# PARITY, DISPARITY, AND ADVERSARIALITY: FIRST PRINCIPLES OF SENTENCING

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> Rule 2: Play Fair.[1]

> The constitution . . . is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process ''due process of law,'' by its mere will.[2]

## INTRODUCTION: PLAYING FAIR

Stark theoretical and ideological differences abound regarding the purpose of punishment, the circumstances under which it can be imposed, and who holds the ultimate authority to impose it. Because these age-old debates are not likely to be resolved in the near future, should Congress decide to address the issue of federal sentencing again, it ought to begin its inquiry from a point of consensus. Are there "first principles" of punishment and sentencing on which most Americans can agree? What lessons have we learned from the last thirty

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1. ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN 2 (1986).

2. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856).

years of sentencing reform and the past hundred years of criminal justice reform? One critical lesson has been that the connection between substance and procedure is quite formidable in virtually every aspect of criminal law. Procedural and substantive law ought to function together to create a justice system that is fair and reliable. Unfortunately, this lesson has gone virtually unheeded in the arena of criminal sentencing. The lack of attention to sentencing procedures has been one of the greatest failings of the last century's sentencing reform movement[3] and is the cause of much of the current upheaval in federal sentencing. Any revisions to the federal sentencing scheme should attend to the procedural and evidentiary law of sentencing as painstakingly as prior reform efforts did to the substantive law of sentencing. Most notably, the inattention—whether by design or neglect—to basic procedural safeguards threatens one of our most fundamental components of due process: the adversarial system of justice.

There are countless reasons why we ought to care about procedural rules that help regulate the adversarial system. Most obviously, the standardization of the sentencing process through procedural and evidentiary rules will influence the reliability of sentencing results. This effect is not to be underestimated. The absence of procedural fairness has tremendous societal costs. The public's faith in the criminal justice system rests upon the belief that the victor in an adversarial process has triumphed over a capable opponent who had a fair opportunity to soundly test her adversary's case.

But there is another benefit of procedural consistency and fairness that is specific to the federal sentencing enterprise. Insisting on fair procedural rules is a crucial means of achieving one of the principal goals of the Sentencing Reform Act: the elimination of unwarranted disparity in sentencing. The absence of procedural safeguards at sentencing has led to an underexamined form of disparity. Evidentiary and procedural rules—such as burdens of proof, standards of proof, exclusion of evidence, hearsay rules, and the like—attempt to instill a certain equilibrium or parity between the parties in any adversarial system. Their elimination undermines the credibility of the adversarial process and creates a disparity based more on the inequitable positions of the parties than on the reliability or relevance of the evidence presented.

Parity does not provide an absolute or inherent measure of fairness. In fact, we tend to rely on notions of parity or comparative fairness precisely when we are unable to reach a consensus regarding substantive fairness. Nonetheless, parity, and the procedural safeguards that undergird it, provides a useful barometer of fairness. The past century of criminal justice reform has taught us that parity is indispensable as a "first principle" of criminal law so long as our

3. *See* Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 315 (1992); *see also* Frank O. Bowman, III, *Completing the Sentencing Revolution: Reconsidering Sentencing Procedure in the Guidelines Era*, 12 FED. SENT'G REP. 187, 187 (2000).

judicial system is an adversarial one. Sentencing law has for too long been divorced from the rest of criminal procedure in this critical respect. Any attempt at lasting reform in sentencing law must seriously consider the parity question in a conscientious and realistic manner.

But what do we mean by parity in the context of criminal procedure? Two kinds of parity are essential to sentencing reform (and most criminal justice reform). First, there must be parity between defendants. The old Aristotelian principle still holds true: like cases are to be treated alike, and unlike cases unalike. The determination of which factors in a case are worthy of differentiated treatment has been traditionally left to the legislature. In the last several decades of federal sentencing, the legislature's primary goal has been to avoid unwarranted disparity.[4] The second type of parity with which criminal procedure has been concerned is that between a very powerful government and the individual accused. The outcome of a criminal case should never be the result of a power differential between the parties, but rather should be based on proof of the allegations. Structural disparity is inevitable because only the government can initiate charges and start the process that can lead to the deprivation of life and liberty. But procedural parity—fairness in the rules that govern how or to what extent the government may cause this deprivation—is both essential and achievable.

