Panel II: The Effects of Region, Circuit, Caseload and Prosecutorial Policies on Disparity

Notes from the Symposium Organizers
The Symposium Organizers convened Panel II to discuss inter-district disparities in federal sentencing, particularly what or who causes regional sentencing variations, whether these differences are unwarranted, and, if so, which actor is in the best position to reduce these disparities. Regional variations may be caused by inter-district differences in (1) caseload composition and volume, (2) investigative and prosecutorial policies, (3) the penalty the offender would receive if prosecuted in state court, (4) circuit law, and (5) district judges’ practices.

Congress clearly intended for the Sentencing Reform Act of 1984 (SRA) to reduce unwarranted disparity, but it is not transparent what types of disparities Congress identified as unwarranted. Disparities caused by variations in circuit law or judicial policies probably qualify as the unwarranted differences Congress intended to reduce. But differences caused by prosecutorial policies are not as easy to classify, and explicit language in the SRA suggests Congress may have wanted the Guidelines to leave room for local actors—including prosecutors, probation officers, and defense counsel—to respond to unique problems and community values. Furthermore, the SRA’s emphasis on national uniformity does not necessarily mean federal judges should ignore the sentencing practices of their host states.

Given the difficulty of determining which types of differences are unwarranted, caution is necessary in formulating responses to regional disparity. Even if inter-district disparities are unwarranted and should be reduced, the Commission might not be in the best position to respond to regional differences caused by inter-district variations in crime and investigative and prosecutorial policies. If regional sentencing variations are to be reduced, the Commission will need to work with Congress, the Department of Justice, and the defense bar to integrate their different policies into a consistent system of prosecution and sentencing that promotes equal justice.

Panel II began with presentations by Professor Frank O. Bowman, III, Katherine Tang Newberger, Yale Law School ’03, and Professor Michael O’Hear. Panelists Bill Mercer, U.S. Attorney for the District of Montana, Jon Sands, Assistant Federal Public Defender for the District of Arizona, and Laura Storto, Yale Law School ‘01, commented on the presentations before the discussion was opened to participation by Symposium attendees. The comments of participants have been edited with the approval of the speakers and the moderator, Professor Dan Freed. The discussion captured here is organized thematically rather than in the order in which the comments were made.

I. What Degree of Disparity Is Tolerable?
Frank Bowman: The paper summarized on the conference website is one of two that I wrote with Professor Michael Heise of Case Western examining the causes of the long, steady decline in the national average sentence length for drug offenders between 1992 and 2000. We concluded that drug sentences declined because of a complicated combination of three factors. First, during this period Congress and the Commission made changes in statutory and Guidelines’ law that tended to reduce drug sentences. Second, the frontline actors in the sentencing system—most notably prosecutors and district judges—exercised their discretion to lower drug sentence lengths. And finally, starting in 1996 the five districts along the Mexican border adopted a series of initiatives that increased the number of drug cases they prosecuted while decreasing the average sentence. The last two conclusions are of particular relevance to the subject of sentencing disparity. That said, the balance of my remarks today will relate only incidentally to my work on drug sentences. Instead, I want to talk about sentencing disparity more generally.

Why is there all this fuss about disparity? At the most basic level, we care about disparity in sentencing because one characteristic of a just system of punishment is that it treats similarly-situated defendants similarly. But equity among defendants is not the only important value. Equity must compete with utilitarian considerations of crime control. Crime control may sometimes counsel stringency to accomplish deterrence or incapacitation; at other times it may suggest leniency to achieve rehabilitation or to encourage cooperation in the prosecution of other offenders. Because all of these utilitarian values may be in tension with resource
constraints or political concerns, it is not self-evident which factors should matter in deciding who is similarly situated.

In the federal courts, we are particularly interested in disparity because reducing disparity was one of the objectives on which all of the diverse partners in the coalition that produced the Sentencing Reform Act agreed. But it’s not clear to me that sentencing uniformity is or should be a prime directive of a sentencing system. Other considerations may be, or perhaps ought to be, much more important.

Let’s try to define what we’re talking about when we say disparity. First, when we refer to disparity, we mean unjustifiable disparity. Disparity merely means difference, and, in any reasonable sentencing system, different defendants are going to receive different sentences. The question is whether the differences—the disparities—are justifiable. If so, disparity is not a problem. Second, even unjustifiable disparity cannot be eliminated by the Guidelines. No human system can attain perfect equity. The goal was minimizing unjustifiable disparity. Third, implicit in the objective of minimizing unjustifiable disparity are two other ideas: (1) reducing it from the level existing before the Guidelines, and (2) reducing unjustifiable disparity enough that the benefits of the reduction outweigh any cost the Guidelines might impose in other areas.

Taken together, these statements impose certain conditions on any arguments about disparity and the Guidelines. First, it is not sufficient to show that two people receive different sentences. Rather one must show they are similarly situated and the observed sentencing differential is unjustifiable. Second, if we are asking whether the Guidelines have succeeded in reducing disparity, we need meaningful comparisons of similarly-situated defendants before and after the adoption of the Guidelines. Our inability to meet this condition is one of the greatest limitations of discussions about disparity under the Guidelines. It may be true that similarly-situated defendants of different races or in different districts receive disparate sentences now. But if we can’t say whether such disparity increased or decreased since the adoption of the Guidelines, we’ve learned nothing about whether the Guidelines have made things better or worse. And despite some ingenious work by some very smart researchers, some of whom are in this room, we really don’t know that much about the before-and-after story. I’m not suggesting that inquiries into sentencing disparity in the Guidelines era are pointless—only that the before and after comparisons are often not very informative.

How then should we talk about disparity? I think we should begin by conceding that even if we do not know, and perhaps cannot learn, very much about the before-and-after story it may nonetheless be worthwhile to see what disparities exist in federal sentencing now and whether in the period since 1987, in which we’ve begun to collect usable data, disparities have gotten better or worse. Having done this, we can have useful discussions about whether any particular claimed disparity is justifiable. And if the disparity is unjustifiable, does it exist to an acceptable degree? And if it exists to an unacceptable degree, what should we do about it? To do these things, we begin by identifying the particular types of unjustifiable disparity that allegedly flourish under the Guidelines and consider what we really know about such disparities.

Racial disparity generates extensive press and concern. We’ve had an excellent panel on that, so I’m not going to talk about it here.

The type of disparity the Guidelines were most plainly intended to address was between similarly-situated defendants sentenced by different judges. A defendant sentenced to ten years in front of Judge Jones shouldn’t receive five years if he happens to get Judge Smith down the hall. The evidence we have, primarily excellent studies by, among others, Paul Hofer, Kevin Blackwell, and Kate Stith, suggest that the Guidelines did reduce inter-judge disparity as long as we are talking about disparity among judges who work in the same district. But those studies suggest that disparity between districts may have increased since the onset of the Guidelines.

Leaving aside the before-and-after question, the evidence is pretty strong that districts around the country do things quite differently, producing different sentences for defendants whose situations differ only in point of geography. Assuming that inter-district disparity is reasonably significant, should we care? And if we care, is there anything we can do about it?

