained minuscule in comparison to the vast territory and growing population of America. By 1900, there were still only 108 federal judgeships, “consisting of 71 district judgeships, 28 appellate judgeships, and 9 Supreme Court Justices. Today, there are 852.” William H. Rehnquist, *1999 Year-End Report on the Federal Judiciary* Vol. 32; No. 1, THE THIRD BRANCH 1 (visited Mar. 14, 2000) <<http://www.uscourts.gov/tb/jan00tb/jan2000.html>>. In the entire period between 1829 and 1861, eight presidents nominated a total of only two hundred lower federal judges, including territorial judges, not all of whom were confirmed. KERMIT L. HALL, THE POLITICS OF JUSTICE 151 (1979).

73. In truth, until after the Civil War, the federal judiciary had relatively little reach in either civil or criminal matters. As one scholar has written, “In the beginning of the Republic, there was dramatic distrust of the federal judicial system, and from 1789 to 1875, the lower federal courts did not have much authority.” Howard Ball, *The Federal Court System* in ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM 554 (Robert J. Janocik, ed. 1987). *See also* CHARLES L. ZELDEN, JUSTICE LIES IN THE DISTRICT 5 (1993) (“For the nation’s first century, demands on the lower federal courts were small.”). Until the Twentieth Century, federal criminal cases were neither numerous nor customarily very significant. For example, in Volumes 1 and 2 of the Federal Reporter, which began reporting cases from all federal circuit and district courts in 1880, out of roughly 700 reported decisions, only fifteen, or 2% of the total, concerned federal criminal prosecutions. 1 F. v -viii (1880); 2 F. iii-vii (1880). By 1889, the total number of federal criminal cases nationwide had reached 14,588, roughly 40% of which were revenue matters. FRIEDMAN, *supra* note 6, at 262. By rough comparison, 59,923 federal criminal cases, involving 80,822 defendants, were filed in 1999. Rehnquist, *supra* note 72, at 4 n.2.

74. The first federal prison opened in Fort Leavenworth, Kansas, in 1895. FRIEDMAN, *supra* note 6, at 269.

75. Professor Lawrence Friedman has described the federal role in criminal law enforcement in the century following the founding of the republic as follows: “[T]he states – then and now –

presence on the national scene until the 1920s.⁷⁶ Thus, if one is seeking the imprimatur of a traditional, typically American distribution of sentencing authority, the place to look is in the history of state and not federal courts.

Even if one were to consider only the federal experience, a moment's reflection on the sentencing regimes in federal courts over the last one hundred years reveals *Fear of Judging's* most profound misreading of legal history. The rise of an extensive federal criminal justice system coincided with the rise of the rehabilitative ideal in sentencing in both state and federal courts. The one period in U.S. history in which broad judicial sentencing discretion had the most theoretical and statutory support, state and federal, was the period when the rehabilitative model was in the ascendant, from the late 1800s to the enactment of the Sentencing Reform Act of 1984.⁷⁷ But Stith and Cabranes gloss over two critical points about the role of judges in the rehabilitative sentencing model.

First, judges were granted access to the widest possible range of information about offenders and allowed to fix punishments anywhere in the spectrum from probation to the statutory maximum because they were conceived to be *experts* in choosing the strength and combination of remedies from the penological armamentarium *most likely to effect rehabilitation*.⁷⁸

had the lion's share of the crime and punishment business. The federal government was a bit player, a spear carrier in the drama of criminal justice." *Id.* at 71. Even as late as 1910, state prisons held 66,831 prisoners, as compared to roughly 2,000 federal prisoners. *Id.* at 270.

76. In 1910, the federal prison population was 2,075. By 1928, it had quadrupled, but was still only 8,401. JAMES D. CALDER, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY* 19 (1993). By contrast, the federal prison population in 1997 was 98,944. Bureau of Justice Statistics, *COMPENDIUM OF FEDERAL JUSTICE STATISTICS*, 1997 85 (1998). For a general description of the rapid expansion of the federal role in criminal law enforcement from the 1890s through the 1920s, see FRIEDMAN, *supra* note 6, at 261-74.

77. See GRISET, *supra* note 6; FRIEDMAN, *supra* note 6; ALLEN, *supra* note 5; see also MICHAEL TONRY & KATHLEEN HATLESTAD, EDs., *SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE* 11 (1997) ("Twenty-five years ago [i.e., in 1972], indeterminate sentencing with its broad discretions and overlapping powers of judges, parole boards, and corrections managers was *the* American sentencing system, and it had changed little since 1930.").

78. See, e.g., the American Bar Association's 1971 argument against jury sentencing: But clearly the most telling argument against jury sentencing is that a proper sentencing decision calls on an *expertise* which a jury cannot possibly be expected to bring with it to the trial, nor develop for the one occasion on which it will be used. *The day is long past when sentencing turned solely on the degree of moral approbation [sic] which the offense commanded.* An enlightened sentencing decision today calls for a sophisticated and informed judgment which takes into account a vast range of additional factors, from the likelihood that the defendant will commit other crimes to the types of programs and facilities *which may induce a change in the pattern of activity which led to the offense.* American Bar Association, *Sentencing Alternatives and Procedures*, Project on Minimum Standards for Criminal Justice, 46-48 (1967), reprinted in LEON RADZINOWICZ & MARVIN E.

Second, the apparently unlimited scope of judicial sentencing power in the rehabilitative period was always something of an illusion. Although federal judges may have had broad power to choose between an incarcerative sentence and pure probation, once the decision to impose any period of imprisonment was made, the picture changed.⁷⁹ In all such cases, rather than being lord of the sentencing manor, the judge was both in theory and in fact no more than an equal partner with the parole authorities. The parole authority's regulations and post-conviction case-by-case administrative decisions set the true length of sentence – the actual months and years the defendant would spend behind bars – within the maximum stated by the court.

Stith and Cabranes repeatedly deride the Guidelines as the misbegotten offspring of excessive rationalism, a sort of bastard child of the Enlightenment.⁸⁰ The Guidelines, they say, are “pseudo-scientific,”⁸¹ and represent a calamitous departure from what they characterize as a long tradition of allowing judges broad exercise of their moral intuition.⁸² In fact, this characterization turns history on its head. It was the rehabilitative sentencing model that relied on “pseudo-science” and unsustainable claims about the power of human rationality. The rehabilitative model rested on the proposition that probation officers, correctional workers, parole authorities, and judges armed with the diagnostic tools and behavior modification techniques of psychology, sociology, and other behavioral sciences could predict and treat anti-social conduct. Thus, in the period which Stith and Cabranes claim as precedent for broad judicial discretion, judges were allowed great sentencing latitude largely because they were viewed as part of a treatment team of criminological professionals whose purpose was protection

WOLFGANG, CRIME AND JUSTICE, VOLUME II: THE CRIMINAL IN THE ARMS OF THE LAW 650 (1971) (emphasis added).

79. Even in cases where probation was imposed, control over much of a probationer's daily existence during the term of probation passed from the judge to a probation officer.

80. See, e.g., STITH & CABRANES, *supra* note 2, at 13:

Like Beccaria in the eighteenth century, the federal Sentencing Guidelines today seek to replace the discretionary power of judges with an elaborate, less intuitive, and more “scientific” system for the administration of penal sanctions. In doing so, they reveal an intellectual affinity not only to Beccaria, but to a continuous tradition of Enlightenment and post-Enlightenment thinkers who have carried into the twentieth century Beccaria's dream of establishing a self-contained calculus of penology.

See also *id.* at 169 (characterizing the Federal Sentencing Guidelines as an effort at “an all-encompassing, technocratic ‘solution’”).

81. *Id.* at 5 (“The [Guidelines] rules themselves . . . often seem to sacrifice comprehensibility and common sense on the altar of pseudo-scientific uniformity.”).

82. See, e.g., *id.* at 169 (“We must recognize . . . that no system of formal rules can fully capture our intuitions about what justice requires. The federal Sentencing Guidelines of today are based on a fear of judging; they attempt to repress the exercise of informed discretion by judges.”).

of society through cure (or, if necessary, lengthy quarantine) of the criminal deviant.

But the rehabilitative model collapsed in the absence of evidence that its goals were being (or perhaps ever could be) achieved. The Federal Sentencing Guidelines, far from being a product of devotion to “science” in sentencing, are a reaction *against* the notion that science has very much to say about criminal punishment. In the place of the claim of rehabilitationists that punishment can be individualized to maximize the odds of “curing” criminal conduct, the Guidelines substitute three simple, but powerful, ideas – one moral and the other two pragmatically utilitarian. First, the moral lodestar of the Guidelines is that criminals should be punished in proportion to their blameworthiness, which is in turn a function of the degree of harm inflicted and the defendant’s state of mind, and to a lesser degree of the defendant’s personal circumstances. Second, the two pragmatic generalizations about human behavior the Guidelines have substituted for individualized criminal diagnostics are: (1) The more blameworthy the criminal conduct, the greater risk the defendant poses to society, and the greater is the need for deterrence and incapacitation; and (2) The best measure of the likelihood of recidivism, and thus of the necessity for deterrence and incapacitation, is prior criminal behavior. The interaction of these three ideas produces a sentencing system that determines punishments based on three considerations, in descending order of influence: (a) offense seriousness (an approximation of blameworthiness embodied in the vertical Offense Level axis of the sentencing grid), (b) criminal history (the horizontal axis), and (c) personal circumstances (primarily relevant to choice of sentence within the guideline range and to departures).

As an aside, Stith and Cabranes would doubtless complain that the Sentencing Commission has never articulated the sentencing philosophy that informs the Guidelines with anything like the certainty expressed in the preceding paragraph. Indeed, one of the counts of their indictment of the Sentencing Commission is the Commission’s failure to be more precise in articulating sentencing purposes.⁸³ I think they demand more of the Commission than any quasi-legislative body can deliver when they insist that the system of sentencing rules be accompanied by what amounts to a philosophical tract resolving fundamental debates about criminal justice that have raged for centuries. Moreover, they ignore the fact that the purposes and values behind a scheme of laws may be divined as well, or better, from an examination of the laws themselves than from reading what the lawmaker *said* about the laws. In the case of the Federal Sentencing Guidelines, the combination of the Commission’s official explanations for its design in the

83. *Id.* at 51-57 (criticizing Congress and the Sentencing Commission for inadequately identifying and justifying the Guidelines’ governing principles).

Introduction to the Guidelines,⁸⁴ the supplementary official and unofficial statements of individual commissioners in law reviews and elsewhere,⁸⁵ and an examination of the Guidelines themselves produces an unusually clear picture of the purposes, objectives, and values undergirding the Guidelines system.

It might be suggested that I am overstating the case. As Professor Daniel Freed has reminded me, some commentators “think the U.S. Sentencing Commission did a very poor job of illuminating the role of purposes and helping to guide judges through those listed in 18 U.S.C. § 3553 (a).”⁸⁶ I think these commentators are largely wrong. The purposes of the Guidelines – most of the time at least – are pretty clear.⁸⁷ Many critiques of the Guidelines for lack of attention to sentencing purposes are actually cloaks for one of two quite different arguments.

First, some commentators who complain about a lack of clearly-stated purposes in the Guidelines (including Professor Stith and Judge Cabranes) are really concerned about *who gets to choose* the dominant purposes in sentencing rather than with the particular choices the Sentencing Commission made in writing the Guidelines. This group favors a regime in which *judges* are permitted to decide which purpose shall predominate in each case. In effect, such commentators advocate a system in which a judge is free to decide, for example, that for drug dealer A, the dominant sentencing purpose should be rehabilitation, and thus the sentence will be probation, while for drug dealer B, the dominant sentencing purpose should be deterrence/incapacitation, and thus the sentence will be five years in prison. The Guidelines largely preclude this sort of judicial choice. Instead, they embody an a priori “legislative” choice by the Sentencing Commission and the Congress that the predominant sentencing

84. U.S.S.G. § 1A (1998).

85. See, e.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); Steven Breyer, *Justice Breyer: Sentencing Guidelines Revisited*, 14 CRIM. JUST. 28 (1999); Wilkins & Steer, *supra* note 46; Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892-93 (1990); Dissenting View of Commissioner Paul H. Robinson to the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18 (1987). Justice Breyer, Judge Wilkins, Professor Nagel and Professor Robinson were all members of the original Sentencing Commission. John Steer is now a Sentencing Commissioner and was formerly General Counsel to the Sentencing Commission.

86. E-mail from Daniel J. Freed to Frank O. Bowman, III, Mar. 5, 2000 (on file with author). Professor Freed refers to, *inter alia*, Marc Miller, *Purposes at Sentencing*, 66 SO. CAL. L. REV. 413 (1992).

87. There are, of course, sections of the Guidelines that could benefit from more careful thought about the relationship of sentencing purposes to particular guidelines rules. See, e.g., Frank O. Bowman, III, *Coping with “Loss”: A Re-examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 468-70 (1998) (discussing the relationship of sentencing purposes to sentencing rules for economic crimes under U.S.S.G. § 2B1.1 and § 2F1.1) [hereinafter Bowman, *Coping with “Loss”*].

purpose in virtually all cases of commercially significant quantities of narcotics is to prevent crime by deterring or incapacitating offenders, and therefore that all drug sellers should go to prison.

The second complaint that often appears clothed in the contention that the purposes of the Guidelines are unclear comes from commentators whose real beef is not lack of clarity, but the Guidelines' achingly clear emphasis on purposes with which the commentators do not agree. Commentators who have never quite reconciled themselves to the current devaluation of rehabilitation as a sentencing goal often fall into this group.

At the end of the day, one can disagree with the choices the drafters made regarding the predominant purposes of sentencing for drug and other cases under the Guidelines, and one can disagree with their choices about the severity of sentences necessary to accomplish their purposes.⁸⁸ However, I do not think one can argue convincingly that the Guidelines' drafters did not make choices about sentencing purposes, or that the choices were often unclear.

