

THE FEDERAL SENTENCING GUIDELINES: A GOOD IDEA BADLY IMPLEMENTED

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The best way to mark the thirtieth anniversary of the Federal Sentencing Guidelines is to candidly admit that they are a classic example of a good idea badly implemented. I propose to consider how the good idea originated, how the first Federal Sentencing Commission implemented it, how the Supreme Court has dealt with the Sentencing Guidelines, what is good about the Guidelines, what are the principal defects of the Guidelines, and the most important step that can now be taken to improve the Guidelines and realize the expectations of those of us who favored sentencing guidelines.

I. ORIGIN OF THE GUIDELINES

In 1974, Marvin E. Frankel, a highly regarded United States District Judge in the Southern District of New York, wrote the path-breaking book *Criminal Sentences: Law Without Order*.¹ Frankel brought to the Nation's attention the major flaw in federal sentencing: disparity. Sentences varied wildly among racial groups and from regions to regions, and within regions.

To reduce sentencing disparity, Frankel urged Congress to create a commission charged with the task of issuing a set of guidelines that would modestly limit the extraordinarily broad discretion of federal sentencing judges.

As a district judge at the time, I fully shared Judge Frankel's concern. When an armed bank robber, for example, came before me for sentencing, I could impose a sentence as high as twenty-five years and as low as probation.² Unlike any other area of the law, no statutes,

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1. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1974).

2. See Act of June 25, 1948, ch. 645, 62 Stat. 796 (codified as amended at 18 U.S.C. § 2113(d) (2012)).

regulations, standards, or criteria limited or even guided the exercise of my discretion to select a sentence within that broad range. And if, after a conviction for committing any crime, I imposed a sentence that most observers would regard as shockingly high or shockingly low, there was no opportunity for appellate review to revise the sentence.

Frankel's book led to the convening of a seminar at the Yale Law School, led by Professor Daniel J. Freed, which met in the late 1970s to explore possible sentencing reforms.³ Frankel and I both participated. That seminar prepared a draft bill that served as the model for what became the Sentencing Reform Act of 1984 ("SRA"),⁴ Title II of the Comprehensive Crime Control Act of 1984 ("CCCA").⁵ The SRA was sponsored by an unusual pairing of senators—Ted Kennedy and Strom Thurmond. Kennedy sought to reduce the number and extent of disparities; Thurmond wanted enhanced punishments.

The core of the SRA was the creation of a Sentencing Commission,⁶ charged with the task of preparing a set of sentencing guidelines.⁷ The SRA also substantially abolished parole, which had authorized release of most prisoners after serving one-third of their sentences,⁸ and created limited appellate review of sentences,

3. At about the same time, the Chief Judge of the Second Circuit Court of Appeals, Irving R. Kaufman, authorized another approach to sentencing reform—the Benchmarks Project. A committee of five judges, including me, was given the assignment of formulating appropriate sentences for about twenty hypothetical cases. These sentences were to be made available for district judges throughout the Second Circuit to use as informal guidance when they encountered comparable cases.

At the group's first meeting, we began our discussion with a typical case of theft. The first judge suggested a sentence of five years. The next judge suggested two and one-half years. All the judges prepared to break up the meeting, telling me that these two responses showed that agreement was not possible. I asked each of the first two judges to state how much of their suggested sentences they expected the defendant to serve before release on parole, which was then available. The first judge said two years. The second judge also said two years. "You see," I told the group, "there is agreement on how long the defendant in the case should remain in custody. The disagreement concerns what sentence should be imposed to achieve that result." The judges differed only in their prediction of the Parole Board's release decision.

Enlightened by this revelation, the group continued its assignment and achieved a remarkable consensus on sentences for the twenty cases. These benchmark sentences were distributed to district judges throughout the Second Circuit, and most reported they found them to provide very useful guidance.

4. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

5. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 and 28 U.S.C.).

6. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 2017, 2017-18 (codified as amended at 28 U.S.C. § 991(a) (2012)).

7. *See id.* § 217(a)(1), 98 Stat. at 2019 (codified as amended at 28 U.S.C. § 994(a)(1)).

8. *See id.* §§ 223–236, 98 Stat. at 2028-33 (codified as amended in scattered sections of 18, 21, 23, 26, 28, 29, 42, 49, and 50 U.S.C.). Under the prior law, some federal prisoners became

authorizing appellate courts to reject sentences that departed from the applicable guidelines range to an unreasonable degree.⁹

The expectation of many proponents of the SRA was that the seven-member Sentencing Commission would comprise people of varied backgrounds, including perhaps a judge, a governor, a mayor, a prosecutor, a defense attorney, and an academic. To the surprise of many proponents of the SRA, including myself, the first Commission had three professors.

Also disappointing expectations was the SRA's abolition of parole, which was intended to promote truth in sentencing: a sentence of a specific number of years would really mean confinement for that many years, less only a one-seventh reduction for good time credits. Although, as a result of the SRA, federal prisoners were no longer eligible for parole, the abolition of parole did little to achieve its goal of altering public perceptions of sentence lengths. Because more than ninety-five percent of sentences are imposed by state courts and are subject to state parole provisions, the public regularly learns through the media of prisoners released on parole after serving only a portion of their sentences. Most people mistakenly think that a federal prisoner is still subject to early release on parole.

