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FEDERAL SENTENCING GUIDELINES: A CURE WORSE THAN THE DISEASE

Gerald F. Uelmen*

Judge Heaney's compelling critique of the Federal Sentencing Guidelines finds resonance in the Ninth Circuit. The deep level of dissatisfaction with the Guidelines in this circuit was reflected in a resolution adopted by the 1991 Ninth Circuit Judicial Conference in Maui, Hawaii. The resolution urged the Judicial Conference of the United States to recommend that Congress make the Sentencing Guidelines permissive and non-binding. The resolution was approved by a vote of 172 to 28, with eighty-five percent of the judges in attendance voting in its favor.¹ A highly respected district judge of the circuit, Judge J. Lawrence Irving of San Diego, recently announced his retirement from the bench with a searing critique of the Federal Sentencing Guidelines. In his view, the Guidelines required him to impose sentences that were irrational: "If I remain on the bench, I have no choice but to follow the law. I just can't, in good conscience, continue to do this."²

I recently had occasion to moderate a panel discussion of the Federal Sentencing Guidelines at the University of San Diego Law School³ and encountered an enormous sense of frustration among the one hundred lawyers and judges participating. There is a widespread and pervasive feeling that no one is listening in Washington, and that urgent demands for Guideline reforms are simply being ignored. Those who created the Guidelines are so wedded to their tenacious defense that they remain oblivious to the systemic dissonance they have created. The Federal Sentencing Commission, and the Congress which created it, simply are not getting the message, although the message could not be clearer: Your cure is worse than the disease.⁴

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1. 9TH CIRCUIT NEWS, CONFERENCE EDITION, Fall 1991, at 4.

2. Alexander Wohl, *The Calculus of Rationality*, A.B.A. J., Jan. 1992, at 37, 39.

3. Panel on Federal Sentencing Guidelines: A Revolution in Criminal Justice, held by the University of San Diego School of Law (Nov. 23, 1991).

4. PUBLIUS, MAXIM 301: "There are some remedies worse than the disease." Cf. PLUTARCH, LIVES, CAIUS MARIUS: "I see the cure is not worth the pain"; FRANCIS BACON, ESSAYS, OF SEDITIONS: "The remedy is worse than the disease"; FRANCIS BEAUMONT AND JOHN FLETCHER, LOVE'S CURE, act III, §

Like Judge William W. Wilkins, Jr.,⁵ I "grew up" under the old system of unlimited judicial discretion with regard to imposing sentences within statutory limits. I served as an Assistant U.S. Attorney in the Central District of California from 1966-1970, participating in federal sentencing proceedings for hundreds of criminal defendants. Since 1970, I have combined my academic career with frequent appearances on the side of the defense in criminal cases, often in federal court. I probably exercised greater power over the lives of others as a federal prosecutor than I have in any position since. I exercised it at a time in my life when I was least prepared to do so, to the extent that life experience, maturity, humility, and thoughtful reflection prepare one to exercise power over the lives of others. Still, ultimate power resided in the hands of the judges who imposed the final sentence. The task of fashioning an appropriate sentence called for an exercise of discretion I have always regarded as the zenith of the judicial craft. With rare exceptions, the men and women who exercised that discretion were eminently equipped to do so. Granted, the results were not completely predictable, but great disparity was the exception rather than the rule.

My experience suggested that a bank robber in Los Angeles was less concerned about his sentence being greater than the sentence imposed on a bank robber in Dallas, than he was about his sentence being greater than the co-defendant in the same case, who talked him into participating in the robbery. Disparity is dissipated by distance. Proportionality is most essential when it is coterminous. The task of apportioning justice based on the relative culpability of co-defendants in the same case is where the rubber hits the road in sentencing. That task was generally managed quite well by judges under the "old system." The Federal Sentencing Guidelines, quite simply, take that task away from judges and turn it over to prosecutors. Prosecutors, I would contend, are ill-equipped to perform the ultimate function of apportioning justice among the plethora of defendants who play varying roles in the typical criminal enterprises prosecuted in federal courts today.

An example of such a typical enterprise was recently utilized for a Ninth Circuit Sentencing Institute.⁶ It involved three co-defendants in a cocaine distribution scheme. Adams is the supplier, Baker a distributor, and Carter a messenger. All three are arrested during the sale of 550 grams of cocaine to an undercover agent, after a prior sale of 56.7 grams. An automobile is seized at the time of the arrest, and a loaded pistol is found in the glove

ii: "I find the medicine worse than the malady."

