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## Sentencing Guidelines: Where We Are and How We Got Here (panel remarks)

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FRANK O. BOWMAN, III\*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *Id.*

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

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