

Misguided Guidelines *A Critique of Federal Sentencing*

by Erik Luna

Executive Summary

Fifteen years ago, the federal justice system underwent a revolutionary but massively flawed revision of its approach to sentencing criminal defendants. Driven by concerns of disparate treatment and undue leniency in punishment, Congress created an independent agency, the U.S. Sentencing Commission, to formulate a new sentencing regime that would drastically limit the discretion of federal judges. The resulting body of law, known as the Sentencing Guidelines, has both perverted constitutional principles and produced grave injustices.

In promulgating detailed sentencing rules that bind federal courts and individual parties, the commission is making law through an unconstitutional delegation of legislative authority. This practice not only violates the constitutional principle of separation of powers, but also severs the typical lines of political accountability in American democracy. Moreover, the Guidelines themselves violate a number of constitutional rights by, among other things,

punishing defendants for uncharged or acquitted conduct.

Beyond constitutional infirmities, the Guidelines have proven to be unfair and unworkable in practice. Justice in sentencing requires an individualized assessment of the offender and the offense, leading to a moral judgment imposed by judges with skill, experience, and wisdom. Those judgments cannot be made by a distant bureaucracy pursuant to abstract rules that disregard important context. Yet that is precisely what occurs in today's federal courts: Individuals are sentenced under the commission's micro-managed rules, which expressly forbid judges from considering personal characteristics like the defendant's age and family responsibilities. That rigidity in sentencing has led to intentional deception among judges, prosecutors, and defense attorneys attempting to avoid the prescribed consequences of the Guidelines. Such dishonesty is flatly inconsistent with the commission's stated goal of "truth in sentencing."

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Introduction and Background

November 1, 2002, marks the 15th anniversary of the U.S. Sentencing Guidelines. But there will be no celebrations, parades, or other festivities in honor of the punishment scheme created by Congress and the U.S. Sentencing Commission. Instead, the day will pass like most others during the intervening decade and a half—with scores of federal defendants sentenced under a convoluted, hypertechnical, and mechanical system that saps moral judgment from the process of punishment. Rather than fanfare, the Guidelines' anniversary will likely be met with a level of ridicule reserved for "the most disliked sentencing reform initiative in the United States in this century."¹

The Guidelines refer to the legal framework of rules for sentencing convicted federal offenders. After a defendant has been investigated by law enforcement, indicted by grand jury, and found guilty at trial (or through a plea bargain), the trial judge must determine an appropriate punishment under the Guidelines. Depending on the crime of conviction and various factors related to the offender and the offense, a federal judge will typically sentence the convicted defendant to a term of imprisonment and possibly a criminal fine. Of course, the federal system is dwarfed by the combined criminal justice systems of the individual states, the primary crime fighters in American society. Of the nearly 2 million inmates in the United States, less than 10 percent are presently serving federal sentences.²

Nonetheless, the federal system remains influential in the national debate on crime and punishment, presenting a prominent model for other jurisdictions in their penological experimentation. For better or worse, federal law enforcement continues to dominate certain categories of crime—such as drug offenses, immigration violations, and white-collar crime—often to the point of occupying the field. This tendency, particularly for narcotics offenses,³ has only increased since the enactment of the Sentencing Guidelines,

resulting in a federal prison population that has quadrupled in just a decade and a half.⁴ In 1999, for example, more than 50,000 offenders were sentenced pursuant to the Guidelines, 44 percent of whom had been convicted of drug offenses.⁵

Some commentators have tried to distinguish the Guidelines from another federal sentencing phenomenon: mandatory minimum sentences.⁶ Those punishment schemes set an absolute floor for sentencing particular offenders. In most cases, for instance, a conviction for possessing five grams of crack cocaine results in an automatic five-year sentence.⁷ In a 1991 report to Congress, the U.S. Sentencing Commission blasted mandatory minimums as, among other things, producing unwarranted disparities among offenders and transferring power from judges to prosecutors.⁸ The great irony, however, is that those same charges could be leveled against the commission's own work product.⁹ Like mandatory minimums, the Sentencing Guidelines set strict parameters for punishment (including a lower limit), absent some basis to depart from the sentencing range.

When Congress enacts a mandatory minimum, the relevant sentencing range shifts upward to meet the legislative mandate. Both the Guidelines and statutory minimums are manifestations of the same trend—mandatory or "determinate" sentencing. It is almost Orwellian doublespeak to call the present regime *guidelines*, given that judges must follow these sentencing rules or face reversal by appellate courts. In fact, the commission has even made the "Freudian slip"¹⁰ of calling the Guidelines "mandatory."¹¹ Both mandatory minimums and the guidelines attempt to purge sentencing discretion in federal trial courts, all but precluding judges from departing from the strictures of determinate punishment. Far from being alternatives, these two schemes feed off each other in curbing judicial discretion. For that reason, both the Sentencing Guidelines and mandatory minimums will be collectively referred to in this study as the "Guidelines."

Although the Guidelines are frowned upon from all corners of the criminal justice system,

the federal judiciary has been particularly adamant in its opposition to the current sentencing regime. Federal judges have described the Guidelines as “a dismal failure,” “a farce,” and “out of whack;”¹² “a dark, sinister, and cynical crime management program” with “a certain Kafkaesque aura about it;”¹³ and “the greatest travesty of justice in our legal system in this century.”¹⁴ In 1990, the Federal Courts Study Committee received testimony from 270 witnesses—including judges, prosecutors, defense attorneys, probation officers, and federal officials—and only four people expressed support for the Guidelines: the U.S. Attorney General and three members of the U.S. Sentencing Commission.¹⁵ Surveys of the judiciary have confirmed widespread disapproval of the Guidelines: A 1992 poll found that more than half of all federal judges believe that the current system should be completely eliminated, while a 1997 survey concluded that more than two-thirds of federal judges view the Guidelines as unnecessary.¹⁶

With 15 years of overwhelmingly negative reaction, it is time to reconsider the Guidelines and the consequences for federal criminal justice. This paper will begin with a brief history of federal sentencing, followed by a description of the impetus for reform that culminated in the current regime. The paper will then critique the present approach to federal sentencing, delineating the major vices and flaws of the commission and its Guidelines. The paper will conclude with a call to scrap the Guidelines and start anew.

Judge as Social Worker: Sentencing before the Guidelines

Like the proverbial road to hell, the path to the Guidelines was paved with good intentions. Federal sentencing was indeterminate in nature throughout much of the 20th century, allegedly pursuant to the rehabilitative ideal fostered by American prison reformers.¹⁷ The criminal sanction was to be tailored to the offender with the ultimate goal

of curing his “disease” and thereby preventing future misconduct. Various officials played a role in this medical model: Federal probation officers collected information about the defendant’s social history and past criminal record, providing a type of “prognosis” on his potential for reform and eventual reintegration into society. Parole authorities would, in turn, determine the actual release date based on their assessment of the offender’s progress toward law-abiding conduct.

Primary control over sentencing, however, was vested in the district court. With few exceptions, Congress provided only maximum terms of incarceration for federal crimes, allowing trial judges unbounded discretion to sentence offenders short of the upper limit—including no prison time at all (probation). Given that an inmate would serve at least one-third, but typically not more than two-thirds of the nominal sentence, the district court was supposed to make a clinical judgment of sorts that an appropriately discounted term of imprisonment would be sufficient to reform the offender. Under a favorable interpretation, then, federal trial judges were part social worker, part soothsayer—gauging the length of sentence based on an unguided evaluation of the necessary conditions for rehabilitation and indoctrination of pro-social behavior. To be sure, this regime suffered from several serious defects. Sentencing judges were dictatorial in practice: The district court was not required to provide reasons for any particular punishment, and so long as the term was within the broad statutory boundaries, the sentence was not subject to review on appeal. As a result, the federal system lacked any mechanism that might ensure a degree of intercase equity in punishment. For instance, a study chaired by Judge Marvin Frankel distributed identical files based on actual cases to 50 district court judges, asking each judge to sentence the hypothetical defendants.¹⁸ The study found an “absence of consensus is the norm,” with one case ranging from a three-year sentence by the most lenient judge to 20 years in prison and a \$65,000 fine by

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Scholars and practitioners came to regard the system as fundamentally unfair and “lawless,”²⁰ spurring a somewhat remarkable confluence of critics, each with his own set of grievances. The concept of “individual reform” came under attack from both prisoners’ rights groups and scientific researchers. The former claimed that rehabilitation was often a pretext to warehouse undesirables, whereas the latter argued that predictive judgments of future dangerousness were inherently unreliable and that rehabilitative programs had no effect on recidivism. Civil rights activists contended that sentence length was often correlated with disturbing classifications, such as race and socioeconomic status. In contrast, political conservatives condemned the prevailing system for allowing “bleeding heart” judges to dole out lenient punishment for hardened criminals.²¹

Despite those differences, critics apparently agreed that largely unlimited judicial discretion, without written justifications and appellate review, tended to produce intolerable sentencing discrepancies between similarly situated offenders.²² With some judges serving as well-intentioned social engineers and others as pseudoempirical shaman, punishment often depended upon which courtroom door a defendant entered.

Judge as Accountant: Sentencing under the Guidelines

Although a few scholars have questioned the actual existence of capricious variations among truly comparable criminals,²³ the image and anecdotes of unequal punishment became widely accepted in the 1970s and early 1980s. Among others, Marvin Frankel was a particularly influential voice against the prevailing discretion in sentencing. His 1973 book, *Criminal Sentences: Law without Order*, lambasted the federal system for its “unruliness, the absence of rational ordering, the unbridled power of the

sentencers to be arbitrary and discriminatory,”²⁴ all of which should be “terrifying and intolerable for a society that professes devotion to the rule of law.”²⁵ Judge Frankel’s remedy was the establishment of an administrative agency—“a commission on sentencing”²⁶—to develop rules that would provide direction for trial courts in determining appropriate punishment. The agency would be insulated from political pressures that distort rational decisionmaking, Frankel argued, and over time the administrators would develop a level of expertise beyond that of congressional generalists.

Behind Judge Frankel’s proposal was an abiding conviction that the bureaucratic model of modern society could apply jot-for-jot to the practice of punishment. Sentencing could be pursuant to a “detailed profile or checklist of factors that would include, wherever possible, some form of numerical or other objective grading.”²⁷ The resulting “chart or calculus” would be used “by the sentencing judge in weighing the many elements that go into a sentence.”²⁸ Frankel even foresaw “the possibility of using computers as an aid toward orderly thought in sentencing.”²⁹ He dreamed of a scientific jurisprudence that limited the discretion of judges through a systematic and all-encompassing body of rules, mechanically applying the law to a set of facts and thereby generating a proper sentence without the vagaries of trial-judge decisionmaking.

In practice, however, Judge Frankel’s vision has proved to be more fantasy than reality. The Sentencing Commission has never been insulated from politics, and Frankel’s mechanical sentencing regime subtracts precisely what is needed most in the human drama of punishment—moral judgment.

The Makeover: The Sentencing Reform Act Creates the Sentencing Commission

As legend would have it, the genesis of federal sentencing reform can be dated to a 1975 party hosted by Sen. Edward M. Kennedy (D-Mass.).³⁰ Among the invitees was Judge Frankel, whom Kennedy would later declare “the father of sentencing reform.”³¹ The dinner conversa-

tion with Frankel and other guests, including criminal justice scholars Alan Dershowitz and James Vorenberg, inspired the Massachusetts Democrat to lead the charge for a congressional overhaul of federal sentencing as it then existed. Although his initial bill was defeated, Senator Kennedy continued the campaign for sentencing reform, compromising here and there, and eventually garnering the support of an odd coalition of political luminaries including Sens. Joseph Biden (D-Del.), Orrin Hatch (R-Utah), and Strom Thurmond (R-S.C.).³² Yet even with modifications to suit the needs of disparate interest groups, the Sentencing Reform Act barely passed as a rider to a general crime control bill.³³

In classic congressional style, the act presented an extravagant set of legislative objectives and statutory requirements. Among its goals were to create a system that: (1) promoted respect for the law; (2) offered a clear statement of the purposes of punishment as well as the available kinds and lengths of sentences; (3) ensured that the offender, federal officials, and the public “are certain about the sentence and the reasons for it”; (4) met the sometimes conflicting demands of retribution, deterrence, incapacitation, and rehabilitation; (5) provided trial judges with “a full range of sentencing options from which to select the most appropriate sentence in a particular case”; and (6) eliminated “unwarranted sentence disparities” between otherwise similarly situated criminals.³⁴

The act ended indeterminate sentencing in the federal system, eliminating parole and requiring that judges set a specific term to be served in full (with a small allowance for good behavior) subject to appellate review. The act also established the U.S. Sentencing Commission—an “independent commission in the judicial branch”³⁵—that was charged with promulgating guidelines that limited the punishment range to 25 percent of the maximum sentence.³⁶ These guidelines were supposed to capture pertinent aspects of the offender and the offense, and toward that end, Congress instructed the commission to “consider” the relevance of various factors

surrounding the crime and the characteristics of the criminal, such as age, education, vocational skills, mental and emotional problems, physical condition, previous employment record, and family ties and responsibilities.³⁷

By statute, the commission included two ex officio members and seven voting members, the latter composed of three sitting federal judges and no more than four individuals from the same party.³⁸ The enormous task facing the original commissioners was exacerbated by a deadline of a mere 18 months in which to formulate a whole new federal sentencing system. From the start, the original commission was mired in the confusing directives of the act and its legislative history, divided over the relevance and application of punishment philosophy, and dogged by critics who saw the entire enterprise as unconstitutional, unwise, or both. And, as will be discussed below, the eventual work product—the U.S. Sentencing Guidelines—showed all the scars of a political struggle within a poorly designed institutional process.