5. Judge William W. Wilkins, Jr., Sentencing Guidelines Debate at the Georgetown University Law Center (Nov. 13, 1991) (Judge Wilkins debated Judge Heaney, the former supporting the Guidelines).

6. FEDERAL JUDICIAL CENTER, ILLUSTRATIVE CASES: FOR DISCUSSION AT THE NINTH CIRCUIT SENTENCING INSTITUTE, Case 2 (Sept. 29, 1991).

compartment.

Adams, the supplier, is a twenty-eight year old college graduate who has supported a luxurious lifestyle through dealing in drugs. He cuts a deal to plead guilty to possession of 500 grams or more for distribution. Based on his cooperation in providing information about his sources of supply, the prosecution moves for a sentence below the mandatory minimum and below Guidelines,⁷ and recommends a sentence of eighteen months.

Baker, a twenty-one year old addict and street dealer, goes to trial and is convicted by a jury. He has three prior convictions for relatively minor offenses. Including adjustments for being an "organizer"⁸ and for possessing a weapon,⁹ he faces a sentence under the Guidelines at level thirty, from nine years to eleven years and three months.

Carter is a twenty-two year old addicted prostitute, whose role in the offense was limited to conveying telephone messages. She pleads guilty to the transaction involving 56.7 grams of cocaine. Because of prior prostitution convictions, she falls into Criminal History Category IV. Since the full amount of drugs in both transactions must be utilized as the "relevant conduct,"¹⁰ she faces a Guideline sentence of five years and three months to six years and six months, even if she is given reductions for "minimal" participation in the offense¹¹ and acceptance of responsibility.¹²

Thus, the addicted prostitute who took telephone messages goes off to federal prison for five or six years, the addict street dealer gets at least nine years, while the sophisticated supplier who organized the enterprise ends up with an eighteen-month sentence.

We used this example at the San Diego symposium, and it was fascinating to watch the participating judges squirming to find some way to manipulate the Guidelines to achieve a more just result. No one disagreed that sending Baker and Carter away for longer terms than Adams was an injustice, but no one could come up with a plausible way to reverse that result. With prosecutorial contrivance, much could be accomplished, however. That's the whole point. Under the "old system," judicial discretion could be relied upon to accomplish justice. Fifty seasoned trial judges would not come out very differently on this case. I am confident none of the fifty

7. See 18 U.S.C. § 3553(e) (1988) (providing courts with limited authority to depart from statutory minimums); UNITED STATES SENTENCING GUIDELINES § 5K1.1 (1987) (defendant's substantial assistance to authorities is valid reason to depart from the Guidelines) [hereinafter GUIDELINES].

8. GUIDELINES, *supra* note 7, § 3B1.1.

9. GUIDELINES, *supra* note 7, § 2D1.1.

10. See *United States v. Rosales*, 917 F.2d 1220, 1223 (9th Cir. 1990) (defendant's claimed knowledge of amount of drugs, which was less than the actual amount, was irrelevant in determining offense level); *United States v. Sailes*, 872 F.2d 735, 738 (6th Cir. 1989) (court viewed son's aiding and abetting part of cocaine business as aiding and abetting entire business).

11. GUIDELINES, *supra* note 7, § 3B1.2.

12. GUIDELINES, *supra* note 7, § 3E.

would conclude that Carter deserved to spend four times as long in jail as Adams. Under the Sentencing Guidelines, the judges would have little choice in the matter. The prosecutor would. And fifty seasoned prosecutors would certainly include more than a few who would rigidly enforce the Guidelines while giving the most culpable defendant a pass.

There is one aspect of the Federal Sentencing Guidelines that I would regard as an improvement over the "old system": the availability of appellate review. Judge Wilkins, however, implies that appellate review and rigid mandatory guidelines go hand in hand. This is not necessarily so. Many jurisdictions have achieved a higher level of consistency in sentencing by allowing appellate review of sentences in the context of a system retaining broad discretion for the sentencing judge.¹³

Most of the sentencing appeals currently flooding the federal courts do not even address the underlying problem of disparity in sentences. They are exercises in nitpicking over the ambiguities which riddle the Guidelines themselves.¹⁴ The judgments that make the biggest difference to the defendant, such as whether the defendant was "contrite," or played a "minor" role in the offense, get short shrift from appellate judges.¹⁵ A rational system of appellate review of the exercise of sentencing discretion does not depend upon the existence of the Federal Sentencing Guidelines. The Guidelines generally serve to misdirect appellate resources and exacerbate the problem of sentencing disparity.

