Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines

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I. INTRODUCTION

Since 1987, the sentence imposed on a person convicted of violating federal criminal law has been governed by the Sentencing Reform Act of 1984 and by the Federal Sentencing Guidelines, whose creation was mandated by that Act. In 1992, Judge José Cabranes, now of the United States Court of Appeals for the Second Circuit, gave this assessment of the Guidelines:

First, the Guidelines system is probably the most significant development in “judging” in the federal judicial system since the adoption in 1938 of the Federal Rules of Civil Procedure; no one can pretend to understand the work of federal judges today without some appreciation of the Guidelines system and what it has done to the courts and what it has done to the work of judges, prosecutors, defense lawyers and others who work in the federal judicial system. Second, the Sentencing Guidelines system is a failure - a dismal failure, a fact well known and fully understood by virtually everyone who is associated with the federal justice system.¹

I agree wholeheartedly with Judge Cabranes' first conclusion. One can hardly overstate the significance of the Guidelines, not merely for judges and judging, but for every aspect of federal criminal practice. On the other hand, I could not disagree more with Judge Cabranes' second pronouncement. The Guidelines are not a "dismal failure." They are not a failure at all, much less a dismal one. They are, at worst, a marked improvement over the system they replaced and are, on balance, a notable, albeit certainly imperfect, success.

In the remarks that follow, I do four things. First, for those unfamiliar with the Federal Sentencing Guidelines, I begin by explaining briefly how the Guidelines work. Second, I endeavor to show why Judge Cabranes is wrong, absolutely wrong in declaring the Guidelines a failure, and mostly wrong in the specific criticisms he and others level against the Guidelines. Third, after jousting with Judge Cabranes a bit, I discuss some problems with the current federal sentencing system, most notably the sheer length of narcotics sentences. Finally, I comment briefly on some of the implications of the Guidelines, and the principles which undergird them, for broader questions of crime control and social policy.

II. The Guidelines

A. The World Before the Guidelines

The United States Sentencing Guidelines represent a radical departure from previous federal practice. Prior to the Sentencing Reform Act of 1984 (SRA),\footnote{Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 1976, 2027.} criminal sentences in the federal courts were said to be "indeterminate." The word "indeterminate" is often used to refer to two different, but related, ideas in the sentencing context.

I have elected Judge Cabranes as a jousting partner for four principal reasons. First, he is among the most vigorous and vocal judicial critics of the Guidelines, and has expressed his opposition to them in a variety of forums. \textit{See, e.g.}, José A. Cabranes, \textit{Letter to the Editor: Incoherent Sentencing Guidelines}, \textit{WALL ST. J.}, Aug. 28, 1992, at A11. Second, although Judge Cabranes often expresses himself more pungently than others who share his point of view, his writings and speeches are certainly representative of a significant body of judicial and academic opinion. \textit{See, e.g.}, \textsc{Michael Tonry}, \textit{Sentencing Matters} 11 (1996) ("Few outside the federal commission would disagree that the federal guidelines have been a disaster."). Third, despite my disagreements with Judge Cabranes on this issue, he is a capable and distinguished jurist. Finally, what he thinks may be of more than representative interest—he was prominently mentioned as a candidate for the last open seat on the Supreme Court, and his undoubted qualifications may yet carry him to that eminence.
First, an indeterminate sentencing system is one in which the judge sentences a defendant to a range of years, say five to twenty, but the number of years the defendant actually serves is then entirely in the hands of an administrative body like a parole board. Prior to the SRA, a similar system existed in federal court. The federal judge sentenced a defendant to a specific term of years, say fifteen, but the percentage of that fifteen years that the defendant would actually spend in a cell was controlled primarily by the United States Parole Commission. The Parole Commission had its own guidelines, and the amount of real time a defendant might serve under those guidelines was undoubtedly more predictable than it would have been without them. But substantial


6. A federal district court had three options when imposing a sentence of imprisonment: (1) The court could impose a sentence under 18 U.S.C. § 4205(a) (repealed 1984), requiring the defendant to serve one-third of his sentence before becoming eligible for parole. (2) The court could impose a maximum term of imprisonment pursuant to 18 U.S.C. § 4205(b)(1) (repealed 1984), but reduce the minimum term required before parole eligibility to less than one-third of the maximum sentence. (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 § 4205(b)(1), the Parole Commission retained control over when the defendant would be released after he served the minimum sentence 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). In addition, there was a statutory entitlement to so-called “good time” credit, up to nearly one-third of the stated sentence. 18 U.S.C. § 4161 (repealed 1984).

uncertainty remained, and the Commission retained significant legal and practical control over release dates.\(^8\)

Second, although it is probably a misuse of the word, the term "indeterminate" is often used to describe another central aspect of federal sentencing before the Federal Sentencing Guidelines. Prior to their enactment, 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.\(^9\) In other words, if the statute said that the penalty for spitting on a federal sidewalk was up to five years imprisonment, the district court could sentence an illegal expectorator to probation, or one year, or two years, or five years. As long as the judge sentenced within the statutory range, virtually no rules governed the judge’s choice of a particular sentence.\(^10\) There was no limitation on either the type or quality of information a judge could consider at sentencing.\(^11\) A judge

\(^8\) The language of 18 U.S.C. § 4206(a) (repealed 1984) indicates the breadth of the Parole Commission’s discretion. The statute describes the Commission’s parole power as follows:

(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 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.


\(^10\) For example, federal law prior to the enactment of the SRA 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).

\(^11\) “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.”
properly could consider information 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. None of this information was subject to filtering by the Federal Rules of Evidence, and the judge was required to make no findings of fact. Moreover, so long as the final sentence was within statutory limits, it was essentially unreviewable by a court of appeals.

18 U.S.C. § 3661 (repealed 1984); see also Williams v. New York, 337 U.S. 241, 249-50 (1949) (stating that due process allows a judge broad discretion as to the sources and types of information relied upon at sentencing).


13. See Koon v. United States, 116 S. Ct. 2035, 2045 (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) ("It 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 the appellate courts 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 defined by concepts of due process. See, e.g., United States v. Tucker, 404 U.S. 443 (1972) (vacating on due process grounds a sentence that relied on prior uncounseled convictions); Townsend v. Burke, 334 U.S. 736 (1948) (holding that a sentence based on erroneous factual information violated due process); United States v. Clements, 634 F.2d 183, 186 (5th Cir. 1981) (holding that the court will "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) ("We . . . do not review the severity of a sentence imposed within the statutory limits. But we have appellate responsibility to give careful scrutiny to the judicial process by which the particular punishment was determined."); United States v. Espinoza, 481 F.2d 553, 558 (5th Cir. 1973) ("[T]he 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 Fisher, supra note 9, at 745 (noting that before the SRA there was no appellate review of sentencing decisions); Stith and Koh, supra note 7, at 226 ("For over two hundred years, there was virtually no appellate review of the trial judge's discretion.").
The watchword of this system was "individualized sentencing." The system recognized reluctantly society's call for retribution for crime, and the system's defenders, if pressed, might grudgingly acknowledge that lawbreakers may deserve punishment, but in many quarters the notion of retribution or "just deserts" as a rationale for sentencing was either scorned completely or looked upon as more than a little barbaric. The rehabilitative ideal, what some have called the "medical model" of sentencing, was at flood tide. The article of faith upon which sentencing rested was that criminal deviance could be treated like any

14. The Supreme Court embraced "individualized sentencing" as the philosophy of federal sentencing in Williams v. New York, 337 U.S. 241, 248 (1949) (referring to "[t]oday's philosophy of individualizing sentences"). See also 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.").

15. In Williams v. New York, Justice Black declared, "retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." 337 U.S. at 247-48. Professor Francis A. Allen writes that Justice Black's dictum "expressed the enlightened opinion, not only of the judiciary, but also of the public at large." FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 5 (1981).

16. JAMES Q. WILSON, THINKING ABOUT CRIME 193 (1975) (viewing the correctional system as intended "to isolate and to punish" would "strike many enlightened readers today as cruel, even barbaric").

Retribution, for which the more descriptive term may be "desert" or "just deserts," as in, "He got what he deserved," has gone in and out of vogue as a rationale for punishment. When retribution is disfavored, as it was during the era of indeterminate sentencing which preceded the Guidelines, the tendency is to equate retribution with "revenge," a term suggesting mean-spirited, vindictive and uncivilized behavior. For example, the 1972 edition of the Model Sentencing Act declares without explanation, "Sentences should not be based upon revenge and retribution." ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 46 (1976) (quoting 1972 edition of MODEL SENTENCING ACT).

17. See generally, ALLEN supra note 15 (discussing the rise and fall of the "rehabilitative ideal").

18. Michigan purportedly was the first state to adopt a sentencing system based at least in part on a "medical model." 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 and 1970 and noting that "[a] medical analogue was frequently invoked"); ALLEN, supra note 15, at 35 (referring to the "medical model" of sentencing).

19. Professor Allen notes that "rehabilitation . . . seen as the exclusive justification of penal sanctions . . . was very nearly the stance of some exuberant American theorists in the mid-twentieth century . . . ." ld. 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.").
other disorder. The cure was to be effected 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. Penitentiaries would inspire penance and reformatories would
reform. Because the precise combination of punitive and reinforcing
measures which would maximize the chances of rehabilitation presumably
varied from person to person, the sentencing judge was guaranteed access
to the widest possible array of information about every defendant.

The theory of pre-Guidelines indeterminate sentencing was essentially
utilitarian, but it was a utilitarianism resting on a more hopeful view
of human nature than is currently in fashion. Indeed, it took a hopeful
view not only of the nature and capabilities of those convicted of
crime, but of those who fixed their penalties. At the time of
sentencing, the system assumed that judges steeped in the law and the
social sciences, and seasoned by the experience of sentencing many
offenders, were perceptive enough to choose penalties that maximized the
rehabilitative chances of offenders. After sentencing, the assumption

20. The very names we give to American prisons illustrate their genesis in the
rehabilitative ideal. The term "penitentiary" was coined by Pennsylvania Quakers, who
conceived of their prison regime of confinement, work and prayer as conducive to
penance and thus to the reform of the offender. For a description of the Pennsylvania
system, see Gustave De Beaumont & Alexis De Toqueville, On The Penitentiary
System In The United States And Its Application In France 41, 83-84 (Southern
Penology In Pennsylvania (1927); Carl E. Schneider, The Rise Of Prisons And The

21. Speaking of rehabilitationist sentencing in general, one commentator wrote:
"Everything about the offender's life was relevant to the pursuit of the ideal treatment
program. Each case was different, each required a different response." Griset, supra
note 18, at 12; see also Williams v. New York, 337 U.S. 241, 249-51 (1949)
(emphasizing that individualized sentenced required judicial access to the broadest possible
array of information about the offender).

22. See Barbara S. Barrett, Sentencing Guidelines: Recommendations For
Sentencing Reform, 57 Mo. L. Rev. 1077, 1079 (1992) (noting shift during sentencing
reform movement away from "an emphasis on utilitarian aims, particularly treatment");
Nemerson, supra note 9, at 683 (describing then-predominant justifications for criminal
punishment as "represent[ing] an implicit, and often explicit, adoption of a utilitarian
moral theory").

23. Of course, one might also conclude that a view of human nature which
assumes human attitudes and behavior to be highly malleable and subject to significant and
casibly predictable modification by agents of the state is not particularly "hopeful" at all.
See, e.g., Professor Allen's discussion of the similarities between the rehabilitative ideal
in American penology and the theory and practice of the penal system in the People's

24. GRISSET, supra note 18, at 1 (discussing the premises of the "rehabilitative
regime" and noting that it rested on the assumptions that "case by case decisionmaking
was that trained penologists could determine when a prisoner had been rehabilitated and thus advise the Parole Commission about release dates.26

A variety of complaints arose about this system. First, critics said that it led to tremendous sentencing disparity.27 Without guidelines for judges, and with virtually no review of their decisions, every federal district judge was a law unto him or herself. There was no requirement even that each judge treat similar defendants similarly. Judges were free to give different sentences based on factors as whimsical as dress or hairstyle or a "gut feeling" that this defendant was good and that one was bad, so long as the judges were not impolitic enough to put the more extreme of such subjective assessments on the record.28 Even if one

should be encouraged; that future behavior could be predicted; that criminal-justice practitioners possessed the expertise required to make individualized sentencing decisions”.

25. "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." WILSON, supra note 16, at 191.

26. See GOTTFREDSON ET AL., supra note 5, at 41-67 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.

27. 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 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 COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 23 (1967) (finding sentencing disparity to be pervasive); NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 142 (1973) (finding sentencing disparity to be pervasive); Peter B. Hoffman & Barbara Stone-Mcierhoefer, Application of Guidelines to Sentencing, 3 LAW AND PSYCHOL. REV. 53, 53-56 (1977) (describing criticisms of then-extant sentencing practices on the ground of “unwarranted sentencing variation”). Peter Hoffman later became the principal draftsman of the Federal Sentencing Guidelines.

28. Even before the adoption of the Federal Sentencing Guidelines, courts could not rely on certain types of information. See, e.g., United States v. Tucker, 404 U.S. 443 (1972) (remanding for resentencing because lower court’s reliance on prior uncounseled convictions violated due process); Townsend v. Burke, 334 U.S. 736 (1948) (holding that a sentence based on erroneous information violated due process). Neither before nor after the adoption of the Guidelines could a judge condition his sentencing decision on the race of the offender. See, e.g., United States v. Schmidt, 47 F.3d 188, 190 (7th Cir. 1995) (holding that a defendant may not waive right to appeal a sentence based on constitutionally impermissible factor such as race); United States v. Marin, 961
believed federal judges to be rigorously rational and internally consistent in their own courtrooms, there was no guarantee of consistency from judge to judge, even when they sat in the same courthouse. A defendant sentenced to ten years in front of Judge Smith might get two years down the hall in front of Judge Jones.\(^{29}\)

Second, critics believed that plea bargaining exacerbated the potential for disparity between similarly-situated defendants.\(^{30}\) While the parties could not exercise absolute control over a judge’s sentence, they could at least limit the judge’s discretion by negotiating a plea to a less serious offense or to fewer than all possible charges. Therefore, because of plea bargaining, the ranges within which Judge Smith and Judge Jones would set out to sentence two similar defendants might be very different depending on the skills and tenacity of the prosecutors and defense attorneys.\(^{31}\)

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F.2d 493, 496 (4th Cir. 1992) (holding the same, that a defendant may not waive right to appeal a sentence based on constitutionally impermissible factor); United States v. Leung, 40 F.3d 577, 586 (2d Cir. 1994) (holding that “even the appearance that a sentence reflects a defendant’s race or nationality will ordinarily require a remand for resentencing”); United States v. Edwards-Franco, 885 F.2d 1002, 1005-06 (2d Cir. 1989) (pre-Guidelines, remanding for new trial based on “appearance” that district court may have imposed higher sentence because of defendant’s nationality).

29. “[F]ederal trial judges, answerable only to their varieties of consciences, may and do send people to prison for terms that may vary in any given case from none at all up to five, ten, thirty, or more years. This means in the great majority of federal criminal cases that a defendant who comes up for sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between.” Frankel, Criminal Sentences, supra note 27, at 6. But see Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 Cal. L. Rev. 1471 (1993). Professor Standen claims that pre-Guidelines sentencing was more predictable than Guidelines sentencing, and that the parties’ ability to predict sentencing outcomes “constrained” and “restricted” the plea bargaining process. Id. at 1502-04. However, Professor Standen provides neither empirical nor anecdotal evidence for the counter-intuitive notion that sentencing in an indeterminate system is more predictable than determinate sentencing under the Guidelines.


31. Of course, plea bargaining could reduce judge-to-judge disparity. Assuming a reasonably consistent view within a prosecutor’s office regarding the appropriate sentence for a given crime, and assuming that prosecutors knew the sentencing habits of
Third, critics observed that because of the parole system, the real power to determine the length of time a defendant actually spent in prison rested not with judges, prosecutors, defense attorneys or legislators, but with a parole board that operated substantially out of public view. Moreover, the variability of its decisionmaking added yet another stage at which disparity could flourish.

Fourth, indeterminate sentencing was thought to erode public faith in the criminal justice system. Because defendants rarely served anything close to the amount of time the judge announced, observers unfamiliar with the system's rituals saw the system as fraudulent. Judges would declaim grandly, "I sentence you to ten years in the custody of the Attorney General of the United States!" but everybody in the courtroom knew the defendant would almost certainly be on the street in a little over three.

Fifth, observers had the sense that lazy prosecutors were indiscriminately plea bargaining away cases against vicious criminals to reduce their workloads, and that soft judges were letting criminals get away with minimal sentences.

Finally, I suspect that all these critiques rooted in concerns about fairness would not have led to global reform if people felt that the system worked, in the sense that it reduced or controlled crime. Whether any criminal justice system in a democratic society can, on its own, "control crime" is a very big question. Nonetheless, the pre-Guidelines system rested on the dual premises: (a) that the correctional system could reduce crime by rehabilitating criminals; and (b) that judges, probation officers and parole boards knew enough about human nature to induce rehabilitation and to recognize rehabilitation when they saw it. When

local judges, plea bargains were often crafted to constrain a judge's discretion within an acceptable range.


33. This is the customary formal phrasing used to pronounce a federal sentence. Because federal prisoners serve their sentences at institutions managed by the Bureau of Prisons, an element of the U.S. Department of Justice, a federal prisoner is technically "in the custody of" the head of the Department of Justice, the Attorney General.

34. See Stith & Koh, supra note 7, at 227 (discussing the pre-Guidelines system and noting that "critics from the political right expressed dissatisfaction with the perceived leniency of sentencing judges and parole officials").

35. I assume that sufficiently harsh measures imposed by a totalitarian state such as Nazi Germany or the Soviet Union in the Stalinist era can drastically reduce many types of crime, albeit at a dramatic cost to personal liberty.
people lost faith in these premises, the perception, at least, became that the country had a sentencing system which was both unfair and ineffective. At the end of the day, the one unanswerable critique of a primarily utilitarian system is that it does not work.

The reform effort that culminated in the Sentencing Reform Act and the Federal Sentencing Guidelines had three objectives:

1) Ensuring that similarly situated defendants received similar sentences;
2) Making the sentencing system "honest" in the sense of requiring that a defendant serve all, or nearly all, of the sentence pronounced by the court, and;
3) Raising at least some sentencing levels, primarily those for narcotics offenses, and to a lesser but still significant degree, those for white collar crimes.

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36. See Barrett, supra note 22, at 1079 (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"); Nemerson, supra note 9, 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.").

37. For a detailed discussion of the process that led to the creation of the Guidelines, see generally Stith & Koh, supra note 7.

38. Justice Stephen Breyer, one of the original sentencing commissioners, has written that Congress had "two primary purposes" in enacting the SRA; namely, "honesty in sentencing," and "reducing 'unjustifiably wide' sentencing disparity." Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Depend, 17 Hofstra L. Rev. 1, 3 (1988). Likewise, Cynthia K.Y. Lee asserts that Congress was "primarily interested in furthering two values" when it passed the SRA: "(1) uniformity and proportionality in sentencing . . . and (2) honesty and certainty in sentencing . . . ." Lee, supra note 32, at 115-16. Karen Bjorkman identifies the objectives of the Guidelines as an effort "to be honest, uniform, and proportional for varying degrees of criminal conduct." Karen Bjorkman, Note, 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, 736 (1992).