The issue of parity has been a critical component of every aspect of criminal justice reform with the notable exception of sentencing reform. The goal of parity between the parties is fundamental to the adversarial system. Some of the most notable cases in our history are grounded in the recognition that parity is a fundamental measure of justice. *Gideon v. Wainwright*[5] held that the right to counsel is constitutionally guaranteed, in part because of the absence of parity between lay defendants and professional prosecutors. *Miranda v. Arizona*[6] addressed the issue of informational parity between the accused and the government by requiring police officers to warn citizens of certain rights prior to custodial interrogation. *Griffin v. Illinois*[7] held that indigent defendants are entitled to free court transcripts for purposes of appealing their cases in an effort to establish a rough parity between rich and poor defendants.

One weakness of the Federal Sentencing Guidelines has been its attempt to strictly regulate the first form of parity (between defendants) through substantive sentencing law without addressing the other form of parity

4. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 51, 104 (1998) ("Reduction of 'unwarranted sentencing disparities' was a—probably *the*—goal of the Sentencing Reform Act of 1984."); MICHAEL TONRY, SENTENCING MATTERS 25 (1996) (stating that the idea of sentencing commissions was introduced "as a device for reducing sentencing disparities and judicial 'lawlessness'").

5. 372 U.S. 335 (1963).

6. 384 U.S. 436 (1966).

7. 351 U.S. 12 (1956).

(between parties) through procedural sentencing law. It is not surprising that this strategy has failed because, as I argue in this Article, these two types of parity work in tandem. The only way for a fact-finder (whether judge or jury) to know whether disparity or uniformity is warranted between specific cases is through the advocacy of the prosecutor and the defense attorney. If the relative procedural and evidentiary burdens and benefits bestowed on the different adversaries are grossly disproportionate, the adjudicator cannot adequately make the determinations required to avoid unjustified disparity at sentencing. The constant calibration of a leveled playing field between prosecution and defense is a necessary part of any successful sentencing structure. In this Article, I examine the interconnectedness of the two types of parity and their importance for sentencing reform in a properly functioning adversarial system.

## I. THE PROBLEM OF PROCEDURAL DISPARITY IN FEDERAL SENTENCING

As a normative matter, a defendant's sentence should reflect a range of factors. Most societies have determined that a criminal sentence ought to be based on the need for deterrence, punishment, justice, rehabilitation, reintegration, and victim compensation, among other goals. Different societies have traditionally valued these principles in different doses and combinations, but when a sentencing scheme strays too far from these goals, most would agree that it has gone awry. For example, a sentence based on legally irrelevant factors such as race, poverty, or lineage, to name some obvious examples, would be widely and justifiably considered inappropriate.

Sentences that are based on legally irrelevant factors are troublesome for two reasons. First, there is the obvious reason that such sentences represent an arbitrary use of government power. A government must have compelling reasons to justify the taking of life or liberty. If some of its reasons are unjustified, then the government's action is also unjustified. The second problem is the unwarranted disparity such sentences produce compared to the sentences of similar defendants convicted for similar crimes but based solely on legitimate factors. A judge who bestows an additional sentencing discount or penalty on all defendants for an arbitrary reason will invariably have disparate sentences from those judges who base their punishments strictly on legitimate sentencing principles. This harm is distinct from, but related to, the first harm, as the sentence is also inconsistent with the purposes of punishment.

These two harms were the focus of the sentencing reform movement of the last third of the twentieth century. Scholars and legislators complained that judges were imposing sentences based on individually determined factors, including legally irrelevant factors such as race, gender, and wealth.[8] Moreover, the judicial discretion that permitted sentences based on a wide

8. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895-97 & nn.73-84 (1990).

variety of factors (some of which were deemed inappropriate) was widely criticized for leading to inconsistent sentences in similar cases.[9] The Federal Sentencing Guidelines, the culmination of the sentencing reform movement in the federal system, were borne of the growing support for regulating the "input" factors of sentencing to create uniformity of sentencing "outputs."

