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Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges

Lynn S. Adelman

Nancy Gertner

Richard G. Kopf

Gerard E. Lynch

Gregory A. Presnell

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Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges

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This panel discussion was held on March 7, 2006, at Fordham University School of Law. The text of the Panel Discussion transcript has been lightly edited.

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THE PHILIP D. REED LECTURE SERIES

PANEL DISCUSSION

**FEDERAL SENTENCING UNDER “ADVISORY”
GUIDELINES: OBSERVATIONS BY DISTRICT
JUDGES***

PANELISTS

Hon. Lynn S. Adelman
Judge, Eastern District of Wisconsin

Hon. Nancy Gertner
Judge, District of Massachusetts

Hon. Richard G. Kopf
Judge, District of Nebraska

Hon. Gerard E. Lynch
Judge, Southern District of New York

Hon. Gregory A. Presnell
Judge, Middle District of Florida

MODERATOR

Daniel J. Capra
*Philip D. Reed Professor of Law
Fordham Law School*

PROFESSOR CAPRA: Good evening. This is the Philip Reed program. It is part of the Centennial Celebration of Fordham Law School. The topic tonight is entitled “Federal Sentencing Under ‘Advisory’ Guidelines.”

* This panel discussion was held on March 7, 2006, at Fordham University School of Law. The text of the Panel Discussion transcript has been lightly edited.

The Federal Sentencing Guidelines¹ (“the Guidelines”) were designed to control what has been referred to as “unwarranted disparity” in sentencing. Before the Guidelines were instituted, judges sentenced essentially in their discretion, and Congress believed—and, in some cases, clearly with good reason—that this resulted in wildly different sentences for similarly situated individuals. So the Guidelines were designed to control judicial discretion by setting base offense levels for various categories of criminal conduct. Once the base level and enhancements were put together with any reductions that were found, the level that was reached was matched on an axis with the defendant’s criminal history. This process would lead to a fairly small range of sentencing guidelines. The Guidelines allowed some discretion to depart from the sentence reached on that grid, but departures under the Guidelines were essentially for very unusual and very limited circumstances, or where the government moved for a downward departure.

The Supreme Court invalidated this system of mandatory Guidelines in January of 2005 in *United States v. Booker*.² The *Booker* story began in a case called *Apprendi v. New Jersey*.³ In *Apprendi*, the Court held that it was unconstitutional for a defendant to be sentenced beyond the sentencing range authorized by the legislature for a crime based on facts found by a judge by a preponderance of the evidence, rather than by a jury beyond a reasonable doubt. The *Apprendi* Court reasoned that a defendant had a constitutional expectation to be sentenced within the legislatively-designated range for the crime charged and that his right to a jury trial and proof beyond a reasonable doubt would be violated if the judge enhanced a sentence beyond the statutory maximum based on facts found at sentencing by a preponderance of the evidence.

The Court in *Booker* held that the *Apprendi* rationale applied to the Sentencing Guidelines as well, and that a sentence enhanced above the base level would violate *Apprendi* because it would result from facts found by a district judge by a preponderance of the evidence. Because the Guidelines’ enhancements were based on mandatory judicial fact-finding, the *Booker* ruling had the potential to either scrap the whole or a large part of the system or render these facts subject to jury determination, which would basically mean trying to instruct juries on things like “more than minimal planning” and “vulnerable victims,” an arguably unworkable system. But the remedial majority in *Booker* held that the constitutional solution was not to invalidate the Guidelines as a whole but only to invalidate the Guidelines insofar as they mandated enhancement on the basis of certain facts—in other words, insofar as they were mandatory. So long as the Guidelines were advisory, they did not violate *Apprendi*, because the defendant has no expectation to be sentenced within a particular guideline if the Guidelines are only advisory.

1. 18 U.S.C. § 3553 (2000).

2. 543 U.S. 220 (2005).

3. 530 U.S. 466 (2000).

The Court invalidated the statute that mandated Guideline application, 18 U.S.C. § 3553(b)(1). In place of mandatory Guidelines, the Court held that while sentencing courts must consult the Guidelines, a sentence is to be determined as well by the general factors of section 3553(a). Those factors include the need for the sentence to promote respect for the law, to provide just punishment, to deter, to avoid unwarranted sentencing disparities, and to consider everything and impose a sentence “sufficient, but not greater than necessary, to comply with [all of these factors].”⁴ The sentences under advisory Guidelines, according to *Booker*, are to be reviewed by the courts of appeals to determine not whether they adhere to the Guidelines, but whether they are reasonable.

This newfound discretion in sentencing under *Booker* raises a number of important policy questions, probably the most important being how to avoid unwarranted sentencing disparity yet allow any kind of discretion in sentencing. Courts are taking different approaches. There are approximately ten district judges who have written what I would refer to as challenging and influential opinions on how federal courts should approach sentencing under advisory Guidelines. We have five of them on this panel. In alphabetical order, from left to right:

Judge Lynn Adelman, Eastern District of Wisconsin, graduate of Columbia Law School, appointed to the court in 1997 after serving twenty years as a Wisconsin state senator.

Judge Nancy Gertner, District of Massachusetts, graduate of Yale Law School, appointed to the court in 1994. Judge Gertner teaches a course on sentencing at Yale and has written a number of influential law review articles on the topic.

Judge Richard Kopf, District of Nebraska, a former Chief Judge of that District, graduate of the University of Nebraska Law School, appointed to the court in 1992 after serving five years as a magistrate judge.

Judge Gerard Lynch, Southern District of New York, a graduate of Columbia Law School, appointed to the court in 2000. Judge Lynch was a professor at Columbia for many years and also served in the U.S. Attorney’s Office of the Southern District, including as Chief of the Criminal Division.

Judge Gregory Presnell, Middle District of Florida, graduate of the University of Florida School of Law, appointed to the court in 2000 after more than thirty years in private practice.

Our format tonight is to take short opening statements from the judges and then to discuss some particular issues of controversy in sentencing after *Booker*. I plan to open it up to questions and comments from the audience at the end.

Judge Adelman.

4. 18 U.S.C. § 3553(a).

JUDGE ADELMAN: Thank you very much. I am delighted to be here. I thank Fordham Law School and Professor Capra. It is a particular pleasure for me to be in New York City, which is where I got my first job as a lawyer with the Legal Aid Society down at 100 Centre Street. I am happy to be back here.

In these opening statements we were asked to say a few words about *Booker*. For me, that is not hard to do. The system created by *Booker* is a vast improvement over the mandatory Guidelines.

I got on the bench in 1997, and the Guidelines were in full swing by then. I had practiced criminal law in the pre-Guidelines system, and I had a lot of trouble with the mandatory Guidelines. I think the new system is much, much fairer. In many cases, I think the sentences required by the mandatory Guidelines were too harsh. The judge was prohibited from considering many very important factors, like what kind of person the defendant was or the motive for the crime. To some extent, I think those of us who had been involved in sentencing under the Guidelines had gotten used to this. But when you think about it from a little bit of a distance, some of the things that you could not consider under the mandatory Guidelines seem really shocking.

The sentencing hearing under the mandatory Guidelines made no sense to the public or to the defendant. You did not talk about “moral culpability” or any of the traditional things that are supposed to be part of sentencing, such as the defendant’s character, the reason that he offended, or the likelihood that he would re-offend. Instead, you talked about how many points on the grid a defendant should be assessed for some particular item. In this respect and others, the mandatory Guidelines system was deeply flawed.

Under *Booker*, however, the focus at sentencing is no longer the Guidelines but section 3553(a), and, unlike the Guidelines, this statute allows judges to consider everything that is important in sentencing a defendant. Because the Guidelines are no longer mandatory, the defendant’s allocution and the lawyers’ statements are meaningful. None of that was true under the mandatory Guidelines. Sentencing under the mandatory Guidelines was a rote process—the defendant would make a statement and the lawyers would make statements, but they really did not have anything to do with anything because the grid was God.

In my opinion, the system we have now, with *Booker*, is about as good as we are going to get in the foreseeable future. But we have a lot of work to do to preserve it, so anybody who is concerned about sentencing ought to work very hard to preserve it. To me, that means making the case for the present system. It means talking about how much better the system is and why. In defending the new system, judges have too often made the argument that, “Well, it is a good system because it is not that different; everybody is still sentencing close to the Guidelines.” I do not think that is a winning argument. I do not think that you are going to win a debate by saying “nothing has changed.”

