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The Federal Sentencing Guidelines Ten Years Later: An Introduction and Comments

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THE FEDERAL SENTENCING GUIDELINES: TEN YEARS LATER

AN INTRODUCTION AND COMMENTS

*Paul H. Robinson**

The Editors have asked me to introduce the Symposium and to comment on its papers. I will begin by discussing why the papers selected here are well worth your reading. Then, I will comment on some of the issues they raise, comments that are sometimes critical of what is said in the papers.

The Editors have brought together papers on the first ten years of the Federal Sentencing Guidelines from authors with diverse backgrounds writing from a variety of perspectives about a range of topics. In *Plea Negotiations Under the Federal Sentencing Guidelines*, Professor Stephen Schulhofer and Provost Ilene Nagel offer what, at first, appears to be another in their series of useful articles on plea-bargaining under the Guidelines. But the work turns out to be much more: a critique of the Guidelines' most pressing difficulties and insights into their cause and solution. Professor Kate Stith and Judge José Cabranes, in *Judging Under the Federal Sentencing Guidelines*, give an eloquent statement of the concern felt by many sentencing judges that the Guidelines undermine much of what judges could bring to the sentencing process. Former United States Attorney James Burns and Assistant United States Attorney Barry Elden and former United States Attorney Brian Blanchard give a well documented defense of the prosecutor's exercise of authority and discretion under the Guidelines, in *We Make the Better Target*.

Professor Kevin Cole's insightful contribution, *The Empty Idea of Sentencing Disparity*, ought to make everyone pause to think about what the central concept of disparity truly means. Professor Julie O'Sullivan presents and Professor David Yellen responds in an enlightening debate on the Guideline's use of "real-offense sentencing," in *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System* and *Just Deserts and Lenient Prosecutors*, respectively. A reader who wishes to get quickly up to speed on the Guidelines' back-

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ground, development, and current points of debate, with emphasis on the Commission's perspective, cannot hope to do better than *The Reality of Federal Sentencing: Beyond the Criticism*, by Deputy Chief Probation Officer Thomas Whiteside. Professor Kevin Reitz offers a critique of appellate review of sentences, including some empirical data, in *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*. Finally, in *Remorse, Cooperation, and "Acceptance of Responsibility,"* Mr. Michael O'Hear, law clerk for a federal district court judge, presents a detailed criticism of, and a reform proposal for, the Guidelines' "acceptance of responsibility" provision.

The contributors include many long-time participants in the federal sentencing reform process, new arrivals to the debate, prosecution-minded and defense-minded writers, apologists for the Guidelines, professional opponents to it, and everything in between. I recommend the Symposium to any serious student of the sentencing debate.

Nearly all of the articles touch on one or more of three important topics: (1) the allocation of sentencing power and discretion, (2) the reasons for, mechanisms of, and solutions to circumvention of the Guidelines, and (3) the factors that should be taken into account in sentencing. I draw together the participants' contributions on each of these, while giving my own comments.**

I. Allocation of Sentencing Power and Discretion

The Symposium papers reflect two kinds of disagreements relating to allocation: descriptive and prescriptive. Professor Stith and Judge Cabranes document the reduction of trial judges' sentencing power and discretion, of which the authors very much disapprove, and cite the often made claim that prosecutors and probation officers have been the beneficiaries of the trial judges' loss.[1] I take the issue to be settled by the well presented paper of former United States Attorney Burns et al., which suggests that prosecutors have little more power now than they had before the Guidelines went into effect. Prosecutors' power is only greater relative to judges', because of judicial loss, not because of prosecutorial gain.[2] As for probation officers, I con-

** Professor Robinson wrote his Introduction in response to drafts of the articles in this Symposium. Professor Robinson was mistakenly informed by the editors that these drafts were final drafts. We apologize for this miscommunication.

1 Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1247, 1256 (1997). While they do not explicitly state their disagreement with this claim in this paper, they inform me that they do disagree with it.

2 James B. Burns et al., *We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)*, 91 Nw. U. L. Rev. 1317, 1318 (1997).

clude from Deputy Chief Whiteside's paper that, while probation officers' collected information about the facts of the offense and offender now have more direct effect than they did before the Guidelines, probation officers have no more decision making power now than they had before. Probation officers are now called upon to collect a different set of facts than previously gathered, but that task remains as administrative as it ever was.

Clearly, judges now stand in a less exalted position at sentencing than before the Guidelines, and, in particular, judges no longer have absolute power compared to prosecutors and probation officers. Still, it does not appear that either prosecutors or probation officers have assumed the lost judicial power. Rather, Congress and, more specifically, its delegate the Sentencing Commission has taken the judges' lost power.

