Litigation-Enmeshed Sentencing: How the Guidelines Have Changed the Practice of Federal Criminal Law

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INTRODUCTION

In 1985, not long after the Sentencing Reform Act was passed, the legendary Charles Wyzanski, for forty-five years a United States District Judge in Massachusetts, was asked what he thought about the approaching sentencing guidelines system. He said, "Whenever a change is made of such magnitude, you can be sure of one thing: that the unanticipated effects of the change will be more important than the anticipated ones."[1]

The guidelines system is indeed a change of first magnitude, both in and of itself and in its range of application. Never before have federal trial judges been required to find facts and apply law as a routine part of sentencing. Granting both parties widespread rights of appeal from sentences reverses centuries of law and tradition and radically expands circuit court jurisdiction. Placing the primary power to decide sentence length in an administrative body, the Sentencing Commission, is a major new step. The number of cases affected by the guidelines is enormous; the guidelines are of prime importance in almost every criminal case.

In this Article I argue that, to whatever extent the guidelines have had their anticipated effects of achieving honesty and reasonable uniformity in sentencing,[2] they have done so only by tying up sentencing in litigation, an outcome much more harmful than the guidelines' putative benefits. This result has raised the costs, both monetary and nonmonetary, of the federal criminal

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[1] Conversation with the Honorable Charles E. Wyzanski, Jr., United States District Judge for the District of Massachusetts, in Boston, Massachusetts (Oct. 1985).

[2] The goals of the Sentencing Reform Act are discussed in UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 1A3 (Nov. 1991) [hereafter U.S.S.G.] (entitled "The Basic Approach").

justice system far more than even the keenest observer could have foreseen. This rise in costs comes at a time when we can least afford it.

I will support my argument by giving examples of typical guidelines cases and the disputes they create and by describing day-to-day practice under the guidelines. I will then put forward some general observations and conclusions. Finally, I will make two suggestions, one practical and one, for now, quixotic.

I. EXAMPLES

Before the guidelines arrived, the process of determining law and facts and applying the one to the other was confined almost exclusively to the guilt phase of federal criminal cases. The sentencing, no matter how controversial or hotly contested, rarely entailed legal research or fact investigation. Because there was nothing specific to be established, litigation as such was almost nonexistent in sentencing. The only real question was how the judge would exercise discretion.

All that has changed. What has proved most important about the guidelines is not *that* their goal is to make sentences more uniform but rather *how* they have gone about reaching that goal: namely, by a massive infusion of rules of law into the sentencing process. The rules are often subtle in themselves, and their application often depends on subtle fact questions.

The following are three examples of routine guidelines cases derived from typical cases in the office where I work, the Federal Defender Office for the District of Massachusetts. After each example, I set forth issues raised by the example in determining the correct offense level. The point of these examples is to show that calculating offense levels for even the simplest case can raise a host of difficult questions. The reader whose appetite for guidelines arcana is satisfied after perusing the first example is invited to proceed to sections D and E below, where I present comments on criminal history score calculations and guidelines departures.

A. Offense Level Calculations: Example 1

> D robs a federally-insured bank of $1500 by using a note. The note says, "All your money. 10s, 20s, and up. I have a gun." The police arrest D a few hours later, and D confesses in a cell at the police station. The police find a penknife in his shoe. After indictment for bank robbery, D moves to suppress the confession and submits an affidavit stating that he was not informed of

> his *Miranda* rights before confessing. The arresting officers testify that he was informed of his rights when arrested; the booking officer also testifies to having informed D of his rights. The suppression motion is denied. D pleads guilty.

Before the guidelines existed, these facts would have caused little controversy. The judge might have attached some weight to the "I have a gun" clause of the note and, possibly, some weight to the speed of the confession. Overall, however, the judge probably would have considered the robbery to be rather average.

Under the guidelines, this simple case is now teeming with issues, subissues, and sub-subissues:

- Is "I have a gun" an "express threat of death," in which case two points are added to the base offense level for robbery?[3]
- Could a judge find by a preponderance of the evidence that, because the note said that D had a gun, D *in fact* had a gun? Under the guidelines, if a dangerous weapon was "brandished, displayed, or possessed," the base offense level is increased three points.[4] One would think the judge could not make such a finding—"note" robbers rarely have guns. Yet would such a finding be clearly erroneous and thus reversible? Suppose D had a prior robbery conviction in which he did carry a gun. Or suppose, conversely, that when he confessed, D denied having a gun.
- Even if no one contends D had a gun, is the *knife* a dangerous weapon? Under the guidelines, the judge decides whether it is a dangerous weapon by determining whether it is "capable of inflicting death or serious bodily injury."[5] Even a penknife can inflict death; did the Commission mean this provision literally or should one consider the context in which the item is possessed?
- Even if the knife is deemed a dangerous weapon, did the Commission truly intend to equate the offender's possession of a penknife that is unknown to the victim with the brandishing of, say, a firearm? Apparently it did, because otherwise the guidelines section would simply have referred to a dangerous weapon being "brandished or displayed" and would have omitted "possessed."[6] But to treat D like a robber who brandishes a gun lumps together dissimilar offense conduct. Could D therefore argue that because the provision equates dissimilar behavior, it creates disparity and therefore is void as applied to D's case? Or could the court properly depart downward because the possession of a penknife unknown to the victim probably was not contemplated by the Commission? Or was it?