A lot has changed—it should have changed—and we should say why the change is good. I think that is an argument we have to make to Congress, and we have to make it very strongly.

We also have to convince the courts of appeals that in reviewing sentencing decisions for reasonableness, they are focusing too much on the Guidelines and not enough on the other § 3553(a) factors or on the parsimony provision. In addition, one avenue that *Booker* opens up is to continue to talk about the flaws in the Guidelines. Even though the Guidelines are not mandatory, they are still there, and a lot of people overvalue them. I think we have to talk about what particular Guidelines are based on, and often that is very little. Finally, I think district judges have to work together to be comfortable with their new empowerment and to improve sentencing practices.

Thank you.

PROFESSOR CAPRA: Judge Gertner.

JUDGE GERTNER: I want to start at the beginning here. I want to talk a little bit about what the Guidelines system was supposed to be at the outset, then how it went wrong.

In the *Maine Law Review* article that I wrote,⁵ I described how everyone behaved badly. So first: How the Guidelines system went wrong, what *Booker* contributes to salvaging the system, and how we are about to go wrong again. I am much more of a pessimist than Judge Adelman.

What was the system at the outset? Because I teach this, I actually read the statute, the legislative history, and every morsel of the material. The elimination of disparity was not the only purpose of the Sentencing Guidelines. Plainly, the Sentencing Reform Act was intended to look at sentencing from top to bottom, listing all the purposes of sentencing that were then extant—rehabilitation, retribution, and eliminating disparity. The Sentencing Commission was supposed to be an expert body that would also be a scientific body; it would look at recidivism studies and bring to bear the best scientific wisdom that it could bring.

The result was not necessarily a system in which judges were to follow Guidelines by rote, but a system where—if you understand that the initial Guidelines were drafted in only a year; essentially it was a rough cut—there would be departures if there was a factor of a kind or to a degree that had not been adequately considered by the Commission. And, in a sense, there was a feedback loop in which the judges, if they thought the Guidelines did not fit the case at bar, would say so. The Commission would take that into account, and there would be a continuing perfection of the Guidelines.

It did not happen that way. The Guidelines essentially supplanted everything. It was almost as if we could no longer speak about anything else, including the statute or the judicial role. We were only speaking about

5. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Me. L. Rev. 569 (2005).

the Guidelines and about compliance with the Guidelines, which were not at all the terms in which the statute had begun.

The Commission made certain choices that in fact made the Guidelines more rigid. It was almost as if, when there was an issue of judicial discretion, the Commission opted for less. It created an enormously complex grid, which gave the illusion of certainty and the reality of something less. The Guidelines focused on quantitative measures rather than the usual measures of sentencing, which is to say it mattered whether the bank robber robbed \$15,000 rather than doing exactly the same thing but only robbing \$5,000. They focused on criminal history and, to a large degree, deemphasized—and in some cases discouraged—consideration of personal characteristics.

The Guidelines themselves were not subject to the Administrative Procedure Act. That is to say, you could never go into court and say, “You know, this Guideline does not match the data on which the Commission was basing it.” You could only say, “The Guideline does not necessarily apply in my case. I have a case outside the heartland.”

Congress behaved badly. Congress created mandatory minimums, and rather than give the Commission discretion, Congress directed the Commission to change the Guidelines. Congress basically overstepped the implicit boundaries in the Sentencing Reform Act.⁶ The appeals courts, which could have interpreted departure authority broadly, did not; rather, they narrowed departure authority. My personal favorite is when the First Circuit reversed me in a case involving extraordinary family circumstances.⁷ Now, the statute says that the Commission was to consider the extent to which family circumstances were relevant. The courts interpreted that as “extraordinary family circumstances.” The First Circuit decided that the only person who can get a departure down in a case of family circumstances is a person who was irreplaceable. I have two teenaged sons; I am not irreplaceable—ask them. A single mother was not irreplaceable because it was so common to be sentencing women offenders who were single mothers.

The district court judges, I might add, for the most part did not interpret the Guidelines but applied them as if they were the Tax Code. As Judge Adelman said, sentencing, instead of being an occasion in which the moral authority of the state is brought to bear on an individual, was an occasion on which you said, “You are an offense level twelve, criminal history two, the range is this,” and virtually nothing else. Rather than encouraging judicial creativity, the Guidelines did just the opposite. There was no feedback loop. Over time, judicial departures were seen as lack of compliance with the Guidelines.

6. Sentencing Reform Act, 18 U.S.C. 3551-3586 (2000).

7. *United States v. Thompson*, 74 F. Supp. 2d 69 (D. Mass. 1999), *vacated and rev'd*, 234 F.3d 74 (1st Cir. 2000).

Booker was an interesting moment in the sentencing story and should have been a moment of creativity for all the players. *Booker* essentially said that when the Guidelines had determinative consequences—in other words, if I find \$50,000, I am in this range—there was no discretion; there was no moment in which I could look at the individual and say, “That might be the range, but you are someone who does not need to be in that range because of your past,” whatever the characteristics were. Since it became rote, with specific facts having determinative consequences, what I was doing looked over time exactly like what the jury was doing. I think that is really the core of *Booker*.

Justice Scalia had an interesting point, which is that, “I was doing what the jury was doing, with few procedural safeguards. There are not the safeguards of a jury trial.”

So *Booker* was a moment of creativity. I love the description that Doug Berman gave to the meaning of that moment. Quoting Ryan S. King and Marc Mauer, he said that we have the possibility of “rational jurisprudence and thoughtful statutory interpretation,” and that there is “a new methodology of judicial deliberation.”⁸

There are now, as Professor Capra said, countless decisions on sentencing, weighing and measuring and bringing into the public issues that had heretofore not been discussed publicly. While I do not agree with everything that everyone says, it is a discussion that seems critical, and the courts of appeals are joining in that discussion.

The problem is that we are being measured in Congress and by the public not by our creativity or our thoughtful decisions, but by whether or not this system is promoting or undermining disparity. In other words, we are being measured by compliance. We are being measured in precisely the terms that one would have thought *Booker* jettisoned. As one judge in Oregon, Michael Marcus, described it to me, it is as if the only thing we are talking about is whether I am doing the same thing as Judge Adelman is doing, even if we are both wrong.⁹ And, indeed, when you think about it, that is the only measure.

Having said that, I understand the concern with disparity. There is really a continuum here. On the one hand there were the mandatory Guidelines, which *Booker* made unconstitutional insofar as a judge applied them. On the other hand, there was what I like to describe as “free at last,” which was sort of a return to the pre-Guidelines moment. I believe that we are somewhere in between. Another way to look at the continuum is there is “free at last,” then there are voluntary guidelines, presumptive guidelines,

8. Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341, 351 (2006) (quoting Ryan S. King & Marc Mauer, *The Sentencing Project, Sentencing with Discretion: Crack Cocaine Sentencing After Booker* 20 (2006), available at <http://www.sentencingproject.org/pdfs/crackcocaine-afterbooker.pdf>).

9. For an overview of Judge Michael Marcus's views on sentencing, see Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 Fed. Sent'g Rep. 76 (2003).

and mandatory guidelines. I think we are somewhere in the middle, which I describe this way: We ought to be sentencing based on standards. It is past the time when we can say, “Gee, I do not think this crime ought to be treated as severely as Congress and the Commission have apparently determined.” We have to be talking about standards.

But the standards are not only the Guidelines. The Guidelines are one source of standards; statutes provide another source. I argue for a common law of sentencing, in which judges describe a set of standards, explain the ways in which the Guidelines are imperfect, and come up with reasons. The Commission should be promulgating standards based on studies about recidivism and efficacy, not just about compliance—the kinds of studies that I had hoped it would do in the beginning.

I had hoped that judges would interpret the Guidelines. There is a way in which, as I said, it has become so rote. I was in the middle of writing an article when *Booker* came down, that of course I had to throw out, that said that what judges were doing was treating the Guidelines as if they were a civil code. In a civil code system, you look at the book for an answer; you believe that the statutes are comprehensive, that someone else has thought through everything, and that all you have to do is figure out the meaning of the words.

