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ONE CHEER FOR THE GUIDELINES

STEWART DALZELL*

I. INTRODUCTION

UNLIKE my betters on this panel, I am institutionally disabled from commenting on the "Policy in the War Against Drugs," at least to the extent that this group has addressed "the social issues and policies surrounding the sentencing of drug offenders." On the other hand, as a United States District Judge, it is my regular duty to impose punishment on defendants in criminal cases, in accordance with applicable law. Since November 1, 1987, that law has had, as its centerpiece, the United States Sentencing Guidelines that have been promulgated pursuant to the authority of the Sentencing Reform Act of 1984. Subject to the limitations that my office imposes on me as to the scope of the comments I may make on the sentencing controversy, I would like to address four subjects in the short time available for my remarks.

I should first like briefly to canvass the general hostility the federal judiciary has, on the whole, demonstrated for the new sentencing regime. Second, I should like to outline why I am in the minority of my colleagues in preferring the current sentencing regime to the one it replaced. Mindful of the focus of this symposium, I will then address two areas of criticism, with particular reference to drug offenses, before discussing two more general criticisms I have about the current system.

* United States District Judge for the Eastern District of Pennsylvania. B.S. 1965, J.D. 1969, University of Pennsylvania. I am grateful for the assistance of my law clerks, Jonathan Lewis and Ralph DeSena, as sounding boards for some of these ideas, and for the help of Judith F. Ambler, Head of Research Services of the Third Circuit Headquarters Library, for her ability overnight to transform a judge's dim recollection of authority into hard citations.


2. For a general discussion of the hostility that the federal judiciary has for the current sentencing regime, see infra notes 6-27 and accompanying text.

3. For a discussion of my preference for the current sentencing regime, see infra notes 28-43 and accompanying text.

4. For a discussion of two areas regarding criticism of the current system, especially as it relates to drug offenses, see infra notes 44-63 and accompanying text.

5. For a discussion of two more general criticisms about the Guidelines, see infra notes 64-71 and accompanying text.
II. JUDICIAL ANTIPATHY TO THE GUIDELINES

I entered on duty as a United States District Judge on October 7, 1991, almost seven years to the day after the Sentencing Reform Act (SRA) was enacted. Although a few pre-SRA criminal cases have appeared on my docket since that time, the great majority of the sentences I have imposed since taking office have been governed by the United States Sentencing Guidelines. Thus, it could fairly be said that I have been, since my induction, innocent of a more halcyon time when the Guidelines were, at most, a gleam in the eyes of Judge Marvin Frankel. Shortly after taking office, however, I no longer remained ignorant of the antipathy of my Article III colleagues to the Guidelines.

This antipathy is hardly a judicial secret. Before the United States Supreme Court decided United States v. Mistretta,7 the Sentencing Commission reported that "more than 200 district judges invalidated the guidelines and all or part of the Sentencing Reform Act."8 The United States Court of Appeals for the Ninth Circuit had also struck down the Guidelines.9

Mistretta's imprimatur of the SRA and the Guidelines did not silence the legion of displeased Article III judges. In its study of the subject, the Federal Courts Study Committee reported the views of sentencing judges that the Guidelines materially increased the time necessary for sentencing hearings, and also reported that a survey


8. UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT 11 (1989). This same report also disclosed that "approximately 120 district judges ruled that the guidelines were constitutional." Id.

of 270 witnesses found 266 opposed, and 4 supporting, the Guidelines — the four supporters were three Commissioners of the United States Sentencing Commission and then-Attorney General Richard Thornburgh. One need not even read the text of Judge Cabranes's article on the subject to ascertain his views about the Guidelines, because the title does a reasonably good job of conveying his conclusion: Sentencing Guidelines: A Dismal Failure.

Why is the judiciary's admiration for the SRA and the Guidelines under such firm control? Judge Marvin Frankel, who served with distinction for thirteen years on the United States District Court for the Southern District of New York, has offered the cynical view that the old regime was attractive to judges because it was "relaxed, agreeable, and not strenuous." Some may find as much fairness as there is cruelty in Judge Frankel's report that:

[o]ne never encountered any judges who doubted the fair and just and merciful character of their own sentences. The system left each of them free to bestow their beneficence upon defendants appearing before them. Judges might have been disposed from time to time to doubt whether all of their colleagues were equally splendid. Yet if that happened, it did not serve to trigger any expressed doubts about the system. On the whole, the judges felt good — or at least not too bad — about the sentencing function.

