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## THE DECLINE AND POTENTIAL COLLAPSE OF FEDERAL GUIDELINE SENTENCING

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[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.

—Judge Marvin E. Frankel (1972)<sup>1</sup>

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1. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1972).

We continue to enforce the Guidelines as if, by magic, they have produced uniformity and fairness, when in fact we know it is not so. In the view of many, myself included, the Guidelines merely substitute one problem for another, and the present problem may be worse than its predecessor. . . .

....

I tend to agree with the many judges who have spoken out against the Guidelines—they are indeed a bit of a farce.

—Judge Harry T. Edwards (1991)<sup>2</sup>

## I. INTRODUCTION

Although it represents an impressive intellectual effort, the present federal sentencing structure is markedly dysfunctional in practice. A recent directive by the Attorney General,<sup>3</sup> to all federal prosecutors, makes an already deeply flawed system so unjust that it deserves speedy replacement. This Article begins by discussing the nature of the problem. Then, the Article discusses the problem's recent history regarding the scope of prosecutive discretion, both traditionally and under the Sentencing Reform Act and Guidelines, and the efforts to reduce the effect of prosecutive discretion. It concludes with a consideration of what is to be done to rectify the problem.

Before the Sentencing Reform Act of 1984 ("SRA")<sup>4</sup> became effective in 1987, federal trial court judges had almost total discretion in the sentences to impose on convicted defendants, provided that the sentences were within statutory limits.<sup>5</sup> In view of the possibility of conviction on multiple counts,<sup>6</sup>

2. *United States v. Harrington*, 947 F.2d 956, 967-68 (D.C. Cir. 1991) (concurring opinion).

3. *See infra* notes 27-34 and accompanying text.

4. Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3586 (1994) and 28 U.S.C. §§ 991-998 (1994)) [hereinafter "SRA"].

5. Sentences to imprisonment were subject to possible release on parole following completion of one-third of the sentence, unless earlier parole eligibility was specified by the sentencing judge. 18 U.S.C. § 4205 (1976) (repealed effective Nov. 1, 1986, Pub. L. No. 98-473, tit. II, ch. II, §§ 218(a)(5), 235, 98 Stat. 1976, 2027, 2031 (1984)). The upper portion of a sentence to imprisonment, consisting of about one-third, was also subject to reduction for "good time" (good behavior in prison). 18 U.S.C. § 4161 (1976) (repealed effective Nov. 1, 1986, Pub. L. No. 98-473, tit. II, ch. II, §§ 218(a)(4), 235, 98 Stat. 1976, 2027, 2031 (1984)). A more limited good time reduction was substituted. *See* 18 U.S.C. § 3624(b) (1994). A lesser reduction was also available for employment in prison ("industrial good time"). 18 U.S.C. § 4162 (1976) (repealed effective Nov. 1, 1986, Pub. L. No. 98-473, tit. II, ch. II,

the imposition of consecutive sentences, and the heavy maximum penalties often authorized by Congress for individual felonies, these limits were not very constraining. Because the exercise of sentencing discretion was subject to great variations in the decisions of different judges and parole officials, wide disparity in outcomes of seemingly similar cases, involving similar defendants, was not uncommon.<sup>7</sup>

The SRA was designed to greatly reduce this disparity. As the Senate Judiciary Committee Report states:

In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may

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§§ 218(a)(4), 235, 98 Stat. 1976, 2027, 2031 (1984)). The former presumptive unreviewability of sentences is discussed in *United States v. Rosenberg*, 195 F.2d 583, 584-87 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952), and generally in *Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 260 (1962) (remarks of Kaufman, J.) ("[T]he various federal appellate courts continue to reiterate their adherence to the common law doctrine of non-reviewability of criminal sentences."). However, sentences remained subject to appellate reversal on procedural due process grounds. *Townsend v. Burke*, 334 U.S. 736 (1948).

6. The liberal standards of Rule 8(a) of the Federal Rules of Criminal Procedure facilitate the joinder of offenses in federal prosecutions. Indeed, failure to join offenses may result in collateral estoppel preclusion of later prosecutions under the double jeopardy clause. *Grady v. Corbin*, 495 U.S. 508 (1990); *Ashe v. Swenson*, 397 U.S. 436 (1970).