39. See Stith & Koh, supra note 7, at 284-85 (stating that, in general, the Guidelines have achieved congressional intent and thus "[i]t is no accident that the percentage of defendants being imprisoned and the length of sentences have increased.").

40. 28 U.S.C. § 994(i) (1994) calls for a "substantial term of imprisonment" for felony drug offenders. For a discussion of the origins of this legislative admonition, see Stith & Koh, supra note 7, at 268-69.

41. See Breyer, supra note 38, at 20-21; Marvin E. Frankel, Sentencing Guidelines: A Need for Creative Collaboration, 101 YALE L.J. 2043, 2047 (1992) ("[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.").
B. History of the Guidelines

Congress began its reform of the federal sentencing system by abolishing parole, and with it, the type of indeterminacy that parole created. Congress decreed that henceforth inmates would serve at least eighty-five percent of their stated sentences. Ten years in prison now means ten years in prison, with only the possibility of fifteen percent, or about eighteen months, off for good behavior.

Next Congress set out to rein in judges by creating guidelines, but did not attempt to do so entirely on its own. Congress recognized that it could not create an entire sentencing scheme alone. It based this conclusion on the two very sensible considerations that too many details were involved, and that the end product might require periodic tinkering. Consequently, Congress created the United States Sentencing Commission.

The Sentencing Commission set out to create a structure for federal sentencing that would make the whole process more predictable and less discretionary. The Commission took several years to create a new federal sentencing system. When the Commissioners were finished, they

42. U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL, ch. 1 pt. A(3) (1995) (intro. comment) [hereinafter U.S.S.G.]; see William W. Wilkins et al., Competing Sentencing Policies in a “War On Drugs” Era, 28 WAKE FOREST L. REV. 305 (1993). “The [Sentencing Reform Act] reflected Congress’ desire for honesty in sentencing by abolishing parole and by substantially reducing and restructuring good behavior adjustments. This represented a change from an indeterminate to a determinate, ‘real time’ sentencing system.” Id. at 306. Judge Wilkins was the first Chairman of the Sentencing Commission. At the time of the article, the other authors, Phyllis Newton and John R. Steer, were the Commission’s Staff Director and General Counsel, respectively.

Interestingly, the Parole Commission is still in existence over a decade after its nominal abolition. The practical necessity of dealing with those federal prisoners who were sentenced before the advent of the Guidelines and who still enjoy parole eligibility under the indeterminate sentencing system required an extension of the Commission’s life.

43. An inmate can earn up to fifty-four days per year of good time credit, beginning at the end of the first year of his term. 18 U.S.C. § 3624(b) (1994); see also U.S.S.G. Ch. 1 Pt. A(3) (intro. comment).

44. See Fisher, supra note 9, at 748 (“[O]nce of the Sentencing Reform Act’s primary goals was to abate judicial discretion in the sentencing arena.”).

45. The Sentencing Commission is an “independent commission in the judicial branch of the United States,” whose voting members are appointed by the President and confirmed by the Senate. 28 U.S.C. § 991(a) (1994). The Commission consists of seven voting members, at least three of whom must be federal judges, and no more than four of whom may be members of the same political party. Id. The Attorney General, or her designee, is an ex officio, non-voting member. Id. The Supreme Court upheld the constitutionality of the Sentencing Reform Act and the institution of the Sentencing Commission in Mistretta v. United States, 488 U.S. 361 (1989).
submitted the result for public comment, and then for congressional approval. The Guidelines became effective on November 1, 1987.46

Each year thereafter, the Commission has modified and amended the Guidelines through the same process: promulgation of proposed amendments for public comment, review of public comment, and submission to Congress. Congress can approve amendments by simply remaining silent. It can revise the Commission’s product. Or it can reject the Commission’s work altogether47 (as it recently and notoriously did with amendments to the Guidelines regarding crack cocaine and money laundering).48

In delegating this task, Congress constrained the Commission by enacting fairly extensive directives about the shape and content of its ultimate product. The most important of these directives were probably the so-called “25% rule,” which restricted the size of the ranges within which judges were allowed to exercise unfettered sentencing discretion,49 and the creation of stiff, some would say draconian, mandatory minimum penalties for certain crimes, most notably narcotics offenses.50

47. 28 U.S.C. § 994(p) (1994) describes the procedure for amending the Guidelines. The Commission is to “promulgate” proposed amendments no later than the first of May each year. Id. “Promulgate” means, among other things, to distribute to all federal courts and to the U.S. Probation System. 28 U.S.C. § 994(a), (p). Amendments take effect automatically on the first of November of the year in which they are promulgated unless “otherwise modified or disapproved by Act of Congress.” 28 U.S.C. § 994(p).
49. The “25% rule” provides:
   If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.
28 U.S.C. § 994(b)(2). An examination of the Guideline Sentencing Table, Table 1 infra note 57 and accompanying text, reveals that each point on the grid is a sentencing range that conforms to the “25% rule”—the top of the range is twenty-five percent higher than the bottom of the range. See also U.S.S.G. Ch. 1 Pt. A(2).
50. See, e.g., 21 U.S.C. § 844(a) (1994) (mandating minimum sentence of five years imprisonment for simple possession of five grams or more of cocaine base); 21 U.S.C. § 841(b)(1)(B)(ii) (mandating minimum sentence of five years imprisonment for possession with intent to distribute five hundred grams or more of cocaine); 21 U.S.C. § 841(b)(1)(A)(ii) (mandating minimum sentence of ten years imprisonment for possession with intent to distribute five kilograms or more of cocaine); see also Stith & Koh, supra
Mandatory minimum sentences established a floor below which sentences for certain crimes could not drop, and in doing so, they affected the architecture of the Guidelines. In effect, mandatory minimums were a set of fixed, immovable points around which the Guidelines architects were obliged to design their edifice. I do not mean to suggest that congressional directives pre-ordained the precise structure of the Guidelines. Despite those directives, the Sentencing Commission could have produced something very different than it did. Still, many aspects of the Guidelines cannot be understood without recognizing the limits Congress placed on the enterprise.

C. The Guidelines

The Guidelines abandon rehabilitation as a goal of sentencing. While the Sentencing Reform Act alludes, at least obliquely, to rehabilitative measures, the goal of rehabilitation is scarcely mentioned in the Guidelines themselves, or in their official statement of purpose.

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51. See, e.g., Stith & Koh, supra note 7, at 283 (describing many choices made by the Sentencing Commission that were, in the authors' view, not mandated by the enabling legislation).

52. See Stewart Dalzell, One Cheer for the Guidelines, 40 VILL. L. REV. 317, 325 (1995) ("[I]t seems to me that much of the criticism of the Guidelines is really criticism of what Congress has directed the Commission to do with them."). But see Michael Tonry, Salvaging the Sentencing Guidelines in Seven Easy Steps, 4 FED. SENT. REP. 355, 355 (1992) (arguing that the "objectionable" features of the Guidelines stem from the Commission's decisions, not from the statute).


54. One of the only times rehabilitation is mentioned in the Guidelines manual is on the first page, where it is observed that the Sentencing Reform Act of 1984 "provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." U.S.S.G. Ch. 1 Pt. A(2) (1995).
Instead, the focus is on a somewhat imprecise amalgam of “just deserts” retributivism and utilitarian “crime control” theories of deterrence and incapacitation. Moreover, the Guidelines move away from a “charge offense” or “offense of conviction” system of sentencing and toward a so-called “modified real offense system.”

1. THE GRID

The best way to start looking at the Guidelines is probably to go backwards. The 396-page book containing the 1995 version of the Federal Sentencing Guidelines is, in a sense, nothing more than a big set of instructions for one particular chart—the Sentencing Table. For easy reference, the Sentencing Table is reproduced below as Table 1.

The goal of Guidelines calculations is to arrive at numbers for the horizontal and vertical axes on the sentencing grid, which in turn generate an intersection in the body of the grid. Each such intersection designates,

55. In the section of the Guidelines manual headed “The Basic Approach,” the Sentencing Commission states:

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of “just deserts.” Others argue that punishment should be imposed primarily on the basis of practical “crime control” considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

U.S.S.G. Ch. 1 Pt. A(3) (emphasis added).

The conclusion that just deserts and crime control theories of punishment will produce “the same or similar” outcomes “in most sentencing decisions” seems, at best, debatable. For example, I argue, infra notes 228-37 and accompanying text, that although drug traffickers may “deserve” very long prison sentences, sentences as long as those often imposed for drug offenses under the Guidelines are very difficult to justify on utilitarian crime control grounds.

56. See U.S.S.G. Ch. 1 Pt. A(4)(a) (describing the Guidelines as a compromise containing elements of both the charge offense and real offense systems); see also infra notes 98-100 and accompanying text, for further discussion of the “modified real offense” character of the Guidelines.

57. U.S.S.G. Ch. 5 Pt. A.
not a specific sentence, but 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.  

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**Table 1**

<table>
<thead>
<tr>
<th>Criminal History Category (Criminal History Points)</th>
<th>I</th>
<th>II</th>
<th>III</th>
<th>IV</th>
<th>V</th>
<th>VI</th>
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</thead>
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<td><strong>Zone A</strong></td>
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<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>1</td>
<td>0.5 0.6 0.6 0.6 0.6 0.6</td>
<td>0.6</td>
<td>0.6</td>
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<td></td>
<td></td>
</tr>
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<td>0.6</td>
<td>1.7</td>
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</tr>
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</tr>
<tr>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>0.6 0.6 1.7 6.10 6.12 9.15</td>
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<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>0.6 1.7 2 6.12 9.15 12.18</td>
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<td></td>
</tr>
<tr>
<td>7</td>
<td>0.6 2.8 4 6.14 9 15.18</td>
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<tr>
<td>8</td>
<td>0.6 4.0 6.12 10.16 15.31 18.24</td>
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</tr>
<tr>
<td><strong>Zone B</strong></td>
<td>9</td>
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<td>12</td>
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<tr>
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<tr>
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</tr>
<tr>
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<tr>
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<td>33.41 37.46 41.31 51.43 63.78 70.87</td>
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</tr>
<tr>
<td>23</td>
<td>46.37 51.43 57.71 70.87</td>
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</tr>
<tr>
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<tr>
<td>28</td>
<td>87.106</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

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58. Id.
The Quality of Mercy Must Be Restrained

2. THE HORIZONTAL AXIS—"CRIMINAL HISTORY"

The criminal history calculation is a rough effort to determine the defendant's disposition to criminality, as reflected in his prior contacts with the criminal law. The basic unit of measurement in this calculation is prior sentences imposed for misdemeanors and felonies. Each such incident is worth a certain number of "criminal history points." These points are added, and the result will fall within one of six "Criminal History Categories." The more criminal history points, the higher the criminal history category, the longer the resulting sentence. The rationales for considering this sort of information are three:

1) *Incapacitation.* Those subscribing to this rationale hold that prior criminal conduct is predictive of recidivism. Therefore, imposing a longer sentence may be appropriate to incapacitate the defendant and

59. See U.S.S.G. Ch. 4 Pt. A (1995) for rules regarding calculation of the criminal history category. In addition to prior misdemeanor and felony sentences, a defendant can receive criminal history points on other grounds. For example, a defendant earns criminal history points if he committed the instant offense while on probation or parole, § 4A1.1(d), or within a specified period following release from another sentence, § 4A1.1(e).
so prevent a number of the crimes he would commit if at liberty. 60

2) Deterrence. One who has offended in the past and has been punished, or at least been made acutely aware of the prospect of punishment, may require a longer sentence to achieve deterrence than would a first time offender. 61

3) Blameworthiness. Those familiar with capital sentencing litigation will be familiar with the position that one who has been through the criminal process before, who previously has been made personally and painfully aware of society’s disapproval of criminal conduct, is thought to be more blameworthy when he reoffends and thus more deserving of greater punishment. 62

3. THE VERTICAL AXIS—"OFFENSE LEVEL"

The offense level is a measurement of the seriousness of the present crime. In general, the Guidelines accomplish this measurement in the following way: The calculation begins with the crime of which the defendant was actually convicted. The court must determine, primarily by reference to the “Statutory Index,” 63 which guideline in Chapter 4 of the Guidelines is applicable. 64

60. U.S.S.G. Ch. 4 Pt. A (intro. comment) ("To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered.").

61. Id. (intro. comment) ("General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence.").

62. Id. (intro. comment) ("A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.").

In the capital sentencing context, the Supreme Court has emphasized on a number of occasions that a defendant’s eligibility for the ultimate penalty of death turns in large measure on his individual blameworthiness. See, e.g., Payne v. Tennessee, 501 U.S. 808, 825 (1991) (affirming that individual blameworthiness is a central factor in the capital sentencing calculus, and permitting the introduction of victim impact evidence as relevant to the jury’s assessment of “the defendant’s moral culpability and blameworthiness”); Booth v. Maryland, 482 U.S. 496, 504 (1987) (holding that individual blameworthiness is the core inquiry in capital sentencing but excluding victim impact evidence as irrelevant to blameworthiness). Previous contacts with the criminal law have been held relevant to the determination of blameworthiness in capital cases. See, e.g., Zant v. Stephens, 462 U.S. 862, 888 (1983).

Two, "Offense Conduct," applies to that crime. Although the Guidelines are a modified real offense sentencing system, the "jumping-off point" for Guidelines calculations remains the crime of conviction. In order to illustrate the following discussion, the guideline for theft, embezzlement, and other similar property crimes, section 2B1.1, is reproduced below as Table 2:

**TABLE 2**

§ 2B1.1. **Larceny, Embezzlement, and Other Forms of Theft: Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property**

(a) Base Offense Level: 4

(b) Specific Offense Characteristics
(1) If the loss exceeded $100, increase the offense level as follows:

<table>
<thead>
<tr>
<th>Loss (Apply the Greatest)</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) $100 or less</td>
<td>no increase</td>
</tr>
<tr>
<td>(B) More than $100</td>
<td>add 1</td>
</tr>
<tr>
<td>(C) More than $1,000</td>
<td>add 2</td>
</tr>
<tr>
<td>(D) More than $2,000</td>
<td>add 3</td>
</tr>
<tr>
<td>(E) More than $5,000</td>
<td>add 4</td>
</tr>
<tr>
<td>(F) More than $10,000</td>
<td>add 5</td>
</tr>
<tr>
<td>(G) More than $20,000</td>
<td>add 6</td>
</tr>
<tr>
<td>(H) More than $40,000</td>
<td>add 7</td>
</tr>
<tr>
<td>(I) More than $70,000</td>
<td>add 8</td>
</tr>
<tr>
<td>(J) More than $120,000</td>
<td>add 9</td>
</tr>
<tr>
<td>(K) More than $200,000</td>
<td>add 10</td>
</tr>
<tr>
<td>(L) More than $350,000</td>
<td>add 11</td>
</tr>
<tr>
<td>(M) More than $500,000</td>
<td>add 12</td>
</tr>
<tr>
<td>(N) More than $800,000</td>
<td>add 13</td>
</tr>
<tr>
<td>(O) More than $1,500,000</td>
<td>add 14</td>
</tr>
<tr>
<td>(P) More than $2,500,000</td>
<td>add 15</td>
</tr>
<tr>
<td>(Q) More than $5,000,000</td>
<td>add 16</td>
</tr>
<tr>
<td>(R) More than $10,000,000</td>
<td>add 17</td>
</tr>
<tr>
<td>(S) More than $20,000,000</td>
<td>add 18</td>
</tr>
<tr>
<td>(T) More than $40,000,000</td>
<td>add 19</td>
</tr>
<tr>
<td>(U) More than $80,000,000</td>
<td>add 20</td>
</tr>
</tbody>
</table>

(2) If the theft was from the person of another, increase by 2 levels.

64. U.S.S.G. § 2B1.1 (reproduced here but omitting subsection (c) concerning cross-references).
(3) If (A) undelivered United States mail was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, and the offense level as determined above is less than level 6, increase to level 6.

(4) (A) If the offense involved more than minimal planning, increase by 2 levels; or
   (B) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 4 levels.

(5) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

(6) If the offense—
   (A) substantially jeopardized the safety and soundness of a financial institution; or
   (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

Most Chapter Two offense conduct guidelines contain two basic components: A "base offense level" and a set of "specific offense characteristics." The base offense level is a seriousness ranking determined solely by the fact of conviction of a particular crime. The specific offense characteristics are an effort to categorize and account for commonly occurring factors which cause one crime to be viewed as worse than another. These characteristics "customize" the crime. For example, the Guidelines differentiate between a theft of $1,000 and a theft of $1,000,000, as well as between a bank robbery where the robber hands the teller a note, and a robbery where the robber pistol whips the teller and shoots the bank guard. This customizing of the sentence by reference to factors not included in the elements of the crime of conviction is one way in which the Guidelines move in the direction of "real offense" sentencing.

65. U.S.S.G. § 2B1.1(b)(1) (reflecting an increase of two offense levels for a theft of $1000, and an increase of thirteen offense levels for a theft of $1,000,000).
66. U.S.S.G. § 2B3.1(b) (reflecting possible increases of up to eleven offense levels for the use of a weapon and causing injuries in the course of a robbery).
The base offense level for all theft crimes is 4. If a defendant stole $1,000,000, the court would consider the “specific offense characteristic” of the “loss,” and would add another 13 offense levels. If the $1,000,000 were stolen from another person, the court would add two more offense levels. Thus, a million-dollar purse snatch or jewelry grab would yield a total Chapter Two offense level of 4 + 13 + 2 = 19.

After determining an offense level by applying the offense conduct guidelines from Chapter Two, the court must consider a series of adjustments contained in Chapter Three. These adjustments depend on the circumstances of each case and include increases in the offense level based on factors such as the defendant’s role in the offense, whether the defendant obstructed justice, whether the offense was committed against a government official or a particularly vulnerable victim, and whether there are multiple counts of conviction. Reductions in the offense level are also possible, based on the defendant’s “mitigating role” in the offense or on the defendant’s so-called “acceptance of responsibility.”

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70. 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.
71. U.S.S.G. § 3C1.1 (emt. n.3). “Obstruction of justice includes conduct such as threatening witnesses, suborning perjury, producing counterfeit exculpatory documents, destroying evidence, and failing to appear as ordered for trial.” Id.
73. U.S.S.G. § 3A1.1 (providing for an offense level enhancement when the defendant selects a victim based on “race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation” or selects a victim “unusually vulnerable due to age, physical or mental condition”).
74. U.S.S.G. Ch. 3 Pt. D.
75. U.S.S.G. § 3B1.2 (providing for a reduction of two or four offense levels when the defendant is found to be a “minor participant” or “minimal participant” in the criminal activity).
76. U.S.S.G. § 3E1.1b (providing for a reduction of two offense levels when the defendant “clearly demonstrates acceptance of responsibility,” and three offense levels if the otherwise applicable offense level is at least 16 and the defendant has “assisted authorities in the investigation or prosecution of his own misconduct”). Despite the euphemism “acceptance of responsibility,” § 3E1.1 is nothing more than an institutionalized incentive for guilty pleas.
4. CALCULATION OF THE SENTENCE

Once the court calculates the offense level on the vertical axis and the criminal history category on the horizontal axis, it can determine the sentencing range. The judge retains largely unfettered discretion to sentence within that range. A judge may "depart" by going above or below the range, but only if the judge can explain the reasoning behind the departure in terms of factors for which the Guidelines do not adequately account. Moreover, except in the most unusual circumstances, the Guidelines specifically exclude from consideration most of the factors which judges formerly used to "individualize" sentences, such as age, educational and vocational skills, mental

77. U.S.S.G. § 5C1.1(A) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range."). There is some modest limitation on a court's discretionary power to sentence within a range. Pursuant to 18 U.S.C. § 3553(c)(1) (1994), if a sentence falls within a range which exceeds 24 months, the court must provide a statement of reasons for its imposition of the particular sentence.