So we would have case law on what “extensive organization” meant, which was mostly relying on *Webster’s Dictionary* and not on legislative history. There was no legislative history, for the most part, for the Guidelines. What was the purpose behind “extensive organization” and why are we making that a more culpable category? What does “vulnerable victim” mean, and what kinds of people did the Commission have in mind?

Instead, judges are literally looking at it flat, looking only at the word, and asking, “What does it mean?” I want judges to interpret the Guidelines. I want the Guidelines departure authority to be interpreted in light of the purposes of sentencing. In other words, I would like the First Circuit to abandon the “irreplaceable” category and to say, “Why do we lighten sentences when someone has a family situation that is compelling? Are we concerned about the family? Are we concerned about the individual? What did we have in mind?” I believe we would have a more consistent and a more fair approach if we did that.

I want there to be common law standards, as I said. Common law standards can evolve in the way judicial standards have evolved in every other area of the law. There is a general rule, and you ask the question of whether or not the general rule applies to the case in front of you: Does this case fit the kind of case that the Guidelines drafters had in mind? Does this case fit the heartland? There may have been reasons why the Commission, for example, excluded age as a consideration in sentencing, and I can understand that. Age sometimes points in the direction of recidivism, and sometimes it excuses behavior. But I may have a case in which the vector of age points in one direction. This is judicial thinking; this is thinking that is informed by rules and standards.

In addition, what *Booker* has done, which is magnificent, is to pay attention to the procedures of sentencing. The procedures of sentencing derive from a period of time when a judge could think about and listen to anything. When sentencing was more like a clinical judgment, the judge could consider anything. You would no more tell a doctor that he could not consider a fact than you could tell a judge in those days that he could not consider a fact. Anything came into the sentencing proceeding, subject to a fair preponderance review. Yet, now the facts that I find in that sentencing proceeding are going to have substantial consequences. So *Booker* has at least alerted us to concerns about the burden of proof and about procedure.

Predicting doom and disaster, however, the Commission has issued statistics which purport to show compliance and what the various district courts and circuits are doing.¹⁰ It is as if the only question is how the most accountable players are doing, but not all the other sources of disparity in the system. The most accountable players have to be on the record, subject to appeal. What the prosecutor does is not on the record, not subject to appeal, and not subject to accessible guidelines. Yet, the focus is on judicial disparity.

One interesting statistic: Sentencing length has not changed, even while departures have gone up in some parts of the country. What does it mean? It means that sentencing is a system in which judges and prosecutors participate. Both players are working towards consistent ends; it is not just the judges. But the sentencing lengths have remained the same. To focus on judicial departures, then, is to suggest that this is really more about symbolism, more about candidly criticizing the entity that everyone loves to criticize, rather than talking about real efficacy or sentencing lengths.

The district courts have had a hard time getting out of—I think Berman calls it—“the culture of compliance.” In one sense, that is understandable. The Guidelines anchored—that is really Judge Lynch’s word—the way we talked about and thought about guidelines. Most of the current bench never existed in a pre-Guidelines world, so they define fairness by the Guidelines. You do not have to do much to keep this group of people in line. They will frame the sentencing in terms of the Guidelines. In fact, if you step back and say that most of the bench now has been appointed by Republicans, and if there are departures under *Booker* we ought to step back and say that maybe they signify problems with the Guidelines rather than judges going wild. You can see the TV news report: “Judges going wild.”

Everything, in fact, militates in favor of the continuing significance of the Guidelines. If there is flexibility, it is flexibility in areas where there ought to have been flexibility. I have done a study of my own court. Most of the departures are, for example, for the guy who has been in INS custody for

10. See, e.g., United States Sentencing Commission, *Booker and Fanfan Materials*, <http://www.ussc.gov/bf.htm> (last visited Aug. 17, 2006); see also United States Sentencing Commission, *Federal Sentencing Statistics by State, District, and Circuit*, <http://www.ussc.gov/LINKTOJP.HTM> (last visited Aug. 17, 2006).

eight months and is going to be deported. Let us count that eight months as part of the sentence; he was essentially in custody.

Many judges all across the country are looking at disparity between co-defendants. We all have had the experience of winding up with three people who have done essentially the same thing, but when you looked at the column of figures you said, "Oh my God, why is he getting twenty years and she is getting X?" So judges have been tweaking the Guidelines, for the most part either following them and being totally compliant or seeking flexibility in areas in which flexibility is deserved.

One last comment: A judge on my court, who was appointed by a Republican and who was a prosecutor all his life, had a case called *United States v. Glavin*.¹¹ The individual was born to a fourteen-year-old mother. When he was eleven, she shot him up with heroin to keep him quiet. Between eleven and twenty, he wound up with a series of small drug crimes that for the most part never got him in state prison. Then he walked into a bank and, with his finger in his pocket, stole \$300. The Guidelines mandated ten years. Judge Wolf decided to go down to seven or eight.

The departures have not been substantial, which is why sentencing lengths have stayed the same. But *Booker* is a moment of creativity. If we can leave sentencing as this, rather than what is now being proposed in the legislature or what we believe will be proposed in the legislature, which is doing something to "get those darn judges in line."

Thank you.

PROFESSOR CAPRA: Judge Kopf?

JUDGE KOPF: If you have had the pleasure of reading these four judges' opinions, as I have, you know that I am here as the goat. My job is to attract the predators, and then you get to watch them kill me.

[Laughter]

I want to thank Professor Capra for inviting me. It is truly an honor. It is especially flattering to be associated with Judges Adelman, Gertner, Lynch, and Presnell. They are superb judges—I mean this sincerely—and I am sure that I will learn a lot from them this evening.

Second, and by way of context, I am from the hinterlands. Despite that, I sentenced 240 people in 2005. The average federal district judge sentences roughly one hundred.

The majority of the sentences that I imposed in the District of Nebraska were for drug offenses. As a result of these 240 people that I had to face and pronounce sentences on, my thoughts about *Booker* are forged from a heavy diet of criminal cases, generating, as Judge Gertner suggested, some God-awfully long prison sentences. Put another way, it is quite possible that my views about *Booker* are wrong. If that is so, I have lots of experience committing reversible error.

11. Transcript of Sentencing Hearing at 35-46, *United States v. Glavin*, No. 04-10093 (D. Mass. Feb. 18, 2005) (on file with Fordham Law Review).

I can express my thoughts regarding *Booker* in five fairly short points.

Point one: In my opinion, the overarching significance of the remedial opinion in *Booker* is that it forces federal judges to consciously decide how properly to exercise discretion in a democratic society. Starkly put, if the choice is between a skinny or a muscular judicial role, I pick the weak one.

Point two—and here I think Judge Gertner and I will have a significant disagreement about what the facts are: As I look at the facts, I do not think one can objectively examine the history of the Guidelines and honestly conclude that Congress thinks the Guidelines conflict with the statutes that Congress wrote. It is far more consistent with an honest reading of the record, in my opinion, to conclude that the Guidelines truly express Congress's view about how best to achieve the statutory goals of sentencing. By this, I do not mean to suggest that Congress is right or that I agree with Congress. I mean only that the Guidelines, like administrative regulations in other contexts, are most often an accurate expression of what Congress wants.

Point three: Deference to the will of Congress as expressed in the Guidelines is not antithetical to the exercise of judicial discretion as mandated by *Booker*. *Booker* did mandate the exercise of judicial discretion. However, deference means that absent a plainly superior and principled reason for doing something different, a judge should freely choose to exercise his or her judicial discretion in a way that is consistent with the Guidelines. This is so even though it may be reasonable in a world without the Guidelines to do something different. As between two rational choices, one can properly exercise discretion under *Booker* by adopting the choice that Congress has endorsed via the Guidelines. That is why several circuit courts have now held that, post-*Booker*, a sentence within the Guidelines is presumptively reasonable.

Point four: Unless there is an obviously superior reason for selecting a non-Guidelines sentence in a particular case—and I acknowledge that there are such cases—the Guidelines' sentence is the only proper choice.

Here, I noticed Judge Gertner's reference to Judge Wolf's decision to impose a seven-year sentence rather than a ten-year sentence. You can articulate a rationale for the seven-year sentence, but you are articulating a rationale for the seven-year sentence that is different than the rationale that, in my opinion, Congress approved. Unless you are able to put together a theoretically coherent explanation that is going to apply not only in the seven-year case in Boston, but also in Wisconsin, Nebraska, New York, and California, then I wonder what you are doing.