In theory, the Sentencing Guidelines delineate an appropriate sentence for each and every case through the application of detailed rules. Using these rules, the trial judge must first determine which of 43 categories governs the crime, thereby providing the “base offense level” for sentencing. The judge must next determine which of six “criminal history” categories applies to the defendant given his prior record of offending. With that information, the judge will then turn to the “Sentencing Table,” a matrix of offense levels and criminal history scores that creates a 258-box grid of all potential punishment ranges for federal offenders. Grade the crime and the criminal record, find each on the grid, and where the axes meet, the applicable sentencing range will be found. The range might then be adjusted by aggravating circumstances, such as the defendant’s brandishing of a weapon, or mitigating circumstances, such as the defendant’s accepting responsibility for his criminal misconduct.

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The Supreme Court Sanctions the Unconstitutional Commission

The commission and its Guidelines suffer from a number of shortcomings that justify a sweeping reconsideration of the current federal system. The first and arguably dispositive problem is the delegation of lawmaking authority—specifically, the power to set punishment—from Congress to the commission. Despite dubious constitutionality, the commission and its Guidelines were upheld by the U.S. Supreme Court in *Mistretta v. United States* (1989).³⁹ In a scathing dissent, Justice Antonin Scalia described the commission as “a sort of junior-varsity Congress,”⁴⁰ effectively empowered to make law by prescribing the punishment for criminal defendants. Among other things, this “new Branch”⁴¹ of government sets the range of punishment, defines when probation is permissible, regulates whether criminal fines should be levied and in what amounts, and determines those characteristics of offenses and offenders that are relevant in sentencing.

As Justice Scalia noted, such decisions are not technical or procedural, but are instead substantive value and policy judgments that the Constitution vested in the political branches.⁴² As a matter of constitutional text and structure, “all legislative Power . . . shall be vested”⁴³ in Congress, meaning that only the national legislative body can create federal law. Yet under the Sentencing Reform Act, the commission’s dictates become law—binding on individual parties and the federal courts—absent presidentially approved congressional legislation to the contrary.⁴⁴

Moreover, the creation of the commission and its Guidelines has blurred the line of accountability for any particular sentence or for punishment policy in general. Congress concocted an administrative agency that is supposedly lodged in the judicial branch, whose members are chosen by the president and approved by Congress to serve a specified term. But unlike other agencies, the commission is largely freed from statutory constraints typically placed on administrative bodies, including regularized procedures for considering new rules, a commitment to

open meetings and discussions, detailed explanations for the issuance of new rules, and review by the courts under an “arbitrary and capricious” standard.⁴⁵ As a result, the commission can act without defending its decisions or its decisionmaking process. The sentences for violent crimes were increased, for instance, “where the Commission was convinced that they were inadequate”⁴⁶—without any explanation as to what made a punishment “inadequate” or how the commissioners became “convinced” that this was the case for a particular offense.

Despite the fact that its composition and activities often seem to have a partisan attachment, the commission lacks a direct line of accountability to any of the three branches and remains largely anonymous to the general public. The Supreme Court’s “nonpolitical” label to the contrary,⁴⁷ the commission was a politicized entity from the beginning, composed of party adherents and aspirants to higher office, but lacking any members with significant experience in the practice of sentencing.⁴⁸ At least under the prior, thoroughly political regime, the citizenry knew whom to blame for any grievances with federal punishment—Congress for enacting the relevant legislation and the president for signing it into law. But with the commission and its Guidelines, no politically accountable entity can be held responsible for the failures of federal sentencing law.

This political yet unaccountable character of the commission infected the creation and content of the Sentencing Guidelines. Historically, American sentencing was flexible in nature, a manifestation of society’s equivocal stance on punishment theory. Retribution has always had both a secular and biblical attraction for the citizenry—you reap what you sow, an eye for an eye, and so on—but considerations of deterrence, incapacitation, and, most notably, rehabilitation have also weighed on the collective conscience. For this reason, sentencing has often reflected a mixture of philosophies, granting trial judges significant latitude to craft punishment based on a variety of concerns. Arguably, Congress wanted the commission to

continue this hybrid approach, as evidenced by the Sentencing Reform Act's enumeration of the "purposes of sentencing" without any preference or statutory mandate.⁴⁹

Nonetheless, the commission misconceived its role as choosing or reconciling sentencing theories through the Sentencing Guidelines. During the ensuing battle over punishment philosophy, the commissioners divided over a harm-based retributive model versus a crime-control scheme. With deadlines fast approaching, the commission reached a thoroughly political, but ill-conceived compromise: The Guidelines would not formally espouse any particular theory and instead would be based on an empirical assessment of past sentencing practices. Yet for some reason,⁵⁰ the Guidelines retained the incremental-harm approach of the retributive model—requiring that punishment change, sometimes drastically, with even minor factual variations.

In turn, the new federal regime rejected the traditional notion that judges should have sufficient latitude to accommodate an eclectic approach to sentencing theory. And although the commission claimed to be relying on an empirical evaluation of past judicial practice in setting potential punishment, the Sentencing Guidelines increased the typical length of imprisonment for most offenders and substantially augmented the punishment for certain criminals—such as narcotics and white-collar offenders.⁵¹

Another disturbing development has been the commission's tinkering with basic concepts of constitutional due process. Although Congress has never had an unblemished record on civil liberties, actions taken by an unaccountable bureaucracy like the commission are even more troubling. For example, the Guidelines' "real offense" sentencing provisions often require federal courts to mete out punishment, not for the specific criminal conviction, but for conduct that may have been committed *beyond the official charges*. Such "relevant conduct" need only be proven by a preponderance of the evidence instead of the constitutionally based standard of

beyond a reasonable doubt. As a result, defendants sometimes face enhanced punishment for acts that were never formally prosecuted or, even worse, for crimes the defendant was actually *acquitted* of, leading critics to argue that convictions and acquittals have become largely irrelevant under the federal scheme.⁵² And because jurors do not determine the "real offense" or the existence of relevant conduct—information that can substantially increase the term of imprisonment—the defendant may be denied not only fundamental due process but also the right to trial by jury.

Some commentators have argued that the Supreme Court may eventually gut the Guidelines' real offense approach.⁵³ They point to the recent decision in *Apprendi v. New Jersey* (2000), where the Court held that, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."⁵⁴

But the *Apprendi* case left for another day whether its reasoning applies to those facts that trigger mandatory minimums or otherwise raise the sentencing floor without piercing the statutory ceiling established by the charged crime. More generally, the Court provided little guidance as to which facts must be deemed elements of the underlying offense rather than sentencing factors, and therefore subject to jury deliberation and heightened proof requirements.⁵⁵ It seems highly unlikely that the Court will fundamentally alter the system that it has helped entrench with more than a decade of Guidelines jurisprudence. Ultimately, the end of real offense sentencing will require action by Congress.

Shift in Power Spawns a "Prosecutor's Paradise"

The Guidelines and the commission rest upon a dubious constitutional foundation, but the regime suffers from other problems as well, most notably the elimination of legitimate judicial discretion and the dehumanization of the punishment process. The absence of moral judgment under the

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Guidelines stems at least in part from a radical change within the power structure of federal criminal justice, with the Sentencing Reform Act drastically shifting the traditional balance between legislative and judicial branches. Throughout most of American history, lawmakers broadly defined criminal offenses and potential punishments while judges determined the comparative seriousness of a specific crime and an appropriate sentence for the offender. As noted earlier, some commentators and practitioners expressed grave concerns about the unbounded discretion of federal trial judges in the indeterminate sentencing era. But that situation has now been reversed: The current system of punishment has wrested from the district court almost all power to determine the relevance and weight of various factors or characteristics concerning the offense and offender, as well as limiting the range of potential sentences and the court's authority to depart from the Guidelines.

If the shift in power were only from judges to lawmakers, a main concern would be the political distortion of sentencing in federal courts. Because "tough on crime" platforms tend to have electoral appeal, legislators often play to voters' short-term emotions rather than considering sound public policy, producing criminal justice initiatives with few real benefits to society but large financial and human costs. Some national lawmakers thought the act would avoid the politicization of punishment by shifting sentencing power from the courts to the commission, rather than to Congress itself. But a number of scholars have shown that the commission simply became another political body, influenced by interest groups and susceptible to many of the pressures placed on lawmakers.⁵⁶ One former commissioner recently claimed, for instance, that gratuitous increases in punishment for robbery and fraud were propelled by political heat from the Department of Justice.⁵⁷

In one sense, the commission is *worse* than a political body, issuing a set of "diktats"⁵⁸ that command specific consequences in sen-

tencing while remaining unaccountable for any disastrous results. In modern constitutional democracies, sentencing rules are deemed legitimate because they are the product of politically accountable processes and warranted by logic or empirical evidence. As suggested earlier, neither condition holds true for the unaccountable commission and its unjustified Guidelines. Moreover, the commission may have usurped more power for itself than even Congress had originally anticipated. For example, the Guidelines and subsequent interpretations by the commission frequently prohibit trial judges from considering facts about the offender that may be highly relevant in fixing an appropriate punishment. Yet the decision to preclude at sentencing any consideration of the defendant's age, employment history, family responsibilities, and so on, was not expressly ordered by lawmakers, nor even implicitly suggested by the congressional record. Instead, the commission made those and other decisions of its own accord and without a clear legislative mandate.

To be sure, Congress and the commission maintain a symbiotic relationship in the control of federal sentencing. Lawmakers send the commission "directives" for new guidelines or sentencing factors, which the commission invariably "considers" and adopts.⁵⁹ Congress has also enacted the aforementioned mandatory minimums, which necessarily influence the Sentencing Guidelines and the permissible range of punishment for relevant crimes. In turn, the commission's work product becomes law unless reversed by congressional legislation to the contrary. But for present purposes, whether the sentencing buck stops with lawmakers or commissioners is beside the point. To the extent that a criminal sentence is preordained by Congress or the commission, individuals are being judged by a distant body that lacks any meaningful understanding of the offense or the offender. Without firsthand knowledge of the case at bar, these far-off entities can only supply cookie-cutter justice that rests on generalities rather than a moral judgment

framed by experience and the holistic assessment of a real human being.

What neither Congress nor the commission may have expected, however, was that the abatement of judicial discretion in sentencing would greatly amplify the authority of federal prosecutors. Limiting the power of judges at the final stage of criminal justice necessarily expands the decisionmaking authority of prosecutors at early points in the process. In fact, the Guidelines have proven to be “a prosecutor’s paradise,”⁶⁰ at least for those prosecutors who crave control over sentencing. To begin with, federal prosecutors exercise greater power than ever through their charging and plea-bargaining decisions. The Guidelines not only threaten severe punishment but also hem in judges through tight sentencing ranges and limited means of departure from those parameters. As a result, defendants often face substantial prison time without the possibility of judicial leniency.

In Professor Albert Alschuler’s metaphor, the Guidelines serve as the classic “bad cop,” intimidating the accused defendant with the possibility of a long prison sentence.⁶¹ Federal prosecutors can then play the part of “good cop” by offering a deal that the defendant literally cannot refuse—unless, of course, he or she is willing to risk a lengthy prison term by standing trial.

Government leverage in plea bargaining is further enhanced by the prosecutor’s unique power to facilitate deviations from the Guidelines. Although judges have few grounds to depart from a given sentencing range, prosecutors have the exclusive and unreviewable authority to seek a “downward departure” based on “substantial assistance” from the defendant. Because the Guidelines often tie the hands of judges at sentencing, the prosecutor’s unilateral authority over “substantial assistance” departures provides yet more government leverage over the defendant and his constitutional rights.

For a concrete example, consider the bust of a small drug ring in northern Virginia.⁶² Through weeks of surveillance, federal law enforcement personnel documented sales

totaling more than 50 grams of crack cocaine, the minimum amount needed to trigger a mandatory 10-year sentence for every individual associated with the drug ring. More than a dozen suspects were arrested, most of whom were in their early 20s, and their convictions were all but preordained in federal district court. The punishment each defendant received, however, was not a function of whether he was a major participant in the ring or just a bit player. Instead, those who cooperated with federal prosecutors by turning in their friends secured lower sentences through “substantial assistance” departures. The drug ring’s lieutenant and two major dealers admitted their active involvement in distributing crack cocaine, sold out their colleagues, and in return received sentences of five years or less. In contrast, three minor dealers (two of whom were teenagers at the time) refused to cooperate with prosecutors and were sentenced to 12 years in federal prison. As the U.S. Attorney admitted, cooperating with law enforcement was “the only ticket to freedom.”⁶³ Although such cooperation has always been a factor at sentencing, federal prosecutors in the executive branch, rather than impartial judges, now determine who is eligible for leniency.

Prosecutors also exert vast power through the Guidelines’ “real offense” scheme which requires judges to sentence defendants based on “relevant conduct” presented by the government. This conduct includes any acts related to the crime of conviction, including all reasonably foreseeable behavior and even those acts that were not part of the underlying crime but were connected to “the same course of conduct or common scheme or plan.”⁶⁴ As previously noted, such conduct need only be proven by a preponderance of the evidence, may be based on hearsay, and can include acts for which the defendant was acquitted.⁶⁵

Consider Vernon Watts, who was arrested after police detectives found cocaine in his kitchen cabinet and loaded guns in his bedroom closet.⁶⁶ At trial, the jury convicted Watts on the drug charges but acquitted him of “using a firearm” during a narcotics-relat-

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ed crime. Despite an acquittal on the weapons charge, the sentencing court announced that Watts indeed possessed the guns in connection with the drug offense and that his sentence would be increased accordingly. As bizarre as it may sound, Watts will serve additional time in prison for the acquitted conduct.

