JUDICIAL OPINIONS AND SENTENCING GUIDELINES

Jeffrey O. Cooper*

Attempting to discern the judiciary's attitude toward the sentencing guidelines by reviewing judges' published opinions is a perilous task. Anyone who reads a large number of judicial opinions is likely to come away with a sense that few judges have great fondness for the present system. Critical words — for Congress, the Sentencing Commission, and other courts — far outnumber words of praise.1 Yet there is reason to be cautious in attempting to discern collective trends in judges' official written work. There is, for one, the obvious tendency of those with the strongest feelings to speak out the most vehemently. On the other hand, the apparent diminution in the frequency of overt criticism may reflect not growing approval but a reluctance, as the guidelines become an established part of the legal landscape, to continue beating one's head against the wall. In short, for some judges the guidelines are a satisfactory system undeserving of critical comment, while to others they seem to have come to resemble a chronic toothache.

Rather than characterizing a collective judicial view, this article attempts to discern some trends in the comments and criticisms of the guidelines that have appeared in trial and appellate opinions. Part I addresses the early reaction to the guidelines, as many district judges, accustomed to wide latitude, briddled under newly imposed restraints on their discretion, while the courts of appeals sought to find their footing in the new system. Part II examines the more recent commentary. It finds that cases that have provoked the strongest commentary have been those in which the guidelines fell farthest short of the goal of similar sentences for similar offenses under similar circumstances. Although these cases have presented a variety of issues, they involve a common perception that, in the name of sentencing uniformity, the guidelines have grouped disparate conduct, or conduct proved with varying degrees of certainty, and, through the application of rigid rules, required them to be treated identically.

I. The Initial Response to the Guidelines

The early judicial commentary on the guidelines focused largely on the mechanical task that district courts found themselves called upon to perform. Judges were not entirely unsympathetic to one of the rationales behind the guidelines: that, under discretionary sentencing, disparities in sentences for similar crimes committed in similar circumstances had become too great.2 Yet, for the most part, trial courts found the cure worse than the disease. For one, it thrust judges into an unfamiliar role:

Sentencing by the numbers is a unique experience for one called upon to "judge." The exercise is long, involved, complex, and is somewhat akin to filling out schedules as a procedure for demonstrating an accounting problem. It brings to mind the observation that one should be unconcerned when computers begin to think like men, but that one should be greatly concerned when men begin to think like computers.3

Worse, judges were largely unconvincd that mathematical formulae could adequately capture the complex factors it was necessary to consider in order to do justice in the individual case:

The very nature of discretion is that it requires the exercise of judgment as to factors too numerous to identify, too interrelated to be considered separately and too indefinite to be assigned specific weights. Any attempt to control the basic nature of discretion by quantification and separation of the factors to be considered and preassignment of the weights to be given is ultimately doomed to failure.4

The perceived evil of disparities in sentences, in this view, represented a recognition of the differences between criminals as well as the similarity between crimes.5

The flaws in the guidelines did not merely reflect bad policy judgments, many district courts decided; rather, they were constitutional in scope. Though advanced by a large number of district courts, however, these arguments fell on deaf ears on appeal. One criticism — that the guidelines represented an improper delegation of the legislative power to define sentencing ranges to a commission that included members of the judiciary — was swiftly disposed of by the Supreme Court.6 District courts also found constitutional fault with the limitations on their ability to consider factors relevant to individual defendants,7 and with the de facto transfer of power over sentencing from the judge to the prosecutor.8 The courts of appeals, however, summarily rejected these arguments.

Indeed, the courts of appeals, at least initially, seemed less troubled by the guidelines than their district court colleagues. In rejecting due process arguments, they uniformly held that the Constitution did not require individualized sentencing except in capital cases. And even if it did, they reasoned, the guidelines provided adequate consideration of the factors that distinguished individual cases from each other. The very complexity of the guidelines was seen as evidence of great efforts "to take many crime-

* Research Fellow, Yale University; former law clerk to Judge Guido Calabresi, United States Court of Appeals, Second Circuit. The views expressed are those of the author.
and offender-specific features into account." In the view of some appellate courts, the guidelines were "not rigid, mechanical requirements." Rather, they gave district courts broad discretion to depart in instances where the guidelines failed to take a consideration into account adequately.