Some of the judiciary's hostility to the SRA and the Guidelines may constitute lingering sour grapes. As demonstrated at length in their useful legislative history of the Guidelines, Professors Stith and Koh have shown that the judiciary, especially through the Judicial Conference, "remained at the periphery" of the debate that led

14. Id. According to the New York Times, Judge Frankel may have had a better grasp than most Article III judges of the sentencing experience. Reporting on Judge Frankel's resignation, the Times commented that "[f]ederal judiciaries are lifetime appointments. But the job got to be more like a lifetime sentence for Marvin E. Frankel, who was bored stiff by it." Van Tassel, supra note 12, at 75.
to the SRA.\textsuperscript{16} Indeed, Judge Lay, formerly chief judge of the United States Court of Appeals for the Eighth Circuit, has confessed as a former member of the Judicial Conference “that the federal judiciary . . . was asleep at the switch.”\textsuperscript{17} Judge Lay reports that, in 1981 and 1982, he attempted to raise the issue of sentencing reform with the Judicial Conference, but “Chief Justice Burger twice ruled that I was out of order because the issue was new business that had not proceeded through the proper committee.”\textsuperscript{18} Judge Lay opines that the Chief Justice did not allow the subject to be “placed on the agenda because the majority of judges of the Conference in the early 1980s overwhelmingly opposed it.”\textsuperscript{19}

This lack of judicial participation continued after the Sentencing Commission began its work. For example, the Sentencing Commission developed its sentencing ranges relying “upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.”\textsuperscript{20} It will be observed that no judge authored any of these sources, perhaps reflecting the premise of the SRA’s proponents that “judges can’t write guidelines.”\textsuperscript{21}

Since taking office in 1991, I have yet to meet a district court judge who was ready to admit that he or she had anything good to say about the Guidelines. Indeed, the Guidelines have propelled at least one judge to resign as a matter of “good conscience,” and he was an appointee of Ronald Reagan.\textsuperscript{22} It therefore must take a form resembling a confession for me to admit that, despite some of the imperfections I will mention, the Guidelines regime is, in my

\begin{itemize}
\item[16.] Id. at 273.
\item[18.] Id. at 1758 n.15.
\item[19.] Id.
\item[20.] \textit{UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL} (Nov. 1994) [hereinafter U.S.S.G.].
\item[22.] The judge is J. Lawrence Irving, who resigned on December 31, 1990. See \textit{Van Tassel}, supra note 12, at 85. According to the \textit{New York Times} account reproduced in Professor Van Tassel’s monograph:
\begin{quote}
Federal District Judge J. Lawrence Irving, who has presided over a series of highly publicized cases in San Diego, has announced that he is resigning because he believes Federal sentencing guidelines are too harsh. “If I remain on the bench I have no choice but to follow the law,” Judge Irving said Thursday, when his resignation was announced. “I just can’t, in good conscience, continue to do this.”
\end{quote}
\end{itemize}

\textit{Id.}
view, preferable to the one it replaced. 23

My more experienced Article III colleagues will quickly interpose that my confession is the result of my never having lived in the simpler pre-Guidelines era. There is doubtless much merit to that objection. In my defense, however, I would point out that, as an active district court judge in the United States District Court for the Eastern District of Pennsylvania, an idiosyncrasy of the venue to which I was appointed gives me a regular view of something that looks like the pre-Guidelines world.

The United States District Court for the Eastern District of Pennsylvania has consistently had by far the highest rate of substantial assistance departures 24 among the ninety-four federal districts. According to the Sentencing Commission's 1994 Annual Report, the substantial assistance departure rate for the fiscal year that

23. I here must add the perhaps unnecessary disclaimer that the regime to which I refer does not include the accretions of mandatory minimum sentences that Congress has engrafted onto sentencing, most notably in the drug enforcement area. See, e.g., 21 U.S.C. § 841(b) (1988). The value of such statutory minima is a subject of vigorous debate outside the scope of this modest paper.

The forces in this debate have been contending for quite a long time, mirroring an ancient dialogue about the relationship between punishment and deterrence. Consider, for example, the views of Cesare Beccaria, whose Dei Delitti e delle Pene has remained a classic since its publication in 1764. As Sir Leon Radzinowicz summarizes Beccaria's views, "[t]here is a limit to severity," and "Beccaria thus pleads for a system of moderate penalties... provided that due regard were paid to... the certainty of punishment[,]... the promptness of punishment[, and]... a certain conformity between crime and punishment." LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE MOVEMENT FOR REFORM 1750-1833, at 281-83 (MacMillan 1948).

By contrast, advocates of severe mandatory minimum sentences derive theoretical support from the much more modern work of Professor Gary S. Becker in his Crime and Punishment: An Economic Approach, 1968 J. POL. ECON. 169. In summary, Professor Becker argues:

that a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities... This approach implies that there is a function relating the number of offenses by any person to his probability of conviction, to his punishment if convicted...

Id. at 176-77.

The application of Becker's approach plainly represents the prevailing legislative wind. See, e.g., Phil Gramm, Drugs, Crime and Punishment: Don't Let Judges Set Crooks Free, N.Y. TIMES, July 8, 1993, at A19 ("Mandatory minimum sentences deal with this problem directly. When a potential criminal knows that if he is convicted he is certain to be sentenced, and his sentence is certain to be stiff, his cost-benefit calculus changes dramatically and his willingness to engage in criminal activity takes a nose dive.").

