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Do the United States Sentencing Guidelines Deprive Defendants of Due Process?

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I. INTRODUCTION

One of the most controversial legal issues today is whether the United States Sentencing Guidelines[1] (Guidelines), which went into effect on November 1, 1987, are constitutional. As of October 2, 1988, at least 140 federal district courts have invalidated the Guidelines, while more than 100 courts have reached the opposite holding.[2] On June 13, 1988, the United States Supreme Court invoked a rarely used procedure by granting a writ of certiorari before judgment in the court of appeals in the case of *United States v. Mistretta*; on October 5, 1988, the Court heard oral argument in the case.[3]

Our highest court certified two issues for review: (1) whether the composition of the Commission, which consists of seven commissioners appointed by the President and is required to include three Article III judges as voting members, violates the doctrine of separation of powers; and (2)

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1. Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-39, 98 Stat. 1987 (codified in scattered sections of 18 U.S.C.).

2. Spivack, *High Court Entering Crucial Term*, Hartford Courant, October 2, 1988, § Al, at Al9.

3. United States v. Mistretta, 682 F. Supp. 1033 (W.D. Mo. 1988), *cert. granted*, 108 S. Ct. 2818 (1988), *aff'd*, 109 S. Ct. 647, 675 (1989) (upholding the constitutionality of United States Sentencing Commission); *see also* 44 CRIM. L. REP. 1007-08 (Oct. 12, 1988) (oral argument before the Supreme Court).

whether Congress has unlawfully delegated legislative power to the Commission.[4] On January 18, 1989, the Court answered both questions in the negative.[5]

There is a third major constitutional challenge to the Guidelines which the Supreme Court has not yet agreed to review. As of October, 1988, there were ten published decisions by federal district courts which had held that the Guidelines as formulated are substantively invalid because their rigid numerical formulas violate a defendant's due process rights under the fifth amendment to the United States Constitution by divesting courts of their traditional and fundamental function of exercising discretion in imposing individualized sentences according to the particulars of each case.[6] Nine federal district courts have held that the Guidelines do not violate due process.[7] One can only speculate concerning the Supreme Court's reasons for certifying a case involving separation of powers and legislative delegation issues, but not one addressing due process questions; it has been suggested, however, that the Court may have granted certiorari in *Mistretta* simply because it was the first available case, and not because the Court hoped to avoid confronting the due process issue.[8] In any event, the widespread uncertainty about the constitutionality of the Guidelines will not be resolved until our highest court decides the due process challenge.

It is difficult to determine whether due process requires individualized

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4. 43 CRIM. L. REP. 1041 (June 15, 1988).

5. United States v. Mistretta, 109 S. Ct. 647, 675 (1989).

The Court's decision did not reach the issue of whether the Sentencing Guidelines violate the due process clause—the focus of this article.

6. United States v. Alafriz, 690 F. Supp. 1303, 1307-11 (S.D.N.Y. 1988); United States v. Scott, 688 F. Supp. 1483, 1494-95 (D.N.M. 1988); United States v. Brittman, 687 F. Supp. 1329, 1355-57 (E.D. Ark. 1988) (speaking for all judges except one in E.D. Ark.); United States v. Brodies, 686 F. Supp. 941, 951-55 (D.D.C. 1988); United States v. Perez, 685 F. Supp. 990, 1000-03 (W.D. Tex. 1988); United States v. Elliott, 684 F. Supp. 1535, 1541 (D. Colo. 1988); United States v. Ortega Lopez, 684 F. Supp. 1506, 1512-14 (C.D. Cal. 1988) (en banc—fourteen judges held that the Guidelines violate due process; ten judges dissented); United States v. Martinez-Ortega, 684 F. Supp. 634, 636 (D. Idaho 1988); United States v. Bolding, 683 F. Supp. 1003, 1005 (D. Md. 1988) (en banc); United States v. Frank, 682 F. Supp. 815, 817-19 (W.D. Pa. 1988). However, in an opinion reversing one of the most important of these decisions, the Third Circuit has held that the Guidelines do not violate due process. United States v. Franks, 44 Crim. L. Rep. 2137, 2137-39 (3d Cir. Nov. 7, 1988), *rev'g* 682 F. Supp. 815 (W.D. Pa. 1988). The Third Circuit emphasized that individualized sentencing was required only in capital cases. In non-capital cases Congress or judges were entitled to basic sentences on retribution or general deterrence rather than on individualized concerns. *Id.* at 2138.

7. United States v. Belgard, 694 F. Supp. 1488, 1492-94 (D. Or. 1988); United States v. Macias-Pedroza, 694 F. Supp. 1406, 1417-18 (D. Ariz. 1988) (en banc); United States v. Franz, 693 F. Supp. 687 (N.D. Ill. 1988); United States v. Weidner, 692 F. Supp. 968, 971-74 (N.D. Ind. 1988); United States v. Rodriquez, 691 F. Supp. 1252, 1253-54 (W.D. Mo. 1988); United States v. Seluk, 691 F. Supp. 525, 539 (D. Mass. 1988); United States v. Landers, 690 F. Supp. 615, 623-24 (W.D. Tenn. 1988); United States v. Alves, 688 F. Supp. 70, 79-80 (D. Mass. 1988); United States v. Kerr, 686 F. Supp. 1174, 1181-84 (W.D. Pa. 1988).