In order to regulate sentencing outcomes, the authors of the Guidelines—the United States Sentencing Commission—focused on standardizing the substantive law of sentencing. That is, the bulk of their efforts were devoted to the arduous task of assigning a fixed range of punishment severity to every crime and its accompanying mitigating or aggravating circumstances. While recognizing the importance of reliable sentencing procedures,[10] the Commission devoted little attention to establishing evidentiary and procedural standards.[11] Important questions like burdens of proof, hearing procedures, and fact-finding procedures were left to the implementation of individual judges.[12] The Commission's vague statements suggesting that "more formal proceedings should be required at sentencing under the guidelines" fell on deaf ears.[13] Not surprisingly, most courts applied the same procedural and evidentiary rules under the new Guidelines scheme as they had under the pre-Guidelines indeterminate sentencing system—that is, almost no procedural or evidentiary safeguards at all.

The well-known case of *Williams v. New York*[14] is perhaps most frequently cited in support of the proposition that defendants are entitled to few procedural or evidentiary rights in the indeterminate sentencing process. Samuel Williams was convicted of murder by a jury that also recommended a sentence of life imprisonment. At a sentencing hearing, the judge sentenced Williams to the death penalty, citing past offenses and describing him as a "menace to

9. Though these critiques of the existing sentencing schemes were levied by many, the most notable proponent was Judge Marvin Frankel. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); *see also* PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 2-3 (1977) (arguing that because judges "are left on their own to develop their own sentencing philosophies," there is no requirement that sentences "have any rational basis whatsoever"); Mark Berger, *Equal Protection and Criminal Sentencing: Legal and Policy Considerations*, 71 NW. U. L. REV. 29, 41-44 (1976) (arguing that penal statutes provide little or inconsistent guidance for sentencing judges); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 916 (1962) (decrying the absence of "control and guidance" among sentencing judges).

10. U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS, ch. 6, pt. A, at 6.1 (intr. cmt.) (1987).

11. For an excellent discussion of the glaring inattention to sentencing procedures under the Guidelines, see Douglas A. Berman, *Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 656-60 (2005); *see also* STITH & CABRANES, *supra* note 4, at 154 (noting that "the Commission's Policy Statements prescribe few procedural safeguards" to ensure reliable fact-finding at sentencing).

12. STITH & CABRANES, *supra* note 4, at 154.

13. *See* Herman, *supra* note 3, at 315.

14. 337 U.S. 241 (1949).

society."[15] The information on which the judge relied was obtained from a presentence report that in turn relied on witnesses and records that Williams was not permitted to confront or cross-examine. Moreover, most of the information in the report—described by one Justice as irrelevant, incompetent hearsay, and damaging—would not have been admitted at trial.[16] Williams's claims on appeal to certain due process and procedural rights at the sentencing hearing were rejected by the Supreme Court. The *Williams* Court explained that in this indeterminate sentencing scheme, judges needed access to "the fullest information possible concerning the defendant's life and characteristics."[17] The Court further noted that an individualized sentencing system in which constitutional due process rights were recognized would be impractical and time consuming.[18] The *Williams* conclusion, troublesome and probably wrong even in the context of indeterminate sentencing, has no place in determinate sentencing schemes.