The problem of sentencing disparity is not unique to the federal criminal justice system. Only the federal system has produced a solution which outweighs the Manhattan telephone directory, however. It is a classic example of overkill which denigrates the federal judiciary. Why is there greater need to limit and control the relative weight of every conceivable factor that might impact upon a federal judge's discretion? The effect has been to reallocate judicial resources to minutiae and to relegate advocacy to the manipulation of computer programs. In one recent California case, counsel tied up a federal courtroom for three days to litigate the issue of whether a defendant convicted of a firearms offense was a "collector" of firearms.¹⁶ Both sides summoned expert witnesses. The issue was of great consequence to the defendant, since a favorable finding would result in a four level re-

13. See ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences* (Approved Draft 1968) (Appendix A collects the statutory provisions for appellate review of sentences of thirteen states).

14. See Wichlens, *Appealing a Federal Guideline Sentence: The Final Frontier*, THE CHAMPION (National Assoc. of Crim. Def. Lawyers), Jan./Feb. 1992, at 34.

15. See *United States v. Carroll*, 893 F.2d 1502, 1511-12 (6th Cir. 1990) (district court's determination that defendant did not accept responsibility for his actions when he entered a guilty plea in the face of almost certain conviction was not clearly erroneous).

16. *United States v. Tuttleman*, C.R. 89-20099 (N.D. Cal. 1990).

duction in the offense level.¹⁷ A whole body of appellate case law is now developing around the issue of who is a firearms "collector."¹⁸ Judge Wilkins would argue that this is an improvement over the old system, where a judge wouldn't even articulate what difference it made in the sentence whether the defendant was a "collector" or not. It is not fair to ask whether we were not better off leaving judges a spectrum of discretion to address a question such as this? "Collectors" come in all shades. A fairer sentence might result from a process in which the judge does not have to resolve a factual dispute "yes" or "no," but can simply give it the weight he or she deems appropriate. Apart from the question of fairness, there is a question of simple efficiency. The more factual findings we require to support a sentencing determination, the more judicial resources we will consume in resolving them, at both the trial and appellate levels.

While it may be impertinent to suggest that infused wisdom does not begin and end inside the Capital Beltway, there may be some valuable lessons to be learned from the sentencing systems developed by many states. While the California system of determinate sentencing is far from perfect, it has achieved a high level of consistency within a relatively simple and understandable system. A judge is given a choice of three sentences for each offense with the presumption that the middle level will ordinarily be utilized. The factors that produce adjustments up or down under the Federal Guidelines are broadly categorized in the California system as aggravating or mitigating factors. A California sentencing judge is simply called upon to hear and weigh these factors. If aggravating factors outweigh mitigating factors, the upper level sentence is imposed.¹⁹ If mitigating factors outweigh aggravating, the lower level sentence is imposed. No one needs a slide rule, and disparity is kept within manageable parameters. Judge Wilkins suggests that we compare the Federal Sentencing Guidelines to the "old system" they replaced, rather than comparing them to some "perfect" system. I would suggest we look to the fifty states comprising the "laboratories" of our federal system. We will find several examples of rational sentencing systems that preserve judicial discretion while controlling unwarranted disparity. And they accomplish these goals without creating a monstrous bureaucracy to crank out regulations, amendments and charts at

17. GUIDELINES, *supra* note 7, § 2K2.1(b)(1).

18. See *United States v. Buss*, 928 F.2d 150, 152 (5th Cir. 1991) (former felons cannot possess firearms even for recreation or collection, although they can legally use firearms for same); *United States v. Prator*, 939 F.2d 844, 846 (9th Cir. 1991) (felons are entitled to reductions when their possession of firearms is for sport or recreation); *United States v. Smith*, 914 F.2d 250 (4th Cir. 1990); *United States v. Dinges*, 917 F.2d 1133, 1135 (8th Cir. 1990) (in light of Bureau of Alcohol, Tobacco and Firearms' ban on assault rifles, court determined that possession of assault rifle is not for sport or collection).

19. CAL. PENAL CODE § 1170 (West 1990).

a faster rate than the Internal Revenue Service.