8. Prof. Daniel J. Freed, Yale Law School (personal communication).

sentencing because sentencing goals and practices have varied greatly during the course of this nation's history.[9] A court applying Judge Bork's original intent doctrine of constitutional interpretation would probably reach a result different from that reached by a court employing a more liberal view of due process protections.[10] It is likely that liberals and conservatives on the current Supreme Court would disagree on whether the Guidelines violate due process.

This article argues that the Guidelines can be saved and can satisfy due process requirements if the Supreme Court interprets the Sentencing Reform Act to permit departures from the prescribed sentence ranges in cases in which significant mitigating circumstances are present. Such an approach would have the added benefit of providing judicial feedback on the Guidelines that will be useful in constructing better sentence guidelines in the future.

II. The United States Sentencing Guidelines

Congress, through the Sentencing Reform Act of 1984, established the United States Sentencing Commission, which was given the task of constructing sentence guidelines to restrict the discretionary authority placed in judges by existing federal criminal statutes. The Act was the product of approximately fifteen years of scholarly debate during which most commentators criticized indeterminate sentence laws and the practice of allowing judges broad sentencing discretion.[11] A number of commentators charged that indeterminate sentence statutes and broad judicial sentencing discretion produced enormous sentence disparity—the sentencing of like cases differently.[12] Other scholars objected on the philosophical ground that sentences ought to be based on the seriousness of the offense committed—that is, on just desserts—rather than on rehabilitative grounds.[13] Politicians clearly were eager to revise criminal sentencing statutes to satisfy a

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9. *See infra* notes 70-86 and accompanying text.

10. *Id.*

11. *See infra* notes 12-14 and accompanying text.

12. *See, e.g.*, M. Frankel, Criminal Sentences: Law Without Order (1972); P. O'Donnel, M. Churgin & D. Curtis, Toward a Just and Effective Sentencing System: Agenda for Legislative Reform (1977); Panel on Sentencing Research, National Research Council, 1 Research on Sentencing: The Search for Reform (1983). It should be pointed out that these studies present evidence of *possible* sentence disparities; at least some of the disparity can be justified on the ground that judges are making predictions about each individual's rehabilitation, and therefore that defendants who have committed the same crime may deserve different sentences. Lowe, *Modern Sentencing Reform: A Preliminary Analysis of the Proposed Federal sentencing Guidelines*, 25 Am. Crim. L. Rev. 1, 9-12 (1987) discusses the disparity issue and surveys the literature.

13. *See, e.g.*, A. von Hirsch, Doing Justice: The Choice of Punishment (1976); Ozanne, *Bringing the Rule of Law to Criminal Sentencing: Judicial Review, Sentencing Guidelines and a Policy of Just Desserts*, 13 Loy. U. Chi. L.J. 721 (1982).

public dissatisfied with a perceived "crime problem"; mandatory sentences were associated with "law and order" while rehabilitative indeterminate sentences were seen as too soft on criminals, although discretionary sentence laws in practice sometimes resulted in more time served in prison.[14]

The Minnesota sentence guidelines became a model for reform in other jurisdictions.[15] Minnesota established a permanent sentencing commission, which produced a sentencing guidelines grid which went into effect in 1980.[16] It is important to examine the grid in detail because it established numerical sentence guidelines as the most popular means for sentencing reform, despite the availability of alternative methods such as more extensive appellate review of sentences or less prescriptive guidelines based on examples furnished by experienced sentencing judges.[17]

Two scales determine the length of sentence in Minnesota.[18] The first ranks the seriousness of the conviction offense on a scale of one to ten.[19] The second rates the criminal history of the offender on a scale of from zero to six.[20] Each serves as one of the two axes of the sentencing grid. After calculating the two scores, a Minnesota judge draws a line across from the vertical axis and down from the horizontal axis to the box in which the two lines intersect. Each box in the grid contains either a fixed sentence or a very narrow sentence range established by the state sentencing commission.[21] Under certain limited circumstances a judge may depart from the sentence prescribed by the Minnesota sentence guidelines system, but such deviations may not be based on the offender's socioeconomic background.[22]

The Minnesota model clearly had a major influence on Congress in the writing of the Act and the creation of the Commission in 1984. The Minnesota guidelines prohibit judges from considering an offender's socioeconomic background both because of the fear that such factors discriminate against

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14. Indeterminate sentencing has been criticized on the ground that it is inhumane because a prisoner can never be sure when a parole board will release him. *See, e.g.*, P. O'DONNEL, *supra* note 12, at 82-83. The inhumane aspects of indeterminate sentences were criticized in AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE (1971) [hereinafter AMERICAN FRIENDS]. For a discussion of how the "law and order" political issues of the late 1960s and 1970s affected sentencing reform see Lowe, *supra* note 12, at 18 n.98; Zimring, *Prisoners, Professors and Politicians—Sentencing Reform in the Decade of the Seventies* in REFORM AND PUNISHMENT (M. Tonry & F. Zimring eds. 1983).

15. For a good discussion of the Minnesota guidelines see Note, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258, 1260-63 (1986).

16. *Id.* at 1260.

17. Appellate review of sentencing has generally been unsuccessful in the United States. *See, e.g.*, Zalman, *Appellate Review of Sentencing: The Antinomy of Law Reform*, 4 DET. C.L. REV. 1513 (1983).