Since *Williams*, much of the nation has moved away from indeterminate sentencing toward determinate or guidelines sentencing. By 2000, almost every state jurisdiction, as well as the federal government, had adopted some sort of determinate sentencing scheme.[19] Noting this development, several commentators have questioned the applicability of the *Williams* holding to guidelines sentencing.[20] The absence of procedural and evidentiary standards in *Williams* was justified on the grounds that indeterminate sentencing is rehabilitative and not adversarial—a claim that can hardly be made about the Federal Sentencing Guidelines or most determinate sentencing systems. Yet almost no jurisdiction had moved away from the procedural lawlessness sanctioned in *Williams* for the indeterminate sentencing process. It is of little surprise, then, that when the U.S. Sentencing Commission left the evidentiary and procedural rules of federal sentencing to judges, without much more guidance than the suggestion that the process be rendered more formal and reliable, little was done. It is this failing of the Federal Guidelines system—the absence of established procedural rules and safeguards during the sentencing process—that is at the heart of the current crisis in sentencing law. The lack of due process guarantees in our Federal Guidelines (and now advisory or quasi-Guidelines) system has led to the twin problems of unreliability in fact-finding and unwarranted sentencing disparities.

15. *Id.* at 244.

16. *Id.* at 253 (Murphy, J., dissenting).

17. *Id.* at 247.

18. *Id.*

19. NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 125 (2004).

20. *See* Joshua Herman, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1858 n.615 (2004); Herman, *supra* note 3, at 317-20 (arguing that *Williams* is limited to a "discretion-oriented, indeterminate sentencing system" like those previously found in many state courts).

## II. RESCUING THE ADVERSARIAL SYSTEM FROM DISPARITY

It has been said that the principal goal of the Federal Sentencing Guidelines has been "to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice."[21] While focusing squarely on the reduction of unwarranted disparity, we have lost sight of the fact that evenhandedness and neutrality are related to disparity and are independently important aspects of achieving a just sentencing system.

The move away from neutrality and parity among parties has been largely attributed to the argument that sentencing is now primarily rehabilitative rather than adversarial. If this was ever true—and I doubt that it was—it is certainly no longer the case under a determinate guideline sentencing system. Given that over ninety percent of federal criminal cases result in guilty pleas, the sentence is often the only disputed aspect of the vast majority of cases. Yet the rules of evidence are not observed, the standard of proof is "preponderance of the evidence"—not even "clear and convincing evidence," let alone "beyond a reasonable doubt"—there is no right to confront witnesses, and there is still no right to jury fact-finding following *United States v. Booker*[22] and *Blakely v. Washington*.[23] In other words, there is a lot of room for procedural regulation at sentencing and little justification to evade it.

Few could contest that the principles underlying the rules of evidence and procedure in the guilt-innocence phase of a prosecution would also be beneficial at the sentencing phase. There are specific checks and balances that ought to be considered in developing a new sentencing scheme and to maintain the parity and equity between the parties that a just adversarial system demands. In the Part that follows, I consider three aspects of the existing federal sentencing scheme that warrant reconsideration. While the examples are not exhaustive, they are illustrative and highly feasible. Any of these would be a tremendous step toward achieving fair play and parity in a sentencing regime that is rightly recognized as adversarial.

## III. DISPARITY BASED ON STANDARD OF PROOF AT SENTENCING

In his opinion in *Blakely v. Washington*, Justice Scalia identified one of the core problems involving the issue of proof.[24] He cautioned against a system in which the jury is relegated to making a determination that the defendant at some point did something wrong—a mere preliminary to a judicial inquisition

21. Koon v. United States, 518 U.S. 81, 113 (1996).
22. 125 S. Ct. 738 (2005).
23. 124 S. Ct. 2531 (2004).
24. *Id.* at 2538-39.

into the facts of the crime the state actually seeks to punish.[25] Justice Scalia's description was all too accurate in depicting exactly the system that prevailed in federal criminal court. A federal prosecutor need only possess enough reliable, admissible evidence to convict the defendant of something beyond a reasonable doubt; once the conviction is obtained, the prosecution can use virtually any information it possesses in order to obtain the desired sentence. The information proffered for sentencing need not reach the same level of reliability or verifiability as the information required to convict.

The most striking example of this is the Federal Guidelines' treatment of what it calls "relevant conduct." Relevant conduct can be uncharged or acquitted conduct of a convicted defendant used to enhance the penalty at sentencing.[26] For example, a defendant who pleads guilty to distributing one kilogram of cocaine can be sentenced for the sale of one-hundred kilograms at sentencing if the prosecution presents some evidence of other sales on separate occasions. The other sales need not have been formally charged or proven beyond a reasonable doubt to a judge or jury. Nor is the defendant entitled to notice at the time of his indictment or even at his plea that the unproven conduct will be a factor at sentencing. In fact, in many instances the prosecutor may decline to formally charge the additional conduct precisely because the evidence to support it is weak or lacking entirely.