In addition, the Guidelines give prosecutors an incentive to reserve important facts or serious charges until sentencing in order to take advantage of looser evidentiary rules. In one case, the government prosecuted a man for robbery but waited until the sentencing phase to tell the court that he was also a murderer.⁶⁷ In another case, prosecutors dropped a weapons charge at trial but then reintroduced the matter as relevant conduct at the sentencing phase to significantly enhance an individual's prison term.⁶⁸ More frequently, the government provides postconviction evidence that drastically increases, for instance, the amount of drugs attributable to the defendant, thereby generating a sentence many times greater than what was possible under the original charge.⁶⁹

In *United States v. Rodriguez*,⁷⁰ the defendant was prosecuted for various drug offenses related to his delivery of 10 ounces of marijuana. The jury struggled over the issue of guilt, convicting the defendant of a single count of conspiracy only after the judge pressured the jurors to reach a verdict.⁷¹ On the basis of only the evidence produced at trial, the defendant should have received a prison term of 18–24 months. But after the jury was dismissed, prosecutors told the judge that the defendant had actually sold more than 1,000 kilos of marijuana. Using the lower, preponderance standard of proof, the trial court accepted the government's claims and sentenced the defendant to *life in prison without the possibility of parole*. Although affirmed on appeal, the decision was severely criticized by dissenting Judge Richard Posner:

There is a serious question whether it is permissible to sentence a person to life in prison, without possibility of

parole, at the end of a brief and casual sentencing hearing in which there is no jury, in which the rules of evidence are not enforced, in which the standard of proof is no higher than in an ordinary civil case, and in which the judge's decision will make the difference between a light punishment and a punishment that is the maximum that our system allows short of death.⁷²

According to the majority ruling, however, Rodriguez received all the process he was due under the Guidelines. He will be in prison for life despite the jury's equivocation on his guilt and the diluted rules of evidence at his sentencing hearing.

The Absence of Moral Judgment

The overt transfer of sentencing authority from the judiciary to Congress and the commission, as well as the shift of power from trial judges to prosecutors, has undermined punishment as the product of moral judgment. Such decisionmaking requires an assessment of an individual as a human being by an entity capable of comprehending all that makes that individual unique. Obviously, moral judgment involves questions of abstract and universal justice, the rights and obligations that correspond to membership in a just society. But it is more than an academic inquiry; the necessary judgment requires sensitivity to complex questions raised by the exigencies of real life, where no single heuristic or guiding principle can guarantee an appropriate outcome. If a particular incident or course of conduct is at issue, the entity passing judgment must fully grasp what the events were, how they came to transpire, and what their ultimate effects on other persons or groups may be.

Making a moral judgment about an individual involved in a given incident also demands an understanding of the bigger picture that constitutes a person's life. Where did that individual come from? What are his personal attributes, good and bad? How does

he treat others? Those questions and many more help to develop a three-dimensional human being with a past, present, and future, rather than a black-and-white caricature lacking depth and detail. An individual's capacity to do good and bad, to feel empathy and remorse, to acknowledge misdeeds and make amends, and so on, cannot be separated into discrete units, placed on a scale, and measured in inches or pounds. No numerical value can be assigned to each part that makes up an individual and plugged into an equation one at a time to spit out a bottom line. A person can only be judged as a whole, with the entirety of his life placed in the metaphysical balance, measured by an entity capable of making this type of context-sensitive, holistic assessment.

Distant government bodies such as Congress and the commission lack the capacity to evaluate the facts of a specific crime or the circumstances of a particular offender. They can only create classes of crimes and criminals that privilege certain factors and ignore others, transforming unique cases into uniform patterns more agreeable to conveyor-belt treatment. A far-off agency can no more judge specific criminals than a blindfolded expert can appraise the worth of unseen paintings. It is true, of course, that prosecutors are privy to the evidence and present for the proceedings, but let's be clear—government prosecutors are partisans in the criminal justice system. Although charged to “do justice,” they often seem preoccupied with obtaining guilty verdicts in an occupation where job performance is typically evaluated by “conviction rate.” That is not a slight against government attorneys but is perhaps an unavoidable consequence of the prevailing “battle model” of criminal litigation.⁷³ Sometimes, the adversarial nature of their position prevents prosecutors from neutrally evaluating the evidence and assessing the defendant as an individual, rather than as a means to an end.

Only a trial court—learned in the law, guided by experience, and dispassionate in decisionmaking—can morally judge a con-

victed criminal. The personal assessment of facts and circumstances, along with the interaction between judge and defendant, provides the basis for a court's imposition of moral judgment in the form of a sentence. This weighing of often disparate and incommensurable factors cannot be done by algorithm or from afar. “To be truly great a judge needs wisdom,” Judge Guido Calabresi once remarked, a “sense of balance which allows one to weigh what cannot be measured.”⁷⁴

Only a human being gifted in wisdom can assess the totality of the circumstances to ensure that the punishment not only fits the crime but also the criminal. And only a judge, trained and experienced, can mediate the law with mercy or condemnation. It is this training and experience that allow a trial court to see the similarities between crimes and criminals, and, more importantly, the differences between individuals and important variations in their conduct. The sentencing judge reaches a moral judgment based on all the information before him—trial evidence, probation reports, arguments made by counsel, facts presented at sentencing hearings, pleas of victims and family members, and other information relevant to the offender and offense. In a solemn ritual, the judge then looks a defendant in the eye and pronounces sentence and the reasons for it, with a gallery of interested parties bearing witness to the entire proceeding. The personal and comprehensible nature of the process gives a sentence credence, the offender having been judged as a unique individual and punished in a fair and comprehensive resolution.

Unfortunately, this type of moral judgment is largely precluded by the Guidelines. For instance, the “real offense” approach allows the court to factor in only aggravating behavior, provides no judicial discretion to temper the ultimate effect of such conduct on sentencing, and rejects other moral considerations such as previous acquittals. More generally, the punishment scheme promulgated by the commission and the aforementioned shift in discretion away from the courts have reduced the authority and legitimacy of federal sentencing.

Distant government bodies such as Congress and the commission lack the capacity to evaluate the facts of a specific crime or the of a particular offender.

The cases are legion of officials miscalculating sentence length, judges using wrong editions of the *Guidelines Manual*, attorneys failing to pick up computation errors, and so on, sometimes resulting in sentences that are off by years.

The Inscrutable Guidelines

The Guidelines subvert moral judgment in three interrelated ways. First, the current system is confusing or downright incomprehensible to practitioners and lay citizens alike, while the hypertechnical nature of sentencing variations is hard to justify and only adds to the chaos. The Guidelines “seem to sacrifice comprehensibility and common sense on the altar of pseudo-scientific uniformity,” Professor Kate Stith and Judge José Cabranes write in their book, *Fear of Judging*. The result has been sentencing hearings “nearly unintelligible to victims, defendants, and observers, and even to the very lawyers and judges involved in the proceeding.”⁷⁵ The sentencing rules are contained in the *Guidelines Manual*, a document that has swelled over the past 15 years to more than 1,000 pages of complex regulations variously described as “Guidelines,” “Policy Statements,” and “Commentary,” and filled with amendments, cross-references, and examples. To many, the Guidelines make the federal tax code look like *Reader’s Digest*.⁷⁶

As might be expected, both federal judges and commentators have recognized a serious shortage of practitioners who truly understand sentencing under the Guidelines. This general illiteracy—effected by the labyrinthine quality of federal punishment and compounded by hundreds of amendments and thousands of court cases—has inspired a cottage industry that, in turn, produces reams of publications intended to educate practitioners about the Guidelines. The commission and others have even set up telephone hot lines to steer attorneys and probation officers through the bewildering rules of federal sentencing.⁷⁷ But despite government and commercial assistance, the sheer complexity of the system ensures a high error rate in tallying federal sentences. The cases are legion of officials miscalculating sentence length, judges using wrong editions of the *Guidelines Manual*, attorneys failing to pick up computation errors, and so on, sometimes resulting in sentences that are off by years.⁷⁸

Even when punishment is mathematically accurate, those individuals directly affected by the sentence may leave the courtroom per-

plexed by the process and justification for a particular term of imprisonment. The Guidelines frequently recognize subtle differences that have little, if any, cognitive value, yet result in significant disparities in sentence length. Lines are drawn between “minor” and “minimal” participation in a crime, for instance, and between “leadership” and “managerial” roles in the offense. As former commissioner, now justice, Stephen Breyer said in 1998, “Ranking offenders through the use of fine distinctions is like ranking colleges or the ‘liveableness’ of cities with numerical scores that reach ten places past a decimal point. The precision is false.”⁷⁹

Unfortunately, neither the language of sentencing nor the Guidelines’ visual aid, the “Sentencing Table,” conveys to the common citizen the process and basis for punishment as a moral judgment. The federal criminal justice system now uses terms like “base levels,” “categories,” “points,” “scores,” and other jargon that sound more like a parlor game than the process for imposing sentence on real human beings. The Sentencing Table offers little help, with its complex matrix of offense levels and criminal history scores producing a 258-box grid that only an economist could love. Even an average person who comprehends the workings of the grid might still be left wondering what makes a level-10 crime worse than a level-9 crime, for instance, or why a level-15 crime receives about twice the sentence of a level-10 crime.

The excessive complexity of the Guidelines impedes understanding of the federal system in general and a given sentence in particular, transforming a human event into a string of terms and numbers. Consider the following sentencing colloquy reported by the *Washington Post*:

The court finds that the base offense level is 20 . . . Pursuant to Guideline 2K2.1(B)(4), the offense level is increased by two levels [to 22] . . . The court notes that the criminal convictions . . . result in a total criminal history category score of 18. At the time of the instant offense . . . the defen-

dant was serving a parole sentence in two causes of action. And pursuant to Sentencing Guidelines 4A1.1(D), 2 points are therefore added. The total criminal history points is 20. And according to the sentencing guidelines Chapter 5, Part A, 20 criminal history points establish a criminal history category of 6 [As a result] the guideline range for imprisonment is 84 to 105 months.⁸⁰

Although the Sentencing Reform Act was supposed to provide “certainty about the sentence and the reasons for it,” the theoretical and practical complexity of the Guidelines all but ensures that the defendant and the general public will remain in the dark. And despite the fact that a main goal of the act was promoting “respect for the law,” it seems hard to argue that the convoluted federal scheme encourages popular compliance among the people. Without expert assistance, average citizens have no way of understanding the body of federal crimes and their respective penalties.

The Mechanical Nature of the Guidelines

The complex, hypertechnical nature of federal sentencing exacerbates a second problem undermining moral judgment: Under the Guidelines, judges mechanically evaluate defendants as inanimate objects or clumps of data rather than human beings. To some, the modern sentencing hearing has become a marionette show, with the central figures in the drama of punishment—judge and defendant—transformed into wooden figures.⁸¹ There was a time when a federal trial judge would draw on all available information and the full capacity of human reasoning, turning the facts and law over and over in his mind to achieve justice in a particular case. Today’s federal trial judge is dominated by the strictures of the Guidelines. Little if any time is spent discussing the purposes of punishment and how a given sentence would achieve such goals, and at best, a few moments are spent on the defendant’s general culpability. In the end, there is no oppor-

tunity for moral judgment in the sense of a comprehensive and comprehensible reckoning of the case. Instead, the commission is the puppet master pulling the strings of punishment, deciding what information is relevant and how the ultimate sentence is to be reached. In turn, the defendant is stripped of many individuating traits and circumstances, then cast into an abstract mold that displays only those factors the commission has deemed relevant.

Others have likened the Guidelines regime to a “sentencing machine,” where the trial court enters the required data and out spits the assigned punishment.⁸² As Stith and Cabranes note, the mechanization of the federal system is consistent with the “juridification” of the law foretold by Max Weber, with sentencing subject to a defined set of rules that produce an exact amount of punishment for a given case.⁸³ Federal sentencing has become, in Weber’s words, “a slot machine into which one just drops the facts . . . in order for it to spew out the decision.”⁸⁴

Still others, such as Judge Jack Weinstein, see the Guidelines as fulfilling Jeremy Bentham’s dream of “a fully rationalized algebra of criminology and penology” that has no need for discretionary decisionmaking.⁸⁵ But whether Weberian or Benthamite or both, federal sentencing has purged much of the human element necessary for moral judgment—a point that has not been lost on the judiciary. One district court judge argued that “human conduct just doesn’t fit into a grid,”⁸⁶ while another judge assailed the Guidelines as a “wholly mechanical sentence computation which desensitizes those associated with it, and converts a sentencing proceeding, which might otherwise have some salutary effect on the offender, to a mathematical and logistical exercise.”⁸⁷

In many cases, the Guideline ranges are too narrow to adequately fit the variations among crimes and criminals. Because a sentence must be within 25 percent of the maximum, judges are left with little room to accommodate either mitigating or aggravating circumstances not already factored into the equation. Sometimes

Under the Guidelines, judges mechanically evaluate defendants as inanimate objects or clumps of data rather than human beings.