The final point is this: I do not have a lot of confidence in district judges. I have a lot of confidence in their ethics and their hard work. I have no confidence in their ability to put together a coherent, analytical sentencing method. We simply lack the institutional and personal competence to do that. Because of that, and if for no other reason, we ought to give the Guidelines heavy or substantial weight when we sentence.

With that, once again, and hoping that I play the goat to everyone's satisfaction, it is a pleasure being here.

PROFESSOR CAPRA: Judge Presnell

JUDGE PRESNELL: Thank you. It is great to be here. I always enjoy coming to New York, although I feel a bit like a fish swimming upstream, as most people at this time of year, given their choice, would be going from New York to Florida rather than vice versa. Also, I was hopeful that I was going to go last so that everything meaningful would have been said.

First, let me make a disclaimer: I am not a Guidelines expert. If you have seen the Guidelines, they are like a fairly good-sized phone book. I was a civil trial lawyer for thirty-two years, so when I came on the federal bench I had no earthly idea what the Guidelines were like. But I dutifully tried to learn and apply the Guidelines, thinking that there was a coherent and reasonable rationale for why I was doing so.

After sentencing hundreds of people over the course of the last five years, before *Booker*, it occurred to me that I was not needed in the process. I felt like I was a meaningless figurehead in the administration of justice when it came to criminal sentencing. As my colleagues have said, unless there was a scoring dispute, pre-*Booker* I had virtually no discretion to consider anything except to impose a Guidelines sentence.

Mothers would come in, crying, talking about why their child had gone wrong, that it was their fault, and to please have mercy. I would listen to that, and I would have to tell her, "Frankly, Ma'am, mercy is not a concept I am allowed to consider." I mean that is a bold statement, but it is true. If I departed because I felt, as a matter of subjective judgment, that mercy required it, the Eleventh Circuit would have reversed me in a heartbeat—and pre-*Booker*, it was pretty good at that.

The issue now, of course, is this: With the discretion that we have, how much discretion are we going to be given? The only thing we are working with is the notion of reasonableness; that is, is the sentence we impose reasonable? We consult the Guidelines, we look at the other factors, and we impose a sentence. Now, post-*Booker*, I write more sentencing opinions than I used to because I think it is important that I explain my rationale for why I think a sentence in a particular case is appropriate.

Thus far, the Eleventh Circuit has confirmed several below-Guidelines sentences, including one of mine; and another one of mine, the *Williams*¹² opinion, is scheduled for oral argument before the Eleventh Circuit in May.

What I want to talk about briefly is something else that I have discussed in my opinions. It relates to the post-*Booker* attitude of the Executive Branch of our government. Post-*Booker* we are supposed to have discretion. The Supreme Court says that the Guidelines are not mandatory, but the Department of Justice, through written memoranda and the conduct

12. *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005).

and policies that have been exhibited by the Assistant United States Attorneys, are still taking the position that the Guidelines are mandatory.

It may be different in other parts of the country, but in the Middle District of Florida, if I impose a sentence below the Guidelines, after we have done the scoring and everything, and I say, "I have considered the Guidelines, I give deference to the Guidelines, but considering these other factors I think a lower sentence is appropriate," the government routinely stands up and says, "Your Honor, for the record I object."

Being a bit feisty, I will say, "Well, what is the basis for your objection?"

The response will be, "Well, it is not a Guidelines sentence."

I will say, "Well, it does not have to be a Guidelines sentence. What factual basis do you have on the record to say that the § 3553(a) factors that I considered result in an unreasonable sentence?"

The Government does not have any factual basis except that it is a non-Guidelines sentence. Its rationale is that it is concerned about sentencing disparity and the need for sentencing uniformity.

I have written in my opinions, however, that I think that these concerns are plainly disingenuous because the Government is only concerned about below-Guidelines sentences. If I go above the Guidelines' sentence, the Government is happy; it does not care about that. And I have issued above-Guidelines sentences as well as below-Guidelines sentences.

The other thing that I find interesting—and I am the only district judge who either finds it interesting or dares to talk about it—is the reporting requirements that the Department of Justice has come up with. District judges who get out of line are reported on a *Booker* form. After *Booker*, the Justice Department came out with a policy that told all of the United States Attorneys that, "If you have any judges in your district who give a sentence below the Guidelines, you have to fill out this form." On the form they talk about what the U.S. Attorney thinks was my reason for the sentence. The form also says that they are going to use this information in the policy debate regarding sentencing legislation. It is clear that they are collecting these statistics and giving what they think I am doing as a basis for the public debate.

So I asked for a copy of my *Booker* forms. That request created great consternation and, I am sure, several e-mails between Washington and Orlando. The result was that they respectfully declined to give me those forms. Not to be deterred, I filed a Freedom of Information Act (FOIA) request.

[Applause]

The FOIA statute gives them six weeks to respond. I mean if we are going to have a public debate, let us make it transparent. And if anybody knows whether the rationale I gave was my rationale, you would think it would be me.

Well, it took the government four months to reply to my FOIA request. You could see that the reason for the delay was the terribly insightful

analysis they gave in their two-word response: "Request denied." I have appealed that denial. It is now somewhere in the dark hole of some administrative appeal division in the Department of Justice.

There is some levity in this, but I think there are some real implications here on the independence of the judiciary. If you think about it, what really is going on here is a political power struggle. The Executive Branch does not want the judges to have a meaningful role in sentencing because, pre-*Booker*, the government investigated the crime, they charged the crime, they prosecuted the crime, and they sentenced. Judges had no meaningful role. That power has now been taken away from the Executive Branch, and it is resisting.

Alexis de Tocqueville said there were two things critical for the survival of this new form of government: a free and vibrant press and an independent judiciary. I think the independence of the judiciary is under attack, and I think *Booker* and post-*Booker* development of the law has profound implications with respect to the independence of our judiciary.

Thank you very much.

PROFESSOR CAPRA: Judge Lynch.

JUDGE LYNCH: I am so glad that Judge Kopf is here because otherwise I would probably be the right wing of this panel and that would creep me out.

[Laughter]

I want to focus my comments on four key words.

First word: guidelines. I am for guidelines. I have been for guidelines since I was a law student and read Marvin Frankel's book.¹³

It is important to go back and think about what sentencing was like before the Guidelines in the federal system. In the Southern District of New York, we had an institution called Part One. Part One was the place you went to be arraigned when you were indicted. There was a particular judge assigned each week to be in Part One. The rules for the division of business were that if you pled not guilty, your case would be assigned at random to some other judge. If you pled guilty, the Part One judge would hear your plea and then sentence you later. When some judges were in Part One, the line to plead guilty was out the door, down Duane Street, over to Broadway, and back up halfway to Fordham. When other judges were there, no one pled guilty. And if that same judge's name happened to come at random out of the wheel, the judge would give a little smile, and the defense lawyer's heart would sink. That is not the way things should be.

Frankly, I do not know that the reason for those differences between judges was that the judges had radically different views about which crimes were worse. I think the problem really was that judges had very different ideas about what constituted a severe or lenient sentence. For one judge a lenient sentence for a particular crime might be five years and a tough one

13. Marvin Frankel, *Criminal Sentences: Law Without Order* (1973).

ten, while for the judge down the hall leniency might be probation and severity five years. We needed guideposts. So I am for guidelines.

On the other hand, “guidelines” does not mean rigid mandates. This brings me to the second key word: disparity. But what does “disparity” in sentencing mean? It is a very slippery word.

I think it is a good thing for people to be consistent. It is wrong for a defendant to go to jail for ten years because he happens to have his case assigned to me, when he would go to jail for five years if the same case were assigned to the judge next door. That is not the way things should be. We all understand that, and we all want some system that will help to make sentencing more consistent.

But what does “disparity” mean? It means treating like cases unlike, but it also means treating unlike cases alike. That is a piece of the problem that we have not heard discussed much. After all, we could have absolutely uniform sentencing in this country. It would only take one law. The law would say “anyone who is convicted of a crime shall go to jail for five years. It does not matter if it is murder or rape, it does not matter if it is a misdemeanor, it does not matter if it is spitting on the sidewalk—every criminal goes to jail for five years.” We would have total even-handedness; everyone would get the same sentence. It would not matter what judge you went before. But obviously, that would not be justice because those cases are different. Murderers should go to jail for longer than people who spit on the sidewalk.