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[3] *See* U.S.S.G. § 2B3.1(b)(2)(F).

[4] *See id.* § 2B3.1(b)(2)(E).

[5] *See id.* § 1B1.1, comment. (n.1(d)).

[6] *See id.* § 2B3.1(b)(2)(E).

- Does D lose the two-point, acceptance-of-responsibility reduction by moving to suppress his confession? Some probation officers have said yes.
- Does D's statement in his affidavit—a statement which the judge has implicitly found to be false—amount to "providing materially false information to a judge or magistrate," in which case two points are added to the base offense level?[7] If so, to what effect is section 3C1.1, application note 1, which says that "[t]his provision is not intended to punish a defendant for the exercise of a constitutional right" and that in applying the provision, the defendant's "testimony or statements should be evaluated in a light most favorable to the defendant"?[8] What if the affidavit had said not that *Miranda* warnings were not given, but that D was "quite sure" the warnings were not given or had "no memory" of the warnings being given? If the judge is inclined to treat the affidavit as an obstruction of justice, must the court hold a hearing to allow D to establish a claim that, say, he was under the influence of drugs when arrested and that his sworn statement therefore was due to bad memory rather than deception? May D wait until the court rules on the question of whether the affidavit is an obstruction and then ask for a hearing, or must he first present evidence?

Consider further the two-point increase under section 2B3.1(b)(2)(F) for an "express threat of death."[9] According to application note 7, the increase is intended for cases in which the offender's conduct "would instill in a reasonable person, who is a victim of the offense, significantly greater fear than that necessary to constitute an element of the offense of robbery."[10] One reported case, *United States v. Eaton*,[11] has already construed the "express threat of death" clause, holding that it applies to a note reading, " 'Give Me All Your Money or I'll Shoot.' "[12] What if the note in *Eaton* had said, instead, "or you'll really regret it," or "if you value your safety," or "and you won't get hurt," or "and no one will get hurt"? Reasonable people could disagree on whether these hypothetical notes are express threats of death, as they could on hundreds of other versions of robbery notes. In ten or twenty years, there will likely be a score of cases deciding whether or not a particular note creates an "express threat of death." Whenever a convicted robber has used a note that arguably

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7 *See id.* § 3C1.1, comment. (n.3(f)).
8 *Id.* § 3C1.1, comment. (n.1).
9 *See id.* § 2B3.1(b)(2)(F).
10 *See id.* § 2B3.1, comment. (n.7).
11 934 F.2d 1077 (9th Cir. 1991).
12 *Id.* at 1079.

threatens death, these cases will have to be found and re-analyzed.

B. Offense Level Calculations: Example 2

> An undercover agent negotiates with D to purchase cocaine. D tells the agent she has many regular customers who buy from her because of the high quality of her cocaine. D sells the agent an ounce immediately and another ounce a week later. At the time of the second sale, D agrees to sell the agent an ounce each week from "here on out." D is arrested right after the second sale and is convicted on a separate count for each sale.

There are two main questions:

- Does D have the claimed "regular customers" or is she puffing? If the former, is it clear that her sales to these customers are "part of the same course of conduct or common scheme or plan as the offense of conviction," in which case her offense level is based on the total amount sold to such customers?[13] How much has she been selling to these other customers and for how long?
- How do the guidelines treat D's agreement to supply one ounce of cocaine per week? The guidelines state:

> If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guidelines calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.[14]

Does this apply to the future sales, given that D has not been *convicted* of attempt or conspiracy? Or, since the conduct that led to the conviction involved negotiation to traffic, does the provision apply? We will know the answer to these questions after the circuit courts have settled on the correct reading of "offense involving negotiation." If the provision is applicable, does it apply only to specific future sales for which the time, place, and amount has been set (as the phrase "weight under negotiation in an uncompleted distribution" suggests) or to general agreements such as the one in this example? If the latter, how does one calculate the "amount under negotiation"? How does one determine what the defendant is reasonably capable of producing? Who has the burden of proof?

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[13] *See* U.S.S.G. § 1B1.3(a)(2) (relating to "Relevant Conduct").