II. THE SENTENCING GUIDELINES

Those of us who supported the SRA expected the Sentencing Guidelines to be a fairly brief document, similar to the parole guidelines previously used by parole hearing officers determining the time of a prisoner's early release from custody. Those parole guidelines comprised just three pages, plus some explanatory material. They presented a table with six rows of offense categories, based on seriousness of the criminal conduct, and four columns based on the prisoner's prior record. At the intersection of each row and column, the table set out a recommended range of months for a prisoner's release on

eligible for parole before serving one-third of their sentences if the sentencing judge imposed the sentence pursuant to 18 U.S.C. § 4205(b)(1) (formerly 18 U.S.C. 4208(a)(2)). Some federal judges imposed longer than usual sentences, expecting the reports of such sentences to promote general deterrence, but imposed these sentences under section 4205(b)(1), expecting these sentences to be ameliorated by parole earlier than the one-third point. Many years ago I obtained from the Bureau of Prisons an analysis comparing the time served by prisoners not eligible for parole until the one-third point with the time served by those eligible for parole earlier. For all offenses, those eligible for earlier parole were serving *more* time than those not eligible for parole until the one-third point. I reported these surprising results at a conference of judges within the Second Circuit. The district judges were astonished to learn that their expectations had not been realized.

9. See *id.* § 3742, 98 Stat. at 2011 (codified as amended at 18 U.S.C. § 3742(e)(3)(C)).

parole. Parole hearing officers were authorized to select a release date at or above the recommended range if circumstances warranted.

In a slightly recast form, the parole guidelines table looked like this:

TABLE 1: PAROLE GUIDELINES¹⁰

	Low prior record 0-3 points	Fair prior record 4-5 points	High prior record 6-8 points	Very high prior record 9-11 points
Low severity offenses	6-10 months	8-12 months	10-14 months	12-16 months
Low-moderate severity offenses	8-12 months	12-16 months	20-14 months	20-25 months
Moderate severity offenses	12-16 months	16-20 months	20-24 months	24-30 months
High severity offenses	16-20 months	20-26 months	26-32 months	32-38 months
Very high severity offenses	26-36 months	36-45 months	45-55 months	55-65 months
Greatest severity offenses	Too few cases to determine	Too few cases to determine	Too few cases to determine	Too few cases to determine

Instead of a simple table in a three-page document, the first draft of the Sentencing Guidelines, running to more than 200 pages, called for a complicated table with 43 rows of offense levels, corresponding to the seriousness of different types of offense conduct, and 6 columns of criminal history categories, corresponding to prior record.

At the intersection of each row and column, the table set out a range of months for a sentence. The current table, changed only in slight detail from the first version, looks like this:

10. I became aware of the parole guidelines before they were published in the *Federal Register*. One day during my second year as a district judge, I telephoned the U.S. Parole Board (now called the U.S. Parole Commission) to ask a question about Board procedures and ended up speaking with Maurice Sigler, then the Deputy Chairman. He asked if I would be interested in a new guideline system the Board was using as a pilot project in the Board's Northeast Region. I said I would. He sent me the parole guidelines, which I promptly published as an appendix to an opinion. *See Battle v. Norton*, 365 F. Supp. 925, 934 app.2 (D. Conn. 1973).

TABLE 2: SENTENCING¹¹

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2, 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235

11. Shown in months of imprisonment.

32	121-151	135-168	151-166	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-life
37	210-262	235-293	262-327	292-365	324-404	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	360-life	360-life	360-life	360-life	360-life	360-life

The sentencing ranges were deliberately overlapped so that some criminal conduct might fall within either of two adjacent ranges, thereby eliminating a sentencing judge's need to make a precise finding as to which of the two ranges was applicable. The idea of overlapping ranges emerged in a conversation I had with Stephen G. Breyer, then a First Circuit Judge and a member of the first Commission. Years later, as a Court of Appeals Judge, I wrote an opinion achieving another benefit of overlapping ranges: the sentencing judge need not select from adjacent ranges if the judge would have imposed the same sentence using either range.¹²

The Guidelines Manual provided detailed instructions to sentencing judges for selecting an appropriate offense level. Starting with a base offense level determined by the offense conduct, the judge added offense levels for various factors such as infliction of injury. The most significant adjustments were for the amount of money or the quantity of narcotics involved in the crime. The original Guidelines set out twenty-one levels, reduced now to sixteen, for different ranges of monetary amounts,¹³ and seventeen levels for different quantities and types of narcotics.¹⁴ Even the number of offense levels added for injury varied depending on whether the injury was "Bodily," "Serious Bodily," or "Life-Threatening."¹⁵

12. See *United States v. Birmingham*, 855 F.2d 925, 934-35 (2d Cir. 1988).

13. Compare U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b)(1), 2B2.1(b)(2) (U.S. SENTENCING COMM'N 1987) [hereinafter U.S. SENTENCING GUIDELINES MANUAL 1987], with U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (U.S. SENTENCING COMM'N 2016) [hereinafter U.S. SENTENCING GUIDELINES MANUAL 2016] (providing a theft loss table).