The extent of the judicial loss also is contested. The picture Professor Stith and Judge Cabranes paint is one of judges reduced to the role of "accountants" or "notary publics"[3] reduced to mindless "minute parsing of administrative regulations"[4] from a "distant bureaucracy."[5] But, Whiteside[6] and Burns et al.[7] point out that judges continue to have considerable authority and discretion. Indeed, Whiteside gives a full accounting of the ways.[8]

The picture of judges' current sentencing power has its puzzling aspects. Professor Schulhofer and Provost Nagel document that judges do not exercise much of the authority and discretion that they do still have. Judges have the power to reject plea agreements and factual stipulations offered by the parties, but they rarely do.[9] Judges have the power to depart from the guideline's sentence range, but rarely exercise that authority.[10]

Mr. O'Hear offers another example of unused judicial authority. (This is somewhat surprising because he simultaneously follows the Yale School complaint of insufficient judicial discretion and power. More on this later.) Judges have the authority to grant or withhold the "acceptance of responsibility" reduction according to whether the offender has shown "remorse."[11] The concept of remorse is not an

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[3] Stith & Cabranes, *supra* note 1, at 1255 (quoting others with apparent approval).

[4] *Id.* at 1256.

[5] *Id.* at 1263.

[6] Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 Nw. U. L. Rev. 1574, 1591 (1997).

[7] Burns et al., *supra* note 2, at 1321-23.

[8] Whiteside, *supra* note 6, at 1593-97.

[9] Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the post-*Mistretta *Period*, 91 Nw. U. L. Rev. 1284, 1299-1301, 1303-04 (1997).

[10] *Id.* at 1298-1300.

[11] U.S. Sentencing Guidelines Manual § 3E1.1 application note 2 (1995).

objective one, of course, and under the Guidelines, pleading guilty is only of evidentiary value. The Guidelines thus call for an exercise of judgement and, inevitably, discretion by the judge. Yet, Mr. O'Hear reports that—at least in the District of Connecticut—judges typically ignore the flexibility offered by the provision and routinely grant or deny the discount according to whether the offender pleads guilty or goes to trial.[12]

One may reasonably wonder, what is going on here? Perhaps things are not so black and white as Professor Stith and Judge Cabranes suggest. Perhaps the change in judicial power is more subtle than a strict limitation on judges' sentencing discretion. Certainly, judges want more authority and discretion than they have; Professor Stith and Judge Cabranes no doubt accurately portray the judicial frustration with the changes of the past decade. If judges are not using the discretion that they do possess, then it must be because some aspect of the new system is, at a minimum, dampening a judge's inclination to exercise discretion. Professor Schulhofer and Provost Nagel present some well-supported speculation for the judicial restraint. Most importantly, judges are hesitant to depart from the Guidelines because to do so would trigger a right of appellate review, thereby exposing the district court judge to reversal, a prospect most district court judges do not relish.[13] Accordingly, judges do not reject plea agreements and factual stipulations that they can reject, and sometimes should reject, because they choose to join with the parties who have determined to circumvent the Guidelines (or statutory mandatory minimums).[14]

But this is not a scenario of powerless judges induced into labor as drone "accountants" and "notary publics."[15] Judges are choosing not to exercise power that they possess. True, their choices are heavily influenced by the system in which they operate, which includes the new threat of appellate review, but they nonetheless retain power, an awesome power, over the lives of the individuals who appear before them. The Supreme Court's recent decision in *Koon v. United States*,[16] requiring an abuse of discretion standard in the review of Guideline departures, only confirms and extends district court power. It puts the appellate courts out of the business of second guessing sentencing decisions, yet preserves their oversight function.

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[12] Michael O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1507, 1534-35 (1997).

[13] Schulhofer & Nagel, *supra* note 9, at 1300, 1302.

[14] *Id.* at 1304-05.

[15] Stith & Cabranes, *supra* note 1, at 1255.

[16] 116 S. Ct. 2035 (1996).

Consider now the prescriptive question: *Should* judges have their sentencing authority constrained in this way? What would be the best allocation of sentencing power and discretion?