Indeed, a few judges opined that it was the flexibility of the guidelines that saved them from constitutional challenge. Thus, Judge Gilbert Merritt of the Sixth Circuit wrote in a concurring opinion:

The guidelines should be viewed as just that — "guidelines." They should not be viewed as mandatory sentencing rules. If the guidelines did not contain the departure provisions which leave broad discretion in the District Court, the due process question would be a much more difficult question for me.

In the early days, then, the courts of appeals seem to have retained a hope that the guidelines would eliminate the worst of the disparities of the previous scheme of indeterminate sentencing, while leaving judges with sufficient flexibility to do justice in individual cases.

II. The Evolving Critique

In the years since constitutionality was resolved, the courts have wrestled with guideline issues too numerous to pursue here. Many have been essentially definitional, as courts have struggled to apply the cold text of the guidelines to real-world situations. Others have struck more deeply at the core of the guidelines' essential approach to sentencing. In particular, courts have struggled with cases in which the apparent mathematical certainty of the guidelines seemed at odds with the peculiarities of individual scenarios. These cases can be divided into two broad categories: those in which questions have arisen concerning whether an individual set of facts falls within the "heartland" of guidelines cases, and those involving factfinding at the sentencing phase on issues not resolved at trial. These issues, and the Commission's responses to them, suggest that a change in the Commission's approach may be needed.

A. The Struggle to Define the "Heartland"

The guidelines prohibit departures in cases lying within the "heartland," a set of typical cases embodying the conduct that each guideline describes. Defining the boundaries of the heartland therefore seems central to the application of the guidelines. The comprehensive structure of the guidelines has made it difficult, however, for courts to conclude that even anomalous cases lie beyond the heartland. As a result, seemingly disparate conduct is treated similarly for purposes of assigning a numerical value under the guidelines.

For example, in United States v. Poff, the Seventh Circuit, sitting en banc, sentenced as a career offender under § 4B1.1 a mentally ill defendant who repeatedly made threats against public officials. Although all agreed that she had no intent to carry out the threats, both the threat for which she was being sentenced and her prior convictions for threats fell within the definition of "crimes of violence" under § 4B1.2, thus requiring that she be treated as a career offender. Despite her apparent harmlessness, the defendant had to be sentenced as harshly as if her prior offenses had caused severe physical injury or death.

As another example, in United States v. Webb, the defendant was convicted of possession of unregistered firearms and firearms lacking serial numbers. The "firearms" in question were two home-made "silencers" fabricated from toilet paper rolls and the stuffing from stuffed animals; the defendant apparently used them to muffle the sound of shots at animals invading his property. As the "manufacturer" of the silencers, the defendant was required to affix serial numbers and register them. The district court departed downward based on the unsophisticated nature of the silencers. The Tenth Circuit reversed, stating:

In this case, the district court may have thought that defendant's silencers represented a significantly less serious violation of the Firearms Act than those usually prosecuted under these provisions. Alternatively, the court may have thought it unrealistic to expect defendant to stamp an identification number on a toilet paper roll used as the exterior covering of the silencer. The court may even have thought that Congress intended the Firearms Act to punish criminality qualitatively different from defendant's behavior. Even so, none of these explanations adequately justify the court's departure from the applicable guidelines range.

Both Poff and Webb involved unusual offenders markedly less culpable than the prototypical defendant. Yet in each case, because the defendant's conduct, strictly speaking, fell within the guideline definition, the court felt constrained to bar a departure.

B. Factfinding at Sentencing

A second issue involves the weight to be given to a factor as to which there exists a degree of uncertainty. That facts relevant to sentencing need not be established beyond a reasonable doubt is generally accepted. Yet in many instances facts proved by a preponderance of the evidence at sentencing are given the same weight as facts proved beyond a reasonable doubt at trial; indeed, in some cases the former have a far greater impact on the resulting sentence than the latter.