14. See U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 2D1.1(c) (providing a drug quantity table).

15. See *id.* § 2A2.2 (providing the injury adjustment for aggravated assault).

Adjustments were also provided for the defendant's role in the offense, with three categories of upward adjustments, depending on whether the defendant was a "leader" of an organization with five or more participants, a "manager" of such an organization, or a "leader" or "manager" of a smaller organization,¹⁶ and two categories of downward adjustments depending on whether the defendant's role was "minor," "minimal," or in between.¹⁷

The Guidelines permitted sentencing judges to make a "departure," above or below the prescribed range, but the grounds for doing so were severely limited.¹⁸ The principal downward adjustment was available for rendering substantial assistance to the government.¹⁹

The first draft of the Guidelines encountered considerable opposition, based primarily on their complexity. A second draft made modest improvements, but the final draft veered back toward the first version. Since the effective date of the Guidelines in 1987, the Commission has increased their complexity, adding about 800 amendments (some required by Congress) set forth in a Guidelines Manual that now numbers more than 500 pages (not counting an appendix and an index).²⁰

III. THE GUIDELINES IN THE SUPREME COURT

The extensive case law generated by the Guidelines is beyond the scope of this Article, but the principal Supreme Court cases should be noted. After hundreds of district and circuit judges had divided on the constitutionality of the Guidelines, the Supreme Court settled the issue by ruling them constitutional.²¹

The most significant Guidelines decision thereafter resulted from the Court's decision in *Apprendi v. New Jersey*.²² The holding in *Apprendi* was that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."²³ Applying *Apprendi* to the Guidelines, the Court ruled in *United*

16. *See id.* § 3B1.1.

17. *See id.* § 3B1.2.

18. *See* U.S. SENTENCING GUIDELINES MANUAL 1987, *supra* note 13, § 5K1.1.

19. *See id.*

20. Douglas A. Berman, *Sentencing Guidelines*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 104-05 (Erik Luna ed., 2017).

21. *See* *Mistretta v. United States*, 488 U.S. 361, 362-63, 412 (1989).

22. 530 U.S. 466 (2000).

23. *Id.* at 490.

*States v. Booker*²⁴ that the mandatory aspect of the Guidelines²⁵ was unconstitutional for lack of jury fact-finding as to facts that determined the applicable Guidelines sentencing range.²⁶ After making that ruling in the first part of *Booker*, the Court severed the SRA's provision making use of the Guidelines mandatory,²⁷ and creatively proclaimed that henceforth the Guidelines would be "advisory."²⁸ However, the Court required sentencing judges to "take [the Guidelines] into account" before using their discretion to make a non-Guidelines sentence.²⁹ The Court also ruled that appellate courts, reviewing sentences for reasonableness, were to apply an "abuse-of-discretion" standard.³⁰

In *Rita v. United States*,³¹ the Court ruled that an appellate court, reviewing a sentence, could presume that a sentence within an applicable Guidelines range was reasonable.³² Then in *Gall v. United States*,³³ the Court ruled that an appellate court should review all sentences, "whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard."³⁴ More importantly, *Gall* gave content to the "take into account" language of *Booker* by requiring sentencing judges to "begin all sentencing proceedings by correctly calculating the applicable Guidelines range,"³⁵ adding that "the Guidelines should be the starting point and the initial benchmark."³⁶

IV. WHAT'S GOOD ABOUT THE GUIDELINES

A. Reducing Sentence Disparity

Before turning to my criticisms of the Guidelines, I think it's only fair to point out their virtues. First, the Guidelines achieved some reduction in sentence disparity. This is difficult to measure, but my impression is that some sentences vary less from the sentences imposed

24. 543 U.S. 220 (2005).

25. See 18 U.S.C. § 3553(b)(1).

26. See *Booker*, 543 U.S. at 226-27, 244.

27. See *id.* at 249-65.

28. See *id.* at 244-46 (Breyer, J., delivering opinion of the Court with respect to remedy).

29. See *id.* at 264.

30. See *id.* at 260-63.

31. 551 U.S. 338 (2007).

32. See *id.* at 341, 347.

33. 552 U.S. 38 (2007).

34. *Id.* at 41.

35. *Id.* at 49 (citing *Rita*, 551 U.S. at 347-48).

36. *Id.*; see also U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, ch. 1 pt. A(2) ("[D]istrict courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guidelines system.").

on similarly situated defendants than would have occurred before the Guidelines.

B. *Modified Real Offense*

The Guidelines also reflect a sensible compromise between two views as to what criminal conduct should be considered in making a Guidelines calculation. One view was that the range should be calculated based only on the conduct for which the defendant had been convicted, what the Guidelines called “‘charge offense’ sentencing.”³⁷ Under the other view, the range would be calculated based on all criminal conduct associated with the offense (for example, possession of a weapon) that the prosecution, at sentencing, could prove by a preponderance of the evidence, what the Guidelines called “‘real offense’ sentencing.”³⁸ Rejecting both views, the Guidelines adopted what has been called a “‘modified real offense’” approach,³⁹ whereby the offense level was based on all acts of the defendant relevant to the offense and the foreseeable acts of others in furtherance of the offense.⁴⁰

C. *Consecutive Sentences*

One benefit of the Guidelines, rarely mentioned, is their response to the often abused power of sentencing judges to impose consecutive sentences upon defendants convicted of multiple counts. The most extreme case I encountered as an appellate judge was a sentence of twenty-six years resulting from eleven two-year sentences and one four-year sentence, all imposed to run consecutively.⁴¹ The Second Circuit remanded to require the sentencing judge to reconsider.⁴²

The Guidelines curb abusive use of consecutive sentences by providing that sentences for defendants convicted of multiple counts should run concurrently, with just two exceptions.⁴³ One exception is for sentences required by statute to be imposed consecutively.⁴⁴ The other exception is for situations where the highest statutory maximum for any count is less than the highest calculated Guidelines range for any one count; in that circumstance, sentences are to be imposed consecutively,

37. U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, ch. 1 pt. A(4)(a).

38. *Id.* ch. 1 pt. A(4)(a), § 6A1.3 cmt.

39. *See* United States v. Concepcion, 983 F.2d 369, 394 (2d Cir. 1992) (Newman, J., concurring).

40. *See* U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 1B1.3(a)(1)(A), (B).