24. Such departures typically are made pursuant to prosecutors' motions under U.S.S.G. § 5K1.1 or 18 U.S.C. § 3555(e) (1988) (departures below statutory mandatory minimums), or both, where "the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."
ended September 30, 1993 was 50.8% in the Eastern District com-
pared with a national average of 16.9%. The Sentencing Com-
mission's 1992 Annual Report revealed an Eastern District departure
rate for the year ended September 30, 1992 of 48.8% compared
with a 15.1% national average. Thus, since I took office in the
Eastern District of Pennsylvania, about one-half of the sentences I
have imposed were not constrained by the Guidelines' infamous
258-point grid.

III. WHAT IS RIGHT ABOUT THE SRA REGIME

Contrasting what I will refer to as Guidelines' constrained ver-
sus non-constrained sentences I have imposed, I cannot agree with
Judge Frankel that the non-constrained version has been "relaxed,
agreeable, and not strenuous," as compared with the constrained
version. Sentencing under any system necessarily involves the colli-
sion of general justice with particular justice, and because judges sit
at the intersection of those powerful forces, sentencing by its nature
can never be "relaxed, agreeable, and not strenuous."

Sentencing hearings free of the Guidelines are as dramatic,
and often wrenching, as they are when conducted in Guidelines
rhetoric — indeed, they may be more so, because the range of dis-
cretion is so much wider outside the Guidelines. I cannot in con-
science report to you that my non-constrained sentences are any
more just than my constrained sentences.

More to the point of this symposium, however, I cannot for the
life of me support the old regime where, as Judge Frankel put it so
pungently:

We gave lawless power to the judges. Subject essentially to

27. It is true, of course, that substantial assistance departures do not com-
pletely return the sentencing judge back to the pre-SRA sentencing regime. It
seems quite clear from the SRA's authorization of such departures, now embodied
in U.S.S.G. § 5K1.1, that the Guideline range applicable absent the departure is a
ceiling on sentences, whose floor could be as low as under pre-SRA law: "The
Commission shall assure that the guidelines reflect the general appropriateness of
imposing a lower sentence than would otherwise be imposed, including a sentence
that is lower than that established by statute as a minimum sentence, to take into
28. I should note, however, that my non-constrained sentences sometimes in-
volve periods of home confinement with electronic monitoring, a very useful and
(from the taxpayers' point of view) economical sentencing option that the Guide-
lines only permit in the lowest strata of the sentencing grid, defined as Zones A
and B. See U.S.S.G., supra note 20, § 5B1.1(a), Application Note 1 appended
thereto.
no law, a federal judge could give a bank robber from zero to twenty-five years — or fifty or seventy-five if there were multiple counts — with no review or recourse to anyone except the Parole Commission, which was almost equally unregulated by law . . . .

By contrast, under the Guidelines the SRA ordained, I find myself in the familiar world of applying readily ascertainable law in carrying out what is unquestionably my most solemn duty. I also find that the Guidelines' overall approach makes quite a lot of sense. Indeed, it seems to me that no fair reader of the "General Application Principles" set forth in Chapter One of the Guidelines could take issue with the rationality of the Sentencing Commission's approach, granting that reasonable people may differ as to this or that call the Commission has made in adopting this or that "General Application Principle."

What reasonable person could quibble, for example, with the Introductory Commentary of Chapter Four of the Guidelines, dealing with "Criminal History and Criminal Livelihood"? As the Commission has written:

A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

Thus, it seems hard to take issue with the six criminal history milestones that define the horizontal axis of the sentencing table, and that roughly double the sentencing range for offenders who have extensive criminal records compared to those who have none.

With respect to the vertical axis of the 258-point grid, there is

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29. Frankel, supra note 13, at 2044.
31. Id. at Ch. 4, Pt. A, intro. cmt.
32. See id. § 4A1.1. For example, a "prior sentence of imprisonment exceeding one year and one month" receives three criminal history points. Id. § 4A1.1(a). Criminal History I covers offenders with fewer than two criminal history points, and Criminal History VI is for those with 13 or more such points. Offenders at, for instance, offense level 20 are subject to a range of 39 to 41
also much embodied in the Guidelines that, to me, warrants a wide consensus of support. Take, for example, Part B of Chapter Three, entitled "Role In The Offense."33 I should think that reasonable people would agree that "an organizer or leader of a criminal activity that involved five or more participants"34 deserves more severe punishment than a defendant who "was a minimal participant in any criminal activity," such as "where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs."35 To be sure, reasonable advocates can and do disagree as to whether a particular defendant has truly "exercised management responsibility over the property, assets, or activities of a criminal organization,"36 or whether the particular defendant's "lack of knowledge or understanding of the scope and structure of the enterprise . . . is indicative of a role as minimal participant."37

For certain — and this especially applies in multi-defendant drug prosecutions — advocates will rarely agree as to the "relevant conduct" when the sentencing calculus must weigh "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" of which the particular defendant "was a part."38 The important point even as to this highly contentious issue is that the Guidelines in section 1B1.3 direct the parties and the sentencing judge to the right questions in their jointly undertaken enterprise of determining the defendant's "relevant conduct."