My first point is that some of the concern about inter-district disparity is blown. Just as all politics is said to be local, all law is local. Any set of formal legal rules put into action by different communities will be applied by each community in a somewhat different way. From locality to locality, local conditions, local values, local needs, and even local personalities will interact with the rules over time to create unique sets of norms and understandings of how nominally identical rules should be applied. That is not a Guidelines’ phenomenon; it’s a truth about the operation of law in society. Therefore, some inter-district variation is inevitable, and we couldn’t change that even if we wanted.

The question remains whether there are types or degrees of local variation that are unacceptable or at least undesirable that we could either eliminate or reduce. I think the answer is yes. First, even if we accept that absolute uniformity is unattainable, there are certainly degrees of variation that shouldn’t be tolerated because the resulting disparity is unfair to defendants and creates the perception of unfairness that undermines public confidence in the federal system of justice. One example of an unacceptable degree of disparity is
the incredible variation between districts in substantial assistance motions, which range from three percent to fifty percent of cases depending on where you live. Second, I think one should try—and this is perhaps the main thing I want to say this morning—to distinguish between the reasons causing inter-district disparity. It is permissible for local understandings of how to apply sentencing laws to grow up over time, shaped by local needs and priorities, as long as the local understandings represent choices made within the range of discretion that is legitimately conferred by the formal rules. As long as the sentencing outcomes produced by local understandings aren’t too wildly different from national norms, I don’t think there is any reason “to have a cow.” So if one district files a lot of crack cases and another doesn’t, that’s ok. If one files a lot of second offender informations in drug cases and the other doesn’t, that’s ok.

But it is an entirely different matter if districts or actors within the districts, such as U.S. Attorney’s Offices, decide that their local conditions or personal preferences entitle them to make choices contrary to the letter or spirit of the law. Now that’s a concededly tough distinction to make. But two examples come to mind. First, it is not, in my view, legitimate for a U.S. Attorney’s Office to use § 5K1.1 motions as a case management tool—that is, to hand them out promiscuously to folks who provide little or no useful information in order to induce early pleas. Nor do I think it is legitimate for judges to wink at this practice.

Likewise, I have very strong reservations about border fast-track programs that offer inducements to plead early that are plainly not contemplated by the Guidelines. Supporters of these programs claim they could not manage their high caseloads without the illegitimate inducements. Based on my experience as an Assistant U.S. Attorney in Miami in the 1990s, I just don’t buy this. Parties in the criminal system will bargain within whatever limits the system sets. As long as the limits are set and some significant advantage comes from a plea, defendants will plead. Local conditions do not render conscious deviation from national law legitimate. The proper response to a crisis of resources, such as that which is said to justify the fast-track programs, is a request to the national legislature for more resources; the proper response is not a decision to consciously ignore the law.

Jon Sands defended border fast-track programs, specifically, and disparity generally: The plea bargains and downward departures offered in border-related cases ensure that a large number of defendants are punished. The message is being sent. Sentencing differences that result from fast-track programs should be classified as warranted disparity. Professor Bowman would take issue with that, but there are limited resources that the executive branch and the court system can expend in a couple of districts or in one region. And disparity that is justified and transparent can work wonders there.

Professor Bowman makes the point that charging policies that lead to prosecutorial disparities are acceptable, but not plea policies. The example that he uses involves the charging of crack cases in one district but not in another. This disparity, to Professor Bowman, is acceptable. Yet, a “fast-track” approach is but a variant of charging policies. A “fast-track” district makes the decision to process a large number of cases, and that is every bit as valid as making a decision to charge at all. This is especially true if a district faces a reactive situation: it must handle cases (such as immigration) given the jurisdiction and the geographic location. A border district may not be able to choose to prosecute as much as react and handle cases. Its choice to offer fast-track pleas that result in substantial savings to the government and court resources under these unique circumstances is valid disparity. The disparity in sentences under such policies can be supported by the reasons stated in such pleas for departures.

But disparity is not just something to be tolerated—it benefits the federal sentencing system. Disparate district policies enable districts to act as sentencing laboratories. The amendment on aberrant conduct shows what is possible when districts are allowed to experiment with different policies. Some circuits had a broad standard for identifying aberrant conduct as a basis of departure while other circuits, notably on the East Coast and in the South, had very restrictive standards. This inter-circuit split led the Commission to act and reach a compromise. A new amendment resulted from regional differences in how an issue was approached. The development of a “totality of circumstances” approach, which was expansive, and a “spontaneous” approach, which was narrow, afforded the Commission an opportunity to weigh and balance how aberrant behavior should be defined and to what situations it could, or should, be applied. The amendment adopted a compromise, which excluded certain acts, but expanded the reach beyond mere reflexive decisions.

Another example is the ongoing discussion on immigration. Fast-track programs and the use of departures along the Mexican border have led the Commission to reform § 2L1.2. The capping of minor and minimal roles is an example of compromise arising from a dialogue about drug cases. Disparity—different ways of approaching issues—may be the quiet rebellion Professor Bowman alludes to, but it also serves as a catalyst for important discussions between the Commission and the players in the sentencing system.

There are certain situations in which disparity presents a problem. One case that comes to mind is terrorism. It’s a national problem. We have taken steps toward full enforcement and prosecution. But requiring
uniformity in the treatment of one type of major offense or offender does not mean disparity is not warranted in other areas of crime, especially when the stakes are quite small. For example, Indians tend to commit crimes that are local in nature and not of national import. The Sentencing Commission, to its credit, recently set up an Ad Hoc Indian Committee that is looking at this issue.⁹

A. Systemic Modifications
Frank Bowman: I think it is particularly obfuscating to talk about disparity as much as we do because our conversations are so often really about something else. If we are concerned that there is regional disparity, we ought to be concerned with the causes of this phenomenon because disparity doesn’t exist in a vacuum. Disparities between districts or between judges are not merely a product of randomness; they are a product of pressures that move people to do things differently than the law might otherwise suggest. And this is where the study that Mike Heise and I did on the decline in drug sentences ties into disparity.¹⁰

The average length of federal drug sentences declined markedly between 1992 and 2000. The objective of our study was to figure out why. We attributed much of that decline to the exercise of discretion by many actors in the system. But we also found in the second half of the study¹¹ that the various sorts of discretionary choices that are possible under the Guidelines were made quite disparately over different districts. How does one explain the conjunction of these two phenomena—a fairly steady national decline in average drug sentence length and markedly disparate patterns of discretionary choice among districts? I suspect that the root of both the national trend and the inter-district disparities is the perception among many—though by no means all—people in the system that drug sentences are too damn high. This perception places tremendous pressure on all the actors in the system—though not all of them respond to it—to do something about the discomfort they feel with drug sentences. When that discomfort exists, disparity flourishes. Why? Because some districts are collectively more comfortable with prevailing drug sentences than other districts, and therefore apply the Guidelines and mandatory minimums as written. Because some districts adhere staunchly to the letter of law despite their misgivings, while others are more flexible. Because the flexible districts manifest their flexibility in different ways, some handing out numerous substantial assistance motions or mitigating role adjustments, others engaging in liberal fact or charge bargaining, and still others acquiescing in numerous § 5K.2.o. departures.