78. The Guidelines' enabling legislation mandates that "[t]he court shall impose a sentence of the kind, and within the range resulting from application of the Guidelines] unless the court finds 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 than that described [by the Guidelines]." 18 U.S.C. § 3553(b). This statutory language is repeated in the "policy statement" describing the grounds for departure contained in the Guidelines themselves. See U.S.S.G. § 5K2.0 (1995).

79. Chapter 5, Part H of the Guidelines contains a lengthy list of factors that the Commission determined to be "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." U.S.S.G. Ch. 5 Pt. H. In theory, most of these factors nonetheless can justify a departure from the applicable range, 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. The exclusion of these factors from the departure calculus stems largely from the Commission's reading of 28 U.S.C. § 994(e) (1994), which required that "the guidelines and policy statements [regarding a sentence of imprisonment] reflect the inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." For a description of the statutory basis and genesis of Chapter 5, Part H, see Stith & Koh, supra note 7, at 249-51. Professor Daniel J. Freed comments that, "Perhaps no provisions in the guidelines evoke more dismay from the federal judiciary, the probation service, and the bar than the policy statements assembled in Chapter 5H." Daniel J. Freed, Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L.J. 1681, 1715 (1992).

Judge Stewart Dalzell of the Federal District Court for the Eastern District of Pennsylvania says that the Chapter 5H policy statements "perhaps more than any other
and emotional conditions, physical condition, history of substance abuse, employment record, family or community ties, socio-economic status, military record, history of charitable good works and "lack of guidance as a youth."

The importance of specifically-delineated facts in determining the offense level highlights another striking difference between the Guidelines and what came before. In former days, all information came in at sentencing and courts could consider it, but they did not have to, and they never had to explain the reasoning behind the sentence. Under the Guidelines, however, the facts of the case and the defendant's past history govern the defendant's placement on both the horizontal and vertical axes of the sentencing grid. The prosecution must prove those facts not beyond a reasonable doubt, but still to a preponderance of the evidence. Therefore, unlike pre-Guidelines sentencing, every sentencing hearing is evidentiary in character. The court must make

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[guideline provision], seem to me to be at the heart of the judiciary's antipathy to the guidelines. Dalzell, supra note 52, at 332. He concludes, however, that to allow consideration of the Chapter 5H factors risks destroying the neutrality of sentencing and may produce "sentencing disparities that impermissibly correlate with statuses such as race." Id. For a discussion of the desirability of considering the individualizing factors ordinarily excluded by Chapter 5H, see infra notes 112-27 and accompanying text.

81. U.S.S.G. § 5H1.2. (providing that educational or vocational skills may be relevant to enhance a defendant's sentence if he used some special skill to further his criminal activity).
82. U.S.S.G. § 5H1.3.
84. Id.
85. U.S.S.G. § 5H1.5.
86. U.S.S.G. § 5H1.6.
88. U.S.S.G. § 5H1.11.
89. Id.
91. Describing federal sentencing as it existed in 1977, Hoffman and Stone-Meierhoefer observed that, "Whether factors relating to the circumstances of the present offense, the defendant's prior record, social background, attitude or remorse, or type of plea are given primary weight, some weight, or no weight at all is left totally to the discretion of the individual sentencing judge." Hoffman & Stone-Meierhoefer, supra note 27, at 56.
92. See, e.g., United States v. Salmon, 948 F.2d 776, 778-79 (D.C. Cir. 1991) (holding that the burden of proof as to a fact upon which a party seeks to rely at sentencing is a preponderance of the evidence); United States v. Fonner, 920 F.2d 1330, 1330 (7th Cir. 1990) (similarly holding that the burden of proof at sentencing is a preponderance of the evidence); United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990) (holding the same).
findings of fact. Both the defendant and the government now have the right to appeal a sentence with which they disagree.

5. RELEVANT CONDUCT

The system described so far seemingly constrains judges rather effectively. Only the seriousness of the offense and the criminal history are relevant to the sentencing range. A judge cannot punish or reward defendants just because he does or does not like the cut of their jibs. Judges can indulge their own idiosyncratic theories of penology only within the narrowly circumscribed limits of the applicable Guideline range. A sentencing court must consider evidence, make findings of fact, and explain its decisions. District court judges cannot depart very often, and the bases for departure are limited. When judges decide to depart, they are obliged to carefully explain that choice.

Still, if treating similarly-situated defendants similarly is a primary objective of the Guidelines system, at least one glaring loophole remains in the system I have described so far: To the extent that a sentencing system limits the facts fed into the Guidelines calculation to those involving the count of conviction, it reduces the sentencing discretion of judges and confers upon the parties, notably the prosecutor, increased power to control sentences through charging decisions and plea bargains.

Consider a hypothetical drug case. Imagine twin brothers, both of whom chose drug dealing as a career. One lives in Lexington, Virginia, in the Western District of Virginia, and the other in Alexandria, Virginia, in the Eastern District of Virginia. Assume that last Sunday each brother bought five kilograms of cocaine, and then each sold a kilogram of cocaine every day, Monday through Friday. If the DEA catches both brothers, the local federal prosecutors in their different districts can charge the twins with all or any combination of five drug sales. In drug

93. "The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence" and must specifically justify any sentence outside the Guidelines range, or any sentence within that range if the range exceeds 24 months. 18 U.S.C. § 3553(c) (1994). The last provision is best understood by examining the sentencing grid. Some sentencing ranges on the grid have maximum sentences as little as six months longer than the minimum for that range; other ranges at the high end of the grid set maximum sentences as much as 81 months longer than their minimum. The statute requires that when a range determined by Guidelines calculations is 24 months or greater, the sentencing judge must state his or her reasons for choosing the sentence within the range. See, e.g., United States v. Moore, 977 F.2d 1227, 1228 (8th Cir. 1992) (remanding to district court for failure to resolve disputed issue of fact and place on record the resolution); see also United States v. Rosado-Ubiera, 947 F.2d 644, 646 (2d Cir. 1991); United States v. Wivell, 893 F.2d 156, 158 (8th Cir. 1990).

cases sentenced under the Guidelines, drug quantity almost entirely determines sentence length. If Brother A, who lives in Lexington, encounters a prosecutor who is a bit of a softy and offers to let him plead guilty to only one count of possession with intent to distribute for the sale on Monday, and if the Guidelines do not require the sentencing judge to consider what Brother A did Tuesday through Thursday, he will receive a sentence of a little over five years. If Brother B encounters a tougher prosecutor in the Eastern District of Virginia, or has a lousy defense lawyer, and the prosecutor indicts and convicts him for all five days' sales, then under any system he will be held responsible for the week's total cocaine sales and will receive a sentence of at least ten years. Hence, because of the differential exercise of discretion by two prosecutors, Brother A receives one-half of his twin's sentence for committing exactly the same crimes.

The Sentencing Commission was unwilling to confer upon prosecutors the unbridled discretion it was trying to divest from judges, so it created "relevant conduct." Exploration of the nuances of "relevant conduct" is beyond the scope of this presentation, but the essence of the concept is that the court can, indeed must, sentence each defendant based on what he really did in the same transaction or series of related transactions that resulted in the count of conviction, regardless of the specific offense of which the defendant is convicted after trial or as a result of a plea. In the case of the drug dealing twins, the relevant conduct guideline requires the judge to sentence both brothers for all five kilograms.

When taken together, the relevant conduct concept, the customization of sentences through "specific offense characteristics," and the rules governing sentences for multiple counts of conviction transformed what would otherwise have been a predominantly "charge of conviction" system into a "modified real offense" system.

96. This hypothetical sentence is based on an offense level of 26, U.S.S.G. § 2D1.1(c)(7), and a criminal history score of 1, U.S.S.G. § 4A1.1. See supra Table 1 and text accompanying note 57.
97. Brother B's sentence is based on an offense level of 32, U.S.S.G. § 2D1.1(c)(4), and a criminal history score of 1, U.S.S.G. § 4A1.1. See supra Table 1 and text accompanying note 57.
Compared with the system they replaced, the Guidelines are a whole new world. Where before the object was to do individualized justice, now there is a plethora of rules designed to ensure that similarly-situated defendants receive the same or very similar sentences. In the new world of Guidelines sentencing, similarity is defined on only two grounds: (1) the seriousness of the present "real offense;" and (2) the extent and seriousness of the defendant’s past criminal conduct. Just as was the case pre-Guidelines, judges may still receive and consider information about the defendant’s unique personality, background, and circumstances. With rare exceptions, however, judges may consider such factors only in setting a sentence within the ultimately determined range on the grid.

In short, we have traveled from a regime which sought to personalize the sentence to the criminal to a system with the objective espoused by the Lord High Executioner in The Mikado:

My object all sublime,
I shall achieve in time:
To let the punishment fit the crime,
the punishment fit the crime.  

III. THE GUIDELINES MEET JUDGE CABRANES AND FRIENDS

Having described, at least in broad strokes, what the Guidelines are and what they do, is Judge Cabranes right? Are they a “dismal failure?” In this section, I examine several of the principal criticisms of the Guidelines system to see if they withstand scrutiny.

A. God From the Machine

The first and most commonly heard complaint about the Guidelines is that they are mechanistic, soulless, and inhuman. To quote Judge Cabranes, they “ignore individual characteristics of defendants and sacrifice comprehensibility and common sense on the altar of pseudoscientific uniformity.” This complaint really has two

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(categorizing the sentencing process under the Guidelines as one based on “‘real offense’ behavior rather than the offense of conviction”). But see Standen, supra note 29, at 1505-12 (asserting that the Guidelines are actually a charged offense system).

101. See, e.g., Tonry, supra note 52, at 358 (referring to the Guidelines Sentencing Table as a “43-Level ‘Sentencing Machine’”); Stith & Koh, supra note 7, at 289 (referring to the “severe, elaborate, and unwieldy guidelines”).
102. Cabranes, supra note 2, at A11.
components: first, that the Guidelines are too complex to be comprehensible; and second, that they are too rigid and fail to take into account the individual characteristics of particular defendants. Let me address the two strands in order.

1. COMPLEXITY

When considering the indictment against the Guidelines for excessive complexity, the first question is: To whom do they seem too complex? Although prosecutors, defense counsel and judges often bewail the Guidelines’ manifold complexities, the truth is that most of these complaints are just the pro forma bellyaching of lawyers in any field who are faced with the unavoidable task of mastering a moderately complicated statute or regulation. In fact, the Guidelines are no more complicated than comparable bodies of law in other fields, or indeed within criminal law itself. By comparison to the Supreme Court’s jurisprudence in the area of double jeopardy, or any small corner of the Internal Revenue

103. For other critiques focusing on the Guidelines’ failure to consider individual characteristics as grounds for departure, see Thomas W. Hillier, II, The Commission’s Departure from an Evolutionary Amendment Process, 4 FED. SENT. REP. 45, (1991) (discussing the Commission’s efforts to limit consideration of individual factors); Jeff Staniels, Opportunities for Courts and Advocates Under the 1992 Amendments, 4 FED. SENT. REP. 314, 314-15 (1992) (criticizing the “Commission’s restrictive view of the relevance of an offender’s background and personal circumstances to an appropriate sentence”).


105. Consider, for example, the Supreme Court’s application of the double jeopardy standard to the law of forfeiture, beginning with the 1931 case Various Items of Personal Property v. United States, in which the Court held that in rem civil forfeitures are not punishment for purposes of the constitutional bar against double jeopardy. 282 U.S. 577 (1931). This decision was followed by Halper v. United States, 490 U.S. 435 (1989), holding that in personam civil penalties constitute punishment for double jeopardy purposes, and Austin v. United States, 509 U.S. 602 (1993), holding that in rem civil forfeitures are punishment under the Eighth Amendment excessive fines clause. Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767 (1994), holding that a state tax on illegal drugs is punishment under the double jeopardy clause, was decided just one year later. This line of cases culminates with the Court’s recent change of heart in United States v. Ursery, 116 S. Ct. 2135 (1996), in which the Court held that civil in rem forfeitures do not constitute punishment for double jeopardy purposes. In so holding, the Court distinguished all language in Halper, Austin and Kurth Ranch which held or plainly
Code, the Guidelines are a model of limpid clarity.

Moreover, despite expressions of distress about the size of the Guidelines Manual, most cases sentenced under the Guidelines are governed by very few provisions. To take the most obvious example, approximately forty percent of all federal sentences result from narcotics convictions.\textsuperscript{106} Drug cases are sentenced under the provisions of Chapter Two, Part D, of the Guidelines Manual. These provisions take up only thirty-seven pages, and practitioners in the drug area become extraordinarily familiar with them through repetition.\textsuperscript{107} The Guidelines are simply not that hard for any lawyer of modest competence to understand or apply.

A more superficially appealing count of the undue complexity indictment is the concern that defendants cannot understand the law under which judges sentence them. Judge Cabranes has said, "Nothing is more disconcerting to me as a District Judge than to watch a defendant and his family and others sitting in a courtroom, literally bewildered by 30 to 60 minutes of conversations about matrices, computations, adding, deducting, excluding, including, departing, not departing. This is not justice..."\textsuperscript{108}

This is not a frivolous concern. Defendants should understand why they are being locked away in a cell, and should be able to grasp the reasons advanced by the sentencing authority for the length of their stay. Yet it is hard to conclude that defendants today are less well-informed about their probable fate and reasons for it than they would have been before 1987. Defendants today, if competently represented, will have reviewed with their counsel the pre-sentence report and the applicable Guidelines calculation before sentencing ever begins. If there is one spectacle less illuminating than the intricacies of a Guidelines argument, it is that of a judge in an indeterminate system sitting in sphinx-like silence through a sentencing and then proclaiming, "In consideration of all the factors presented before me here today, I sentence you to forty-seven months. Thank you. We will be in recess." The workings of the implied that civil forfeitures are punishment.

\textsuperscript{106} U.S. SENTENCING COMM'N 1993 ANNUAL REPORT 55 [hereinafter 1993 ANNUAL REPORT].

\textsuperscript{107} U.S.S.G. Ch. 2 Pt. D (1995). Of course, even those who specialize in drug cases must be familiar with other parts of the Manual such as the sections on relevant conduct, role adjustments and criminal history. U.S.S.G. §§ 1B1.3, 3B, and ch. 4. The point remains, however, that to the average lawyer practicing in federal criminal cases, large swathes of the Guidelines will remain \textit{terra incognita} without prejudice either to the government or to any individual client.

Guidelines are complicated, but at least they are visible. Moreover, I think Judge Cabranes underestimates the acuity of those who have appeared before him. In my experience, defendants may not be able to get their arms around the sweeping principles of guidelines theory, but they grasp the essentials as applied to themselves with surprising rapidity.

2. RIGIDITY

To assess the complaint that the Guidelines take insufficient account of the individual characteristics of criminal defendants, consider two cases:

CASE #1: An Hispanic male, age twenty-one. Born in Mexico. Brought to this country by his single mother when he was five years old and abandoned by her at age ten when she became addicted to heroin. Raised thereafter by his grandmother. Intelligent, but never finished high school. Involved with gangs from his early teens onward. Several arrests and adjudications for car theft and relatively minor muggings while a juvenile. Brought to federal court for sentencing because he and some friends ran an operation in which they stole credit cards from the mail and ran up unauthorized charges totaling more than nine million dollars.

CASE #2: A white, Anglo-Saxon Protestant, nay Episcopalian, male. Fifty years old. Married. Three children. Vice-president of the First National Bank, and long-time vestryman of the St. Aloisius Memorial Church. Member of the Rotary and Kiwanis. Frequent contributor to charitable causes. Volunteer youth soccer coach. All around good guy. Making his first appearance in a judicial setting because he made one trifling error of judgment—over the last five years, he embezzled nine million dollars from his employer.

What does it mean to say in these cases, and the thousands like them that pass through federal courts each year, that the sentences should be “individualized”? Before the Guidelines, the “individualized sentencings” in these cases would have gone something like this:

In the case of the Latino credit card thief, his lawyer would have argued that the defendant’s age, minority status, troubled childhood, and “lack of youthful guidance” mitigated the seriousness of his offense, and thus that the sentence should be low. The prosecutor, by contrast, would have argued that the defendant’s age, tenuous ties to this country, unstable childhood, and history of juvenile delinquency made it probable that the defendant would offend again, and thus that the sentence should be high.

In the case of the embezzling pillar of the community, his lawyer would have pointed to his age, his lack of prior record, his previously unblemished professional career, his exemplary family life, his piety, and his record of service to the community. The lawyer would have claimed that the defendant was suffering enough from the mere fact of a
conviction. He would contend that there was virtually no likelihood of recidivism, and argue for a low probationary sentence. The prosecutor, for his part, would have pointed to exactly the same factors—age, family support, membership in a religious community, professional success, and community status—to argue that the defendant was motivated purely by greed. He would insist that a person with so many advantages had no excuse for so profound a breach of trust, and he would urge that the defendant’s conduct merited a particularly severe sentence.

Before the Guidelines, the sentence ultimately meted out to the Latino thief or the Anglo embezzler depended entirely on the world view of the particular judge to whom these arguments were addressed.\(^1\) If the judge thought that youth and adversity merited a second chance: probation. If the judge thought the same factors merely predicted future dangerousness: prison. If the judge looked at the banker and thought, “There, but for the grace of God, go I:” probation. If another judge looked at same banker and thought of betrayal and greed: prison.

The difficulty here is not merely that trying to individualize sentences inevitably results in disparity. One could, under the Guidelines, limit that disparity to some degree by assigning positive or negative values to the factors mentioned above and attempt to control the uses judges made of them.\(^1\) The real problem is that all of the arguments I have placed in the mouths of the defenders and prosecutors of my hypothetical defendants are “true.” Youth, poverty, and family breakdown can all contribute to underdeveloped moral sensibilities and powers of self-control, and a young person without the advantage of these qualities feels less culpable to us. But one need not be a theologian or a saint to recognize that stealing nine million dollars is profoundly wrong. Moreover, the very developmental deficiencies that seem to excuse the youthful and impoverished offender also, and undeniably, increase the threat he will reoffend.

As for the upper middle class embezzler, he probably presents less of a future threat to society than the youthful gang member. But the betrayal of the social contract by a banker who has benefitted from that contract so long is hugely greater than that of a boy whom society barely acknowledged at all.

For every defendant there are both excuses for his conduct and reasons why, in his case, the conduct is especially disappointing and

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109. “The reasons for the sentencing patterns in many courts have little or nothing to do with achieving some general social objective, but a great deal to do with the immediate problems and idiosyncratic beliefs of the judges.” WILSON, supra note 16, at 166.