[14] *See id.* § 2D1.4, comment. (n.1).

C. Offense Level Calculations: Example 3

> D lives in a northern industrial city and is out of work. On three occasions over one year, D is paid $2000 by a friend to bring two kilos of cocaine from Florida to the city. D has reason to believe his friend has connections with serious Florida drug dealers. Shortly after the third trip, the Florida dealers, friend, D, and others are arrested and in due course convicted for conspiracy and various substantive offenses. Evidence shows that the Florida dealers have been distributing about fifty kilos a year for the five years before arrest.

The question in this example is D's accountability for the drugs distributed by the conspiracy as a whole. The answer to the question depends on the extent to which the codefendants' conduct was "reasonably foreseeable by the defendant."[15] But, as every law student knows, the word "foreseeable" is as flexible as any word can be. This provision will generate countless hearings, arguments, and appeals. For example:

> • Can drugs distributed before D joined the conspiracy be used in computing D's offense level? An illustration to the application note seems to indicate that one can "foresee" the past,[16] and a recent case so holds.[17] But does not that position violate the well-established rule that one cannot be convicted of crimes committed by coconspirators before one joins the conspiracy?[18]

One faces the obvious point that, in one sense, *anyone* involved with transporting cocaine can safely assume that the cocaine originated in a multi-kilo shipment, itself probably part of an

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[15] *See id.* § 1B1.3, comment. (n.1). The second sentence of this application note reads:

> In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.

Id. According to the fourth sentence, it also may depend partly on whether the codefendants' conduct was "within the scope" of the defendant's agreement, a concept not explained in the application note. *See id.*

[16] *See id.* § 1B1.3, comment. (n.1, illus. e) (stating that the defendant "is not accountable for prior . . . shipments . . . if . . . not reasonably foreseeable").

[17] United States v. Edwards, 945 F.2d 1387 (7th Cir. 1991).

[18] *See* Levine v United States, 383 U.S. 265 (1966); United States v. Harrell, 737 F.2d 971, 981 (11th Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

ongoing distribution network. While the guidelines do not mean to assess D for the entire output of the Medellin cartel, they give a court no help on where to draw the line. And, realistically, how could they? Such questions are imponderable. Judges are human. Their findings as to what is foreseeable will sometimes depend not so much on the specific facts as on their attitude toward drug offenses generally or the defendant in particular.

Consider another issue:

> • Suppose only D and his friend are indicted and convicted. Is D's friend a *conspirator with* the Floridians or merely a *buyer from* the Floridians? This subtle distinction determines whether or not D's offense level includes the other drugs moved by the Floridians. The answer depends on a close analysis of many facts and can give rise to interminable debate.[19]

D. Criminal History Scores

The calculation of a criminal history score (CHS) under the guidelines, like the calculation of offense levels, can be daunting. Arguments about which prior cases count, and for how many CHS points, are highly technical. Making these arguments requires an intimate knowledge of state court practice and its evolution.

First, consider "diversionary dispositions." These count as part of the CHS if "they involved a judicial determination of guilt or an admission of guilt in open court."[20] Massachusetts courts frequently use a device—called a "continuance without a finding"—whereby cases are postponed for a specified period and later dismissed unless the defendant commits a new crime. Sometimes a Massachusetts judge who continues a case without a finding actually makes a finding of guilt, which therefore counts in calculating the CHS. Sometimes, however, the judge does not make such a finding, and there is not an admission of guilt in open court. The only way to decide whether the case counts is to locate the tape that was prepared of the original proceeding—that is, if the tape *can* be located—and find out what happened.

Second, when one examines a prior conviction closely, one often discovers a fundamental error, such as an invalid waiver of

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[19] *See* United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1972); United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).

[20] *See* U.S.S.G. § 4A1.2, comment. (n.9).

counsel or a court's failure to determine whether a proffered guilty plea was voluntary. Determining whether there was such an error, and, if so, its effect on the CHS, can take up many days of a lawyer's time and hours of a court's time.

Third, consider the problem raised by the rule that certain misdemeanors and petty offenses—such as writing a check on insufficient funds or giving false information to a police officer—count for CHS purposes if "similar to [the] instant offense."[21] Is writing a check on insufficient funds similar to interstate theft? Is giving false information to a police officer similar to bank fraud? We will know only after years of appellate litigation, and even then each new case will have a twist of its own.

Finally, a presentence report (PSR) sometimes incorrectly lists prior case outcomes, leading to erroneous CHSs. Catching such errors can mean hours poring over copies of old judgments and docket entries, which often require much effort—and some expense—to chase down.

In short, as the above instances demonstrate, the calculation of CHSs is no mere mechanical exercise. It involves complex questions of law, fact, and judgment.