41. *See* United States v. Golomb, 754 F.2d 86, 87, 89 (2d Cir. 1985).

42. *Id.* at 90-91.

43. *See* U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 5G1.2.

44. *See id.* § 5G1.2(a).

but only to the extent necessary to achieve the Guidelines sentencing range.⁴⁵ Of course, before *Booker*, sentencing judges could impose consecutive sentences by making “departures,” and, after *Booker*, could do so by imposing non-Guidelines sentences.

V. WHAT’S WRONG WITH THE GUIDELINES

A. Complexity

The most serious defect of the Guidelines is their complexity. No other Guidelines system has such extraordinary detail. The Guidelines of many states, such as Minnesota and Pennsylvania, have sensible guidelines requiring only a few pages.⁴⁶ It has been argued that the Federal Guidelines needed to be so detailed because there are so many federal statutory offenses. However, the parole guidelines managed to provide parole release dates for those convicted of federal crimes and did so in a three-page document.

Furthermore, the Guidelines became needlessly complicated when the Commission endeavored to provide numerical offense level adjustments for hundreds of factors such as carrying a weapon and inflicting injury. Although such factors are relevant to sentencing, there was no need to have them precisely quantified. Doing so led the Commission to require sentencing judges to make detailed findings on all sorts of matters and to make fine distinctions, such as whether a defendant’s role in an offense was “minor” or “minimal” or something in between.⁴⁷

B. “Incremental Immorality”

At a philosophical level, a more fundamental defect was the Guidelines’ adoption of a sentencing principle that required every increment of wrongdoing to result in an increment of punishment. For example, even under the Guidelines’ current loss table with its 16 levels of loss for theft offense,⁴⁸ a theft of more than \$6,500 requires an upward adjustment of two offense levels and a theft of more than \$15,000 requires an upward adjustment of four offense levels.⁴⁹

45. *See id.* § 5G1.2(d).

46. *See, e.g.*, MINN. SENTENCING GUIDELINES AND COMMENTARY (MINN. SENTENCING COMM’N 2017); SENTENCING GUIDELINES IMPLEMENTATION MANUAL (PA. COMM’N ON SENTENCING 2018).

47. *See* U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 3B1.2(a)–(b).

48. *See id.* § 2B1.1(b).

49. *Id.* § 2B1.1(b)(1)(B), (C).

Furthermore, the impact of an increment of money or drug quantity increases significantly as the base offense level increases for various offenses. At offense level 22, for example, a two-level increase for that second \$5,000 raises the minimum sentencing range from 41 to 51 months, nearly one year.⁵⁰ At offense level 36, however, the same two-level increase for that second \$5,000 raises the minimum sentencing range from 188 to 235 months, nearly four years.⁵¹

As I tried to explain to the Commission many years ago, no thief wakes up in the morning and decides whether to steal \$5,000 or \$10,000. He might choose between robbing a convenience store or a bank, but if he selects a convenience store, he takes whatever is in the till. The fortuity of that added \$5,000 being there should not result in added punishment.

Of course, crimes involving very large sums of money should incur more punishment than crimes involving small amounts, but 16 gradations of loss carry that principle to an absurd length and require sentencing judges to make detailed findings about the amount of loss. The Commission's finely graded loss tables implement a philosophy I have called "incremental immorality"—every increment of criminal conduct deserves a precise increment of punishment.⁵² This is a principle unknown to any punishment system in the world.

One vice of this approach is that punishments will often vary, not by the venality of the offender, but by the work schedule of the investigating agent. A busy postal inspector might end a mail fraud investigation after three months, but an inspector not so busy might keep his case going much longer, resulting in more violations (one for each fraudulent mailing) and therefore a higher sentence.

C. Weighting Money and Drug Quantities More Than Role in the Offense

The numerous levels of the monetary loss tables and the many levels of the similarly multi-layered tables for narcotics quantities reveal another basic defect of the Guidelines. Amounts of money and quantities of narcotics are the major determinants of sentencing ranges for financial and drug crimes, while role in the offense is relegated to a slight adjustment. The amount of money can increase a theft offense from

50. *Id.* ch. 5 pt. A.

51. *Id.*

52. Jon O. Newman, *Easing Mandatory Minimums Will Not Be Enough*, JUDICATURE, Spring 2016, at 28, 29.

offense level 6 to level 36;⁵³ being the kingpin of a criminal drug enterprise adds just four levels more than the level for an ordinary soldier in the ranks.⁵⁴ This has the tail wagging the dog.

Bean-counters count beans, and the architects of the Guidelines counted amounts of money and quantities of drugs with great precision because such items could be readily counted. Role in the offense could not be so easily quantified, so the drafters settled for just three gradations of organizational leadership.

D. Cumulation of Adjustments

The Guidelines' identification of scores of factors that warrant primarily upward adjustments created a possibly unintended consequence—very high sentencing ranges resulting from the cumulation of factors frequently found in the same case. The Commission identified most of these factors by noting that at least one of them was present in many of the 10,000 cases that were examined in formulating sentencing ranges and appeared to have persuaded the sentencing judges in those cases to enhance particular sentences. Requiring increased offense levels was reasonable for Guidelines calculations where one or perhaps two factors were both present in the same case. But the Commission appears not to have appreciated that several factors were likely to be present in some cases. And, because of the structure of the sentencing table, a factor that might result in a modest increase in the sentencing range if it was the only factor, resulted in a large increase when cumulated with other factors.

