Federal Probation

The Sentencing Reform Act of 1984 and Sentencing Guidelines

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This Issue in Brief

YEARS FROM now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice. The Sentencing Reform Act of 1984 which brought about the sentencing guidelines sent ripples in the pool of the Federal court system that affected all who participate in the sentencing process. Certainly the day-to-day work of judges, both district and appellate, prosecutors, attorneys, probation officers, and correctional personnel has been altered significantly, and the course of careers has changed. This special issue of *Federal Probation* gives a voice to those who have been working in the midst of such historic change.

Federal Probation invited eminent jurists and prominent sentencing experts to prepare articles reflecting their thoughts and perspectives regarding the Sentencing Reform Act and the sentencing guidelines. The first three articles comprise thoughtful, varied perspectives from the bench. The articles that follow are by authors representing other critical roles in sentencing. The articles are organized by profession in the order that each author would typically become involved in the sentencing process.

Ever since the Federal sentencing guidelines went into effect, judges and commentators have criticized the guidelines for placing excessive restrictions on judicial discretion. The Honorable Gerald Bard Tjoflat, chief judge of the U.S. Court of Appeals for the Eleventh Circuit, asserts that critics fail to appreciate the significant discretion that the judge retains. In **"The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel,"** Judge Tjoflat addresses the failure of attorneys to appropriately exploit judicial discretion within the guidelines structure. Advice for attorneys is offered regarding how to develop proper arguments to guide the sentencing judge's discretion in a particular case. Providing substantial background information, the article describes the congressional purposes of the sentencing guidelines, the elements of guideline sentencing, and the scope of judicial discretion embedded in the guidelines.

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The Sentencing Guidelines: Two Views From the Bench

At the invitation of Federal Probation, *the Honorable Andrew J. Kleinfeld and the Honorable G. Thomas Eisele respond to the proposition: "Sentencing Guidelines Have Been Beneficial to the Federal Courts in Sentencing Defendants."*

The Sentencing Guidelines Promote Truth and Justice

BY ANDREW J. KLEINFELD

Judge, United States Court of Appeals, Ninth Circuit

THE SENTENCING guidelines, in my view, promote truth and justice. Despite their unpopularity with much of the bench and bar, the guidelines serve the public interest fairly well. The guidelines do not need watering down, just the continuing monitoring and adjustment for which the Sentencing Commission was established.

Justice means, in this context, treating like cases alike. The determination of what characteristics of crime and criminals are material and what are immaterial, for determining which are like cases, should rest upon a social consensus, not individual judges' varying views. The guidelines filter out inappropriate variation based upon the varying individual philosophies of particular judges and probation officers, docketing pressures, defendants' social skills, as well as race, gender, social standing, and other irrelevant criteria.

A system based on truth promotes public confidence, while one based on falsehood undermines it. The traditional sentencing law used parole to even out sentences, so the judge's declaration of a sentence was not the real sentence. When a judge's publicly pronounced sentence has no meaning because the parole system will decide upon the real sentence in a subsequent hidden bureaucratic proceeding, the criminal justice system loses legitimacy. When newspapers add a line after the statement of the sentence noting when the defendant will be eligible for release, they correctly imply that the sentence does not truthfully state what punishment will be imposed. The public loses confidence that the criminal justice system will protect them from crime, when people cannot believe its solemn pronouncements.

The fundamental problem with traditional preguideline sentencing is that it focuses on predictions of the criminal's future behavior, whether the criminal will be more likely to commit future crimes if one or another sentence is imposed. We cannot predict the future very well. The biggest change worked by the

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guidelines is that they focus our efforts upon determining what happened in the past. This kind of individualized historical fact-finding is what courts do best. Justice is seen to be done when we impose consistent sentences based upon what criminals actually have done. Widely varying sentences based on judges' predictions about what particular criminals will do in the future look unfair, because they are unfair. It is fairer for criminals to "be punished for what they have done, not for what they might do."[1]

Our professional skills enable us to evaluate evidence and make reasonably accurate factual determinations about such guideline criteria as leadership role in an offense and quantity of narcotics involved. We have no professional competence and obtain no useful evidence for looking into offenders' hearts to evaluate their remorse or for judging whether they have truly repented and will in the future maintain law-abiding lives.