So the conversation about regional and inter-district disparity ought to be about why people are behaving this way. If you want to reduce inter-district disparity in, for example, drug cases, the answer may not have anything at all to do with the Guidelines per se but with the severe penalties created by the interaction of the Guidelines and statutory minimum sentences that create the pressures that induce people to manipulate or evade the law.

A similar point can be made with respect to border district fast-track programs. The disparities between border and non-border districts don’t exist in a vacuum. We know why border districts feel compelled to do things differently. We may or may not decide that it is legitimate for them to do things differently than everyone else. One possible solution is to give them the resources they need to do the job rather than to wink at the fact that they have chosen to handle their caseloads by essentially cheating on the law. I don’t think that’s a legitimate way to do it. But again, the point I want to make more than anything else is that our conversations about disparity are so often a cover for talking about other things entirely.

B. Fully Enforcing the Existing Guidelines To Reduce Disparity
Bill Mercer:¹² We should care about disparate treatment of federal defendants at sentencing. The SRA requires us to worry about it. For example, two defendants responsible for the same loss amounts in two different fraud cases should not receive different sentences merely because they are before different judges. It is clear that some federal judges disapprove of incarceration of defendants in certain fraud cases. With a judge of this philosophy, a defendant responsible for a substantial loss may receive a sentence of probation or, at worst, a short term of community confinement through the application of a non-substantial assistance downward departure. Another judge, one willing to follow the Guidelines who does not have an aversion to the incarceration of “non-violent” offenders, will sentence the defendant in Zone D as contemplated by the Commission. Justice Breyer’s 1988 article in the Hofstra Law Review explained that the initial Commission was compelled to establish guidelines designed to incapacitate fraud defendants because so many similarly-situated defendants had received probationary sentences in the pre-Guidelines era. But today white-collar defendants still raise claims of diminished capacity and community and family ties, and some federal judges, who have the same view of white-collar defendants that judges had pre-Guidelines, believe probation is the appropriate sentence. Such sentences undercut the Guidelines. The fact that non-substantial assistance downward departures occur in more than 10,000 cases a year with an alarming percentage increase in the post-Koon era should give us pause. In my view, the Commission must circumscribe non-substantial assistance downward departure authority to a greater extent by limiting the scope of the provisions in §H and §K.
A significant amount of disparity occurs in fraud cases. I will offer an intra-district—not an inter-district—example. As part of a national identity theft initiative, in my district we’ve had three sentencing in the last six months. The first defendant was responsible for about $50,000 of loss. She didn’t have any criminal history points. The judge found that her conduct constituted aberrant behavior—even though the scheme had lasted more than four years—and departed down four levels in order to give her a probationary sentence. Last week in a sentencing involving a criminal history Category Six defendant responsible for a monetary loss of $10,000, a different judge departed upward seven levels and the defendant went from a 24 – 30-month range to a 51 – 63 range and received a five-year sentence. Disparity in outcome? You bet. An objective observer would conclude that the range established by § 2B1.1 was virtually irrelevant. Those sorts of judgments with disparate treatment are imposed in districts all over the country on a regular basis. Why isn’t there more outrage over this disparity? We would have a very different discussion today if we had a national upward departure rate of 18.3 percent. Many of you would say, “We thought it was ok to have a non-substantial assistance downward departure rate of 18.3 percent, but we sure don’t like the idea that the upward departure rate is now equal to the non-substantial assistance downward departure percentage.”

I think we would find a lot more disparity in the system if we could measure similarly-situated defendants. For example, let’s say that we could evaluate all sentencing outcomes of defendants responsible for approximately $50,000 of loss. If a defendant has stolen $50,000, I want him to be sentenced within that Guidelines’ range, regardless of whether he had 10 years of great civic responsibility. But that’s not happening. And that’s borne out by the data. I would encourage you all to get your Sourcebooks out when you get back home, and look at the Eastern District of Washington. In 2000, that district—my neighbor to the West—had non-substantial assistance downward departures in 43.6 percent of its cases. In the most recent set of data, non-substantial assistance downward departures were given in 51.1 percent of its cases. That is swallowing the purpose of what those Guidelines were intended to do. And then we look at districts like the Southern District of Illinois, which gives non-substantial assistance departures in only 2.7 percent of cases and substantial assistance departures in only 7.7 percent of cases.

C. Limiting Prosecutorial Discretion in the Filing of Substantial Assistance Departure Motions

Judge Paul L. Friedman: Prosecutors very much enjoy the discretion that they have in filing § 5K1.0 downward departure motions in order to turn defendants into government cooperators, which may be a legitimate societal goal. But when it comes to every other type of departure, they resist because non-substantial assistance departures give judges discretion. And the greatest disparity is in the use of § 5K1.0. That is where we have a lack of uniformity throughout. The defendant who is able to provide useful information gets a § 5K1.0—sometimes. It depends on how useful the information is, how substantial it is. I can’t tell you how many cases I’ve had in which the defendant pled in hopes of getting a § 5K1.0 and then six months, a year later, even 18 months later, the government decides the assistance was not substantial or was substantial enough for a § 5K1.0 but not for an 18 U.S.C. § 3553(e). I am disturbed by that.

Kevin Blackwell: If prosecutors are using § 5K1.0 motions inconsistently, why don’t judges use their authority to deny the motion to enforce a uniform standard?

Judge Paul L. Friedman: When you have a prosecutor coming in saying, “This defendant has been very helpful and I request a downward departure,” and defense counsel saying, “I agree with that motion—please do it,” there’s got to be a lot of good reasons to say no. There is a societal interest, a policy interest, in getting people who know about crimes to help prosecutors. There’s a lot to be said for getting their help. And when you’re sitting there saying as a judge, “151 to 188 months seems like a lot for this defendant and now there is a way I can give him 10 years or 8 years or 7 years and both sides think that’s fair,” it’s going to be very hard to say “no” even though I sign the order.

D. Standardizing Departure Policies Circuit-by-Circuit

Judge Paul L. Friedman: We need to look at the district-by-district and circuit-by-circuit data on the tremendous differences in the number of substantial assistance departure motions and the level of the resulting sentences. With respect to non-substantial assistance departures, I would expect that if you looked at it, you would find the departure rate depends on the attitude of the particular court of appeals as to the exercise of discretion by judges. Some circuits apply very rigid rules. Other circuits are much more willing to suggest, or to countenance the notion, that district court judges ought to have a level of discretion or are willing to read Koon in a way that some of us wish more circuits would read it.