I encountered this phenomenon in an appeal by a defendant, Gregory Sofsky, who pled guilty to receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A).⁵⁵ His base offense level was 17.⁵⁶ To this level, the following levels were added: two for photos of a minor under age twelve,⁵⁷ five for trading pornographic images,⁵⁸ four for depiction of violence,⁵⁹ two for images transmitted by

53. U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 2B1.1(a)–(b)(1).

54. *See id.* § 3B1.1(a).

55. *See United States v. Sofsky*, 287 F.3d 122, 123-25 (2d Cir. 2002).

56. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(a) (U.S. SENTENCING COMM'N 2002) [hereinafter U.S. SENTENCING GUIDELINES MANUAL 2002]; *Sofsky*, 287 F.3d at 124 n.1.

57. *See* U.S. SENTENCING GUIDELINES MANUAL 2002, *supra* note 56, § 2G2(b)(1); *Sofsky*, 287 F.3d at 124 n.1.

58. *See* U.S. SENTENCING GUIDELINES MANUAL 2002, *supra* note 56, § 2G2.2(b)(2)(A); *Sofsky*, 287 F.3d at 124 n.1.

59. *See* U.S. SENTENCING GUIDELINES MANUAL 2002, *supra* note 56, § 2G2.2(b)(3); *Sofsky*, 287 F.3d at 124 n.1.

computer,⁶⁰ and two for obstructing justice by erasing some computer files.⁶¹ These adjustments increased his offense level to 32.

At Sofsky's base offense level, 17, with no prior convictions, his sentencing range would have been 24 to 30 months. At the adjusted level, 32, his sentencing range was 121 to 151 months. His adjustments raised his minimum sentencing range by eight years and one month. Yet most, and sometimes all, of Sofsky's adjustments are present in every case of a defendant who sits at a computer and views child pornography. Moreover, if the five-level adjustment for trading images had been the only adjustment, it would have raised his minimum sentencing range by 17 months (a year and a half), but because this adjustment was cumulated with other adjustments, it increased his minimum sentencing range by 51 months (more than four years). Even the two-level adjustment for using a computer, a factor common to virtually every case of receiving pornography, would have raised his minimum sentencing range by only six months had it been the only adjustment, but when combined with the other adjustments, it raised his minimum sentencing range by 17 months.

Sofsky received a sentence of ten years and one month, the bottom of his Guidelines sentencing range. I understand the argument that those who *view* downloaded child pornography at their computers deserve punishment because they are indirectly supporting the market for such images, but that market will continue to exist whether someone like Sofsky serves less than two years, his base level sentencing range, or more than ten years, his adjusted level sentencing range. Is ten years an appropriate sentence? One way to answer that question is to note that had Sofsky been convicted of *producing* child pornography, an activity that directly risks harm to children, his base offense level would have been 32, resulting in a sentence of 70 months, just under six years.⁶²

Even before *Booker* made the Guidelines advisory, I wrote an opinion for the Second Circuit allowing sentencing judges to make a departure where a cumulation of adjustments produced a significant increase in the calculated sentencing range.⁶³ Now, under the advisory Guidelines regime, a cumulation of adjustments, such as

60. See U.S. SENTENCING GUIDELINES MANUAL 2002, *supra* note 56, § 2G2.2(b)(5); *Sofsky*, 287 F.3d at 124 n.1.

61. See U.S. SENTENCING GUIDELINES MANUAL 2002, *supra* note 56, § 3C1.1; *Sofsky*, 287 F.3d at 124 n.1.

62. See U.S. SENTENCING GUIDELINES MANUAL 2002, *supra* note 56, § 2G2.1(a); *Sofsky*, 287 F.3d at 124 n.1.

63. See *United States v. Lauersen*, 348 F.3d 329, 343-44 (2d Cir. 2003), *aff'd on reh'g*, 362 F.3d 160 (2d Cir. 2004).

occurred in *Sofsky*, would obviously be an appropriate basis for a non-Guidelines sentence.

E. Building on Statutory Mandatory Minimum Sentences

One defect of the Guidelines is required by Congress, and the Sentencing Commission had to accept it, but did not need to make it worse. The defect concerns mandatory minimum sentences.

Congress has enacted several statutes establishing mandatory minimum sentences for certain offenses *e.g.*, twenty years for a second conviction for selling more than fifty grams of methamphetamine;⁶⁴ seven years imposed consecutively for brandishing a weapon during a drug trafficking offense.⁶⁵ With respect to the Guidelines, Congress required the Commission “for each category of offense” to “establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.”⁶⁶

Thus, for offenses subject to statutory mandatory minimums, the Guidelines were required to set a sentencing range no lower than those mandatory minimums. However, instead of just conforming sentencing ranges to these minimums, the Guidelines needlessly built upon them and set sentencing ranges on top of them. For example, for trafficking in at least three kilograms of heroin the statutory mandatory minimum penalty is ten years,⁶⁷ and the base offense level under the Guidelines is 32,⁶⁸ which, without a prior record, translates to a minimum sentencing range of 121 months (ten years and one month). Upward adjustments, for example for role in the offense, will raise the minimum sentencing ranges higher than the minimums established by Congress.

Building sentencing ranges higher than statutory mandatory minimum is inconsistent with the Commission’s reason for existence. The Commission was established to provide its expert view as to the appropriate ranges of sentences for various combinations of offenses and offender characteristics. To have been faithful to that responsibility, the Commission should have begun setting the minimum range for selling narcotics by using the number of years Congress required and then made a final determination based on whether or not it believed, in the exercise of its expertise, that any more severe punishment was appropriate. Instead, the Commission imposed its entire system of adjustments on top

64. See 21 U.S.C. § 841(b)(1)(A)(viii) (2012).

65. See 18 U.S.C. § 924(e)(1)(A)(ii).

66. 28 U.S.C. § 994(b)(1).