110. Of course, attempting to quantify even more factors within the Guidelines structure would make it correspondingly more complex.
The Quality of Mercy Must Be Restrained

blameworthy. Society, through the legislature and the courts, can
determine, at least to a good approximation, how seriously it views
various categories of criminal conduct and the harm that conduct causes
or risks. It can embody its judgments in a scale of punishments for
categories of criminal conduct. Society can also decide a priori that
certain personal characteristics excuse or mitigate criminal culpability,
such as, for example, insanity or diminished mental capacity. What
society cannot do when setting the sentence for each prisoner, however,
is perform a completely individualized moral calculus. The variables are
too many. Our powers of understanding other human souls are too
limited.

One of the recurring criticisms of the Guidelines is that they are too
ambitious, that they attempt to factor too many considerations into written
instructions for a chart. Judge Cabranes dismissively refers to them as a
“utopian experiment.” There is, of course, some merit to this claim.
The Guidelines could be simpler, could try to subdivide offense conduct
into fewer categories. Nonetheless, the true tribunes of hubris are those
who yearn for former days and claim that the exercise of unfettered
sentencing discretion by district court judges was, as Judge Cabranes
maintains, never a “major or irreparable weakness of the federal courts
system—it was one of its strengths.” Judge Cabranes’ position
inescapably rests on a claim that the judiciary possesses a unique
competence in achieving the right individualized sentence by, as he
says (in counterpoint to the Lord High Executioner), “mak[ing] sure that

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112. Cabranes, supra note 1, at 2.
113. For example, in 1992, Judges Cabranes wrote:

Our system is a human institution, and since biblical times we have
assumed that the quintessential duty of a judge in a criminal case is to
exercise judgement in sentencing, to make sure that the punishment fits
the crime and also that the punishment fits the criminal. The exercise of
discretion by a federal judge at sentencing was not, in my view, ever a
major or irreparable weakness of the federal courts system—it was one of
its strengths.

Cabrantes, supra note 1, at 2 (emphasis added).

I do not think this passage can fairly be construed as anything other than a claim of
special judicial competence in sentencing, a claim buttressed by appeals to antiquity and
even, by allusion, to religious tradition. Moreover, a claim of special judicial competence
in sentencing is unmistakably implied by Judge Cabranes’ consistent advocacy of a return
to the pre-Guidelines regime of unfettered judicial sentencing discretion. Judge Cabranes
has proposed modifying the pre-Guidelines system by installing some form of appellate
review of sentences, Cabranes, supra note 1, at 2, but that proposal seems, if anything,
to be another expression of faith in the peculiar competence of judges to sentence.
the punishment fits the crime and also that the punishment fits the criminal.”

The flaw in the claim that judges have unique insight into the choice of individualized sentences lies in the assertion unmistakably implicit in such a claim that the individualized sentence is the right sentence, or at least a sentence that is more likely to be right than a sentence imposed by any other means. Indeed, the flaw lies in the very notion of a “right sentence.” On the one hand, choosing the right sentence could mean choosing the correct sentence, the efficacious sentence, but that can only mean that we are thinking of a sentence as a prescription designed to achieve a result. That desired result presumably is rehabilitation, or at least, the prevention of recidivism. The idea of the right individualized sentence in this sense is thus exposed as only a disguised version of the claims of the rehabilitationists—judges have the wisdom to prescribe the correct dose of bitter medicine. But if we have learned anything at all in the last century, it is that neither judges nor anyone else have the keys to the medicine cabinet of the soul.

114. Cabranes, supra note 1, at 2. Judge Cabranes echoes, perhaps unconsciously, the language of Justice Black in Williams v. New York, 337 U.S. 241 (1949). Justice Black referred to “a prevalent modern philosophy that the punishment should fit the offender and not merely the crime.” Id. at 247. Despite the Court’s embrace of the philosophy of individualized sentencing in Williams, it was clear even before the advent of the Federal Sentencing Guidelines that no constitutional right to an individualized sentence exists. See Lockett v. Ohio, 438 U.S. 586, 602 (1978).

115. Consider the following passage from Professor Daniel J. Freed, a prominent academic critic of the Federal Sentencing Guidelines: “Each case involves unique offenders and offense circumstances, and their underlying stories—of need or greed, of recklessness or malice, in mitigation or aggravation—need to be assessed and sentenced by experienced professionals exercising human judgment. Numerical ‘offense levels’ are useful in launching the sentencing process, but they are woefully unreliable as substitutes for judges.” Freed, supra note 79, at 1705. Professor Freed is a knowledgeable and perceptive observer, but it is difficult to escape the conclusion that his critique flows primarily from a basic hostility toward determinate sentencing and a lingering romance with the idea of judges as supercompetent professional therapists.

116. As early as 1969, Leslie T. Wilkins concluded that “the major achievement of research in the field of social pathology and treatment has been negative and has resulted in the undermining of nearly all the current mythology regarding effectiveness of treatment in any form.” LESLIE T. WILKINS, EVALUATION OF PENAL MEASURES 78 (1969). When Congress passed the Sentencing Reform Act of 1984, it concluded: “We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.” S. REP. NO. 225, 98th Cong., 2d Sess. 40 (1984) reprinted in 1984 U.S.C.C.A.N. 3182, 3223; see also CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 372-74 (1978) (expressing skepticism about the rehabilitative efficacy of the penal system); WILSON, supra note 16, at 162-67 (summarizing studies of prison treatment programs and concluding that the “evidence supporting the efficacy of
On the other hand, if choosing the right individualized sentence does not mean choosing the correct therapeutic sentence, then it must mean choosing the uniquely just sentence—the one sentence which represents the optimum deserved response to a particular act resulting in particular harms performed by a unique human being at a particular moment in his life's journey. Judgments of that kind are best left to God. To do otherwise asks too much of judges and of human justice.

The true "utopian experiment" was indeterminate sentencing. That utopianism is apparent in the system's inescapable dual claims. The first of these is that a single human judge can make rational and consistent choices that take account not only of the many factors the Guidelines notoriously include, but also of all the factors the Guidelines wisely exclude (at least from the calculation of the final Guideline range).
The second claim is that the choices of a single judge will, with neither central guidance nor collective consultation, be acceptably consistent with the choices of hundreds of fellow judges making their solitary decisions.\textsuperscript{121}

The point is not that the individual characteristics of individual offenders are, or ought to be, wholly irrelevant to the determination of criminal sentences. The real point is that because the conflicting arguments that arise in every case about the meaning to be accorded individual characteristics are all valid to one degree or another, or at the least will be seen to be so by some judges and not by others, individual characteristics cannot be the predominant factor in assigning the punishment a defendant is obliged to suffer for his criminal acts. If on sentencing day the individual is all, then compassion (or as is equally likely, vengeance, bias, or pure caprice) is free to swallow justice.

The truth about the Federal Sentencing Guidelines, a truth which could be entirely missed if one listened only to the system’s critics,\textsuperscript{122}


\textsuperscript{121} Many critics of the Guidelines, Judge Cabranes among them, cite opposition from federal judges in the years following the adoption of the Guidelines as proof of their “failure.” \textit{See}, e.g., Cabranes, \textit{supra} note 1, at 2 (suggesting that disapproval of the guidelines among judges and others is “well nigh universal”); Freed, \textit{supra} note 79, at 1752 (“The early reactions by district courts to the guidelines have made it clear that, with respect to a number of significant issues, the Commission elected the wrong policies for federal sentencing reform.”). If judges had loved the Guidelines immediately, one would be forced to question the reform’s effectiveness. Pre-guidelines, federal judges were doing what they thought best, what they believed was just. “One never encountered any judges who doubted the fair and just and merciful character of their own sentences.” Frankel, \textit{supra} note 41, at 2044. Any sentencing system that set out to force the judiciary to make different choices was likely to be perceived by judges as compelling injustice. To the extent the implementation of the Guidelines stemmed from a judgment that judicial behavior needed to be changed, the discomfort of judges with the Guidelines was a necessary (although by no means sufficient) indicator of their success.

Moreover, my own experience is that judges appointed since 1987 are much less resistant to the Guidelines than their predecessors. Recently appointed judges may not unanimously embrace the Guidelines, but many to whom I have spoken seem to welcome the guidance afforded by a set of sentencing standards. \textit{See}, e.g., \textit{Federal Judicial Center, Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges} 37 (1994) (suggesting that the Guidelines enjoy a higher level of approval among active judges than among senior judges); \textit{see also} Dalzell, \textit{supra} note 52, at 334, in which the author, a federal district judge appointed in 1991, concludes by paraphrasing Winston Churchill: “[The Sentencing Reform Act] has wrought the worst sentencing system except for the rest.”

\textsuperscript{122} \textit{See}, e.g., \textit{Tonry, supra} note 2, at 11 (“The commission has forbidden
is that federal judges are *not* barred from setting criminal sentences based on the individual characteristics of defendants. Judges may consider all the factors which were appropriate before the advent of the Guidelines *in determining the sentence within the Guideline range*. This is not a trivial matter. As noted above, the top of every guideline range is twenty-five percent higher than the bottom of the range. In effect, the Guidelines say that seventy-five percent of each criminal sentence will be determined by the severity of the current offense and the seriousness of the defendant’s prior criminal history, and twenty-five percent of the sentence will rest on the sentencing judge’s virtually unreviewable assessment of individualized factors.

To put some flesh on the point, consider the cases of our hypothetical middle-aged WASP bank embezzler and youthful Latino credit card thief, each of whom stole nine million dollars. Under the Guidelines, the sentencing range for the embezzler would be fifty-seven to seventy-one months; the range for the credit card thief would be forty-six to fifty-seven months. It of considerable importance to the embezzler that the judge has unfettered control over fourteen months of his life, and it matters a great deal to the credit card thief whether he gets out in less than four years or has to stay caged for nearly five. The question Judge Cabranes and other Guidelines critics must answer is why the idiosyncratic judgments of a randomly selected judicial officer should ever control more than twenty-five percent of any criminal defendant’s sentence.

The most likely response would be some variant of Professor Tonry’s assertion that, “Rigid sentencing laws . . . create unacceptable risks of injustice because they make it impossible to take account of important judges to take account of many considerations . . . that many judges (and most people) believe to be ethically relevant in a just system.”

123. *See supra* note 49 and accompanying text.

124. This sentencing range assumes a conviction for a fraud offense with a base offense level of 20 (level 6 plus an additional 14 levels for a loss exceeding five million dollars), U.S.S.G. § 2F1.1(b)(1)(O) (1995); an increase of two levels for more than minimal planning, U.S.S.G. § 2F1.1(b)(2); an increase of four levels because the crime affected a financial institution and the defendant derived “gross receipts” greater than one million dollars, U.S.S.G. § 2F1.1(b)(6); and an increase of two levels for abuse of trust, U.S.S.G. § 3B1.3, for a total offense level of 26. It further assumes that the defendant pleads guilty promptly and receives a three-level reduction for “super” acceptance of responsibility under U.S.S.G. § 3E1.1.

125. This sentencing range assumes a conviction for a fraud offense with a base offense level of 20 (level 6 plus an additional 14 levels for a loss exceeding five million dollars), U.S.S.G. § 2F1.1(b)(1)(O); an increase of two levels for more than minimal planning, U.S.S.G. § 2F1.1(b)(2); an increase of four levels for an aggravating role, U.S.S.G. § 3B1.1(a); and a three-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1.
differences between defendants." The problem with this argument is not merely that it mischaracterizes the Guidelines by suggesting that they prohibit judges from considering individual characteristics at sentencing. The central difficulty is that the argument assumes what it should be trying to prove—that these "important differences" are not only important to assigning penalties for crime, but that they are more important than the factors the Guidelines make determinative of sentencing ranges. The critics' position is that judges should be allowed to decide that, for example, an impoverished and abusive childhood is more important in setting a sentence than the severity of the defendant's crime. The Guidelines do not say that judges cannot consider a bad childhood. They can—in setting a sentence within the applicable range. A judge, however, cannot use childhood deprivation to override the policy decision that the defendant's conduct merits a particular minimum punishment. The issue is not, as it is routinely misrepresented to be, the exclusion of individualizing characteristics. The issue is the creation of a hierarchy of sentencing values—offense severity first, prior criminal history second, and personal characteristics third—with which the critics disagree.

The most we have any right to ask of human justice is that the punishment bear some rough rational relationship to the severity of the offense, that judges impose roughly similar punishments with reasonable consistency on those who commit similar crimes, and that there be some room for flexibility to consider individual circumstances and truly unusual cases. To the extent that the Guidelines have moved us measurably closer to that modest ideal, and they have, we must score them a success.

B. "Disparity Is Worse Than Ever"

Which brings us to the next most common complaint, that the Guidelines have not reduced disparity. Again, Judge Cabranes: "Even on their own terms, the guidelines have failed . . . . [T]he guidelines have

126. TONRY, supra note 2, at 7. Professor Tonry places this argument in the mouths of a hypothetical group of time-traveling judges, but it is plainly representative of his views. See, e.g., supra note 122. In fairness, it should also be noted that Professor Tonry included among the "rigid sentencing laws" against which the argument is leveled not only the Guidelines, but also minimum mandatory sentences. In general, I share Professor Tonry's disapproval of minimum mandatory sentences because they often have the dual effect of eliminating any meaningful range within which a sentencing judge can give effect to individual factors, and of nullifying the power to depart outside the range to accommodate truly unusual cases. I hasten to add, however, that minimum mandatory sentences are unnecessary only if there exists a guideline system with a high degree of judicial compliance.
not eliminated—indeed, they have arguably exacerbated—the problem of arbitrary disparities among sentences imposed for similar offenses.”

This is a terribly serious, indeed crippling, charge, if it is true. And it is made over and over again by judges opposed to the Guidelines, members of the defense bar, and throughout academic literature on the subject.

I have read anguished speech after anguished speech and slogged through indignant article after indignant article, and each time I come to the inevitable passage which claims that the Guidelines have increased, or at least failed to reduce, sentencing disparity, I look for any evidence in support of the claim. I am still looking, because no such evidence exists. The critics who make this claim either give no authority for it, or cite to some earlier critic who, in his turn, made the claim with no supporting evidence.

127. José A. Cabranes, Speech to University of Puerto Rico Law School, (Oct. 1993) in LEGAL TIMES, Apr. 11, 1994, at 17; see also Cabranes, supra note 1, at 2 (“Indeed, disparity is not only alive and well, it is now probably more common than before and certainly more hidden than before.”).


129. See, e.g., the comments of Federal Public Defenders Judy Clarke and Thomas W. Hillier, II, infra note 131.

130. See, e.g., Freed, supra note 79, at 1683 n.2 (commenting on the level of “informal noncompliance with the guidelines” and contending that it creates disparity); Stith & Koh, supra note 7, at 287.

131. See, e.g., Stith & Koh, supra note 7, at 287. In this otherwise meticulously researched and documented article, the authors assert in conclusion that, “We also believe that unwarranted sentencing disparity is as great now as it was before the Federal Sentencing Guidelines, though perhaps more hidden from view.” As authority, the authors cite Judy Clarke, The Sentencing Guidelines: What a Mess, 55 FEDERAL PROBATION 45 (1991); Judge Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 AM. CRIM. L. REV. 161 (1991) 164-65; Thomas W. Hillier, II, The Sentencing Commission and Its Critics, 2 FED. SENT. REP. 224, 226 (1990); Stith & Koh, supra note 7, at 287 n.399.

Ms. Clarke and Mr. Hillier are prominent members of the defense bar whose opinions are certainly of value, but neither of them provides any evidence of guidelines disparity beyond anecdotes or hypotheticals. For example, Ms. Clarke, the nationally-respected Federal Public Defender for the Eastern District of Washington, claims the
The somewhat troubling truth is that the actual evidence on the question of the Guidelines' effect on disparity is scant. Only two significant studies have ever been done. The U.S. Sentencing Commission conducted a study in 1991 that concluded the Guidelines had reduced disparity as compared to pre-Guidelines practice. The General Accounting Office did a study the next year that criticized the existence of "interpretive disparity," that is, differences in interpretations or applications of the same or similar facts by judges and probation officers. Three responses suggest themselves: (1) She supports her claim for the existence of "interpretive disparity" with hypothetical cases. She cites neither statistics, nor even actual cases, to demonstrate the existence or prevalence of the phenomenon. (2) She does not claim that the Guidelines have increased sentencing disparity, only that disparity continues to exist, an undoubted fact that even the most sanguine Guidelines supporter would not deny. (3) Because Guideline sentencings are on the record, the factual "interpretations" made by courts and probation officers are, contrary to the assertion of Stith and Koh, not "hidden from view" at all, but are on the record and subject to review by courts of appeals. The process of review leads to the elimination over time of many such "interpretive disparities."

Mr. Hillier, in testimony before the House Judiciary Committee Subcommittee on Criminal Justice, claims that disparity is "a regular Guideline byproduct." Hillier, supra at 226. But like Ms. Clarke, he neither argues for, nor provides evidence to support, the premise that disparity has increased under the Guidelines. He argues that substantial assistance motions under U.S.S.G. § 5K1.1 create disparity, but provides no evidence of this assertion. Id.

Judge Heaney's study does not attempt to compare pre- and post-Guidelines sentencing and arrive at general conclusions about the effect of the adoption of Guidelines on rates of unwarranted disparity. It examines cases from only a single, post-Guidelines year (1989), and from only four judicial districts. Heaney, supra note 128, at 167. He concludes that, in 1989, there were differences in sentencing patterns among the four districts, id. at 184; but without comparable data from before 1987, he is unable to reach any general conclusion about changes in sentencing wrought by the Guidelines. For a general critique of the Heaney study, see DOUGLAS C. MCDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, NCJ-145328, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986-1990, 26-28 (1993). Judge Heaney does conclude that adoption of the Guidelines had a disparate impact on Hispanic and African-American defendants in the four studied districts, Heaney, supra note 128, at 204-05, but even this conclusion has been criticized as unsupported by his data. See MCDONALD & CARLSON supra at 28 ("The pattern that Judge Heaney saw as evidence of disparity could have resulted from comparing two different populations of offenders."); Joe B. Brown, The Sentencing Guidelines Are Reducing Disparity, 29 Am. Crim. L. Rev. 875, 877-78 (1992) (arguing that the apparent disparities derived by Judge Heaney from his 1989 data flow from the fact that certain case types move to sentencing more quickly than others and Judge Heaney studied only the first full year of guidelines operation).

132. SENTENCING COMM’N IMPACT REPORT, supra note 128, at 43, 47, 48, 54.
Sentencing Commission's report, and found a reduction in some types of disparity but the existence of others, and concluded that "limitations and inconsistencies in the data available for pre-guidelines and guideline offenders made it impossible to determine how effective the sentencing guidelines have been in reducing overall sentencing disparity." No one has studied the question since. Social scientists who have considered the problem seem to concur that the question will probably never be resolved conclusively because comparing the data from before and after the implementation of the Guidelines is so very difficult.

All I can bring to the dispute is the experience of a practitioner who has been both a prosecutor and, on occasion, a defense lawyer, and has practiced before and after the Guidelines. In my experience, the level of predictability in sentencing under the Guidelines is indisputably greater than it was before. For most routine cases, and most cases are

134. Id. For other critiques of the Commission's approach, see William Rhodes, Sentencing Disparity, Use of Incarceration, and Plea Bargaining: The Post-Guideline View from the Commission, 5 FED. SENT. REP. 153-55 (1992) (calling the Commission's study on disparity "well-crafted" and accepting that it shows a reduction in disparity after guideline implementation, but expressing disappointment in its narrow scope and disagreement with some of its methods); David Weisburd, Sentencing Disparity and the Guidelines: Taking a Closer Look, 5 FED. SENT. REP. 149-52 (1992) (finding flaws in some Commission methodology and taking issue with what Weisburd views as an overly optimistic interpretation of the data, but not disagreeing with the general conclusion that "disparity in sentences imposed has declined with the implementation of the guidelines").