E. Departures

Similarly, the decision on whether to depart from the guidelines also involves complex questions. A departure may, on its face, seem like an easy concept to apply. The court simply determines if a circumstance exists that the Commission did "not adequately take[] into consideration" that "should result" in a sentence outside the guidelines.[22] Litigation over departures, however, has already generated hundreds of reported cases on the circumstances in which departures are, and are not, permitted. In deciding whether or not to depart, therefore, judges sometimes have to spend hours hearing arguments, perusing briefs, and reviewing cases.[23]

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[21] *See id.* § 4A1.2(c)(1).

[22] 18 U.S.C. § 3553(b) (1988).

[23] That departures and appellate reviews of departures are acquiring their own "jurisprudence" is a point made in Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV 1 (1991).

II. Practice Under the Guidelines

As the foregoing demonstrates, we have abandoned a simple sentencing system, however erratic it sometimes was, for one which by its nature generates innumerable disputes. The reassuring word "guidelines" is a misnomer. The guidelines are no different from a statute, 385 pages in length, which in 4 years has already given birth to thousands of pages of reported cases. Until the guidelines, substantive criminal law comprised the statutes and cases that defined and explained criminal offenses. Now, of equal importance, there exists a whole substantive law of sentences. Given the guidelines' main function—determining the length of prison sentences—can it be a surprise that their every provision, clause, and phrase, nearly their every word, is a battleground of litigation?

Because of their complexity, the guidelines are creating a revolution in the day-to-day practice of federal criminal law, not just for lawyers but also for judges and probation officers. In this Part, I will try to describe this new practice of federal criminal law, mainly from a defense lawyer's viewpoint.

As already noted, the average preguidelines sentencing involved no legal research. Now, most cases require lengthy legal research: studying guidelines, notes, commentary, and policy statements; tracing amendments; and analyzing cases. Because cases are being generated at such a furious rate, computerized research is essential. This leaves out in the cold many excellent lawyers who lack access to computerized research. Books and services[24] that collect guidelines cases are required reading. The number of reported cases on the guidelines is awesome. A computer search of court of appeals cases mentioning "sentencing guidelines" came up with 490 in 1989, 1313 in 1990, and 1630 in 1991.[25] The number seems destined to increase.

Legal writing has become all important. Both Assistant United

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[24] The prime example is the excellent Guidelines Grapevine put out by the Federal Defenders of San Diego, Inc. Telephone Interview with the Federal Defenders of San Diego, Inc. (Mar. 16, 1992). The Federal Judicial Center's *Guidelines Sentencing Update* is also helpful, but is apparently not available to private practitioners.

[25] Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 906 n.17 (reporting that computer search for 1990 court of appeals cases mentioning "sentencing guidelines" produced nearly 1100 cases, as opposed to fewer than 450 mentioning "Title VII" and fewer than 250 mentioning "RICO," excluding those

States Attorneys (AUSAs)[26] and defense counsel usually have to respond to the initial draft of the PSR; these responses can run several pages. More important, defense counsel often has to brief the issues, a task that can eat up a full week. One may have to put just as much time and effort into a memorandum about, say, an issue relating to two offense level points as a traditional memorandum on a motion to suppress or a motion to dismiss. AUSAs are forced to respond in kind. In addition, district judges often feel obliged to write opinions.

The constant amendments to the guidelines are also hard on practitioners. The Commission, through no fault of its own, churns out amendments at an alarming rate. After the guidelines became effective in November 1987, there were 35 amendments effective in January 1988, 28 in June 1988, 3 in October 1988, 250 in November 1989, 56 in November 1990, and 62 in November 1991.[27] Because explanatory notes accompany some amendments, interpreting a guideline requires checking all previous amendments. In many cases, the relevant guideline changes during the course of the defendant's criminal conduct. Applying the guidelines in these cases is intricate work. In doing so, one is almost required to have the earlier guidelines manuals applicable when each offense occurred; it is not easy to reconstruct earlier guidelines by tracing back the amendments.

For defense lawyers, the task of explaining guidelines issues to clients is formidable. Sadly, some clients lack the aptitude to grasp more than the dimmest notion of what the guidelines are, let alone the relevant issues and their possible effects. Some other clients, bright and inquisitive, can easily get sidetracked on issues that seem irrelevant to the lawyer. It is often critical, however, that clients do understand the relevant issues. To give just one example, the decision on whether to go to trial or not sometimes depends on the lawyer's assessment of how the judge is likely to rule on a particular guidelines issue.

For example, the government may propose a plea agreement in which, to avoid trial, it agrees to recommend the low end of the guidelines range as that range is determined by the court. Before

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mentioning "Puerto Rico"). A Lexis search on February 19, 1992, revealed 1630 cases for 1991.

[26] I will use AUSA to refer to any federal prosecutor.