The treatment of drug quantities is one example. The guidelines allow consideration of quantities not
specified in the count of conviction, and provide that "[w]here there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance." Courts have attempted to refine what must be done to "approximate" drug quantities. Yet the apparent precision of the ultimate finding of drug quantity often fails to reflect the vast range of uncertainty as to which evidence is presented. And the defendant is sentenced on the basis of the resulting quantity as if that amount had been seized from him, subjected to strict laboratory analysis, and proved at trial beyond a reasonable doubt.

Perhaps the guideline area that has drawn the harshest criticism is the consideration as relevant conduct of charges that either were dismissed pursuant to plea agreement or actually resulted in an acquittal at trial. In such cases, equating relevant conduct proved by a mere preponderance of evidence to conduct proved beyond a reasonable doubt at trial can result in a sentence so stratospheric, in relation to the sentence called for by the offense of conviction, that some reviewing judges have found it necessary to do "the habiliments of an astronaut." Indeed, the sentence may be the same as if the acquittal or dismissal never happened. The result, as Judge Oakes stated in his concurring opinion in United States v. Frias, is "jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"

C. Judicial Attempts at Flexibility

Some appellate courts are attempting to provide district judges with flexibility to deal with the relevant conduct evidence issue. In United States v. Gigante, for example, the Second Circuit reasoned:

With regard to adjustments, we believe that a district judge would be entitled to depart downward when faced with a situation in which a series of adjustments, each of which involves conduct proven by a bare preponderance, lead[] to substantial enhancement. The magnitude of the possibility of factual error increases as each adjustment is added to the base offense level. A district judge convinced that the weight of the factual record and ultimate sentence are substantially misaligned would be entitled to conclude that the Commission had not taken this into account and to depart downward.

Whether the courts will be permitted to pursue such innovative efforts to bring a measure of flexibility to the guidelines is unclear. The Sentencing Commission's typical response to cases involving the boundaries of the "heartland" has not been encouraging. The Commission has regularly amended the guidelines in response to previously unforeseen problems that have been held to constitute grounds for departures. This was expected — the Sentencing Commission from the beginning has stated that the guidelines would evolve over time in response to unforeseen problems. Nevertheless, the growing complexity of the guidelines has narrowed the areas in which courts are permitted to exercise their discretion and depart from the guidelines.

To take one example, in United States v. Lara, the Second Circuit approved a downward departure for a defendant whose youthful manner, appearance and slight physique rendered him unusually vulnerable to sexual assault. In response, the Commission amended § 5H1.4 to state that physique would not ordinarily serve as the basis for a departure. In proposing the amendment, the Commission stated:

In several cases, courts have departed based upon the defendant's alleged vulnerability to sexual assault in prison due to youthful appearance and slender physique. This amendment expresses the Commission's position that such grounds are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

The amendment did not necessarily involve a rejection of Lara, as the court had expressly found that Lara presented an "extreme" case. Nevertheless, the amendment did narrow the courts' discretion to depart. Nor is § 5H1.4 unique. The Manual has grown in complexity annually, increasing the frustration of some judges:

The guideline system of sentencing has become exceedingly opaque. We judges do the best we can to interpret the increasingly bulky, almost incomprehensible code of the guidelines. Nevertheless, without an overhaul of the entire guideline system, it is nearly impossible to sentence offenders in a straightforward and equitable manner.

III. Conclusion

The published opinions applying the guidelines are hardly unrelentingly critical of the guidelines or the Sentencing Commission. Yet to the extent that the Commission feels the need to respond to the criticisms that have been voiced in the federal reporters, it may wish to review some of the central premises of the guidelines rather than continuing to address individual problems piecemeal. Further guidance as to what constitutes a case within the "heartland" would facilitate determining when a court may or may not depart from the guidelines. And, because factfinding at the sentencing hearing has taken on such dramatic importance under the guidelines, the Commission may wish to re-examine the premise that facts proved only by a preponderance of the evidence (and in some cases facts that are admittedly no more than "approximations") may nevertheless be assigned precise weights and plugged into sentencing formulae to attain an accurate and just result.
FOOTNOTES


8 See Roberts, 726 F. Supp. at 1363-66. This criticism has been raised at the court of appeals level as well: United States v. Harrington, 947 F.2d 956, 965 (D.C. Cir. 1991) (Edwards, J., concurring). Judge Edwards did not claim that this aspect of the guidelines raised constitutional problems.