The justification for considering uncharged or acquitted conduct is to account for meaningful differences between offenders. This way, so the argument goes, defendants will be sentenced based on their actual conduct and not on what the prosecutor has elected to charge. In other words, real-offense sentencing purports to reduce disparity arising from prosecutorial discretion. Ironically, the cure for the potential abuse of prosecutorial discretion is greater discretion and empowerment through the creation of a procedural subsidy. The lower burden of proof and absence of evidentiary requirements for sentencing facts, including those relating to relevant conduct, greatly empower the prosecutor to increase the offender's sentence.

Subsidizing the prosecution's case in this way is dangerous and unnecessary. First, the decision to employ real-offense sentencing does not require a lower burden of proof. Even if lawmakers decide to retain the use of relevant conduct at sentencing, such conduct should still be required to meet the reasonable doubt standard to ensure the reliability of the evidence. Second, the prosecutorial subsidy resulting from the lower burden of proof produces inconsistent results that seriously threaten the goal of reducing sentencing

25. *Id.* at 2539.

26. A finding of relevant conduct requires a judge to sentence a defendant not only for charged conduct, but also for "any additional criminal behavior related to the present offense." STITH & CABRANES, *supra* note 4, at 70 (emphasis omitted). This includes other "uncharged (or even acquitted)" crimes that the defendant may have committed or crimes committed by her accomplices in jointly undertaken activities. *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004).

disparity and undermine our adversarial system of adjudication. The prosecution should not, and often does not, need an unfair advantage to obtain a legitimate sentence. A justified sentence should be just that: justified on the basis of reliable evidence and proven beyond a reasonable doubt.

Under the Federal Sentencing Guidelines, the prosecution could obtain the sentence it desires even if it could not prove all the facts necessary to justify the sentence beyond a reasonable doubt. And the impact of this change goes well beyond sentencing. This evidentiary subsidy strengthens the government's power in plea negotiations and creates a system in which the government need only prove enough to get to the sentencing hearing, at which it can obtain a longer sentence without the limitations imposed on lawyers by the Federal Rules of Evidence and the higher burden of proof. The sentencing changes brought on by *Blakely*[27] and *Booker*[28] have done little to address this problem.[29] Until it is addressed, a fundamental inequity will persist in federal sentencing that will in turn create inequitable and disparate sentences.

## IV. DISPARITY FROM THE SHIFTING BURDEN OF PROOF

One critical tenet of the American criminal justice system is that the state bears the burden of proving every element of the charged offense beyond a reasonable doubt.[30] This principle minimizes the risk of faulty outcomes and helps ensure that the community feels respect for and confidence in the criminal justice system.[31] Although the Guidelines have not adopted the "reasonable doubt" standard at sentencing, they rightfully place the burden of proof for most sentencing enhancements on the prosecution.[32] In most instances, the prosecution bears the burden of proving any sentence increases by a preponderance of the evidence, and the defense bears a similar burden in proving sentence decreases.[33]

Placing the burden of proof on the government for sentence increases is

27. 124 S. Ct. at 2531.

28. 125 S. Ct. at 738.

29. *See* Margareth Etienne, *Into the Briar Patch?: Power Shifts Between Prosecution and Defense After* United States v. Booker, 39 VAL. U. L. REV. 371 (2005).

30. The Supreme Court stated in *In re Winship*, 397 U.S. 358, 364 (1970), that the Due Process Clause of the Constitution requires prosecutors to persuade the judge or jury "beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged."

31. *Id.* at 363-64.

32. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2004).