In place of the Guidelines system, with its settled hierarchy of sentencing values, *Fear of Judging* advocates a system in which the only settled principle would be the principle of judicial supremacy. Despite proposing a return to a level of judicial sentencing discretion that arose as a component of the rehabilitative model of sentencing, the book's authors make no effort to defend or resurrect the rehabilitative model. Although the Sentencing Reform Act abolished the Parole Board and thus largely eliminated the role of correctional professionals in determining sentence length,⁸⁹ *Fear of Judging* does not propose reviving the Parole Board or giving any sentencing role to correctional officers. Nonetheless, Stith and Cabranes want for federal judges the same power to set sentences freely within statutory minima and maxima that the judges enjoyed before the Guidelines. In the absence of a parole system, the practical effect would be not to "restore" federal judicial sentencing authority, but to render it absolute to an historically unprecedented degree.

88. See *infra* notes 143-220 and accompanying text.

89. A few vestiges of the former power of correctional officials remain. The "truth in sentencing" component of the Sentencing Reform Act mandated that federal prisoners serve virtually all of their stated sentences. However, after the first year of incarceration, prisoners may earn up to 54 days per year of credit for "satisfactory behavior." The award of such "good time" credits is within the authority of the Bureau of Prisons. 18 U.S.C. § 3624(b). The Director of the Bureau of Prisons may reduce the term of imprisonment of certain offenders by one year if they successfully complete a substance abuse treatment program. 18 U.S.C. § 3621(e)(2). Also, correctional officials may request the sentencing court to grant a reduction of sentence for "extraordinary" hardship and for certain prisoners over the age of seventy. 18 U.S.C. § 3582(c)(1)(A).

2. The Claim that “Moral Judgment” Is Impossible Without Personal Confrontation

Of course, the fact that the sentencing model proposed by Professor Stith and Judge Cabranes is a departure from historical norms by no means disqualifies it from respectful consideration. However, the fundamental flaw in their approach is not its novelty, but the fact that it rests on doubtful premises about the nature of criminal sentencing and the relationship of sentencing to law itself. The essence of the Stith and Cabranes indictment of the Guidelines and their argument for judicial sentencing hegemony can be gleaned from three key passages. In Chapter One, they write:

The Federal Sentencing Guidelines were born of an uneasiness with the very concept of authoritative discretion, a naive commitment to the ideal of rationality, and an enduring faith in bureaucratic administration. . . . The Guidelines *juridify* criminal sentencing (to use Max Weber’s term) – that is, they encumber sentencing law with minute formal distinctions and administrative detail – much as has occurred in certain other areas of law, such as the law of torts and contract. The endless specification of formal rules in the Sentencing Guidelines, their neoclassical preoccupation with artificial order, and their attempt to mechanize justice may seem anachronistic in what many intellectuals insist is our ‘post-modern’ or ‘post-Enlightenment’ age. In a time of discontent and fierce competition among value systems, the Guidelines represent the continuing triumph of the administrative state.⁹⁰

If this means only that the current Guidelines make too *many* rules, try to predetermine the precise sentencing effect of too many relatively minor sentencing factors, then I am disposed to agree (and will return to the point below⁹¹). But a close reading suggests a far more fundamental critique of the Guidelines and a concomitantly more radical vision of the criminal sentencing process. On the one hand, Stith and Cabranes plainly long for an age of “authoritative discretion.”⁹² At the same time, they characterize rationality as “naive.” They equate the Guidelines rules to what they disparagingly label the “minute formal distinctions” of modern tort and contract law, and they dismiss the whole Guidelines project as a “neoclassical” anachronism in this “post-Enlightenment,” “post-modern” world. At the risk of being labeled a naive neoclassicist, one is left to wonder what constraints remain on “authoritative discretion” if rationality and the *a priori* imposition of formal distinctions are to be banned from the sentencing process. Indeed, if we are to shun not only the unquestionably high degree of prescriptive detail of the current Guidelines, but also (as *Fear of Judging* plainly implies) the “minute formal distinctions and administrative detail” of predominantly common law disciplines such as

90. STITH & CABRANES, *supra* note 2, at 6-7 (emphasis in original).

91. See *infra* notes 109-35.

92. STITH & CABRANES, *supra* note 2, at 6.

torts and contracts, in what respect would the imposition of a criminal sentence be recognizable as “law” at all? Punishment without rules is not law, but a grim lottery.

It might be thought, of course, that I am over-interpreting a single introductory paragraph, but the absolutist view of judicial sentencing power hinted at in the beginning of *Fear of Judging* is made manifest in the chapter titled “Judging Under the Federal Sentencing Guidelines.” The authors write:

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

Justice has sometimes been represented by the blindfolded icon, *Justicia*. This ancient metaphor is appropriate for adjudication. . . . The decision on guilt or innocence is properly blind to [a defendant’s personal] circumstances, blind to everything but the question of whether the defendant’s actions and accompanying mental state instantiate the abstract features specified in a criminal statute. . . . Essentially a matter of weighing evidence and determining facts, the process of adjudication has more in common with scientific than with moral reasoning.

But *Justicia* usually is depicted also holding a sword, representing not the power to determine guilt or innocence, but the power to punish. Before that power is exercised, before the sword is raised, *Justicia* must lift the blindfold. When it comes to the imposition of punishment, the question is always one of degree. The need is not for blindness, but for insight, for equity, for what Aristotle called ‘the correction of the law where it is defective owing to its universality.’ This can occur only in a judgment that takes account of the complexity of the individual case.⁹³

This is pretty remarkable stuff. Stith and Cabranes lead off by implying that the broad exercise of judicial discretion at sentencing is a norm of the American constitutional order. Moreover, they invest judges with both a “power” and a “duty” to weigh not only all the *circumstances* of a particular case, but all the theoretical *purposes* of sentencing, before imposing punishment also. In other words, implicit in the constitutional order is a

93. *Id.* at 78-79 (emphasis in original).

judicial power and duty not only to consider a defendant's personal situation, but also to decide in the exercise of the judge's own discretion whether deterrence, retribution, rehabilitation, or incapacitation shall predominate in setting the sentence. Where this power and duty are to be found in the Constitution is left unsaid.

Even if the authors' purpose is not to make any statement about constitutional norms, but only to describe an ideal of the sentencing process, their conception of the place of sentencing in the criminal justice system remains a striking one. For Stith and Cabranes, the act of deciding criminal guilt is mechanical, the coldly logical application of rules to facts. Only when a guilty verdict is pronounced does removal of the blindfold allow the light of moral reasoning to illuminate the process of deciding the defendant's fate. And who will perform the moral reasoning? Why, the judge, of course. As the authors say, "This solemn confrontation [of the judge and defendant in a pre-Guidelines sentencing] was predicated on the fundamental understanding that only a person can pass moral judgment, and only a person can be morally judged."⁹⁴

This is lovely rhetoric. It sounds so self-evidently humane that one feels beastly in venturing to cavil at it. But the declaration that individual judges either do or should have a monopoly on moral judgment in the criminal sentencing process cannot withstand scrutiny. The entire process of making and enforcing the criminal law is permeated with moral judgments by every institutional actor in the legal system. When the legislature defines crime – and degrees of crime, which are reflected in degrees of punishment – it makes moral judgments. When prosecutors decide which crimes to charge and which to take to trial, they make judgments which are in part forensic (what can I prove?), and in part administrative (what do I have time and money to prosecute?). Those judgments, however, are also in large measure moral judgments. For example, among all the types of crime I might prosecute, which are the most heinous, the most morally reprehensible, and thus the most worthy of the expenditure of my time and resources? Among all the defendants who have committed one type of offense to a legally provable degree, who do I prosecute and who do I not? Likewise, when juries decide guilt or innocence, and when they decide degrees of guilt – first vs. second degree murder, and so on – they are nominally applying facts to law, but also, and simultaneously, they are making moral judgments. For example, does the conduct of a defendant in a murder case seem more or less heinous, more or less blameworthy, or more or less worthy of condemnation and punishment, compared to others who have also killed?

All of these moral judgments, if they are to have any meaning at all, are relevant not only merely to the adjudication of guilt, but also to the resulting

94. *Id.* at 82 (emphasis added).

quantum of punishment. When *Fear of Judging* pines for a day when judges are free to choose a sanction anywhere in the entire range of punishments from probation to statutory maximum, it endorses a system in which sentencing judges are unbound by the moral (or policy) judgments of any other institutional actor in the criminal universe. Moreover, a system in which the only directive to judges is that they engage in individualized moral reasoning is without content and gives no guidance even to judges. In such a system, Judge Smith, a committed Kantian, might conclude that, except in the most extraordinary circumstances, heroin dealers *deserve* lengthy imprisonment because they have chosen to participate in a business which degrades its customers and notoriously employs murder and corruption as its tradecraft. In the next chambers, Judge Jones, a utilitarian and social liberal, noting the persistence of the drug trade despite heavy penalties and the high monetary and social costs of lengthy imprisonment of drug offenders, might decide that probation should be the norm for first-time drug offenders, even heroin dealers. Both positions are plausible, shared by many serious persons, and rationally and morally defensible. Yet the differing moral stances of Judges Smith and Jones will certainly produce dramatically disparate sentences for similarly situated defendants, but *Fear of Judging's* approach to sentencing yields no clue as to which outcome is preferable.

I suspect at this juncture the authors might protest that I mischaracterize their final position, that they propose not unbridled discretion of individual judges, but a system of broad sentencing discretion subject to appellate review, leading to the development of a federal common law of sentencing. Their plan boils down to this: (1) abolish the Sentencing Commission and repeal the Guidelines, (2) create a "committee" solely within the Judicial Branch (whose membership is thus controlled by the judiciary, even if not all the members are judges), (3) have the committee write purely advisory sentencing principles, and (4) give virtually total discretion to district court judges, subject only to two requirements not present pre-Guidelines: (a) a written statement of reasons for each sentence imposed and (b) appellate review on an "abuse of discretion" standard.⁹⁵ The flaw in this vision is that there is little reason to think that the combination of purely advisory Guidelines and toothless "abuse of discretion" review would produce any appreciable constraint on judicial sentencing behavior, still less any meaningful body of sentencing law.⁹⁶

95. See *id.* at 168-77 (describing the authors' ideal federal sentencing regime).

96. And there is reason to wonder whether Professor Stith and Judge Cabranes, in their heart of hearts, really want a detailed body of appellate sentencing law imposing constraints on district court judges. For example, they cite Federal Rule of Evidence 403 (which permits a trial judge to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect) as their model of an important judicial decision reviewable on an abuse of discretion standard. STITH & CABRANES, *supra* note 2, at 171. As any experienced trial lawyer knows, the one rule that can most effectively bullet-proof a judge's evidentiary decision is Rule 403. An out-

The idea of having judges develop a common law of sentencing is, in principle, a plausible cure for the ill of placing unchecked sentencing discretion in the hands of individual judges. The English have been evolving such an arrangement for decades.⁹⁷ But for such a system to have any real effect, the judiciary must be prepared to make, and then enforce through meaningful appellate review, precisely the sort of *ex ante* categorical distinctions between classes of cases that Stith and Cabranes deplore. In the end, the authors of *Fear of Judging* are so wedded to the mystique of a single trial judge imposing sentences based on “individualized moral reasoning” that they seem unprepared to yield meaningful authority over sentencing even to courts of appeals, much less to the penologists of the prison bureaucracy, the police and prosecutors of the executive, or the democratically accountable representatives of the legislature.

What accounts for this seeming absolutism? So far as I can determine, Professor Stith and Judge Cabranes see the imposition of a criminal sentence as *sui generis*, a judicial task to be performed outside the constraining web of the law by judges reasoning from first principles and acting – at least so far as each particular defendant is concerned—as philosopher kings. But a sentencing judge is neither an autocrat nor a professor presiding over a philosophy seminar. Judging without doubt requires “moral reasoning.” But moral reasoning in law – which is to say *legal reasoning*—is the act of making factual and legal distinctions, on principled grounds, *that have recognized consequences in particular cases*. Moral reasoning of this sort is not only integral to the creation and enforcement of law governing the *adjudication* of criminal *guilt*, but it is also of the essence both in making and applying law governing criminal *sentences*. The debates about whether to have sentencing guidelines, what such guidelines should look like, and whether particular guidelines should apply to particular facts and thus generate particular sentencing outcomes, all require moral reasoning in precisely this sense. When the Sentencing Commission debates over whether drug quantity should affect

of-court statement is either hearsay or it is not, and copious law exists to guide appellate courts reviewing rulings on hearsay. *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 781-1110 (2d. ed.) (discussing the law of hearsay). In stark contrast, once a trial judge bases her decision on the discretionary balancing test of Rule 403, appellate courts scarcely ever intervene and there is precious little coherent law on the subject of when 403 may or may not be employed. When Stith and Cabranes suggest that sentencing decisions should be subject to the same degree of appellate scrutiny as a trial judge’s decision to exclude evidence under Rule 403, they signal (whether intentionally or not) in terms unmistakable to any trial lawyer or district judge that they favor minimal appellate review. *See generally* Barry L. Johnson, *Discretion and the Rule of Law in Federal Sentencing: Developing Departure Jurisprudence in the Wake of Koon v. United States*, 58 OHIO ST. L.J. 1697, 1740-45 (1998) (arguing that meaningful appellate review of sentencing decisions is essential to bringing the rule of law to the sentencing realm).

97. *See* D.A. Thomas, *The Role of the Court of Appeal in the English Sentencing System*, 10 FED. SENTENCING REP. 259 (1998).

drug sentences,⁹⁸ or “loss” amount should affect fraud sentences,⁹⁹ or “acceptance of responsibility”¹⁰⁰ should have consequences for offenders in general, it engages in this sort of moral reasoning.

Likewise, a judge construing the Guidelines engages at every turn in “moral reasoning” of the kind permitted to judges. Even the authors of *Fear of Judging* would presumably concede that a district court judge performs moral reasoning when deciding where to sentence an offender within the Guidelines range (even if they think that those ranges are too narrow and unduly restrictive of judicial choice). But moral reasoning permeates the process of determining Guidelines sentencing ranges as well. For example, when a judge tries to decide whether a particular defendant has indeed “accepted responsibility” for purposes of applying the applicable offense level reduction,¹⁰¹ she is not performing a “mechanical” or “accountant-like” or “pseudo-scientific” task. She is doing what lawyers and judges do – trying to understand what the legal phrase “acceptance of responsibility” means and the reasons why the rule permitting sentence reductions for its presence exists, and then applying the words of the rule and its underlying rationale to particular facts to decide whether the defendant fits into a category of persons thought to deserve sentencing lenity.

