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PANEL 3: THE ALLOCATION OF DISCRETION UNDER THE GUIDELINES

Moderator: *Daniel J. Freed*, Clinical Professor of Law and Its Administration, Yale Law School

Professor Gerard E. Lynch, Professor of Law, Columbia University; former Chief of the Criminal Division of the Office of the U.S. Attorney, New York

The guidelines have shifted the locus of discretion from the judge to the prosecutor. This transfer has drastically changed sentencing because the prosecutor's role is very different from the judge's role.

Before the guidelines, the prosecutor's role in sentencing was minimal. The prosecutor could put a cap on the sentence by accepting a plea to a charge with a low maximum, but there was virtually no instance in which the charge would put a floor under the judge's sentence. The judge, on the other hand, could sentence however he liked. Not only was the judge's decision correct because it was final—there was no appellate review of sentences within the statutory maximum—it was correct because there was no law by which it could be called incorrect. Absent a few factors that were statutorily excluded from consideration, the judge could take into account any factor he thought relevant, and weigh it to whatever degree he thought it counted. The judge could be harsh or lenient, a retributivist or a utilitarian, a believer in deterrence or rehabilitation.

The guidelines have put an end to the judge's discretion. Instead, they have enhanced the power of the prosecutor. The factors that count for the guidelines are factual issues, and the prosecutor is more or less the master of the facts in a criminal case. The prosecutor knows more about the legally provable facts than anybody else, and the prosecutor has legal control over what facts will be asserted. However, it is not the case that the prosecutor has the same discretion, or as significant discretion, as judges had under the *ancien régime*. By moving the locus of the discretion, the guidelines have changed the nature of the discretion, the constraints under which it is exercised, and the issues with which that discretion will be concerned.

The discretion accorded to sentencing judges under pre-guidelines law was explicitly and intentionally *sentencing* discretion. Its purpose was to determine the appropriate sentence for the particular individual convicted of a crime; it was clearly correctional and punitive. In contrast, the prosecutor's discretion under the guidelines regime is intimately bound up with the traditional *charging* discretion of the prosecutor, a discretion that has its own logic and purposes. The prosecutor is not expressly or overtly entrusted with any discretion at all over sentencing; rather, he is given the authority to charge or not to charge particular offenses, to assert or omit particular facts or arguments. While the

power to influence sentencing does not disappear because it is not expressly acknowledged, there is a critical difference between having acknowledged, authorized, and legitimated discretion and having covert discretion. Prosecutors are not only interested in obtaining a particular sentence for the defendant; they are also interested in making a formal record of the results of governmental investigations.

A prosecutor today, under the guidelines, may have the effective power to reduce a sentence by underselling the charge, but such an act may well be at odds with the prosecutor's other objectives in determining the charges. This intrinsic distinction between overt and covert sentencing discretion profoundly affects the nature of the decision that will be made. The guidelines have done more than merely shift the locus of the discretion to a different decisionmaker; they have turned the nature of decisionmaking from a pure sentencing decision into something else.

The prosecutor is not free to dispense mercy at will. The judge has the power to thwart unwarranted leniency, to order the prosecutor to put on facts, and to reject a plea agreement. According to the guidelines, a judge may only accept a plea agreement if she is convinced that the sentence is within the applicable guidelines range or if "the agreed sentence departs from the applicable guideline range for justifiable reasons."[10] In other words, a judge is not supposed to approve a plea bargain unless the agreed-upon sentence is a guideline sentence. We have not yet seen judges moving against prosecutorial seizure of authority, but the tool is there.

More importantly, the issues that will principally determine the prosecutor's choice will often have more to do with the strength of the prosecutor's case than with abstract arguments of justice and mercy. Although some prosecutors, gauging appropriate sentence length by what they are used to, find the guidelines draconian, future prosecutors will inevitably come (as will future judges) to internalize the guideline sentences as presumptively correct. While circumstances will occasionally warrant overt or covert departures, the most significant motivator of agreement will be the existence of bona fide factual disputes about the applicable facts (both as to guilt and guidelines issues), the perceived likelihood of success in proving one side of the dispute version, and the resources necessary to be expended to accomplish that. To move the sentence up imposes costs on the prosecutor that were not borne by a judge sentencing under a non-guidelines regime—costs that the prosecutor might well choose not to bear. This is indeed an inevitable part of a guidelines system. By making the sentence turn on specified factual and legal issues, the guidelines invite the prosecutor and defense lawyer to estimate the likelihood of prevailing on the merits of those issues and consider the expected value of the sentence in light of those estimates. In such an atmosphere, what is likely to drive leniency is

10. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 6B1.2(c)(2) (1992).

not considered judgment about appropriate sentences (whether right or wrong), but judgments about whether compromise is forced by the strength of the prosecutor's litigation position.