The Guidelines remove morally relevant factors from the sentencing process.

the Guidelines set even tighter ranges than are required by statute. Consider, for instance, a first-time offender convicted of an (otherwise) unremarkable assault with a deadly weapon. In Utah, this defendant could receive probation or serve up to five years in prison consistent with the state's indeterminate sentencing procedures.⁸⁸ Under California's determinate scheme, the offender could be sentenced to as little as six months in a local jail or as much as four years in the state prison.⁸⁹ Using federal statutes *in the absence of the Guidelines*, assault with a deadly weapon would result in a sentence of anywhere from probation to 10 years of imprisonment.⁹⁰ But under the Guidelines, this aggravated assault calls for a sentence of 27 to 33 months⁹¹—a mere six-month range (or 18 percent of the maximum) within which the judge must tailor a fair resolution. That tight spread seems only marginally preferable to the commission setting an exact sentence itself.⁹²

The most troubling restrictions, however, involve the use of relevant information and characteristics of the offender. “Traditionally,” noted the Supreme Court in 1993, “sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant.”⁹³ These factors included any information that might explain the defendant's behavior, provide insight into his potential for reform, or indicate significant effects on other parties as a consequence of the sentencing decision. By statute, the Guidelines were required to be “neutral” toward the offender's race, sex, national origin, and creed—a limitation that comports with American conceptions of equality and the major impetus for federal sentencing reform.⁹⁴ But the commission has barred an array of seemingly relevant factors from being considered by trial courts, including the following:

- age
- education
- vocational skills
- mental and emotional condition
- physical condition

- drug or alcohol dependence
- lack of guidance as a youth
- employment history
- family ties and responsibilities
- community ties
- military or public service
- charitable works⁹⁵

In the past, judges would have considered most if not all of those factors during sentencing. A young person who went astray without parental support, for example, but who possesses an education and employable skills, might deserve mercy based on our natural empathy for wayward youth and the offender's potential for reform and eventual success in society. Likewise, a trial court might reduce a sentence because of the defendant's good employment record, strong ties to the community, responsibilities for underage dependents, and a history of philanthropic contributions. In such a case, the defendant has built up a reserve of goodwill that won't necessarily be annulled by his crime, while his record of employment and ties to family and community might suggest a high probability of reform and successful reintegration into society. Such factors could point in the other direction as well—for instance, a defendant with a poor educational and employment record despite strong adult guidance—possibly pushing the judge toward a longer sentence. Nonetheless, the Guidelines remove these morally relevant factors from the sentencing process.

To be clear, the current federal regime may make sense for the hypothetical “average defendant”—for example, a person ordinary in all respects, without a criminal history and individual traits that might aggravate or mitigate the sentence, who commits a generic assault with a firearm. A Guidelines sentence of 27–33 months might seem perfectly appropriate for this undistinguished offender and common crime. Consistent with the goals of sentencing reform, this range of punishment prevents judges from imposing an oppressive 10-year term of imprisonment or, conversely, a mere slap of probation. But

the Guidelines' range may become unjust when human factors are added to the hypothetical, converting this mythical average defendant into a real and unique person. The young man with a strong record of education and employment, stable ties to family and community, a wife and children, and a history of volunteerism—who brandished a weapon in a one-time, nonlethal street altercation—must serve between two and three years in federal prison. In contrast, an older criminal with a spotty employment record, little education, and no vocational skills, who lacks ties to family and community and has a history of being a drug abuser, dead-beat dad, grifter, and drifter, will serve no more than 33 months of imprisonment regardless of an ignominious past and limited chance of personal transformation.

Of course, the Guidelines were supposed to end inconsistent treatment of offenders, a worthy cause by all appearances. But as Albert Alschuler has quipped, “Some things are worse than sentencing disparity, and we have found them.”⁹⁶ Whatever its effects on *disparity*, the current federal regime has produced excessive *uniformity* in punishment, with significantly different offenders and offenses receiving similar sentences.

This problem has been recognized and criticized not only by members of the judiciary and academic opponents of the Guidelines, such as Alschuler and Michael Tonry,⁹⁷ but also by those who (cautiously) support the Guidelines regime, such as Stephen Schulhofer.⁹⁸ By privileging certain facts, particularly quantifiable details such as monetary loss or drug quantity, while ignoring morally relevant factors about the offender and his life, federal sentencing creates the *illusion* of eliminating unwarranted disparities. Though the Guidelines ensure that those who steal the same amount of money or sell the same quantity of drugs receive similar sentences, this “aggregation” of defendants in no way guarantees *equality*—the like treatment of similarly situated offenders who commit comparable crimes. As one former commissioner admitted, “The emphasis was more on making sentences

alike, and less on insuring the likeness of those grouped together for similar treatment.”⁹⁹

Consider Judge Pierre Leval’s hypothetical of two offenders who independently embezzle \$10,000 from a bank.¹⁰⁰ They may receive the same sentence even if one defendant is “universally known by coworkers, family and friends as honest, hard-working, loving and generous,” and stole the money “to buy expensive medications that might save her child”—while the other defendant lived “a life of abused and wasted privilege,” “cheated and deceived at every opportunity, [and] abandoned his first wife and children after exhausting his wife’s money.”¹⁰¹ In such circumstances, it is difficult to argue that justice is done by doling out the same punishment to both defendants.

A comprehensive understanding of equality is also challenged by comparing the sentences for different crimes. Whereas second-degree murder is a base level-33 offense under the Guidelines, possessing 150 grams of crack cocaine with intent to sell is a level-34 offense. Given the large disparity of injury caused by these two crimes, it seems hard to fathom a moral system of sentencing that deems a drug offender similar to, let alone worse than, a murderer.¹⁰²

An Open Secret: Routine Circumvention and Nullification of the Guidelines

A third and largely unreported problem with federal sentencing involves the hidden nullification of the Guidelines by criminal justice actors. In light of the problems discussed earlier, it is little wonder that some judges, prosecutors, and defense attorneys have circumvented the Guidelines’ strictures in order to achieve a just outcome in individual cases. “There’s a certain fiction we all engage in if we want a certain result,” one defense attorney acknowledged.¹⁰³ Trial judges bothered by a particularly onerous punishment under the Guidelines, but unwilling to overtly disregard the rules, simply manipulate the actual facts of a case to reduce sentence calculations. Some judges have even instructed probation officers to tai-

By privileging certain facts, such as monetary loss or drug quantity, while ignoring morally relevant factors about the offender, federal sentencing creates the *illusion* of eliminating unwarranted disparities.

Fact bargaining is corrosive to the pursuit of truth, literally turning the world of criminal justice upside down.

lor their reports (e.g., omit certain items) so as to be consistent with a preordained outcome.¹⁰⁴

Federal prosecutors and defense attorneys also engage in their own machinations to evade the Guidelines through the use of clandestine agreements on those facts to be presented in open court. This process of “fact bargaining” results in counsel lying to the judge about, for instance, the amount of drugs or monetary loss, the dates of crime, or the existence of a firearm—all with the goal of skirting the federal rules and securing a lower sentence for the defendant.¹⁰⁵ As one probation officer notes, “The widespread use of fact bargaining, and the lying to the court that is inevitable with the frequent use of such bargaining, is the dirty little secret in the prosecution of federal criminal cases.”¹⁰⁶ In a 1996 survey, less than one-fifth of probation officers reported that Guidelines calculations were factually accurate in most of the cases they had seen, while two-fifths of the respondents reported that calculations were more likely than not to be incorrect.¹⁰⁷ Moreover, Professor Schulhofer and former commissioner Ilene Nagel have found that the Guidelines are circumvented in at least 20–35 percent of all cases resolved by guilty plea.¹⁰⁸

A recent appellate ruling detailed the plight of six defendants, all charged with conspiracy to distribute approximately 5,000 grams of crack cocaine over a 36-week period. Those who refused to cooperate with prosecutors were liable for the full quantity of drugs, resulting in punishment of around 20 years in prison. In contrast, the defendants who played ball with the government were held accountable for only a fraction of the crack cocaine and therefore received sentences of 5 years or less.¹⁰⁹ On appeal, the reviewing court admitted that the disparity caused by fact bargaining “would strike many as unfair” and “exact[s] a high price from those who exercise their constitutional rights to trial,” although it concluded that the resulting inequity was of no constitutional moment.¹¹⁰ A subsequent district court opinion, however, criticized the appellate decision as representing “a sad epiphany.”¹¹¹

If fact bargaining is acceptable, then the entire moral and intellectual basis for the Sentencing Guidelines is rendered essentially meaningless. If “facts” don’t really matter, neither does “judging” contribute anything to a just sentence. . . . “Facts are like flint,” judges say, and their proper ascertainment is the crowning goal of our entire adversary system. When parties can “make up” their own facts with little fear of discovery and no effective sanction, however, courts no longer adjudicate actual cases and controversies, as required by the Constitution. They simply ratify the government’s secret bargains with defendants, thus lending (and dissipating) their moral authority as an independent third branch of government.¹¹²

Fact bargaining is corrosive to the pursuit of truth, literally turning the world of criminal justice upside down. It is as though the Queen of Hearts had designed the whole process—sentence first, facts later—with the parties negotiating punishment and then working backward to a fact pattern supporting the outcome. Despite intentions to the contrary, the rigidity and excesses of the Guidelines have only encouraged dishonesty in service of other goals, with a wink and a nod between litigants and the court. “That’s what makes it a sham,” one defense attorney scoffed.¹¹³

But these sentencing shenanigans are more than a sham—they conflict with the idea of an open, representative democracy. Guidelines circumvention is “hidden and unsystematic,” Schulhofer and Nagel suggest, occurring “in a context that precludes oversight and obscures accountability.”¹¹⁴ As a general rule, representative democracy requires accessibility of elected officials to the people, responsiveness of officials to popular demands, and accountability of officials for their decisions. In turn, accessibility, responsiveness, and accountability require honesty and some minimal amount of openness or

“transparency” by the state. Without knowledge of the factual basis for official decisions, the public is unable to evaluate these judgments and therefore denied the opportunity to demand an accounting of the official’s deeds and reasons.

If the nominal facts underlying Guideline sentences are different from the actual facts of the relevant cases, can the public correctly evaluate the effectiveness of federal law enforcement, for instance, or assess the law-and-order claims made by a local member of Congress? The answer must be “no” if accountability is predicated on truthful information rather than fabrications. In the words of one disgruntled district court judge: “The Guidelines . . . have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring the law in an effort to achieve a just result. All under the banner of ‘truth in sentencing!’”¹¹⁵ The dishonesty spawned by the current regime may lead to cynicism and contempt of the Guidelines not only among practitioners and jurists, but also by the citizenry as it evaluates the legitimacy and trustworthiness of government, and thus the basis for general compliance with the law.¹¹⁶

Ironically, the Guidelines’ anti-discretion crusade to eliminate disparities in sentencing may have only exacerbated the problem. Experience has shown that the federal scheme has not prevented sentencing discretion but has merely driven it underground to the hidden realm of legal contortions and fact bargaining. Whatever the shortcomings of the prior regime, at least sentencing determinations and any resulting disparities were made in the open. Now, much of the decisionmaking takes place behind closed doors, with collusion among the parties and even the judge to circumvent the Guidelines, subject to none of the disinfectant that openness provides.¹¹⁷ The disparities in sentencing continue, with punishment depending on the location of the crime, the temperament of the prosecutor, the competence of defense counsel, and the craftiness of the judge.¹¹⁸

The Guidelines have thus created the worst of all worlds: a formal system that prevents the court from considering a defendant’s humanity combined with an underground process that secretly attempts to ameliorate the system’s many failures.

The Perverse and Unjust Consequences

To be clear, many of the defendants serving time under the Guidelines are violent or serious criminals. The defendant in the aforementioned *Rodriguez* case, for instance, will never be a candidate for sainthood.¹¹⁹ He had previously been convicted of possessing heroin and methaqualone, both with intent to distribute. In his latest conviction, the defendant allegedly transported hundreds of pounds of marijuana from Texas to Wisconsin. As such, *Rodriguez* is a case unlikely to inspire empathy for the defendant and public outrage against the Guidelines. Yet under the American system of law, even brazen criminals charged with the most serious offenses are entitled to the full panoply of procedural protections guaranteed by the Constitution. The very integrity of the process is measured not by the rights accorded sympathetic defendants, but by the treatment provided the worst offenders in the criminal justice system. If it is unfair to sentence the most pitiful defendant to an elongated term based on, for instance, evidence not presented to the jury and not found to be true beyond a reasonable doubt, it must also be deemed unjust to do the same thing to an unmitigated scoundrel.

More importantly, the practical injustices produced by the Guidelines have not been limited to the procedural claims of rogues and villains. There are countless horror stories of low-level or minor offenders, with compelling arguments in mitigation of their crimes, who nonetheless received oppressive sentences. For example, Kemba Smith grew up in a loving middle-class home, actively participating in pro-social activities like Girl Scouts, gymnastics, ballet, and the high school band.¹²⁰ When she matriculated at Hampton University in Virginia, Smith began to suffer from low self-esteem and doubts about her appearance and

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It didn't matter that Smith was a college student with a strong family background, had no prior record, had been abused by the chief culprit in the criminal scheme, and was the mother of an infant child.

popularity. That made her a perfect target for Peter Michael Hall, a flamboyant man eight years her elder, who spoke in a charming Jamaican accent, drove fancy cars, wore expensive clothes, and was all the rage at Hampton—despite the fact that he was not a college student. Instead, Hall was the kingpin of an east coast drug ring that moved millions of dollars in cocaine during the 1980s and early 1990s.