The constraint described above reflects a mechanism for achieving a balance of power in which all 1000 plus federal sentencing judges have the same sentencing guidelines to work from, yet each retains the ability to depart if he or she believes the case at hand is importantly different from the range of paradigm cases envisioned by the applicable guideline. The judges cannot substitute their opinion for that of the Commission—to allow that would reintroduce the old Russian roulette sentencing system—but they can distinguish the case at hand from the cases the Commission had in mind. The threat of appellate review provides an incentive for judges to take the departure decision seriously but does not provide an obstacle where the judge feels strongly about a case. This is precisely the balance in power the drafters of the Sentencing Reform Act had in mind, of course, and in my view, it is an appropriate balance. (As a matter of full disclosure, let me note that I was Counsel for the U.S. Senate Subcommittee on Criminal Laws and Procedures during the initial drafting and processing of what became the Sentencing Reform Act of 1984.[17])

This balance of power between the Sentencing Commission and the sentencing judges is vigorously opposed by Professor Stith and Judge Cabranes.[18] The core of their argument is their view that sentencing is more than just an administrative exercise. It is an act with great moral significance.[19] I could not agree more.[20] Their message is an important one that needs saying and repeating. Indeed, I have argued elsewhere that criminal sentencing should be seen as a moral enterprise not only by the retributivists among us but by the utilitari-

[17] The antecedent bill was the Criminal Code Reform Act of 1977, S. 1437, 95th Cong. (1977). *See* S. Rep. No. 95-605 (1977). Senate bill 1437 was passed by the full Senate but was not processed by the House. Part III of the bill subsequently became the Sentencing Reform Act of 1984, enacted by the 98th Congress, Second Session.

[18] *See infra* text accompanying notes 29-33. Professor Reitz would no doubt object as well. He would prefer a greater role for the appellate judges. That is an issue of interest in those states thinking of adopting a guideline system, but it is no longer an issue in the federal system where the issue is settled. Even the important loose ends, such as that presented in the recent case of *United States v. Watts*, 117 S. Ct. 633 (1997), are resolved.

[19] Stith & Cabranes, *supra* note 1, at 1248, 1252, 1254, 1282.

[20] I do not always agree, however, with their rhetoric. For example: "[T]he Guidelines are simply a compilation of administrative *diktats*. A set of unexplained commandments may warrant unquestioning obedience if they are thought to constitute divine revelation or its equivalent (the Ten Commandments come to mind), but ordinarily not in human intercourse . . . . [We are left with] a set of rules promulgated and enforced *ipse dixit*—because the Commission says so." *Id.* at 1271-72. This is another example of the anger and frustration that I refer to later. *See infra* notes 44-47.

ans as well.[21] My difficulty with the Stith-Cabranes position is that I cannot see why they assume that only the individual federal district court sentencing judge is able to make the moral judgements that underlie a principled system of moral punishment.

Would it not be possible for a thoughtful and wise sentencing commission (for example, one consisting only of former federal district court sentencing judges) to devise guidelines built upon true principles of justice? Perhaps such guidelines would not rely so heavily on the very specific and objective criteria that form the hallmark of the current Guidelines. Perhaps these guidelines would establish the relevant factors and their relative importance in determining a just sentence, yet leave it to individual sentencing judges to determine whether and to what extent each of such factors existed in the case at hand.

Indeed, it appears this is just the way Professor Stith and Judge Cabranes see the proper judicial role. They tell us what they think "common law judges do best": "The hallmark of judging in the common law tradition is the judge's application of general principles to specific facts."[22] Yet, the truth is, they want judges to do much more. While Professor Stith and Judge Cabranes often couch their arguments in terms consistent with this judicial function, typical of judicial authority in other areas of law—"appl[ying] general principles to specific facts"[23]—a closer look at their arguments reveals they want judges to determine the general principles themselves to which the specific facts will be applied; they want judicial policy-making authority.[24]

But all of the reasons for removing such policy-making authority from individual district court judges still exist today as they did ten years ago. The arguments hardly require repeating, but let me at least flag the most obvious. Even if we could count on every sentencing judge to carefully assess the proper underlying principles applicable in every case, itself an unrealistic and impractical assumption given the press of judicial business, different judges will disagree about the underlying principles, including the purposes of sentencing both generally and in any particular case. Therefore, different judges will give different sentences in identical cases. The result is a system where an offender's sentence is no longer the product of the offense and the offender characteristics, but a product of who the judge happens to be.

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[21] Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 475-77, 496-97 (1997) [hereinafter Robinson & Darley, *The Utility of Desert*]; *see also* Paul H. Robinson & John M. Darley, Justice, Liability, and Blame 201-15 (1995).

[22] Stith & Cabranes, *supra* note 1, at 1255.

[23] *Id.*

[24] *See infra* text accompanying notes 29-33.