And let us also not overlook another change under the SRA that people who care about principle in the law should applaud. I refer to the fact that the SRA made sentences imposed under it subject to appellate review.39 Although it is now difficult to remember, sentences in the pre-SRA regime were effectively subject to no months in Criminal History I, but 70 to 80 months under Criminal History VI. See id. at Ch. 5, Pt. A (sentencing table).

33. Id. §§ 3B1.1-3B1.4.
34. Id. § 3B1.1(a).
35. Id. § 3B1.2(a), cmt. n.1.
36. Id. § 3B1.1, cmt. n.2.
37. Id. § 3B1.2, cmt. n.1.
38. Id. § 1B1.3(a)(1)(B). The resolution of the degree of the co-conspirator's conduct, and what conduct — usually, what drug quantity — may properly be attributed to each accomplice, sometimes requires a sentencing hearing more searching than a trial. See, e.g., United States v. Collado, 975 F.2d 985, 990-95 (3d Cir. 1992); United States v. Edwards, 945 F.2d 1387 (7th Cir. 1991), cert. denied, 503 U.S. 973 (1992).
appellate control unless they exceeded the statutory maximum.\textsuperscript{40} It does not overstate matters to describe the pre-SRA sentencing regime as an example of Hart’s celebrated game of scorer’s discretion, which operated devoid of any “core of settled meaning.”\textsuperscript{41}

As I’ve so far canvassed the Guidelines regime, I think it fair to say that in this central zone of the system we have, to borrow Radzinowicz and King’s statement, “measures to improve rationality and consistency in the way discretion is used and to ensure adequate redress when it goes astray.”\textsuperscript{42}

As we move outward from the central zone of the Guidelines where, as I have just described, a wide consensus likely exists, we encounter, on the vertical axis, more problematic and controversial questions. Before we consider four of these, it is well to remember that the Commission, which Justice Scalia snidely described in his solo dissent in \textit{Mistretta} as “a sort of junior-varsity Congress,”\textsuperscript{43} is subject to the will of the varsity Congress. The Commission has no choice but to dance to Congress’ tune, and it seems to me that much of the criticism of the Guidelines is really a criticism of what Congress has directed the Commission to do with them.

\section*{IV. Two Drug-Related Objections}

Take, for example, the highly-charged issue of the 100:1 ratio of cocaine to cocaine-base in the Drug Quantity Table of Guidelines section 2D1.1(c) — for example, trafficking ten grams of crack earns the same offense level as trafficking a kilogram of cocaine powder. As the United States Court of Appeals for the Eighth Circuit noted in \textit{United States v. Buckner},\textsuperscript{44} this ratio in the Table was “derived directly” from 21 U.S.C. § 841 (b), as a result of the Anti-Drug Amendments of 1986.\textsuperscript{45} The 100:1 ratio has been challenged in some courts as either violating substantive due process because it

\textsuperscript{40} See, e.g., Williams v. New York, 337 U.S. 241, 247-52 (1949); Burns v. United States, 287 U.S. 216, 220 (1932). In Burns, the Court stated:

\textit{It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.}\textsuperscript{\textit{Id.} at 220.}

\textsuperscript{41} H.L.A. Hart, \textit{The Concept of Law} 142-44 (2d ed. 1994).


\textsuperscript{44} 894 F.2d 975 (8th Cir. 1990).

is claimed to be arbitrary and capricious46 or because its effect is racially discriminatory47 or constitutes cruel and unusual punishment.48 As the United States District Court for the Eastern District of Missouri found in United States v. Clary,49 98.2% of defendants in crack cases in the Eastern District of Missouri for a five-year period were black, but with respect to cocaine powder the percentages were largely reversed, with whites having by far the highest use.50 While these objections to the 100:1 ratio have to date been unsuccessful in the courts of appeals,51 they clearly have been more successful in the halls of Congress.

The recent crime legislation specifically directs the Sentencing Commission to complete a study of this disparity by the end of 1994.52 It has been reliably reported to me that the reason Congress imposed such a short deadline was because it was advised that the study, well into gestation at the time the Violent Crime Control Act was adopted, can be completed before the statutory deadline, notwithstanding the change in Commissioners that took place on November 1.