This is not to offer unmitigated approval of the guidelines as they are. Like all law, sometimes they are a procrustean bed. The acutely individual process of sentencing makes the generality of law troubling. Like all Federal district judges, I have sometimes felt compelled by the guidelines to impose a sentence which seemed much too long, and this has been a very painful event.

Compared to traditional sentencing, though, I think we have a more just process with guidelines than we did before, and the inevitable problems can best be dealt with by tinkering around the edges. Individualization is not persuasively fair, even though it may feel fair to the judge. Marvin Frankel makes the interesting remark that no one would want to live in a system of individualized taxes, where the official decided what one should pay based upon his judgment about the taxpayer's situation and character.[2]

Most Federal judges and criminal defense attorneys seem to be unhappy with the sentencing guidelines. A natural inference might be that if so many experienced sentencing professionals dislike the guidelines, the guidelines must be a mistaken policy. Here is why this inference would be incorrect.

Trial judges can be expected to be uncomfortable with sentencing guidelines, even if the guidelines improve the quality of justice. First, since a judge formerly had virtually unlimited discretion in sentencing, every sentence imposed was consistent with that particular judge's opinion of what was just. The judge imposed the sentence which, in every case, appeared to the judge to be fair. The sentencing guidelines sometimes compel a judge to impose a sentence with which that judge personally disagrees, but which is compelled by the law. Every Federal judge now is required sometimes to impose sentences which he or she feels are quite wrong. This leaves many judges with a sense of greater injustice under the guidelines than they had before. The sentences may be objectively correct in some sense, but they sometimes are subjectively incorrect.

We should keep in mind the two fundamental reasons, noted in the legislative history, why the guidelines system was created. First, unjust sentencing disparities pervaded the old system. Congress noted that 50 percent of robbers got probation in the Northern District of New York, but they all got time to serve in the Middle District of Florida and the Eastern District of Kentucky; 79 percent of the counterfeiters and forgers in the Central District of California got probation, but only 17 percent in the Eastern District of Kentucky.[3] All these sentences were imposed by judges who felt that they were imposing fair sentences, but some of the judges must have been wrong.

Second, sentencing was insulated from democratically made judgments. Those judgments might differ from views shared among judges. Congress noted that the Sentencing Commission, after determining average sentences, "might conclude that a category of major white collar criminals too frequently was sentenced to probation or too short a term of imprisonment because judges using the old rehabilitation theory of sentencing, did not believe such offenders needed to be rehabilitated and, therefore, saw no need for incarceration."[4] Frankel suggested that it was "impossible on th[e] premise [that rehabilitation is the purpose of sentencing] to order a week in jail for the elderly official finally caught after years of graft, now turned out of office and disgraced, and neither in need of nor susceptible to any extant kinds of rehabilitation."[5]

Judges object to the amount of time required for guideline sentencing. Under the old system, imposition of sentence usually took less than 45 minutes, plus perhaps a half hour to an hour of preparation time. Under the new system, it is not at all unusual for sentencing to take several hours, plus an hour or more of preparation time. My longest guideline sentencing involved many witnesses and took 3 days. Obligations speedily to try other criminal cases, and to decide motions and try civil cases, make it impossible to give more time to sentencing without giving less time to other duties.