Such differences in sentencing philosophy have been confirmed by a number of studies of sentencing judges. In one study, a survey of federal judges revealed that

> [w]hile one-fourth of the judges thought rehabilitation was an extremely important goal of sentencing, 19 percent thought it was no more than "slightly" important; conversely, about 25 percent thought "just deserts" was a very important or extremely important purpose of sentencing, while 45 percent thought it was only slightly important or not important at all.[25]

Studies also confirm that these differences in philosophy do indeed translate into different sentences. One study done by the judiciary gave 50 judges the same 20 cases to sentence. The differences among the judges' sentences were staggering: "In one extortion case, for example, the range of sentences varied from 20 years imprisonment and a $65,000 fine to three years imprisonment and no fine."[26]

This same disparity is reflected in the sentences given every day in actual cases. One pre-Guideline study compared the sentences imposed in the different federal circuits. As just one example of what it found:

> [t]he range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit.[27]

Disparity in sentencing is a source of great unfairness, and that unfairness can bring the criminal justice system into great disrepute. As the Senate report on the reform legislation concludes:

> Sentencing disparities . . . are unfair both to offenders and to the public. A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public. Such sentences are unfair in more subtle ways as well. Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add to disciplinary problems in the prisons.[28]

The Sentencing Reform Act calls for a system in which a centralized commission shares power with sentencing judges. The Commis-

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[25] S. Rep. No. 98-225, at 41 n.18 (1983) (citing INSLAW, Inc. et al., Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions III-4 (1981).

[26] *Id.* at 44.

[27] *Id.* at 41 n.21 (quoting Whitney North Seymour, Jr., *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. St. B.J. 163, 167 (1973)).

[28] *Id.* at 45-46.

sion sets a single sentencing policy; the judges apply that policy to the facts of the individual case. That application depends upon judges with wisdom and good judgement. The Commission determines the relative importance of a particular factor but it is the judge who determines whether that factor exists, and, if so, to what degree.

Professor Stith and Judge Cabranes disparage this balance of power, for it is in truth policy-making authority that they seek for judges. Though early in their paper they talk of judges "appl[ying] general principles to specific facts,"[29] their specific points make their intentions clear. They complain that, under the Guidelines, "very rarely does a federal court have the opportunity to address larger issues of penal philosophy"[30] and that "there is almost no discussion [by judges] of the purposes of sentencing generally."[31] They complain that judges "have been denied the opportunity to develop a principled sentencing jurisprudence."[32] They want judges to contribute "to our understanding of crime and punishment and the evolution of the criminal law."[33]

Professor Stith and Judge Cabranes are right, I think, in their criticism that the Guidelines are sometimes too objective and specific in their criteria, to the point that specific criteria no longer accurately represent the concept they were designed to reflect. I argued many years ago that this flaw violates an important drafting principle for a guideline system:

> *Use Conceptual Criteria If Needed To Capture the [Sentencing] Factor Fully.* While specific and objective criteria should be used if possible, the system should use more conceptual or judgmental criteria if necessary to capture fully the concept of the factor.[34]

The use of more general concepts admittedly allows judicial discretion that may yield disparity among judges, but at least the potential disparity is limited. Thus, its effect on the ultimate sentence is minimized.

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[29] Stith & Cabranes, *supra* note 1, at 1255.

[30] *Id.* at 1270.

[31] *Id.*; *see also id.* at 1264.

[32] *Id.* at 1248. They complain that "both sentencing judges and appellate judges" have been denied this opportunity. *Id.*

[33] *Id.* at 1275.

[34] Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 21 (1987). Similarly, a guideline system should:

> *Use Only Meaningful and Distinguishable Categories.* When variations in a [sentencing] factor are irrelevant or when the value of a factor cannot be defined in a way that allows small variations, use only the number of categories that are meaningful and can be reasonably distinguished.

Id. at 20. This has not always been my view. My dissent to the federal guidelines complained of some vague terms that I now find tolerable, even useful. Other vague terms, such as that contained in the "analogous guideline" provision, I continue to think unwise.

The Guidelines do not always use too specific and objective criteria. For example, the Guidelines have a well crafted "role in the offense" adjustment. The provision requires the offender's "role in the offense" to be taken into account and establishes the factor's relative weight, but calls upon judges to use their wisdom, good judgement, and experience, in assessing the degree of an offender's role in the offense. This is not a judgment we would trust to an "accountant" or a "notary public." Determining the extent of a particular offender's involvement, as compared to the involvement of other offenders in other cases, requires good judges and gives judges real power. While it increases the potential for disparity, it also increases the probability of a proper result. More specific criteria would distort the concept and permit questionable results.