33. *See* United States v. Kirk, 894 F.2d 1162, 1164 (10th Cir. 1990) (holding that the government bears the burden of proof for sentence increases under the Guidelines, while the defendant bears the burden of proof for sentence decreases—"[e]vidence which does not preponderate or is in equipoise simply fails to meet the required burden of proof"); United States v. Urrego-Linares, 879 F.2d 1234, 1239 (4th Cir. 1989) (holding that the government should bear the burden when it "seeks to enhance the sentencing range and potentially increase the ultimate sentence").

procedurally and constitutionally sound as a matter of due process. However, it is possible to fashion a sentencing scheme in which the substantive provisions have an unintended and deleterious effect on the traditional allocation of evidentiary burdens. The U.S. Sentencing Commission did just that with the Federal Guidelines. The allocation of burdens between the prosecution and defense does not necessarily function in practice as it was intended in theory. In theory, the prosecutor must provide reliable evidence to prove the offense beyond a reasonable doubt and also has the burden to prove any enhancing sentencing factors. The defense has no burden to disprove the government's allegations, but rather ought to put the government's evidence "to the test" through cross-examination and counteracting evidence, if available. This confrontation of the evidence is the constitutional right of the defendant[34] and the duty of her zealous attorney.[35]

But under the Federal Guidelines, attempts to challenge or even question the government's evidence may place the defendant in a worse position at sentencing.[36] At least one study has shown that these challenges can lead to a higher sentence based on the finding that the defendant has either failed to accept responsibility or has obstructed justice.[37] Once the prosecutor alleges that the defendant has not accepted responsibility for her conduct, the burden of proof shifts to the defense to demonstrate that she is entitled to a sentencing reduction under that provision.[38] The clearest way for a defendant to justify her

34. U.S. CONST. amend. VI (mandating that, in criminal prosecutions, the accused has the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence").

35. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt.1 (2003) [hereinafter MODEL RULES] ("A lawyer must . . . act with commitment and dedication to the interests of the client . . . ."); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1980) [hereinafter MODEL CODE] ("A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules."); *see also* MODEL RULES, *supra*, at R. 1.3 cmt.1 ("A lawyer must also act . . . with zeal in advocacy upon the client's behalf."); MODEL CODE, *supra*, at EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.").

36. Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2111 (2003) [hereinafter Etienne, *Regulating Advocacy*] (arguing that the Federal Guidelines permit judges to regulate the nature and degree of defense attorney advocacy by withholding certain Guidelines benefits at sentencing).

37. Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 443-62 (2004) [hereinafter Etienne, *The Declining Utility of the Right to Counsel*]; *see also* Etienne, *Regulating Advocacy*, *supra* note 36, at 2143-47 (discussing how strong attorney advocacy can be used as the basis for a higher sentence on grounds that the defendant has failed to accept responsibility).

38. A defendant has the burden to show that she is entitled to a sentencing reduction under the Guidelines for acceptance of responsibility. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2004); *see also* United States v. Nguyen, 339 F.3d 688, 690 (8th Cir.

initial challenge to the prosecution's proffered evidence of offense level or enhancement is by disproving it. Although technically the burden to prove the offense level or enhancement remains with the prosecution, the structure of the Guidelines essentially shifts the burden to the defense, which must then disprove any allegations regarding the offense. If the defendant challenges the government's evidence as inadequate without presenting affirmative proof, she places herself at risk of a higher sentence. As a result, defense lawyers may be reluctant to challenge the government's case unless they can affirmatively prove it to be incorrect.

This form of burden-shifting is not a necessary component of guidelines sentencing. Nor is it critical to an "acceptance of responsibility" or "obstruction of justice" provision. The purpose of provisions such as the acceptance of responsibility provision is to reward remorse and encourage efficiency through quick guilty pleas. But the federal version of that provision is an ambiguous catch-all category that permits a two- or three-level sentence reduction under a variety of circumstances. A provision that treats the reduction as a plea discount would accomplish the goals of efficiency in various ways. First, a plea discount would more certainly encourage pleas than a system in which a guilty plea is only one of several factors to be considered. Second, a clearer standard would help reduce appeals. The acceptance of responsibility provision is the fourth most commonly appealed Guidelines issue by defendants and the second most commonly appealed issue by prosecutors.[39]