Similarly, when a sentencing judge decides drug quantity or amount of fraud loss, sometimes the facts are so straightforward that no meaningful choice is involved. But if the issue is (and it commonly is) for what quantity of drugs or amount of “loss” is one defendant in a larger conspiracy responsible, then the question becomes: what quantity of drugs or amount of “loss” was “reasonably foreseeable” to that defendant?¹⁰² And *that* choice is a quintessential example of the law disguising in the language of statistical probability a choice which is really about the moral calculus of blameworthiness and relative culpability.

98. See U.S.S.G. § 2D1.1(a)(3) (1998) (setting base offense level for drug offenses based on amounts specified in drug quantity table).

99. See U.S.S.G. § 3F1.1(b) (1998) (providing increases to fraud base offense level depending on amount of loss caused by defendant’s fraudulent conduct).

100. See U.S.S.G. § 3E1.1(1998) (awarding offense level reduction of two levels for defendant who demonstrates “acceptance of responsibility”).

101. See U.S.S.G. § 3E1.1 (1998) (awarding offense level reduction of two levels for defendant who demonstrates “acceptance of responsibility”).

102. See U.S.S.G. § 1B1.3, app. note 2 (1998) (providing that conduct of co-conspirators must be “reasonably foreseeable” and within the scope of defendant’s agreement to count as relevant conduct). For a discussion of relevant conduct in drug conspiracies, see HAINES, BOWMAN & WOLL, *supra* note 3, at 323-28. For discussion of relevant conduct and foreseeability in fraud cases, see Bowman, *Coping With “Loss,” supra* note 87 at 509-11, 529-36.

The foreseeability calculation serves as a means of measuring the outer limits of legal responsibility in criminal law, contracts, and torts.¹⁰³ When a judge or jury decides that an event was reasonably foreseeable, they are nominally making a descriptive statement about what the defendant could have predicted at the time he committed the wrongful act. However, the guts of the decision is really a normative judgment on the degree of responsibility the defendant ought to bear for the harm caused by his discreditable behavior. The choice to impose foreseeability as the limitation on drug quantity or loss amount in guidelines conspiracy cases, or to impose foreseeability as a limitation on liability in civil torts cases, is a choice involving moral reasoning of the highest order. Moreover, it is a choice to devolve an important decision about the limits of legal liability to the factfinding judge or jury. Accordingly, when a sentencing judge in a guidelines case decides how many kilos of cocaine, or dollars of victim loss, were foreseeable to a defendant, that judge is engaging in a quintessentially legal form of moral reasoning because the choice has, and the judge knows it will have, immediate consequences for the defendant.

What gives moral reasoning in the law its desperate immediacy, what makes the reasoner, the parties subject to the reasoning, and the public at large care about the content and quality of judicial reasoning, is that the reasoning matters. The conclusions to which the judge is led by the act of legal reasoning matter to the defendant. The quality of the reasoning matters as well because flawed reasoning – deficient application of logic, morals, precedent, etc. – may produce appellate reversal, while persuasive reasoning may create enduring precedent. Professor Stith and Judge Cabranes want sentencing judges to write discourses on the purposes of sentencing as applied to particular cases, but they do not want any particular bit of factfinding or moral reasoning to have any necessary consequence, either in the case at hand or in cases that follow. It is all to be relative, contingent, “individualized,” and discretionary. There can be little doubt that sentencing decisions accompanied by a statement of reasons would be an improvement on the standardless and unexplained decisions of the pre-Guidelines era. But the mere presence of discourse untethered to present or future outcomes is not the same thing as law.

Professor Stith and Judge Cabranes titled their book “Fear of Judging” because they view the Sentencing Guidelines as the product of an excessive and unhealthy distrust of judicial discretion. However justified their complaint, the system they would erect in place of the Guidelines suffers from the opposite, but even more crippling, defect – it rests on a fear of law itself. And it is here that the authors of *Fear of Judging* and I have our most profound disagreement. Where they view the movement of federal sentencing from the

103. See Bowman, *Coping With “Loss,” supra* note 87, at 532-36 (discussing the role of foreseeability as a limitation on civil and criminal liability).

province of personal discretion to the realm of law as a disaster, I see the same transfiguration as the Guidelines' greatest strength. The greatest weakness in pre-Guidelines sentencing was not that it generated intolerable sentencing disparities, though it may have, but that the process of arriving at a sentence was invisible. As a class, pre-Guidelines judges may have rendered sentencing judgments that were, with only inconsiderable exceptions, wise, reasoned, and compassionate. But how would we know?

By contrast, even the Guidelines' most controversial provisions force meaningful debate about what really should matter in sentencing. Should sentencing judges consider a defendant's uncharged, unconvicted, or even acquitted conduct? The first Sentencing Commission considered the question and installed as the federal norm the judgment that they should.¹⁰⁴ Should the length of narcotics trafficking sentences be tied directly to the quantity of drugs involved? The Guidelines make it so.¹⁰⁵ Dissent from both of these conclusions may be slowly forging a reconsideration of the original position. But without the Guidelines, the debate would necessarily have remained theoretical, with some judges thinking one thing, and some another, and all free to act on their idiosyncratic conclusions.¹⁰⁶

Of course, making theoretical debates concrete cannot be the sole justification for sentencing guidelines. One could not enact into law a set of rules at random solely for the purpose of creating an original position about which to debate. The course of a human life is at stake in every criminal sentencing. The rules we start with should be the best rules that human reasoning can devise – and one can certainly argue that the current Federal Sentencing Guidelines fail that test. But that is really the point. The claim of *Fear of Judging* that individual judging involves moral reasoning, while the Guidelines do not, is simply wrong. The real problem is that the Guidelines embody, and seek to enforce, a set of moral, legal, and policy judgments with which the authors (and others) do not agree.

104. See U.S.S.G. § 1B1.3 (1998) (specifying that “relevant conduct” for purposes of determining a defendant’s offense level under the Sentencing Guidelines may include uncharged, unconvicted, and acquitted conduct).

105. See U.S.S.G. § 2D1.1 (1998).

106. Professor Stith and Judge Cabranes may be right that, in time, the combination of advisory guidelines and written explanations might evolve into a meaningful body of enforceable sentencing law. I confess to skepticism. If busy judges know that neither they nor anyone else will be bound by the statements of sentencing reasons they offer, and that their decisions will be free of careful scrutiny by appellate courts armed with meaningful rules, it is hard to imagine that the quality of “moral reasoning” embodied in the required statement of reasons will often rise above recitation of the bromides and formulaic language necessary to insulate sentences from the unlikely prospect of reversal for “abuse of discretion.”

IV. THE STATE OF THE GUIDELINES AND PROPOSALS FOR REFORM

At the end of the day, debate over the ideal federal sentencing model proposed by Professor Stith and Judge Cabranes is, in every sense of the word, academic. The vital question is not whether we should adopt a federal sentencing system that places sentencing authority almost wholly with the judiciary, because that is not going to happen. As Judge Cabranes himself pointed out in his introduction to the final panel of the St. Louis University symposium, the Federal Sentencing Guidelines are the law now and are likely to be with us for a very long time.¹⁰⁷ The vital questions are: (1) whether the Guidelines we have are workable and adequate to their purpose, and (2) if the current Guidelines have significant flaws, how can those flaws be fixed, or at least ameliorated, given existing political constraints. A full discussion of these two questions would require a tome at least equal in length to *Fear of Judging*. In the remainder of this Article, I will touch on only a few of the questions raised by the book's critique of Guidelines particulars and its prescriptions for incremental reform.¹⁰⁸ First, I will discuss the contention that the Federal Sentencing Guidelines are overly complex. Second, I will explore the relationship between sentence severity, the exercise of sentencing discretion by all parties to the federal sentencing process, and the problem of sentencing disparity. Finally, I will venture a few thoughts on the current status and future prospects of the Guidelines, with particular reference to several suggestions for reform made by Professor Stith and Judge Cabranes.

A. Complexity

One thread running throughout *Fear of Judging* is the lament that the Federal Sentencing Guidelines are too complex. Judge Cabranes reiterated the point during the symposium by holding up a copy of the hefty Guidelines

107. See Jose A. Cabranes, 44 ST. LOUIS UNIV. L.J. 271, 271 (2000) in this volume. *The U.S. Sentencing Guidelines: Where Do We Go From Here?*

108. In particular, I have largely omitted from these pages discussion of topics as to which I have previously explained my differences with Judge Cabranes in print. For example, *Fear of Judging* expresses Judge Cabranes' long-held view that the Guidelines take inadequate account of the personal characteristics of defendants. Compare STITH & CABRANES, *supra* note 2, at 61, 74-75, 94, with José A. Cabranes, *Letter to the Editor: Incoherent Sentencing Guidelines*, WALL ST. J., Aug. 28, 1992, at A11. For discussion of Judge Cabranes' views on this point, see Bowman, *Quality of Mercy*, *supra* note 3, at 707-14. *Fear of Judging* also reiterates the concern Judge Cabranes has expressed for some years about the increase of prosecutorial discretion relative to judicial discretion in the sentencing process. Compare STITH & CABRANES, *supra* note 2, at 130-42, with José A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J. 2, Feb. 11, 1992 ("[T]he guidelines have *sub silentio* moved the locus of discretion from the judge to the prosecutor."). For discussion of Judge Cabranes' critique of the prosecutorial role in sentencing under the Guidelines, see Bowman, *Quality of Mercy*, *supra* note 3, at 724-32. On the latter point, as the next section of this article may suggest, since 1996, I have moved somewhat closer to Judge Cabranes' views.

manual and relating how he has his law clerks ritually weigh the document and certify the results.¹⁰⁹ As amusing and rhetorically effective as such demonstrations are, they muddle the debate by merging in a single visual image several distinct criticisms of the Guidelines, some of which have merit and some of which do not.

The first prong of most complexity arguments is the assertion that the Guidelines are so complex that they are difficult for judges, lawyers, and parties to *understand*. This assertion sometimes takes the form of the claim that the Guidelines are complex relative to other legendarily convoluted bodies of law. For example, Stith and Cabranes note with dismay the existence of entire treatises on Guidelines law.¹¹⁰ They maintain that the Guidelines Manual “may be usefully compared to” the Internal Revenue Code, and they helpfully advise that the Manual outweighs the Code, five pounds to four.¹¹¹ Wishing to check the accuracy of the scales in Judge Cabranes’ chambers, I ventured to the library to find a copy of the tax code to weigh. I discovered that the federal tax code consumes fourteen volumes of West Group’s U.S. CODE ANNOTATED and six full volumes of Lexis Publishing’s UNITED STATES CODE SERVICE. Desirous of avoiding serious back trauma, I retrieved only a single volume of the Lexis tax set,¹¹² and discovered that it alone was thicker than the entire sentencing guidelines treatise I co-author with Roger Haines and Jennifer Woll, a volume that includes the full text of the Guidelines, application notes, commentary, the majority of all relevant guidelines amendments since 1987, and (we think) hundreds of pages of trenchant analysis.¹¹³

The truth is, of course, that while the Guidelines are moderately complex, they are not remotely comparable in mass or intricacy to the U.S. Tax Code¹¹⁴ or any one of a dozen other truly inscrutable bodies of federal law. But far more importantly, the Guidelines, despite the bulk of the book in which they are published, are just not that difficult to understand for any person of ordinary intelligence. Section II(B) of this Article explains the principal features of the system in four pages, complete with footnotes.¹¹⁵ Young

109. Cabranes, *supra* note 107.

110. STITH & CABRANES, *supra* note 2, at 93 n.83.

111. STITH & CABRANES, *supra* note 2, at 3. *See also id.* at 91 (again comparing the Guidelines to the Tax Code).

112. 26 U.S.C. §§ 1563-6000 (1999).

113. *See* HAINES, BOWMAN & WOLL, *supra* note 3.

114. And I doubt that Judge Cabranes would make the comparison except for rhetorical effect. In the text of *Fear of Judging*, the authors allude to “the Internal Revenue Code and its accompanying four thousand pages of administrative regulations.” STITH & CABRANES, *supra* note 2, at 33. The Guidelines will never attain that level of complexity if they last a thousand years.

115. *See supra* notes 28-50 and accompanying text.

lawyers and new probation officers can be, and commonly are, trained to use the Guidelines in a single day. (Try *that* with the Tax Code.)¹¹⁶ In fact, the Guidelines are a remarkably coherent and comprehensible work of statutory draftsmanship. Particularly when one considers the difficulties of attempting to design from scratch a comprehensive sentencing regime covering the myriad disparate offenses in the Brobdingnagian federal criminal code, one is forced to the realization that the Guidelines are in many respects downright elegant.

Nonetheless, even if the Guidelines are not too complex to be comprehensible, the complexity critique is not frivolous. As noted above, a primary objective of the Guidelines was to reduce unwarranted sentencing disparity by constraining and guiding the exercise of judicial sentencing discretion. A system which imposes meaningful constraints on judicial discretion, and at the same time makes a serious effort to draw meaningful distinctions between different offenses and offenders, will unavoidably be somewhat complex. For example, one could eliminate sentencing disparity in robbery cases by writing a one-line guideline decreeing that all convicted robbers serve ten years. But if the objective is to eliminate disparity while recognizing that not all robbers and robberies are the same, then the robbery guideline will no longer be quite so simple. And the problem of reconciling the competing objectives of consistency and individualization in a single guidelines system grows exponentially when the underlying statutory framework is as complicated and disorganized as the federal substantive criminal law.

Given that any federal sentencing guidelines system will have an irreducible minimum level of complexity, the question is whether the system we have is anywhere close to that minimum. There comes a point at which reasonable constraints and sensible guidance cross the line into fussy micromanagement. Sometimes the Guidelines plainly cross that line. The result is rules which create more decision points in the sentencing process than are necessary or sensible. Consider as one example the robbery guideline, Section 2B3.1:

116. This is, of course, not to say that one can become an "expert" on the Guidelines in a single day. There are, as Professor Stith and Judge Cabranes rightly note, a great many subtleties in Guidelines interpretation—enough subtleties to keep judges and treatise writers busy. The fact remains, however, that neither the structure of the Guidelines nor even the arguments over most of the interpretive fine points are very hard to understand. The contrast with the utter impenetrability of the Tax Code could not be starker.