47. See, e.g., United States v. Marshall, 998 F.2d 634 (8th Cir. 1993).

48. See, e.g., United States v. Colbert, 894 F.2d 573, 574-75 (10th Cir. 1990).


51. No circuit has found any constitutional infirmity in the 100:1 ratio. See, e.g., United States v. Frazier, 981 F.2d 92, 95 (3d Cir. 1992) (rejecting equal protection and cruel and unusual punishment arguments), cert. denied, 113 S. Ct. 1661 (1993); United States v. King, 972 F.2d 1259, 1260 (11th Cir. 1992) (rejecting equal protection arguments); United States v. Harding, 971 F.2d 410, 412-14 (9th Cir. 1992) (rejecting equal protection arguments), cert. denied, 113 S. Ct. 1025 (1993); United States v. Watson, 953 F.2d 895, 898 (5th Cir.) (rejecting due process and equal protection arguments), cert. denied, 112 S. Ct. 1089 (1992); United States v. Lawrence, 951 F.2d 751, 755 (7th Cir. 1991) (rejecting equal protection arguments); United States v. Pickett, 941 F.2d 411, 418 (6th Cir. 1991) (rejecting due process and cruel and unusual punishment arguments); United States v. Thomas, 900 F.2d 37, 39-40 (4th Cir. 1990) (rejecting equal protection arguments); United States v. Cyrus, 890 F.2d 1245, 1248 (D.C. Cir. 1989) (rejecting equal protection and cruel and unusual punishment arguments).

52. Violent Crime Control and Law Enforcement Act of 1994, § 280006. This section provides in full:

SEC. 280006. COCAINE PENALTY STUDY.

Not later than December 31, 1994, the United States Sentencing Commission shall submit a report to Congress on issues relating to sentences applicable to offenses involving the possession or distribution of all forms of cocaine. The report shall address the differences in penalty levels that apply to different forms of cocaine and include any recommendations that the Commission may have for retention or modification of such differences in penalty levels.
I have no inside information as to what the report will disclose or what the Sentencing Commission will do with its recommendations. It would be surprising, however, if a ratio as high as 100:1 survived, although we will all have to wait and see. For our purposes, the important point is that the ratio has been subject to a legislative response. That response, in turn, will, we trust, be based on an empirical basis.

53. After the symposium concluded, the Sentencing Commission on February 28, 1995, fulfilled its statutory duty by publishing an over-200 page Special Report to the Congress, Cocaine and Federal Sentencing Policy. Although the Special Report noted that "important distinctions between the two may warrant higher penalties for crack than powder [cocaine]," it continued that:

the Sentencing Commission cannot support the current penalty scheme. The factors that suggest a difference between the two forms of cocaine do not approach the level of a 100-to-1 quantity ratio. Research and public policy may support somewhat higher penalties for crack versus powder cocaine, but a 100-to-1 quantity ratio cannot be recommended.

UNITED STATES SENTENCING COMMISSION, COCAINE AND FEDERAL SENTENCING POLICY xiv (1995). Instead, the Commission recommends a series of changes to the Guidelines, to be completed no later than May 1, 1996, to provide "a comprehensive revision of the guidelines applicable to cocaine offenses." Id. at xvi.

The Commission’s proposed Guideline amendments, which embody its recommendations on the repeal of the 100:1 ratio, have not been warmly received by the other two Branches. On September 13, 1995, the House Committee on the Judiciary favorably reported H.R. 2259, which, at §§ 1 and 2, disapproves "of amendments relating to equalization of crack and cocaine powder quantities." H.R. 2259, 104th Cong., 1st Sess. (1995). In his September 6, 1995, memorandum to the full Committee, Congressman McCollum, Chairman of the Subcommittee on Crime, reported that the Clinton "Administration expressed its general opposition to the Commission’s proposals regarding cocaine." Memorandum from Congressman William McCollum, Chairman, House Subcommittee on Crime, to members of the House Judiciary Committee (Sept. 6, 1995) (on file with author).

Interestingly, Congressman McCollum’s memorandum to the full Committee "noted, however, that the current 100-to-1 quantity ratio may not be the appropriate ratio," and states that Congressman’s belief that "it is appropriate for the subcommittee to consider, in cooperation with the Department of Justice, the Senate and the Sentencing Commission, alternatives to the current 100:1 ratio." Id.

Similarly, when the Senate on September 29, 1995 disapproved the Commission’s proposal, it adopted an amendment of Senator Kennedy requiring the Commission to canvass the crack/cocaine powder issue again, though recognizing as a consideration that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powdered cocaine." Transcript of Congressional Record (Sept. 29, 1995) (quoting amendment 2879 to S. 1254, 104th Cong., 1st Sess. (1995)) (on file with author). Senator Kennedy explained that he offered his amendment "in an attempt to maintain some momentum for change." Id. When the full House on October 18, 1995 disapproved the Commission’s proposal, it did so by adopting the Senate version, S. 1254.