By constraining the judge's sentencing discretion, guidelines and mandatory minimum sentences have enhanced the prosecutor's influence over the sentence. But to say that this has somehow shifted the judge's sentencing discretion to a different actor (who may or may not be less wise in its use) is an oversimplification. What the prosecutor now has is a discretion significantly different, more complicated, and more constrained than the discretion formerly exercised by judges.

Steven M. Salky, Partner, Zuckerman, Spaeder, Taylor, Goldstein & Kolker, Washington, D.C.; Chairman, ABA Sentencing Guidelines Committee

From the viewpoint of most defense attorneys, the federal sentencing guidelines have marked a step backward in the imposition of fair and just punishment. Regardless of whether or not the guidelines have served the cause of justice, it is undeniable that defense attorneys feel robbed of power as a result. Three primary reasons explain this phenomenon.

First, the process has been dehumanized because offender characteristics and situational factors have been largely removed from consideration at sentencing. Defense attorneys under the old system had significant control over the presentation of the human dimensions of the case and, as a result, were often able to influence the outcome. With the elimination of human factors from sentencing and, to a large extent, plea bargaining, this typical form of advocacy has been lost. Second, the ability of the courts to impose creative sentences has been virtually eliminated. While there is authority to depart, the approved grounds for departure are so narrow that they eviscerate the defense attorney's power to persuade the court to adopt a creative alternative sentence. Third, there is no doubt that the guidelines have increased the power of the prosecutor. This increased power is most evident when it comes to cooperation, the primary escape valve from the otherwise harsh mandatory minimum sentencing system being adopted by Congress. The defense attorney is somewhat superfluous when the defendant is cooperating, and cooperation has become the primary manner in which defendants avoid harsh sentences.

This is not to say that there are not avenues for effective advocacy under the guidelines. Because the factors that will determine the sentence all relate to the client's conduct and the harm intended or caused, and because the weight such factors carry can be identified with specificity, fact bargaining remains critical. Fact bargaining has always been a critical part of the system, but its importance is elevated in a system where judicial discretion is narrow. Now more than ever before, the defense attorney's focus must be on persuading the prosecutor.

Maria Rodriguez McBride, Chief U.S. Probation Officer for the District of Connecticut

Federal probation officers agree that their role in the sentencing process has changed significantly under the guidelines. There is no consensus, however, on exactly how the role has changed and whether those changes are positive or negative.

The primary duty of the probation officer in the sentencing process is to prepare the presentence investigation report and make a recommendation to the court for sentencing. Prior to the guidelines, probation officers compiled their information by obtaining details of the offense from the U.S. Attorney's file, interviewing the case agent, and interviewing the defendant. The body of the probation officer's report consisted of information about the defendant's prior record and social history. The officer generally attempted to understand the defendant and his reasons for involvement in the offense, and tried to arrive at a prognosis for the defendant's ability to rehabilitate. The report was then submitted to the sentencing judge. The probation officer would meet with the judge prior to the sentencing hearing to discuss the report and the officer's recommendation. The probation officer's power in this process lay in her ability to influence the judge with respect to the outcome of the sentencing.

The implementation of the guidelines has decreased the sentencing judge's discretion in sentencing. This reduction has in turn diminished the probation officer's role by reducing the officer's ability to influence the outcome of the sentence. In addition, the guidelines have altered the presentence report, negatively affected the probation officer's ability to obtain information relevant to sentencing, and significantly increased the amount of time needed to complete an investigation. Probation officers report difficulty in gaining access to the U.S. Attorney's file and even greater difficulty in getting information from defendants. Defense attorneys are reportedly advising their clients against full cooperation and often will not allow them to discuss the offense with the probation officer due to a concern that the client might provide information that could result in a higher guideline range. Consequently, the probation officer is left with a version of the offense that is less complete than in pre-guidelines cases and a social history that is severely lacking. Unfortunately, the failure to provide this type of information can result in a more severe sentence because the defendant's story is never presented to the court, and the officer has no personal information about the defendant on which to base a recommendation for downward departure.