135. GAO REPORT, supra note 133, at 10.

136. Id. at 12.

137. Id. at 10.

138. This point was first brought to my attention by Barry Ruback, Professor of Sociology and Psychology at Pennsylvania State University. Dr. Ruback served as the Judicial Fellow at the United States Sentencing Commission during 1995-96 and while there, devoted considerable thought to the question of whether a valid study of the Guidelines' effect on disparity could be designed. Professor Tonry concurs in this view. "The evidence on federal sentencing disparities is mixed, and the best conclusion at present is that we do not know whether disparities have increased or decreased." TONRY, supra note 2, at 42. Tonry further states that "[t]he complexity of the federal guidelines and their reliance on relevant conduct present nearly insuperable difficulties for a before-and-after disparity analysis." Id. at 46; see also Michael Tonry, GAO Report Confirms Failure of U.S. Guidelines, 5 FED. SENT. REP. 144, 146 (1992) (referring to the "insurmountable problem that comparable data are not available on sentencing disparities before and under the guidelines").

139. In fairness, let me reiterate that my career has been spent primarily as either a state or federal prosecutor. Until recently I belonged to a group, that is, federal prosecutors, which was most likely to report a belief that the Guidelines have reduced unwarranted disparity, according to the survey data in the 1991 U.S. Sentencing Commission disparity study and the 1992 GAO Report. See Tonry, supra note 138, at 146.
routine, everybody—prosecutors, judges, defense counsel, and (if competently advised) defendants themselves—knows what the sentencing range will be within reasonably narrow limits very early in the criminal process.

I hasten to add that those limits are not as narrow as Congress may originally have hoped for, and not as narrow as some of the purists at the Sentencing Commission might like them to be. There remains considerable room for maneuver by prosecutors making charging decisions, by both parties in crafting plea agreements, and, loath though many of them are to admit it, by the judges themselves. The

140. One Guidelines critic, Professor Jeffrey Standen, admits that studies of sentencing results under the Guidelines have so far shown no unwarranted disparity; he maintains, however, that "the fact that all offenders similarly charged receive similar sentences does not demonstrate parity. Rather it represents a masking of [prosecutorial] discretion, with its unavoidably disparate results . . .." Standen, supra note 29, at 1515-16. This is a rather remarkable statement. He implies that because studies showing a lack of sentencing disparity do not prove the absence of prosecutorial manipulation, those studies must prove the opposite—that prosecutorial manipulation exists. He makes no effort, however, to offer any affirmative proof of the existence or extent of such manipulation.


Even Judge Cabranes concedes that "federal trial judges themselves retain substantial discretion over sentencing decisions, despite the presence of the guidelines," although he goes on to note that "they are now permitted to exercise this discretion only by performing elaborate gyrations within the confines of the guidelines calculations." Cabranes, supra note 127, at 17. Others might characterize these "elaborate gyrations" as the exercise of guided discretion.

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scope of this residual discretion would be subject enough for a paper in itself, so I will make only two points.

First, although facts drive the additions and subtractions of points and levels that lead to a final guideline range, district judges make the findings of fact which lead to the allocation of points. Their decisions on factual issues are accorded great deference by courts of appeals. Anyone who believes that federal district court judges are such puritanical pillars of intellectual honesty that considerations of sentencing consequences never sway their findings of fact has never practiced in the federal, or indeed in any human, court system. Moreover, judges retain the power to depart from the Guideline range, a power which the Supreme Court may have materially broadened with its recent decision in United States v. Koon, the sentencing appeal of two of the officers in the Rodney King beating. Nonetheless, the Guidelines, now and for the foreseeable future, give even the most result-oriented and intellectually

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142. The sentencing court's factual determinations are reviewed under a clearly erroneous standard. See, e.g., United States v. Sanchez-Lopez, 879 F.2d 541, 557 (9th Cir. 1989); United States v. Ortiz, 878 F.2d 125, 126-27 (3d. Cir. 1989); United States v. White, 875 F.2d 427, 431 (4th Cir. 1989).

143. For a discussion of the departure power, see supra note 78 and accompanying text.

144. 116 S. Ct. 2035 (1996). In Koon, the district judge granted two of the officers convicted of beating Rodney King significant downward departures from their otherwise applicable guideline sentences. In explaining his decision to depart, the judge cited five factors he asserted to be "circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ." Id. at 2042 (quoting 18 U.S.C. § 3553(b) (1994)). The Ninth Circuit reviewed and invalidated all of these grounds for departure. United States v. Koon, 34 F.3d 1416 (1994), reh'g en banc denied, 45 F.3d 1303 (9th Cir. 1995). The Supreme Court reversed, holding that the proper standard of appellate review for most departure decisions is not de novo, but abuse of discretion. 116 S. Ct. at 2043.

The Koon decision represents a potentially dramatic change in Guidelines practice. Ever since the Guidelines were first adopted, appellate courts reviewing departures under § 3553(b) have understood their task as one of ascertaining the boundaries the Commission meant to set on the "heartland" of cases for which no departure is appropriate. The question of whether a particular set of aggravating or mitigating circumstances was "adequately taken into consideration by the Commission" was construed as a way of asking whether the circumstances at issue fell inside or outside of that boundary. Koon, by contrast, can be read to imply that sentencing judges may depart based on a disagreement with the "adequacy" of the Commission's judgment in setting the boundaries of the heartland, and that appellate courts should generally defer to the views of the sentencing judge. Despite the unsettling implications of its language, the effect of the Koon decision on federal sentencing practice is difficult to project. The hopeful view of Koon is that sentencing judges will expand their use of the departure power enough to ameliorate some of the harsher Guidelines outcomes, but will move with sufficient restraint that they will neither imperil the Guidelines structure in fact, nor be perceived as doing so by Congress, the bar, or the public.
elastic judge much less room to roam than he would have had before 1987. I, for one, will gladly embrace a sentencing system in which most of the time the outcome is reasonably predictable and consistent from case to case and judge to judge over a system in which every sentencing is, by design, an unpredictable adventure in judicial psychoanalysis.

Second, I also hasten to concede that there are, as Guidelines critics point out, anomalies and absurdities in the Guidelines that produce unfair results. But considered carefully, the very fact that Guidelines critics can identify specific sentencing rules that reliably and repetitively produce sentences the critics consider unjust or anomalous illustrates one of the Guidelines' great strengths. Under the Guidelines, at least we can see most of the potholes, and can work to fill them. Before the Guidelines, it was impossible to have rational arguments about what judges did or did not do about particular factors thought to be relevant to sentencing, because what the judges did was unknown and largely unknowable. The Guidelines let light into the black box of sentencing. Of course, despite the Guidelines, some degree of unexaminable discretion remains. Discretion and its attendant potential for arbitrariness cannot be eliminated entirely from any human system. But a room with a bright light illuminating its center, while leaving some dim and shadowy corners, remains a better environment for rational choice and incremental reform than a sealed, windowless vault.

Judge Cabranes, in his oft-quoted "the guidelines are a dismal failure" article, provides a classic illustration of both advantages and flaws in the process of evolutionary change made possible by the Guidelines system. Judge Cabranes noted the anomaly produced in LSD cases by the rule then embodied in both statute and guideline that the weight of any controlled substance for sentencing purposes includes the entire "mixture or substance" in which the illegal drug is found. Because a user ingests LSD through "carrier media" (blotter paper, sugar cubes, and gelatin capsules being among the more common) of widely

145. See, e.g., Standen, supra note 29, at 1507-08 (arguing that the "money laundering" guideline, U.S.S.G. § 2S1.1, permits prosecutors to impose disparate sentences on similar defendants by charging or not charging a money laundering offense in fraud cases). The potential for unjustifiably disparate results presented by this guideline was the subject of the Commission's unsuccessful 1995 amendment, and continues at this writing to be the subject of ongoing discussions between the Commission, the Department of Justice, and Congress.

146. Cabranes, supra note 1, at 2.

divergent weight, Judge Cabranes observed that "the sentence of a dealer selling the same dosage of LSD might vary from 10 to 16 months to as much as 188 to 235 months depending on the weight of its carrier medium . . . ." 148 He characterized this result, not without justice, as "loony" and "irrational." 149 It is, however, the Sentencing Commission's subsequent actions to address the obvious inequity of such results that, as the saying goes, point the moral and adorn the tale.150

In November 1993, the Sentencing Commission amended the commentary to the drug guideline to establish a standard weight per dose of 0.4 milligram, regardless of carrier medium, for purposes of determining the base offense level in LSD cases, thus eliminating in calculations under the Guidelines the disparity which distressed Judge Cabranes.151 Unfortunately, this apparent happy ending has been complicated by a collision between the Commission's reform of the Guidelines and the "mixture and substance" language in the statutes criminalizing LSD trafficking. The Commission cannot change the language of the statute. In United States v. Neal,152 the Supreme Court decided that an alteration by the Commission in the way it measures LSD for the purpose of Guideline calculations does not determine the meaning of the statutory language used to ascertain the applicability of minimum mandatory penalties.153 The Court said that because it had previously decided in Chapman v. United States,154 that "mixture and substance" included the entire ingestible carrier medium in LSD cases, stare decisis precluded any change in that interpretation of the statute absent congressional action.155

The upshot is an incremental improvement of the situation that existed in 1991. LSD dealers who sell their product in heavy forms will run afoul of minimum mandatory statutory penalties in some cases where dealers selling the same number of dosage units in light mediums will not,

150. SAMUEL JOHNSON, VANITY OF HUMAN WISHES 1.222 (1749).
153. Id. at 768.
155. 116 S. Ct. at 768-69.
but the Guidelines will not escalate penalties to astronomic levels over and above the mandatory minimums merely because one dealer chose sugar cubes instead of blotter paper. Still, this is obviously an imperfect solution to Judge Cabranes' legitimate concerns. What is critical to remember, however, is that the story is not over. Congress retains the power to amend the statute in light of the expressed concerns of the Commission and members of the judiciary. Whether the prospect of casting the final resolution of such matters into the arena of democratic politics ought to cause satisfaction or alarm is a question to which I will return at the conclusion of this article.

In truth, what most Guidelines critics really mean when they say unwarranted disparities have increased under the Guidelines is that the Guidelines do not account for many factors the critics think should be considered in defining similar and dissimilar cases. Critics of this school do no more than recast the argument in favor of "individualized" sentencing into an "unwarranted disparities" mold.156 The more perceptive of such commentators say plainly that the source of their critique is not unwarranted disparity, but what they perceive to be an undesirable uniformity.157 Other complaints about "disparity" are actually arguments that the Guidelines should assign different weights to the factors they do consider. For example, some critics have claimed that unwarranted disparity results if a cooperating defendant receives a lower sentence than his less culpable, but noncooperating, co-defendant.158 This is not a case of unwarranted disparity.

Brief elaboration on the point will make it clear. The phenomenon of which the critics complain arises when co-conspirator A, who is more knowledgeable about and more culpable for the acts of a criminal group than co-conspirator B, cooperates with the authorities and B does not. Critics find it anomalous that A may receive a lower sentence than B after the government makes a motion for reduction of A's sentence below the otherwise applicable guideline or statutory minimum under 18 U.S.C. Section 3553(b) and/or U.S.S.G. Section 5K1.1. The perceived anomaly has been christened the "cooperation paradox."159

156. For a discussion of the debate over "individualized sentencing," see supra notes 109-26 and accompanying text.
158. See, e.g., Hillier, supra note 131, at 224.
159. Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 WAKE FOREST L. REV. 199, 211-12 (1993); see also Philip Oliss, Comment, Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines, 63 U. CIN. L. REV. 1851, 1858 (1995) (referring to this phenomenon as "inverted sentencing" and as the "cooperation paradox").
Despite its superficial appeal (which undoubtedly owes something to the catchy cognomen "cooperation paradox") this argument lacks much real bite. Any time a criminal receives leniency for informing on his comrades, there is some compromise of the principle of meting out punishment among the population of offenders in direct proportion to blameworthiness. The inevitable effect of giving sentencing credit for assistance to the authorities is to impose lower sentences on cooperators than on similarly-situated noncooperators. Even if the sentence given the informer is not lower than that of less culpable co-defendants in his own case, it will certainly be lower than that imposed on equally or less culpable noncooperating defendants in other cases. After all, this is the point of the program. The value of the Section 5K1.1 motion in investigations of group criminality is to break group solidarity by offering preferential sentencing treatment to those who turn on their colleagues. In passing 18 U.S.C. Section 3553(b), Congress made two judgments. First, Congress made the value judgment that cooperating and noncooperating defendants are not similarly situated. Second, Congress made the policy judgment that the social utility of achieving convictions through bargained-for testimony outweighs the cost, if any, of deviating from a sentencing system that ranks penalties strictly by relative culpability measured at the time of the commission of the crime.

The particular outrage expressed by critics over situations in which the sentence of a "more culpable" cooperator is lower than that of a "less culpable" noncooperator is a red herring. The principle of sentencing in proportion to culpability is no less compromised when cooperating defendant A receives a lower sentence than equally culpable noncooperating co-defendant B, than it is if A's sentence is lower than noncooperating co-defendant C, whose culpability is ten percent (or one percent) less than A's and B's. Moreover, in order to preserve strict proportionality of sentencing among co-defendants, the maximum sentencing concession available to any cooperator would have to be limited by the purely arbitrary factor of the sentence of the next-most-culpable co-defendant. For example, a cooperating defendant could receive a ten-month reduction in sentence if the next-most-culpable defendant in his case received a sentence ten months lower than the cooperator's guideline range. A cooperator in a different case who was identically situated, except that there happened to be no less culpable co-defendants in the case, would have no downward limit on the sentence reduction a judge might award. A cooperation system structured in this way would be both practically ineffective (because it would frequently preclude offering meaningful incentives to those with valuable information to impart) and facially unjust (because sentence reductions for cooperation would be subject to arbitrary limitations having no relationship to the value of the cooperation provided).
One can argue that the government should not be in the business of bartering with hoodlums for information, but neither the practice of doing so, in general, or the so-called "cooperation paradox," in particular, are unique creations of the Guidelines. One may also disagree with the judgment, made by the original Sentencing Commission and ratified by Congress, to codify in the Guidelines a formalized version of the historical practice of rewarding cooperating defendants with sentencing concessions. In either case, however, it cannot be fairly argued that the perceived flaw in the present Guidelines is one related to unwarranted disparity.

In sum, the Guidelines’ many detractors have failed to make a convincing case that “disparity” is a crippling problem for the current federal sentencing system.

C. Prosecutors Have All the Power

I mentioned above that prosecutors possess some discretionary power to influence sentencing outcomes through charging decisions and plea negotiations. The existence of that power, and its actual or alleged scope, is one of the biggest sore points for Guidelines critics. Again, Judge Cabranes: “[T]he guidelines have sub silentio moved the locus of discretion from the judge to the prosecutor.” On this issue, Judge Cabranes’ comments are among the more restrained. Critics commonly allege that the Guidelines represent a wholesale transfer of discretion from judges to prosecutors. One commentator goes so far as to say that


161. Cabranes, supra note 1, at 2.

162. See, e.g., FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 138 (1990) (“[W]e have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor.”); Albert W. Alschuler & Stephen Schulhofer, Judicial Impressions of the Sentencing Guidelines, 2 FED. SENT. REP. 94, 94-99 (1989) (describing results of a poll taken among participants at a conference of federal judges which suggested judicial concern over “a transfer of sentencing discretion from judges to prosecutors.”); Fisher, supra note 9, at 749 (“[A] tangible amount of discretion has shifted to prosecutors.”); Bennett L. Gershman, The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction, 5 CRIM. JUST. 2, 4 (1990) (“Since the prosecutor is able to make a very precise selection of the ultimate sentence, the judge’s role is simply to ratify the choice of sentence determined by the prosecutor.”); Mank, supra note 30, at 400 (“Courts and commentators have criticized the Guidelines for expanding prosecutorial power at the expense of judges.”); Freed,
"this transfer of discretion from judges to prosecutors undermines the American system of justice."163

The assertion that the Guidelines represent a dramatic transfer of sentencing power from judges to prosecutors is grounded in this much truth: The Sentencing Reform Act of 1984 did reduce, and reduce dramatically, the sentencing discretion of judges.164 That was, after all, its principal purpose.165 What is critical to understand, however, is that

supra note 79, at 1697.

Plea bargains in the age of guidelines add significantly to the prosecutor’s traditional power over charging and guilty pleas. The guidelines do not explicitly confer new power on the prosecutor, nor do they, in a technical sense, “transfer” power from the judge to the Assistant U.S. Attorney (AUSA). But to the extent that the guideline parameters diminish the power of the judge, they correspondingly enhance the power of the prosecutor.


Even Judge Andrew Kleinfeld, a member of the Ninth Circuit Court of Appeals and a supporter of the Guidelines, writes that “[t]he most troubling area of guideline sentencing is the way it shifts sentencing control from judges to prosecutors.” Andrew J.* Kleinfeld, The Sentencing Guidelines Promote Truth and Justice, 55 FED. PROBATION 16, 19 (1991).


164. See Fisher, supra note 9, at 748 (arguing that the SRA was successful in achieving the goal of “abating” judicial discretion in the sentencing arena”); Freed, supra note 79, at 1697 (“Guidelines are administrative handcuffs that are applied to judges and no one else.”); Mank, supra note 30, at 402-03 (“While the Guidelines give some sentencing discretion to judges, there is little question that district courts have far less authority today, and prosecutors far more, than they had before the 1984 act created the Commission.”); William J. Powell & Michael T. Cimino, Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?, 97 W. VA. L. REV. 373, 382 (1995) (“Much of the substantial power held by federal judges prior to [November 1, 1987] simply vanished. The Sentencing Commission and prosecutors became the newly empowered . . . .”).

165. “Congress clearly intended to structure and narrow judicial discretion by developing guidelines. But comparatively few commentators anticipated the extent to which enhanced prosecutorial power would fill the judicial vacuum created by the guidelines.” Freed, supra note 79, at 1698. See also Lee, supra note 32, at 116 (asserting that Congress sought to achieve its goals of sentencing reform in two ways: (1) imposing “restrictions on judicial sentencing discretion” and (2) “some discretion previously exercised by federal judges [was] shifted or ‘displaced’ to other sources of authority—in particular, to the offices of the prosecutor”); Stith & Koh, supra note 7, at 278 (observing that the attitude of the Senate, in particular, was that “the judges were ‘the problem’”).
the Guidelines restrict judicial choice, first, by limiting the universe of facts which a judge is permitted to consider in setting a sentence, and second, by dictating that those kinds of facts which can count, must count.