18. Note, *supra* note 15, at 1260-62.

19. *Id.*

20. *Id.*

21. *Id.*

22. MINN. STAT. ANN. § 244.09, comment II.D.03(1) (West Supp. 1988).

racial minorities and because these issues are relevant only if the sentencing judge has some discretion to modify a sentence in light of the defendant's rehabilitative potential.[23] The Act mandated that the Commission establish sentencing guidelines which are "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders" and which "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."[24] The Act provided that sentence ranges within the Guidelines could be no greater than twenty-five percent, which was much less than in existing federal statutes but somewhat greater than the ranges in most categories of the Minnesota guidelines.[25] The Act also followed the Minnesota example by providing that judges would be permitted to depart from sentence guideline ranges only under very limited circumstances, which will be examined in depth below.[26]

The Commission was clearly influenced by the highly numerical Minnesota guidelines when it wrote the first draft of the Guidelines. Many judges and scholars were critical of the extremely rigid numerical approach taken in the first draft of the Guidelines, although one commissioner, Professor Paul Robinson, dissented because the first draft did not go far enough in creating a new mathematical model for assessing offense behavior.[27] A second draft of the Guidelines took a far more lenient approach to departures and included sentence ranges in excess of the twenty-five percent mandated by statute.[28] After extensive public debate about the draft Guidelines, the Commission issued its final version of the Guidelines, which went into effect on November 1, 1987.[29] This article will discuss the Commission's policies concerning departures from the Guidelines' sentence ranges and judicial consideration of offender characteristics in detail in Section V. Before examining the due process implications a brief description of the Guidelines will be provided.

The Guidelines follow a numerical grid scheme. There are forty-three offense severity ratings, and an offender's criminal history is rated on a scale

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23. *See* Mank, *Corrections Law: The Role of Employment Factors in Sentencing*, 24 CRIM. L. BULL. 249, 249-53 (1988).

24. 28 U.S.C.A. §§ 994 (d) & (e) (West Supp. 1988).

25. *Compare* UNITED STATES SENTENCING COMMISSION, UNITED STATES SENTENCING GUIDELINES AND POLICY STATEMENTS, 52 Fed. Reg. 18,046, § 5A (1987) (sentencing table with twenty-five percent ranges) [hereinafter cited as GUIDELINES] *with* the Minnesota Sentencing Guidelines Grid, reproduced in Note, *supra* note 15, at 1261.

26. For a discussion of departures under the Guidelines see *infra* notes 87-103 and accompanying text. For a discussion of departures in Minnesota see Note, *supra* note 15, at 1263.

27. *See* Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987) (criticizing the Guidelines).

28. *Id.* at 3-6.

29. *Id.*

from one to six.[30] There are 258 sentence boxes contained in the grid; each box contains a sentence range which usually measures twenty-five percent from maximum to minimum.[31] Each major crime category is assigned a base offense level on the forty-three-point scale. For example, the base offense level for robbery is eighteen points.[32] Points are added to the base offense level depending upon such variables as the amount of money stolen, the type and quantity of illegal drug sold, or the degree of bodily injury to the victim.[33] For instance, two points are added to the base of eighteen for robbery if between $10,001 and $50,000 is stolen, and an additional four points would be added if the offender during the course of the robbery inflicted "serious bodily injury" upon one victim.[34] Let us suppose that the total offense level is twenty-four points and that the defendant is a first offender. The sentencing table provides a range between fifty-one and sixty-three months.[35]

Federal judges retain some discretion under the Guidelines, but far less than before.[36] There is a twenty-five percent range between the maximum and minimum sentence in the Guidelines' sentencing table.[37] Judges have much less freedom, however, to grant probation in lieu of a prison sentence.[38] Under the Guidelines probation is limited to offenders whose minimum sentence is not greater than six months.[39] Thus, many first offenders who might have received probation from a sentencing judge who believed that the crime was an aberration which would not be repeated would receive a substantial prison term under the Guidelines.[40] It is estimated that the federal prison population will substantially increase in the wake of the Guidelines, although this increase will be due not only to the new restrictions on probation but also to the fact that parole has been abolished for federal prisoners sentenced under the Guidelines.[41]

Federal judges do retain some limited discretion in making certain adjustments permitted under the Guidelines. Judges may adjust the offense level up or down by a few points if the following circumstances exist: the victim was especially vulnerable; the defendant played a role in organizing a

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30. GUIDELINES, *supra* note 25, at § 5A (sentencing table).
31. *Id.*
32. *Id.* at § 2B3.1(a).
33. *Id. passim.*
34. *Id.* at §§ 2B3.1(b)(1)(C) & 2B3.1(b)(3)(B).
35. *Id.* at § 5A.
36. Calve, *Commissioner Defends Controversial Guidelines*, 14 Conn. L. Tribune, No. 20, May 16, 1988, at 11 (Judge Stephen Breyer, one of the seven commissioners on the Commission, stated that the Guidelines reduced but did not eliminate judicial discretion).
37. GUIDELINES, *supra* note 25, at § 5A.
38. *Id.* at § 5B1.1(a)(2).
39. *Id.*
40. Murphy, *Penalties for Federal Crimes Made Stricter Under New Law*, Hartford Courant, Nov. 1, 1987, at A4.
41. *Id.*

criminal activity that involved five or more participants; the defendant was a minimal participant; the defendant willfully obstructed the investigation or prosecution of the offense; the defendant was convicted of multiple counts; or the defendant accepted responsibility for the crime—for example, by pleading guilty or by acting as a government witness.[42] These adjustments require the judge to make judgment calls—for instance, a judge can add four points if the defendant was an "organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive" but may add only three points if the defendant was merely a "manager or supervisor."[43] The judge retains some discretion in determining whether a defendant's criminal conduct fits into box A or box B of the Guidelines. It should be noted that government prosecutors still retain enormous power to determine the sentence through plea bargaining.[44]