The current presentence reports reflect our present sad state of affairs. Prior to the guidelines, the presentence report provided an assessment of the entire individual, including personal characteristics. The guidelines place greater emphasis on the offense behavior and the individual's prior criminal record and minimize individual characteristics. The guideline range is calculated on the

offense behavior and the criminal record before any personal information about the defendant is presented. Personal characteristics are considered relevant only for departures, and probation officers tend to believe that departures are permitted in very few cases. Officers hesitate to make departure recommendations on untried grounds due to inexperience and uncertainty, and judges are similarly reluctant to follow departure recommendations for fear of being overturned.

Although the guidelines have changed the probation officer's role in the sentencing process and in some ways have diminished the officer's power, most probation officers approve of the guidelines. Learning how to fashion an appropriate recommendation for a sentence has always been one of the most difficult tasks for officers. Guidelines that consider relevant information and then provide a sentencing range make the officer's task easier. Officers agree, however, that judicial discretion with options for departure is necessary for a fair guidelines system. Individual characteristics and offender needs are crucial to sentencing decisions. In addition, probation officers need full cooperation and participation by the defendant and defense attorney during the presentence investigation in order to present the court with a balanced report and to provide any and all information that might warrant a departure.

Judge Vincent L. Broderick, U.S. District Court for the Southern District of New York

While the guidelines have taken some power away from judges, judges still retain ultimate power over sentencing. Spectators at New York Knicks games in the late 1960's used to chant: "Defense! Defense! Defense!" Today's message for sentencing judges is: "Depart! Depart! Depart!" Departures are the lifeblood of the sentencing guidelines process.

This message needs to reach four audiences. First, the Commission. The Commission needs better information and better guidance on how to develop the guidelines. Second, the courts of appeals. They are likewise in need of education. They need to learn more about the power and the duty of district judges to depart. Third, district judges. District courts must exercise their departure power, and when they do depart, they need to explain their reasons adequately. Fourth, defense counsel. Defense attorneys must learn to present arguments for departures. Federal defenders know and understand the guidelines, and they are beginning to chart out the statutory underpinnings of the guidelines and the implications these have for arguments.

Another group that the guidelines significantly affect is probation officers. The Commission has made a very conscious effort to change the role of the probation officer. While probation officers have a much more difficult and technical role under the guidelines, they are still an arm of the court and should help the court in reaching sentencing decisions.

The guidelines have downplayed characteristics that judges found relevant in the past, such as family, employment, and community ties. Under the guidelines, these factors are no longer considered "ordinarily relevant." They may not seem relevant in the abstract, but for each particular defendant, they are extremely relevant. They affect the defendant's prison assignment and the information available to the probation officer for the supervisory phase.

The guidelines have not effected any real shift in power, but they have changed the roles of the players in the sentencing process. Each of these players needs to learn to work with, through, and around the guidelines better.

PANEL 4: THE FUTURE OF THE GUIDELINES

Moderator: *Stanton Wheeler*, Ford Foundation Professor of Law and the Social Sciences, Yale Law School

Judge Nathaniel R. Jones, U.S. Court of Appeals for the Sixth Circuit

The guidelines represent incursions into constitutional protections. Before the 1970's, the number of black and minority Article III judges was minuscule. In fact, before the Kennedy Administration, there was only one black Article III judge. Kennedy and the Presidents who followed him, especially President Carter, added many minority judges to the bench. As a result of these changes on the bench, the minority community began to change its perspective on the law, seeing it as an instrument for promoting equality rather than an obstacle to equality. The judiciary was becoming more sensitive to problems of race and the law.

Unfortunately, the guidelines have stripped judges of their ability to consider human factors in sentencing. The role of the judge has been marginalized. Instead of judicial discretion, the guidelines have placed tremendous discretion in the hands of investigative agents, prosecutors, and probation officers—often people with hardly any real life experience. The rationale and justification for the guidelines was to rid the system of disparity, partly in order to close the sentence gap between the poor and the affluent. Instead, they have created a multimillion dollar bureaucratic nightmare. We delude ourselves if we think that the guidelines have brought uniformity to the sentencing process and ended disparity. Indeed, one of the consequences of the guidelines has been an acceleration of the incarceration rate of minorities and the poor. Presently, one quarter of black males from twenty to twenty-nine years old are either in prison, on probation, or on parole. This is a higher proportion than the percentage of black males in college.