67. See 21 U.S.C. § 841(b)(1)(A)(i).

68. See U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 2D1.1 (c)(4).

of statutory mandatory minimums that were already high. It is possible that the Commission believed that the statutory minimums were too low and wanted higher sentences, but it has never said so, and I think that explanation is unlikely. By building on top of mandatory minimums, the Commission missed an opportunity to lead, rather than follow.

F. Leniency for Cooperating with the Prosecution

The Guidelines authorize a departure for a defendant who “has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”⁶⁹ That departure, however, is available only “[u]pon motion of the government.”⁷⁰ By giving the government control over whether a defendant’s cooperation can be rewarded with a lower sentence, the Guidelines place enormous power in the hands of a prosecutor. The motion for a 5K1.1 departure can be withheld even after a defendant cooperates if he has not provided as much information as the prosecutor thinks he could give.⁷¹

Several years ago, I learned of a case where a defendant had given useful information about six participants in the offense. The prosecutor nevertheless refused to make a 5K1.1 motion because the defendant had not given information to help convict a seventh participant. The defendant explained his reluctance: “She’s my sister.” No prosecutor should be given so much leverage over a defendant. The government motion requirement is not only unfair, it creates an incentive for false accusations.

The Commission might have given this power to prosecutors out of ignorance. At a sentencing institute many years ago attended by all the Commission members, I asked why a cooperation departure required a prosecutor’s motion. “We did that,” a commissioner replied, “because it was always required before the Guidelines.” There were gasps of disbelief from a roomful of district judges, many of whom had been federal prosecutors and knew that, before the Guidelines, sentencing judges could reward cooperation without a prosecutor’s permission. A prosecutor could object, or dispute the extent of cooperation, but had no veto power.⁷² Such power should be eliminated.

69. *Id.* § 5K1.1.

70. *Id.*

71. *Id.*

72. Congress required a government motion only for cooperation reductions below mandatory statutory minimums. *See* 18 U.S.C. § 3553(b)(1).

G. *Acquitted Conduct*

My last critique of the Guidelines concerns a matter most people are unaware of and would be surprised to learn about. The Guidelines provide that once a defendant is convicted on even one count, his punishment should be based on “relevant conduct,”⁷³ a category that courts have interpreted to include criminal conduct described in counts of which a defendant was acquitted.⁷⁴

The Second Circuit encountered an extreme example of this aspect of the Guidelines in *United States v. Concepcion*.⁷⁵ In that case, Nelson Frias was charged with three offenses that affected his sentence: conspiracy to distribute heroin in violation of 21 U.S.C. § 841(a)(1)(A), possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d), and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).⁷⁶ He was convicted of the two weapons offenses and acquitted of the heroin conspiracy.⁷⁷ If he had been convicted of all three offenses, his Guidelines sentencing range would have been 210 to 262 months (17½ to 22 years). If he had been sentenced only for the conduct resulting in the two firearms convictions, his Guidelines sentencing range would have been 12 to 18 months (1 to 1½ years). However, because the Guidelines permit conduct of which he was acquitted, the heroin conspiracy, to be considered in determining his sentence, his Guidelines sentencing range was 210 to 262 months (17½ to 22 years), exactly the same as if he had been convicted of the heroin conspiracy count. He was sentenced to 20 years, resulting from consecutive maximum sentences on the two firearms counts.⁷⁸

The Second Circuit, applying its precedents,⁷⁹ ruled that conduct underlying counts of which a defendant had been acquitted was properly considered in determining an adjusted offense level, and hence a sentencing range.⁸⁰ Bound by circuit precedent to accept this use of acquitted conduct, I concurred, but wrote separately to explain how this bizarre result came to be.⁸¹

73. U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 1B1.3.

74. *See, e.g.*, *United States v. Roland*, 748 F.2d 1321, 1327 (2d Cir. 1984); *United States v. Sweig*, 454 F.2d 181, 183 (2d Cir. 1972).

75. 983 F.2d 369 (2d Cir. 1992).

76. *Id.* at 374.

77. *Id.* at 393 (Newman, J., concurring).

78. *Id.* at 389.

79. *See, e.g.*, *Roland*, 748 F.2d at 1327; *Sweig*, 454 F.2d at 181-84.

80. *See Concepcion*, 983 F.2d at 386-89.

81. *See id.* at 393 (Newman, J., concurring).

First, I pointed out that in adopting a “modified real offense” approach, the Guidelines had used the concept of “relevant conduct,”⁸² that was broad enough to include acquitted conduct.⁸³ Second, the Guidelines “price” relevant conduct at the same level of severity as convicted conduct. By that I meant that base offense levels and adjustments, notably those determined by the multi-graded levels of the monetary and narcotics quantity tables, counted acquitted conduct in exactly the same way they counted convicted conduct, as long as the latter qualified as relevant conduct.⁸⁴

The third reason that acquitted conduct can significantly increase sentences is not directly attributable to the Guidelines. Long before the Guidelines, courts had used the preponderance-of-the-evidence standard to establish proof of facts relevant to sentencing on counts of conviction, whether or not the facts were the basis for a conviction.⁸⁵ That was defensible when those facts were only *eligible* for consideration by sentencing judges, but, under the Guidelines, the standard is used to establish facts that are *required* to be considered at sentencing and that affect sentencing to as great (or even greater) an extent as convicted conduct.