As we think about disparity, we have to be aware of the problem that we are trying to treat like cases alike, while also trying to make meaningful and relevant distinctions between cases. This is where it gets complicated.

The Guidelines book, as you were told, becomes the size of a phone book. That is because if you try to foresee every wrinkle that could possibly affect how severely criminals should be treated, you are going to get not one phone book but two, not two but three.

Even if we have that feedback loop that Judge Gertner referred to, that still will not solve the problem because the idea of departures as feedback to the Sentencing Commission aims at the unattainable ideal of the Guidelines’ perfection. If a sentencing judge identified a factor not listed in the Guidelines that indicated a difference between one case and another, the thing to do was to write that factor into the Guidelines. Then, if another judge comes up with another wrinkle, we will write that into the Guidelines, too. We will try to capture all of human diversity, all the varieties of human evil, all the varieties of human sorrow, into a code that will somehow mathematically cover everything. I think it cannot be done. I think there will always be differences that cannot be captured by such a calculus. Then we have to worry whether we are creating disparity by treating the unlike alike, by failing to consider all the things that ought to be considered.

I want to talk about a third word today: compliance. We are going to hear a lot, I suspect, in the upcoming debate about compliance with the Guidelines.

But “compliance” is almost as slippery a word as “disparity.” The Sentencing Commission has compiled a lot of statistics about sentencing after *Booker*, and there is a great article in the *Houston Law Review* by Frank Bowman that analyzes all of these statistics.¹⁴ One question Bowman addresses is what he calls the extent of judges’ “compliance” with the Guidelines. But the one objection I had to Bowman—and I tried to persuade him to use a different word—is that the word “compliance” is a very bad word because it suggests disobedience. The idea is that if a sentence is within the Guidelines, it is a compliant sentence; if the sentence is given outside the Guidelines, for whatever reason, it is a noncompliant sentence. That is a mistake for a number of reasons.

One mistake is something Nancy referred to earlier: The Guidelines themselves, and the Sentencing Reform Act itself, contemplate departures. To depart is not to be noncompliant; to depart is to say that there is a fact about this case that is important to sentencing and that the Guidelines do not adequately take into account. An outside-the-Guidelines sentence is sometimes entirely compliant with the Guidelines, because the Guidelines themselves authorize various departures. Also, after *Booker*, even a sentence that is outside the Guidelines system is fully compliant with the law, because § 3553(a) makes the Guidelines only one factor to consider in imposing a sentence. So it is not noncompliant to be outside the Guidelines.

On the other hand, it is entirely possible for a sentence within the Guidelines to be noncompliant, because the judge herself, whose compliance is being measured, calculated the applicable Guidelines range. If you are doing the job honestly, you are trying to interpret the Guidelines, as Nancy puts it, in a way that is consistent with their purposes. But not everyone does that. It is not only judges; prosecutors and defense lawyers can get together and create a Guidelines outcome. A sentence that is within a Guidelines range that results from manipulated Guidelines calculations will register statistically as a “compliant” sentence, when in fact it is not.

Often, in perfect good faith, I can impose a sentence in two different ways. I can say, “You know, I read this guideline this way and I am going to take two points off because I do not think this guideline applies.” If, as a result of that, I give a particular sentence within that newly configured Guidelines range, it counts as compliant. But if instead I decide, “You know, it is a close call, but I think really the Guideline should be interpreted the other way and he gets the two points; but when I look at all the factors, I think the sentence should be a little lower,” the same answer, the same bottom line, will be considered noncompliant.

14. Frank O. Bowman, III, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 *Hous. L. Rev.* 279 (2006).

Watch your wallet when people talk about disparity. Watch your wallet when people talk about compliance. Look behind that talk and try to figure out what they are really talking about.

The fourth word I want to talk about is “presumption.” Here is where I think I differ from Judge Kopf, because I do not think it is a good idea to talk about hard presumptions. I do think, though, that if we are playing the game fairly, if we are trying to do what Congress mandates, then most sentences will and should be within the Guidelines. Congress, after all, gets to make the law, that is their power; the Executive has to follow that when it may not like it, and the Judiciary has to follow that when it may not like it.

That does not mean, however, that there should be a presumption in favor of the Guidelines sentence. That is not what the Supreme Court said in *Booker*, and it is not what the statute says, at least once you excise the part that the Supreme Court excised. The statute says to look at all of these factors and impose the lowest sentence necessary to accomplish these goals, only one of which is consideration of the Guidelines recommendations.

Nevertheless, I want to talk about a psychological and a legal phenomenon that I think will and should lead most judges to stay close to the Guidelines.

The psychological fact is that there is in social science literature a concept called “anchoring.” Some folks have done an experiment where they take three control groups, perfectly matched people in all relevant respects, and give them each a bottle of the same wine.

They say to the first group, “We are going to market this wine and we would like your opinion as consumers. We would like to know what you think of this wine. The way we want you to express your opinion is to tell us how much you would pay for this bottle if you went into a liquor store and bought this wine.” The subjects all give different answers because no one knows. Everybody pretends they have taste, but nobody really knows. So the experimenters get a whole lot of different answers. They take an average, and the average comes out to \$10.

Meanwhile, they take a second group and give that group the same bottle of wine and set the same problem, except they say, “We are going to market this wine. We are thinking of marketing this for \$50 a bottle. You tell us what you would pay.” Everybody expresses their opinion. When the experimenters average the amounts, it comes out to \$20; it no longer comes out to \$10.

Then they take the third group and say, “We are thinking of marketing mass quantities of this wine. We are going to sell this for five dollars a bottle, but we would like to know what you would pay.” And, sure enough, what was a \$10 bottle of wine now comes down to \$6 or \$7.50 or something.

That is what anchoring means: When you have a question that is very subjective that people are called upon to answer and you give them a number as a kind of baseline, that number is very helpful. Whether people

like that number or not, even if they are angry about that number, does not matter; they will still be influenced by that number. That is the psychological fact. I think it is psychologically inevitable that the Guidelines will have a powerful influence on sentences, even if they are purely advisory, because they put a number on a question that is otherwise quite subjective.

There is also a legal fact. If you look at the factors in § 3553(a), first, the Guidelines recommendation itself is a factor in its own right. Second, avoiding disparity is a factor. As I said, avoiding disparity can be a very complicated thing, and, in my opinion, often you avoid disparity by not following the Guidelines. But more often, if we all follow the Guidelines, there will be less disparity. That is a factor that will often cut in favor of following the Guidelines. Third, the need for just punishment is a factor, and the need to deter crimes is a factor. Of course, we all have our opinions about what kind of sentence is necessary in order to impose just punishment.

Let me tell you something about the way sentencing works. We judges sit in a room and we see the facts. That is something that drives us in sentencing. We see the particular cases. We see the sorrowful mothers, not only of the defendants but also of the victims. We see the people who lost their life savings. We see the people with horrible lives that led them into a life of crime and brought them before the bar of justice. We see all the messed-up stuff that happens in particular cases. We see the intensity with which one case differs from another case, and that is something that drives us, and I think it should drive us. I think it is wrong for the law to ignore those factors.

On the other hand, even if we have a unique perspective that Congress lacks, it is a limited perspective. I agree with Judge Kopf about this. It is not just that we do not have a mechanism for taking the broad view; I think we are psychologically incapacitated from taking the broad view. We are looking at grief when we impose sentences. We have a hard time—I have a hard time—looking at these people and inflicting pain on them, which is what I am asked to do. By the same token, we have all the facts about the victims as well and that will push us in the opposite direction. But what we do not have is the overview, the policy perspective, and that is an important perspective to have.

A little digression: Let me bring it back to § 3553(a). I think that I am in a very good position to assess some facts, that I am in a better position to assess those facts than the Sentencing Commission or even the democratically elected members of Congress. When we are asked to consider in § 3553(a) the particular characteristics of an individual—when we are asked to consider whether this person is a threat to society or whether this person is in need of rehabilitation and, if so, how much—I think we have a better view than Congress, because we see that person and Congress does not.