II. Does the Tolerability of Disparity Depend on Which Actor (the Investigator, Prosecutor, Judge, etc.) Creates It?

Bill Mercer: I agree with Frank Bowman that it is inappropriate to use fact bargaining and charge bargaining or substantial assistance motions as case management tools when the assistance is either not
substantial or nonexistent or when prosecutors are not charging the most serious readily provable offense. A key point in Department of Justice history on these issues occurred in 1993 when Attorney General Reno came out with a policy that modified the Thornburgh Memo, which had given very clear guidance to federal prosecutors in terms of how they were to deal with charging and plea decisions. The Thornburgh Memo specified that prosecutors had to charge the most serious readily provable offense and secure a plea agreement to the most serious readily provable offense. To the extent that we fail to do that through fact bargaining and charge bargaining or departures that are hidden based on our plea decisions, we are really creating problems in terms of Guidelines administration.

As Professor Bowman has noted, this problem is most pronounced on the southern border where some districts have implemented fast-track programs. Although the Thornburgh memo included a safety valve for local problems of a certain magnitude, we may have reached the point where it is too inequitable for a national system to have the volume of departures seen in fast track. The potential impacts for these districts are significant; however, the impacts for the criminal justice system are even greater. The Reno Memo allowed prosecutorial discretion regarding “proportionality” to sneak in, and I think as part of this discussion we really do need to question whether the decisions made by prosecutors generate disparity.

Judge Nancy Gertner: There is something so extraordinarily obfuscating about this discussion. Congress believes it has accomplished so much by controlling judges. We have, in short, controlled the one actor in the sentencing system whose decisions are totally transparent and who is accountable. Kevin Blackwell’s paper, for example, suggests that the Guidelines have eliminated racial disparity created by judges. But what we have not begun to do is control disparity created by all the other players in the system. One of the things the Commission might do is try to research sources of disparity other than judges. The Commission has to look at data on prosecutors and probation officers—even if its charge is not to control these two actors—to prevent Congress from congratulating itself when it shouldn’t be congratulated. Congress and the Commission have controlled judges while leaving all other actors unhindered and the sentencing disparity they cause unexamined.

The median average federal sentence in 1998 was 43 months. The existence of inter-district sentencing disparity does not necessarily mean the Sentencing Reform Act (SRA) has failed to meet the goals Congress set for it. The SRA only targeted “unwarranted disparity.” If inter-district sentencing differences are warranted, their existence does not connote a failure of the SRA or the Guidelines.

Whether inter-district sentencing disparity is warranted depends on its causes. In my paper, I attempt to show that inter-district sentencing differences can be explained by regional variations in caseload composition. As an illustration, compare the caseloads of the Eastern District of North Carolina, which had a mean sentence of 97 months in 1998, and the Western District of Texas, which had a mean sentence of 28 months. The caseloads of the districts were quite different in two ways. First, more than 36 percent of the Western District of Texas’s caseload involves immigration violations, which generally receive much shorter sentences than “other” offenses, which compose 32 percent of the Eastern District of North Carolina’s caseload. The second major caseload difference is that even though drug cases compose a similar proportion of the caseloads of both districts, 66 percent of drug cases in the Eastern District of North Carolina involve crack while 69 percent of the drug cases in the Western District of Texas involve marijuana. Since “other” offenses tend to receive higher sentences than immigration violations, and crack prosecutions receive much harsher penalties than marijuana cases, the variations in the two districts’ caseloads explain the difference in the two districts’ mean sentences.

But it is important to remember that just because 66 percent of drug cases in the Eastern District of North Carolina involve crack and less than 7 percent in the Western District of Texas do not necessarily mean crack is more prevalent in Raleigh-Durham than in Austin, El Paso, or San Antonio. A better explanation for the disparate composition of drug crimes in the two districts is that law enforcement agencies and federal prosecutors in North Carolina are focusing on crack distribution while their counterparts in Texas are focusing on drug smuggling along the border. In other words, inter-district sentencing differences are caused by regional variations in investigative and prosecutorial policies.

That is not to say that there are not real differences in the types of crimes the districts face. Because of the
border, the Western District of Texas definitely has more immigration violations and drug smuggling than most districts. But differences in the types of crimes prevalent in the districts are not likely to be the sole cause of interdistrict sentencing disparity.

To test the hypothesis that interdistrict sentencing disparity can be attributed to regional variations in investigative and prosecutorial priorities, I conducted a study to determine what would happen to the mean sentences of several districts if they had the same investigative and prosecutorial policies as a control district—the District of Massachusetts. The mean sentence for each district is a function of the referrals handled, the prosecution rates, conviction rates, and offense-specific mean sentences of the district. The referrals handled are all the cases referred to the U.S. attorney’s office that are either declined or prosecuted—and they reflect the types of crimes that occur in the district as well as the investigative choices of law enforcement agents. The offense-specific mean sentence is the average sentence for different types of crimes in the district—and it reflects not only the sentencing decision of the judge but also the charging decisions of the prosecutor and the factual stipulations that are made relevant to sentencing, such as quantity and type of drug.

I found that if districts had the same referrals handled, prosecution rates, or offense-specific mean sentences as the District of Massachusetts, their mean sentences would change—in some cases dramatically. For example, the Northern District of Illinois would have a mean sentence of 64.84 months—up from 48 months—if it had the District of Massachusetts’s referrals handled. The average sentences for the Eastern District of North Carolina, Western District of Kentucky, and Northern District of Florida are much higher than they would be—and the border districts’ mean sentences are much lower than they would be—if the districts had the same investigative and prosecutorial policies as the District of Massachusetts.

Intuitively, any sentencing disparity caused by the fact that each district experiences different types of crime is not the type of disparity Congress intended to end by enacting the Sentencing Reform Act. But what about sentencing disparity caused by regional variations in investigative and prosecutorial policies? Does investigative and prosecutorial discretion need to be constrained to fulfill the goals of the SRA? The short answer is no.

There are two ways to arrive at this conclusion. The first is to look critically at what the SRA includes—and what Congress left out. In the 1970s Congress received two reports from the Government Accounting Office warning that regional disparities were being caused by the lack of nationally uniform prosecutorial policies, and the House Judiciary Committee Report on the Act even admitted that regional charging differences might be a cause of disparity. Yet Congress chose not to curb prosecutorial discretion with the SRA. This leads to the conclusion reached by the Ninth Circuit in United States v. Banuelos-Rodriguez, that “it cannot be fairly said that Congress was seeking to reduce sentencing disparities arising from the exercise of prosecutorial discretion when the legislation that it enacted would, if anything, enhance that discretion.”

A second way of arriving at the conclusion that disparities caused by prosecutorial discretion do not conflict with the goals of the SRA is to look pragmatically at the uses of that discretion. In the fifteen years since the promulgation of the Guidelines, most discussions about prosecutorial discretion have focused on plea agreements aimed at Guidelines’ circumvention. But the data in my paper suggest that most investigative, declination, and charging choices are motivated by legitimate and unavoidable considerations—not Guidelines’ circumvention.