It is puzzling, then, to learn that Professor Stith and Judge Cabranes specifically criticize these aspects of the Guidelines. The "role in the offense" adjustment, for example, they blast as nebulous.[35] Ironically, they call for greater judicial discretion in determining the ultimate issue of which sentence constitutes "justice," as if the discretion in determining the much grander concept of "justice" is less nebulous.

Mr. O'Hear's paper provides another example of this internally inconsistent view. He apparently agrees with Professor Stith and Judge Cabranes, at least in the view that the wisdom and experience of judges ought to be given greater deference. He claims to want the Guidelines drafted "with a closer eye to actual district court experiences."[36] But consider his proposal. Sentencing judges before the Guidelines certainly saw an offender's remorse or lack thereof as a relevant factor in sentencing, and regularly acted upon that view. Yet, Mr. O'Hear disapproves of the Guidelines' use of the concept of remorse. His reason: "remorse" is too vague a term for judges to apply.[37] He proposes a two-part substitute. The first part is a discount based on more objective criteria that looks to whether the offender actually pled guilty or not. (The second part is a discount that looks to whether the defendant's post-offense conduct "facilitates the efficient and fair administration of the criminal justice system,"[38] as if that were a noticeably clearer and more easily applied standard.) The effect of the proposal, of course, is to drop from sentencing the concept of "remorse," a concept taken directly from the experience of sentencing judges.

Before the reader concludes that I disagree with all that Professor Stith and Judge Cabranes have to say, let me hasten to add that I am

35 Stith & Cabranes, *supra* note 1, at 1266.
36 O'Hear, *supra* note 12, at 1572.
37 *Id.* at 1544.
38 *Id.* at 1560.

sympathetic to their central claim: the Federal Guidelines do not succeed in setting sentencing rules that are principled and just. This was the central task of the Commission, and it could and should have been done better. My dissent to the Guidelines makes clear my specific indictments, which I will not repeat here.[39]

Professor Stith and Judge Cabranes are also correct in claiming that this failure of the Guidelines makes judges less willing to adhere to the Guidelines. As I have put it elsewhere, the Guidelines have no "moral credibility" with judges.[40] I believe Professor Stith and Judge Cabranes would agree. The Guidelines rule by force, not by respect or reputation. But, I do not accept Professor Stith and Judge Cabranes' claim that the only road to moral credibility in sentencing lies in giving individual sentencing judges discretion to administer justice as they see it. The Guidelines' lack of moral credibility, and the resulting incentive for circumvention, is the second theme of the papers that I think worth exploring further.

II. The Circumvention Problem

Professor Schulhofer and Provost Nagel provide excellent documentation of sentencing judges' circumvention of the Guidelines, and the mechanisms by which this is accomplished.[41] They complain of judges (and prosecutors) refusing to apply the Guidelines in good faith,[42] and offer a variety of proposals to avoid or reduce such circumvention.[43] While their analysis is sound and many of their proposals worthwhile, ultimately, I fear, they are overly optimistic, for reasons that the Stith-Cabranes paper makes clear: the Guidelines are seen as mechanistic and unprincipled. They have a serious credibility problem with many sentencing judges.

The Stith-Cabranes paper gives a clear sense of the frustration and even anger that the Guidelines provoke. One feels the emotion in the choice of language in their paper, presumably arising in part from the daily frustrations of Judge Cabranes. After recounting a list of Guideline flaws, the paper concludes that these will "ensure [the

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[39] Dissenting View of Commissioner Paul H. Robinson to the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18,121 (1987) [hereinafter Dissenting View].

[40] Paul H. Robinson, *Moral Credibility and Crime*, Atlantic Monthly, Mar. 1995, at 72. For a discussion of the importance of the system's moral credibility, see generally Robinson & Darley, *The Utility of Desert*, *supra* note 21.

[41] Schulhofer & Nagel, *supra* note 9, at 1285, 1289-94.

[42] *Id.* at 1301. As Whiteside and others note, much of the motivation for the circumvention comes from dissatisfaction with mandatory minimums. *See* Whiteside, *supra* note 6, at 1578-79. But as Professor Schulhofer and Provost Nagel point out, once circumvention begins, it spills over into other areas. Schulhofer & Nagel, *supra* note 9, at 1312-13.

[43] Schulhofer & Nagel, *supra* note 9, at 1313-16.