What do I mean? Remember, the Guidelines say that most of the factors judges formerly used to individualize sentences—age, sex, family ties, community good works, employment history, and so forth—cannot now be considered either in setting the Guideline range or in departing from that range. Now only the seriousness of the offense and the defendant’s criminal history count. But those things, if proven, must be counted. If the government proves or the defendant admits that he sold 500 grams of crack, the judge cannot ignore that fact. If the defendant has two prior felonies, the judge cannot ignore that fact. In such a system, the actions of the prosecutors inevitably have a great effect, because prosecutors are the “masters of the facts.” They control access to most of the evidence upon which the factual findings that drive the Guidelines depend. Indeed, when I was a practicing prosecutor, this always seemed the single best feature of the Guidelines. Before 1987, the only thing I could really do at a sentencing hearing was stand up, wrap myself in the flag, and call the defendant names. No amount of evidence on any particular point would have any necessary effect on the sentence. With the advent of the Guidelines, if I did my job as an advocate, I could achieve concrete results.

When Guidelines critics complain about the transfer of discretion to prosecutors, they are not complaining about the requirement that proof of certain facts dictates particular sentencing outcomes. They are not complaining about the ability of prosecutors to achieve higher sentences by presenting additional inculpatory or aggravating evidence to the court, or to the extent they are making that complaint, it does not withstand scrutiny. There is a difference between power and discretion. The motor in your car has the power to make the car move. What it lacks is the “discretion” to choose to move or not move. The mere creation of a fact-based sentencing system gives prosecutors power to affect sentences by presenting facts. Nonetheless, a prosecutor has discretion in such a system only to the degree that she is free to choose either to present or to withhold inculpatory facts.

Therefore, what Guideline critics are complaining about is the possibility that prosecutors will manipulate sentences downward, by charging less than the most serious provable offense or withholding inculminating evidence from the court. The prosecutor may do so in order

to facilitate a plea bargain, or simply to achieve a result that she finds more in harmony with her sense of justice than the sentence the Guidelines would have dictated if the judge had all the facts.  

There are two basic responses to this critique. First, prosecutors undoubtedly do, through charging decisions and plea bargains, sometimes seek, or agree to, lower than the maximum possible sentences. They have always done that. With respect to charging decisions, the Guidelines themselves do not even attempt to limit the historical practice. Indeed, it is difficult to imagine a system which could eliminate prosecutorial charging discretion. Nonetheless, the Justice Department recognized at the outset of the Guidelines era that unrestrained pre-indictment bargaining over charges would undermine the Guidelines, particularly the effort to achieve something close to a real offense system. Therefore, it issued internal directives that prosecutors are to charge the most serious readily provable offense "consistent with the nature of the defendant's conduct." Likewise, absent special circumstances, federal prosecutors may accept pleas to no less than one count of the most serious readily provable offense. This directive clearly has some wiggle room in it (what, after all, is "readily provable"?), and it has been

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167. See Thomas E. Zeno, A Prosecutor's View of the Sentencing Guidelines, 55 FED. PROBATION 31 (1991). Zeno admits that application by individual prosecutors of their personal notion of what is "fair" in crafting plea agreements which omit or misrepresent facts "would return unwarranted disparity to sentencing by allowing prosecutors to decide when the guidelines sentence should be imposed and when it should not." ld. at 33.

168. For a detailed description of the process by which the Department of Justice policy regarding charging and plea negotiation practices under the Guidelines was developed, see Ilene H. Nagel & Stephen J. Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practice Under the Federal Sentencing Guidelines, 66 S. CAL. L. REV. 501, 506-12 (1992); see also Zeno, supra note 167, at 32-33 ("Nothing prevents prosecutors from introducing unwarranted disparity into the system by charging one defendant less severely than another, for reasons decided upon solely by the prosecutor. Admittedly, the idea of needing to curb prosecutorial lenity seems unusual; but the Department of Justice anticipated precisely this problem when the guidelines were promulgated.").

169. The current DOJ policy is embodied in U.S. DEPT OF JUSTICE, U.S. ATTORNEYS' MANUAL, §§27.000-27.720 (1995) [hereinafter USAM]. One of the purposes of the Principles of Federal Prosecution is to assure that charging and plea bargaining practices do not undermine the SRA's goal of reducing unwarranted sentencing disparity. See Memorandum from Attorney Janet Reno to Holders of the United States Attorney's Manual (Oct. 12, 1993) in 6 FED. SENT. REP. 352 (1994) [hereinafter Reno Memo]. Accordingly, the basic policy is 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." USAM § 9-27.310 (1995).

170. USAM § 9-27.410.
softened a bit under the Clinton Administration, but the basic principle remains. 171

As for plea bargains after indictment, the primary justification of the relevant conduct guideline is to ensure that prosecutors cannot manipulate sentences by dismissing counts. 172 As long as the judge knows all the facts, the precise charge of which a defendant is convicted is usually of little consequence except to set the statutory maximum sentence. Moreover, given that so many Guidelines battles are fought over drug sentences, it bears emphasis that the statutory maximum sentences in such cases are, as a rule, so high that the real points of contention are invariably the quantity-driven minimum sentences prescribed by either statute or guideline. 173 Drug quantity is a fact known to the prosecutor and critical to sentencing, but not directly relevant to the charging decision. Similarly, the primary sentence determinant in fraud cases is

171. The Reno Memo, supra note 169, contains some language clearly intended to give prosecutors somewhat more leeway than they had been granted under the Bush Administration. The memorandum states, in part:

It should be emphasized that charging decisions and plea agreements should reflect adherence to the Sentencing Guidelines. However, a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime.


172. See Wilkins & Steer, supra note 98, at 499-500 (explaining that a primary function of the relevant conduct provisions of the Guidelines was to limit the effect of prosecutorial discretion on guideline outcomes).

173. See, e.g., 21 U.S.C. § 841(b)(1)(C) (1994) (setting the statutory maximum penalty for possession with intent to distribute any quantity of cocaine, heroin, and other schedule I or II controlled substances at 20 years imprisonment).
not the crime of conviction, but the amount of "loss"—a fact determined at sentencing. Thus, in order to really control sentences through plea bargaining, a prosecutor must be willing to hide facts from the court.

I will not say that no such event has ever occurred. The temptation for a prosecutor to jigger the facts in collusion with defense counsel is sometimes awfully strong. But the position of the Department of Justice has been and remains that misstating or concealing relevant facts from the court, even in aid of preserving a plea agreement, is unethical. Thus, the Guidelines critics are right to the extent that if federal prosecutors as a group are willing to behave unethically, then they are indeed not only the masters of the facts, but the masters of the Guidelines.

The truth is that most prosecutors, most of the time, play the sentencing game straight down the middle. To achieve plea bargains,

174. If the amount of loss in a property crime case, combined with other aggravating factors, were high enough to dictate a sentence in excess of 60 months (five years), one could in theory limit a defendant's maximum exposure by negotiating a plea to one count of an offense such as mail fraud, 18 U.S.C. § 1341 (1994), that carries a statutory maximum sentence of five years per count of conviction.


176. The Principles of Federal Prosecution provide that federal prosecutors are to provide all requested information to the United States Probation Service whenever possible so that an accurate and complete presentence report can be prepared. USAM 9-27.720 (1995). The Principles go on to state that "the Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical." USAM 9-27.430 (emphasis added).

177. Virtually every claim in the academic literature that prosecutorial "evasion" or "manipulation" of the Guidelines is widespread takes as its authority a single estimate by Steven Schulhofer that Guidelines manipulation occurs "in twenty to thirty-five percent of all guilty plea cases." Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, 29 AM. CRIM. L. REV. 833, 845 (1992); see, e.g., Freed, supra note 79, at 1683 n.2 (citing Schulhofer as evidence that an "underground" system of "informal noncompliance" is undermining the Guidelines).

Schulhofer's estimate is a tenuous cornerstone on which to build much of an edifice. First, the 20-35% figure is not an estimate of the prevalence of "fact bargaining," but seems to combine in a single category Schulhofer's estimates of the incidence of various techniques of circumventing a strict application of the Guidelines, including charging offenses with low statutory maximums and making substantial assistance motions for defendants whose assistance was, in truth, not very useful. Schulhofer estimates that pure fact manipulation occurs only in "perhaps five percent of the total" number of plea cases. Id. at 844.

Second, the 20-35% figure is at best subjective and imprecise, although, it is admittedly difficult to know how one acquires hard data on this subject. It is apparently based on Schulhofer's personal interpretation of a series of interviews done with Assistant
they will give defendants the benefit of close calls on the provability of certain facts, or on the applicability of certain enhancements to the undoubted facts of a given case. But they will not lie and they will not conceal evidence. The consequence is that prosecutors, too, have had their discretion restrained by the Guidelines. Because of the Guidelines, they can no longer make just any plea agreement that suits their administrative convenience or personal sense of justice. While it may come as a surprise to Judge Cabranes and his judicial colleagues, probably the biggest complaint among prosecutors about the Guidelines is that they restrict prosecutorial discretion.

Considerations of prosecutorial ethics aside, perhaps the greatest institutional constraint on unbridled manipulation of the facts by the parties is the United States Probation Office, an agency of the judicial

U.S. Attorneys (AUSAs) as part of a study of plea bargaining he did with former Sentencing Commissioner Ilene Nagel. For a description of the methods employed in the study, see Nagel & Schulhofer, supra note 168, at 512-16. Indeed, Schulhofer himself is so uncertain of the accuracy of the figure that he said:

This figure is a rough estimate and reflects a national average; the data makes clear that guideline manipulation varies widely among districts. Unfortunately, I cannot begin, in this space, to defend the accuracy of this estimate. Those with different intuitions are entitled to retain their own view until a detailed analysis can be presented.

Schulhofer, supra at 845 (emphasis added).

As far as I can determine, no further “detailed analysis” of the Nagel-Schulhofer data on this particular point has been published. Moreover, perhaps the most important point about the Schulhofer estimate is that, even if true, it means that there is no attempt to manipulate guidelines in 65 to 80% of cases. That is a considerable success rate. See Brown, supra note 131, at 880. “From my experience as Chair of the [Attorney General’s Advisory Committee on the Sentencing Guidelines] I believe the Department’s policy [on adherence to the Guidelines] is carried out in the vast majority of cases.” Id.

178. For a discussion of the appropriate Department of Justice response to the specific problem posed by the allegation that prosecutors commonly manipulate facts at sentencing, see Frank O. Bowman, III, To Tell the Truth: The Problem of Prosecutorial “Manipulation” of Sentencing Facts, 8 FED. SENT. REP. 324 (1996).

179. See, e.g., FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMM. (1990) reprinted in 2 FED. SENT. REP. 232 (1990), in which the Committee (a distinguished group that included Judge José A. Cabranes) reported that they “were told as well that the guidelines unduly constrain prosecutors by limiting the concessions they can legitimately offer to induce guilty pleas.” Id. at 234; see also William Braniff, Intra- and Extra-Guideline Prosecutorial Discretion, 7 FED. SENT. REP. 133, 135-36 (1994) (expressing discomfort with the degree to which the Guidelines circumscribe legitimate prosecutorial discretion, and recommending the creation of internal Department of Justice policies to define, legitimize, and monitor occasions for prosecutorial “departures” from strict adherence to Guidelines rules); Brown, supra note 131, at 880 (discussing resistance against the Guidelines by some “generally older Assistant United States Attorneys who try to justify their action with the thought, ‘I know what the case is worth’”).
branch whose officers investigate the facts which form the basis for the guidelines calculations and then report directly, and often ex parte, to the sentencing judge. Probation officers prepare the Presentence Investigation Report that becomes the factual baseline from which the parties customarily argue. Various commentators have remarked that this responsibility transforms probation officers from social workers identified in the eyes of many with protection of the interests of defendants to so-called "guardians of the guidelines." I can testify from personal experience that federal probation officers take their new guardianship very seriously.

The practice in the Southern District of Florida, where I spent seven years as an Assistant United States Attorney, is for the probation officer assigned a defendant to write the Presentence Investigation Report (which is distributed to the parties) and to consult privately before sentencing with the judge in chambers about the disputed issues of law and fact. This is the practice in many other districts as well.

Rule 32 of the Federal Rules of Criminal Procedure requires that the probation officer make the Presentence Report (PSR) available to the parties "not less than 35 days before sentencing." FED. R. CRIM. P. 32(b)(6)(A). Within 14 days following disclosure, the parties are permitted to file written objections to the report with the probation officer. FED. R. CRIM. P. 32(b)(6)(B). The probation officer responds to these objections. FED. R. CRIM. P. 32(b)(6)(C). The court is then permitted to adopt the language of the PSR as findings of fact except as to matters successfully disputed by the parties. FED. R. CRIM. P. 32(b)(6)(D); see also U.S.S.G. Ch.6 Pt. A (1995).

See, e.g., Sharon M. Bunzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 104 YALE L.J. 933, 934 (1994) (describing the transformation of the role of federal probation officers from neutral social workers in a system aimed at rehabilitation of offenders to "‘guardian[s]’ of the Guidelines."). Bunzel observes that, "[a]s the defender of Guidelines protocol, the probation officer presents an obstacle to the prosecutor’s discretion in arriving at plea agreements." Id. at 962-64; see also Clarke, supra note 131, at 47 (characterizing probation officers as "guardians of the guidelines"); Jerry D. Denzlinger & David E. Miller, The Federal Probation Officer: Life Before and After Guideline Sentencing, 55 FED. PROBATION 49, 49-52 (1991) (contrasting the work of probation officers before and after the adoption of the Federal Sentencing Guidelines and noting that the probation officer sometimes "stands alone" when advocating factual or legal positions that neither party supports due to an interest in maintaining a plea agreement); John Hagan & Ilene Nagel Bernstein, The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts, 13 LAW & Soc’Y 467, 474 (1979) (noting the then-current view of "the traditional role of probation officers in assessing the defendant’s potential for rehabilitation").

The concern of probation officers for ensuring that guideline sentence calculations be based on all available facts, irrespective of the desires of the parties, was manifested recently in a letter from the Probation Officers Advisory Group to Judge Richard P. Conaboy, Chairman of the Sentencing Commission. Letter from Francesca D. Bowman, Probation Officers Advisory Group Chair, to Judge Richard P. Conaboy, Sentencing Commission Chair 1 (Jan. 30, 1996) (on file with the author). The letter summarizes the results of a survey sent to probation officers in 85 districts and expresses the concern that, in the view of some probation officers, the government is "usually"
approach is that, whereas busy federal judges might miss, or be disposed to gloss over, the kinds of prosecutorial factual omissions that can grease a plea agreement, the probation officers, acting as agents of the court, have assumed the role of "special master" of Guidelines facts. In this role they give the judges the resources to keep the parties honest and to prevent the most obvious efforts at Guidelines manipulation.

One last point about the bogeyman of rampant prosecutorial discretion: The people who most loudly denounce the power of prosecutors to "circumvent" the Guidelines to allow less-than-maximum sentences are often the same people who are most displeased about the length of the sentences which the Guidelines require when strictly applied. I say to such folks—be careful what you wish for because you may get it. In the present and foreseeable political environment, the most likely response to such arguments from both the Sentencing Commission and Congress will be to tighten the screws still further—to try to squeeze even more discretion from the system. 184 When prosecutors can exercise the discretion that is the source of the complaint in only one direction—to allow a lower sentence than the facts of the case, vigorously presented, would require 185—those Guidelines critics whose real concern is sentence length may want to lower their voices just a bit.

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184. Proposals of just this sort were part of a number of sentencing reform bills drafted during the long evolutionary process that finally produced the Sentencing Reform Act of 1984. At one time or another, both the Senate and the House were considering bills requiring the development of guidelines for prosecutorial charging and plea negotiation decisions. Stith & Koh, supra note 7, at 261-66.

185. I deliberately have not addressed the most explicit delegation of discretion to prosecutors under the Guidelines, the prosecutorial monopoly on the power to make motions for downward departures based on a defendant's cooperation with the government in the investigation or prosecution of others. See 18 U.S.C. § 3553(e) (1994) (authorizing a court to depart below the otherwise applicable statutory minimum mandatory sentence on motion of the government); U.S.S.G. § 5K1.1 (1995) (authorizing a court to depart below the otherwise applicable guideline sentencing range on motion of the government). This is a complex subject for another day. For the present, it is sufficient to observe that, once again, the exercise of prosecutorial discretion to make a substantial assistance motion can result only in reductions to the sentence that would otherwise be required, and that district court judges retain virtually unreviewable discretion to grant or deny such motions. See, e.g., United States v. Ortez, 902 F.2d 61, 63-64 (D.C. Cir. 1990); United States v. Davis, 900 F.2d 1524, 1528 (10th Cir. 1990); United States v. Bayerle, 898 F.2d 28, 30-31 (4th Cir. 1990); United States v. Morales, 898 F.2d 99, 101 (9th Cir. 1990).
D. Those Sentences

Which brings us to those sentences. They are longer under the Guidelines than they used to be, a lot longer. From 1984 to 1990, the average federal sentence of incarceration (a figure which excludes those cases in which probation was ordered) rose from twenty-four months to forty-six months. By fiscal year 1994, the average federal sentence (again excluding cases in which probation was ordered) had risen to 65.9 months. The reaction in some quarters to the overall rise in federal sentences has been an undifferentiated primal howl of anguish. As I will discuss below, some of that dismay is warranted. Much of it, however, is not. A sober assessment of the sentences the Guidelines generate depends on a nuanced understanding of how Congress and the Commission went about setting penalties for various categories of crime.

The overall increase in federal criminal sentences was not only a predictable outcome of these particular Guidelines, it was inevitable. Recall that the Commission set out to increase sentences for drug and white collar crimes. Those two categories of offenses comprise roughly two-thirds of all federal cases. Moreover, the method chosen by the Commission for setting the sentences for the remaining one-third of the cases handled in the federal courts ensured that the increases in drug and white collar sentences would not be offset by decreases elsewhere. The Commission set sentencing levels for crimes such as bank robbery, immigration offenses, and the like by studying a sample of 10,000 actual past cases and determining what sentences had been given.

186. SENTENCING COMM’N IMPACT REPORT, supra note 128, at 60. As indicated, the figure in the text excludes from the average all probationary sentences by counting such sentences as zero months. Id. Including probationary sentences, the average sentence rose from 13 months in 1984 to 30 months in 1990. Id.

187. U.S. SENTENCING COMM’N 1994 ANNUAL REPORT, 54-55, tbl. 21 [hereinafter 1994 ANNUAL REPORT]. The median federal sentence of incarceration in 1994 was 36 months. Id.

188. One prominent academic has written of drug sentences under the Guidelines that it is unclear “that a federal judge who follows the national sentencing guidelines is entitled to the Nuremberg defense that he or she was following orders in so violating the rights of those guilty of marginally harmful conduct.” Paul D. Carrington, The Twenty-First Wisdom, 52 WASH. & LEE L. REV. 333, 353 (1995).

189. See supra notes 39-41 and accompanying text. It may be too much to say that the original Commission consciously desired an increase in drug sentences, but it is undeniable that the Commission consciously created a structure for drug sentences which could have had no other result.

190. For example, in fiscal year 1993, narcotics offenses constituted 43.9% of offenses committed by defendants sentenced under the Guidelines; embezzlement constituted 2.2%; larceny constituted 7.4%; fraud defendants constituted 13.3%. 1993 ANNUAL REPORT, supra note 106, at 55.
The Commission then attempted to create guidelines for these offenses that "followed typical past practice." In short, sentences for the one-third of federal cases that involved neither drugs nor white collar crime were set at roughly their pre-Guidelines levels, and sentences for the remaining two-thirds were raised.