When President Clinton signed S. 1254 on October 30, 1995, he, too, noted that "[s]ome adjustment is warranted" to the 100:1 ratio and noted that the bill "directs the Sentencing Commission to undertake additional review of these issues and to report back with new recommendations." Statement by the President (The White House, Office of Press Secretary, Oct. 30, 1995) (on file with author). Thus, the public debate on the ratio will continue, albeit while the 100:1 ratio remains in effect.
on a careful balancing of the scientific, \textsuperscript{54} social\textsuperscript{55} and political\textsuperscript{56} vec-

\textsuperscript{54} There has already been considerable public testimony about the scientific aspects of this problem. \textit{Hearing on Crack Cocaine, U.S. Sentencing Comm'n 106-17 (Nov. 9, 1993)} [hereinafter \textit{Crack Cocaine: Sentencing Comm'n Hearing}] (testimony of Dr. Charles R. Schuster); see also \textit{"Crack" Cocaine: Hearing Before the Permanent Sub-comm. on Investigations of the Senate Comm. on Governmental Affairs, 99th Cong., 2d Sess. 20 (1986)} [hereinafter \textit{"Crack" Cocaine: Senate Hearing}] ("[H]ere we have a substance which is tailor made to addict people . . . .") (statement of Dr. Byck).

\textsuperscript{55} For example, although it seems undisputed that the molecules of cocaine powder and crack cocaine are identical, how people ingest drugs causes dramatically different social effects. Given the cultural acceptance and, indeed, promotion in many quarters of cigarette smoking, and given the understandable aversion most people have to injecting themselves with hypodermic needles, it is socially inevitable that the availability of cocaine in a smokable form will distribute the drug in its most addictive state far more widely than it will in an equally addictive state that depends upon intravenous injection. \textit{See, e.g., Crack Cocaine: Sentencing Comm'n Hearing, supra note 54}, at 116-17 (testimony of Dr. Schuster); \textit{id. at 123-24} (testimony of Dr. Byck) (citing example of what happened in the Bahamas, when "no more cocaine was available . . . only smokable cocaine later known to be crack . . . this epidemic occurred, and the admissions to hospitals, which used to be almost zero, went up to very large numbers").

\textsuperscript{56} Two of my fellow panelists decry what they regard as the demagogic fomenting of anti-drug hysteria to suit the ends of politicians they doubtless do not admire. No fair reading of the legislative response to crack cocaine can, however, attribute it merely to sound bite politics. The testimony of disinterested experts invariably depicts a ubiquitous phenomenon that traumatizes our nation's most vulnerable citizens.

Consider, for example, the testimony two years ago of Dr. Robert S. Hoffman, Senior Attending Physician of the Department of Emergency Services at Bellevue Hospital Center in New York City:

\textit{Since 1986, we have had another problem and that other problem has been crack cocaine. As of 1986, crack surpassed all other causes of illicit drug presentations to the emergency department, such that, if you came to our emergency department for some drug-related cause, it was going to be crack in well over 50 percent of the events. Now we are up in about the 70 or 80 or 90 percent, if you include crack cocaine or cocaine with other drugs.}

\textit{Id. at 171. Dr. Hoffman continued:}

\textit{When acutely intoxicated, these patients present with wild severe agitation, uncontrollably violent behavior, life-threatening abnormalities of their vital signs, usually accompanied to the hospital by six or eight or ten police officers, a number of paramedics. They are outwardly violent, boisterous, in need of emergent [sic] health care and, single handedly, one wildly intoxicated crack patient can disrupt the entire functioning of one of the largest emergency services in the country.}

\textit{Id. at 173.}

Or consider the testimony of Dr. Ira J. Chasnoff, President of the National Association of Perinatal Addiction Research and Education:

\textit{In our research, we are following a population of about 400 children who were exposed to both cocaine, crack, and other drugs during pregnancy. We are in the eighth year of that study and have been able to track the children from the prenatal period. It is those two areas — the overload and the behavioral regulation — that show the most difficulty.}

\textit{So that, even in the children who are now 3/4/5 years of age, although they have the cognitive capabilities to understand and to learn, their be-}
tors that all legitimately come into play in the line-drawing enterprise.

Compare the experience, ill-starred though it may have been, of the 100:1 ratio with what would have occurred before the SRA. Assume a pre-SRA sentencing judge was presented on one day with a defendant who had plead guilty to selling one kilogram of cocaine. The next day, another defendant appeared before the judge with the identical criminal history as the defendant who sold one kilogram of cocaine, but sold one kilogram of crack. How should the hypothesized pre-SRA judge have dealt with these two defendants? How should the judge have gone about determining the difference in victim impact of the two substances? Clearly, parties would not likely have presented the sentencing judge with resources such as the expert testimony of, say, Dr. Robert Byck, of the Yale University School of Medicine, who testified to the Senate Subcommittee in 1986, or of Dr. Robert DuPont, former Director of the National Institute on Drug Abuse, who presented a paper at a Sentencing Commission symposium. It would, at a minimum, have raised eyebrows if the hypothesized judge had invited a representative of the Congressional Black Caucus to express the views of that body on community impact. And, assuming the impossible,

haviors get in the way. So that a child who is exposed to crack or cocaine during pregnancy will become easily overloaded in the classroom. If too much is going on or if, heaven forbid, there should be a fire drill, that child's learning behaviors fall apart. He has difficulty regulating his behavior, so the children can become quite aggressive and will begin to strike out as they get frustrated and will have shortened attention spans.