[27] U.S.S.G. App. C. Appendix C, which lists all the amendments and, as noted, must frequently be consulted, is now itself 254 pages long and published as a separate volume.

a client accepts such a proposal, the lawyer must explain what the guidelines issues are and give some opinion on how the judge may decide them. This may require the lawyer to review precedents with the client, predict whether the judge is likely to adopt the reasoning of particular cases, tell the client how the judge has ruled in other cases, predict the probation officer's view of the issues, and describe the judge's record for adopting or rejecting the probation officer's views. Frequently, the lawyer tries to summarize the issues by letter. Such letters are often, of necessity, so full of disclaimers that they may in fact confuse rather than clarify the issues.

This raises the guidelines' most serious personal ramification for defense lawyers: the multifarious opportunities the guidelines have created for mistakes and malpractice. Some reported drug cases suggest that defense counsel failed to realize that the drug quantities covered by dismissed counts are usually counted against the client—about as basic a misunderstanding of the guidelines as one can have.[28] One can fail to spot a mistake in the PSR's analysis of a guidelines issue or in the listing of a prior conviction. There have been instances of lawyers not knowing of the severe career offender guideline[29] or failing to notice that it applied to their client. The number and frequency of amendments make it easy to harm a client by relying on the wrong version of the guidelines. One can miss an issue altogether that would benefit the client. Until now, claims of counsel's ineffectiveness in sentencing have been rare. With the guidelines, however, ineffective counsel cases claiming incorrect guidelines advice are guaranteed to arise in bulk and further clog the courts.

In addition, the guidelines have seriously affected the relationship between lawyers and probation officers. Lawyers used to discuss questions of law with probation officers only rarely; now *most* lawyer-probation officer conversations are about law. Indeed, it has gotten to the point where lawyers cite cases to probation officers and the officers, who have direct access to computerized research services, then retrieve the cases and study them.

Legal discussions between lawyers and probation officers are

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[28] *See* U.S.S.G. § 1B1.3(a), comment. (backg'd.); United States v. Garcia, No. 91-1708, 1992 U.S. App. LEXIS 541 (1st Cir. Jan. 16, 1992); United States v. Fernandez, 877 F.2d 1138 (2d Cir. 1989).

[29] *See* U.S.S.G. § 4B1.1; United States v. Prichett, 898 F.2d 130 (11th Cir. 1990).

apt to be frustrating for both sides. Quite naturally, the officers, unless they happen to be lawyers, assume there is only one way the guidelines apply to any given set of facts. They tend to view lawyers who argue for a different interpretation as technical and legalistic. They also suspect, perhaps rightly, that the lawyers' views of certain guidelines issues are sometimes colored by a desire to work out a satisfactory plea bargain. We lawyers, on the other hand, get upset when probation officers do not realize that what they regard as a mere calculation often masks important factual and legal decisions. Yet the officers, understandably, regard it as their job not to present a range of possible options to the court, but to make a decision on each guidelines question, letting the lawyers fight about it in court if one of them disagrees.[30] Overall, the injection of legal issues—as well as specific issues of fact that may have to be litigated—into the relationship between lawyers and probation officers requires a huge investment of time for both.

It need hardly be said that vast amounts of time are spent in guidelines disputation between opposing lawyers. If, despite all this conflict—and guidelines issues can be fought just as hard as any trial issue—the opposing parties arrive at a tentative plea agreement, new problems arise. Before the guidelines, barring issues of forfeiture or the like, plea agreements were usually simple: for example, "if defendant pleads guilty, the government will recommend X years." Now they are intricate, laden with conditionals and provisos: for example, "if the court finds such-and-such on issue X, the government will lower its recommendation to Y." Because plea agreements are often prepared hurriedly, it is easy for lawyers to make serious errors.

To be an effective guidelines advocate, one must keep tabs on unreported precedent in one's district. This is an obvious hardship for lawyers who infrequently take federal cases or who handle out-of-district cases. If a judge is on the fence about whether factor X permits a departure, it can make all the difference for the judge to learn that a colleague down the hall has previously departed from the guidelines because of factor X. For this reason, the Federal Defender Office in Massachusetts is attempting

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[30] I believe that probation officers are becoming increasingly aware that applying the guidelines is not just arithmetic and that interpretation and judgment lie at the heart of many calculations. One wonders whether this awareness will spur probation departments to try to hire lawyers to advise them on guidelines calculations!

to record all of the district's departures and the precise words used by the judge in the "Statement of Reasons" form.[31] Collecting and sharing this information takes time and money. Moreover, it is vital for counsel on both sides to know the tricks of the trade—the devices and interpretations that shortcut the guidelines or avoid long hearings and the risks they create. In short, one of the biggest drains on lawyers' time in guidelines cases is following up on accounts of similar cases.

