The New Commission's Opportunity

JON O. NEWMAN

Chief Judge, United States Court of Appeals for the Second Circuit

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The United State Sentencing Commission is now at the second critical juncture of its relatively brief existence. The first occurred in 1987 when the newly appointed commissioners faced the challenging assignment of promulgating a comprehensive set of sentencing guidelines, covering virtually all conduct punished by federal law. Now, with a newly appointed majority of the Commission in place and eight years of experience under the guidelines as initially issued and later amended, a major opportunity exists to take a fresh look and make significant changes.

The need to make significant changes has nothing to do with the usual debate as to whether punishments are too severe, or, in some instance, too lenient. Rather, the opportunity now presented is to reconsider some of the fundamental choices that the first Commission made—choices that were not compelled by the Sentencing Reform Act and that have not been made by any of the numerous state commissions that have issued sentencing guidelines. The first Commission chose:

- a guideline structure that insists on incremental punishment for every measurable aspect of offense conduct, a structure that inevitably results in needless complexity and burdens courts with needless minute fact-finding tasks;
- a regime under which uncharged conduct, even conduct of which the defendant is acquitted, is not only counted in assessing punishment, but counted to precisely the same extent as conduct of which the defendant is convicted—a result unknown elsewhere in the civilized world;
- a sentencing table with 43 steps, needlessly narrowing the discretion of sentencing judges;
- a system of assigning precise numerical values to all sorts of aggravating and mitigating circumstances, instead of formulating ranges in which judges could exercise modest discretion.

Congress did not require the Commission to make any of these choices. They were unsound in 1987, and experience has demonstrated how ill-advised they were. In particular, two of the Commission's initial choices merit further consideration.

1. The Commission's decision to require incremental punishment for every measurable aspect of offense conduct has been a principal cause of the extraordinary complexity of the guidelines. This fundamental decision has also had the unfortunate consequence of shifting significant sentencing authority not merely to prosecutors but to law enforcement agents. By creating so many discrete levels within the drug quantity table, for example, the guidelines permit undercover drug enforcement agents to determine the ultimate punishment by shaping the conversation with a suspect concerning the extent of future deliveries.

Obviously it makes sense to have some general correlation between seriousness of an offense and severity of punishment. But with respect to narcotics offenses, for example, there is no good reason to make drug quantity the overriding determinant of punishment and then subdivide drug offenders into 19 categories based solely on fine distinctions among quantities. A better system would recognize that role in the offense is a far more significant measure of culpability than quantity. A mule crossing a border or an addicted street seller should not have punishment increased simply because the quantity of drugs involved was 300 milligrams rather than 200 milligrams.

Similarly, for property offenses, a thief should not receive extra punishment because he stole $3,000 rather than $2,000. Thieves who steal from locations with relatively small amounts of money take whatever is in the cash drawer; they do not make decisions to violate the law in discrete dollar increments, and they should not be punished as if they had.

2. One of the Commission's major mistakes was the decision to punish a defendant for all relevant conduct at precisely the same measure of punishment that applies to the offense of conviction. I am not questioning whether relevant conduct should count, only at what price it should count. The Commission initially had a major internal debate between a system of "charge offense sentencing" and "real offense sentencing" and opted for what it called—in Section 1A4(a) of the Introduction—"modified real offense sentencing." I think that was generally a sound compromise.

However, no other guideline system in any of the states punishes a defendant for all relevant conduct at the same level of severity as the conduct that resulted in conviction.

Ameliorating the *degree* of punishment for relevant conduct would serve two very important purposes. First, it would lessen the ability of investigative agents to manipulate sentences when inviting the commission of crime. The current practice whereby an

undercover agent mentions a large quantity of drugs and that quantity becomes the required basis for sentencing is one of the most dangerous features of the guidelines. Second, modifying the pricing of relevant conduct affords a good opportunity to reintroduce a measure of discretion into the sentencing process, a step urgently needed.

There are various ways to accomplish a modification of the pricing of relevant conduct, especially if the Commission were to move away from requiring finely calibrated, incremental punishment for every slight addition of offense conduct. Even if the Commission retains the current guideline structure, one way of modifying the "full" pricing of relevant conduct is to price it within a range of appropriate fractions of the punishment in the guideline table and accord the sentencing judge discretion to select the precise fraction. The Commission might provide that relevant conduct (as currently defined by § 1B1.3) is to be punished, on top of the punishment for the offense of conviction, through adjustments within a range of one-third to two-thirds of the usual enhancements provided by the guidelines for the defendant's conduct. That is, an initial offense level would be calculated based only on the elements of the offense of conviction. Further enhancements, based on relevant conduct, would then be added, but the extent of such enhancements would be one-third to two-thirds of the normal guideline increment, the precise fraction to be selected by the sentencing judge.

To illustrate, if a defendant is convicted of selling 25 grams of cocaine, but the relevant conduct shows a conspiracy to sell 475 more grams, the current system fully charges the defendant for all 500 grams and places him at level 26. Under a "discretionary enhancement" system, the sentencing judge would start with a base level of 14 – the level the table sets for the convicted offense of selling 25 grams of cocaine – and then add between one-third to two-thirds of the 12 additional levels that the table requires for selling 500 grams. The judge could increase the base level of 14 by 4, 5, 6, 7, or 8 levels, and end up with an adjusted offense level between 18 and 22, instead of using level 26, which treats the defendant as if he had been convicted of selling 500 grams.

Under the current system, the defendant in this example, with no prior record, would be subject, at level 26, to a sentencing range of 63 to 78 months. Under "discretionary enhancement," he could be placed as low as level 18 or as high as level 22, giving the sentencing judge the option of selecting a sentence between 27 months (the bottom of level 18) and 51 months (the top of level 22). The point of the change is to give recognition to the common-sense idea, somehow overlooked by the current guidelines, that while criminal behavior not resulting in conviction merits some extra punishment, it does not merit the same degree of punishment that would have been imposed if all of the criminal behavior had been prosecuted and had resulted in a conviction.

In determining what fraction between one-third and two-thirds to select to assess the degree of enhancement, the sentencing judge would have virtually unreviewable discretion. The judge would examine all relevant circumstances of the offense and the offender, thereby exercising, within specified limits, the traditional discretion historically available to sentencing judges.

A system like this, or some variant of it, would go a long way toward realizing the original purpose of sentencing guidelines – to replace the previously unfettered discretion of sentencing judges with a system of structured discretion. The current system goes too far by virtually eliminating all judicial discretion. That has not only alienated the judges who must implement the system, but it has also created needless complexity, required protracted hearings, and shifted undue sentencing authority to prosecutors and law enforcement officers. A system of "discretionary enhancements" would bring the guideline system back into balance, limiting but not eliminating judicial discretion.

I have long supported the idea of sentencing guidelines and still believe that, within the requirements of the Sentencing Reform Act, guidelines can be crafted that usefully lessen disparity and enhance the coherence of sentencing. But the guidelines adopted by the first Commission are so far from what a reasonable system ought to be as to call into question the whole concept of sentencing guidelines. The current system is too rigid, too complicated, and too cumbersome, and it accords far too much weight to circumstances of slight relevance to the purposes of punishment and far too little weight to offender characteristics that are critical to the purposes of punishment.

Despite the hopes of those of us who have long supported sentencing guidelines, the blunt truth is that the current structure has given sentencing guidelines a bad name. States are wary of embarking on a guideline system because they know the shortcomings of the federal system, and they do not always appreciate the virtues of some of the more sensible state systems.

The new membership of the United States Sentencing Commission has a magnificent opportunity to make sense of guideline sentencing.