7. FRANKEL, *supra* note 1, at 69; see S. REP. NO. 225, 98th Cong., 1st Sess. 41 (1983); ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FED. JUDICIAL CTR., FJC NO. 74-4, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT *passim* (1974).

receive widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely.<sup>8</sup>

After years of failing to replace the federal criminal code with a more rational one,<sup>9</sup> a more limited reform seemed possible.<sup>10</sup> Proposed sentencing reform drew support from both liberals and conservatives;<sup>11</sup> replacing the anxieties and disparities of imprisonment on judge-imposed indeterminate sentences appealed to the former, while the possibility of limiting the power of lenity of judges and parole officials appealed to the latter.<sup>12</sup> In any event, the major decisions as to sentencing parameters could be delegated to a commission, and a struggle to achieve congressional agreements avoided. With the vital advantage of being attached to a last minute omnibus funding bill in the House of Representatives, the SRA was ultimately enacted as part of a law and order effort in a presidential election year.<sup>13</sup>

By creating a commission to establish guidelines that, presumptively, are binding on district court judges, the SRA would markedly reduce discretion and greatly enhance uniformity of sentencing outcomes. For example, one of the techniques of control requires that the maximum guideline sentence not be more than one-quarter longer than the minimum sentence, or six months, whichever is greater.<sup>14</sup> Another guideline narrowly circumscribes the situations in which judges are allowed to depart from the prescriptions of the guidelines.<sup>15</sup>

To achieve the goal of minimizing judge-created disparities, the danger of merely shifting discretion from the district court judges to other actors in the criminal justice process had to be faced. One such actor was the United States Parole Commission, which had authority to release inmates prior to

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8. S. REP. NO. 225, *supra* note 7, at 38. "Such disparate release dates are the result of the wide discretion granted to sentencing judges and the United States Parole Commission under current Federal law." *Id.* n.6 (citing 18 U.S.C. §§ 4203, 4206-4207).

9. *See infra* text accompanying note 48.

10. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

11. *Id.* at 230-36.

12. *Id.* Some of the reformers also were concerned that existing factors related to judicial and parole decisions, including education, employment skills and record, and family ties, and resulted in disproportionate adverse impact on racial minorities. *Id.* at 231.

13. *Id.*

14. 28 U.S.C. § 994(b)(2) (1994).

15. 18 U.S.C. §§ 3563(c), 3564, 3573, 3582(c) (1994).

completion of their maximum terms of confinement.<sup>16</sup> The SRA addressed this problem by abolishing parole for persons sentenced under the guidelines to be established by the Sentencing Commission.<sup>17</sup>

A more difficult task was to prevent shifting sentencing discretion to federal prosecutors. Prosecutors are responsible for choosing whether to institute a federal prosecution, which charges to bring, and which plea agreements to accept. Therefore, their power to control outcomes has greatly expanded while the federal judges are constrained by the Guidelines. The Sentencing Commission, an agency of the judicial branch of government,<sup>18</sup> was authorized to control judges but not prosecutors—a part of the executive branch. Congress also heightened this amplification of prosecutive power to affect sentences by enacting harsh mandatory minimum statutes in the important drug offense area.<sup>19</sup>

In the course of discussions between representatives of Congress and the Justice Department while Congress considered the SRA, Justice Department officials agreed to issue instructions to federal prosecutors in an attempt to limit the exercise of their prosecutive discretion.<sup>20</sup> On November 1, 1987, the effective date of the Sentencing Guidelines, the Justice Department distributed the first of a series of directives to federal prosecutors in order to reduce the likelihood that their decisions might undercut the Guidelines.<sup>21</sup> The Associate Attorney General issued a second, similar memorandum two days later, requiring that “the prosecutor should charge the most serious offense or offenses consistent with the defendant’s conduct.”<sup>22</sup> On March 13, 1989,

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16. 18 U.S.C. § 4205(a), (b)(2) (1976) (repealed by the SRA, Pub. L. No. 98-473, tit. II, ch. II, § 218(a)(5), 98 Stat. 1976, 2027 (1984)).

17. 18 U.S.C. §§ 3563(b), 3583(d) (1994). The Parole Commission’s authorizing legislation, codified at 18 U.S.C. § 4203 (1988), was repealed by the SRA, Pub. L. No. 98-473, tit. II, ch. II, § 218(a)(5), 98 Stat. 1976, 2027 (1984). The Commission has continued to function to make parole decisions with respect to persons sentenced prior to the effective date of the SRA. *Id.* § 235(a)(1); 18 U.S.C. § 3551 note (1994).

18. 28 U.S.C. § 991(a) (1994) (“an independent commission in the judicial branch of the United States”).

19. *See* 21 U.S.C. §§ 841(b), 960(d) (1994). *See also* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 6053, § 1018(c), 102 Stat. 4181.