Guidelines litigation, like any other, requires investigation of facts. As a result, demands on defense investigators have risen sharply. The use of experts has increased in sentencing. It is almost a *sine qua non* that requests for departure because of "significantly reduced mental capacity" under section 5K2.13 be supported by a psychiatrist's report. Chemists are needed to check drug weights, accountants to peruse determinations of loss.

III. Consequences of the Guidelines

Whatever the guidelines have accomplished, their most dramatic impact has been to submerge the federal courts, already barely afloat, in a maelstrom of litigation. Because they affect almost every criminal case, it is possible that no single act of Congress has ever produced as much litigation as has the guidelines' enabling legislation, the Sentencing Reform Act. This country's romance with lawsuits and its litigation "explosion" is, of course, already a serious national problem. This present litigation explosion may soon seem like a minor eruption in comparison to the cataclysm set off by the guidelines. Guidelines litigation is enormously expensive, highly technical and specialized, and, seemingly, will only grow more complex with time.

A. Time and Expense

The guidelines have greatly increased the time consumed by the average prosecution. For each case where the guidelines are easy to apply—and some exist—there is another requiring massive expenditures of time: time of probation officers, AUSAs, defense lawyers, trial judges, and, not infrequently, circuit judges.

[31] Judges specify the reasons for the sentence to be given on the "Statement of Reasons" form. They also include fact-finding relating to the guidelines and, if they depart from the guidelines, the reasons for their departure. Telephone Interview with the United States Sentencing Commission (Mar. 16, 1992).

Time spent on guidelines issues means fewer prosecutions and even less opportunity for the federal courts to do their other proper business.

The expense of the guidelines is enormous. Take, for example, the additional cost of court-appointed counsel, the area with which I am most familiar. From 1985 through 1987, each lawyer in my office handled roughly seventy cases per year. For 1990 and 1991, each lawyer handled only roughly thirty-two cases per year. I believe the guidelines are primarily responsible for the change. They make each case more complex and time-consuming, thus preventing lawyers from handling more cases. The Judiciary's budget submission to Congress for the fiscal year 1993 estimates that the Sentencing Reform Act has increased the time taken for the defense of the average case by twenty-five to fifty percent.[32] In the period from 1988 to 1991, the number of criminal cases handled by federal public defenders throughout the country rose only about eight percent while the number of public defenders rose approximately forty-seven percent.[33]

Because the guidelines are still being phased in, present costs are nowhere near what they will be. Many cases that are still pending charge preguidelines offenses, as will some not yet filed. Cases under the still-preliminary probation and supervised release violation guidelines are a trickle compared to the torrent they will become, both for district and circuit courts.[34] Finally, the remarkably complex new guidelines for the sentencing of organizations are guaranteed to further fuel the litigation boiler. The courts will be tied up in such disputes as whether an "organization operated primarily for a criminal purpose or primarily by

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[32] *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE JUDICIARY: BUDGET ESTIMATES FOR FISCAL YEAR 1993—CONGRESSIONAL SUBMISSION (forthcoming 1992).

[33] Specifically, from fiscal year 1988 to fiscal year 1991, the number of lawyers in public defender offices increased from 325 to 504 while the number of criminal cases that were opened by federal defender organizations increased from 23,340 to 25,218. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 100, tbl. S-14 (1990) [hereafter ANNUAL REPORT]; Memorandum from the Administrative Office of the United States Courts (Jan. 21, 1992) (on file with the *U.C. Davis Law Review*); Telephone Interview with David Cook, Administrative Office of the United States Courts (Mar. 16, 1992).

[34] Because supervised release replaces parole, every former parole violation hearing is now translated into a full-blown guidelines case, complete with the right to appeal.

criminal means";[35] whether a given individual is among the "high-level personnel of the organization,"[36] or the "substantial authority personnel,"[37] or neither; and whether "tolerance of the offense by substantial authority personnel was pervasive throughout the organization,"[38] to name a few. Major law firms will be in the front lines of organizational guidelines litigation, generating volumes of work for the courts and, naturally, enormous fees that will make it harder, in cases, to collect fines and will damage legitimate, struggling companies.

B. Intellectualism and Specialization

Guidelines litigation is highly technical and specialized. There is a premium on issue-spotting, thorough legal research and analysis, persuasive legal writing, and appellate-style courtroom debate. Lawyers come to court for sentencings with litigation bags overflowing with memoranda, correspondence, photocopies of federal cases, and Westlaw and Lexis printouts. The sentencing process used to call upon a judge's common sense, judgment, experience, and wisdom. Now, what is most important is the judge's knowledge of a specific body of law and general intellectual acumen. Sentencing has become a law professor's dream.