The time for sentencing, though, is well spent, often better spent than in trial. In routine cases tried by good lawyers, I have sometimes felt that I had little substantive judicial work to do on the bench between the voir dire Monday morning and the reading of standard jury instructions Wednesday afternoon. When the jury returns a verdict in less than an hour,

as often occurs, one must wonder whether a question so easily answered by them, was this particular defendant guilty of the crimes charged, was really worth several days. In many criminal trials, there is no genuine issue of fact material to the question of the defendant's guilt. In sentencing, by contrast, the court is likely to have real decisions to make. Though a defendant may plainly be guilty of selling cocaine, the questions of how much cocaine, and what role this defendant had in the sale, may control the duration of his sentence under the guidelines and often raise genuine, serious factual and legal questions. This suggests that justice would be enhanced in many criminal cases by an hour or two subtracted from trial and added to sentencing.

A related question is why, if guidelines are so good, so many criminal defense lawyers think they are so bad. It should be said that not all feel this way. Some defense lawyers like guidelines because they eliminate the risk of idiosyncratically long sentences. By removing the risk of catastrophe, the guidelines can make it easier to take a case to trial where there is a real possibility of a not guilty verdict. A defense lawyer can tell his client, for example, that although the statutory maximum is 10 years, he risks, in all likelihood, a guideline sentence of 15 to 21 months if he goes to trial and loses. The guideline limits on sentencing risk can make it much easier for an innocent defendant to reject a plea bargain and put the Government to its proof. A defendant can also reject a plea bargain which includes an unacceptable stipulation of fact, plead guilty without a bargain, and put the Government to its proof on a critical issue affecting the sentence, such as amount of money stolen, instead of going through a pointless trial on the indictment.

Much defense attorney discontent comes, I think, from a misunderstanding by some defense attorneys of when they are effective. Every lawyer likes to feel that he or she is accomplishing something for the client. Defense attorneys would seek the most lenient credible sentence under the old system. If enough passion could be put into the argument, enough concern displayed by relatives, and enough remorse displayed by the defendant, the system left open at least the possibility of great lenience. Now some defense lawyers feel that they cannot accomplish much.

The defense attorneys' feelings of accomplishment under the old system, though, were often illusory. The issues in sentencing, though important, were intellectually undemanding, so the judge really did not need the lawyers as guides through any legal intricacies. The judge was likely to listen politely and then impose a sentence more influenced by the probation officer's recommendation and the judge's own sentencing philosophy than the lawyers' arguments. A defense lawyer might feel that he or she had successfully persuaded the judge to impose a lenient sentence, when the judge had actually made that decision independently of defense counsel's efforts.

By contrast, under the guidelines, issues are complex, and the judge often really needs attorneys' arguments in order to understand the law and apply it properly. The lawyer feels hemmed in by the law, because he or she cannot credibly propose a below-guideline sentence. The judge, though, is also hemmed in by the law and cannot impose 5 years where the guidelines cap the sentence at 18 months. Now that there is a body of law governing sentencing, the defense attorney can make a judge do something that the judge does not want to do, by proving that the defendant is entitled to a particular location on the grid.

A major virtue of the guidelines is their alteration of the impact of docketing pressure on sentences. The combination of docket pressure and the Speedy Trial Act gives judges and prosecutors a large incentive to accept overly lenient plea bargains. The value of the incentive may lead to an excessive discount, in busy jurisdictions, for pleading guilty. The pre-guideline sentencing statistics are notable for more lenient sentences in the larger metropolitan areas and harsher sentences in the more rural areas.

The value to society, though, of a guilty plea is much less than its value to actors within the justice system. If there is more crime in a particular jurisdiction, there is more need within the court system for docket clearing, so there is likely to be a greater discount for pleading guilty. But outside the court system, separation of criminals from society is more important than docket clearing. The jurisdiction with a greater crime problem probably needs harsher sentences, not more lenient ones. It does not make much sense to make the criminal justice system weaker in locations where the criminals are stronger. Yet that is the effect of unregulated discounts for guilty pleas.

The worst effect of excessive discounts for pleading guilty may be pressure upon innocent defendants, and defendants guilty of much less than the crimes with which they are charged, to plead guilty. Wholly innocent defendants will plead guilty to misdemeanors in exchange for dismissal of felony charges, and defendants guilty of much less than the crimes charged will plead guilty in exchange for immediate release if they have been held in custody.