§ 2B3.1. **Robbery**

- (a) Base Offense Level: **20**
- (b) Specific Offense Characteristics
- (1) If the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, increase by **2** levels.
 - (2) (A) If a firearm was discharged, increase by **7** levels; (B) if a firearm was otherwise used, increase by **6** levels; (C) if a firearm was brandished, displayed, or possessed, increase by **5** levels; (D) if a dangerous weapon was otherwise used, increase by **4** levels; (E) if a dangerous weapon was brandished, displayed, or possessed, increase by **3** levels; or if a threat of death was made, increase by **2** levels.
 - (3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury.

<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent or Life-Threatening Bodily Injury	add 6
(D) If the degree of injury is between that specified in subdivisions (A) and (B),	add 3 levels;
(E) If the degree of injury is between that specified in subdivisions (B) and (C),	add 5 levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **11** levels.

- (1) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any person was physically restrained to facilitate commission of

the offense or to facilitate escape, increase by 2 levels.

- (2) If the offense involved carjacking, increase by 2 levels.
- (3) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by 1 level.
- (4) If the loss exceeded \$10,000, increase the offense level as follows:

<i>Loss (Apply the Greatest)</i>	<i>Increase in Level</i>
(A) \$10,000 or less	no increase
(B) More than \$10,000	add 1
(C) More than \$50,000	add 2
(D) More than \$250,000	add 3
(E) More than \$800,000	add 4
(F) More than \$1,500,000	add 5
(G) More than \$2,500,000	add 6
(H) More than \$5,000,000	add 7

A careful reading of Section 2B3.1 illustrates several points. First, though detailed, this guideline is not hard to understand. It is really quite straightforward – the Base Offense Level for robbery is 20, and more offense levels will be added if other enumerated (and perfectly understandable) Specific Offense Characteristics were present in the offense. Second, with one possible exception, all of the Specific Offense Characteristics enumerated in Section 2B3.1 are plainly logically and morally relevant to determining the relative seriousness of robbery crimes.¹¹⁷ Use of a firearm or other dangerous weapon poses an increased risk of harm to victims and bystanders.¹¹⁸ Abduction is an evil in itself and is pregnant with the risk of physical harm to the abductee.¹¹⁹ Causing actual bodily injury is doing harm in fact.¹²⁰ Taking a firearm, a bomb, or drugs during a robbery implies an intention to commit

117. The one robbery enhancement which bears little intuitive relation to offense seriousness is the two-level upward adjustment in § 2B3.1(b)(5) for carjacking. This was a congressionally mandated amendment. *See* U.S.S.G., Amend. 483, App. C (1998). It is not clear that stealing a car by force is any more harmful or blameworthy than using the same force to steal a bicycle, a purse, a wallet, or a payroll.

118. U.S.S.G. § 2B3.1(b)(2) (1998).

119. U.S.S.G. § 2B3.1(b)(4) (1998).

120. U.S.S.G. § 2B3.1(b)(3) (1998).

other crimes in the future.¹²¹ The amount of money taken is a good measurement of the quantum of financial harm done to the victim.¹²² Section 2B3.1(b)(1), the upward adjustment for robbery of a postal facility or financial institution, is less compelling than the adjustments for weapon use, abduction, bodily injury, or loss amount. Nonetheless, the federal government does have a special interest in the integrity of the mails and the financial system, and thus one can fairly argue that robberies of postal and banking institutions merit increased sanctions under federal law.

Thus, it will not do to criticize the robbery guideline as incomprehensible, or on the ground that it commands sentencing judges to consider factors that are morally or logically irrelevant to offense seriousness, and thus to appropriate punishment. Moreover, a fair reading of the rest of the Federal Sentencing Guidelines would, I think, produce the same general conclusion – as a rule, the Guidelines do not compel judges to consider irrelevant or trivial matters. Rather, the Guidelines do a quite impressive job of identifying those factors that *ought* to be considered in distinguishing one offense from other offenses of the same general type.

Where the robbery guideline (and the Guidelines generally) *can* be criticized as unduly complex is for the effort to dictate the precise sentencing consequences of each gradation or subcategory of every Specific Offense Characteristic.¹²³ For example, it is entirely appropriate for sentencing guidelines to mandate that a robber armed with a gun or other deadly weapon receive a longer sentence than one who is not armed. But is it necessary to specify, as does Section 2B3.1(b)(2), six different ways in which a weapon might be employed, and prescribe a different level of sentence enhancement for each one of the six?¹²⁴ Similarly, whether a robber injured a victim is undeniably important to the sentencing calculus. But do we really need five different levels of sentence enhancement for victim injury depending where the injury falls on a spectrum between “permanent or life-threatening” and mere “bodily” harm?¹²⁵ And while amount of loss surely matters, are seven decision points necessary to capture the importance of the loss factor in robberies?¹²⁶

121. U.S.S.G. § 2B3.1(b)(6) (1998).

122. U.S.S.G. § 2B3.1(b)(7) (1998).

123. Professor Barry Ruback has calculated that there are 4,608 possible combinations of all the robbery offense factors in Chapter Two of the Guidelines. Barry Ruback, *Warranted and Unwarranted Complexity in the U.S. Sentencing Guidelines*, 20 LAW AND POLICY 357, 379 (1998).

124. See U.S.S.G. § 2B3.1(2)(A)-(F) (1998) (prescribing increases in offense level from 2 to 7 levels depending on the type of weapon possessed during a robbery and the manner in which the weapon was employed).

125. U.S.S.G. § 2B3.1(b)(3)(A)-(E) (1998) (prescribing increases in offense level from 2 to 6 levels depending on the degree of bodily injury inflicted on the victim).

126. U.S.S.G. § 2B3.1(b)(7)(A)-(H) (1998) (prescribing increases in offense level from 1 to 7 levels depending on the amount of the loss).

Professor Stith and Judge Cabranes are surely right that not all of these distinctions are necessary. There are, for example, certainly ways of allowing a judge to take account of the differing circumstances in which a weapon might be employed in a robbery without creating – and forcing trial and appellate judges to give meaning to – legal distinctions between “discharg[ing],” “otherwise us[ing],” and “brandish[ing], display[ing], or possess[ing]” a firearm.¹²⁷ The Sentencing Commission under the chairmanship of Judge Richard Conaboy began a “simplification project,” one objective of which was to identify places in the Guidelines where the level of detail could be usefully reduced. Although the Commission staff produced a report on the level of detail in Chapter Two of the Guidelines (the chapter covering offense levels for all federal crimes), the Conaboy Commission itself was unable to take action before the terms of its members expired.¹²⁸ The simplification initiative ought to be pursued. Although reduction of the level of detail in some guidelines would be, at best, a palliative for those most deeply distressed by the Guidelines’ complexity, incremental improvements are achievable and not to be sneered at.¹²⁹

There is another aspect of the “complexity” critique we have not yet discussed. As just noted, I think the Guidelines as a whole are quite cogent. However, there are a some sections that are poorly drafted, and that therefore create the sort of complexity that arises when courts are forced to find meaning

127. U.S.S.G. § 2B3.1(b)(3) (1998).

128. United States Sentencing Commission, Staff Discussion Papers, Simplification Project, *Level of Detail in Chapter Two* (November 1996). See also, Michael Goldsmith, *A Former Sentencing Commissioner Looks Forward*, 12 FED. SENTENCING REP. 98,99 (Sept./Oct. 1999) (describing the Sentencing Commission’s simplification initiative and recommending that the new Commission continue to pursue simplification).

129. As with most law reform, however, “simplification” is not as easy as it looks. Although there certainly are ways to reduce the number of decision points in a guideline like § 2B3.1, they face important structural and legal difficulties. For example, the Guidelines enabling legislation require that the top of any sentencing range be no more than 25% higher than the bottom of the range. 28 U.S.C. § 994(b)(2). The Commission has interpreted the “25% rule” to mean that the end result of a Guidelines calculation must be a single point on the sentencing grid designating one, and only one, sentencing range within which the judge has unfettered discretion to set a sentence. This rule presents a problem for those who would simplify Guidelines such as § 2B3.1. Assuming that one wants to be able to impose sentencing enhancements of varying degrees depending on the type of weapon a robber uses, how he uses it, and whether anyone is hurt, one has two basic choices. One must create the sorts of definitional categories that now complicate § 2B3.1, and thus force judges into the “minimal pair” choices derided by Stith and Cabranes. STITH & CABRANES, *supra* note 2, at 83. Or one must say something like, “The court shall enhance the offense level by two to eleven levels depending on the type of weapon possessed, the manner in which it was employed, and the degree of injury, if any, caused to others.” The trouble with the latter solution is that it arguably violates the 25% rule by conferring on judges unguided, or only loosely guided, discretion to choose among multiple offense levels, and thus to adjust the final sentence, not by 25%, but several hundred percent.

in language whose meaning is unclear. The most notable examples of this phenomenon are the guidelines governing economic crimes, Sections 2B1.1 (Theft) and 2F1.1 (Fraud).¹³⁰ The primary determinant of sentence length for federal economic criminals is the amount of the “loss” resulting from the offender’s conduct.¹³¹ There is no denying that some measurement of the economic harm inflicted by theft and fraud defendants should have a powerful influence on their sentences. But because the Guidelines contain no coherent definition of what “loss” means, the “loss” calculation is one of the most frequently litigated issues in federal sentencing law.¹³² There are splits of opinion between the federal circuits on numerous separate, analytically distinct, issues concerning the meaning and application of the “loss” concept.¹³³ In this case, the “complexity” of the process of Guidelines *interpretation* could be markedly reduced by doctrinally coherent redefinition of the term “loss.” Happily, the Commission has been hard at work on this issue for the last several years.¹³⁴ A sensible reform package has been assembled by the Commission staff, with the input of various outside observers and constituent groups.¹³⁵ With some modest fine-tuning, this package should be implemented by the new Commission. The result should be a more comprehensible, workable, and thus less “complex” set of standards for sentencing economic crime offenders.

B. Severity, Discretion, and Disparity

Professor Stith and Judge Cabranes note the increase in sentence severity under the Guidelines,¹³⁶ and criticize them for unduly restricting judicial

130. See generally Bowman, *Coping With “Loss,”* *supra* note 87; Frank O. Bowman, III, et al., *Rethinking “Loss” in Fraud and Theft Cases*, 10 FED. SENTENCING REP. 115-75 (1997) (entire issue devoted to reform of economic crime sentencing Guidelines).

131. Sentence length for both theft-like and fraud-like crimes is determined largely by reference to “loss tables” appearing at U.S.S.G. § 2B1.1(b)(1) (Theft) and § 2F1.1(b)(1) (Fraud).

132. As one admittedly imprecise measure, on August 15, 1997, a computer search of the Westlaw database for all federal appellate cases (excluding the U.S. Supreme Court) revealed that the concept of “loss” in either U.S.S.G. § 2B1.1 or § 2F1.1 was discussed in 894 federal appellate opinions. (Search result on file with author.)

133. See Bowman, *Coping With “Loss,”* *supra* note 87, at 464 n.3 (describing eleven circuit splits on the meaning of the term “loss”).

134. On October 15, 1997, the Sentencing Commission held its first hearing on the “loss” question. See, *October 1997 Hearing on the Definition of “Loss”: Excerpts*, 10 FED. SENTENCING REP. 157 (1997). Another hearing was held on March 5, 1998. For a transcript of that hearing and the written statement of the witnesses, see <<http://www.ussc.gov/agenda/hrg3_98.htm>>.

135. In the summer of 1998, Commission staff field tested a revised loss definition with federal judges and probation officers. See UNITED STATES SENTENCING COMMISSION, A FIELD TEST OF PROPOSED REVISIONS TO THE DEFINITION OF LOSS IN THE THEFT AND FRAUD GUIDELINES: A REPORT TO THE COMMISSION (Oct. 20, 1998).

136. STITH & CABRANES, *supra* note 2, at 59-65.

discretion¹³⁷ and for failing to meet the objective of reducing unwarranted disparity.¹³⁸ Each of these critiques is debatable on its separate merits, but the point on which I wish to comment here is that the authors may not have fully appreciated the effect on the evolution of the Guidelines system of the *interaction* between offense severity, the exercise of judicial discretion, and the disparity of sentences generated under the Guidelines.

1. The Influence of Sentence Severity on Guidelines Operation

Remember, the Sentencing Reform Act of 1984 and the resultant Federal Sentencing Guidelines were crafted with two basic goals in mind. First, produce a nationally uniform sentencing system that largely eliminates unjustifiable sentencing disparities¹³⁹ by: (a) restricting the scope of, but not eliminating, front-end judicial sentencing discretion through the creation of mandatory guidelines; and (b) eliminating altogether the back-end discretion of non-judicial penological experts through abolition of parole and the Parole Commission. Second, raise some criminal penalties,¹⁴⁰ primarily for drug offenses,¹⁴¹ but also for white collar crime.¹⁴² Careful examination of the history of Guidelines operation so far suggests that the measures adopted to increase sentence severity, particularly for drug crimes, have tended to frustrate, if not to defeat entirely, the goal of reducing disparity. The same severity increases have left sentencing judges with the justifiable feeling that

137. *Id.* at 99-103. *But see id.* at 126 (“[D]espite the effort of the Sentencing Commission to draft detailed and exhaustive sentencing rules, judges still retain some sentencing discretion.”).

138. *Id.* at 126.

139. Then-judge, now Justice Stephen Breyer, one of the original Sentencing Commissioners, has written that Congress had “two primary purposes” in enacting the SRA, “honesty in sentencing,” and “reduc[ing] ‘unjustifiably wide’ sentencing disparity.” Breyer, *supra* note 85, at 3. Another commentator has identified the three objectives of the guidelines as “to be honest, uniform, and proportional for varying degrees of criminal conduct.” Karen Bjorkman, *Who’s the Judge? The Eighth Circuit’s Struggle With the Sentencing Guidelines and the Section 5K1.1 Departure*, 18 WM. MITCHELL L. REV. 731 (1992). Saying that the system should be “uniform and proportional” is another way of saying that similarly situated defendants should receive similar sentences. A defendant who has committed a more serious “degree of criminal conduct” is not situated similarly to a defendant who has committed a less serious offense.