The guidelines can be intellectually fascinating; they provide a chance for creative legal thinking by gifted lawyers. Issues tend, however, to become abstract. Discussion of guidelines issues sometimes seems more like an exercise in scholastic philosophy or Talmudic exegesis than law. Counting angels on the head of a pin is kids' stuff compared to some guidelines problems. Consider this example: D unsuccessfully attempts to defraud Bank X of $100,000 and then, soon after, successfully defrauds Bank Y of $100,000. Is his offense level based on a $100,000 fraud or a $200,000 one? Or suppose D, seeing too many police as he heads to a bank, waits until the following day to rob it. Can he be tallied for two crimes or just one? Too easily can one get carried away—smitten, to use one probation officer's word[39]—with the technical game of sentencing.

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35 U.S.S.G. § 8A1.2(b)(1).

36 *Id.* § 8C2.5(b)(1)(A)(i).

37 *Id.* § 8C2.5(b)(1)(A)(ii).

38 *Id.*

39 Francesca D. Bowman, *The Greening of Probation Officers in Their New Role*, 4 FED. SENTENCING REP. 99, 99-101 (1991) (one of several insightful, refreshing articles by probation officers in the Reporter).

There is also a tendency for sentencing to degenerate into gamesmanship. Sometimes one side will have to tiptoe around an adverse guidelines issue, hoping that the other side and the probation officer will miss it. When there is a debatable issue, one has to decide whether to keep quiet in hopes that the probation officer will miss it, or whether to raise it and try to head it off. Such strategy questions pervade guidelines practice, as they do most litigation. ASUAs, some probation officers feel, occasionally hide facts or issues to prevent the upsetting of plea bargains. The new system has caused much suspicion and second guessing.

Sentencing guidelines are becoming a legal specialty. Guidelines practice requires total immersion. One must be familiar with the Sentencing Reform Act, the guidelines themselves, the amendment process, case law, and local practice. Books on the guidelines are proliferating. The excellent *Federal Sentencing Reporter*, packed with information and ideas, amounts to a trade journal for the specialist. The services of well-remunerated federal sentencing "experts" could well become *de rigueur* in high-profile, white collar cases. Sadly, many fine criminal lawyers now avoid federal court; they lack the time to study the guidelines, which, they have heard, are arcane, technical, and fraught with traps.[40] Indeed, guidelines practice bears a striking likeness to tax practice: it is technical, numerical, labyrinthine, often abstract, at times fascinating, subject to constant change, full of traps, and forbidding to outsiders.

C. Inherent Complexity

That practice under the guidelines has proved technical and legalistic does not mean that they are poorly drafted or that they focus on unimportant issues. Quite the contrary: they are probably as well drafted as one could expect from so vast a set of rules, and the criteria they use to determine offense levels are the appropriate ones. Rather, the difficulty is that as soon as one tries to capture even the basics of offense behavior and criminal history in a set of rules, the rules become the issue more than the behavior. Every rule has gray areas, and the specific offense characteristics, definitions, adjustments, and criminal history rules are no

[40] One experienced practitioner, expressing many lawyers' feelings, calls the guidelines the "Rubik's cube of the criminal law." Statement of Edward J. Lee, Partner, Hale, Sanderson, Byrnes & Morton in Boston, Massachusetts.

exception. Usually, more than just one or two guidelines rules could apply to a particular case. In these cases, there will probably be a bona fide dispute about whether each rule applies and, if so, how. Thus, in the *average* case, there is likely to be legitimate doubt as to what the guidelines score is.

D. The Future

Can the deluge of reported guidelines cases be passed off as just startup costs? Will there come a time when every important guidelines question has been decided? It would be naive to think so. The law, it seems, becomes only more refined and more complex with time. Distinctions breed further distinctions; clarifications need clarifications of their own.

For the same reason, it would be naive to think that the Commission will stop producing amendments. There is also the danger that a permanent body such as the Commission will, taking on the proverbial life of its own, eventually be motivated to keep generating amendments partly to justify its existence.

And what about the long term? Suppose the Commission as a whole adopts a new sentencing philosophy—will the guidelines then be largely revised? Just as individual judges have quite different views about appropriate sentences—hence the guidelines—so too will different incarnations of the Commission. Will the guidelines' basic philosophy swing back and forth over time, as with the Tax Code? And, as with the Tax Code, will Congress pass periodic Guidelines Reform and Simplification Acts, each time creating new issues? Or will the compromise of conflicting interests that lies behind the guidelines' present form[41] be readjusted, even mildly, thereby casting doubt on existing precedent? One cannot be sanguine about the road ahead.