While judges have some discretion under the Guidelines, there are certain factors which may not be considered in adjusting the offense level. Professor Alschuler has argued that the Guidelines fail to take into account " 'situational' characteristics—for example, whether the offense was a 'stranger' or a 'nonstranger' crime."[45] He and other commentators have criticized the failure of the Guidelines to consider important offender characteristics—for example, whether the crime was motivated by personal financial difficulties.[46]

III. Due Process and the Guidelines

Ten district courts have held that the Guidelines violate due process, while nine have reached the opposite conclusion.[47] Those courts which have held that the Guidelines violate due process have emphasized that defendants are entitled to have a meaningful opportunity to present mitigating evidence to a sentencing judge who has enough discretion to make an individualized sentence.[48] On the other hand, courts holding that the Guidelines satisfy due process requirements have emphasized that mandatory sentences are constitutional and that individualized sentencing is required only in capital cases.[49] The Supreme Court has never embraced the question whether

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42. Guidelines, *supra* note 25, at §§ 3A1.1 through 3E1.1.

43. *Id.* at §§ 3B1.1(a) & (b).

44. *See* Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 470-76 (1988).

45. *Id.* at 462-63.

46. *See id.* at 462-65. For a criticism of the tendency of sentencing guidelines to ignore the significance of the work records and vocational skills of offenders see Mank, *supra* note 23, at 249-53.

47. *See supra* notes 6 & 7.

48. *See infra* notes 50-60 and accompanying text.

49. *See infra* notes 61-66 and accompanying text.

individualized sentencing is mandatory in noncapital cases. In Section IV, this article argues that the due process issue can be understood only in the context of the historical development of American sentencing laws.

A. *The Guidelines Violate Due Process*

Courts which have held that the Guidelines violate due process have acknowledged that mandatory sentencing statutes may pass constitutional muster in some circumstances, but have concluded that Congress may not give judges some discretion and then effectively take it away. One court stated: "It is true that Congress may have the power to fix definite sentences for crime. However, once Congress has decided to set only a permissible range of sentences for each crime, it creates a sphere of discretion. That discretion is properly judicial in nature."[50] Another district court concluded:

> We do not hold that the Constitution guarantees to a defendant (at least in non-capital cases) "individualized sentencing." However, when a definite sentence is not statutorily mandated, a defendant being deprived of his liberty pursuant to a statute which sets a sentencing range is constitutionally entitled to an articulated exercise of discretion by the judge before whom he appears rather than to the mechanical application of formulae adopted by non-constitutional commissioners invisible to him and to the general public.[51]

Some courts have held that the Guidelines violate due process because defendants are constitutionally entitled to present mitigating evidence concerning their social background and to have a judge weigh their individual potential for rehabilitation and culpability. One district court concluded that the right to individualized sentencing ought to be extended from capital cases to noncapital cases. "The Court . . . finds guidance in Supreme Court decisions which mandate that a sentencing judge or jury cannot be restricted from considering all relevant mitigating circumstances when the death penalty is a possibility . . . [T]he Court's ability to consider such factors should not be determined by whether the defendant faces . . . a lesser term of incarceration."[52]

At least three district courts have concluded that the Ninth Circuit's decision in *United States v. Barker*[53] prohibits the use of mechanical sentencing formulas and that the Guidelines are of that nature.[54]

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50. United States v. Brittman, 687 F. Supp. 1329, 1355 (E.D. Ark. 1988).
51. United States v. Bolding, 683 F. Supp. 1003, 1005 (D. Md. 1988) (en banc).
52. United States v. Perez, 685 F. Supp. 990, 1002 (W.D. Tex. 1988).
53. United States v. Barker, 771 F.2d 1362 (9th Cir. 1985).
54. United States v. Alafriz, 690 F. Supp. 1303, 1309 (S.D.N.Y. 1988) (relying on *Barker* for the proposition that "individualized sentencing is a defendant's right"); United States v. Ortega Lopez, 684 F. Supp. 1506, 1513 (C.D. Cal. 1988) (same); United States v. Frank, 682 F. Supp. 815, 818 (W.D. Pa. 1988).

> Quite simply, the mechanical formulas and resulting narrow ranges of sentences prescribed by the Guidelines violate defendants' right to due process of law under the Fifth Amendment by divesting the Court of its traditional and fundamental function of exercising its discretion in imposing individualized sentences according to the particular facts of each case. *See United States v. Barker*, 771 F.2d 1362 (9th Cir. 1985) (application of mechanical sentencing procedures violates due process) . . . . The guidelines do require a court to consider certain enumerated factors specific to individual offenders which are unrelated to their offense(s) of conviction. However, the rigid, computerized nature of the guidelines—which assign positive or negative numerical values to various sentencing factors and 'adjustments'—precludes the trial court from *weighing* the importance of aggravating and mitigating factors relating to both the offender and the offenses of conviction. (*United States v. Frank*, 682 F. Supp. 815, 819 (W.D. Pa. 1988).) This weighing responsibility of the trial judge rests at the core of due process. *Id.* at 819. Further, the Guidelines offend the guarantees of due process by depriving the defendant of the opportunity to affect the court's weighing of all relevant factors at the time of sentencing. *Id.*[55]

In Subsections B and C, this article will examine whether *Barker* should be interpreted to prohibit the use of numerical sentencing guidelines.