140. *See* Stith and Koh, *supra* note 13, at 284-85 (arguing that Guidelines have in general faithfully implemented congressional intent and thus that, “It is no accident that the percentage of defendants being imprisoned and the length of sentences have increased.”).

141. *See* 28 U.S.C. § 994(I) (1988) (calling for a “substantial term of imprisonment” for felony drug offenders); *see also* Stith and Koh, *supra* note 13, at 268-69 (describing origins of this legislative admonition).

142. *See* Breyer, *supra* note 85, at 20-21; Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2047 (“[T]he Commission produced guidelines that actually increase the overall severity [of federal sentences], taking particular aim at so-called white-collar offenders whom the Commission found (perhaps correctly) to have been treated with undue solicitude.”).

far more of their real sentencing discretion has been stripped away than the text of the Guidelines would suggest.

To understand this interplay, one must first consider the question of sentence severity. Sentences have undeniably increased under the Guidelines, both in terms of the frequency of imprisonment¹⁴³ and the length of incarceration.¹⁴⁴ (Although in the last five years the average sentence length imposed under the Guidelines has actually declined.)¹⁴⁵ In and of itself, the increase in sentences under the Guidelines is not necessarily a bad thing. First, in general, I disagree with those who are critical of the Guidelines for imposing incarcerative penalties more often than was formerly the case.¹⁴⁶ I am not convinced that probationary sentences accomplish very much. Moreover, as a general matter, I do not believe that federal prosecutors should expend their scarce resources prosecuting persons whose crimes are not serious enough to merit imprisonment. Second, the increase in sentences for white collar theft and fraud defendants produced by the Guidelines was, if anything, overdue. Pre-Guidelines, the customary sentence for white-collar offenses was probation.¹⁴⁷ The thievery of the rich and articulate is every bit as deserving of punishment as the crimes of the disorganized poor.

That said, the narcotics sentences generated by the Guidelines and the various minimum mandatory statutory sentencing provisions are often, if not always, too high. I say this as a former prosecutor of some fourteen years experience, seven of them as an Assistant U.S. Attorney in Miami, who helped send a fair number of folks to prison for narcotics offenses. I do not favor the legalization or decriminalization of narcotics. I have little sympathy for those

143. See Bowman, *Quality of Mercy*, *supra* note 3, at 736-38.

144. From 1984 to 1990, the average federal sentence of incarceration (a figure which excludes those cases in which probation was ordered) rose from 24 months to 46 months. UNITED STATES SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 60 (1991) [hereinafter SENTENCING GUIDELINES IMPACT REPORT]. This excludes from the average all probationary sentences, by counting such sentences as 0 months. *Id.* Including probationary sentences, the average sentence rose from 13 months in 1984 to 30 months in 1990. *Id.*

145. By fiscal year 1994, the average federal sentence (again excluding cases in which probation was ordered) had risen to 65.9 months. UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT 1994, 54-55 tbl. 21 (1994). The median federal sentence of incarceration in 1994 was 36.0 months. *Id.* In 1998, the average federal sentence was 58.1 months, and the median was 30 months. UNITED STATES SENTENCING COMMISSION, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (hereinafter "1998 SOURCEBOOK") 30, tbl. 14 (1999).

146. See, e.g., MICHAEL TONRY, SENTENCING MATTERS 11 (1996). See also Bowman, *Quality of Mercy*, *supra* note 3, at 736-38 (discussing Professor Tonry's assessment of the frequency of non-incarcerative penalties under the Guidelines).

147. See, e.g., Breyer, *supra* note 85, at 7 n.49 ("A pre-Guidelines sentence imposed on [white collar] criminals would likely take the form of straight probationary sentences.')

who engage in drug trafficking for profit. They deserve punishment, and some of them deserve every day of the lengthy terms of imprisonment the Guidelines mete out to them. Nonetheless, too many of the drug sentences required by honest application of the Guidelines are too long. For example, the *average* sentence length for crack cocaine offenses is over *ten years*.¹⁴⁸ The average sentence for methamphetamine offenses is over eight years,¹⁴⁹ and the average sentence for powder cocaine offenses is more than six-and-one-half years.¹⁵⁰ Given that more than 20,000 persons are now sentenced annually for federal drug crimes,¹⁵¹ literally thousands of defendants each year receive sentences higher, and sometimes far higher, than these averages. Moreover, it may be worth noting that 56.7% of all drug offenders sentenced in 1998 were first-time offenders,¹⁵² and in 87.9% of drug cases there was no weapon involvement.¹⁵³

These sentences are long in comparison to sentences customarily meted out for other crimes of equal or greater seriousness. For example, the average sentence for robbery, 114.9 months, is *less* than the 122.4 month average sentence for crack offenses.¹⁵⁴ The average sentence for methamphetamine cases is higher than the average sentence for sexual abuse, more than double the average sentence for assault, one-and-a-half times the average sentence for arson, and nearly four times the average sentence for burglary.¹⁵⁵ Drug sentences are long as a proportion of any human life. They are often longer than can be rationally justified to achieve deterrence.¹⁵⁶ They are very long in comparison to the settled pre-Guidelines expectations of federal lawyers and judges. They are so long that they frequently seem disproportionate and inhumane to the judges obliged to impose them, and even to the prosecutors who work so diligently to secure them.

148. 1998 SOURCEBOOK, *supra* note 145, at 83, fig.L (showing mean sentence length for crack offenders between 1993 and 1998 remained above 120 months): *see also id.* at 81, fig.J (showing mean sentence for crack offenders in 1998 was 122.4 months, and median sentence for crack offenders was 96 months).

149. *Id.* at 81, fig.J (showing median sentence for methamphetamine offenders in 1998 was 96.8 months, and median sentence for methamphetamine offenders was 71 months).

150. *Id.* (showing median sentence for powder cocaine offenders in 1998 was 79.3 months, and median sentence for powder cocaine offenders was 60 months).

151. *Id.* at 81, fig.J n.1 (stating that 20,368 cases were sentenced under U.S.S.G., Chapter Two, Part D (drugs) in 1998).

152. *Id.* at 72, tbl. 37.

153. *Id.* at 74, tbl. 39.

154. *Compare id.* at 30, tbl. 14, *with id.* at 81, fig.J.

155. *Compare id.* at 81, fig.J (showing median sentence for methamphetamine in 1998 was 96.8 months), *with id.* at 30, tbl. 14 (showing median sentence in 1998 for sexual abuse was 75.7 months; arson was 65.5 months; assault was 39.5 months; and burglary was 26.3 months).

156. *See* Frank O. Bowman, III, *Playing "21" With Narcotics Enforcement: A Response to Professor Carrington*, 52 WASH. & LEE L. REV. 937, 980-81 (1995) (discussing deterrence as a rationale for narcotics sentences).

The excessive length of many drug sentences has a number of deleterious effects on the sentencing guidelines system as a whole, of which I will mention only two:

- a. The effect of drug sentence severity on judicial behavior and perceptions of the Guidelines

Professor Stith and Judge Cabranes' contentions to the contrary notwithstanding, the design of the Federal Sentencing Guidelines actually gives sentencing judges a great deal of discretion. This discretion comes in three forms: the wholly unrestricted discretion to sentence anywhere within the prescribed guideline range (the top of which is 25% higher than the bottom); the hidden, but perfectly legitimate, discretion inherent in making close factual calls in decisions on guidelines application (as, for example, the determination of the amount of drugs or "loss" foreseeable to a co-defendant in a narcotics or fraud conspiracy); and the discretion to depart from the otherwise applicable guideline range. If application of Guidelines rules consistently produced sentencing ranges that fell, broadly speaking, within most judges' comfort zones, judges would feel they could achieve rough justice most of the time by using the discretionary tools given them. And if that were the case, I strongly suspect that most complaints about undue restriction on judicial discretion would long since have died away.

The problem is that honest application of the guidelines in drug cases tends to produce sentences so high that most judges in most cases do not consider a sentence higher than the bottom of the range to be a tenable option. For example, in 1998, 79.3% of all drug trafficking offenders were sentenced at or below the guideline minimum.¹⁵⁷ Moreover, honestly calculated drug sentences are often so far out of judges' comfort zones that no amount of marginal tinkering with close factual calls on guideline application can bring them into that zone. And even if judges are prepared to tinker right up to the border of intellectual dishonesty, minimum mandatory sentences may trump the effort. When experiences like this become sufficiently common – and drug

157. 1998 SOURCEBOOK, *supra* note 145, at 56, tbl. 27, and 59, tbl. 29 (1999). The Sentencing Commission reported that of 19,113 drug trafficking offenders, 5,939 received substantial assistance departures. *See id.* at 56, tbl. 27. 2,492 received other downward departures. *Id.* And 6,719 were sentenced at the guideline minimum. *Id.* at 59, tbl. 29. The percentage of defendants receiving guideline minimum sentences is undoubtedly higher than reflected in these figures because the Commission had insufficient data to code over 1,000 drug cases. *See id.* at 56, 59. In the same year, an additional 9.8% of drug traffickers sentenced within the guideline range were sentenced within the lower half of the range. *Id.* at 59, tbl. 29. *See also* Alex Kozinski, *Carthage Must Be Destroyed*, 12 FED. SENTENCING REP. 67 (1999), in which Judge Kozinski of the United States Court of Appeals for the Ninth Circuit describes his experiences sitting as a trial judge: "Once I have figured out the range, I always sentence at the very bottom"

cases represent 40% of all federal convictions and sentencings¹⁵⁸—some judges understandably begin to feel that the theoretically generous amount of discretion entrusted to them by the Guidelines' formal rules is a cruel illusion. That feeling, in turn, translates easily into general disgruntlement with the Guidelines system, and in some cases to a willingness to collude in, or at least wink at, blatant evasion of Guidelines rules.

b. The effect of drug sentence severity on prosecutorial conduct

Unduly high drug sentences also distort the behavior of other actors in the criminal justice system, notably prosecutors. Professor Stith and Judge Cabranes contend that the net effect of the Guidelines has been to transfer to prosecutors much of the sentencing discretion once exercised by judges.¹⁵⁹ They and I would doubtless disagree about the true extent of the transfer, as well about its desirability.¹⁶⁰ But it cannot be denied that the conduct of prosecutors is central to the success of the Guidelines system.

Prosecutors are critical to the Guidelines, not because the Guidelines grant them unlimited discretionary power, but because the Guidelines command that facts have necessary consequences at sentencing, and prosecutors are, in general, the masters of the facts.¹⁶¹ The Guidelines are a modified real offense system, meaning that sentences are based largely on what the defendant "really did," rather than on the offense of conviction. When the Sentencing Commission drafted the original Guidelines, it created the relevant conduct provisions¹⁶² primarily to ensure that the discretion withdrawn from judges was not merely transferred to prosecutors.¹⁶³ The efficacy of the restraint embodied in the relevant conduct concept, and thus the overall integrity of the Guidelines process, rests not on any external coercive mechanism, but on the conviction that prosecutors will act as faithful stewards, pursuing cases with vigor, advising the court of all relevant facts with candor, and letting the sentencing chips fall where the guidelines say they must. In short, for the Guidelines system to work, in the sense of generating substantially equivalent

158. In FY 1998, of 50,076 federal defendants sentenced nationwide, 19,489, or 38.9%, were sentenced for drug trafficking crimes. App. B, Nat'l Data (1999).

159. See STITH & CABRANES, *supra* note 2, at 130-142; see also, Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J., Feb. 11, 1992, at 2 ("[T]he guidelines have *sub silentio* moved the locus of discretion from the judge to the prosecutor.").

160. See Bowman, *Quality of Mercy*, *supra* note 3, at 724-32 (discussing, with special reference to the views of Judge Cabranes expressed before publication of *Fear of Judging*, the allegation that prosecutors are granted all the power in the Guidelines regime).

161. For further discussion of this point, see *id.* at 724-30; Frank O. Bowman, III, *To Tell the Truth: The Problem of Prosecutorial "Manipulation" of Sentencing Facts*, 8 FED. SENTENCING REP. 324, 325-26 (1996) [hereinafter "Bowman, *Tell the Truth*"].

162. U.S.S.G. § 1B1.3 (1998).

163. See Wilkins and Steer, *supra* note 46, at 499-500.

punishments for similarly situated defendants, prosecutors must defend it by following its rules.

But just as unduly high drug sentences corrode judges' confidence that they have any meaningful sentencing discretion, so, too, do such sentences reduce the incentives of government lawyers to defend the Guidelines system. It is easy to forget that one impetus for installing Guidelines in the first place was the widespread conviction that judges and prosecutors together were giving away the criminal justice store in the form of sentences plea bargained to unconscionably low levels. Although such criticisms were, in my view, frequently overstated, they reflected the undeniable reality that prosecutors were then—and are now—subject to many pressures to dispose of cases by making sentencing concessions. In drug cases under the Guidelines, the natural temptations are abetted by the fact that sentences start so high. If Guidelines-generated sentences were generally perceived to be “about right,” that is, set at a level such that most prosecutors would view any significant reduction from the legally mandated sentence range as the defendant “getting away with it,” then prosecutors would tend to fight tenaciously to enforce Guidelines rules as written. As matters stand in drug cases, even if a prosecutor agrees to give a defendant an immense and illegitimate break (by, for example, not telling the probation officer about that second load of cocaine,¹⁶⁴ or recommending a substantial assistance departure for a defendant who helped the government not at all¹⁶⁵), the defendant will almost certainly still receive a significant sentence. “Thus,” says the Tempting Angel on the prosecutor's shoulder, “conviction will be assured, you will be spared the nuisance of a trial, and stiff punishment will still be imposed. And who'll know?”

Moreover, prosecutors are not insensitive to the same realization that unsettles many judges: the (often grudging) recognition that the drug sentences the law commands are sometimes just too dang long. When that realization occurs often enough, prosecutors tend to do what their creed tells them they should—seek justice—even if that means fudging the Guidelines a little to find it.

If the foregoing assessments of judicial and prosecutorial reactions to current drug sentencing levels are accurate, one would expect to find widespread evasion and manipulation of Sentencing Guidelines rules in drug

164. Omitting information about conduct part of the same scheme or plan as the offense of conviction would affect the offense level due to the relevant conduct guideline. U.S.S.G. § 1B1.3 (1998). For discussion of the operation of relevant conduct in the Guidelines system, see *supra* notes 42-46 and accompanying text.