After they began dating, Hall exerted more and more control over Smith, beating her repeatedly, threatening her life, telling her she couldn't leave, and using her as a "mule" in his drug business. Smith was caught in an abusive relationship and suffered from all the symptoms of battered women's syndrome, paralyzed by fear of physical violence and an overwhelming sense of helplessness. When Smith eventually summoned the strength to leave, she returned home to her parents, pregnant with Hall's child, only to learn that she had been indicted for a variety of offenses, including conspiracy to distribute cocaine. Federal law enforcement authorities told Smith that the charges would be dropped if she would disclose the location of Hall, who was now on the U.S. Marshal's "15 Most-Wanted List." Unfortunately, Smith agreed to cooperate with the government only after Hall had been found dead in a Seattle apartment. With nothing to offer in exchange for a plea bargain, Smith pled guilty to a number of charges and hoped for mercy from the prosecution or the court. None was forthcoming: The government failed to ask for a downward departure or some type of judicial leniency, and the trial judge hammered Smith with a staggering 294 month sentence. It didn't matter that Smith was a college student with a strong family background and promising future, had no prior record and had never personally sold drugs, had been abused and threatened by the chief culprit in the criminal scheme, and was the mother of an infant child. Under the Guidelines, none of that mattered: Smith would have to spend almost a quarter-century in federal prison, and her child would grow up in a parentless home.

The story of Clarence Aaron is just as disturbing. Aaron grew up in a poor section of Mobile, Alabama, raised by his grandfather, a shipyard worker who made it his foremost goal to ensure that his grandson received a college education. Under his grandfather's tutelage, Aaron was a successful high school athlete and student, and received an athletic scholarship to college. He was the first member of his family to attend a university, where he majored in marketing and participated in extracurricular activities. In the summer before his senior year, Aaron made the mistake of introducing two groups of drug dealers, for which he was paid \$1,500. Months later, he was literally pulled out of class by FBI agents, arrested, and charged with conspiracy to distribute crack cocaine. Unknown to Aaron, the major players in the drug ring had already been arrested and were scheming to lay all blame on the then 23-year-old college athlete. But while the big fish in the drug ring were able to snitch out others down the proverbial food chain, Aaron had no information to provide law enforcement. "The only thing I did know was that I introduced the two parties," he lamented in a PBS interview, "but that's as far as I could give them. I couldn't give no name, no place, none of that and so . . . what could I do?"¹²¹

At trial, Aaron's former friends and even a cousin testified against him, claiming that he was the mastermind behind the drug ring. In return, prosecutors made "substantial assistance" motions in their favor that resulted in drastically reduced sentences. But when Aaron was convicted, there was no motion for a reduced sentence. Instead, prosecutors argued that he was responsible for distributing nine kilos of cocaine, which was subsequently converted into crack. The government had no independent evidence on the amount of drugs distributed, with only the word of snitches supporting the quantity and attached punishment. "Nobody ever saw any drugs," Aaron's attorney noted, "but because of what [the snitches] said the quantity was, and because of the Sentencing Guidelines we have in this country today, the

sentencing judge had no alternative except to sentence Clarence Aaron to life without parole.”¹²² So Aaron sits in a federal cell today, a model prisoner, with no prior record and only a year away from a college degree. He admits it was wrong to introduce the two groups of drug dealers, but some say his biggest mistake was not playing ball with the government and telling the prosecutors what they wanted to hear. “Either tell the truth, probably go to prison for the rest of your life—or lie, cooperate with the government, do whatever it takes to get a lesser sentence,” says Aaron in describing his Hobbesian choice. “Which sounds better?”¹²³

Finally, consider the recent case of 38-year-old Dale Yirkovsky. While helping to remodel the home in which he was staying, Yirkovsky found a .22-caliber round and placed it in a small box in his room. Some time later, the police came to the home and asked to search Yirkovsky’s room after his ex-girlfriend claimed that he still had some of her property. During the search, law enforcement turned up the single bullet, and Yirkovsky admitted “putting it in a safe place to keep it from being a public hazard.”¹²⁴ According to the *Des Moines Register*, federal prosecutors “hoped to squeeze information out of Yirkovsky about other crimes,” and although he pled guilty and cooperated, “the feds refused to reduce the severity of the charge.”¹²⁵ Based on his prior record, Yirkovsky was convicted in federal court of being a felon in possession of ammunition and received an astonishing 15-year sentence. The appellate court affirmed the judgment, conceding that the prison term was “an extreme penalty under the facts,” but ultimately concluding that “our hands are tied in this matter by the mandatory minimum sentence which Congress established.”¹²⁶ Dissenting Judge Morris Arnold called the punishment “draconian” and maintained that “the severity of sentences in general under the United States Sentencing Guidelines and recent congressional enactments is, or ought to be, a matter of great public concern to every citizen.”¹²⁷ Nonetheless, Dale Yirkovsky will be imprisoned for the next decade and a half for

the crime of possessing a single bullet, with neither a gun nor criminal intent.

Judge as Judge: Sentencing beyond the Guidelines

As inequities under the Guidelines have become more apparent, plaguing nearly every federal courthouse, scholars, practitioners, and the media have joined the majority of federal trial judges in criticizing the Guidelines.¹²⁸ Even initial supporters of sentencing reform, such as Judge Jon Newman, have concluded that “these guidelines go far too far,” creating a surreal world “like ‘Alice in Wonderland.’”¹²⁹ Unfortunately, many of the most influential and eloquent critics seem to concede that the commission and its Guidelines are here to stay. For instance, Professor Stith and Judge Cabranes temper their compelling arguments for change with “a recognition that the Guidelines are likely to remain substantially intact for some time to come.”¹³⁰

Admittedly, the resources and labor put into the Guidelines, as well as the passage of time since their creation, pose significant barriers to any large-scale reform efforts. But, of course, the same could have been said about the great liquor ban of the early 20th century. As one senator put it in 1930, “There is as much chance of repealing [Prohibition] as there is for a humming-bird to fly to the planet Mars with the Washington Monument tied to its tail.”¹³¹ Yet just a few years later, America’s ill-fated experiment in alcohol criminalization was over. With nearly 15 years of Guidelines sentencing under our collective belt, it seems high time to consider alternatives to the current regime. Tinkering with the Guidelines will not do; in the words of one federal trial judge, the only remedy is to “tear it down and start all over.”¹³²

To begin with, architects of a new federal system of criminal justice should revisit the wisdom imparted by the previous generation of reformers but ignored by Congress and the commission—namely, the demand for

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An offense can no more be isolated from punishment than a story can be told without its conclusion.

code reform in addition to sentencing reform.¹³³ As pointed out in a 1977 Senate report:

The need for extensive reform of the Federal criminal laws is apparent. Present statutory criminal law on the Federal level is often a hodgepodge of conflicting, contradictory, and imprecise laws with little relevance to each other or to the state of criminal law as a whole. It necessarily burdens the responsibility of assuring every man of knowing what he may do and what he may not do.¹³⁴

Unfortunately, neither Congress nor the commission recognized that the concerns driving the reform movement—unwarranted sentencing disparities, for example, or general confusion on the purposes of punishment and the justification for a particular sentence—were not merely the function of indeterminate sentencing. Instead, various defects in the federal sentencing system could be traced back to the disorganized and virtually incomprehensible set of crimes dispersed throughout the federal code. Whether appreciated or not, defining crime and setting punishment work in unison, simultaneously describing banned conduct and calibrating its gravity. It is hard to imagine the crime of murder, for instance, without also visualizing the penalty—death or life in prison. The punishment is part of the crime’s definition, conveying the seriousness of killing others with malice aforethought. An offense can no more be isolated from punishment than a story can be told without its conclusion.

Successful reform projects must also recognize that sentencing discretion is not an evil in itself. Instead, it is a tool that can be used for positive goals, like creatively structuring a sentence that fits both crime and criminal—or, conversely, for negative ends, such as secretly increasing punishment based on the offender’s race. Moreover, discretionary judgments that affect sentencing can be found throughout the criminal justice system, not just in the judicial branch. Such

judgments include the legislature’s definition of crime and possible punishment; law enforcement’s decision to investigate and arrest; the prosecutor’s determination to charge a defendant or add particular offenses; the jury’s verdict and, sometimes, its sentencing recommendation; the trial court’s imposition of sentence; an appellate court’s review of that sentence; and the parole board’s consideration of early release.

With those considerations in mind, a truly beneficial renovation of federal sentencing would examine the entire process from a holistic perspective. As just suggested, it would reevaluate the current potpourri of crimes in the federal code, with an eye toward organizing penal statutes into a comprehensible statement of federal offenses and the principles of criminal liability. Successful reform efforts might also examine the process of selecting the actors who wield discretion, most notably Article III judges. The sentencing reform movement was driven by images of unduly lenient or severe jurists, mocked as either “turn ’em loose Bruce” or “hang ’em high Harry.”¹³⁵ But such caricatures, fostered by media hype and political opportunism, are belied by the reality of judicial appointments in the federal system. Article III judges are individually selected by the president, put through the rigmarole of Senate confirmation, and accorded life tenure and salary protection, all to ensure qualified and independent judges on the federal bench.¹³⁶ Given the multiple layers of investigation into their character and fitness, the men and women of the federal judiciary are probably the most qualified and trustworthy decisionmakers in national government and the precise individuals that the American public should entrust with the most important judgments in the criminal process. So if the existence of skilled trial courts is assumed—a justified premise, extremist nonsense to the contrary, given the current corps of district court judges¹³⁷—sentencing reform efforts might build upon the following general ideas:

Shared discretion. American constitutional

democracy demands that lawmakers define crime and potential punishment, juries decide guilt, and judges impose sentence. But this separation of powers and labor does not require that each body be hermetically sealed from the others. Instead, a healthy division would encourage some sharing of authority while securing each body sufficient discretion to adequately perform its tasks. So, for instance, juries might continue service after a determination of guilt, remaining for the sentencing hearing and then providing the judge with an advisory opinion on an appropriate punishment. In turn, legislators could set broad boundaries of punishment that accommodate the variations in crime and criminals, thereby ensuring trial judges sufficient discretion to render moral judgment through sentencing. The federal sentencing ranges under the “25 percent rule” are simply too narrow to account for relevant differences among cases. A better approach would create, with care and consideration, a sufficiently low sentencing floor for the “good” defendant and a sufficiently high ceiling for the hard-core criminal, regardless of the span between the two.¹³⁸

Real guidelines. The Guidelines are in no way “guidelines,” at least as the term is typically defined: a recommendation or general principle for decisionmaking. Instead, the Guidelines have become obligatory on the courts, with the commission even referring to their strictures as mandatory. A better approach would establish real guidelines for real judges, and once again, much can be learned from the wisdom of legal reformers from the recent past, such as Professor Kenneth Culp Davis. In his seminal book, *Discretionary Justice*, Professor Davis emphasized that “discretionary power is a necessary government tool but excessive discretionary power is dangerous and harmful.” Rather than seeking its elimination, Davis argued that discretion should be confined, structured, and checked. For federal sentencing, this might suggest a system of benchmarks that provide starting points for judicial decisionmaking. Professor Alschuler has proposed a set of “recurring paradigmatic cases” that

could provide standards for sentencing, such as the young, poor, and disadvantaged man who becomes a small-time drug dealer. Real guidelines would offer a presumptive punishment and rationale for this paradigmatic case while empowering trial courts to set a different sentence based on facts that distinguish the present case from the benchmark. A necessary consequence of real guidelines would be the end of the 258-box federal sentencing grid and the low comedy it produces. Derisively analogized to the games Parcheesi and “GO,” the sentencing grid will not be missed by many.¹³⁹

Written reasons, appellate review, and institutional memory. A system of real guidelines might foster a common law of sentencing in federal courts, with the reasoned judgments of past decisions helping trial judges decide today’s cases. At a minimum, the common law model requires three ingredients for success. First, trial judges should provide written reasons for the sentences they pronounce, explaining to the defendant and all others the exact justifications for a particular punishment. Second, appellate courts should be able to review a sentence to ensure reasonable application of real guidelines, a justified deviation from the guidelines, and the absence of invidious discrimination against the defendant. And third, the written reasons and relevant appellate decisions should be part of an institutional memory for the federal judiciary, allowing future courts to use these judgments as a database for their sentencing decisions. In 1999, Professor Ronald Wright pointed out that Scottish judges have computer access to key information about recent sentences: “When the time arrives to impose a sentence, the judge asks the database to display information about cases that resemble the case at hand in all relevant ways . . . [and] the database then informs the judge about the sentences imposed in past cases with comparable features, including information about the distribution of the sentences imposed.”¹⁴⁰ Quite frankly, it is somewhat embarrassing that computer-savvy Americans were not the first to consider this humane use of technology.

Full transparency. Finally, whatever model

The federal sentencing ranges under the “25 percent rule” are simply too narrow to account for relevant differences among cases.

The Guidelines teach that circumventing the law is acceptable, as long as it is done under the table and then masked above with passable lies.

eventually replaces the Guidelines should generate an honest system of sentencing. The current process encourages judicial sleight of hand and fact bargaining by the parties, resulting in “facts” that are not factual and legal rulings that push the envelope of reasonable interpretation. To be sure, the outcome of an individual case may be acceptable, avoiding draconian punishment under the Guidelines. But collectively, this chicanery by judges and attorneys only undermines the moral authority of law and calls into question a system that tolerates systemic deception. “Our government is the potent, the omnipresent teacher,” Justice Louis Brandeis famously observed, and “if the government becomes a lawbreaker, it breeds contempt for law.”¹⁴¹ Unfortunately, the Guidelines teach that circumventing the law is acceptable, as long as it is done under the table and then masked above with passable lies. Needless to say, no legitimate form of government would perform in such a manner.