E. Conclusions

It is a truism that our society is too litigious. We have tried, nevertheless, to solve a serious problem, excessive sentencing disparity, by a device that is proving to be a litigation dynamo. Moreover, the guidelines have come at a time when we can least spare the resources they consume. Although I represent criminal defendants for a living, it has not been lost on me that the country

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[41] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

is engulfed in violence. Yet the precious time of judges, AUSAs, defense lawyers, and probation officers—time better spent on more prosecutions—must now be spent in sophistic debate about words, meanings, and abstractions. We are, it might be said, fiddling while Rome burns.

IV. REMEDIES

A. Compromise of Guidelines Disputes

In many disputes over the guidelines' application, there is little relation between the amount of incarceration at issue and the amount of time spent on the dispute. Two adversaries can battle over an issue involving just one offense level or one criminal history point. The loser can, and often does, appeal the trial court decision on this issue to the court of appeals and can even petition the United States Supreme Court for a writ of certiorari. In almost every other area of the law, such disputes are usually settled.

A mechanism for settling guidelines disputes is badly needed. The guidelines, however, are not understood to permit settlements. Indeed, many cases viewed as guidelines manipulation are no more than attempts to settle bona fide disagreements. The governing statute speaks of "*the* sentencing range established . . . [by] the guidelines"[42] and requires the court to sentence within that range, absent grounds for departure.[43] The statute does not contemplate that often there is no such thing as *the* sentencing range, at least until an appellate court decides what it is.

There is an obvious way out. Would it not make sense for the Commission to adopt a guideline providing that if there is a dispute as to what the correct range is, a range agreed upon by the parties, with court approval, is deemed to be the guidelines range? The Commission could require that, before approving such a compromise, the court find that the agreed-upon range adequately reflects the seriousness of the actual offense behavior and will not undermine the statutory purposes of sentencing.

For example, imagine that a defendant with no criminal record is to be sentenced for a fraud, which has a base offense level of six.[44] Suppose that there is a dispute about whether the amount

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[42] 18 U.S.C. § 3553(a)(4) (emphasis added).

[43] *Id.* § 3553(b).

[44] U.S.S.G. § 2F1.1(a).

of loss is $23,000, resulting in a four-level increase,[45] or $18,000, resulting in a three-level increase.[46] Suppose further that there is also a dispute about whether the fraud involved "more than minimal planning," resulting in a two-level increase.[47] Rather than fight endlessly about whether the total offense level is twelve, giving a sentencing range of ten to sixteen months,[48] or only level nine, giving a range of four to ten months,[49] the parties could agree that the guidelines range is, say, seven to thirteen months. This agreed-upon range would be subject to the court's finding that such a sentencing range did not undermine the statutory purposes of the guidelines.

B. An Alternative to Substantive Sentencing Law

What if aberrational sentencing could be reduced short of a system that, like the guidelines, creates a substantive law of sentencing? What if the system were litigation-free, simple, and inexpensive? As the courts become increasingly trapped in the guidelines thicket, surely such an alternative would be worth considering.

Would not the most direct way of reducing aberrational sentencing by individual judges be a system in which more than one judge is, or may be, involved in the sentencing decision? Although they get advice from probation officers, judges make sentencing decisions in relative isolation. New judges, particularly, do not get input from other judges unless they seek it out informally. In short, would not some form of a three-judge panel system, if logistically possible, be the best way to correct aberrational sentencing? Would a system be feasible that gives a dissatisfied party the option of a de novo resentencing—or something like it—before a three-judge panel? Because there is an ever-increasing number of judges (including circuit judges),[50] the problem of assembling three-judge panels on fairly short notice would not be as insurmountable as it might once have been.

Alternatively, instead of de novo sentencing, the trial judge could keep ultimate responsibility for sentencing and each party

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45 *Id.* § 2F1.1(b)(1)(E).
46 *Id.* § 2F1.1(b)(1)(D).
47 *Id.* § 2F1.1(b)(2).
48 *Id.* § 5A.
49 *Id.*
50 ANNUAL REPORT, *supra* note 33, at 95 (table S-13).

could be given the right to have the judge reconsider the sentence after consultation with, say, two other judges. Such a system might be set up as follows. When a judge announces the sentence, the parties would have the right, within a specific, short period, to have the matter reconsidered. Two other judges would be randomly selected from around the country to consult with the sentencing judge. The other judges would be sent the PSR, sentencing transcript, and other relevant papers. The parties could present their views to the other judges in writing or perhaps in a conference call. After consulting with the other judges, the sentencing judge would decide whether to revise the sentence. The other judges would be required to put on the record their agreement or disagreement with the sentence. If they disagreed with the sentence, they would state what sentences they would have imposed and why.

This system of consultation would do nothing to restrain the rare judge who not only sentences irrationally, but who also will not listen to colleagues. It would have the advantage, however, of making sentencing decisions more collegial and therefore more uniform and consistent.