165. 18 U.S.C. § 3553 and U.S.S.G. § 5K1.1 (1998) permit a sentencing judge to depart below mandatory minimum sentences and the otherwise applicable Guideline range, upon motion of the government, where a defendant has provided substantial assistance to the government in the investigation or prosecution of another person.

cases. Moreover, if judges, prosecutors, probation officers, and defense lawyers have indeed evolved methods of evading the system in response to the stimulus of heavy drug penalties, one might also expect that the willingness to work outside the system's formal rules would spread inexorably to the sentencing of other kinds of crime. There is a growing body of evidence that both these expectations are now the reality. The Sentencing Guidelines system often does not work as designed because the system's human actors are using informal means to exercise a degree of discretion the rules sought to deny them. The evidence of this phenomenon takes a variety of forms.

2. Evidence of Guidelines Manipulation

a. Departures

The overall national departure rate has been creeping steadily upward for the last five years. In 1994, 71.7% of all federal cases were sentenced within the guideline range determined by the sentencing judge, a figure which declined to 66.3% in 1998.¹⁶⁶ The breakdown of types of departure in that period is more significant than the gross numbers. Between 1994 and 1998, the most common type of departure, that for substantial assistance to the government, held steady at about 19%.¹⁶⁷ The number of upward departures, de minimis to begin with, declined from 1.2% to 0.8%.¹⁶⁸ Meanwhile, non-substantial assistance downward departures nearly doubled, from 7.6% in 1994 to 13.6% in 1998.¹⁶⁹

One might find in these gross national figures nothing more than an (arguably desirable) reassertion of judicial sentencing discretion, accelerated perhaps by the Supreme Court's encouragement of departures in *Koon v. United States*.¹⁷⁰ Increased judicial assertiveness may indeed be part of the explanation, but a closer look at the departure numbers demonstrates that much more is at work. For example, the *national* downward departure rate for narcotics trafficking cases is now 44.2%,¹⁷¹ or to put it another way, only just over half of all drug trafficking defendants are sentenced within or above the guidelines range. In 1998, 31% of all drug traffickers nationwide received sentence reductions for substantial assistance to the government,¹⁷² and judges

166. 1998 SOURCEBOOK, *supra* note 145, at 51, fig.G.

167. *Id.*

168. *Id.*

169. *Id.*

170. 518 U.S. 81 (1996) (holding that judicial departures from the sentencing Guidelines under U.S.S.G. § 5K2.0 are reviewable on an abuse of discretion standard).

171. 1998 SOURCEBOOK, *supra* note 145, at 56, tbl. 27 (showing an overall departure rate for drug trafficking cases of 44.4% and an upward departure rate in such cases of 0.2%).

172. *Id.* Moreover, the 31% figure understates the frequency of substantial assistance reductions because, although the Sentencing Commission only counts substantial assistance

found an additional 13% to have demonstrated mitigating circumstances so unusual that they fell outside the heartland of cases contemplated by the Sentencing Commission in creating the drug guidelines.¹⁷³ Even as national averages, these numbers are inconsistent with faithful application of the Guidelines structure.

First, it is not plausible to assert that the government needs to make cooperation agreements with more than one-third of the drug defendants in America to successfully prosecute drug crime.¹⁷⁴ Nor is it plausible to assert that more than one-third of all drug defendants actually provided genuinely “substantial” assistance in the prosecution of one or more other persons. The inescapable conclusion is that, in some unknown but significant proportion of substantial assistance cases, the government (with the cooperation of the courts) is using substantial assistance not to build cases against others, but as a caseload management tool and/or as a means to circumvent the guidelines in cases where they are perceived to be unreasonably high.¹⁷⁵

Carefully considered, the national 13% non-substantial assistance departure rate for drug cases is equally striking. Since 31% of all drug offenders receive § 5K1.1 substantial assistance departures, to say that another 13% of *all* drug offenders get § 5K2.0 departures means that *18.7% of those who do not get § 5K1.1 departures do get § 5K2.0 departures*. Put another way, nationwide, judges are finding that nearly one in five drug defendants who do not get a substantial assistance reduction present facts “of a kind, or to a degree, not adequately taken into consideration by the Sentencing

reductions accomplished at the time of the original sentencing through § 5K1.1 motions, a number of districts commonly grant these reductions only *after* sentencing under, Rule 35 of FEDERAL RULES OF CRIMINAL PROCEDURE. See Linda Drazga Maxfield and John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, United States Sentencing Commission 5, n.11 (Jan. 1998) (noting that Rule 35(b) data is not collected, but estimating that Rule 35(b) motions occur in roughly 500 cases per year); see also, Stanley Marcus, *Substantial Assistance Motions: What Is Really Happening?* 6 FED. SENTENCING REP. 6 (1993) (questioning accuracy of Sentencing Commission departure data because information about Rule 35(b) motions not collected).

173. Marcus, *supra* note 172. The general downward departure provision of the Guidelines is U.S.S.G. § 5K2.0 (1998).

174. I say “more than one-third” because the reported figures on substantial assistance departures show that 31% of all drug defendants receive such departures at sentencing, see *supra* note 166, while an unknown additional number receive such departures after the initial sentencing under FED. R. CRIM. P. 35(b). *Id.* Based on personal experience and anecdotal reports, I suspect the Commission’s estimate that there are only 500 such additional departures per year is significantly under the true figure.

175. See Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt On “Substantial Assistance” Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 8, 57-58, 62-63 (1999); Frank O. Bowman, III, *Defending Substantial Assistance: An Old Prosecutor’s Meditation on Singleton, Sealed Case, and the Maxfield-Kramer Report*, 12 FED. SENTENCING REP. 45 (1999).

Commission in formulating the Guidelines.”¹⁷⁶ With the greatest respect to America’s district court judges, there just are not that many drug cases outside the Guidelines heartland.

The phenomenon of over-use of departures to manipulate sentences is probably most pronounced in drug cases, but is scarcely limited to such offenses.¹⁷⁷ The case becomes even plainer when one moves from national averages in drug cases to regional and single-district departure figures for all categories of crime. In 1998, the substantial assistance departure rates in the Northern District of New York, Southern District of Ohio, Eastern District of Pennsylvania, Western District of Missouri, and Western District of North Carolina, were 37.5%,¹⁷⁸ 41.9%,¹⁷⁹ 42.7%,¹⁸⁰ 43.1%,¹⁸¹ and 43.6%¹⁸² respectively. In the same year, the entire Second and Ninth Circuits had a non-substantial assistance departure rates of 23.4%¹⁸³ and 29.6% respectively.¹⁸⁴ Judges in the District of Arizona departed downward for reasons other than substantial assistance in 61% of the 2,195 cases sentenced in their court.¹⁸⁵ One cannot look at these figures and maintain with a straight face that the prosecutors and judges in these jurisdictions are making much effort to enforce the Guidelines as written.

b. Charge bargaining

Another method of circumventing the Guidelines is charge bargaining. Charge bargaining can take the form of charging or accepting a plea to an offense less serious than the defendant’s conduct would support. Alternatively, a defendant might be permitted to plead guilty to fewer counts than the government could actually prove, thus in theory subjecting him to liability for only a limited subset of all his criminal conduct. The Guidelines do not explicitly prohibit charge bargaining. However, the relevant conduct

176. U.S.S.G. § 5K2.0 (1998).

177. See, e.g., Michael S. Gelacak, Ilene H. Nagel & Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 364 (1996) (reporting high downward departure rates in the Eastern District of New York for drug couriers, in the District of Columbia for female white collar defendants, and in the District of South Dakota for firearms offenders, and concluding that “some departures are based on judges’ sympathies and political views, rather than on the presence of atypical factors in particular cases”).

178. *Id.*

179. *Id.*

180. *Id.*

181. 1998 SOURCEBOOK, *supra* note 145, at App. B.

182. *Id.*

183. *Id.*

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

185. *Id.* Many of the Arizona departure cases reportedly result from an aggressive “fast track” program for criminal immigration cases.

feature of the Guidelines is designed to nullify the effect of such bargains.¹⁸⁶ Pursuant to Section 1B1.3, the sentencing judge is required to take into account in setting the base offense level and all adjustments “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or wilfully caused by the defendant,”¹⁸⁷ as well as all the foreseeable acts of his co-conspirators,¹⁸⁸ that occurred in relation to the offense of conviction or “as part of the same course of conduct or common scheme or plan as the offense of conviction.”¹⁸⁹ As a result, the judge is to sentence each defendant for everything he actually did in relation to course of criminal conduct that led to his conviction, regardless of the specific offense to which he pled guilty. The judge is to include both uncharged and acquitted conduct, if proven at sentencing by a preponderance of the evidence.¹⁹⁰

As a general rule, if the sentencing judge has full information about the case, i.e., all the facts about the entire course of conduct that resulted in the defendant’s conviction, charge bargaining can only influence the sentence if the statutory maximum sentence for the bargained-for offense of conviction is less than the sentence the Guidelines would dictate for the same course of conduct. For example, if the conduct of a wire fraud defendant would ordinarily generate a guideline sentence in excess of five years, a charge bargain could limit his sentencing exposure by permitting him to plead guilty to only a single count of wire fraud with a statutory maximum sentence of five years.¹⁹¹ In drug cases, again assuming that the judge has full information, charge bargaining often will not help very much. If the defendant sold one kilogram of cocaine to Buyer X the first week of the month, and then sold five kilos to the same buyer each of the remaining three weeks in the month, the government could choose to charge him with only one count of distribution of one kilo. But the judge would still be obliged to calculate the defendant’s offense level based on all sixteen kilos because the entire month’s transactions were plainly part of the “same course of conduct or common scheme or plan.”¹⁹² The Guidelines dictate a sentence of at least 151-188 months (about twelve to fifteen years) for distribution of sixteen kilos of cocaine. Therefore, because the statutory maximum sentence for a single count of cocaine

186. See Wilkins and Steer, *supra* note 46.

187. U.S.S.G. § 1B1.3(a)(1)(a) (1998).

188. U.S.S.G. § 1B1.3(a)(1)(b) (1998).

189. U.S.S.G. § 1B1.3(a)(2) (1998).

190. See HAINES, BOWMAN & WOLL, *supra* note 3, at 113 (“All circuits agree that relevant conduct includes uncharged conduct outside the offense of conviction”); *United States v. Watts*, 519 U.S. 148 (1997) (holding relevant conduct includes acquitted conduct proven by a preponderance of evidence at sentencing).

191. See 18 U.S.C. § 1343.

192. U.S.S.G. § 1B1.3(a)(1)(B) (1998).

distribution is twenty years,¹⁹³ a plea to a single count will not cap the sentence below the guideline range.

There are, nonetheless, several ways to charge bargain around the drug guidelines, even if the judge has full information. The method most easily detectable from an examination of national statistics is to have the defendant plead guilty to use of a communication facility to carry out a drug trafficking offense, 21 U.S.C. § 843(b), known in the trade as a “phone count.” Anyone guilty of a phone count is also, by definition, guilty of a substantive drug offense or of conspiracy to commit one.¹⁹⁴ But any defendant who pleads guilty only to a phone count is likely to have received an immense break because the statutory maximum sentence for this offense is four years, a term that will often be years less than the guideline sentence to which the defendant would be subject if charged with a trafficking crime. The fact that such cases are almost always guidelines-evading plea bargains is further proven by a striking national statistic – in 1998, seven out of ten cases sentenced under 21 U.S.C. § 843(b) were sentenced at the absolute top of the guideline range.¹⁹⁵ In these cases prosecutors almost certainly made deals (in which the judges acquiesced) to allow the defendant to plead guilty to a phone count and be sentenced at the top of the range in return for dismissal of (or an agreement not to file) drug trafficking charges.¹⁹⁶

Another example of charge bargaining around the Guidelines is the “fast track” program employed by the Southern District of California in immigration cases involving criminal aliens. The Sentencing Guidelines provide that an alien convicted of reentering the United States after deportation following conviction of an “aggravated felony” (a term which includes all drug offenses and most common law crimes).¹⁹⁷ would receive a sentence of 51-63 months if

193. 21 U.S.C. § 841(b)(1)(C).

194. Section 843(b) makes it a crime “for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony” under the provisions of the remainder of Title 21. Thus, any defendant who violates § 843(b) must commit, or cause or facilitate the commission of, another drug felony, in which case he is also guilty of the other felony as a principal, a co-conspirator under 21 U.S.C. § 846 or 21 U.S.C. § 963, or on an aiding and abetting theory under 18 U.S.C. § 2.

195. 1998 SOURCEBOOK, *supra* note 145, at 59, tbl. 29. Of all cases sentenced under the “Communications Facility—Drugs” category, 68.3% were sentenced at the top of the guideline range. This is nearly double the percentage for any other type of crime, the next highest being 40.6% for murder, and 40.3% for racketeering/extortion. *Id.* In stark contrast, only 10.1% of drug trafficking cases are sentenced at the top of the range. *Id.*

196. Roger Groot has reminded me of another method of limiting sentencing exposure in a drug case – plead guilty to a conspiracy to commit “an offense against the United States” (drugs) under the general federal conspiracy statute, 18 U.S.C. § 371. Such a plea would limit the defendant’s sentence to five years, the statutory maximum under § 371.