Guidelines'] lasting *insignificance*."[44] Elsewhere, they conclude the Guidelines have transformed the "venerable ritual of sentencing into a puppet theater"[45] and that the Guidelines provide "soulless processing and bureaucratic penalization."[46] Instead of controlling the parties and the sentence, judges at sentencing hearings now feel "awkward" and "embarrass[ed]."[47]

No simple manipulation of the current Guidelines system will avoid this anger and frustration. The Guidelines must be reworked to bring them moral credibility with the judges. No doubt part of the anger is caused by the ego adjustment the new system requires of sentencing judges, a group not prone to acquiescent manipulation. But, the members of this same group, sitting face to face with the persons to be punished, no doubt have strong feelings about the importance of doing justice. Whatever the effect on the egos of judges, guidelines that manifestly seek to do justice are guidelines that judges would, however reluctantly, embrace.

Can the Commission make a good case that their Guidelines are well calculated to do justice? Their rigidity and excessive detail, of which many complain, do not help in this effort. But, even if those structural issues were remedied, could one persuasively argue that the Guidelines are calculated to do justice? The Guidelines' well known birth process makes such a claim implausible. As I describe in my dissent, the Commission did not deduce sentencing guidelines from principles of justice, or logical principles of any sort. The Sentencing Reform Act took judges out of the sentencing philosophy business so that a single, centralized authority—the Commission—could sort through the competing arguments and come to a single conclusion on sentencing philosophy for a given case. But, the Commission never undertook this analysis. Instead, it based its sentences on mathematical averages of past practice of federal sentencing judges, with minor and equally irrational adjustments.[48]

The effect of this foundation of the Guidelines is that no one, Commissioner or judge, can give an explanation for any Guideline sentence other than to say that the sentence is what has been done in the past, or, worse, that the sentence is the mathematical average of what has been done in the past. As I argued in my dissent, such mathematical averaging often ensures irrational sentences.[49] Judges may have disagreed, for example, whether it is best to give drug users who sell to support their habit a purely rehabilitative, nonprison sentence

44 Stith & Cabranes, *supra* note 1, at 1270 (emphasis in original).

45 *Id.* at 1263.

46 *Id.* at 1254.

47 *Id.* at 1264; *see also supra* note 20.

48 *See* Dissenting View, *supra* note 39, at 18,122.

49 *Id.*

to a drug treatment program, or whether it is better to give a long prison term to provide a dramatic deterrent. Both approaches have a logic and can be rationally defended. The same cannot be said for a mathematical average of the two, which may be too short for the dramatic deterrent and yet not provide the drug rehabilitation.

Burns et al. seem to approve of the mathematical averaging because its continuation of past practice made the transition to the Guidelines much less eventful than it might otherwise have been.[50] This, of course, was its attraction to the drafters, who at the time were worried about political opposition to the Guidelines. The Commission politicos reasoned that, while it might not be the most inspiring approach, the status quo element of mathematical averaging would limit the strength of opposition to the Guidelines. How could anyone get too worked up if what was being done was primarily a continuation of past practice? Perhaps the Guidelines would not provide the historic breakthrough that the Sentencing Reform Act had dared to hope for, but not making an historic breakthrough is hardly grounds for political revolt.

It may well have been that the Commissioners who took this view were right in their political assessment and that I was wrong. Perhaps any other approach would have fueled a political attack on the vulnerable infant Guidelines. But, the chickens have come home to roost. The infant has grown to be a less than inspiring juvenile, handicapped by its ill-considered creation. The Guidelines have survived, but in a form that risks a long-term if not permanent disrespect arising from their lack of principle.[51]

How can the lack of principle be repaired, then, if it is essential to establishing the moral credibility of the Guidelines? Not easily. All of the difficulties that faced the original Commission still exist, particularly the difficulty of deciding among conflicting sentencing purposes and drafting guidelines that logically follow from the sentencing purposes sought to be achieved. The easy confusion in thinking about sentencing philosophy is as prevalent now as it was ten years ago.

An example is provided by the Stith-Cabranes paper. The paper contains grand accolades about sentencing as a moral exercise of the greatest symbolic importance. The authors speak of "our society's belief that the justification of punishment rests on a moral judgement about an individual."[52] Yet, we learn later in the paper that the authors consider general deterrence and incapacitation as legitimate sen-

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50 Burns et al., *supra* note 2, at 1323-24.

51 Professor Cole's insightful paper explains that even the much vaunted and heavily used concept of "disparity" has no content independent of the underlying purposes sought to be achieved. Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 Nw. U. L. Rev. 1336, (1997).