On the other hand, it helps to have a broader view when the questions are, "what does society need as a whole? and are these sentences for drug cases, which seem outrageously severe to me, really necessary?" it helps to have a broader view. Of course, I have my own opinions on that, and like everybody else, I think my view is right and yours is wrong; I think mine is right and Congress's is wrong. But I am just one citizen. If Congress thinks that I am wrong, if a majority of the people think that I am wrong, then I think they are in a better position than I am to set that social policy.

As a citizen, I may not like the general assumption that we are going to be tough on drugs. Well, I get to vote. If other people vote for the guys who think this is good public policy, well guess what? It is a democracy. They win.

What conduct is necessary to deter? I agree with Judge Gertner, the Commission does a terrible job of what they could, in an ideal world, do a wonderful job of doing real studies about what works with deterrence and who needs to be incapacitated. Whether the Commission does a good job or a bad job, it is entrusted with that job. The result is that the factors of punishment and deterrence will favor imposition of a Guidelines sentence in most cases.

I think several of the factors mandated by the statute will and should lean us towards the Guidelines. I do not think I would like to see appellate courts turn that into a hard presumption, but I think the cumulative effect of those factors is that we are likely to stick with the Guidelines. Moreover, because of the anchoring phenomenon, I think we are also likely not to deviate that much when we do deviate. When you look at these studies of judicial "compliance" with the Guidelines after *Booker*, one question to ask (which is rarely asked) is, what is the extent of the departure?

I suspect that after *Booker*, life is better for judges in most respects. But it is not better in one way: It is much more painful to impose sentences. You can not hide behind the Guidelines anymore. You can not say to the grieving mother, "Sorry, mercy is not in my vocabulary. Congress has forbidden me to consider it." You have to say, "In this case your kid has to go to jail for the good of society. I am not going to exercise mercy, that is my call, and I am making it." That is a painful thing for judges.

On the other hand, nobody likes to be a potted plant, in Brendan Sullivan's famous term.¹⁵ Nobody likes to be someone who is sitting there as a figurehead. People want to feel that they are doing justice. That is why we are doing this instead of getting paid the big bucks somewhere else. So it is better for us to have that discretion.

But is it better for defendants? I am not sure it will be, at least by very much, because I suspect that for all of the reasons I have suggested, the extent of departures is not going to be that great. If the general public policy is "get tough on crime," judges will be enlisted to execute that policy

15. See *Behind the Accusatory Outbursts, Sullivan Has a Protective Purpose*, Wash. Post, July 10, 1987, at A14.

and they will follow that policy. They may trim it around the edges; they may save some poor devils who are particularly sympathetic from the fullest rigors of that system. But *Booker* does not represent the day of jubilee for defendants and defense lawyers, and, for a variety of reasons, I do not think it is or should be for judges either.

Thank you.

PROFESSOR CAPRA: I would like to open it up now, if any of the panelists want to comment on what has gone before.

Judge Adelman, since you went first, do you have any reactions you want to speak of? Otherwise, I will direct specific questions.

JUDGE ADELMAN: I think it is interesting that even though there are different emphases among the judges, what I think I heard correctly is that everybody likes *Booker* a lot better than the mandatory Guidelines system. I think that is significant because probably over the next year or so, maybe sooner, we will face possible threats to *Booker*. So I think that is a significant fact.

PROFESSOR CAPRA: Judge Gertner.

JUDGE GERTNER: I want to respond to Judge Kopf for a moment.

Congress does not sentence an individual; Congress sets the broad social policy. As Judge Lynch said, the broad social policy, particularly with respect to drugs, is drawing everyone's sentences up from where they would otherwise be. The sentence by Judge Wolf I described earlier went from ten years to eight. If given full discretion, he would have chosen two or one. But clearly, Congress's social policy is being implemented.

The Guidelines drafters recognized that it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct particularly relevant to a sentencing decision. The Commission recognizes that circumstances that may warrant departure from the Guidelines range cannot be comprehensively listed and analyzed in advance.

There is a difference between broad social policy and individuals. Having said that, I agree with Judge Kopf that we need to develop principled means of distinguishing between one defendant and all the others under the Guidelines. We do that in every other aspect of our work. We come up with principled distinctions. We create common law rules. The court of appeals either thinks they are good or does not think they are good.

We have begun to exchange sentencing information in my court so that I can hear the basis for Judge Wolf's sentence and I can decide whether it applies in my case. From that will come additional rules and standards, just as they evolve in everything else we do.

And finally, if the Guidelines are what Congress wants and that is why we should interpret them, then we have a serious separation of powers issue here. The Sentencing Commission is in the Judicial Branch. The

Sentencing Commission was intended not to be, as Justice Scalia described it, a “junior-varsity Congress.”¹⁶

JUDGE KOPF: In dissent.

JUDGE GERTNER: Yes, in dissent.

PROFESSOR CAPRA: Eight to one.

JUDGE GERTNER: Yes. But he is now going to be in the majority, so it should not be a one-to-one correlation between the Commission and Congress.

JUDGE KOPF: It is interesting for Judge Gertner to speak for Justice Scalia.

JUDGE GERTNER: Yes, it is.

JUDGE KOPF: It makes me tingle.

[Laughter]

JUDGE GERTNER: We are onboard on this one.

But, seriously, the *Mistretta*¹⁷ Court based its decision regarding the sentencing system on the fact that the Sentencing Commission was in the Judicial Branch. The setup of the statute implied that the Sentencing Commission would do that which Congress could not do, which was look at the minutiae of sentencing and come up with standards and guidelines. It is not a one-to-one correlation between what Congress wants and the Guidelines. And Congress cannot sentence individuals. That is why we set up the framework that we did.

PROFESSOR CAPRA: Judge Kopf, do you want to respond?

JUDGE KOPF: The goat passes.

PROFESSOR CAPRA: Okay.

Well, let us take an example of what Congress wants. Congress wants a one hundred-to-one sentencing ratio for crack-to-powder cocaine. What do we do with a one hundred-to-one sentencing ratio after *Booker*? Judge Kopf, how about we start with you?

JUDGE KOPF: If it were up to me, I would use a different ratio. Twenty-to-one is the last iteration of what the Commission suggested was appropriate. But it is absolutely clear that Congress rejected that.

I agree that there may be circumstances in a crack case that may be idiosyncratic, but, generally speaking, to reject the ratio categorically is simply to tell Congress to go to hell. If you want to do that, fine, but be up-front and say what you are doing.

JUDGE GERTNER: I agree with you.

JUDGE KOPF: Well, let me conclude, and then maybe you will not.

JUDGE GERTNER: I am just so excited.

JUDGE KOPF: As am I.

[Laughter]

16. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

17. 488 U.S. 361.

But that is not what happens. No one sits down and says, "Screw you, Congress, I am not enforcing this." There is always reference to some higher abstract principles, when the abstract principles have, for whatever good or bad reason, been rejected.

I think the question has been answered by Congress. I think they are wrong, but they are not irrational; that is to say, they are not crazy.

PROFESSOR CAPRA: We are going to let Judge Adelman speak because he has written on the matter.

JUDGE ADELMAN: I think I was actually the first judge in the country to impose a non-Guidelines sentence based on the disparity between crack and powder and the way crack is treated. I do not think any reasonable person would disagree that there is no reasonable basis for the distinction between the way the Guidelines treat crack and powder. I do not think anybody would disagree that it has huge implications for racial disparity. So here is a case where—

JUDGE KOPF: Judge Adelman, are you saying that the crack guidelines are irrational in the legal sense of that word?

JUDGE ADELMAN: Well, "legal" is a slippery word. Judge Lynch was talking about slippery words.

JUDGE KOPF: But are you saying it is unconstitutional because, even apart from the race angle, it is irrational?

JUDGE ADELMAN: No. I think courts have ruled to the contrary. Courts have said that the different legal treatment between crack and powder does not violate the Equal Protection Clause. I am using the word "rationality" in its ordinary sense, rather than its legal sense.

The Sentencing Commission has said that the one hundred-to-one distinction between powder and crack makes no sense. It went to Congress, and Congress said—I think it failed by six votes—"we are not going to change it."

I do not think that binds me. There are two different kinds of situations. One is a mandatory minimum; there Congress has passed a law, and I am bound by that. No doubt about it, I have got to follow it, whatever I think of it.