197. See HAINES, BOWMAN & WOLL, *supra* note 3, at 547-51 (discussing the meaning and application of the term “aggravated felony” in the sentencing of criminal immigration cases).

convicted after trial, or 41-51 months if convicted by plea.¹⁹⁸ The Southern District of California set out to create a set of incentives to encourage criminal alien defendants to plead guilty, thus facilitating the processing of large numbers of such cases. As Roger Haines describes the program:

Originally "fast track" defendants were allowed to plead guilty to violation 8 U.S.C. § 1326(a), which capped their sentence at 24 months, the statutory maximum. However, on March 24, 1998, the Supreme Court eliminated the two year statutory maximum when it decided in *Almendarez-Torres v. U.S.* that an alien's prior aggravated felony convictions are not elements of the offense and therefore § 1326(a) is not a separate offense. Accordingly, the United States Attorney now allows "fast track" defendants to plead guilty to two counts of illegal entry under 8 U.S.C. § 1325, thus subjecting them to a statutory maximum of 30 months in custody.¹⁹⁹

I express no view on whether charge bargaining of this sort is desirable. Strong arguments can be made that, particularly in high-volume types of cases like immigration, charge bargaining to facilitate rapid processing of defendants represents sound public policy.²⁰⁰ There can be no denying, however, that the effect of the practice is to generate sentences substantially lower than the Guidelines, neutrally applied, would dictate. Moreover, there would appear to be some tension between the practice of charge bargaining and the stated policy of the Justice Department that prosecutors must charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction,"²⁰¹ and that prosecutors are not to negotiate a plea to anything less than one count of the most serious readily provable offense.²⁰²

198. Pursuant to U.S.S.G. § 2L1.2, an alien convicted of reentry after deportation following an aggravated felony conviction has a base offense level of 8, plus an enhancement of 16 for the aggravated felony, for a total base offense level of 24. Because he has a prior felony conviction, any such defendant will almost certainly have a criminal history category of at least II (although in some cases he might still be in category I if the sentence for the prior felony was probation). See U.S.S.G. § 4A1.1. Therefore, his sentencing range if convicted after trial would be Offense Level 24, Criminal History Category II, or 51-63 months. U.S.S.G. § 5A Sentencing Table. If the defendant pleads guilty early enough in the process to receive all three levels of the reduction for acceptance of responsibility, § 3E1.1, sentencing range would be Offense Level 21, Criminal History Category II, or 41-51 months. *Id.*

199. HAINES, BOWMAN & WOLL, *supra* note 3, at 557.

200. For example, the Ninth Circuit has praised the Southern District of California's "fast track" program for criminal aliens. See *United States v. Estrada-Plata*, 57 F.3d 757, 761 (9th Cir. 1995).

201. U.S. Attorney's Manual 9-27.310 (1995).

202. U.S. Attorney's Manual 9-27.410 (1995). For a discussion of whether this policy has been modified by Attorney General Janet Reno, see Bowman, "Tell the Truth," *supra* note 161, at 325.

c. Fact bargaining

The most direct, if disingenuous, method of evading a fact-driven real offense sentencing system is for the parties to conceal (or for the court to turn a blind eye to) facts that would increase the sentence beyond the agreed upon level.²⁰³ No serious observer doubts that fact bargaining occurs. The debate has been between those who think it happens a lot and those who think it is a relatively rare occurrence. In 1996, writing in response to a survey of probation officers that suggested prosecutors across the country commonly withheld facts from the Probation Department (and thus from the sentencing judge) “to protect a plea agreement,”²⁰⁴ I was skeptical that the phenomenon was a very common one.²⁰⁵ Four years on, although we have no more conclusive data now than we did then, I am beginning to think that I was unduly sanguine.²⁰⁶

Anecdotal information and conversations with lawyers and judges across the country suggest a creeping increase in the willingness by all parties, lawyers and judges alike, to fudge the facts a little to achieve desired sentencing outcomes. As but one example, I spoke to a district judge during the St. Louis University symposium who told me that judges in her district formerly spent a good deal of time resolving disputes between what the parties claimed the facts to be and the version of the facts presented by the probation officer in the presentence report based on the officer’s own investigation. The judge said that this problem was solved by adopting a local practice of having the parties to plea agreements stipulate to all the facts necessary to guidelines calculations. The story is revealing at both ends. It tells us that, under the old system, probation officers often thought the parties were manipulating the facts, while under the new system, the judicial branch, probation officers and judges alike, have simply abdicated any responsibility for policing the accuracy of the parties’ claims about the facts of the case.

203. See, e.g., David Yellen, *Probation Officers Look at Plea Bargaining, and Do Not Like What They See*, 8 FED. SENTENCING REP. 339, 340 (1996) (describing “fact bargaining and guideline-factor bargaining” as “the surest way to influence the sentence of a defendant who pled guilty”).

204. Letter of Francesca Bowman, Chair, First Circuit, Probation Officers Advisory Group, to Richard P. Conaboy, Chairman, United States Sentencing Commission (Jan. 30, 1996), 8 FED. SENTENCING REP. 303 (1996). (Ms. Bowman is no relation to the author of this Article.)

205. Bowman, “*Tell the Truth*,” *supra* note 161, *passim*.

206. To some degree, my thinking on this subject is undoubtedly influenced by having spent seven years as an Assistant U.S. Attorney in the Southern District of Florida, a district in which the U.S. Attorney’s Office has historically been among the most strict in insisting that its prosecutors enforce the Sentencing Guidelines as written. I still do not believe that prosecutors across the country are routinely giving away the store in the form of outrageous fact bargains, but I do think that the Southern District of Florida was and is at one end of a spectrum that includes at its other end offices that are very flexible indeed.

3. Guidelines Evasion and Sentencing Disparity

If I am correct in thinking that the Guidelines system often does not work as designed because the judges and lawyers who make it run are routinely employing a variety of strategies to avoid strict adherence to its rules, then one would think that disparity would be rampant. If that were so, one of Stith and Cabranes' primary charges against the system—that it has failed to reduce unwarranted sentencing disparity—would be proven to the hilt. As it happens, there are several quite recent studies on disparity in Guidelines sentencing, and the best of them present a picture that poses challenges to both the conventional critiques and the conventional defenses of the Guidelines.

Several very credible studies (including one co-authored by Professor Stith) have now found that the Sentencing Guidelines have measurably *reduced* “inter-judge” disparity within judicial districts, that is differences between the sentences of similarly situated defendants attributable to differences in sentencing approach between judges in the *same* district.²⁰⁷ The study co-authored by Professor Stith concluded:

Our study indicates that the Guidelines (and concomitant statutory minimum sentences) have been successful in reducing interjudge nominal sentencing disparity. To the extent that this was the central goal of the Sentencing Reform Act of 1984, Congress successfully achieved this goal. The Guidelines have reduced the net variation in sentence attributable to the happenstance of the identity of the sentencing judge. The expected difference in the sentence lengths of two judges receiving comparable caseloads was 16 to 18 percent in the pre-Guidelines period of 1986-87. Comparing interjudge disparity before and after the Guidelines, we find that this measure declined substantially, with estimates of the expected difference ranging between 8 and 13 percent during 1988-93.²⁰⁸

207. Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY (forthcoming 1999); James M. Anderson, Jeffrey R. Kling, and Kate Stith, *Measuring Interjudge Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. OF LAW AND ECON. 271 (1999) (concluding “the expected difference between two typical judges in the average sentence length was about 17 percent (or 4.9 months) in 1986-87 prior to the Guidelines and fell to about 11 percent (or 3.9 months) in 1988-93 during the early years of the Guidelines.”); A. Abigail Payne, *Does Inter-Judge Disparity Really Matter? An Analysis of the Effects of Sentencing Reform in Three Federal District Courts*, 17 INT’L. REV. OF LAW AND ECON. 337, 338, 357-58 (1997) (concluding from a study of three judicial districts that the Guidelines did reduce inter-judge disparity, but only by a small amount). *But see* Joel Waldfogel, *Aggregate Inter-Judge Disparity in Federal Sentencing: Evidence from Three Districts*, 4 FED. SENTENCING REP. 151, 153 (1991) (concluding that inter-judge disparity before and after the adoption of the Guidelines stayed the same in one district and increased in two others). *See also* Hofer, et al., *supra* at 88-89 [these are manuscript pages; TEXT AT N.114](questioning Waldfogel’s results).

208. Anderson, Kling & Stith, *supra* note 207, at 303.

However, the most comprehensive of these recent studies, authored by Paul Hofer, Kevin R. Blackwell, and R. Barry Ruback, also finds that disparities between judges in *different* regions and districts have markedly *increased* since the advent of the Guidelines in 1987.²⁰⁹ Moreover, the increase in inter-city disparity occurred almost entirely in drug cases,²¹⁰ lending support to the idea that drug sentences under the Guidelines provide a particularly powerful stimulus to manipulations of the system.²¹¹

What are we to make of a Guidelines system in which apparently widespread manipulation of its rules produces *more* uniform sentences within judicial districts, but markedly *less* uniformity in sentences district to district? For Guidelines supporters like myself, it becomes increasingly difficult to say that the Guidelines have succeeded in producing a sentencing regime that is applied uniformly nationwide. For Guidelines critics like Professor Stith and Judge Cabranes, it would seem equally difficult to continue characterizing as rigid, mechanical, and devoid of discretionary choice a system in which all of the actors, judges included, are routinely and adroitly working with, and sometimes around, the nominal rules to achieve desired outcomes. In short, the Guidelines system we now have matches neither the mental picture of it cherished by its designers nor that reviled by its critics.

In place of a single uniform national sentencing system, the Guidelines appear to have created a network of separate local and regional systems. What we know, anecdotally and statistically, suggests that each judicial district has tended to create a local equilibrium in which the customary sentencing players—judges, prosecutors, defense lawyers, law enforcement officers, and probation officers—have reached accommodations regarding the commonly occurring issues in guidelines application. This local equilibrium appears to enhance predictability and to ensure that similarly-situated defendants within the same district are sentenced reasonably uniformly, regardless of the identity of the sentencing judge. However, the sentencing outcomes produced by the local practices in one district may be markedly dissimilar to outcomes in similar cases in courts just across the district line. The Guidelines may be thought of as the common framework on which each local system is built. The local craftsmen in each district have made different choices – some sanctioned by the official rules, and some *sub rosa* adjustments made despite the rules—such that the final structure erected on the Guidelines framework in each district is a little bit different.

209. Hofer, et al., *supra* note 207.

210. *Id.* at [manuscript page] 132 and tbl. 3.

211. Hofer, et al. express the same point, albeit in the understated language of the social scientist. They say that their results suggest “that the drug Guidelines are affecting different cities differently, both through development of distinct city-wide adaptations and also in the degree to which the Guidelines constrain individual judge discretion.” *Id.* at [manuscript page] 116. *See also id.* at [manuscript pages] 135-36.

If this picture of federal sentencing today is reasonably true-to-life, what, if anything, should be done about it? One approach would be to declare categorically that, because the Guidelines have failed to achieve *national* uniformity in federal sentencing, they should be declared a failure and abolished. I suppose Professor Stith and Judge Cabranes might lean to this camp. Another approach would be to declare that, in an age of resurgent federalism, local and regional experimentation is to be welcomed rather than disparaged. In this view, there is simply nothing wrong with individual districts evolving their own sentencing practices sensitive to local law enforcement needs and the local legal culture. However, I think neither the abolitionist nor status quo position will answer.

Leaving all other considerations aside, the political realities are that the Guidelines will not be abolished anytime soon, if ever. Nonetheless, the fact that a federal sentencing guidelines system will endure for the foreseeable future does not mean that we should accept that system exactly as it now exists if doing so also means accepting as routine significant regional disparities between the sentences of similarly situated defendants. The federal structure of the United States results in fifty differing systems of state criminal law. But *federal* criminal law is the law of the whole nation. Although allowances must be made for local needs and priorities, unequal treatment of citizens haled before a federal court based on the fortuity of the venue of their prosecution must be viewed, not as a norm to be cultivated, but as an occasionally justifiable exception to the general rule of equal punishment. Moreover, it would appear that many of the local accommodations employed to achieve intra-district equilibria require hidden adjustments of the ostensible legal rules, which erodes a primary argument in favor of guidelines over unguided judicial discretion – that guidelines translate the private and uncontested discretionary choices of judges into public and rationally debatable legal decisions.

So what are we to do? I do not think the answer lies in placing our whole trust in the discretion of judges, though the wise exercise of that discretion must always be an integral part of criminal sentencing. Instead, we are most likely to discover solutions to the Guidelines' problems by looking to the Guidelines' greatest strength – that they bring law to sentencing. I believe the defects in the Guidelines can be sensibly diminished, though they will never be eliminated altogether, by resort to the processes of the law and the mechanisms of democratic law reform. Among the things we ought to do are these:

a. Reduce drug sentences

Professor Stith and Judge Cabranes and others of similar views often liken the Sentencing Guidelines to a machine.²¹² Although, for reasons I have explained elsewhere,²¹³ the metaphor is not a very apt one, it can sometimes be employed to yield valuable insights. Imagine a machine tool for manufacturing widgets. Its inventors designed the machine to produce large quantities of smoothly uniform widgets, but they also engineered into the machine a feature that allowed the operator to customize each widget within broad, but specified, tolerances. The machine was hailed as a breakthrough and was shipped out to widget factories around the country. However, all the local widget factories discovered that, when operated at the settings built into the device by its manufacturer, the widget machine produced smoothly uniform widgets admirable in every way, except that about 40% of the time they were just too big. Moreover, trying to limit the number of oversize widgets disabled the customizing feature. When all the local factories tried independently to adjust their machines to produce smaller widgets while retaining the ability to customize them, each factory jury-rigged the mechanism in a slightly different way. Thus each factory produced widgets incompatible with the widgets from every other factory and the national widget market was cast into disarray.

So long as drug sentences remain at levels that are consistently higher than the sense of rough justice broadly shared by all the actors in the criminal system will support, local court systems will jury-rig the Guidelines machine. If the Guidelines are ever to work as advertised, the level of drug sentences must be reduced to a level at which the actors in the criminal system, particularly judges and prosecutors, are no longer irresistibly tempted to guidelines evasion. I repeat that I do not advocate the legalization of drugs. Nor am I suggesting any slackening of the effort to apprehend, prosecute, and punish drug traffickers. But there is a principled distinction between punishing and over-punishing the guilty. Too often, we are over-punishing drug offenders, and our excesses are undermining not only the credibility of the drug enforcement effort, but the entire federal sentencing reform project.

I recognize the political difficulty of this suggestion. Regardless of what the Sentencing Commission might want to do, it is tightly constrained both by mandatory minimum sentence statutes and a realistic assessment of the probable spasmodic negative reaction of Congress to any sudden or sweeping attempt to lower Guidelines drug penalties. I do not delude myself that Congress is likely to experience an epiphany on this subject any day soon. I do think, however, that those things we think of as unalterable political verities

212. See, e.g., TONRY, *supra* note 146, at 358 (referring to the Guidelines Sentencing Table as a "43-Level 'Sentencing Machine'").