For example, it makes sense that law enforcement agents tailor their investigative priorities to address the crime problems unique to the district. If District A has several carjackings a year and District B has only one, it makes sense for District A to devote resources to the detection and prosecution of carjacking, whereas it does not make sense to devote similar resources in District B—even if that means a carjacker in District A is more likely to be apprehended and charged federally than in District B. It also makes sense that investigators and prosecutors take local concerns into consideration when choosing what cases to pursue. As Judge Broderick has noted, a felon in possession of a gun will be viewed very differently in Wyoming than in the South Bronx. Consideration of community values is in keeping with explicit language in the SRA. Furthermore, federal prosecution is appropriate when federal investigative enforcement agencies and U.S. attorneys have a comparative advantage over their state counterparts. Maximizing comparative advantages has long been a guiding policy of the Attorney General because it encourages the most efficient use of limited resources. Federal authorities must take resource constraints into consideration when deciding what cases to target and prosecute. With more than 3000 federal crimes—and the list expanding—it is impossible for federal authorities to detect and prosecute all violations of federal law. Choices must be made.

Thus, local crime problems, community values, comparative advantages of federal prosecution, and resource constraints may result in similarly-situated defendants being treated differently depending on the district in which they commit their crime. However, I do not think that this type of disparity was the primary concern of Congress when it enacted the SRA. It is the result of considerations that are both fundamental to our system of criminal justice and unavoidable.

That is not to say all investigative and prosecutorial
discretion should be unchecked. Investigative agents and U.S. attorneys should not be guided by the same idiosyncratic preferences that Judge Frankel found so problematic. Furthermore, in some situations, nationally uniform treatment of particular crimes is fundamental. For example, it may be important for civil rights offenses to be prosecuted regardless of whether the community agrees if the point of federalizing the crime was to prevent local prejudices from obstructing justice. Similarly, perhaps environmental crimes should be prosecuted uniformly throughout the nation so that states are not able to engage in race-to-the-bottom maneuvering.

Thus the task before us is to find a way of encouraging investigators and prosecutors to consider legitimate factors while eliminating malign factors from consideration. How to do that is not clear; but what I think is clear is that the existence of inter-district sentencing disparity caused by legitimate exercises of investigative and prosecutorial discretion does not constitute a failure of the Sentencing Reform Act or the Guidelines. And that leaves us with the difficult question: If the Sentencing Reform Act has said equal treatment of those people who are convicted in federal courts is so important, why is it that we’re not going to demand that same type of equality of treatment for people who actually commit federal crimes? Maybe the answer is just a pragmatic one, which is that it is too difficult—we don’t have the resources and there are too many crimes and because of that there is going to be disparity between districts in what they prosecute or detect. But I would hope we can come up with a more principled response and that perhaps we can move toward finding a solution that addresses this problem.

Bill Mercer: We should not worry much about apparent inter-district disparity that may be suggested based upon, say, a drug offender in the Eastern District of North Carolina getting three or four times the amount of time that a drug defendant is getting in the Western District of Texas. I think those data really do not give the proper attention to drug quantities and the types of cases that are cropping up in those two districts. The same thing can be said about fraud cases. Those cases are driven by loss, and the fact that sentences in the Southern District of New York are greater than sentences in the District of Montana is only suggestive of the likelihood that securities defendants are causing greater losses and are therefore getting more time in sentences in both the Eastern and Southern districts of New York. So I guess I don’t find that to be the right way of framing the issue. I’m concerned with similarly-situated defendants receiving different sentences.

B. Shifting the Exercise of Discretion So Its Uses Are Transparent

Laura Storto offered a framework for guiding the prosecutorial policies that result in inter-district sentencing differences: I’m going to agree with many of my fellow panelists by saying that national uniformity is an impossible goal of the Sentencing Guidelines because as prosecutors and defense attorneys reach resource constraints, they will have to make choices. Our task is to figure out how can we guide these choices so that they don’t create unwarranted disparity.

As Frank Bowman mentioned, the cry of the Sentencing Reform Act was the judge factor—that is, why should you get a different sentence in front of Judge Jones than you would in front of Judge Smith down the hall? I believe there are three aspects of this inter-judge disparity that were troubling. The first was that the sentence was arbitrary; it was unprincipled. The second problem was that the sentencing process was opaque; it was impossible to know what principles guided judges’ decisions. Third, there was no review of judges’ decisions. The Guidelines have created a system of checks to ameliorate these problems for inter-judge disparity—not only do judges have regulations to guide them, presumably making their decisions principled and open, they also have appellate review to make sure that they are interpreting these regulations appropriately.

To the extent that we can address these same three problems, arbitrariness, opacity, and lack of review—as they apply to actors other than judges—we can come up with a system to guide actors so that we can be assured that inter-district differences are not unwarranted.

As to the first question regarding arbitrariness, several people today have talked about the justifications for regional sentencing differences. For example, in border districts that have resource constraints, you have to prosecute people and you have to make a choice, for example, whether you are going to prosecute a wide swath or whether you are going to prosecute only the most serious offenders. The goal of maximizing law enforcement resources may be a good goal.

But to ensure that discretion is principled, we additionally need to look at whether the means of implementing that goal are justified or whether some means are more justifiable than others. This brings up the paper I wrote, which I am not going to discuss at length. I looked at two pairs of districts, each of which sentenced outside of the Guidelines in some way and to some extent. One pair was two border districts—the Southern District of California and the District of Arizona. Each of these districts, which were faced with heavy caseloads, chose to implement fast-track programs that gave great discounts for pleading early. The big difference between the two programs was in the method of discounting. The Southern District of California primarily used the charge bargain to control the sentence. The District of Arizona fast-track sentences are achieved through a series of departures. The question we need to think about is whether we should
be concerned about this difference in means. Is there a reason why we should care—when the goal is laudable—that we use departures to achieve the goal versus charge bargaining?

One reason to care about the difference in means is the opacity problem. It is possible that a system of departures would be less opaque because it’s on the record, whereas a system of charge bargaining—because it goes on before you get on the record—would not be as easy to scrutinize. A second consideration, raised by Dan Richman in his paper about substantial assistance departures, is that we may care whether substantial assistance departures are used because they have a moral component that we as a society may not want to endorse: We may not want to encourage ratting on friends, for example. I’m not sure where I come out on that, but I want us to think about these considerations when reviewing the means.

In order to guide discretion to avoid opacity, any types of deviations that we discuss have to be talked about in an open forum. The border districts are a good example of this. The former U.S. Attorney of the Southern District of California wrote an article about his fast-track program, so everyone knows about the program and we’re able to have a discussion about it.

The third principle that must be addressed is how we can publicly review and approve decisions that prosecutors and other actors make. This is where the Commission or some other body can come in. The Commission could act as an adjudicative body by accepting petitions on what localities wish to change the Guidelines to respond to their needs. Then we could actually put on the record all the types of considerations discussed today and the Commission could determine whether the purposes are correct and whether the means are justified. By making these determinations visible by putting them on the record, the Commission would remove the opacity problem. If we can think about a system of discretion and disparity that incorporates these three principles, we can be confident that regional differences are not unwarranted.

**Michael O’Hear:** Many of the comments today highlight the importance of decisions made by investigative agents and prosecutors as a source of regional disparity. Some comments seem to suggest that this aspect of the problem—if it is a problem—lies beyond the scope of the Guidelines and the Commission’s mandate. This is not entirely true. Congress authorized the Commission to make policy statements about the acceptance and rejection of plea bargains to make sure they are consistent with the SRA. In 1987, the Commission did very little in this regard, but indicated an intent to study the issue further. I would suggest that this remains an important piece of unfinished business for the Commission. The promulgation of policy statements in this area may provide an opportunity for the Commission to think about disparity arising from the exercise of prosecutorial discretion and to articulate principles to help determine when such disparity is warranted and when it is not.