Together, shared discretion and real guidelines coupled with written reasons, appellate review, institutional memory, and full transparency would help create a federal common law of sentencing that treats offenders as human beings—worthy of individualized treatment and a comprehensible justification for their fate—while limiting the potential for unwarranted disparities in punishment. The discretion allowed under nonmandatory real guidelines would permit judges to tailor punishment to the unique characteristics of a given offender rather than cramming the offender into a sentencing pigeonhole based on a truncated list of factors. In turn, written reasons, appellate review, and institutional memory would ensure that punishment is not determined by the courthouse door one enters but rather by a just assessment of the offense and offender in light of punishment received by similarly situated criminals. Finally, full transparency would guarantee the bona fides of sentencing information and judgments, both in the aggregate and for specific cases. In this way, a new system of sentencing could navigate between the Scylla of arbitrariness in the indeterminate sentencing era and the

Charybdis of excessive uniformity under today’s mandatory Guidelines.

Conclusion

Kemba Smith—formerly federal inmate No. 26370-083, serving a 24-year sentence under the Guidelines—recently graduated from Virginia Union University with a 3.1 grade point average. Since her release from prison, Smith has reconnected with her now seven-year-old son, completed her bachelor’s degree, worked part-time as a legal assistant and social work intern, and recounted her story at public forums and college campuses, warning other young people about the dangers of drugs and drug dealers. She has now set her sights on becoming a lawyer. “It just seems right for me to pursue law,” Smith says, “to have that title to go along with my advocacy.”¹⁴² After six years in prison, she is now ready to follow her dreams and provide for her family.

But neither the Guidelines nor the commission set Smith free; no judge or prosecutor was able to undo the draconian sentence that had been levied against this first-time, low-level offender. Instead, the 30-year-old mother, who had been caught in an abusive relationship with a drug kingpin, received mercy from a most unlikely source. At the end of his term, President Bill Clinton included Smith on a much ridiculed list of offenders who received executive pardons. Yet Smith’s case is the exception proving the rule—the futility of trying to remedy excesses and injustices under the Guidelines without also changing the current sentencing system itself. Only a tiny fraction of pardon applications actually receive substantive review and an even smaller amount are granted by the president.¹⁴³ The number is likely to dwindle even further under the Bush administration, with the pardon fiasco of fugitive financier Marc Rich still fresh in the mind of the electorate.

More importantly, an infrequently used, postconviction approach cannot even start to ameliorate the harsh punishment demanded

by the Guidelines. As suggested by the head of the NAACP's criminal justice project, "Kemba is . . . just the tip of the iceberg."¹⁴⁴ Clarence Aaron and Dale Yirkovsky will remain in federal lock-up, as will countless other low level and first-time offenders who received cruel sentences under the Guidelines. They were punished not by the respective trial courts, but by a dehumanizing process that prevents moral judgment. Absent a repeal of the Guidelines, many more defendants will follow them into prison, fodder for the thoughtless machine that is federal sentencing.¹⁴⁵

American conceptions of justice demand that the Guidelines be scrapped and the commission disbanded. Congress created an unconstitutional "fourth branch" of government, with the commission assuming the power to make law but lacking any type of political accountability. Moreover, the commission has usurped much of the judiciary's traditional authority over sentencing through its enactment of mandatory Guidelines that all but eliminate the capacity of trial courts to mete out individualized punishment. In turn, the current system has drastically expanded the power of federal prosecutors, giving them yet another tool with which to squeeze out information and guilty pleas from defendants while encouraging law enforcement to play fast-and-loose with the rules of evidence.

The Guidelines have also undermined the legitimacy of sentencing law, diluting and obscuring moral judgment. The complexity of the current system generates confusion among both criminal justice actors and lay citizens, while the hypertechnical character of the Guidelines produces sentencing variations that are nearly impossible to justify. The Guidelines also dehumanize the process of punishment by deeming relevant only certain factors about the offense or offender and ignoring all others, mechanically plugging into the sentencing equation those privileged characteristics and then spitting out the bottom line of punishment.

To temper the severity of federal sentencing, prosecutors, defense attorneys, and even judges have engaged in the hidden nullifica-

tion of the Guidelines, tinkering with case facts, for instance, in order to reach an agreeable sentence. Although this nullification may lead to just outcomes in particular cases, the process of fact bargaining engages the parties in blatant dishonesty, unbecoming to officers of the court. This corruption not only subverts the moral authority of the federal system, but also conflicts with the democratic prerequisites of open and accountable government. As a result, many practitioners, jurists, and even average citizens have come to view the Guidelines with cynicism and contempt.

There are many possible paths to positive change, all leading to the dissolution of the commission and the repeal of its Guidelines. Brave members of Congress might step up to the plate of their own accord, recognizing the injustice of the current system and instigating a new era of sentencing reform. A blue-ribbon commission, representing all parties with a stake in federal sentencing, could be impaneled and empowered to design an approach to punishment that avoids the Guidelines' many vices. It even seems possible that the citizenry itself might grow weary of the enormous financial and human costs, placing pressure on Congress to scrap the Guidelines and start again. But, however prompted, the American public and its elected officials will eventually have to face a fundamental choice: Is the sentencing process one of man or machine? In a recent speech, Judge Bruce Jenkins compared federal sentencing to speaking with a computer chip:

We forget that the computer is just a tool. It is supposed to help, not substitute for thought. It is completely indifferent to compassion. It has no moral sense. It has no sense of fairness. It can add up figures, but can't evaluate the assumptions for which the figures stand. Its judgment is no judgment at all. There is no algorithm for human judgment.¹⁴⁶

In the end, the American people must decide whether defendants should be sen-

American concepts of justice demand that the Guidelines be scrapped and the commission disbanded.

If the last 15 years have proven anything, it is that justice in sentencing cannot be served by the convoluted rules of a distant bureaucracy.

tenced by the complex, hypertechnical rules of a mechanical process—or, instead, by an entity capable of individualized decisions made pursuant to wisdom and experience. If the last 15 years have proven anything, it is that justice in sentencing cannot be served by the convoluted rules of a distant bureaucracy. Only trial judges can mete out punishment that fits both the offense and the offender, mindful of the deeply held notion that people must be treated as unique beings worthy of individualized treatment and not as undifferentiated objects on the conveyor belt of sentencing. Ultimately, Congress must end the Guidelines era and begin anew, guaranteeing that the next 15 years of federal punishment will not be like the last. It is time to scrap the commission and its Guidelines, and to embark on a new age of moral judgment in sentencing.

Notes

1. Michael Tonry, "Sentencing Commissions and Their Guidelines," in *Crime and Justice: An Annual Review of Research*, ed. Michael Tonry (Chicago: University of Chicago Press, 1993), vol. 17 p. 138.
2. See Bureau of Justice Statistics, *1999 Sourcebook of Criminal Justice Statistics*, (Washington, Government Printing Office: Department of Justice, 2000), p. 500.
3. See Erik Luna, "Drug Exceptionalism," *Villanova Law Review* 47 (2002):770. "On the prosecution side, nearly one-third of all criminal matters investigated by U.S. Attorneys are for suspected drug offenses, almost double the percentage from the early 1980s. In turn, drug offenders were more likely than others to be prosecuted in federal court. In 1981, drug defendants accounted for less than one-fifth of all federal prosecutions, but comprised 37% of prosecutions in 1999. From the judicial perspective, the number of drug cases per federal trial judge more than tripled since the early 1980s, while the number of drug defendants in federal court more than quadrupled over the past two decades. As could be expected in light of these numbers, there are more drug cases and convictions in the federal system than for any other offense, constituting more than 35% of all convicted defendants in federal court. . . . In 1999, 92% of those convicted of federal drug crimes received prison time, and of those who were incarcerated, 61% were subject to mandatory minimum sentences. Drug defendants received some of the stiffest punishment in the federal system—on average, more than six years imprisonment for all drug crime and about ten years for crack cocaine offenses—resulting in a federal prison population of 60% drug offenders."
4. See *1999 Sourcebook*, p. 526.
5. *Ibid.*, p. 442.
6. See, for example, Paul D. Borman, "The Federal Sentencing Guidelines," *Thomas M. Cooley Law Review* 16 (1999): 4.
7. 21 U.S.C. § 844 (2000). Congress has enacted a "safety valve" provision that allows certain first-time, nonviolent drug offenders to escape mandatory minimum sentences. See 18 U.S.C. 3553(f) (2000).
8. U.S. Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington: U.S. Sentencing Commission, 1991), pp. ii–iv.
9. See Michael Tonry, *Sentencing Matters* (New York: Oxford University Press, 1996), p. 83. In the words of Professor Nancy King, the Guidelines have created "a super-complex set of mandatory minimums." Quoted in David E. Rovella, "A Looming 'Apprendi' Tsunami? Experts Predict Acceleration of Court Sentencing Reform," *National Law Journal*, January 8, 2001, p. A1.
10. Tonry, *Sentencing Matters*, p. 83. See also Michael Tonry, "Mandatory Minimum Penalties and the U.S. Sentencing Commission's 'Mandatory Guidelines,'" *Federal Sentencing Reporter* 4 (1991): 129.
11. See *Special Report*, p. ii; U.S. Sentencing Commission, *Annual Report—1990* (Washington: U.S. Sentencing Commission, 1991), p. 1.
12. José A. Cabranes, "Sentencing Guidelines: A Dismal Failure," *New York Law Journal*, February 11, 1992, p. 2; *United States v. Harrington*, 947 F.2d 956, 964 (1991) (Edwards, J., concurring); and Lawrence Karlton, "Commentary," *Federal Sentencing Reporter* 4 (November/December 1991): 186.
13. G. Thomas Esole, "The Sentencing Guidelines System? No. Sentencing Guidelines? Yes." *Federal Probation* (December 1991): 20.
14. *Ibid.*, p. 21 (quoting Judge Donald Lay).
15. Federal Courts Study Committee, *Report of the Federal Courts Study Committee* (Washington: Administrative Office of the U.S. Courts, 1990), pp. 133–44.

16. Federal Judicial Center, *The United States Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* (Washington: Federal Judicial Center, 1997); Federal Judicial Center, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* (Washington: Federal Judicial Center, 1994). See also Don J. DeBenedictis, "The Verdict Is In," *American Bar Association Journal* 79 (1993): 78.
17. For brief historical reviews of federal sentencing, see Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago: University of Chicago Press, 1998), pp. 9–22; Douglas A. Berman, "Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines," *Notre Dame Law Review* 76 (2000): 25–30; Kate Stith and José A. Cabranes, "Judging under the Federal Sentencing Guidelines," *Northwestern University Law Review* 91 (1997): 1248–54; and William J. Powell and Michael T. Cimino, "Prosecutorial Discretion under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?" *West Virginia Law Review* 97 (1995): 374–379.
18. See Anthony Partridge and William B. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (Washington: Federal Judicial Center, 1974).
19. *Ibid.*, pp. 1–3, 9. Congress subsequently relied on the Second Circuit Sentencing Study in enacting the Sentencing Reform Act and creating the U.S. Sentencing Commission. See Senate Committee on the Judiciary, Comprehensive Crime Control Act of 1983, 98th Cong. 1st sess., 1983, S. Rept. No. 225, 1, 39, reprinted in 1984 U.S.C.C.A.N. 3182, 3224–27.
20. See, for example, Marvin E. Frankel, *Criminal Sentences: Law without Order* (New York: Hill and Wang, 1973); Marvin E. Frankel, "Lawlessness in Sentencing," *University of Cincinnati Law Review* 41 (1972): 1; Marvin E. Frankel, "Sentencing Guidelines: A Need for Creative Collaboration," *Yale Law Journal* 101 (1992): 2043.
21. See Stith and Cabranes, *Fear of Judging*, pp. 30–31; Michael Tonry, "Twenty Years of Sentencing Reform: Steps Forward, Steps Backward," *Judicature* 78 (1995): 170.
22. See Stith and Cabranes, *Fear of Judging*, p. 31; Berman, pp. 26–28; Powell and Cimino, p. 379; Frankel, "Sentencing Guidelines," pp. 2044–45; Charles J. Ogletree Jr., "The Death of Discretion? Reflections on the Federal Sentencing Guidelines," *Harvard Law Review* 101 (1988): 1942–44; Daniel J. Freed, "Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers," *Yale Law Journal* 101 (1992): 1688–89; José A. Cabranes, "A Failed Utopian Experiment," *National Law Journal*, July 27, 1992, p. 17.
23. See, for example, Stith and Cabranes, *Fear of Judging*, pp. 106–12.
24. Frankel, *Criminal Sentences*, p. 49.
25. *Ibid.*, p. 5.
26. *Ibid.*, pp. 118–24.
27. *Ibid.*, p. 114.
28. *Ibid.*, p. 113.
29. *Ibid.*, p. 115.
30. See Mary Pat Flaherty and Joan Biskupic, "Despite Overhaul, Federal Sentencing Still Misfires," *Washington Post*, October 6, 1996.
31. Statement of Sen. Kennedy, *Congressional Record* (September 30, 1982) 128, p. S12,784.
32. See Stith and Cabranes, *Fear of Judging*, pp. 43–47; Ogletree, p. 1944 n.35.
33. See Stith and Cabranes, *Fear of Judging*, pp. 47–48; Flaherty and Biskupic, "Despite Overhaul, Federal Sentencing Still Misfires," *Washington Post*, October 6, 1996."
34. See 18 U.S.C. § 3553 (a) (2000); Senate Committee on the Judiciary, Comprehensive Crime Control Act of 1983, 98th Cong. 1st sess., 1983, S. Rept. No. 225, 1, 39, reprinted in 1984 U.S.C.C.A.N. 3182, 3222.
35. 28 U.S.C. § 991 (2000).
36. 28 U.S.C.A. § 994(b)(2) (2000).
37. 28 U.S.C.A. § 994(d) (2000).
38. 28 U.S.C. § 991(a) (2000).
39. *Mistretta v. United States*, 488 U.S. 361 (1989).
40. *Ibid.*, p. 427 (Scalia, J., dissenting).
41. *Ibid.*
42. *Ibid.*, pp. 414–15.
43. U.S. Constitution, art. I, sec. 1.
44. See 28 U.S.C. § 994(p) (2000).
45. See S. Rept. 225, pp. 3363–64; *United States v.*

Lopez, 938 F.2d 1293, 1297 (1991); Stith and Cabranes, *Fear of Judging*, pp. 40, 56–57, 95; Stith and Cabranes, “Judging Under,” pp. 1271–72.