213. See Bowman, *Quality of Mercy*, *supra* note 3, at 704-14.

often can be altered, if the project of altering them is pursued realistically, tenaciously, incrementally. I venture with some confidence to say that, excepting Congress, no group or institution involved in the federal criminal process privately believes (whatever it may say for public consumption) that the current overall level of severity of federal drug sentences is desirable. Moreover, there is compelling evidence that this private consensus has already had a marked, and measurable, effect. In 1994, the mean drug trafficking sentence imposed in federal courts nationally was 90.7 months.²¹⁴ Over the next four years through 1998, average drug trafficking sentences declined steadily.²¹⁵ By 1998, the mean was 79.2 months, *a drop of nearly 13%, or almost a full year lower than it had been in 1994.*²¹⁶

As far as I know, there are no studies explaining the decline in drug sentences since 1994. Some of the drop is undoubtedly attributable to the enactment in 1994 of the so-called “safety valve” provision of 18 U.S.C. § 3553(f), permitting a sentence reduction below an otherwise applicable statutory minimum mandatory sentence in the case of certain first-time drug offenders.²¹⁷ However, given the acceleration of the downward trend, I suspect more is at work. Indeed, given the increase in departures discussed above,²¹⁸ the documented uses of charge bargaining,²¹⁹ and the anecdotal evidence of guidelines evasion through fact bargaining,²²⁰ it is difficult to avoid the conclusion that the entire system is using both overt and covert means to push drug sentences into ranges more generally acceptable to the lawyers and judges who do the work of administering the law.

The task remaining is to continue the process of translating a largely private consensus into politically viable public action. If the newly appointed Sentencing Commissioners and their successors are wise and patient, and if they are encouraged and supported by sensible elements in the judiciary, the Justice Department, and the defense bar, federal drug sentences – by which I

214. 1994 ANNUAL REPORT, *supra* note 145, at 54, tbl. 21. The median drug trafficking sentence in 1994 was 60.0 months. *Id.*

215. The mean and median drug trafficking sentences for 1995-1998 were as follows: 1995: 89.7 months (mean), 60.0 months (median), UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT 1995, 62 tbl. 19 (1996); 1996: 86.6 months (mean), 60.0 months (median), UNITED STATES SENTENCING COMMISSION, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 24 tbl. 14 (1997); 1997: 82.3 months (mean), 57.0 months (median), UNITED STATES SENTENCING COMMISSION, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 30 tbl. 14 (1998); 1998: 79.2 months (mean), 57.0 (median), 1998 SOURCEBOOK, *supra* note 145, at 30 tbl. 14.

216. *Id.*

217. For a complete discussion of the “safety valve,” see HAINES, BOWMAN & WOLL, *supra* note 3, at 909-18.

218. See *supra* notes 166-85 and accompanying text.

219. See *supra* notes 186-202 and accompanying text.

220. See *supra* notes 203-06 and accompanying text.

mean the sentences produced by an honest application of the Guidelines—can be nudged, increment by increment, down to levels that are both more substantively just and less likely to distort the sentencing process as a whole.

b. Transform the Sentencing Commission into a politically effective institution

One of the justifications advanced for creating a Sentencing Commission in the first place was the conceit that such a commission of neutral experts would be free to pursue just results insulated from the politics of crime and criminal justice. Of all the expectations for the Guidelines system, this may perhaps have been the most unrealistic. Crime and punishment have been staples of political controversy since the beginning of recorded history. There was never the slightest chance that the executive or legislative branches would consent to remain permanently aloof from decisions about criminal sentencing in the federal courts.

Not only was the hope of keeping sentencing out of the political arena unrealistic, it was fundamentally misguided. In this, at least, the original architects of the Guidelines system share one misapprehension with Professor Stith and Judge Cabranes. Both the proposal to consign sentencing entirely to the discretion of life-tenured judges and the attempt to create a politically insulated body of sentencing experts are, in part, efforts to remove criminal punishment from the arena of democratic choice. The prevention and punishment of crime is one of the core functions of government. Criminal law, particularly including the law allocating criminal punishment, is only legitimate when promulgated by democratically accountable institutions. Criminal laws, particularly those inflicting punishment, will only be effective when they comport, at least roughly, with the public's sense of justice. Hence, an effort to permanently insulate sentencing from political component of lawmaking risks being perceived as illegitimate because it is undemocratic, and risks being ineffective to the extent it is out of touch with the popular will.

By placing the Sentencing Commission in the judicial branch, requiring that roughly half its members be sitting judges, and exempting the Commission from norms of openness and procedural regularity required of executive agencies, the Sentencing Reform Act sought to insulate sentencing reform from politics. There can be no doubt that the early isolation of the Commission from direct political pressure contributed significantly to the original Commission's success in producing anything at all. But the next phase of Guidelines development, the phase we have been in since 1987, the process of studying, explaining, evaluating, amending, and improving on the original structure, demands a more open, transparent, participatory, "political" process. Nonetheless, the Act assigns this highly visible political task to an agency whose institutional ethos is predisposed toward the secretive and apolitical mindset of the judiciary.

I suggest that, at this point in the history of the Guidelines experiment, a Sentencing Commission will function best, not when it acts in secret as an insular cell of technocrats, but when it functions most openly, most “politically.” When formulating policy, the new Commission should actively seek cooperation and input from the public, and from public and private institutions most interested in federal criminal law—the judiciary, the Department of Justice, the defense bar, the Congress, the academy. Observers of the Commission, including Professor Stith and Judge Cabranes,²²¹ have been advising for some time that Guidelines changes are likely to be both substantively better and more readily accepted when they are the product of a broadly consultative process.²²² The new Commission should follow in the footsteps of its immediate predecessors, at least insofar as the last Commission began developing more open, inclusive procedures for developing and refining guideline amendments. The work done on the so-called “economic crime package” by Commission staff, judges, probation officers, prosecutors, and academics over the last two years has illustrated the value (as well as some of the drawbacks) of a more transparent process.²²³

In addition, the Commission, as an institution and as individuals, should begin immediately to cultivate working relationships with essential opinion leaders and decision makers in the federal sentencing community, notably including congressional leaders on both sides of the aisle. These relationships are essential, not only for the perhaps Quixotic project of incrementally reducing drug sentences, but for advancing the whole of the Commission’s law reform agenda.

c. Make the federal sentencing system more responsive to the concerns of judges

Some might infer from what I have written here a hostility to a prominent and meaningful judicial role in federal sentencing. Nothing could be further from my view. While judges may not be the sole repositories of moral reasoning in the criminal law, they are possessed, both individually and institutionally, of qualities indispensable to a just sentencing regime. Any sentencing process, even one as rule-bound as the Guidelines, must be presided over by a neutral decision-maker not allied with either party. Given the often emotionally or politically charged nature of criminal sentencing, the neutrality

221. See STITH & CABRANES, *supra* note 2, at 95.

222. See, e.g., Marc. L. Miller and Ronald F. Wright, *Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. R. 723 (1999).

223. For discussion of the ongoing project of re-examining the economic crime provisions of the Guidelines, see Vol. 10; No. 3, FED. SENTENCING REP., an issue devoted to *Rethinking “Loss” in Fraud and Theft Cases*, and United States Sentencing Commission, *A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines* (Oct. 20, 1998) (available at <http://www.ussc.gov>).

of the sentencing arbiter is enhanced by residence in the judicial branch and the job security afforded by life tenure. And while judges as individuals are not *necessarily* any wiser, more humane, or more discerning than the rest of the citizenry, they are certainly no less so, and there is reason to think that age and experience and the weight of responsibility for imposing sentences on real people may confer on judges a perspective that others lack. Professor Stith and Judge Cabranes are absolutely correct that the perspective of judges is indispensable to the sentencing process, and that judges ought to be more than machine tool operators on the sentencing assembly line.

In the last twenty years, federal judges have gone from being the apparent monarchs of the sentencing process²²⁴ to becoming the subjects of a system designed in large measure to rein in what some saw as judicial inconsistency and caprice. What is needed now is a movement to “rehabilitate” the judicial role in criminal sentencing. Ideally, the Guidelines should not be a set of fetters for judges, but the product of a cooperative effort between the Sentencing Commission, the judiciary, the Congress, the Justice Department, and the defense community to produce sentences that are the best approximation of just and effective punishments that a democratic system of government can devise. Judges have a prominent, if perhaps no longer dominant, role to play in that effort.

Five of the Sentencing Commission’s seven members are now judges, the largest number of judge-commissioners in the body’s history. The membership change alone will certainly bring added sensitivity to judicial concerns. But the Commission cannot act alone. If the federal judiciary wants changes in the Guidelines system, it must bestir itself to action as an institution to achieve those changes.

First, as Professor Douglas Berman has suggested, the judiciary could play a more active role in the development of federal sentencing law through a more vigorous and creative application of traditional tools of judging to sentencing.²²⁵ Professor Berman observes that federal judges passed from active resistance of the Guidelines by declaring them unconstitutional to passive acceptance of Guidelines constraints following the Supreme Court’s determination of their constitutionality in *Mistretta v. United States*.²²⁶ He argues with considerable force that federal judges have been asleep to the real possibility of developing a federal common law of sentencing that interacts with and, over time, modifies the formal regulations of the Sentencing

224. Although, as noted in *supra* note 79 and accompanying text, even in those halcyon days, judges shared sentencing power with Congress and the Parole Commission.

225. Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 10 STAN. LAW & POL. REV. (forthcoming 2000).

226. 488 U.S. 361 (1989).

Guidelines.²²⁷ This suggestion is not irreconcilably far from the views of Professor Stith and Judge Cabranes. Where they would abolish the Guidelines and start anew, creating a common law of sentencing from advisory sentencing rules and effectively unreviewable judicial “explanations” of sentences, Professor Berman urges development of a more vigorous federal common law of sentencing *within the framework of the existing system*.

I would add to Professor Berman’s suggestion the following caveat. If judges truly want to regain more control over sentencing outcomes, they must be prepared, figuratively speaking, to “put their money where their mouths are.” The coin of the realm, the scarcest resource, in federal district court is *time*. Based on my own experience and on conversations with lawyers and judges around the country, judges want more control over sentences, but often begrudge the time it takes to deal with sentencing issues. They dislike spending court time on evidentiary issues related to sentencing under a system in which facts have necessary sentencing consequences. They dislike spending time on the legal intricacies of Guidelines law. Thus, the instinctive preference of judges is to let the parties work out sentencing issues by agreement, saving judicial time and avoiding the awkwardness of resolving conflicting factual and legal claims.

Judges’ resistance to investment of time on sentencing is entirely understandable. There are too few federal judges and too many federal cases. But if, as Professor Stith and Judge Cabranes argue, the act of imposing a criminal sentence is a characteristic and quintessentially important judicial function, then judges must be willing to invest the time to perform it faithfully, and where necessary, creatively. No persuasive common law of federal sentencing can arise if the problem cases are routinely disposed of *sub rosa* by invisible dealings of the parties.

Finally, if judicial concerns about sentencing are to be given appropriate weight, I think judges, like Sentencing Commissioners, must be prepared to behave less reactively than judges are wont to do. The judiciary should engage the Sentencing Commission, the Justice Department, and the relevant congressional committees in substantive discussions on the particular aspects of sentencing policy judges think are most in need of reform. If, for example, a primary problem with the current federal sentencing structure is unsupportably high drug sentences, the judiciary should be prepared to say so, publicly through organs like the Judicial Conference, and privately to Sentencing Commissioners and lawmakers with whom judges are acquainted. It is certainly true that judges are not politicians and rightly guard their public and private utterances on questions of law reform out of respect for the institutional role they fill. Nonetheless, there are issues on which judicial input outside the confines of particular cases and controversies is entirely

227. Berman, *supra* note 225.

appropriate. I think sentencing is one of these, and in *Fear of Judging*, Judge Cabranes has provided a scintillating example of how judges can use media other than judicial opinions to inform and profoundly influence the sentencing debate.

d. Increase the procedural protections of defendants at sentencing.

Professor Stith and Judge Cabranes correctly observe that the Sentencing Guidelines are a de facto recodification of federal criminal law.²²⁸ They do create “Guidelines crimes,”²²⁹ that is they set defendants’ punishment based on judicial findings of facts which are not elements of the offense of conviction, or indeed elements of any crime in the criminal code. Yet despite the centrality of fact finding to the determination of Guidelines sentences, the procedural rules governing sentencing hearings under the Guidelines are but little changed from the rules that governed the wholly discretionary sentencing of the pre-Guidelines era. This is unfair to defendants, and offensive at least in spirit to constitutional norms of due process.

Judge Cabranes’ proposal, voiced at the close of the St. Louis University conference, that the Federal Rules Advisory Committee take up the question of amending the Federal Rules of Criminal Procedure to impose greater procedural regularity on sentencings is worthy of support. In addition, the Sentencing Commission ought to consider whether it can mandate, or at least encourage, increased procedural protections for defendants at sentencing through amendments to Chapter Six of the Guidelines regarding sentencing procedures.²³⁰

V. CONCLUSION

The Federal Sentencing Guidelines do many things very well and solve a host of problems associated with the pre-existing regime. In this Article, I have concentrated largely on the system’s most notable weaknesses because those are the points on which Professor Stith and Judge Cabranes focus in their fine book. Any system that aims to constrain human behavior within a web of rules will be subject to continuing adjustment, as well as some outright manipulation and evasion. That is unavoidable, and in the case of complex legal systems, is often healthy. Evasions of the letter of the law sometimes enable the law to deal justly with hard or extraordinary cases, but persistent patterns of evasion are signals to lawmakers about the ways in which the law is deficient or could be improved. The Federal Sentencing Guidelines are now being evaded to a degree that signals the need for some important changes. In

228. STITH & CABRANES, *supra* note 2, at 148.

229. *Id.*

230. The issues implicated by an increase in procedural formality at sentencing are explored in the forthcoming Vol. 12; No. 5 of the FEDERAL SENTENCING REPORTER.

the end, where I part company with the authors of *Fear of Judging* is that I welcome the advent of law in the form of the Guidelines to the realm of criminal sentencing, and I have faith in the mechanisms of the law to improve, even if they will never perfect, those Guidelines.