**Kate Stith:** I am dubious about solving the imbalance caused by the Sentencing Guidelines by creating yet more guidelines—for prosecutors or other participants in trials and sentencing. To mix a few metaphors: I fear that more legal constraints on the exercise of discretion would drive more of the process underground, and pretty soon we’re getting under some pretty ugly rocks. I don’t propose a solution here. This is just an observation as to the irony and difficulty of the situation in which we find ourselves.

**Jon Sands:** One of the ways the Commission is dealing with unwarranted disparity is by focusing more on the individual. The Commission is trying to deal with the prosecution and the defense bar by focusing on factors which may warrant an upward adjustment and factors that may warrant a downward adjustment. The capping of minor and minimal role in a recent amendment is a step toward controlling prosecutorial discretion.

**III. Does the Importance of Nationally Uniform Sentences Diminish for Some Types of Crimes?**

**Michael O’Hear** suggested national uniformity may not be the unyielding requirement of the sentencing system that we assume it to be. My paper has two distinct objectives: one of them is a pretty narrow doctrinal objective and that is to consider the problem of departures based on disparities between federal and state sentencing laws. The second objective is a little more theoretical—and in some ways Frank Bowman has stolen my thunder on this point—the second objective is to start to ask the question: Why is it that we care about inter-district uniformity in the way defendants are treated? And taking into account these purposes, can we identify certain categories of cases in which national uniformity concerns are particularly strong and other categories of cases in which national uniformity concerns are comparatively weak?

I will begin with a few words about terminology. First, I’m going to refer in my comments to a concept of “national uniformity,” and by this I mean inter-district uniformity in the federal system, ensuring that similarly-situated defendants in every district in the country receive similar sentences. The other key concept is “local uniformity,” and by this I mean uniformity of sentences within a particular district across the state/federal divide. In other words, similarly-situated bank robbers in New Haven would receive the same sentences even if one was prosecuted federally and the other locally. When I talk about departures that are intended to mitigate differences between state and federal sentencing, I’m talking about departures that are
intended to achieve local uniformity. I’ll refer to these in my comments as local uniformity departures.

Currently, what’s happening with local uniformity departures? There are about a dozen published decisions involving enterprise defendants who have made the claim that they ought to get a departure in federal court from their Guidelines’ sentence because if they had been sentenced for the same conduct in state court, they would have received a substantially lower sentence. These claims have received a mixed reception in the district courts. There are at least a couple of district courts that have granted local uniformity departures, while others have denied them. However, at the appellate court level, the results are uniform: every appellate court that has considered this type of departure has rejected it. And in fact, most of these courts have not merely rejected the departure on the facts before them; they have issued broad holdings rejecting local uniformity departures as a matter of law.

I have no quarrel with any of these appellate decisions on the facts presented. But I do have some reservations about how sweeping the holdings of these cases have been and how conclusory the analysis. It seems to me that the appellate courts have not asked some rather interesting questions. In essence the appellate court analysis has been that we can’t have these sorts of departures because they would undermine national uniformity in federal sentences. There are a couple of assumptions here: one is that national uniformity is in fact an unyielding principle at the core of the federal sentencing system, and the other is that a departure taking into account state sentencing would necessarily undermine or undercut that national uniformity objective.

My paper has an extended discussion about these assumptions; time prevents a complete recapitulation of the issues here. But let me briefly suggest a couple of thoughts in a contrarian vein. First, it is not clear that Congress in fact intended to make national uniformity a rigid and unyielding component of the federal sentencing system. In fact, Congress expressly empowered the Commission to take into account community views of the gravity of the offense and also the community-based incidence of the offense. If you look at the legislative history of the provisions, there is good evidence that Congress contemplated the possibility of some regional variation. Second, I think it is important to note that the Guidelines do not represent a system of unyielding and rigid national uniformity. As Frank and Michael Heise discuss in their Quiet Rebellion papers, there is flexibility through role adjustments, acceptance of responsibility, substantial assistance departures, and so forth. I think their papers do a nice job of demonstrating how these different areas where there is play in the joints get used differently in different parts of the country. And, in fact, to go one step further, I think work done by Frank and others in this room suggest that we do not have a smoothly functioning system of national uniformity in practice. I think this reality diminishes the force of arguments that we can’t have any particular sort of departure because it’s going to undermine national uniformity. This seems to me to be exalting an ideal that is both unrealized and unrealizable.

Putting aside the narrow question of departures, I would like to turn to the question of why it is that we care about national uniformity in the first place and what sort of limitations we might want to impose on this principle. In the paper, I talk about a number of reasons why national uniformity might be an important objective. I would emphasize two in particular. First, national uniformity may address arbitrariness concerns. Classically, these concerns arise from the possibility that two similarly-situated defendants appearing in front of different judges will receive quite different sentences. These concerns play out in a very compelling fashion if set in the context of sentencing within a particular federal district, where the assignment of cases is made on a random basis. If the identity of the judge is determining the sentence, then a random case assignment is ultimately driving the process. This creates a perception of sentencing as an arbitrary exercise of state power.

What if we expand the sphere from the district to the nation as a whole? I would suggest that arbitrariness concerns do not play out quite the same way on a national scale. After all, cases are not randomly assigned to particular districts. The district of prosecution is determined by prosecutors and law enforcement agents, who must work within the confines of federal venue requirements under Rule of Criminal Procedure 18 and related statutes. In some cases, only one district will be available; in others, prosecutors may be able to choose among several. Picture a multi-state drug trafficking enterprise, or a fraudulent securities scheme targeting investors nationwide. In such cases, a particular district of prosecution may be selected based on any of a number of considerations: the convenience of agents and prosecutors, the desire to avoid or obtain a particular judge, jury proclivities, location of evidence and witnesses, docket crowdedness, and so forth. In a system of significant inter-district sentencing disparity, such considerations will end up—whether intentionally or not—playing a significant role in the actual sentence imposed. In such a scenario—as in the more conventional case of arbitrariness (i.e., the sentence being determined by the random assignment of a case within a district)—the sentence will be substantially affected by matters unrelated to the gravity of the offense and the personal characteristics of the offender, and so may appear arbitrary.