But Congress has not passed any law; they rejected a recommendation from the Commission. I do not have to follow a sort of vague legislative intent. I do not think the fact that Congress turned down the Commission binds me. The Guidelines are advisory, so I do not have to follow them. There is no statute that says that I am stuck with this one hundred-to-one distinction, except if there is a mandatory minimum. Therefore, I think I am not bound by it.

There are a couple of cases. Recently, the First Circuit has said to the contrary,¹⁸ and also the Fourth Circuit.¹⁹ But I think those decisions, if you read them, are really badly analyzed.

18. *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006).

JUDGE GERTNER: I do not agree with that.

JUDGE ADELMAN: All right.

But since when do I have to follow something that is not a law? I only have to follow Congress's laws, that is all. If Congress has not enacted a law, my responsibility is to follow the § 3553(a) factors.

Nobody in their right mind thinks that the Guidelines are reasonable on this point.

PROFESSOR CAPRA: Judge Lynch.

JUDGE LYNCH: For me, this is the hardest question. I think we should not be distracted by it in the sense of thinking that this is a typical question about the post-*Booker* world. This is an atypical question.

To me it is hard for several reasons. I do not think that it is a good idea for some judges to say, "We are just not going to follow this particular guideline," because the problem is that other judges will take a different view. Then we will have identical defendants being sentenced very differently based on different judges' beliefs about drug sentences. I do not think that is what is going on in the post-*Booker* world, and I do not think that should be going on.

There is a problem, though. I do not know that I would use the word "irrational," but I would use the word "evil." Under the mandatory Guidelines, I have imposed many sentences that, if I were given the godlike power that judges used to have, I would not have imposed. They were not sentences that in my heart of hearts I think represent the best version of justice. But they were not nuts—they were not "irrational," in Judge Kopf's words—and they were not ultimately evil. I may think they do not lead to good public policy, I may think they hurt more than they help, but reasonable people can differ about that.

The crack ratio is something that I think goes beyond this, because it is so far beyond what is reasonable. I think reasonable people can conclude that there are a variety of social reasons why crack should be treated more seriously than powder, but at the one hundred-to-one ratio, you are talking about sentences that inflict enormous harm beyond any justification.

Some young man who was in the Justice Department was quoted in the early days of the Bush Administration in the *New York Times* as essentially saying, yes, people talk about this 100:1 ratio. That is a liberal red herring. It is wrong, because the sentences are not 100:1. That ratio treats one gram of crack as a hundred grams of powder, but that does not mean the sentence is a hundred times as great. It is only five times as great. What are they complaining about?²⁰ If you know what powder sentences are like and then you multiply them by five, well, that fellow should get that kind of sentence for callously trivializing these enormous sentencing disparities.

19. *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006).

20. See Neil A. Lewis, *Justice Department Opposes Lower Jail Terms for Crack*, N.Y. Times (Late Edition), Mar. 20, 2002, at A5.

It does have a profound racial impact. The drug trade is like many illegal activities. The gangs that get involved in these things are often ethnically organized because people trust people who are like them. And sure enough, it turns out that different kinds of people, different ethnic groups, find themselves in control of particular distribution networks. The consequence is that African-Americans are sentenced disproportionately more heavily because of crack. These are people who, in terms of their role in the drug trade, are identical, selling what is actually the same chemical, getting vastly different treatment under the statutes and Guidelines.

We are not here to talk about equal protection analysis, but to me this is just reckless indifference to that kind of disparity, and Congress is afraid to look like it is softening on anything. The result is that we have sentences that go beyond unjust in this area, and I find it very offensive.

Sorry for the editorial. Let me get back to what I have to do. I do not believe judges post-*Booker* are supposed to just categorically reject the Sentencing Commission's policy about any particular crime. But that is the problem. I think this is the one place where a lot of judges really do feel a pull to just say, "We are not going to do it." I am sure you could not find five like that.

PROFESSOR CAPRA: We have one right here.

JUDGE LYNCH: No, no, I am not talking about judges. I mean you could not find five areas, five guidelines, five rules, five sentencing issues where judges will be strongly tempted to just ignore or reject a Guidelines position across the board. Maybe you could not find three, and I am not sure I can quickly come up with another one.

PROFESSOR CAPRA: I have got another coming up, but Judge Presnell wants to speak.

JUDGE PRESNELL: Well, I think it is important for those who are not in the process—particularly the law students—to understand how this really works.

If you read my *Williams*²¹ opinion, we have a young, twenty-something-year-old black kid who is a petty powder cocaine dealer. He has been through the state system three or four times and he has served a total of three years in prison. The state says, "Look, our state laws are not tough enough. We are going to turn him over to the feds." So the feds go out and they get an undercover agent and they decide, "Look, we can only get him for maybe seven or eight years on powder, so we are just going to set him up with crack." They send the undercover agent in, and he buys some crack, he goes back, and they keep buying until they have the amount they need to get the sentence they want. That is the way it works from the prosecutorial standpoint.

I included a footnote in my opinion that just recognizes the disparity and the political concern about the racial implications. I did not say it was the

21. *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005).

basis for my opinion, but the U.S. Attorney has used that as one of the arguments on appeal. The case is before the Eleventh Circuit now.

But powder cocaine and crack cocaine are the same chemical substance. I do not see how you get that disparity, either. We keep using this word “departure,” and we should not, because we are not departing now; we are sentencing pursuant to the 3553(a) factors.

PROFESSOR CAPRA: Okay. The second one I have is illegal reentry cases. Illegal reentry cases under the PROTECT Act authorize the Department of Justice to set up what are called fast-track departures.²² Certain districts have fast-track departures, which result in a four-level reduction if there is quick cooperation. But other districts do not have fast-track departure. I think we do not have a fast-track departure district in New York. Do you have one?

JUDGE KOPF: We are.

PROFESSOR CAPRA: Nebraska is one.

JUDGE GERTNER: We are not technically one, but we are de facto one.

PROFESSOR CAPRA: So the question is, under *Booker*, how does a district become a de facto fast-track departure system?

JUDGE GERTNER: Well, I will tell you. This is another issue with “compliance.” There is someone who is picked up for illegal reentry after deportation. All of a sudden, you get a request from both sides, the government and the defense, to have a sentencing without a presentence report. The person is then sentenced without a presentence report. The defense asks for time served. The government stands mute. Time served is way below what the Guidelines would otherwise identify.

I am having a battle over the Massachusetts statistics. When I looked at our *Booker* departures, at what was in that category, there were eighteen or twenty cases where clearly the government and the defense were getting together to get these people out of the country and deported. So there are de facto fast tracks around the country.

A good deal of the criticism about the post-*Booker* world is that there are regional disparities. It is not clear to me that the regional disparities are any different than they were before. It also makes an enormous difference on your docket. If you have lots of small cases and are overwhelmed with immigration cases, there are certain pressures on your docket. It does not make sense that in a post-*Booker* world we would recognize those regional differences, those regional pressures, with respect to some issues but not with respect to others.

In Massachusetts we are overwhelmed with street crime, but virtually no white-collar crime. As a result, the prosecution has a lower rate of cooperation departures than anywhere else in the country. Small wonder.

22. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(m)(2)(b), 117 Stat. 650, 674 (2003).

These cases are so small there is no one to cooperate against. If the *Booker* variance rate is high, it is because these small cases, individuals on a street corner with crack, test the Guidelines more than anything else.

So the question of regional disparity, if people are serious about it, would essentially wipe out the fast-track program. But I think maybe we should be attentive to regional pressures. Gun charges look different in New York than they do elsewhere in the country.

Within a broader framework of a national system, I am suggesting variations around the kind of anchoring phenomenon that Judge Lynch talked about. Variations on a theme will not bring us back to the pre-Guidelines world. They will be variations on a theme, as opposed to wild swings from one end of the country to the other.

PROFESSOR CAPRA: Did you want to speak about the fast track, Judge Adelman?

JUDGE ADELMAN: Well, let me just make a related point. The fast track has to do with imposing a lower sentence on somebody who enters the country after being deported and committing a felony. The idea of fast track is some districts allow lower sentences, so judges in other districts have been lowering their sentences out of the disparity theory.

I actually think there is a more important issue in the illegal reentry cases and that this other issue illustrates something that nobody talks about very much now.