Id. at 154-55. It bears noting, in this regard, that Dr. Schuster reports that 31% of 3,000 children studied in a sample in an inner-city hospital "had been exposed to cocaine in utero by their mothers." Id. at 111.

No reflective or responsible member of the political branches could allow this national catastrophe to continue without response, and it does nothing to assist the many victims of this crisis to add fuel to any demagogic fire by questioning the motives of those seeking a legislative amelioration of this widespread human tragedy.


Why did so many cocaine users switch so quickly from snorting to smoking cocaine? When cocaine enters the nose, one of its effects is to close down the blood vessels, thereby slowing the absorption of cocaine from an area of the nose about the size of a fingernail. When people smoke cocaine, they bring it into their lungs, where it is absorbed into the blood from the tiny air sacs of their lungs, from a surface area the size of a football field. The reinforcing potency of any drug is much greater when the brain is hit by rapidly rising, high levels of the drug.

Id. at 71.
even if one defendant got the benefit of all these resources, no other defendant would have it because there would be no social change — there would instead be one shorter sentence in a sea of longer ones.

The suggestion I am making on this most controversial 100:1 ratio question is that if the Guidelines' relentless application produces results that disturb significant constituencies, or that touch a wide enough legislative sense of injustice, there will be a change. This, I submit, is unsurprising because the SRA regime is completely visible. The old regime, by comparison, was invisible and thus not nearly as subject to the fine-tuning that we have already witnessed in the only seven years of the Guidelines' application to real defendants.

I should hasten to stress that I am not arguing that the current regime represents the best of all possible worlds. The Guidelines continue to produce bizarre anomalies. Consider, for example, Guidelines section 2K2.1, dealing with "Prohibited Transactions Involving Firearms or Ammunition." Imagine a defendant who was previously convicted of a non-violent, non-drug felony who violated 18 U.S.C. § 922(g)(1) by selling fifty or more Uzis. Her offense level, under section 2K2.1(a)(6) and (b)(1)(F), would be 20. Her offense would, therefore, be exactly equivalent to what she would have received had she trafficked in two or three grams of crack cocaine.

I should think that most fair-minded citizens would agree that unlawful trafficking in fifty or more automatic weapons presents far more societal harm than trafficking in two to three grams of crack. Under the existing Guidelines, both offenses, at Criminal History I, would subject my hypothesized defendant to as little as thirty-three months' incarceration. How does this anomaly get fixed?

As Professor Freed has shown, the Commission has not been responsive to the comments of sentencing judges. I know from my


60. U.S.S.G., supra note 20, § 2D1.1(c)(10).

own experience that when I have written to the Commission to point out anomalies I have not even received the courtesy of an acknowledgement. Professor Freed's point is, therefore, very well taken that the "Commission should reverse its policy of the first five [now seven] years and begin openly responding to the courts." 62 This is a serious failing in the operation of the SRA regime, and one that the Commission can unilaterally address without further assistance from the varsity Congress — indeed, Congress in the SRA specifically directed the Commission periodically to "review and revise" the Guidelines "in consideration of comments and data coming to its attention." 63

V. TWO GENERAL OBJECTIONS

Consider another, more general problem. When Congress adopted the SRA, it on the one hand directed the Commission to consider whether factors such as age, education, family and community ties "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and to take them into account only to the extent that they do have relevance," 64 but in the very next statutory breath, it directed the Commission to "assure that the Guidelines ... reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 65 As is by now well-known, the Commission resolved this tension in Part H of Chapter Five 66 by holding such factors "not ordinarily relevant to the determination whether a sentence should be outside the applicable guideline range." 67

This decision by the Sentencing Commission, probably one that is faithful to the SRA, does represent, as Professor Freed has observed, something of an evasion of the Commission's duty to assure "that the guidelines and policy statements be consistent with all provisions of titles 18 and 28." 68 The section 5H provisions, perhaps more than any others, seem to me to be at the heart of the judiciary's antipathy to the SRA and the Guidelines. As Professor Freed put in his criticism, "most judges in most courts sentence by

62. Id. at 1750.
64. Id. § 994(d).
65. Id. § 994(e)
66. U.S.S.G., supra note 20, §§ 5H1.1-5H1.6, 5H1.10-5H1.12.
67. Id.; see also id. Pt. H (Introductory Commentary).
68. Freed, supra note 61, at 1716.
reference to the offender, not just to the crime,” and listen carefully to what the defendant and his counsel “say in mitigation, and to what the AUSA presents about voluntary disclosure, remorse, or bad character, . . . or about future dangerousness.” Contrary to the litany in the section 5H policy statements, these factors have been “ordinarily relevant,” and it is very difficult to look the particular defendant in the eye and tell him or her that these characteristics — which in any other context define the defendant’s very identity — are “not ordinarily relevant.”