Another set of issues, which I group under the heading of public choice considerations, also supports national uniformity. The basic idea here is that the
people who are affected by criminal justice policy decisions should have some sort of voice in the way those decisions are made. Some crimes have a national or multi-state component, causing people in more than one district to be affected by the crime and giving them a legitimate interest in the sentence imposed. In such instances, it seems reasonable to expect that the sentences imposed would reflect national priorities and be the result of a national political process in which people from more than one district have a voice. Inter-district disparity—assuming that it is the result of decisions made by local actors—may undermine this principle. The fast-track policies used in the Mexican border districts for illegal entrants provide an illustration. The integrity of the national border is surely a matter of national concern. Illegal entrants will not necessarily remain in border districts, but may travel to any part of the country. The sentencing of illegal entrants in the border districts is accordingly a matter as to which all citizens should have a voice; otherwise, there is a risk that local actors will adopt policies as a matter of local convenience that have deleterious effects elsewhere in the country. This might be a fair criticism of the locally adopted fast-track programs in the border districts. To the extent that they represent an opting out of the federal sentencing regime, the fast-track programs circumvent national policy choices as to matters that are of legitimate national concern. The fast-track programs may or may not be good policy, but their unilateral adoption by local decision makers may violate public choice principles. Greater national uniformity ensures that sentences are as to crimes of national concern are driven by national policy preferences.

These considerations that support national uniformity (arbitrariness and public choice) do not apply in the same way to all cases. Consider, in particular, crimes that lack any discernible multidistrict component, such as possession crimes, or the sort of routine property crimes that end up in federal court only because they are committed in Indian Country. In these sorts of cases, there is no real choice as to district of prosecution. Even in the absence of national uniformity—i.e., even if the place of prosecution plays an important role at sentencing—it is hard to see a compelling claim of arbitrariness. The place of prosecution is not the result of random chance or a prosecutor gaming the system. Rather, it is a result of the defendant’s choice to engage in criminal conduct in a particular locale. If sentenced in light of the community values of that place, or other district-specific considerations, on what basis may the defendant complain?

Likewise, the public choice arguments also ring hollow as the basis for national uniformity in the sentencing of local crimes. It is hard to see why the people of my home state of Wisconsin, for instance, should have a say in the sentencing of a felon in possession here in New Haven, or a bank robber in Providence, or a burglar on an Indian Reservation in Nevada. It is people in those communities who have suffered the true harm or threat of harm from the crimes. Likewise, it will most likely be people in those communities (such as the defendant and the defendant’s family) who will suffer harm if the defendant is incarcerated. The sentencing decision requires difficult trade-offs between liberty interests, just punishment, public safety, and third-party interests. When one particular community bears a lion’s share of the consequences of these trade-offs, that community should be the one to set the parameters on the sentencing decision.

Broadly speaking, I am suggesting here that national uniformity should not be viewed as an important objective with respect to a class of crimes that might be called “purely local.” But how do we know what is “purely local”? I doubt that I, or anyone else, could produce a list of objective criteria that would be free of controversy. I will nonetheless hazard a few tentative guidelines.

First, we might piggyback on venue law and limit “purely local” to cases that may only be prosecuted within a single federal district. For reasons I suggested earlier, this seems a helpful way to get at arbitrariness concerns. But this criterion provides merely a first step in the analysis. One might imagine a multiplicity of cases that, while prosecutable in just one district, are nonetheless truly of concern on a national or multi-district basis. In tax evasion cases, for instance, venue may be proper in only a single district, but the public choice arguments for national uniformity are nonetheless relatively strong. Money laundering, likewise, is an offense that may be prosecutable in only a single district (the place where the financial transaction at issue occurred), but if the money laundered comes from a multi-state criminal enterprise, then the case for national uniformity is again relatively strong. In short, we need to distinguish among single-district cases to identify those that implicate important national or regional interests. Crimes in which the federal government is a victim fall into this category, as do terrorism and other national security offenses. Likewise, the sentencing of defendants involved in multi-district criminal enterprises, as in the money laundering example, might appropriately be subject to nationally uniform standards.

I will not here attempt a comprehensive catalog of “national” and “local” cases, but I will conclude with a final offense type that I find particularly difficult to categorize: civil rights offenses. I am thinking here of police brutality cases in particular. On the one hand, the consequences of the crime and the sentence appear, in every tangible sense, to be quite localized—the injuries suffered by Rodney King, to use a concrete example, and the sentencing consequences borne by the convicted officers, their families, and their police depart-
ment. On the other hand, there is a long and particularly important tradition of federal vindication of civil rights in this country, which may suggest the existence of a compelling, if relatively intangible, national interest in the field. Likewise, given the cozy relationship that exists in some jurisdictions between police, prosecutors, and judges, there is perhaps some particular reason to question the wisdom of substantial local discretion in sentencing civil rights cases. Thus, I conclude by leaving civil rights as an open question—one that is suggestive of some of the difficulties that may be encountered when attempting to categorize cases as national or local.

Frank Bowman: It’s been suggested that otherwise suspect degrees or types of regional disparity may be justified by federalism. I don’t think federalism is an issue. Federalism is a component of constitutional theory that divides powers and responsibilities between overlapping national and state sovereignties. Federalism is not implicated when local branches of the national government choose to disregard the national law for local ends.

Jon Sands: Many regions and judges have to respond to state problems. For example, in Yuma, Arizona, which is on the Mexican border, the county is overloaded—they can’t handle all the legal traffic or drug traffic, so the federal courts have to step in. The regional differences there support Professor O’Hear’s argument that you have to be responsive to local conditions. It is a warranted disparity if the federal system steps in to a local sandbox to help deal with a problem. The same argument can be made in gun prosecutions. Under the Exile Project in Richmond, federal prosecutors and courts may stand in for local authorities.

Lyle Yurko: My suspicion is that if you take drugs out of the mix, a lot of these unwarranted disparities would disappear. And really what these disparities evidence is that players, including prosecutors, in the system are mirroring local standards and are saying in a very loud voice that Congress—in establishing the mandatory minimums—is way out of step with the norms of the nation.

Ronald Weich: I’d like to ask Bill Mercer: What mechanism does the Department of Justice have to capture the sentiment among prosecutors that drug sentences are too high? If there is indeed this pressure that Frank Bowman and others have identified that over time in many districts prosecutors, through filing substantial assistance motions or not appealing other departures, are saying drug sentences are too high, how does the Department, as the 800-pound gorilla in drug policy discussions, capture that sentiment and turn it into policy?

Bill Mercer: DOJ does not necessarily make policy based upon the views of line assistants. Recommendations are based upon a national snap-shot—including the views of DEA, FBI, Customs, U.S. attorneys, and AUSAs—of what makes sense. On this subject, a significant number of people in law enforcement—including AUSAs—think the current system works well. The most recent manifestation of this thinking is the Department’s opposition to proposals to reduce penalties for crack cocaine. Moreover, our job is to enforce the statutes established by Congress. There may be some who are uncomfortable with drug sentences, but ignoring or subverting the applicable Guidelines and statutory punishments is an inappropriate response by actors in either the executive branch or the judicial branch.

Ronald Weich: Don’t you think it’s relevant if individual prosecutors—who play the role that they do in the system and look the defendants in the eye—say the sentence is unjust repeatedly over time in many districts? Isn’t it relevant to the Attorney General?

Bill Mercer: I don’t mean to say that it’s not relevant. I think that the Department is well served when the leaders of the criminal division, line AUSAs, managers, and others in law enforcement get to say, “This is what we’re seeing.” And that is what our subcommittee does. Our subcommittee is a forum for these views. It’s certainly the role of the U.S. attorney community to say, “This is what we think is happening.” So I don’t want to suggest there isn’t a forum. I just don’t think considering AUSAs input alone should be seen as the way DOJ would make policy. It’s not necessarily the way things are done.