9 United States v. Pinto, 875 F.2d 143, 145 (7th Cir. 1989) (Eastbrook, J.). See also United States v. Seluk, 873 F.2d 15, 16-17 (1st Cir. 1989) (per curiam) (noting "the broad range of variables which the guidelines do take into account").

10 United States v. White, 869 F.2d 822, 829 (5th Cir.) (per curiam), cert. denied, 490 U.S. 1112 (1989).

11 Seluk, 873 F.2d at 17.


13 Why this attitude should have been more prevalent among circuit judges than among district judges is not entirely clear. The distinction has persisted, however. The 1992 Federal Judicial Center survey revealed that, although both circuit and district judges expressed reservations about the guidelines, a greater percentage of district judges strongly disapproved of them. See Planning for the Future, supra note 1, at 153-56. At least one district judge has attributed the disparity, in part, "to the fact that a judge's not having to impose sentences in person may make it easier to accept or even to approve a mechanistic grid-dominated system — a system in which any differentials in sentencing tend to be based only on differences in crimes and not on any differences among the criminals who commit those crimes." United States v. Bailey, ___ F. Supp. ___, 1995 WL 363433, at *1 (N.D. Ill. June 6, 1995) (Shadur, J.).

14 An example is the definition of the meaning of "methamphetamine (actual)" as opposed to simple "methamphetamine" under § 2D1.1. A note to § 2D1.1 states:

The terms "PCP (actual)" and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual).

This apparently simple directive has produced two cases in which the panels were deeply divided over meaning. See, e.g., United States v. Bogusz, 43 F.3d 82 (3d Cir. 1994) (Hutchinson, J.; Nygaard, J., concurring in part and dissenting in part, cert. denied, 115 S. Ct. 1812 (1995); United States v. Carroll, 6 F.3d 735 (11th Cir. 1993) (Carnes, J.; Bright, J., concurring in part and dissenting in part, cert. denied, 114 S. Ct. 1234 (1994)).

15 Ch. 1, Pt. A(4)(b).


17 Over a dissent by Judge Easterbrook, a majority of the en banc court concluded that because threatening a public official was a "crime of violence" under § 4B1.2, it could not be a "non-violent offense" for which diminished capacity might justify a downward departure under § 5K2.13. Id. at 593.

18 49 F.3d 636 (10th Cir. 1995) (Tacha, J.).

19 Silencers are treated as "firearms" under the National Firearms Act. See 26 U.S.C. § 5845(a)(7). One of the two silencers in the Webb case was attached to a semiautomatic rifle that was legally purchased and possessed. 49 F.3d at 641 & n.2 (Logan, J., dissenting).

20 Id. at 640.


22 § 2D1.1 app. n.12.

23 See, e.g., United States v. Pirre, 927 F.2d 694, 697 (2d Cir. 1991) (Pratt, J.) (finding it "sufficient for the government to show that its method of establishing the total is grounded in fact and is carried out in a manner consistent with accepted standards of reliability"); United States v. McCuhen, 992 F.2d 22, 25 (3d Cir. 1993) (Becker, J.) (adopting Pirre standard).

24 In United States v. Carroll, 6 F.3d 735 (11th Cir. 1993), cert. denied, 114 S. Ct. 1234 (1994), a case involving the manufacture of methamphetamine, the district court heard evidence from a defense expert who testified that the chemicals seized could have produced between 150 grams and 1.5 kilograms of the drug, and from a government expert who estimated that between 9.55 and 19.1 kilograms could have been produced. On the basis of this testimony, the district court concluded that the pertinent quantity was 1.8 kilograms of methamphetamine, and the court of appeals sustained the finding as not clearly erroneous.
25 Id. at 393 (Oakes, J., concurring).
26 39 F.3d 42 (2d Cir. 1994) (Winter, J.).
27 Id. at 48.
28 See, e.g., Ch. 1, pt. A(4)(b) (1987) ("By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.").
29 905 F.2d 599, 605 (2d Cir. 1990) (Cardamone, J.).
31 See also United States v. Smith, 27 F.3d 649, 653 (D.C. Cir. 1994) (Williams, J.) (the amendment to § 5H1.4 was "not an outright disapproval of Lara").