52 Stith & Cabranes, *supra* note 1, at 1282.

tencing purposes that should be taken into account.[53] They speak eloquently of the moral significance of sentencing.[54] It is hard to understand how sentencing an offender to a sentence that will provide a powerful deterrent to others, if it is more than the offender deserves for the offense, can satisfy the moral mission of sentencing. Nor will moral credibility be established by sentencing an offender to a longer term than deserved because he is seen as dangerous. The same can be said for sentences shorter than an offender deserves, based upon findings that general deterrence or incapacitation are not needed.[55] The Stith-Cabranes use of general deterrence and incapacitation as sentencing purposes means their system cannot have the moral credibility they tell us is so important to sentencing.

As noted above,[56] I have argued elsewhere that even good utilitarians ought to prefer a desert distribution of liability and punishment (or at least a distribution of liability according to principles based upon shared community perceptions of desert). Such a distribution will maximize the system's moral credibility and, thereby, harness the powerful social forces that have much greater influence over individual conduct than the threat of official punishment. Such a desert distribution has deterrent and incapacitation effects, which can and should be enhanced in selecting the *method* in which punishment is to be imposed. But, for moral credibility, the *amount* of punishment must be a function of what the offender deserves, no more, no less.

If this view is accepted, the conflict among sentencing purposes is avoided and the Guidelines need only do one thing: generate a sentence that follows those intuitive principles of justice shared by the community. If the arguments for the utility of desert are not accepted, then drafters must undertake the more complex task of defining the interrelationship of the alternative purposes. This is a difficult task but not an impossible one, as I have explained in some detail elsewhere.[57] If the Guidelines are to gain credibility as principled and as doing justice in the eyes of those called upon to apply them, they must be based upon thoughtful analysis, not the politically pragmatic but unprincipled foundation upon which they currently rest.

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53 *Id.* at 1270.

54 *E.g.*, *id.* at 1252.

55 If Professor Stith and Judge Cabranes would respond by suggesting that the system use multiple purposes but that it defer to desert in any instance in which another purpose conflicts with it, they are essentially rendering the other purposes meaningless, which is not what their paper suggests is their view.

56 *See supra* note 21.

57 *See* Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 Nw. U. L. Rev. 19 (1987).

III. The Factors to be Taken Into Account in Sentencing

As the Cole paper and the previous discussion make clear, the factors that should be taken into account in sentencing depend upon the purposes that are to be achieved. I have elsewhere reviewed how different purposes require different factors be taken into account.[58] But even if the purposes question were resolved, there remains another central question that must be answered, the question taken up by Professor O'Sullivan, to which Professor Yellen has responded.

Professor O'Sullivan argues for considering all evidence relevant to assessing the appropriate sentence for the offense for which the offender is being sentenced; in other words, she defends the current Guidelines provision. Professor Yellen attacks such "real offense" sentencing, as it is called, as unfair. In particular, he objects to using conduct that constitutes another offense or makes the charged offense a more serious grade. He is particularly adamant about the impropriety of using evidence of conduct for which the jury has found the defendant "not guilty." We now know that even this most extreme practice is not unconstitutional,[59] but that in itself does not answer Professor Yellen's claims.

Professors O'Sullivan and Yellen agree that the goal of real-offense sentencing is to avoid shifting sentencing power to the prosecutor through charge and plea manipulation.[60] Mr. Burns et al. seem to have shown that the Guideline approach is successful in that respect. Avoiding this shift of power, the professors note, also has the effect of avoiding the disparity that results as different prosecutors in different situations make different decisions.[61] (Of course, this conclusion must be qualified by Professor Cole's observations about the meaninglessness of "disparity" in the absence of established sentencing purpose.)

What Professors O'Sullivan and Yellen disagree about is the relative importance of avoiding such disparity as compared to the unfairness of basing a sentence on conduct for which the offender has not been convicted. Professor Yellen argues that the unfairness is worse, and, in any case, many of the potentially undesirable effects of the offense-of-conviction sentencing that he prefers can be reduced by closer control of prosecutorial conduct.[62] One response to this debate is to point out that, like many others, it is not, in one sense, a dispute about the Guidelines. The practice of real-offense sentencing was the standard practice of individual sentencing judges before there

58 *Id.*

59 *See* United States v. Watts, 117 S. Ct. 633 (1997).

60 Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 Nw. U. L. Rev. 1342, 1347 (1997); David Yellen, *Just Deserts and Lenient Prosecutors*, 91 Nw. U. L. Rev. 1434, 1435 (1997).