This problem, when we look a little closer at it, is not as far removed from the 100:1 ratio issue as one might think. Most fair-minded people would agree with Congress and the SRA that “[t]he Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.” This is the SRA’s statutory language for what we used to say, “justice is blind.” If we are allowed to see the factors that the Commission has said are “not ordinarily relevant,” however, the entire neutrality of sentencing may well find itself producing sentencing disparities that impermissibly correlate with statuses such as race.

A full consideration of this critical issue is, regrettably, beyond the time limitations this symposium affords. Suffice it to say, however, that it may well be that unpleasant and unnatural as the section 5H policy statements may be, we may have no alternative but to grit our teeth and accept the Commission’s call on this important point.

My second general criticism of the Guidelines regime may sound like an aesthetic judgment, but I submit it is more than a matter of taste. As I near the conclusion of a sentencing hearing that has been filled with SRA and Guidelines’ jargon, I can often see a glaze in the defendant’s eye, as well as in the eyes of the defendant’s family. The proceedings must sound to most defendants much as the proceedings of, say, the Tax Section of the American Bar Association would sound to most of us when tax practitioners discuss the esoterica of the Internal Revenue Code. While we may be somewhat bemused by our ignorance at such gatherings, there is nothing at all funny about a sentencing hearing to the defendant. Defendants in most cases will be unhappy with the fate the sentencing judge imposes, but at least these litigants should have a minimal understanding of how the judge has come to this unpleasant con-

69. Id. at 1717.

clusion in each case. Under the Guidelines regime and certainly in multi-defendant drug prosecutions, I suspect it is a rare defendant who has even the beginning of an appreciation for what has happened after an hour or much more drowning in a sea of Guidelines argot. Considering that the sentence is also no longer final, but subject to appeal, the defendants in such cases do not even have the satisfaction of finality. 71

VI. CONCLUSION: KEEP THE DEBATE ALIVE

In the last analysis, I would like to suggest that the major issue underlying this controversy is trust. Why do advocates of the old regime trust judges to make the value choices that animate discussions like this one? I am flattered that so many on this panel seem to prefer me and my colleagues to Senators Kennedy and Gramm to make these judgments, but the Constitutional fact is that the House and Senate make laws and judges only apply them. The idea has always been encapsulated in its politically incorrect phrasing, a "government of laws, not men." But was not the old sentencing regime, which was tantamount to Hart's scorer's discretion, precisely an enclave of men and women who made up rules to fit each situation?

I should like to end by noting that symposia like these are heard not only in Washington, D.C., but also by appellate judges. In his critique in 1992, Professor Freed accurately described what he called a "gap" that exists between sentencing courts and appellate reviewers. 72 Simply put, Professor Freed with fairness criticized appellate judges' failure to "comprehend the complexity of the prescribed computations and the bizarre results they can produce," which "has lead the courts of appeals to enforce the guidelines in ways that district court judges find increasingly intolerable." 73

71. Consider, for example, the sentencing experience of Kenneth Shoupe, who has completed three round trips to the United States Court of Appeals for the Third Circuit after his conviction for cocaine trafficking. United States v. Shoupe, 929 F.2d 116 (3d Cir.), cert. denied, 502 U.S. 943 (1991) (Shoupe I); United States v. Shoupe, 988 F.2d 440 (3d Cir. 1993) (Shoupe II); and United States v. Shoupe, 35 F.3d 835 (3d Cir. 1994) (Shoupe III). On his initial sentence that led to Shoupe I, he received 84 months. Shoupe III, 35 F.3d at 836. After Shoupe I, he received a term of 168 months. Id. at 837. At his third sentencing, Shoupe was sentenced to 120 months imprisonment. Id. The saga is not over, however, because there will be a fourth sentencing as a result of the reversal in Shoupe III. All of this interesting litigation has to do with departures (or lack of them) under U.S.S.G., supra note 20, § 4A1.3, policy statement. Perhaps some day Mr. Shoupe will know what his sentence is, and may start planning the rest of his life.

72. Freed, supra note 61, at 1728-30.

73. Id. at 1728, 1729.
cism like Professor Freed's, and that of other commentators, is starting, in my judgment, to have an effect in the Court of Appeals. See, for example, the Third Circuit's recent reference to "the impressive array of commentators" (Professor Freed among them) that has led our Court of Appeals to encourage judges like me "not [to] shrink from utilizing departures when the opportunity presents itself and when circumstances require such action to bring about a fair and reasonable sentence." 74

Paraphrasing Winston Churchill,75 I can only conclude by saying that the SRA has wrought the worst sentencing system except for the rest. It is, to be sure, imperfect, and can bear significant improvement. I am confident that symposia like this one will continue this salutary process of reform of what is, in the last analysis, a sentencing regime that remains in its infancy.


75. Speech to the House of Commons, Nov. 11, 1947, as quoted in The Oxford Book of Quotations 150 (3d ed. 1979) ("No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.").