Finally, Judge Heaney's study verified the problem of racial disparity prevalent under the Guidelines. I strongly suspect that this trend is a national phenomenon, not confined to the federal system at all. Here in California, a recent "Blue Ribbon" Commission on our prison inmate population revealed that the racial composition of our burgeoning prison population has changed dramatically in the past decade. In 1981, the prison population in California was thirty-six percent white and sixty-four percent minority. In 1989, after the total prison population nearly tripled, the proportions were thirty percent white and seventy percent minority.²⁰

What this data suggests to me is that the current "drug war" which is filling our prisons at unprecedented rates is a war with serious racial undertones. The heaviest sentences are going to the addicts and street dealers who belong to racial minorities. The Federal Sentencing Guidelines, while facially neutral, contribute to this process in some insidious ways. For example, in setting the base offense levels for various categories of drugs, the guidelines create a one hundred to one ratio between "crack" cocaine and ordinary cocaine.²¹ This means that the Guideline sentence for a white defendant selling one ounce of powdered cocaine on Long Island is level fourteen (fifteen to twenty-one months) while the Guideline sentence for a black defendant selling one ounce of "crack" cocaine in Harlem is level twenty-eight (seventy-eight to ninety-seven months), assuming neither have prior convictions. The Guidelines do not distinguish between white and black defendants, but sociologists and criminologists will verify that use and distribution patterns for "crack" cocaine closely track inner city ethnic and racial lines, just as do distribution patterns for many other drugs.²² The federal courts have generally upheld the Guidelines distinction,²³ but the Federal Sentencing Commission should take little comfort from the fact that its distinctions survive the minimal scrutiny of a "rational basis" test. Perhaps it is time for the Commission to look beyond the media drug hype²⁴ and start looking at the actual impact of the sentencing distinctions

20. STATE OF CALIFORNIA. BLUE RIBBON COMMISSION ON INMATE POPULATION MANAGEMENT. FINAL REPORT 30 (1990).

21. GUIDELINES, *supra* note 7, § 2D1.1(a)(3).

22. See, e.g., Michael Z. Letwin, *Report From the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 809-16 (1990).

23. *United States v. Thomas*, 932 F.2d 1085, 1096 (5th Cir. 1991) (distinction between crack and cocaine passes the rational basis test because crack is arguably stronger and more addictive than cocaine); *United States v. Pickett*, 941 F.2d 411, 418 (6th Cir. 1991) (same); *United States v. Turner*, 928 F.2d 956, 960 (10th Cir. 1991) (same); *United States v. Buckner*, 894 F.2d 975, 978-79 (8th Cir. 1990) (same); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C.Cir. 1989) (same); *State v. Russell*, 447 N.W.2d 886 (Minn. 1991) (striking down statutory distinction between crack and cocaine under Equal Protection Clause of State Constitution).

24. See ARNOLD S. TREBACH, *THE GREAT DRUG WAR* 5 (1987); Gerald F. Uelman, *When Supreme*

they created. Judge Heaney's evidence of racial disparity may reflect a complex variety of factors, but one of those factors is certainly the impact of classifications and distinctions among drugs created by the Federal Sentencing Guidelines.

The Federal Sentencing Guidelines are another sad example of the all too common American phenomenon of constructing remedies that are worse than our diseases. The disease of drug addiction, for example, has spawned a law enforcement/drug testing complex that puts the military/industrial complex to shame.²⁵ The "complex" has become self-perpetuating, investing as much energy and effort in preserving and justifying itself as in fighting the disease that led to its creation. The problem of sentencing disparity under the "old system" was hardly deserving of characterization as a "disease." It was more like a persistent case of athlete's foot. To eradicate it, we created a federal bureaucracy which seeks to ration justice by quantifying and litigating every conceivable variable that might affect the exercise of sentencing discretion. That bureaucracy has spawned treatises, computer programs, training courses, and volumes of appellate opinions, without bringing us any closer to our ideal of justice. Judge Heaney's study confirms what hundreds of federal judges instinctively recognized: this entire enterprise is actually institutionalizing greater injustice, by shifting sentencing power away from a neutral and independent judiciary into the hands of government advocates with political agendas. Our cure is truly worse than the disease we sought to remedy. Surely, we can do better, perhaps by doing less.

Court Justices Enlist in a War, THE CHAMPION, April, 1991, at 14; Adam Paul Weisman, *I Was a Drug-Hype Junkie*, NEW REPUBLIC, Oct. 6, 1986, at 14 (how the media is "addicted" to the drug crisis in America).

25. The term "drug abuse industrial complex" was coined by the National Commission on Marijuana and Drug Abuse, which produced the only rational government study of drug abuse ever published. SECOND REP. OF THE NAT'L COMM'N ON MARIJUANA AND DRUG ABUSE. DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE 3 (1973). The report, and its advice, have largely been ignored at the federal level, and the report has never been cited or referred to in any opinion of the U.S. Supreme Court. See Uelmen, *supra* note 24, at 16.