At least this was true before the Supreme Court ruled in *Apprendi* that facts used to enhance sentences, other than prior convictions, had to be found by a jury.⁸⁶ But once *Booker* rendered the Guidelines advisory and avoided the *Apprendi* problem, sentencing judges were free to resume using facts that they found by a preponderance of the evidence in calculating the applicable sentencing range. And these facts include acquitted conduct.

My opposition to use of acquitted conduct in making Guideline calculations, especially pricing it as severely as convicted conduct, has been shared by other judges.⁸⁷

82. U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 1B1.3.

83. In Frias’s cases, the use of acquitted conduct was technically based on U.S. Sentencing Guidelines Manual § 2K2.1(c), a cross-reference section for weapons offenses, rather than § 1B1.3, but my criticism of using acquitted conduct applied equally to both provisions, and I focus on relevant conduct in this Article because it is the principal provision permitting use of acquitted conduct to affect sentencing ranges. See *Concepcion*, 983 F.2d at 394 n.3.

84. For theft offenses, the base offense level and adjustments for monetary amounts are applicable only in the event of a conviction for such offenses. See U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 2B1.1(a)(1). For other economic crimes, conviction is not required to permit use of acquitted conduct as relevant conduct in the event of conviction for one or more other offenses. See, e.g., *id.* § 2B2.1 (regarding burglary); *id.* § 2B3.1 (regarding robbery).

85. See, e.g., *United States v. Lee*, 818 F.2d 1052, 1057 (2d Cir. 1987).

86. *Apprendi v. New Jersey*, 530 U.S. 466, 473, 482 n.9, 483 n.10 (2000); see also U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 1B1.3.

87. See *United States v. Frias*, 39 F.3d 391, 393-94 (2d Cir. 1994) (Oakes, J., concurring)

Of course, after *Booker*, a sentencing judge can circumvent all of the defects outlined above (except complexity) by imposing a non-Guidelines sentence. However, many judges, required to start with a Guidelines calculation in every case,⁸⁸ stop their analysis at a point and impose a Guidelines sentence.

VI. IMPROVING THE GUIDELINES

A. Simplification

I would like to see the Sentencing Commission remedy all of the defects I have just outlined, but, facing up to reality, I will propose only the one most urgently needed improvement: simplification. The complexity of the Guidelines can be readily reduced and simplification can be accomplished without entering the debate as to whether some sentencing ranges are too lenient or too severe. A revision can be punishment neutral. Here are a few steps that could be readily taken.

The number of levels in the loss tables for monetary crimes could be substantially reduced. For example, the loss table for theft offenses could be reduced from the current 16 levels,⁸⁹ to just four categories—small, medium, large, and very large. A simplified loss table for theft offenses, reflecting the same severity as the existing table, might look as follows:

\$5,000 to \$100,000	increase 2 to 8 levels
\$100,000 to \$1 million	increase 10 to 14 levels
\$1 million to \$5 million	increase 16 to 20 levels
more than \$5 million	increase 22 to 30 levels

Similar reductions in the number of levels could be made for other monetary loss tables and for drug quantity tables.

The role in the offense adjustments could be simplified, at current levels of severity, by permitting sentencing judges to increase by two to four levels depending on the judge's generalized assessment of the defendant's role in the hierarchy of a criminal organization. This would

(“As the Queen of Hearts might say, ‘Acquittal first, sentence afterwards.’”); *United States v. Hunter*, 19 F.3d 895, 897-98 (4th Cir. 1994) (Hall, J., concurring) (“I agree with the Ninth Circuit that a defendant ought not be punished for a charge on which he has been acquitted in the very same proceeding.”); *United States v. Brady*, 928 F.2d 844, 851 (9th Cir. 1991) (“We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted.”).

88. See *Gall v. United States*, 552 U.S. 38, 47-48 (2007).

89. See U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 2B1.1(b)(1).

eliminate the need for precise findings, for example, whether the defendant was a “leader” or a “manager.”⁹⁰ The two gradations for a mitigating role adjustment could be combined into one reduction of three to four levels, without the need to determine whether the defendant’s role was “minimal” or “minor.”⁹¹ A more thorough revision, apart from simplification, would provide much smaller increases for the drug quantities and much larger increases for role in the offense so that a drug kingpin’s role would warrant an increase of 24 to 28 levels, a mule’s role would result in no increase, and drug quantities would have less effect on the adjusted offense level.

Injury gradations could be combined so that injury for an aggravated assault, for example, could result in an increase of three to seven levels, eliminating the need to determine whether the injury was “bodily,” “serious bodily,” or “life-threatening.”⁹² Similarly, the three firearms gradations could be combined into an increase of three to seven levels, eliminating the need to determine whether the firearm was “discharged,” “used,” or “brandished.”⁹³

Beyond these steps, many required adjustments could simply be eliminated, leaving to the sentencing judge’s discretion whether to raise or reduce offense levels for circumstances now requiring adjustments.

B. *The Twenty-Five Percent Issue*

Any proposal to simplify the Guidelines must reckon with the twenty-five percent issue. The SRA requires that the top of any sentencing range established by the Guidelines must not be more than twenty-five percent higher than the bottom of that range.⁹⁴ All of the sentencing ranges in the Guidelines sentencing table conform to this requirement. For example, in Criminal History Category I, the sentencing range at offense level 17 is 24 to 30 months (30-24=6, and 6 is 25% of 24) and at adjusted offense level 37 is 210 to 262 months (262-210=52, and 52 is 25% of 210).⁹⁵

Some members of the staff of the Sentencing Commission have argued that broadening the range of adjustments, such as I have suggested above to achieve some simplification, would violate the twenty-five percent requirement. Their theory is that if, for example, a

90. *See id.* § 3B1.1(a)–(b).