20. Telephone Interview with Ronald L. Gainer, former Deputy Associate Attorney General (Mar. 25, 1996). It was believed that the level of disparity in decisions by Assistant United States Attorneys exceeded that of federal judges. *Id.*

21. U.S. DEP’T OF JUSTICE, PROSECUTOR’S HANDBOOK OF SENTENCING GUIDELINES AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984 (Nov. 1, 1987), *excerpted in* 6 FED. SENTENCING REP. 333 (1994).

22. *See* Memorandum from Stephen S. Troot, Associate Attorney General, to All Litigating Division Heads and All United States Attorneys (Nov. 3, 1987), *reprinted in* 6 FED. SENTENCING REP.

Attorney General Richard Thornburgh issued a memorandum ("Thornburgh Memorandum") stating:

[A] federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. . . .

....

The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability to prove a charge for legal or evidentiary reasons.<sup>23</sup>

The issuance of a bluesheet on plea bargaining by Acting Deputy Attorney General George Terwilliger on February 7, 1992, further prescribed procedures to enforce the Thornburgh Memorandum.<sup>24</sup> It required that all plea agreements, entered into by government attorneys, be approved by at least a supervisory Assistant United States Attorney or a supervisory attorney of a litigating division of the Department of Justice.<sup>25</sup> These supervisory attorneys must evaluate the proposed agreement to assure its appropriateness under the Thornburgh Memorandum.<sup>26</sup>

A primary thrust of these efforts was to recognize the primacy of the Congress, the Sentencing Commission, and the federal judges in federal sentencing policy and to prevent, insofar as it seemed possible, ad hoc and disparate leniency from creeping into the process by action of federal prosecutors. In other words, Justice Department policies furthered objectives of the Guidelines, consistency, and severity at the expense of leniency, tolerance, and individualization.

With the appointment and confirmation of Janet Reno as Attorney General, priorities more sympathetic to defendants soon became apparent.

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342, 342 (1994).

23. Memorandum from Dick Thornburgh, Attorney General, to Federal Prosecutors (Mar. 13, 1989), *reprinted in* 6 FED. SENTENCING REP. 347, 347-48 (1994) [hereinafter Thornburgh Memorandum].

24. Memorandum from George J. Terwilliger, III, Acting Deputy Attorney General, to Holders of United States Attorneys' Manual Title 9 (Feb. 7, 1992), *reprinted in* 6 FED. SENTENCING REP. 350 (1994) [hereinafter Terwilliger Bluesheet].

25. *Id.*

26. *Id.*

Without explicitly revoking the prior memoranda, Reno issued a bluesheet ("Reno Bluesheet") to all federal prosecutors to "clarify the Department's policy concerning the principles that should guide federal prosecutors in their charging decisions and plea negotiations."<sup>27</sup>

It should be emphasized that charging decisions and plea agreements should reflect adherence to the Sentencing Guidelines. However, a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. Thus, for example, in determining "the most serious offense that is consistent with the nature of the defendant's conduct, that is likely to result in a sustainable conviction," . . . it is appropriate that the attorney for the government *consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation. Note that these factors may also be considered by the attorney for the government when entering into plea agreements.*<sup>28</sup>

Taken literally, the Reno Bluesheet represents a revolutionary step in federal sentencing policy. The constraints on the judiciary imposed by the SRA, the mandatory penalty statutes, and the Guidelines of the Sentencing Commission are, of course, undisturbed. However, the bluesheet explicitly permits federal prosecutors to consider everything which federal judges could take into account prior to the imposition of the Guidelines.<sup>29</sup> Furthermore, the Reno Bluesheet merely requires that charging and plea decisions "be made at

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27. Memorandum from Janet Reno, Attorney General, to Holders of U.S. Attorneys' Manual, Title 9 (Oct. 12, 1993), reprinted in 6 FED. SENTENCING REP. 352 (1994) [hereinafter Reno Bluesheet].

28. *Id.* (emphasis added).

29. See 18 U.S.C. § 3553(b) (1994) (permitting the court to take into account an aggravating or mitigating circumstance not considered by the Guidelines when imposing sentence).

an appropriate level of responsibility and documented with an appropriate record of factors applied."<sup>30</sup> This "standard" appears to replace the Terwilliger Bluesheet requirement of supervisory approval with authority of the ninety-five United States Attorneys to delegate these decisions to the thousands of individual Assistant United States Attorneys without requiring other approval.