One district court has argued that the Guidelines violate a defendant's due process right to be sentenced on accurate information because courts must sentence based on prescribed formulas rather than upon the individual facts of a particular case.[56] Another district court has made a similar argument in contending that the "formulaic nature of the Guidelines create a great risk of error by giving inadequate consideration to the particular facts of a defendant's case."[57] Other district courts have concluded that the Guidelines violate basic due process principles by lumping together different defendants within the same numerical box.

> The Guidelines exemplify the arrogance of quantification. If a sentencing judge, under the prior system, lumped all defendants into categories based on broad generalizations, he would rightly be accused of abusing his discretion. But that is precisely how the Guidelines operate. The heart of prejudice and bigotry is generalization. The independence of the federal judiciary and its substantial discretion in sentencing matters over the past century has provided a protection against these evils. The Guidelines represent a substantial retreat from the goal of providing each individual criminal defendant a fair and unbiased sentence following conviction.[58]

Yet another district court has held that the prescriptive point system em-

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55. United States v. Ortega Lopez, 684 F. Supp. at 1513.
56. United States v. Scott, 688 F. Supp. 1483, 1495 (D.N.M. 1988).
57. United States v. Ortega Lopez, 684 F. Supp. at 1513.
58. United States v. Martinez-Ortega, 684 F. Supp. 634, 636 (D. Idaho 1988).

ployed by the Guidelines violates due process because such a scheme operates in the same manner as "conclusive presumptions which consistently have been held to constitute a denial of due process."[59] Thus, while these district courts have employed somewhat different rationales, they have all reached the conclusion that rigid numerical guidelines are insensitive to individual differences among defendants, and therefore violate due process.

It is clear that those judges who have held that the Guidelines violate due process believe—either explicitly or implicitly—that they can do a better job than numerical grids in assessing offender culpability and in judging the rehabilitative potential of each defendant.[60]

B. *The Guidelines Do Not Violate Due Process*

The nine district courts which have held that the Guidelines do not violate due process have explicitly rejected most of the arguments made in Subsection A. First, those courts which have upheld the validity of the Guidelines in the face of a due process challenge have pointed out that mandatory or fixed sentences for a crime are clearly constitutional.[61] Second, they have relied on the fact that the Supreme Court has required individualized sentencing only in the context of capital cases.[62] Third, two district courts have contended that the Guidelines are compatible with the Ninth Circuit's decision in *United States v. Barker*. While the basis of *United States v. Barker* is that a judge cannot refuse to exercise discretion given by statute, the case does not state that there is a constitutional right to individualized sentencing.[63]

Courts rejecting the due process challenge have attacked the assumptions that the Guidelines prevent defendants from presenting significant mitigating evidence, and therefore increase the risk that an individual defendant will receive an inappropriate sentence based on rigid point systems prescribed by the Commission.

> We fail to see how the guidelines' limitations on judicial discretion will increase the risk of error. The concept of "error" assumes that there is a correct sentence for each crime and offender. But sentencing is not a factual determination so much as a value judgment in which there is no correct result . . . . The guidelines do not alter the defendant's right to challenge the factual premises underlying his sentencing and the court's

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59. United States v. Elliott, 684 F. Supp. 1535, 1541 (D. Colo. 1988).

60. *See generally supra* note 6 and *supra* notes 50-59 and accompanying text.

61. United States v. Franz, 693 F. Supp. 687, 690 (N.D. Ill. 1988); United States v. Weidner, 692 F. Supp. 968, 971-72 (N.D. Ind. 1988); United States v. Landers, 690 F. Supp. 615, 624 (W.D. Tenn. 1988); United States v. Kerr, 686 F. Supp. 1174, 1183 (W.D. Pa. 1988).

62. United States v. Franz, 693 F. Supp. at 690; United States v. Weidner, 692 F. Supp. at 971-72; United States v. Kerr, 686 F. Supp. at 1184.

63. United States v. Weidner, 692 F. Supp. at 971-72; United States v. Kerr, 686 F. Supp. at 1183.

obligation to ensure that the sentence is based on reliable information.[64]

Another district court has concluded that Congress has the power to assign predetermined values to certain offense or offender factors. The court stated: "Due process no more affords a defendant the right to contest Congress' evaluation of certain crime related factors than it does to contest Congress' evaluation of the need for a specific sentence for certain crimes."[65] Finally, three district courts emphasized that sentencing judges still retain considerable sentencing discretion under the Guidelines.[66]

C. *Existing Precedent Is Unclear*

A crucial question, of course, is how the Supreme Court is likely to rule when it eventually reviews the due process challenge to the Guidelines. It is important to observe that more district court judges, at this time, have held that the Guidelines violate due process than have taken the opposite view, but that fact alone is not determinative. It is fair to say that those courts which have held that the Guidelines violate due process have extended and broadly construed previous decisions defining due process requirements for sentencing. The Supreme Court has required individualized sentencing only in capital cases. Three district court decisions striking down the Guidelines have relied in part upon *Barker* for the proposition that mechanical sentencing procedures violate due process.[67] In *Barker*, however, the district court had imposed the maximum five-year sentence permitted by statute on all five defendants convicted of smuggling marijuana despite significant differences in the culpability of the defendants, and in the face of a government recommendation that two defendants receive a sentence of one year and that the other three defendants serve eighteen months.[68] While the Guidelines limit judicial discretion to some extent, adjustments are made in

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64. United States v. Kerr, 686 F. Supp. at 1184.