The guidelines in practical terms codify the discount for pleading guilty at two levels on the grid.[6] The two-level reduction will, for example, reduce a 41-month maximum to 33 months. The reduction is a substantial incentive for a provably guilty defendant not to put the Government to its proof, but not enough to induce an innocent person to plead guilty. Judges in high crime

jurisdictions may have more trials under the guidelines because they cannot offer as much reduction of sentences for guilty pleas. That is probably good for society and for innocent defendants, even though it is bad for those of us with the responsibility to clear our dockets.

The most troubling area of guideline sentencing is the way it shifts sentencing control from judges to prosecutors. In shaping indictments and negotiating plea bargains, prosecutors can exercise much more control than judges over sentences. For example, the two-level reduction for acceptance of responsibility can be changed to an unlimited discount by a prosecutor's dismissal of some counts or dismissal of the indictment and filing of an information to which the defendant pleads. A judge cannot dismiss a case because it was not fair to prosecute it, nor turn a felony case into a misdemeanor if its seriousness does not merit more than a misdemeanor. A prosecutor can do both.

Judges have some control over prosecutors who give away too much in order to clear their dockets, because at the low end we can reject plea bargains which do not fairly reflect the seriousness of the offense. Under the guidelines, though, we have lost our control over the high end. If a prosecutor creates too much of a spread between those who plead and those who do not, we cannot moderate the sentences of those who are overprosecuted because of their refusal to cooperate. Sometimes the refusal to cooperate, as pleading guilty and testifying against someone else is called, may be motivated by relative innocence and fear, or even complete innocence and not knowing anyone to testify against.

Before guidelines, judges might vitiate excessive harshness of charges with lenient sentences, but that door has been shut. This is troubling, and the solution is not evident. Justice Department supervision of prosecutors and internal departmental guidelines are probably even more important with the guidelines than before, but the sentencing commissioners should continue to examine plea negotiation, in case refinements of the guidelines may alleviate injustices. This is a genuine and serious problem without an obvious solution.

The fundamental reason that I as a trial judge have been an enthusiastic proponent of the sentencing guidelines is that I have an acute awareness that I am sometimes wrong. Errors in sentencing, which is to say, serious injustices to individual criminals, victims, and society, will inevitably be made, so long as we rely on mortal human beings to impose sentences. Wrong judgments are still made by individual judges in individual cases under the guidelines, but the injustice cannot be so great as under traditional sentencing, where the range is limited, for example, to 37 to 46 months. A 24 percent error is not as bad an injustice as the hundreds of percent possible and perhaps not rare under traditional sentencing.

It is about time for us to accept the guidelines as a democratic judgment. We live in a democratic republic. The democratic organs of government have judged our traditional criminal sentencing system and found it wanting. The Supreme Court has decided that the solution which Congress and the President chose was constitutionally permissible. It is about time for judges and lawyers to accept it. The criminal justice system belongs to the people of the United States, not to the professionals who work in it.

NOTES

[1]Marvin Wolfgang, A Return to Just Deserts, Key Reporter Autumn 1986, p. 3.

[2]Frankel, Criminal Sentences—Law Without Order 10-11 (1973).

[3]Senate Report No. 98-225, p. 164, at 1984 U.S. Code Congressional and Administrative News 3347, citing a table in O'Donnell et al., Toward a Just and Effective Sentencing System.

[4]*Id.* at 177, 1984 USCCA at 3360.

[5]Frankel at 7.

[6]Of course, the two-level reduction for acceptance of responsibility is sometimes available to a defendant who goes to trial and unavailable to one who pleads guilty. A simple discount for pleading guilty might violate the fifth amendment. Nevertheless, in practical terms the acceptance of responsibility category works something like a 20 percent discount for pleading guilty.