In addition to the efficiency arguments, a provision that shifts the burden of proof from the prosecution to the defense is problematic for other reasons. The placing of the burden of proof on the government is designed to enhance accuracy as well as fairness. Shifting the burden to the defense increases the risk of unwarranted and elevated sentences. In any sentencing system that penalizes advocacy or threatens the adversarial proceedings, defendants will base their challenges not on the merits of their claims, but on their level of risk aversion or the quality of their counteracting evidence. Both these factors should be irrelevant to the severity of the sentence imposed. Imposing clear and consistent standards for sentence reductions and enhancements is critical to any sentencing scheme that seeks to avoid the disparity that surely results from ambiguity and burden-shifting.

## V. DISPARITY RESULTING FROM SENTENCING COMPLEXITY

One central criticism levied against the Federal Sentencing Guidelines deals with its complexity. Referred to as the "Forty-Three-Level Sentencing

2003); United States v. Ngo, 132 F.3d 1231, 1233 (8th Cir. 1997).

39. U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbls.57 & 58; *see also* Michael M. O'Hear, *Remorse, Cooperation, and the "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1524 (1997).

Machine,"[40] the Federal Guidelines are far more complicated than most state guidelines systems. For instance, Minnesota's guidelines have ten severity levels, while Pennsylvania and Washington have thirteen and fourteen, respectively.[41] Some states have raised concerns about the complexity of the federal grid and its seeming arbitrariness in assigning sentence severity to some offenses over others. But an equally important problem with the "sentencing machine" is the high error rate flowing from such a highly mechanical and complicated system. This error rate problem can be viewed as one of parity. Although studies have shown that judges,[42] probation officers,[43] and other so-called Guidelines experts arrive at very different results when given similar facts, the party most harmed by any complex sentencing scheme will be the defendant and her lawyer.[44]

Unnecessary complexity will almost always benefit the repeat player in federal court. Although most federal districts have federal defense organizations staffed by attorneys who are highly experienced repeat players,[45] the majority of criminal defendants are represented by panel attorneys who are far less experienced. The Federal Guidelines are replete with legal minefields and loopholes requiring the guiding hand of counsel.[46] The more complicated the sentencing scheme, the more defendants need the expertise of a Guidelines specialist rather than the more limited competence of a generalist.[47] Guidelines competence is important at every stage of the criminal process, including

40. TONRY, *supra* note 4, at 98 (internal quotations omitted).

41. *Id.*

42. *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 165 (1991) (arguing that "[v]arying approaches in guidelines application among district courts and sentencing judges and among probation offices and officers also account for disparities"); *cf.* Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 241 (1999) (finding that despite a notable reduction in interjudge disparity in sentences, significant disparities remain).

43. TONRY, *supra* note 4, at 99 (describing a Federal Judicial Center report in which a study showed that forty-seven probation officers who were asked to conduct Guidelines calculations based on the same facts produced widely varying results).

44. *See generally* Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435 (2002).

45. One study by Ilene Nagel and Stephen Schulhofer shows that federal public defenders generally know the Guidelines better than prosecutors and private attorneys. *See* STITH & CABRANES, *supra* note 4, at 128. In addition, the Commission to Review the Criminal Justice Act reports that the overall level of representation provided by federal defense organizations—including federal public defenders and community defense organizations—is "excellent" and could serve as a model for other states and nations. *See* Inga L. Parsons, *"Making It a Federal Case": A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837, 839 n.7 (citing COMM. TO REVIEW THE CRIMINAL JUSTICE ACT, REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT (1993), *reprinted in* 52 Crim. L. Rep. (BNA) 2265, 2285, 2294 (1993)).

46. *See* Etienne, *The Declining Utility of the Right to Counsel*, *supra* note 37, at 482.

47. *See id.*

indictment, trial, plea negotiation, and sentencing.[48] As sentencing becomes more technical and intricate, the disparity of sentencing outcomes grows based not on the nature of the offense, but on the quality of the representation.