1. WHITE COLLAR CRIME SENTENCES

One of the reasons the Commission did not apply to white collar crime its method of setting guideline prison sentences by reference to past practice is that, before the Guidelines, there were scarcely enough instances of actual imprisonment of white collar crooks to provide a statistically useful sample. As Justice Breyer put it in 1988, "A pre-Guidelines sentence imposed on these criminals would likely take the form of straight probationary sentences." The Commission concluded not only that white collar criminals received probation at a very high rate, but that when prison sentences were actually imposed, they were shorter than those given to "blue collar" criminals who stole similar amounts. In consequence, the Commission decided to "require short but certain terms of confinement for many white collar offenders . . . ."

The Commission's decision to require prison in some cases where "non-incarcereative alternatives" had previously been the norm has been the subject of much indignant protest. To hear the critics tell it, the

191. Breyer, supra note 38, at 7 n.50.
192. Id.
193. Id. at 7 n.49; see also Hagan & Nagel Bernstein, supra note 182, at 475 ("[U]nless we [advocate strongly for imprisonment] almost everybody would walk out on probation . . . .") (quoting an AUSA regarding an office policy of vigorous advocacy in white collar sentencing hearings).
195. Id. at 20.
196. See Freed, supra note 79, at 1706-08; Donald P. Lay, Rethinking the Guidelines: A Call for Cooperation, 101 YALE L.J. 1755, 1766 (1992) (complaining that then-pending amendments to the Guidelines "do not adequately address the concept of intermediate punishment"); Lawrence S. Lustberg, The Importance of Purposes in Choosing Between Prison and Probation, 3 FED. SENT. REP. 334, 334 (1991) (arguing that the Guidelines have created a "presumption of imprisonment" and that this supposed presumption arose from a failure by the Sentencing Commission to consider adequately the appropriate purposes of punishment); Stith & Koh, supra note 7, at 266-69, 284-85 (characterizing the outcome of the legislative process which produced the SRA as "encouragement of imprisonment," and noting the "rigidity and harshness" with which the Sentencing Commission implemented the SRA); Tonry supra note 52, at 356 (criticizing decrease in availability of probationary sentences as being "based on a false policy premise"); Michele H. Kalstein et al., Comment, Calculating Injustice: The
Commission's choice bordered on medieval barbarism. Reading the numerous complaints on this score, one would think that the Guidelines were a reversion to the French penal system which condemned Jean Valjean to the galleys for stealing a loaf of bread. Indeed, some of the more fevered critics have made the comparison explicit. Whatever may be said about the federal drug guidelines, the average citizen will be unlikely to weep for the plight of the federal white collar offender once apprised of the facts. The facts are that the Guidelines do not require an embezzler who is caught and pleads guilty to his crime to spend a single day in a penitentiary unless he has embezzled more than $200,000. Even in that case, the guideline range would be eight to fourteen months, and the embezzler could, if the judge permitted, serve half of the sentence at a half-way house or in home confinement. Two hundred grand buys a lot of baguettes.

Of course, a district court judge may elect to impose a prison term on one who steals less than $200,000, but contrary to the imputations of


197. See generally Lois G. Forer, A Rage to Punish: The Unintended Consequences of Mandatory Sentencing 20-29 (1994) (tracing a "medieval legacy" of equating crime with sin which the author claims leads to the overuse of incarceration as punishment).

198. "Jean Valjean was born of a poor peasant family. . . . There was a very severe winter; Jean had no work, the family had no bread; literally, no bread, and seven children." So he stole bread, he was caught, and the tribunal sentenced him to five years in the galleys. Victor Hugo, Les Miserables 29-30 (Charles Wilbour trans., Halcyon House 1947) (1862).


200. This calculation assumes that the defendant embezzled more than $200,000 in a one-time event which did not require "more than minimal planning" under U.S.S.G. § 2B1.1(b)(4)(A) (1995). It assumes further that the defendant pled guilty sufficiently early in the process to avail himself of the three-level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), (b). If the defendant's crime did involve "more than minimal planning," some incarceration would be required for stealing $70,000. U.S.S.G. § 2B1.1 and Ch. 5 Pt. A.

201. See supra note 57 and accompanying text.

the Guidelines' critics, the court is rarely bound to do so. Moreover, not
only does one have to steal a great deal of money before prison is
required, but the Guidelines set what some might consider embarrassingly
low sentences for defendants who have stolen obscenely large amounts.
For example, an embezzler or swindler who stole between $20,000,000
and $40,000,000 would, if he pled guilty, receive a Guideline sentence
of only thirty-seven to forty-six months.\footnote{203} Forty million dollars is not
a bad return for three or four years in the galleys, much less in a well-
appointed federal correctional facility.

The very high threshold loss amount that the Guidelines require
before mandating imprisonment in federal property crime cases
illuminates two other points that Guideline critics either miss or
misrepresent. First, if one read only the academic literature about the
Guidelines, one might easily conclude that in the federal system probation
is now as dead as parole, and that any Guidelines sentence must be a
prison sentence. Prominent Guidelines critic Michael Tonry has declared
categorically, “The guidelines allow virtually no role for nonimprisonment
sentences.”\footnote{204} In fact, in 1995, 21.3\% of the defendants convicted in
federal court and sentenced under the Guidelines received a sentence of
probation.\footnote{205} In 1994, the figure was 22.2\%;\footnote{206} in 1993, 22.7\%.\footnote{207}
Thus, contrary to Professor Tonry's confident claim, in the past three
years, more than one-fifth of all federal sentences have been
“nonimprisonment sentences.” It is true that in 1993, 1994 and 1995,
about one-third of federal probationers were subject to some condition of
confinement—intermittent confinement,\footnote{208} community confinement,\footnote{209}

\footnote{203. See U.S.S.G. § 2B1.1, Theft, and § 2F1.1, Fraud. This result assumes that
a $20,000,000 scheme will be sufficiently complex to warrant a two-level increase for
“more than minimal planning” under § 2B1.1(b)(4)(A) or § 2F1.1(b)(2), and that the
defendant receives a three-level reduction for “acceptance of responsibility” under §
3E1.1.}
\footnote{204. Tonry, supra note 2, at 11 (emphasis added). For similar comments by
other critics, see supra note 195.}
\footnote{205. U.S. SENTENCING COMM’N, 1995 ANNUAL REPORT 60, tbl. 18 [hereinafter
1995 ANNUAL REPORT].}
\footnote{206. 1994 ANNUAL REPORT, supra note 187, at 52-53, tbl. 20.}
\footnote{207. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, 1993 SOURCEBOOK
OF CRIMINAL JUSTICE STATISTICS 531, tbl. 5.49 [hereinafter 1993 SOURCEBOOK].}
\footnote{208. “Intermittent confinement (custody for intervals of time) may be ordered as
a condition of probation during the first year of probation.” U.S.S.G. § 5B1.3(d) (1995).}
\footnote{209. “Residence in a community treatment center, halfway house or similar
facility may be imposed as a condition of probation . . . .” U.S.S.G. § 5B1.4(b)(19).}
or home detention—\(^{210}\) as a condition of probation.\(^ {211}\) However, even if one assumes that by nonimprisonment sentences Tonry refers only to straight probation without so much as a day even of community or home confinement,\(^ {212}\) the Guidelines system now produces such sentences in one of every seven cases.\(^ {213}\) Any system that generates sentences that

\(^{210}\) "Home detention may be imposed as a condition of probation . . . as a substitute for imprisonment." U.S.S.G. § 5B1.4(b)(20).

\(^{211}\) In 1993, 7.9% of all federal sentences were sentences of probation with some condition of confinement. 1993 SOURCEBOOK, supra note 207, at 53 tbl. 5.49. Thus, in that year 34.8% of all probationary sentences included some condition of confinement. \(\text{Id.}\) In 1994, 7.8% of all federal sentences involved probation with a condition of confinement. 1994 ANNUAL REPORT, supra note 187, at 53 tbl. 20. Hence, in 1994, 35.1% of all probationary sentences included a condition of confinement. \(\text{Id.}\) In 1995, 7.8% of federal sentences were to probation with a condition of confinement. 1995 ANNUAL REPORT, supra note 205, at 60 tbl. 18. Therefore, in 1995, 36.6% of probationary sentences included a condition of confinement. \(\text{Id.}\)

\(^{212}\) In addition to stating in Chapter One of his book that the Guidelines "allow virtually no role for nonimprisonment sentences," TONRY, supra note 2, Professor Tonry declares in Chapter Three that "despite burgeoning interest nationally in intermediate sanctions since 1980, the guidelines do not authorize their use." \(\text{Id.}\) at 79 (emphasis added). This is incorrect. The Guidelines expressly authorize judges to impose restitution, fines, community confinement, home detention, community service, occupational restrictions, participation in mental health or substance abuse programs as conditions of probation or of supervised release. U.S.S.G. § 5B1.4(b).

Two sentences after asserting that the Guidelines "do not authorize" intermediate punishments, Professor Tonry concedes that they do, saying, "Penalties such as house arrest, intensively supervised probation, restitution, community service, and outpatient drug or sex-offender treatment, though in widespread use in many states, may be ordered only as conditions to probation." \(\text{Id.}\) (emphasis added). This statement is true. However, Professor Tonry seems to imply that it is preferable to impose community service or house arrest as a separate penalty rather than as a condition of probation, but nowhere in his book does he explain this preference.

Professor Tonry has done me the honor of reviewing this article. His explanation of these passages is that he would have preferred a guideline system in which the sentencing grid contained a band of cells such as those now providing for sentences of roughly 12 to 24 months of imprisonment, for which the "presumptive" sentence would be an intermediate sanction rather than either probation or a term of imprisonment. Letter from Michael Tonry to Frank Bowman, (Sept. 18, 1996) (on file with the author). His preferred system would also have included another band of cells in which "judges had discretion to impose a prison sentence or an intermediate [sanction]." \(\text{Id.}\)

\(^{213}\) See, e.g., 1993 SOURCEBOOK, supra note 207, at 53 tbl. 5.49 (14.8% of federal sentences were "probation only"); 1994 ANNUAL REPORT, supra note 187, at 53 tbl. 20 (14.4% of federal sentences were "probation only"); 1995 ANNUAL REPORT, supra note 205, at 60 tbl. 18 (13.6% of federal sentences were "probation only").

Professor Tonry asserts, "In 1993, only 14.8% of convicted [federal] offenders received straight probation (i.e., without confinement conditions) and thus in less than one-sixth of federal convictions was it possible for a judge to sentence a defendant to an intermediate sanction." TONRY, supra note 2, at 79. This is a marked misreading of the
do not require prison terms for more than one-fifth of all defendants, and do not require confinement of any type for any period for one defendant in seven can hardly be said to have eliminated all intermediate sanctions.

What is accurate to say about the Guidelines is that their advent has undoubtedly reduced, and reduced markedly, the frequency with which federal judges impose probationary sentences. Nonetheless, I submit that those who are distressed over the Guideline system's "failure" to mandate alternatives to incarceration in a high percentage of cases misapprehend the role of the federal criminal justice system. Although exceptions certainly exist, as a rule defendants are in the federal system instead of a state system because they have done something sufficiently heinous in character or far-reaching in effect that it is a matter

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evidence, even employing Tonry's own definitions of terms. As previously noted, supra note 211, in 1993, in addition to the 14.8% of federal defendants who received straight probation, another 7.9% were given probationary sentences with some "confinement conditions." All "confinement conditions" which can by law be imposed on federal probationers—intermittent confinement, community confinement, halfway houses, home confinement—are "intermediate sanctions." Most of these conditions are listed by Professor Tonry himself elsewhere in his book as examples of "intermediate sanctions" desirable as alternatives to "imprisonment." Tonry, supra at note 2, 109-14 ("boot camps"), 117-20 (house arrest and electronic monitoring), 120-21 ("day reporting centers," a form of nonresidential halfway house). Therefore, by Tonry's own terms, intermediate sanctions short of "imprisonment" were in fact imposed in 22.7%, and not 14.8%, of all federal cases in 1993.

Professor Tonry's conclusion that "in less than one-sixth of federal convictions was it possible for a judge to sentence a defendant to an intermediate sanction" is also inaccurate. Id. at 79 (emphasis added). The quoted statistic reveals only how many defendants were sentenced to such sanctions; it says nothing whatever about the number of cases in which the Guidelines gave the sentencing judge an option to impose an "intermediate sanction," but the judge declined to exercise it.

One may well view the undeniable reduction in probationary, noncustodial sentences since the adoption of the Guidelines, see infra note 214, as bad, or even calamitous. The point should, however, be argued fairly on the facts as they exist.

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214. The percentage of federal offenders sentenced to prison has been creeping upwards for years. In 1982, 51.1% of convicted federal defendants were sentenced to a term of imprisonment. 1993 SOURCEBOOK, supra note 207, at 494-95 tbl. 5.22. In 1987, 53.0% of federal defendants were sent to prison. Id. In 1987, the year before the Guidelines went into effect, the imprisonment rate was 53.0%. Id. In 1988, the first year the Guidelines were in operation, the percentage rose to 58.5% Id. By 1992, 64.7% of convicted federal offenders were sent to prison for some period. Id. In 1994 the rate was 77.8%. 1994 ANNUAL REPORT, supra note 187, at 52 tbl. 20.

215. For example, there are a host of relatively minor offenses, such as single, noncommercial violations of the Migratory Bird Act, 18 U.S.C. § 41 (1994), that are nonetheless under the exclusive jurisdiction of the federal courts. Similarly, theft from the United States mails, 18 U.S.C. § 1708 (1994), and forgery of Treasury checks, 18 U.S.C. § 510 (1994), are prosecuted in federal courts even where the amount of loss may not be great.
of interest to the national government, or because the crime is sufficiently complex that the states lack the resources to do much about it.\textsuperscript{216}

Even though federal statutory law may allow federal prosecution of defendants who have committed relatively minor crimes,\textsuperscript{217} or crimes over which the states have concurrent jurisdiction,\textsuperscript{218} the declination policies of most United States Attorney's Offices are designed to ensure that the scarce resources of the national government are not exhausted on insignificant matters.\textsuperscript{219} As a rule, the federal courts do not deal with drunk drivers, petty thieves, barroom brawlers, and similar candidates for probationary intervention. The expression, "Don't make a federal case out of it," embodies a truth about federal criminal courts—they are, and should be, largely reserved for serious offenses which, in the event of conviction, merit serious punishment.\textsuperscript{220}

\begin{itemize}
\item \textsuperscript{216}Salient examples of the difficulties faced by local prosecutors in dealing with complex cases are fraud cases and international drug trafficking cases. When I was a Deputy District Attorney in Denver, Colorado, as a practical matter we did not handle fraud cases. Even though fraud was certainly illegal under Colorado state law, neither the police nor the local prosecutors had the resources or the expertise to investigate or prosecute such cases. It was simply understood that cases of that sort were federal. For a discussion of the difficulties states face in dealing with narcotics traffickers whose operations cross state and national borders, see Frank O. Bowman, III, \textit{Playing "21" With Narcotics Enforcement: A Response to Professor Carrington}, 52 WASH. & LEE L. REV. 937, 955-64 (1995).
\item \textsuperscript{217}For example, there is no minimum quantity of narcotics for prosecution under federal narcotics statutes, 21 U.S.C. \S\ 841 (1994), nor is there a minimum amount of fraud loss required for prosecution under the federal mail fraud statute, 18 U.S.C. \S\ 1341 (1994).
\item \textsuperscript{218}For example, all states have laws prohibiting trafficking in cocaine, as does the federal government. \textit{See, e.g.}, COL. REV. STAT. \S\ 18-18-105 (1988) (prohibiting in Colorado the distribution, manufacturing, dispensing, sale, or possession of controlled substances, including cocaine); \textit{cf.} 21 U.S.C. \S\ 841(a)(1).
\item \textsuperscript{219}For example, in the early 1990's, when I reviewed case intake decisions at the Southern Criminal Division (Major Crimes Unit) of the U.S. Attorney's Office for the Southern District of Florida, the declination policies dictated that, absent special circumstances, the Office would not accept for prosecution cocaine trafficking cases involving less than five kilograms of cocaine (the Miami wholesale value of which was approximately $85,000-$115,000) or fraud cases in which the loss was less than $100,000.
\item \textsuperscript{220}It is for this reason, among others, that comparisons between rates of incarceration in the federal courts and rates of incarceration in state courts are not particularly instructive. The overwhelming majority of state defendants who receive probation, even for felony convictions, would not be prosecuted in federal court at all. It is nonetheless interesting to note that the rate of incarceration of state felony defendants is higher than the overall federal rate of imprisonment. For example, in 1992, the most recent year in which statistics are available for both state and federal courts, the rate of incarceration (defined as a sentence to either a prison or a jail) for convicted state felony defendants was 70%, while 30% of state felons received probation. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 1994 SOURCEBOOK OF CRIMINAL JUSTICE
\end{itemize}
In the case of federal white collar crime prosecutions, the question is not why the Guidelines now require some term of imprisonment in so many federal cases. The question ought to be why any United States Attorney’s Office should ever expend its resources on an economic offense not serious enough to demand imprisonment as a penalty. At the end of the day, if there is a criticism to be made about white collar criminal sentences under the Guidelines, it is that they are often too short in relation to their moral seriousness, in relation to the harm they cause, and in relation to the investment of resources required to prosecute them.

2. GUIDELINE DRUG SENTENCES ARE TOO LONG

Drug sentences imposed under the Federal Sentencing Guidelines are another matter altogether. Ironically, for a system whose very existence is premised on the search for consistency, many of the undoubted defects of the Guidelines result largely from failures to live up to their own guiding principles. A primary example of this failure is the absolute length of drug sentences.

Many criticisms of the Guidelines are couched in terms of process—complaints about the complexity of the grid, the length of the manual, the necessity for time-consuming fact-finding sentencing hearings, the numerous appeals. But if you scrutinize these complaints, you soon discover that the burr under the critic’s saddle is not really process at all. Instead, the true source of the gall is that some forty percent of federal criminal cases are drug cases, and the Guidelines, taken together with mandatory minimum sentences, compel the imposition of very long sentences on drug sellers. These sentences are long relative to the previously settled expectations of the participants in the federal system. They are long as a percentage of the duration of any human

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STATISTICS, 487 tbl. 5.50 [hereinafter 1994 SOURCEBOOK]. In 1992, only 64.7% of all federal prisoners were sent to prison for some period. 1994 ANNUAL REPORT, supra note 187, at 52 tbl. 20. Even the felony incarceration rates for the state and federal systems are not dissimilar. As noted, the state felony incarceration rate for 1992 was 70%; in 1992, 77.5% of federal defendants convicted of a felony received some period of incarceration. 1994 SOURCEBOOK supra at 452 tbl. 5.21.

221. During fiscal year 1995, drug cases accounted for 39.9% of sentenced defendants. 1995 ANNUAL REPORT, supra note 205, at 43 tbl. 10. There is in fact a modest downward trend in the percentage of drug cases in the federal courts. During 1994, drug cases accounted for 41.8% of sentenced defendants. 1994 ANNUAL REPORT, supra note 187, at 39 tbl. 12. In 1993 the figure was 43.9%. 1993 ANNUAL REPORT, supra note 106, at 55 fig. B.