There is a sixteen-level enhancement to the Guidelines for certain aggravated felonies, so the sentence goes way, way up. If you do any kind of research into how that sixteen-level enhancement got passed, basically it was the Sentencing Commission.

Somebody made a motion—you know, I used to be in the legislature; I know how these things happen. There was not any long study, there was not any sort of “here is the reason, here are the problems, here are the statistics.” It was just “here is a motion. How about sixteen levels?”

That is about how the one hundred-to-one crack ratio happened, too. It came about after the Len Bias case—the basketball player.²³ So this is how things sometimes get enacted, both in the legislature and in the Sentencing Commission.

I did some opinions regarding the fast track. But in those opinions I also talked about—and nobody has really picked up on this, which is way more interesting to me than the disparity issue—the lack of basis for this sixteen-level enhancement.

I think that is important because if you study the Guidelines, you see that we do not really know much about how the Sentencing Commission chose the numbers. It was all private. It was not reviewed, as Judge Gertner said

23. See generally WashingtonPost.com, *The Len Bias Tragedy*, <http://www.washingtonpost.com/wp-srv/sports/longterm/memories/bias/launch/biasfrnt.htm> (last visited Aug. 14, 2006).

earlier, by any judge; it was not reviewed by Congress. It was not reviewed by anybody.

I think that it is important now, in this new post-*Booker* world, to talk about whether the particular numbers in particular Guidelines are rational, and to criticize and scrutinize them, because the problem is that we are dealing with the Guidelines like they are the Ten Commandments. Even when they are advisory, they still have this sort of aura—everybody measures everything against the Guidelines.

The Guidelines themselves have not really been scrutinized, and now under this new regime they can be. So I would make a pitch for that.

JUDGE LYNCH: Could I just make a point? There are a lot of people who I see in the audience who know what all these words mean, but there are also a lot of law students. It is probably useful to just clarify a couple of things.

First, you should know what sixteen levels means. If you go up two levels, that is typically a twenty-five percent increase in sentence; another two levels, another twenty-five percent above that, and so on.

JUDGE PRESNELL: Plus the base for this crime is eight.

JUDGE LYNCH: Yes, so sixteen levels is a huge jump.

Second, what is the jump for? It is a crime to reenter the country after you have been deported; that is the basic crime. But it is a more serious crime, and there is a separate statutory maximum that also gives you this Guidelines enhancement, if you reenter the country after having been deported for what is called an “aggravated felony.” That sounds pretty reasonable until you realize that an aggravated felony does not have to be aggravated, and it does not have to be a felony. It just has to be on this big long list, and Congress and the Commission have periodically added to the list. The list is somewhere else in the immigration laws, and Congress keeps throwing things in it, and it is incorporated by reference into the Guidelines.

The thing to understand about fast track, when people talk about what happens in different districts, is that it is a Justice Department program; it is a government-sponsored program. The government asks for these departures, the prosecutor asks for these departures, in particular districts. Most of those districts are along the southern rim of the country, but not all of them.

I was surprised when I found out that Nebraska was one. I did not find out today. I found out because one of my students at Columbia did some research into the fast-track program. I learned a lot of things I did not know before. For example, I thought there was one fast-track program, and if the local U.S. Attorney petitioned the Justice Department, you could have it in your district if they thought it was appropriate. But that is not so. In fact, there are lots of different fast-track programs in lots of different districts, and they are all different. In some places you get four levels, in some you get one, in some you get two, and it has a lot to do with what it takes to get enough guilty pleas to clear the dockets and stop using so many government

resources. So it is quite a remarkable little piece of disparity in its own right.

I do want to raise, though, one bigger issue about regional disparity. I am for regional disparity. I think one of the foolishnesses of the Guidelines is the notion that because we are one federal system, we are one sovereignty, the United States of America, everybody in the country should be sentencing in the same way.

I said before, and I mean it, that I think it is a terrible idea that I should give radically different sentences than the judge in the next courtroom. I am not sure it is so odd or wrong that I should give somewhat different sentences than a federal judge in Texas. They have a different culture and they have different social problems than we do. There is also the simple fact that they sit in different states than we do. Another piece of disparity that we do not often talk about is the disparity between the federal sentence and the state sentence for the same kind of criminal behavior. As Judge Presnell said, people get put in the federal system because somebody decided to put them there. Some prosecutor decided that this guy should be prosecuted federally, not necessarily because they were out to get him or because they thought he was a bad guy. Maybe they were investigating his neighborhood or they were investigating his organization, and some poor schlub who is selling drugs for that organization is suddenly a federal offender and is going to get the federal sentence, while somebody who is in the state system gets a different sentence.

Here is an example from right here in the Southern District of New York: You may have heard or read that the Manhattan District Attorney has considered himself from time to time a rival of the United States Attorney. There is not a lot of cooperation there. In the Bronx, however, there is a lot of cooperation. That means that if you are a felon in possession of a firearm and you happen to be on the east side of the Harlem River, you are very likely to be turned over to the feds and you will get a very severe sentence. If you are on the west side of the Harlem River in Manhattan doing the same thing, you will be prosecuted in the state system and get a very different sentence. That is a piece of disparity that neither the judges nor the Sentencing Commission have any control over. But when we are sentencing a drug or gun offender, should it not be relevant what happens to similar offenders in the state where we are sitting? If he were in the state court across the street, is he going to get the same severe sentence as he is in federal court or is he going to be treated much more leniently?

There really are significant differences in the way different kinds of crimes are treated around the country. I do not know why that is necessarily so terrible. Along a border, they have a lot of these immigration cases, and they probably are different from the ones that we get. They may have people who just got back over the border or people who are part of a community that is always moving back and forth across the border. It is a different story than the same crime by people in New York or in Chicago, who are usually caught because they have been arrested for some other

crime. I am not arguing that we ought to be so severe on illegal immigrants necessarily. I am just saying there is a different story here than there is in Brownsville, Texas.

PROFESSOR CAPRA: That issue of state-federal disparity is discussed in one of Judge Adelman's opinions.²⁴

Judge Gertner.

JUDGE GERTNER: I have a stark example of that. I just finished a case that could have been a potential death penalty case. Two gangs were shooting at each other. One was prosecuted as a RICO case in federal court, subject to the death penalty, but the gang at which they were shooting, who were shooting back, was being prosecuted in the state court, for which there was no death penalty.

It was even worse than that. All federal jurisdictions wind up taking juries from largely suburban areas—not in New York so much, but certainly the Eastern District of Massachusetts has seven percent people of color. If the same crime was tried across the street, there would have been twenty to thirty percent people of color on the jury. So there was a prospect of trying a death penalty case to a largely white or all-white jury based on the decision of the prosecutor. I think that this is part of what the discussion should be, because when you talk about disparity you really do have to talk about all the players in disparity, rather than controlling just one player.

As one of my colleagues once said, discretion is hydraulic; if you control one person, it flows to someone else. One of the issues that occurred under the mandatory Guidelines was that judges lost their discretion, and it was then mightily transferred to the prosecutor, under very different terms.

There is also a disparity that comes from different state systems. Massachusetts is not a Guidelines state, so I am often asked to interpret sentences that were administered in a non-Guidelines state and plug them into the Guidelines. So, for example, there is sort of a community alternative here, called "continued without a finding." It is done all throughout the Massachusetts courts. It is a way of getting someone under the supervision of the court without a guilty plea. The Guidelines treat that as a conviction, and treat it very seriously. The state judge that imposed it surely did not.

PROFESSOR CAPRA: Judge Kopf, do you have a comment?

JUDGE KOPF: What you are hearing is the degree to which judges view their ability to develop a coherent methodology of sentencing. Some people, God bless them, think that they have that ability, and others do not.

My question to the panelists would be this: Now that you have raised all these problems, what are you going to do—what is your response to this? In individual cases, you are going to write opinions to explain why it is you are doing something. What does that do for the rest of the country? And

24. *United States v. Wachowiak*, 412 F. Supp. 2d 958 (E.D. Wis. 2006).

why is it that we care? Why is it that we want Judge Lynch to tell us what is evil? Why is it up to him to decide that the crack Guidelines are evil? Why do we want an unelected judge to derive his own categories of evil?

I think that question, prompted by *Booker*, compels us to have this wonderful debate about role. Wherever you come down on this, ultimately the question that it asks district judges to answer is, what is our role? It is a profound and difficult question.