A tremendous knowledge gap currently exists between federal public defenders and private lawyers, many of whom understand little about the intricate Guidelines.[49] This knowledge gap—starting off as a disparity between attorneys—leads to a disparity in sentencing outcomes among defendants. And while there will always be some difference between the comparative skills and abilities of criminal defense attorneys, a sentencing system that unnecessarily magnifies these differences should be avoided.

The caution regarding sentencing complexity and its tendency to magnify already existing differences between the quality of counsel is a serious problem with the existing forty-three-level machine, but becomes even more relevant as Congress considers alternative sentencing schemes. A few of the proposals that have been discussed are particularly likely to increase disparity between similarly situated defendants. For instance, a Guidelines "fix" that raises the presumptive sentence to the statutory maximum from which the defendant must justify a variance relies heavily on the abilities of the defense to identify and carry this new burden of proof. Defendants with incompetent or ineffective counsel will receive sentences at or near a statutory maximum that, in most cases, were never intended to be the actual sentences. Similarly, sentencing "fixes" that create mandatory or de facto mandatory minimums tremendously empower prosecutors during the charging and plea bargaining stages—such a system creates additional inter- and intradistrict disparity. Increased prosecutorial discretion often means that lawyers who have ongoing working relationships with the prosecutors,[50] who have a more intricate knowledge of the Guidelines variables,[51] or who are better negotiators[52] will obtain significantly better sentencing results for their clients. Mandatory minimum schemes are particularly susceptible to this form of disparity because those who can avoid the mandatory minimums are often exponentially better off than those who cannot. This is known as the "cliff effect" of mandatory systems. A defendant who faces a ten-year minimum sentence for distribution of five kilograms of cocaine but faces a three-year sentence for 4.99 kilograms will be significantly better off with a zealous attorney who hires a myriad of experts to

48. *See id.* at 483; *see also* STITH & CABRANES, *supra* note 4, at 128.

49. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 546 (1992).

50. *See* Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (1967) (describing defense attorneys, judges, and prosecutors as cooperative players in the courtroom and explaining how their relationships affect case outcomes).

51. Etienne, *The Declining Utility of the Right to Counsel*, *supra* note 37, at 482-83.

52. *See* Nagel & Schulhofer, *supra* note 49, at 542 (noting that prosecutors use charge and fact bargaining to influence sentencing results in a significant percentage of cases).

weigh and reweigh the evidence or who can successfully bargain away the 0.01 kilogram with the prosecutor. This disparity in sentencing is stark even though most would agree that the difference in offense severity is negligible.[53]

Unfortunately, this sort of disparity will not be easily eliminated in a new sentencing system that relies so heavily on the abilities and characteristics of prosecutors and their defense attorney adversaries. Indeed, efforts by the Commission and the Department of Justice to regulate disparity resulting from prosecutorial discretion have been historically inconsistent and unsuccessful.[54]

## CONCLUSION

The lower standard of proof at sentencing, the shifting burden of proof, and the complexity of the sentencing scheme represent only three of the many threats to the adversarial process on which our justice system is founded. The prosecutorial and defense functions are too different in kind to require a formalistic equality between them. Nonetheless, there must be a genuine effort at leveling the playing field between the parties in some key respects. Some checks and balances for the sentencing process include burdens of proof, applicability of rules of evidence, regulation of appellate waivers, regulation of benefits/penalties for advocacy decisions (such as acceptance of responsibility, obstruction, etc.), and transparency in plea bargaining, screenings, and declinations. Many of these specific issues have been discussed in greater detail by the other authors in this Issue. Despite their different proposals and recommendations, what many of these scholars have in common is a shared recognition that the federal sentencing system has long been lacking a healthy adversarial process. Without greater attention to procedural protections during sentencing, we risk sentencing outcomes that are unjust, inconsistent, and untrusted by the general public.

53. DEMLEITNER ET AL., *supra* note 19, at 91.
54. STITH & CABRANES, *supra* note 4, at 136-39, 145.