Kate Stith: There may be a democratic disconnect or failing here. Ron Weich and others have argued that on the local level drug sentences, and federal sentences more generally, appear to be inconsistent with community norms; they are too high. But members of Congress are elected by these same local citizens, and these lawmakers perceive that in order to be reelected they cannot suggest amelioration of federal sentencing laws. Ironically, whereas it was hoped that the Sentencing Guidelines would allow dispassionate expertise to prevail in sentencing, in fact just the opposite has happened: The visibility, saliency, and political potency of sentencing in federal court has increased tremendously.

Dan Freed: I’m struck by the array of analyses this morning about sources of disparity that members of the panel and the audience now view as justifiable. I wonder what Judge Marvin Frankel would have said had he heard this discussion? Is it possible that we are
today identifying types and sources of disparity that were not properly within the target range of Frankel’s analysis of inter-judge disparity when he wrote his book? I think it likely that many of the charges about sentencing judges and unwarranted disparity prior to 1984 were never sufficiently analyzed and documented by Frankel in 1973, or Congress in 1984, or the Commission that formulated the Guidelines in 1987. If there had been a sufficiently careful study and accurate data about pre-guidelines sentencing, wouldn’t the reformers in and out of Congress have distinguished more carefully in the Sentencing Reform Act between differences that were justifiable and those that were unwarranted? Between disparity that was properly attributed to judges and disparity that was produced by other actors and other causes? And if those distinctions were in fact not made when the Guidelines were originally conceived and drafted, shouldn’t we and the Sentencing Commission consider making them today in light of this Panel discussion?

IV. Research Needed to Probe the Causes of Disparity

Over the course of the discussion, several conference participants offered suggestions for further research. Bill Mercer said the Commission needs to capture Rule 35 data because without it, data on § 5K.1 motions have little meaning. Marc Miller stated that in order for researchers to study inter-judge disparity, they needed access to judge identifiers so they can determine which judges decided which cases. Bill Mercer agreed that judge identifiers were crucial to enabling scholars and practitioners to evaluate what judges are doing. He called upon the judges attending the conference to “go to bat for us on this with the administrative office of the courts.” But Marc Miller suggested a movement for the release of judge identifiers would be aided if U.S. attorneys took a strong position in favor of such a release.

To study the disparity caused by investigative and prosecutorial policies, Gregory Huber suggested scholars do fieldwork to collect data on what happens during the arrest and charging phases. Judge Kimba Wood echoed this request asking the Commission to look into prosecutorial charge disparity. Katherine Tang Newberger pointed out that the Transactional Records Access Clearinghouse (TRAC) maintained by Syracuse University gives the public access to the referral and declination data collected by the Department of Justice. She suggested the Department of Justice standardize what counts as a referral and declination so that the data provide an accurate picture from which researchers can learn about prosecutorial and investigative decisions.

Notes

1 Professor, Indiana University School of Law—Indianapolis; former Deputy Chief of the Southern Criminal Division, Office of the U.S. Attorney for the Southern District of Florida; and former special counsel to the U.S. Sentencing Commission.
4 See supra summary of proceedings for Panel I.
5 According to 2000 data, § 5K.1 departures were granted in 3.1 percent of the cases in the E.D. Okla. and 50.9 percent in the N.D.N.Y. See U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at 53–55 tbl. 26 (2000), but see Laura Storto, Getting Behind the Numbers: A Report on Four Districts and What They Do “Below the Radar Screen” (2002), available at http://www.law.yale.edu/outside/html/Centers/cen-sentencing.htm (arguing districts with different departure rates may still have the same sentencing outcomes); summary also available at the website and infra in this issue.
6 A second offender information is a document, which, when filed by the U.S. Attorney, triggers dramatically increased penalties in drug cases for persons who have previously been convicted of a felony drug offense. 21 U.S.C. § 851. The filing of a second offender information is discretionary with the prosecutor.
7 Assistant Federal Public Defender for the District of Arizona; chair of the Federal Defender Guidelines Committee; member of the U.S. Sentencing Commission’s Ad Hoc Committee on Indian Crimes; former Federal Defender Representative to the U.S. Sentencing Commission.
10 See supra notes 2 and 3.
11 Supra note 2.
12 U.S. Attorney for the District of Montana; Chair of the Subcommittee on the Sentencing Guidelines of the Attorney General’s Advisory Committee. Mr. Mercer’s comments constitute his thinking only and do not necessarily represent the beliefs of his colleagues or the Attorney General.
14 U.S. SENTENCING COMMISSION, supra note 5.
15 Id. at 55 tbl. 26.
16 Id. at 54 tbl. 26. But see Storto, supra note 5, who points out that districts that have different departure rates may still have the same aggregate sentences because the reliance on departures in District A may be to offset the fact that in District A, unlike in District B, the prosecutor refuses to plea bargain.
17 U.S. District Judge, District of Columbia.
18 Senior Research Associate, U.S. Sentencing Commission.
U.S. District Judge, District of Massachusetts.

See supra summary of proceedings for Panel I.

Yale Law School '03.

All data from this presentation is from the Transactional Records Access Clearinghouse, at http://www.trac.syr.edu.


Id. at 16 tbl. 3 and 51 app. 1 tbl. 1.


215 F.3d 969, 976 (9th Cir. 2000) (en banc).


See 28 U.S.C. § 994(c)(4)–(7), which calls on the Commission to consider:

(a) the community view of the gravity of the offense;
(b) the public concern generated by the offense;
(c) the deterrent effect that a particular sentence may have on the commission of the offense by others; and
(d) the current incidence of the offense in the community and in the Nation as a whole.

See MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 9 (1973) (“We must reject individual distinctions—discriminations, that is—unless they can be justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyncratic uokases of particular officials, judges or others.”).

Yale Law School '01.

Storta, supra note 5.


Professor, Marquette University Law School.

Lafayette S. Foster Professor, Yale Law School.


See § 994(c), supra note 31.

See supra notes 2 and 3.


Representative, North Carolina Academy of Trial Lawyers; Member, North Carolina Sentencing and Policy Advisory Commission.

Partner, Zuckerman Spaeder LLP; former chief counsel to Sen. Edward Kennedy on the U.S. Senate Judiciary Committee and special counsel to the U.S. Sentencing Commission.


Clinical Professor Emeritus of Law & Its Administration, Professorial Lecturer & Director, Criminal Sentencing Program; Editor, FEDERAL SENTENCING REPORTER.

Fed. R. Crim. P. 35(b). Under a Rule 35(b) motion, the sentence of a cooperating defendant is reduced after sentencing ... States. For sentencing purposes such a filing is deemed to be the equivalent of a substantial assistance pleading.

Assistant Professor of Political Science, Yale University.

U.S. District Judge, Southern District of New York.

The Transactional Records Access Clearinghouse is located at http://www.trac.syr.edu.