61 O'Sullivan, *supra* note 60, at 1346-47; Yellen, *supra* note 60, at 1435, 1438.

62 Yellen, *supra* note 60, at 1438-39.

were guidelines. Further, the practice was institutionalized quite some time ago by the U.S. Parole Commission when it adopted parole release guidelines.[63] I have some sympathy for Yellen's position, especially his opposition to use of conduct for which the offender has been acquitted. While the practice may be constitutional, it does degrade the system's moral credibility in the eyes of the public. But, I fear, Professor Yellen overstates his case. He prefers calling the practice "alleged-related offense sentencing." But there is nothing "alleged" about the related conduct that affects the offender's sentence. It must be proven at a hearing before an impartial judge with a defense counsel who has full capacity to cross-examine and present contrary evidence. The conduct need only be proven by a preponderance of the evidence, rather than beyond a reasonable doubt, but the former is a standard of proof we have accepted in fact-finding proceedings other than criminal trials. Applying Professor Yellen's terminology, after a civil trial and the imposition of civil liability, one could only say that there has been an "alleged" civil wrong.

The dispute reduces to this: Is it justifiable to have factual issues beyond the offense definition determined by a judge rather than a jury and by a preponderance standard rather than beyond a reasonable doubt? My own view is that the reason for the jury determination and the higher standard is to protect the system's moral credibility. When the law points the finger of criminal liability at a person, we want the community to have full faith in that conclusion. Even though the reasonable doubt standard has a significant cost in letting off people who are in fact deserving of punishment, the high standard is justified because anything less undercuts the criminal law's usefulness as a moral authority.[64] Once the higher standard has been met in determining liability, however, is it the case that the same danger exists if the same standard is not also used in sentencing? I think the answer to this question is less clear. As long as we are sure that a person has done something deserving of punishment, and have a general sense of the seriousness of the offense, it is probably enough to maintain the system's credibility that the precise amount of punishment is based upon good faith findings by an impartial judge; the reasonable doubt standard is unnecessarily demanding in this context. But, this conclusion, I admit, is simply my own speculation of what is and is not required to ensure the system's moral credibility with the community.

It should be noted that this shift of the standard of proof is essentially current practice. The beyond a reasonable doubt standard is not

63 28 C.F.R. §§ 2.19-2.20 (1996). It was in that context that the issue was first litigated. See authorities collected at Russell G. Donaldson, Annotation, *United States Parole Commission Guidelines for Federal Prisoners*, 61 A.L.R. Fed. 135, 189-92 (1983 & Supp. 1996).

64 For an elaboration on this usefulness, see Robinson & Darley, *The Utility of Desert*, *supra* note 21.

in fact limited to the liability determination. It also governs the first half of the amount-of-punishment decision, the grading decision. We shift to the preponderance standard only after determining, beyond a reasonable doubt, the general ballpark of seriousness. Indeed, the Guidelines use the "relevant conduct" provision, of which Professor Yellen complains, to do less than this. The Guidelines do not allow free movement within the ballpark, but provide for specific adjustments in specific situations; they allow the runner to advance to first base if hit by a pitched ball, etc. On balance, while I still worry about the adverse public relations effect of using conduct for which the offender has actually been found "not guilty," I cannot conclude, as Professor Yellen does, that the use of relevant conduct is either unfair or unwise.

Conclusion

As is apparent from my comments here, I have mixed emotions about the Federal Sentencing Guidelines. They are flawed and deserve much of the criticism they have received. I am no less persuaded of this today than I was ten years ago this month when I wrote my dissent. Indeed, much of what I complained of in that dissent has proven to be true. The historic opportunity was missed to introduce a system of which we could all be proud for its ability to bring justice to more cases than ever before.

On the other hand, the Guidelines have also received criticism they do not deserve. Frequently, the Guidelines' application demonstrates an admittedly serious problem, but one that is not of the Guidelines' making and is beyond solution by the Commission. Such is the case with statutory mandatory minimum sentences, which the Commission has always opposed. At other times, the criticism, while directed at one or another aspect of the Guidelines, in reality is an attack on the entire concept of guidelines, by persons who have opposed the idea from its inception, who have hoped the Guidelines would fail, and who have done what they could to bring that about.

No doubt some of my defense of the Guidelines is akin to the parent who is highly critical of a child but somehow offended at other's criticism. Discount my views accordingly. But, nothing in the last ten year's experience has dissuaded me from believing in the vision of comprehensive and just sentencing guidelines advanced by the Sentencing Reform Act. The feasibility of that vision makes the aborted attempts at principled drafting by the Commission all the more unfortunate, but it also means there is hope that the next ten years might see the vision realized.