222. Of course, very long, even cruelly long, sentences for narcotics offenses were hardly unknown before the Guidelines. See, e.g., United States v. Espinoza, 481 F.2d 553, 554 (5th Cir. 1973), in which the defendant was sentenced to fifteen years
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They are based primarily on the quantity of drugs a defendant was buying, selling, or transporting. There is relatively little room for considerations of the defendant’s role in the offense. Therefore judges find themselves sending away for a great many years a lot of folks who do not look or feel much like Pablo Escobar.

Now I have no truck with drug dealers. I do not favor legalization. I have prosecuted many traffickers and urged their lengthy incarceration with zeal, and witnessed its imposition with satisfaction. While I confess to stray libertarian impulses concerning freedom over one’s own vices, I am finally convinced that the destructive impact of hard narcotics on human personalities and on the communities they inhabit is so great that prohibition is required. Moreover, regardless of my feelings about the harms caused by drug consumption, I have no moral qualms whatever about imprisoning drug sellers for substantial terms. They are a class of persons who have enlisted for pecuniary gain in an industry whose business practices notoriously include the murder of judges, policemen, competitors, unruly employees, welshing customers, and unlucky innocent bystanders.

But even stern retributive justice has its limits. Those limits are, or ought to be, imposed not only because of namby-pamby considerations like mercy, which go unmentioned in the Guidelines’ preamble, but also because of the hard-nosed utilitarian objective of crime control achieved through deterrence and incapacitation, which is a philosophical pillar of the Guidelines system. Put simply, even if we were justified on moral grounds in imprisoning every drug seller for life, such a policy would make no practical sense.

imprisonment for distribution of 0.62 grams of heroin.


224. Drug defendants can receive enhancements and reductions in their offense levels based on their aggravating, U.S.S.G. § 3B1.1, or mitigating, U.S.S.G. § 3B1.2, roles in the offense of conviction. However, the size of the adjustments (plus or minus four levels) is small relative to the long sentences often imposed for narcotics offenses.

225. For thoughts on narcotics enforcement in general, see Bowman, supra note 216, passim.


Even if one believes, as I do, in the deterrent power of imprisonment, a point exists beyond which the prospect of incarceration exhausts its deterrent effect. My own purely personal guess (based primarily on years of plea negotiations and discussions with defendants who have, as we say, "flipped," and decided to cooperate with the government) is that any sentence that exceeds about ten years of real prison time does not provide additional deterrence. Any adult not deterred by a decade in a cell will not be deterred by the prospect of two decades, or three, or four.

Incapacitation is also of limited usefulness in narcotics cases. Drug crimes, like robbery and theft, are crimes of greed. But unlike robbery and theft, drug crimes are market-driven. If the police catch and imprison Smith, whose life's work is sticking up 7-11s, a certain number of 7-11s that would have been robbed had Smith not been caught will go unrobbed. Other 7-11 robbers will be at work while Smith is imprisoned, but not because there is an unmet "demand" for 7-11 robberies in Smith's absence.

Not so with drug crimes. So long as there is a population of drug users willing to pay for their peculiar pleasures, market pressure exists to replace any imprisoned dealer. Whether the demand for a seller will be filled depends on the size of the market, that is, on the number of customers and the prices they are willing to pay, and on whether potential replacement dealers perceive that the risks of selling are worth the rewards. Thus, imprisonment plays a role in fighting drug trafficking, but that role is not so much to incapacitate drug dealers as to affect the cost-benefit calculations of their prospective replacements.

One other consideration is at work in sentencing which transcends and combines the just deserts and crime control rationales for punishment. The criminal justice system serves not only the narrow community of victims, offenders, and those teetering on the brink of offending, it also serves the educational function of putting into highly visible action the moral vision of the community. The severity of punishment the society assigns any given crime ought to reflect its moral gravity—the graver the offense, the more severe the punishment. Likewise, if punishment deters crime among the unpunished and prevents it altogether among the imprisoned, the severity of punishment for any particular crime should reflect the degree to which society feels the need to prevent that crime. Beyond both these considerations, the severity with which a society punishes a particular act is, or should be, an accurate mirror of the degree of disapproval the community has for the act. Severe punishment is a

way of illustrating in the most dramatic fashion the moral code of the society. The function of punishment I am describing here has been characterized as the "reprobative" or "expressive" function of punishment. Severe drug trafficking penalties place a dramatically visible price on society's aversion to the use and sale of addictive drugs, and in doing so assist the members of society to internalize that aversion. Still, it is very difficult to argue that those federal drug sentences that are far longer than, perhaps double, the length necessary to achieve maximal individual deterrence are nonetheless acceptable because of their reprobative or expressive value. Some additional increment of punishment for reprobative effect may be justifiable; raising the otherwise appropriate penalty by fifty or one hundred percent is not.

In order to be minimally consistent with the announced principles of the Guidelines, drug sentences should be no more severe than the conduct at issue deserves, and no longer than necessary to achieve the maximum possible deterrence. By this standard, many, though by no means all, drug sentences imposed under the Guidelines fail. Five years in a federal penitentiary is just too long for mere possession of five grams of crack cocaine. Such a sentence is so disproportionate to the harm the crime causes, either to the perpetrator or anyone else, as to border on the morally offensive. Likewise, although a sentence of fifteen to twenty years for a transporter of fifty kilograms of cocaine may, if one subscribes to a fairly stern view of such undertakings, be morally


230. For a discussion of whether the anti-drug efforts of the past twenty-five years can be deemed successful, at least in part because these efforts have served a "reprobative" or expressive" function, see Bowman, supra note 216, at 969-71.

231. See Nemerson, supra note 9, at 682 (discussing what the author calls "a maximum appropriate sentence"—that is, an upper limit beyond which punishment, though authorized by positive law, is morally indefensible").

232. See 21 U.S.C. § 844(a) (1994). It should be noted that the number of federal prisoners incarcerated for mere possession of narcotics is quite small. Only four percent of those serving federal sentences for drug crimes are serving time for possession offenses. 1993 Sourcebook, supra note 207, at 632.

233. Indeed, although it is a closer case, absent some aggravating factor such as a prior trafficking conviction, I would not argue strenuously with anyone who views a five year prison term for distribution of five grams of crack as disproportionately severe.

234. Pursuant to U.S.S.G. § 2D1.1(c)(2) (1995), the base offense level is 36 for possession with intent to distribute 50 kilograms or more of cocaine in violation of 21 U.S.C. § 841(a)(1). Assuming no reductions in offense level (such as for acceptance of responsibility, § 3E1.1) no increases in offense level (such as for role in the offense, § 3B1.1), and assuming that the defendant had no prior convictions, his sentencing range would be 188-235 months, or a range of just over fifteen years to just under twenty years.
justifyable, by any practical measure, it is counterproductive and extremely expensive overkill.\textsuperscript{235}

In defense of the Sentencing Commission, certain drug sentences are embedded in statute and the Commission could not change them even if it were so inclined. For example, the minimum mandatory sentences of five years for possession of five grams of crack cocaine\textsuperscript{236} and ten years for possession with intent to distribute five kilograms of powder cocaine\textsuperscript{237} are statutory and can be changed only by legislative enactment. Nonetheless, no statute mandated that the original Commission construct a scheme in which sentences for more than statutory minimum quantities of narcotics escalate upwards from the statutory minimums to the top of the sentencing chart with neat geometric proportionality.\textsuperscript{238} The maximum sentence for a first time drug offender, regardless of amount and absent some special aggravating factor, need not have been set (as it was in 1989) at life imprisonment.\textsuperscript{239} The Commission could and should have chosen some figure dictated less by considerations of symmetry and more by careful consideration of the stated goals of the system.

Both the Commission and Congress have, in recent years, nudged drug sentences downward a bit. For example, the maximum offense level on the drug quantity table was dropped in 1994 from Level 42 to Level 38.\textsuperscript{240} In practical terms, this change reduced the maximum prison term for a first-time offender based purely on the quantity of narcotics from

\begin{itemize}
\item \textsuperscript{235} See Bowman, supra note 216, at 983.
\item Treating drug crime as a law enforcement problem rather than as warfare requires . . . that we abandon the illusion that imposing sentences of a "jillion" years on the criminal we catch today will eliminate the necessity of sentencing another criminal next year and the next and the next. It requires us to decide whether we want to incarcerate one drug dealer for forty years, or four drug dealers for ten years, or eight drug dealers for five years. The current approach is to incarcerate eight dealers for forty years—and worry about the long-term costs tomorrow.
\item Id.
\item \textsuperscript{236} 21 U.S.C. § 844(a).
\item \textsuperscript{237} 21 U.S.C. § 841(b)(1)(A)(ii).
\item \textsuperscript{238} See Tonry, supra note 52, at 358 (contending that the Commission should treat minimum mandatory sentences as "trumps" rather than as "guideposts"); Stith & Koh, supra note 7, at 283 (arguing that the Commission was not required . . . to incorporate statutory minimum sentences in the way it has").
\item \textsuperscript{239} See U.S.S.G. § § 2D1.1, Ch. 5 Pt. A. The Sentencing Table assigns an offense level of 42, which produces a guideline range of 360 months to life imprisonment for an offender (even first-time offenders), for the highest quantities of drugs, (for example, more than 1500 kilograms of cocaine).
\item \textsuperscript{240} U.S.S.G. app. C amend. 505 (1994).
\end{itemize}
life imprisonment to twenty-four years, five months.\textsuperscript{241} Similarly, the so-called "safety valve" legislation passed by Congress in 1994 allows judges to sentence certain low-level, first-time, non-violent drug offenders below the otherwise applicable statutory minimum sentence.\textsuperscript{242} The Sentencing Commission thereafter passed, and Congress accepted, an amendment to the Guidelines which allows an additional two-offense-level reduction to the same class of defendants.\textsuperscript{243}

Nonetheless, a very high overall level for drug sentences was frozen in amber by the early choices of the Commission, and the raw, unpalatable political truth is that drug sentences will not be materially reduced any time soon, certainly not for years, perhaps not for decades. Most of what the current Sentencing Commission might, in its heart of hearts, like to do in that direction would be derided by an Administration determined not to be branded "soft on crime,"\textsuperscript{244} and blocked by a Congress equally determined not to be outflanked to the right.

My own rueful prediction is that drug sentences will never be seriously reduced until some future irreproachably socially conservative president recasts the debate from crime to economics and declares that the cost of locking up so many drug sellers for so very long is just too great.

\textbf{E. A Generous Consistency: Taking the Principles of the Guidelines Seriously}

Honest adherence to the principles that actuate the Guidelines would require not only that we reduce the severity of drug sentences, but also that we rethink our approach to crime control generally, and to those human beings who are now serving, may in the future serve, or have in

\begin{itemize}
\item \textsuperscript{241} Compare the 1989 and 1995 versions of U.S.S.G. § 2D1.1, the Drug Table, and Ch. 5, Pt. A, the Sentencing Table.
\item \textsuperscript{243} Guidelines Amendment 515 added § 2D1.1(b)(4), which decreases by two levels the offense level of any defendant who meets the criteria of 18 U.S.C. § 3553(f), as embodied in U.S.S.G. § 5C1.2. See U.S.S.G. app. C amend. 515 (1995).
\item \textsuperscript{244} The most recent evidence of this tendency was the Administration's reflexive opposition to the crack/powder amendment last year, despite the fact that, based on my own experience, relatively few line prosecutors would be prepared to defend the rationality of the 100-1 crack/powder ratio. In defense of the Administration's political instincts, however, there can be little doubt that politicians of the opposite party were salivating at the prospect of berating the Clinton Justice Department for going soft on drug dealers.
\end{itemize}
the past served sentences meted out by the federal criminal justice apparatus.\textsuperscript{245}

Both the development of the Guidelines and the resurgence of capital punishment stem from the perception of accelerating social breakdown, a growing fear of crime, and rising revulsion against the culture of excuse which seems to hold no one responsible for his own actions. The public clamor has been matched by a turn of the intellectual wheel. Punishment is no longer therapeutic. It is instead to be justified as society's moral response to the choice between good and evil freely exercised by an autonomous moral being. The outer limits of punishment are to be set by what is deserved. The actual sentence meted out can be set inside those limits by utilitarian considerations of incapacitation and general and specific deterrence. Rehabilitation is out. Just deserts is in. We are all near-Kantians now.\textsuperscript{246}

Despite some cynicism about the ease with which the polemicists of the political right seem to have become disciples of Immanuel Kant, I am myself much more comfortable with a system of criminal punishment that rests on the premise that people have the power of choice, and that holds people responsible for the choices they make. At the end of the day, when it comes to criminal behavior, particularly serious criminal behavior, I don't much want to understand you. I don't want to feel your pain. I want you to behave, and if you will not, then to accept the consequences of your misbehavior with no expectation that every regrettable circumstance of your prior life will mitigate your punishment.

Nonetheless, it is ghastly and unseemly, not to speak of intellectually inconsistent, that we insist on the power of criminal defendants to choose between good and evil only as a justification for killing or caging them. After all, the moral justification for punishment in a system which emphasizes in roughly equal measure just deserts and crime control through deterrence assumes that human beings have the power, not merely to choose evil, but also to choose good. Moreover, the utilitarian claim of the Guidelines, that criminal punishment can prevent crime

\textsuperscript{245} "It requires no great penetration to discern that modern controversies surrounding penal rehabilitationism are in significant degree debates about human nature. . . . [C]onflicting theories of crime causation and penal treatment also rest ultimately on opposing perceptions of human character and potential. It is this circumstance that most clearly identifies issues of penal policy with the larger political controversies of the time." \textsc{Allen, supra} note 15, at 40.

\textsuperscript{246} Kant himself would not admit that even the \textit{reduction} of deserved punishment could be justified on utilitarian grounds. He wrote, "The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it . . . ." \textsc{Immanuel Kant, The Metaphysical Elements of Justice} 100 (John Ladd trans., 1965).
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through both general and specific deterrence, assumes that the actions of the state can influence the choice. Thus, while I believe in the power of choice, and believe that it does justify punishment, even very severe punishment, I also insist that a society which demands the unflinching imposition of stringent penalties as punishment for the choice of evil bears a heavy responsibility for encouraging, fostering, and nurturing those conditions which strengthen the disposition to choose the good.

I find no crippling defect in a guidelines sentencing system unwilling to excuse the poor, the young, the immigrant, the ignorant, or the oppressed for crime. I am unwilling, however, to declare what seems to me both plainly untrue, and ultimately immoral—that the only answer to crime is punishment. To hold otherwise is to say of humans what we would not say of dogs—that they respond only to the lash, and that in our anguished search for solutions to the scourge of crime, we owe our fellow creatures no more than the lash and the threat of the lash.

In policy terms, the national movement toward tougher and more determinate penalties, of which the federal sentencing guidelines scheme is only one example, is, at best, half of a sensible and moral response to the problem of crime in America. The other half must be a commitment to alleviating those social, cultural, and economic conditions which breed crime. Until the country makes a commitment to the prevention of crime equal in resources and fixity of purpose to the commitment to punish embodied in the Sentencing Reform Act of 1984, our national romance with determinate sentencing will remain troubled and uneasy.

IV. Conclusion

I like the Federal Sentencing Guidelines. I confess that this feeling may be only the perverse affection that experienced practitioners in any corner of the law come to feel for their own arcane specialty. Nonetheless, I sense a growing acceptance of the Guidelines, and even a (sometimes grudging) recognition of their virtues, among a rising proportion of those of us who work daily in federal criminal practice. Judge Cabranes is wrong. The Guidelines are not a failure.

Still Judge Cabranes and other Guidelines critics are indisputably correct in at least two respects. First, the Guidelines are a very long way from perfect, and indeed remain a very long distance from the irreducible minimum level of imperfection inevitable in any human legal system. The Guidelines can and should be made simpler, both in terms of use by legal professionals and their comprehensibility to nonprofessionals affected by the results they generate. Drug sentences should, in general, be shortened. Other changes, perhaps including some rethinking of the way relevant conduct functions in the system, may well be appropriate. Such changes should, however, be made with caution and with the
recognition that constant tinkering is in itself an impediment to consistency and confidence in the system.

Guidelines critics like Judge Cabranes are also partially correct when they bewail the way in which the Guidelines have redistributed the exercise of sentencing discretion. As I hope I have made clear, the limitation of unaccountable judicial discretion is, on balance, a beneficial result of the Guidelines. The fact that other participants in the criminal system, in particular prosecutors, probation officers, and indeed the defendants and their counsel, exercise far more influence over sentencing than they did before the Guidelines is no cause for alarm. Federal sentencing proceedings before 1987 were, in effect, a ritualized series of prayers to the inscrutable, if usually well-intentioned and reasonably benevolent, sentencing god seated on the bench. Guidelines sentencing is characterized by the interplay of the guided discretionary choices of a number of different participants. In this respect, the Guidelines are an improvement.247

The lurking danger to the entire Guidelines enterprise is that the process of creating guidelines has moved discretion away, not merely from judges in particular, but from the entire class of persons who work in the criminal justice system daily and thus deal with defendants face-to-face as human beings. The Guidelines system has shifted the locus of sentencing power away from all of the courthouse actors to the Sentencing Commission in Washington which makes the rules, to the courts of appeals which interpret the rules in splendid judicial isolation, to the Justice Department's national policy apparatus (as distinct from United States Attorney's Offices) which lobbies both the Commission and Congress, and to Congress which exercises veto power over the entire rulemaking system. A national rule-making mechanism must exist in order to establish a national sentencing guidelines system. That is unavoidable. Nonetheless, the greatest peril to both the moral legitimacy and the long-term practical success of the guideline structure springs from its vulnerability to national political currents.

As I have argued above, the legitimacy of the Federal Sentencing Guidelines rests on the view that human beings, even those who commit serious crimes, are free moral actors who are capable of choosing

247. In United States v. Mistretta, 488 U.S. 361 (1989), the Supreme Court noted that "the sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one branch." Id. at 390. Although this observation was made in the course of responding to separation of powers objections to placing the Sentencing Commission in the judicial branch, it suggests a sentencing model of multi-party interaction that is much closer to the Guidelines system than the virtual judicial monopoly on sentencing decisions under the former system.
between good and evil, and that the society is not at liberty to treat even convicted criminals as animals to be caged for periods that have no necessary relation either to desert or a rational scheme of deterrence. It is, regrettably but I think undeniably, far easier for national policymakers who never see criminal defendants as individuals to objectify them, to consider them as statistics, or simply to brand them with the Mark of Cain and cease thinking of them as members of society at all.

This mindset was graphically on display in last fall’s brouhaha over the Commission’s crack and money laundering amendments. Deep down, both congressmen and Justice Department officials surely knew that some adjustment in both areas was appropriate. Yet neither Congress nor the Administration could resist pandering to the fear of the electorate. I do not believe that the crack/money laundering debacle necessarily foreshadows permanent political gridlock in sentencing reform. Indeed, my experience as Special Counsel to the Sentencing Commission during 1995-96 suggests that political lessons have been learned which could make future compromise more likely, on the crack and money laundering issues as well as on broader systemic concerns. On the other hand, if I am wrong in my interpretation of such small hopeful auguries, then the politicization of sentencing law will impose a one-way ratchet on every future reform proposal, slowly transforming what is, in my view, an appropriately stern system of punishment into a straightjacket so inflexible and so unsustainably expensive that Judge Cabranes’ many prayers for its abolition will at last be answered.