91. *See id.* § 3B1.2(a)–(b).

92. *Id.* § 2A2.2(b)(3)(A)–(C).

93. *Id.* § 2A2.2(b)(2).

94. *See* 28 U.S.C. § 994(b)(2) (2012).

95. *See* U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, ch. 5, pt. A (sentencing table).

sentencing judge can make an upward adjustment of anywhere from 3 to 7 levels for the extent of a victim's injury, and the unadjusted offense level, for example, would be 10, the judge would have discretion to place the defendant in an adjusted offense level as low as 13 and as high as 17. Under the sentencing table, the argument continues, this would mean that the applicable sentencing range would be as low as 12 months (the bottom of the range for offense level 13) and as high as 30 months (the top of the range for offense level 17). This result, the argument concludes, violates the twenty-five percent requirement because 30 months is 150% of 12 months ($30-12=18$, and 18 is 150% of 12).

I do not question the staffers' arithmetic, only their reading of the SRA. The SRA states that the top of a sentencing range shall not exceed the minimum of that range by more than the greater of twenty-five percent or six months.⁹⁶ My proposal to combine categories of adjustments leaves all current sentencing ranges unchanged, *i.e.*, in full compliance with the twenty-five percent requirement. The SRA imposes no requirements on whether adjustments must increase or decrease base offense levels by a fixed number of levels or a range of levels, nor on the extent of any range of levels.⁹⁷ I would read the SRA literally and not extend the twenty-five percent requirement beyond its precise terms.

The Supreme Court gave substantial support to my reading of the SRA in *United States v. Kimbrough*.⁹⁸ The case concerned the 100 to 1 ratio that was then applicable to the weights of powder cocaine and crack cocaine: for every gram of crack cocaine, the Guidelines' drug quantity table used 100 grams of powder cocaine to set an offense level. For example, offense level 12 was established for both 250 milligrams of crack and 25 grams of powder, and offense level 38 was established for both 1.5 kilograms of crack and 150 kilograms of powder.⁹⁹

In *Kimbrough*, a sentencing judge imposed a non-Guidelines sentence, concluding that the 100 to 1 ratio could be disregarded because it was "disproportionate."¹⁰⁰ The Government argued that because the statutes setting mandatory minimum sentences used the 100 to 1 ratio, Congress had "[i]mplicit[ly]" required the Guidelines to use the same ratio and the sentencing judge could not ignore that ratio.¹⁰¹

96. 28 U.S.C. § 994(b)(1)–(2).

97. *Cf. id.*

98. 552 U.S. 85 (2007).

99. See U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, § 2D1.1(c)(1), (14); see also *Kimbrough*, 552 U.S. at 97.

100. *Kimbrough*, 552 U.S. at 93.

101. See *id.* at 102 (quoting Brief for United States at 32, *Kimbrough v. United States*, 552 U.S. 83 (2007) (No. 05-6330)).

The Supreme Court rejected the Government's argument because "[i]t lacks grounding in the text" of the mandatory minimum statute.¹⁰² Acknowledging that the statute sets a minimum and a maximum penalty, the Court observed that "[t]he statute says nothing about the appropriate sentences within these brackets, and we decline to read any implicit directive into that congressional silence."¹⁰³ Similarly, the SRA sets the twenty-five percent requirement for the structuring of sentencing ranges, but says nothing about the method for determining the extent of adjustments that place a defendant within those ranges.

VII. CONCLUSION

Thirty years ago, the Sentencing Commission proclaimed that "the guidelines are evolutionary in nature."¹⁰⁴ Ten years ago, the Supreme Court echoed the point: "The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process."¹⁰⁵

Unfortunately the evolution has not happened. Indeed, it has not even begun. The structure and nearly all the details of the original Guidelines remain unaltered, as do the premises underlying them. Although the Commission has issued about 800 amendments since the original Guidelines became effective in 1987, nearly all make minor refinements, many required by congressional creation of new statutory offenses.

Two changes of significance should be noted. In 2010, the Sentencing Commission adjusted the Guidelines to comply with the Fair Sentencing Act of 2010, which modified the 100 to 1 weight ratio between powder cocaine and crack cocaine to 18 to 1.¹⁰⁶ In April 2014, the Commission lowered drug offense levels by two levels, and made that provision retroactive in July 2014.¹⁰⁷

Now is the time for the Sentencing Commission to make a thorough reappraisal of the Guidelines. The assignment should be entrusted to a task force comprising a broad array of people with experience and expertise in the administration of criminal justice.

102. *Id.*

103. *Id.* at 103.

104. U.S. SENTENCING GUIDELINES MANUAL 2016, *supra* note 13, ch. 1 pt. A.2.

105. *Rita v. United States*, 551 U.S. 338, 350 (2007).

106. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (codified at 21 U.S.C. § 2372 (2012)).

107. *See* AMENDMENTS TO THE SENTENCING GUIDELINES § 2D1.1(c) (U.S. SENTENCING COMM'N 2014); U.S. SENTENCING COMM'N, FREQUENTLY ASKED QUESTIONS: RETROACTIVE APPLICATION OF THE 2014 DRUG GUIDELINES AMENDMENT 1 (2014).

The idea of promulgating guidelines to narrow the excessively broad discretion of federal sentencing judges was sound. That idea can be implemented in numerous ways. The guidelines of many states have shown far more imagination and flexibility than the needlessly complex system under which federal judges are now obliged to select sentences, even under the post-*Booker* advisory guidelines regime.

Let the evolution begin.