46. U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (Washington: U.S. Sentencing Commission, 1987), p. 19.

47. *Mistretta*, at 396.

48. See, for example, Stith and Cabranes, *Fear of Judging*, p. 48; Tonry, *Sentencing Matters*, p. 84; Ogletree, p. 1948; and Jeffrey S. Parker and Michael K. Block, “The Limits of Federal Criminal Sentencing Policy; Or Confessions of Two Reformed Reformers,” *George Mason Law Review* 9 (2001): 1019.

49. Although rehabilitation was included as a sentencing goal, see 18 U.S.C. § 3553(a)(2)(D) (2000), the Sentencing Reform Act also notes “the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” 28 U.S.C. § 994(k) (2000).

50. A few commentators have suggested that the Guidelines’ commitment to incremental harm was the vestige of a preliminary draft by Commissioner Paul Robinson, a distinguished scholar and “just deserts” theorist. Although Robinson later resigned over the commission’s failings, his draft was the only fully developed sentencing model with time running out, and according to some commentators, it served as the model for the final Guidelines. See Stith and Cabranes, *Fear of Judging*, pp. 53–55; Tonry, *Sentencing Matters*, pp. 86–89; and “Conference on the Federal Sentencing Guidelines: Summary of Proceedings,” *Yale Law Journal* 101 (1992): 2073 (comments of Judge Jon Newman). In my conversations with Professor Robinson, however, he suggests that any credible punishment scheme would necessarily take into account resulting harm, at least to the extent that such harm can be traced to the defendant’s culpability. Moreover, Robinson issued a scathing dissent from the final Guidelines, dispelling any claims that his position on sentencing supports the current federal system. See Paul H. Robinson, “Dissent from the United States Sentencing Commission’s Proposed Guidelines,” *Journal of Criminal Law and Criminology* 77 (1986): 1112.

51. According to one estimate, average nominal sentences increased nearly 80 percent under the Guidelines (from 28 months to 50 months) while actual time served ballooned by 230 percent (from 13 months to 43 months). Stith and

Cabranes, *Fear of Judging*, p. 63. Much of the increase in average sentences can be traced to the elimination of parole, restrictions on probation, and the enactment of mandatory minimum sentences, particularly for drug crimes.

52. See, for example, Elizabeth T. Lear, “Is Conviction Irrelevant?” *UCLA Law Review* 40 (1993): 1179; Kevin R. Reitz, “Sentencing Facts: Travesties of Real-Offense Sentencing,” *Stanford Law Review* 45 (1993): 523; and David Yellen, “Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines,” *Minnesota Law Review* 78 (1993): 403.

53. See Frank J. Murray, “Court Revisits ‘Apprendi’ Precedent,” *Washington Times*, April 23, 2002, p. A6; Vivian Berger, “Will ‘Apprendi’ Live On?” *National Law Journal*, April 8, 2002, p. A17; and Linda Greenhouse, “Court to Weigh Criminal Sentencing,” *New York Times*, December 11, 2001.

54. 530 U.S. 466, 490 (2000). See also *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (requiring that juries determine sentence of death).

55. See, for example, *Harris v. United States*, 122 S.Ct. 2406 (2002) (attempting to articulate a distinction between sentencing factors and elements of crime).

56. See, for example, Stith and Cabranes, *Fear of Judging*, p. 48 (arguing that “the U.S. Sentencing Commission from its inception has been highly visible to bar and bench, acutely sensitive to the political environment in which it operates, and controversial”); Tonry, *Sentencing Matters*, p. 84 (noting that the Commission’s “work was highly politicized from the outset, and it was riven by ideological factionalism and political intrigue.”)

57. Parker and Block, p. 1019. Michael Block “was an initial member of the Commission, serving from its inception in 1985 until 1989.” *Ibid.*, p. 1003 n.13.

58. Stith and Cabranes, *Fear of Judging*, p. 95.

59. See Parker and Block, pp. 1022–25.

60. Albert W. Alschuler, “The Failure of Sentencing Guidelines: A Plea for Less Aggregation,” *University of Chicago Law Review* 58 (1991): 926.

61. *Ibid.*

62. Robert F. Howe, “Drug Sentencing Faulted; Benefits for Snitches Leave Some Out in Cold,” *Washington Post*, February 25, 1991.

63. Quoted in *ibid.* See also Mary Pat Flaherty and

Joan Biskupic, "Prosecutors Can Stack the Deck; Sentencing Powers Shift from Judges," *Washington Post*, October 7, 1996 (discussing sentencing disparity between two brothers based on cooperation with prosecutors); and *United States v. Ives*, 984 F.2d 649 (1993) (same).

64. U.S. Sentencing Guidelines Manual § 1B1.3(a)(2) (2000).

65. The results can be stunning and disconcerting, with undercover agents encouraging suspects to act in ways that increase their own punishment through a process of "sentence entrapment" or "sentence manipulation." Federal officials are particularly notorious for structuring arrests to maximize the number of guns or drugs that can be pinned on a suspect. See Flaherty and Biskupic, "Prosecutors Can Stack the Deck," p. A1. One agent even persuaded a drug defendant to convert her cocaine from powder to crack, upping her sentence exponentially. See *United States v. Shepherd*, 857 F.Supp. 105 (D.D.C. 1994), vacated by 102 F.3d 558 (D.C. Cir. 1996).

66. See *United States v. Watts*, 519 U.S. 148 (1997).

67. Stith and Cabranes, *Fear of Judging*, p. 140, citing Brief of Appellee, pp.17-18, *United States v. Fulton*, No. 96-1029 (1996). See *United States v. Fulton*, 173 F.3d 847, 1999 WL 132172 (upholding upward departure based on proof of murder).

68. *United States v. Tejada*, 956 F.2d 1256 (1992).

69. See, for example, *United States v. Ebbole*, 917 F.2d 1495, 1495-96 (1990) (increase from one gram to 1.7 kilograms of cocaine).

70. 67 F.3d 1312 (1995).

71. On the third day of deliberations, "the jury sent a note to the court: 'Honorable Judge Curran, the jury is unable to reach a unanimous verdict, in spite of intense discussion and all of the information provided by the court. How do we proceed?'" *Ibid.*, at. 1318. According to reviewing judge Richard Posner, "the jurors were actually rather troubled by the issue of guilt—enough so that the judge had to give [a special instruction] to blast a verdict out of them." *United States v. Rodriguez*, 73 F.3d 161, 162 (1996) (Posner, J., dissenting).

72. 73 F.3d at 162.

73. John Griffiths, "Ideology in Criminal Procedure or 'A Third Model' of the Criminal Process," *Yale Law Journal* 79 (1970): 359 (describing the "Battle Model" of the criminal process).

74. Guido Calabresi, "What Makes a Judge Great: To A. Leon Higginbotham, Jr.," *University of*

Pennsylvania Law Review 142 (1993): 513.

75. Stith and Cabranes, *Fear of Judging*, p. 5.

76. After poring over "page after page of amendments, examples, and references to other sections" in the Manual, Judge John Rhodes argues that "one will be left with the distinct impression that confusions reign and further amendments are on the way." Mary Pat Flaherty, "Innocent Errors Add Years to Terms of Guilty Parties," *Washington Post*, October 6, 1996, p. A21.

77. See, for example, Flaherty and Biskupic, "Despite Overhaul."

78. Mary Pat Flaherty, "Innocent Errors" (quoting Judge John Rhodes); Tonry, *Sentencing Matters*, pp. 98-99.

79. Stephen Breyer, "Federal Sentencing Guidelines Revisited," *Federal Sentencing Reporter* 11 (1999): 180. Some lines that have been drawn by the Guidelines "seem crazy" and "loony," such as counting the weight of the carrier medium impregnated with LSD in determining the sentencing range. *United States v. Marshall*, 908 F.2d 1312, 1332, 1333 (7th Cir. 1990) (Posner, J., dissenting). Under the initial Guidelines, a first-time offender caught selling 100 doses of LSD in sugar cubes would receive a sentence of between 188 and 235 months. But if he had sold his stash on blotter paper, his punishment would decrease to 63-78 months; if he sold the LSD in gelatin capsules, his sentence would have been 27-33 months; and if he sold the drug in pure form, he would have received a term of just 10-16 months. See *Chapman v. United States*, 500 U.S. 453, 458 n.2 (1991). In each scenario, the amount of intoxicant peddled remains the same, only the length of imprisonment changes. Although the Supreme Court somehow found this scheme "rational" (*ibid.*, pp. 465-66), the commission eventually changed the Guidelines to limit the carrier medium's effect on sentences for LSD-related crimes. U.S. Sentencing Guidelines Manual § 2D1.1; *ibid.*, App. C. Nonetheless, LSD offenders continue to receive lengthy sentences, based in part on the carrier medium, with little chance of mercy. See *United States v. Camacho*, 261 F.3d 1071 (11th Cir. 2001) (LSD offender resentenced under amended Guidelines); *United States v. Sia*, 104 F.3d 348, 1996 WL 728191 (1st Cir.) (same).

80. Flaherty and Biskupic, "Despite Overhaul" (quoting Judge Samuel Kent).

81. See Stith and Cabranes, *Fear of Judging*, p. 84 (arguing that "the Guidelines threaten to transform the venerable ritual of sentencing into a puppet theater").

82. Tonry, *Sentencing Matters*, p. 98, quoting Alfred Blumstein et al., *Research on Sentencing: The Search for Reform* (Washington: National Academy Press, 1983), p. 159.
83. Stith and Cabranes, *Fear of Judging*, pp. 6, 30.
84. Max Weber, *Economy and Society* (Berkeley: University of California Press, 1978), p. 886, quoted in Stith and Cabranes, *ibid.*, p. 30.
85. Jack B. Weinstein, "A Trial Judge's Second Impression of the Federal Sentencing Guidelines," *Southern California Law Review* 66 (1992): 366.
86. Joan Biskupic and Mary Pat Flaherty, "Loss of Discretion Fuels Frustration on Federal Bench; Most District Judges Want Shift in Sentencing Rules," *Washington Post*, October 8, 1996 (quoting Judge Judith Keep).
87. Remarks of Hon. Morris E. Lasker, U.S. District Judge for the Southern District of New York, before the Symposium on Sentencing Guidelines, September 9, 1997, www.november.org/dissentingopinions/Lasker.html. The Guideline's "mechanical jurisprudence" or "sentencing by the numbers," as some jurists have called it, converts a judge as moral actor into an "automaton," "rubber-stamp bureaucrat," "notary public," or "accountant." See "Summary of Proceedings," p. 2054 (comments of Judge Edward Becker); Cabranes, "Failed Utopian Experiment," p. 17; Stith and Cabranes, *Fear of Judging*, p. 169; Weinstein, p. 364; Frank S. Gilbert, "The Probation Officer's Perception of the Allocation of Discretion," *Federal Sentencing Reporter* 4 (1991): 109; and Ellsworth A. Van Graafeiland, "Some Thoughts on the Sentencing Reform Act of 1984," *Villanova Law Review* 31 (1986): 1293-94. See also *United States v. Russell*, 685 F.Supp. 1245, 1249 (N.D. Ga. 1988) ("[The Guidelines] reduce the role of the sentencing judge to filling in the blanks and applying a rigid, mechanical formula."); *United States v. Justice*, 877 F.2d 664, 666 (8th Cir. 1989) ("sentencing has been relegated to a somewhat mechanical process"); *United States v. Bogle*, 689 F.Supp. 1121, 1163 (S.D. Fla. 1988) (Aronovitz, J., concurring) (describing federal sentencing as a "mechanistic administrative formula"). In the end, laments Judge Weinstein, the Guidelines "tend to deaden the sense that a judge must treat each defendant as a unique human being." Weinstein, p. 366.
88. Utah Code Annotated, (Lexis Law Publishing, 1982), secs. 76-5-103, 76-3-203.
89. Cal. Penal Code, sec. 245(a)(2).
90. 18 U.S.C. § 111(b) (2000).
91. *U.S. Sentencing Guidelines Manual* 2A2.2(b)(2)(C).
92. The Guidelines' limited leeway might be more palatable if trial judges had ample means to depart from the initial sentencing range, but commission interpretations and appellate rulings have confined departures to two circumstances. First, prosecutors can request a downward departure from the sentencing range based on the defendant's substantial assistance. The decision to seek this type of departure rests solely with the government, however, and provides no independent discretionary authority for the district court. The second basis for departure is where the judge finds a factor "not adequately taken into consideration" by the commission, requiring a sentence different from that prescribed by the Guidelines, 18 U.S.C. § 3553(b) (2000). The relevant statutory provision was intended to provide a type of safety valve for the courts to deal with unique situations that fall outside the "heartland" of cases amenable to a given sentencing range. See *U.S. Sentencing Guidelines Manual* § 1A4.b ("The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. . . . When a court finds an atypical case, one to which a particular guideline linguistically applies but where the conduct significantly differs from the norm, the court may consider whether a departure is warranted."). Unfortunately, the commission has determined that departures from the heartland should be "rare," in large part because most circumstances have already been considered and either incorporated into the Guidelines or expressly rejected. Wary of this alleged preemption, the federal appellate courts have been downright miserly in foreclosing heartland-based departures. See *United States v. Weinberger*, 91 F.3d 642, 644 (4th Cir. 1996) ("Given the comprehensive sentencing structure embodied in the guidelines, [o]nly rarely will we conclude that a factor was not adequately taken into consideration by the Commission.").
93. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993).
94. 28 U.S.C. § 994(d) (2000).
95. *U.S. Sentencing Guidelines Manual* § 5H1.1 (age); § 5H1.2 (education and vocational skills); § 5H1.3 (mental and emotional conditions); § 5H1.4 (physical condition, including drug or alcohol dependence or abuse); § 5H1.5 (employment record); § 5H1.6 (family ties and responsibilities, and community ties); § 5H1.11 (prior good works, including military, civic, charitable, or public service); § 5H1.12 (lack of guidance as a youth).
96. Alschuler, p. 902.