65. United States v. Franz, 693 F. Supp. at 691; United States v. Landers, 690 F. Supp. at 624.

66. United States v. Weidner, 692 F. Supp. at 972-73; United States v. Alves, 688 F. Supp. 70, 79 (D. Mass. 1988); United States v. Kerr, 686 F. Supp. at 1184.

A recent Second Circuit decision, United States v. Correa-Vargas, No. 88-1167 (2d Cir. Oct. 18, 1988), 44 CRIM. L. REP. 2077 (Nov. 2, 1988), emphasized that trial judges have considerable discretion to depart from the Guidelines. In *Correa-Vargas*, the defendant had been caught with twenty kilos of relatively pure cocaine. Prosecutors allowed him to plead guilty to one count of using a telephone in the commission of a drug offense—a crime for which "amount" is not an offense characteristic, according to the Guidelines. The sentencing judge, however, used the amount of the drug as justification for departing from the Guidelines and imposing a statutory maximum term of forty-eight months. The Second Circuit affirmed, emphasizing that judges may depart from the Guidelines in appropriate circumstances. The decision supports the reasoning of those district courts which have upheld the Guidelines on the ground that judges retain discretion to depart from Guideline sentence ranges.

67. *See supra* note 54 and accompanying text.

68. United States v. Barker, 771 F.2d 1362, 1363-69 (9th Cir. 1985).

the offense level determinations based, for example, on an offender's role in a drug distribution network, on the amount and type of drugs sold, and on the offender's willingness to cooperate with the government.[69] The Guidelines do not impose sentences in the same arbitrary manner as did the district judge in *Barker*.

Neither the Supreme Court nor the federal circuit courts of appeal have faced the question whether individualized sentencing is required in noncapital cases. This issue can be resolved only by studying the history of American sentencing to understand whether individualized sentencing is a fundamental guarantee in our legal tradition.

IV. Due Process and the History of American Sentencing

There are three major periods in the history of American sentencing. First, during the colonial period and to some extent until the middle nineteenth century, judges had little sentencing discretion.[70] From the late nineteenth century until the late 1960s, there was a heavy emphasis on rehabilitating offenders and judges had great discretion to tailor individualized sentences.[71] Finally, in the 1970s and 1980s, there has been a strong emphasis on limiting judicial discretion and on a just desserts sentencing philosophy, and reduced emphasis on rehabilitating offenders.[72] An advocate of Judge Bork's original intent approach to constitutional interpretation could find ample support for the view that fixed sentences meet due process standards as they existed in 1787. On the other hand, a jurist who believes that due process standards evolve with the development of civilization could point to many judicial opinions in which individualized, rehabilitative sentencing is seen as a tremendous advance over the fixed sentences of the colonial era.[73] The problem, of course, is that judges of different schools of constitutional interpretation and political philosophy cannot agree upon the meaning of due process.

During the colonial era fixed sentences were the norm and rehabilitation was not a consideration in sentencing. In *United States v. Grayson*,[74] Chief Justice Burger gave the following description of colonial sentencing practices: "In the early days of the Republic, when imprisonment had only

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69. Guidelines, *supra* note 25, at §§ 2D & 3E1.1.

70. *See infra* notes 74-78 and accompanying text.

71. *See infra* notes 79-85 and accompanying text.

72. *See supra* notes 11-14 and accompanying text; *infra* note 86 and accompanying text.

73. *See infra* notes 79-85 and accompanying text. Judge Sweet, in United States v. Alafriz, 690 F. Supp. 1303, 1307-11 (S.D.N.Y. 1988), heavily relied on the historical evolution of sentencing toward individualized sentencing as the basis for his holding that the Guidelines violated due process. However, in United States v. Franz, 693 F. Supp. 687, 690 (N.D. Ill. 1988), the court cited United States v. Grayson, 438 U.S. 41 (1978), for the principle that narrow sentence ranges do not offend due process because such sentence ranges have been used "for centuries."

74. United States v. Grayson, 438 U.S. 41 (1978).

recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square, the period of incarceration was generally prescribed with specificity by the legislature. Each crime had its defined punishment."[75] Colonial Americans did not believe that anyone, let alone criminals, could be rehabilitated given their belief in original sin and the basic depravity of all human beings.[76]

During the first half of the nineteenth century, fixed sentencing statutes were gradually modified to allow judges some discretion, but sentence ranges were very narrow.[77] Rehabilitation was not yet an important sentencing goal. According to Chief Justice Burger: "Nevertheless, the focus remained on the crime: Each particular offense was to be punished in proportion to the social harm caused by it and according to the offender's culpability . . . . The purpose of incarceration remained, primarily, retribution and punishment."[78]

About 1870 there began a significant change in the goals of sentencing, at least in part due to the work of the National Prison Congress.[79] In 1870 New York enacted the first important penal statute to emphasize individualized sentencing.[80] In *Grayson*, Chief Justice Burger described this fundamental shift in sentencing philosophy:

> Approximately a century ago, a reform movement asserting that the purpose of incarceration, and therefore the guiding consideration in sentencing, should be rehabilitation of the offender, dramatically altered the approach to sentencing. A fundamental proposal of this movement was a flexible sentencing system permitting judges and correctional personnel, particularly the latter, to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism.[81]

In *William v. New York*,[82] the Supreme Court strongly endorsed individualized sentencing in holding that a sentencing judge may exercise wide discretion as to the type of information about the defendant's social background which is considered in determining the sentence.

> Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a re-

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75. *Id.* at 45.

76. A. CAMPBELL, LAW OF SENTENCING § 2, at 9 (1978); REPORT OF TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 83 (1976) (background paper by Alan Dershowitz) [hereinafter TASK FORCE].

77. TASK FORCE, *supra* note 76, at 87.

78. United States v. Grayson, 438 U.S. at 46.

79. TASK FORCE, *supra* note 76, at 93.

80. A. CAMPBELL, *supra* note 76, § 2, at 12; TASK FORCE, *supra* note 76, at 95.

81. United States v. Grayson, 438 U.S. at 46.

82. Williams v. New York, 337 U.S. 241, 247-48 (1949).

> quirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.[83]

Justice Black in his majority opinion treated the colonial approach to sentencing as a dark age from which a civilized America had finally emerged:

> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime . . . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial . . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.[84]

Williams did not hold that defendants have a due process right to individualized sentencing, but it suggested that any other approach was less than civilized. The rhetoric of *Williams* was echoed in many subsequent opinions, so that individualized sentencing became the ideal. Chief Justice Burger, clearly a judicial conservative, concluded in *Grayson* that "it is proper—indeed even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality . . . . "[85]

There is certainly support in *Williams* and its progeny for the view that modern conceptions of due process demand that a defendant be sentenced based on the court's evaluation of his rehabilitative potential and the likelihood of recidivism. Nonetheless, even if one does not accept Judge Bork's original intent theory of constitutional interpretation, there are certain problems with the argument that individualized sentencing is a necessary requirement of modern due process. Since the late 1960s a number of scholars have criticized the individualized sentencing model advocated in *Williams* for the following reasons: (1) it is much more difficult to reform offenders than was assumed by advocates of indeterminate rehabilitative sentencing; (2) it may be more fair to base the length of criminal sentences on a just desserts or retributive basis than to keep an offender in prison until a parole board decides he is "reformed"; (3) judicial discretion may lead to serious sentencing disparities.[86] It is less clear today than it was in

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83. *Id.* at 247.

84. *Id.* at 247-48.

85. United States v. Grayson, 438 U.S. at 53.

86. *See supra* notes 11-14 and accompanying text; *see also* TASK FORCE, *supra* note 76, at 98, and J. Q. WILSON, THINKING ABOUT CRIME (1975) (in late 1960s scholars began questioning rehabilitative model). A number of scholars in the past fifteen years have argued that rehabilitation does not work for most offenders. *See, e.g.*, F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND PURPOSE (1981); Lowe, *supra* note 12, at 18-19 nn.95-99 (citing Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation,*

1949 when the Supreme Court decided in *Williams* that individualized sentencing is good policy. On the other hand, an argument can still be made that offenders ought to be treated as individuals rather than as numbers in a computerized Guidelines system.

It is likely that so called "conservative" and "liberal" justices on the Supreme Court would disagree over whether the Guidelines violate due process. There may be a way, however, to avoid a divisive split on this critical issue.

V. DEPARTURES

This article argues that the Guidelines can be saved from due process challenges if the Supreme Court interprets the Act to allow departures from the guideline sentence ranges in a significant number of cases. Such an interpretation could allow the Court to reach a consensus on this fundamental issue and might achieve better policy results than a rigid adherence to the sentencing table in the Guidelines.

Those courts which have held that the Guidelines violate due process have explicitly or implicitly assumed that the system allows very little judicial discretion.[87] On the other hand, three of the district courts which have rejected due process challenges to the Guidelines have concluded that the Commission has left substantial discretion in the hands of the federal judiciary.[88]

A critical issue in determining the amount of judicial discretion allowed under the Guidelines is the extent to which judges may depart from the guideline ranges. The 1984 Sentencing Reform Act mandated that judges could depart from the ranges established in the Guidelines only in very limited circumstances.[89] The Commission, however, adopted a more liberal policy toward departures, and Congress has recently amended the Act in this area.[90] Thus, there is a sound basis for concluding that the Guidelines permit enough judicial discretion to meet due process requirements.

The 1984 Act specified that a judge could depart from the guideline range only when a case involved a factor "that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ."[91] Obviously, the word "adequately" was open to interpretation. Professor Paul Robinson, one of the seven original commissioners, has argued that the legislative history and language of the 1984 version of the Act demonstrate that Congress intended to severely restrict departures.[92] He

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7 HOFSTRA L. REV. 29 (1978)).