97. See Tonry, *Sentencing Matters*, pp. 11, 72–99.
98. See Stephen J. Schulhofer, “Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity,” *American Criminal Law Review* 29 (1992): 835, 851–70.
99. Ilene H. Nagel, “Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines,” *Journal of Criminal Law and Criminology* 80 (1990): 883, 934.
100. See *United States v. Rodriguez*, 724 F.Supp. 1118, 1122 (1989).
101. *Ibid.*
102. See Biskupic and Flaherty, “Loss of Discretion,” p. A1 (comparing sentences for drug offender and murderer). But see Erik Luna, “The Prohibition Apocalypse,” *DePaul Law Review* 46 (1997): 485 (“Former ‘drug czar’ William Bennett would behead drug dealers. Nancy Reagan branded casual users ‘accomplice[s] to murder,’ and the erstwhile police chief of Los Angeles, Daryl Gates, opined that even occasional drug users should be ‘taken out and shot.’”).
103. Flaherty and Biskupic, “Prosecutors Can Stack the Deck,” (quoting James Druker).
104. See, for example, Catherine M. Goodwin, “The Independent Role of the Probation Officer at Sentencing and in Applying *Koon v. United States*,” *Federal Probation*, September 1996, p. 71.
105. Flaherty and Biskupic, “Prosecutors Can Stack the Deck.”
106. Tony Garoppolo, “Fact Bargaining: What the Sentencing Commission Hath Wrought,” *BNA Criminal Practice Manual* 10 (1996): 405. See also Eugene D. Natali, “The Probation Officer, Bean Counting and Truth in Sentencing,” *Federal Sentencing Reporter* 4 (1991): 103 (“Subtle and creative forces began to short-circuit the whole process of guideline sentencing. Attorneys for the defense and the government found new ways to ply their old trade with plea bargains . . . in all shapes and sizes . . . stipulations seemed to be fiction writings, when compared with the known facts of the cases they attempted to address.”).
107. Probation Officers Advisory Group, “Probation Officers Advisory Group Survey,” *Federal Sentencing Reporter* 8 (1996): 303.
108. See Stephen J. Schulhofer and Ilene H. Nagel, “Plea Negotiations under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-*Mistretta* Period,” *Northwestern University Law Review* 91 (1997): 1284; Ilene H. Nagel and Stephen J. Schulhofer, “A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines,” *Southern California Law Review* 66 (1992): 501.
109. *United States v. Rodriguez*, 162 F.3d 135, 150–52 (1998).
110. *Ibid.*, at 152.
111. *Berthoff v. United States*, 140 F.Supp.2d 50, 66 (D.Mass. 2001) (discussing *Rodriguez*).
112. *Ibid.*, pp. 66, 90–91.
113. Flaherty and Biskupic, “Prosecutors Can Stack the Deck” (quoting Larry Silverman).
114. Schulhofer and Nagel, “Guideline Circumvention,” p. 1312.
115. Weinstein, p. 365 (quoting anonymous federal judge).
116. See Erik Luna, “Transparent Policing,” *Iowa Law Review* 85 (2000): 1154–63 (discussing trust of government, perceived legitimacy, and compliance with the law).
117. See generally Louis D. Brandeis, *Other People’s Money* (1933): 62 (“Publicity is justly commended as a remedy for social and industrial disease . . . Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”)
118. See, for example, Stith and Cabranes, *Fear of Judging*, pp. 7, 104–142; Berman, pp. 61–65; Frank O. Bowman and Michael Heise, “Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level,” *Iowa Law Review* 87 (2002): 477; Frank O. Bowman and Michael Heise, “Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences,” *Iowa Law Review* 86 (2001): 1054; John S. Martin Jr., “The Role of the Departure Power in Reducing Injustice and Unwarranted Disparity under the Sentencing Guidelines,” *Brooklyn Law Review* 66 (2000): 259; James Anderson, Jeffrey Kling, and Kate Stith, “Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines,” *Journal of Law and Economics* 42 (1999): 271; Schulhofer and Nagel, “Guideline Circumvention,” p. 1284; Nagel and Schulhofer, “A Tale of Three Cities,” p. 501; Gerald W. Heaney, “The Reality of Guidelines Sentencing: No End to Disparity,” *American Criminal Law Review* 28 (1991): 161; and Stephen J. Schulhofer and Ilene H. Nagel, “Negotiated Pleas under the Federal Sentencing Guidelines: The First Fifteen Months,” *American Criminal Law Review* 27 (1989): 231.

119. For purposes of clarification, I should make clear my own opinion on drugs and drug crime. As a civil libertarian on issues of criminal justice, I oppose prohibition as being immoral in theory, racist and classist in practice, and ultimately destined for failure in a free society. But being a civil libertarian doesn't demand sympathy or even tolerance for drug criminals such as defendant Rodriguez. Here is an individual who violates drug laws not for his own consumption or addiction. Rodriguez is not distributing marijuana to ease the pain of those who suffer from debilitating diseases like cancer and glaucoma. Nor is he a street-level drug offender who engages in crime as part of the reality of being a poor, young, minority male in today's inner cities. Instead, Rodriguez is the heir to gangster rumrunners like Al Capone, becoming rich through a failed government policy and demonstrating only indifference to the larger consequences of his criminality. In all likelihood, the identity of the contraband—whether it be booze or drugs or guns or whatever—is irrelevant to organized criminals such as Capone and Rodriguez. If the national ban on narcotics were lifted, such entrepreneurs would find another way to partake in the heightened financial margins of illegal commerce. So just as those who opposed alcohol prohibition in the early 20th century were not chums of Capone, modern-day civil libertarians need not befriend Rodriguez.
120. For descriptions of the Smith case, see Libby Copeland, "Kemba Smith's Hard Time," *Washington Post*, February 13, 2000; Reginald Stuart, "Justice Denied: Kemba's Nightmare Continues," *Emerge*, May 31, 2000, p. 41; and Reginald Stuart, "Kemba's Nightmare," *Emerge*, May 31, 1996, p. 28.
121. PBS, "Snitch," *Frontline* special, www.pbs.org/wgbh/frontline/shows/snitch/cases/aaron.html.
122. "Time to Rethink the War on Drugs?" Cato Institute Policy Forum, May 22, 2001, p. 11 (quoting criminal defense attorney Dennis Knizely).
123. PBS.
124. Dale Yirkovsky, "Letters to the Editor," *Des Moines Register*, February 11, 2002.
125. Register Editorial Board, "One Bullet, 15 Years," *Des Moines Register*, January 21, 2002.
126. *United States v. Yirkovsky*, 259 F.3d 704, 707 n.4 (2001).
127. *United States v. Yirkovsky*, 276 F.3d 384, 385 (2001) (Morris, J., dissenting).
128. "The Commission has been the Rodney Dangerfield of federal agencies: it 'don't get no respect.' Despised by judges, sneered at by scholars, ignored by the Justice Department, its guidelines circumvented by practitioners and routinely lambasted in the press, the Commission has, most alarmingly, fallen out of favor with the Congress that created it." Ronald Welch, "The Battle against Mandatory Minimums: A Report from the Front Lines," *Federal Sentencing Reporter* 9 (1996): 97.
129. Biskupic and Flaherty, "Loss of Discretion." See also *United States v. Galloway*, 976 F.2d 414, 438 (1992) (Bright, J., dissenting) ("Only in the world of Alice in Wonderland, in which up is down and down is up, and words lose their real meaning, does such a sentence comply with the Constitution.").
130. Stith and Cabranes, *Fear of Judging*, p. xi. This resignation to the current scheme is evidenced by, among other things, the modest nature of proposed congressional reforms. One bill (S. 1834) attempts to alleviate the grave sentencing disparity between crack and powder cocaine, increasing the amount of crack while simultaneously decreasing the quantity of powder cocaine that trigger mandatory minimum sentences. Another bill (H.R. 1978) would simply eliminate mandatory minimums for most drug crime. Both proposals offer improvements over the current approach to narcotics offenses, a major source of discontent in federal sentencing. But neither bill contemplates a change to the basic Guidelines scheme and its impediments to moral judgment by trial judges.
131. Luna, "The Prohibition Apocalypse," p. 564 (quoting Texas Senator Morris Shepard).
132. Flaherty, "Innocent Errors" (quoting Judge John Rhodes).
133. See, for example, Frank J. Remington, "The Federal Sentencing Guidelines as a Criminal Code: Why the Model Penal Code Approach Is Preferable," *Federal Sentencing Reporter* 7 (1994): 116.
134. Criminal Code Reform Act of 1977, 95th Cong., 1st sess., 1977, S. Rept. 95-605, p. 3.
135. See Powell and Cimino, p. 379.
136. See *United States v. Boshell*, 728 F.Supp. 632, 637 (1990): "Regardless of which political party holds sway, the process for selecting federal judges is much the same. Nominees are hung out like fresh meat to be poked, prodded and examined in minute detail as to every aspect of their personal and professional lives. The first step is to gain the confidence of a nominating senator who will con-

duct such investigation as he deems appropriate. Then the FBI, Department of Justice, the American Bar Association, and the Judiciary Committee get into the act. Only after surviving scrutiny that far will the Senate consider granting its stamp of approval.”

137. See *ibid.* “Judges may . . . occasionally ascend the bench without the basic qualifications to serve, but when the system fails in that manner, it is aberrational in the extreme.”

138. Ronald F. Wright, “Rules for Sentencing Revolutions,” *Yale Law Journal* 108 (1999): 1372–79 (discussing jury sentencing).

139. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), p. 27; See Alschuler, pp. 939–49; Biskupic and Flaherty, “Loss of Discretion” (quoting Judge Bruce Selya: “People think of it as a game, like Parcheesi.”); Marc Miller, “True Grid: Revealing Sentencing Policy,” *U.C. Davis Law Review* 25 (1992): 588 n. 4 (“The table looks like the board for the game of ‘GO.’”).

140. Wright, p. 1386.

141. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

142. See Kevin O’Hanlon, “Judge to Ask President

Bush to Pardon Drug Dealer,” *Associated Press*, January 9, 2002; Deborah Alexander, “Ruling Forces Judge to Impose Longer Sentence,” *Omaha World-Herald*, January 9, 2002, p. B4; Deborah Alexander, “Court May Review Dealer’s Sentence,” *Omaha World-Herald*, September 4, 2001, p. B4; “Man Sentenced in Meth Case,” *Tulsa World*, June 2, 1998, p. 5; Editorial, “Judge Not,” *Tulsa World*, January 17, 1998, p. 16; Doug P.Grow, “Woman Is a Footnote in U.S. War on Drugs,” *Minneapolis-St. Paul Star Tribune*, April 25, 2001, p. B2; Paul Gustafson, “First-time Offender Pleads to Lesser Offense, Gets 8 Years,” *Minneapolis-St. Paul Star Tribune*, April 25, 2001, p. B2; “Judge Quits Case over Federal Sentencing Guidelines,” *Associated Press*, January 20, 2001.

143. See, for example, *1999 Sourcebook*, p. 475.

144. Quoted in Stuart, “Kemba’s Nightmare Continues.”

145. Quoted in “Graduation puts ‘Kemba’s Nightmare’ Further in the Past,” *Associated Press*, May 10, 2002; and Michael Paul Williams, “Nightmare Shaped a Dream,” *Richmond Times-Dispatch*, May 10, 2002.

146. Bruce S. Jenkins, “The Federal Court System: for Thinking Press 1, for Compassion Press 2, For Judgement Press 3,” *Vital Speeches of the Day* 68 (January 15, 2002): 198.

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