87. *See supra* note 6; *supra* notes 50-59 and accompanying text.
88. *See supra* note 66 and accompanying text.
89. 18 U.S.C. § 3553(b) (1985).
90. *See infra* notes 95-103 and accompanying text.
91. 18 U.S.C. § 3553(b) (1985).
92. Robinson, *supra* note 27, at 2-5.

points out that the Commission was mandated by statute to consider a very wide range of offense and offender characteristics.[93] Professor Alschuler, who tends to favor a liberal policy toward departures, has conceded that the Act as originally written in 1984 was intended to "confine judicial discretion narrowly."[94]

At first the Commission intended to adopt a restrictive policy toward allowing judicial departures from the Guidelines, but the final version of the system invited judges to depart from the official sentence ranges.[95] The Commission explained that it had adopted this policy because of "the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision."[96] It is also likely that the Commission adopted a more liberal departure policy in the wake of complaints from judges and academics that the first draft of the Guidelines was too restrictive.[97]

Congress apparently agreed with the Commission's decision to adopt a more liberal policy in regard to departures, because the statutory standard for departures was amended soon after the final version of the Guidelines went into effect. The Act now authorizes departures when "there exists an aggravating or mitigating circumstance of a kind, *or to a degree*, that was not adequately taken into account by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[98] This amendment was approved by the House of Representatives on November 16, the Senate on November 20, and the President on December 7, 1987.[99]

This amendment could be read either broadly or narrowly on its face, but if a narrow interpretation would result in the Act and Guidelines being held in violation of due process, then established principles of statutory construction demand that the amendment be construed so that the Act meets constitutional requirements.[100] One district court has explicitly held that the

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93. *Id.* at 2-3 n.6.

94. Alschuler, *supra* note 44, at 460.

95. Robinson, *supra* note 27, at 3-4; GUIDELINES, *supra* note 25, at 18,050.

96. GUIDELINES, *supra* note 25, at 18,050.

97. *See, e.g.*, Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1292-94 (1986) (federal judge criticizes first draft version of the Guidelines for being too restrictive). The Ninth Circuit has held that the enumerated grounds for departures from the Guidelines are not exhaustive and that departures may be made on grounds not mentioned in the Guidelines. United States v. Nino-Huizar, 859 F.2d 85, 87 (9th Cir. 1988). The court also held that unguided departures from the Guidelines should be applied in the atypical or unusual case, where the conduct differs significantly from the norm. *Id.*

98. Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1279 (1987) (emphasis added). This amendment is discussed in Alschuler, *supra* note 44, at 460 n.4.

99. Alschuler, *supra* note 44, at 460 n.4.

100. Long Island Vietnam Moratorium Comm. v. Cahn, 437 F.2d 344, 348 (2d Cir. 1970) ("Although the courts should try, whenever possible, to construe statutes to avoid a constitutional infirmity, they may not, in doing so, rewrite the statute or do violence to its plain lan-

amendment was insufficient to save the Guidelines, and the other courts which have held that the Guidelines violate due process have apparently taken the same view in this regard, because all of these cases have been decided since the passage of the amendment.[101] Professor Alschuler has noted that the amendment could be interpreted either narrowly or broadly.[102] Courts as a matter of policy seek to interpret statutes to avoid constitutional conflict.[103] Where a plausible interpretation of a statute will work to avoid a constitutional problem, then that understanding of the statutory purpose should be chosen over another interpretation which would put the act in conflict with the Constitution. Thus, this author believes that the amendment ought to be construed as liberally as is necessary to save the Act and Guidelines. The Supreme Court is more likely to achieve a consensus based on this principle of statutory construction than on whether individualized sentencing is required in noncapital cases. Moreover, a liberal departure policy will provide more judicial feedback concerning any important factors which the Guidelines fail to take into account, because judges will be required to explain their rationale for departing from the guideline sentence ranges.

VI. Conclusion

Sometimes it is better if courts avoid tough legal issues. The Guidelines are very important because they apply to the vast majority of federal criminal defendants and because the system is likely to serve as a model for many states. This is an important area in which the rule of law would be enhanced if the Supreme Court could reach a consensus which would be accepted by most of the public and the criminal bar. It is unlikely that "conservatives" and "liberals" on the Court could agree on what protections due process provides in the area of criminal sentencing. The goals of sentencing have changed dramatically over the years. Is the norm in sentencing the fixed punishments of the colonial era, the individualized sentencing advocated in

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guage"), *aff'd*, 418 U.S. 906 (1974); Anderson v. Edwards, 505 F. Supp. 1043, 1048 (S.D. Ala. 1981) ("where a statute . . . is susceptible to two different readings, one reading which would make it constitutional and a second reading which would make it unconstitutional, the rule of construction is that a court must read the statute to be constitutional. Bickel v. Burkhart, 632 F.2d 1251, 1255 (5th Cir. 1980) . . . . "); University of Conn. Chapter AAUP v. Governor, 200 Conn. 386, 400, 512 A.2d 152, 159 (1986) ("where a statute reasonably admits of two constructions, one valid and the other invalid on the ground of unconstitutionality, courts should adopt the construction which will uphold the statute even though that construction may not be the most obvious one.") (quoting Adams v. Rubinow, 157 Conn. 150, 153, 251 A.2d 49, 55 (1968)).

101. United States v. Perez, 685 F. Supp. 990, 1001 (W.D. Tex. 1988) ("The mitigating circumstances upon which a Court may base a departure are so limited by the amended 18 U.S.C. § 3553(b) that the Court is restricted in tailoring the sentence to a defendant even when departing from the Guidelines.").

102. Alschuler, *supra* note 44, at 465.

103. *See supra* note 100 and accompanying text.

Williams, or the just desserts oriented approach of recent years? The 1987 amendment to the Act and the liberal policy of the Commission toward departures provide a sufficient basis for the Supreme Court to conclude that the Guidelines do allow sufficient judicial discretion to meet due process standards.