Senator Orrin G. Hatch, then Ranking Minority Member of the Senate Judiciary Committee strongly protested the Reno Bluesheet. Stating that the bluesheet "reverses the Department of Justice's policy that prosecutors must charge the most serious, readily provable offense," Senator Hatch charged that federal prosecutors are now "free to substitute their own view of what degree of punishment is fair and what is not" for that of Congress and the Sentencing Commission, to engage in "unwarranted softening" of sanctions for violent offenders, and to depart from Congress's desire that "similarly culpable defendants will have similar sentences imposed."<sup>31</sup>

Attorney General Reno responded with transparent disingenuousness,<sup>32</sup> denying that any departure from the standards of the Thornburgh Memorandum had been authorized and stating that her bluesheet was merely a "clarifying" one.<sup>33</sup> The entire relevant portion of this reply follows:

Let me reiterate, as set forth in the clarifying bluesheet to which you allude, that it remains the directive of the Department of Justice that prosecutors charge the most serious offense that is consistent with the nature of the defendant's conduct, that is likely to result in a

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30. Reno Bluesheet, *supra* note 27, at 352.

31. Letter from Senator Orrin G. Hatch, Ranking Minority Member, United States Senate Committee on the Judiciary, to Janet Reno, Attorney General (Jan. 13, 1994), *reprinted in* 6 FED. SENTENCING REP. 353 (1994) [hereinafter Hatch Letter].

32. The Thornburgh Memorandum phrase "consistent with the nature of the defendant's conduct," while literally perhaps inviting some discretion, in context only permits it to estimate whether factual or legal barriers to obtaining a conviction exist. Thornburgh Memorandum, *supra* note 23, at 347; *see also* Daniel Klaidman, *AG Reno Restores the Plea Bargain; Ending GOP Policy, New Memo Expands Prosecutor's Power*, TEX. LAW., Nov. 22, 1993, at 6 ("Although department officials are downplaying the new policy as a 'clarification' of the Thornburgh directive, senior department officials acknowledge privately that it represents a dramatic policy reversal. . . . [A Justice spokesman said] Reno was . . . concerned about 'overcharging' criminal defendants and subjecting them to overly harsh sentences . . ."), *available in* LEXIS, News Library, Txlawr File. However, on October 10, 1996, Attorney General Reno again denied that federal prosecutors had been authorized to depart from the policies of the Guidelines. *See* Mary P. Flaherty & Robert Suro, *Reno Criticizes Manipulation of U.S. Sentencing Guidelines*, WASH. POST, Oct. 11, 1996, at A4, *available in* 1996 WL 13425903.

33. Letter from Janet Reno, Attorney General, to Senator Orrin Hatch (Mar. 8, 1994), *reprinted in* 6 FED. SENTENCING REP. 353 (1994) [hereinafter Reno Letter]. Unlike the Reno Bluesheet, this letter was not published in the United States Attorney's Manual, where it could serve as a very general interpretative guide to line prosecutors.

sustainable conviction; that prosecutors adhere to the Sentencing Guidelines; and that charging and plea agreements be made at an appropriate level of responsibility with appropriate documentation. In short, contrary to what you suggest, individual prosecutors are not free to follow their own lights or to ignore legislative directives.

The Department of Justice is committed to law enforcement policies which are vigorous, effective and fair. We are steadfast in our opposition to *unwarranted* softening of sentences for violent offenders or drug traffickers . . . [W]e look forward to working with you.<sup>34</sup>

Senator Hatch clearly has the more convincing position in this dispute. One cannot rationally defend unleashing thousands of federal prosecutors, while closely constraining Article III federal judges, except as a politically expedient way to reduce the severity of federal sentences and to permit individualizing sanctions to an extent that the Guidelines and mandatory minimum penalty systems do not.

## II. A BRIEF RECENT HISTORY OF FEDERAL SENTENCING

Beginning in the latter part of the nineteenth century, the federal government and a growing number of states adopted various forms of the indeterminate sentence.<sup>35</sup> A convicted person would receive a sentence which had a minimum, possibly zero, and a maximum, subject to statutory limits. The period between the two was designated as one of parole eligibility, and a parole board would periodically review the question of the actual release date.<sup>36</sup> Thus, an inmate's progress could be monitored and an estimated optimal date of release calculated.<sup>37</sup> For example, a fixed sentence of five years in prison was thought to be no more appropriate than a fixed order of hospitalization for a specified term for a medical patient.<sup>38</sup>

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34. *Id.* (emphasis added).

35. See *Mistretta v. United States*, 488 U.S. 361, 363 (1988).

36. See Peter B. Hoffman & Michael A. Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 90 (1979).

37. *Mistretta*, 488 U.S. at 364-65 ("[U]nder the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment.").

38. "The diagnosis and treatment of the criminal is a highly technical medical and sociological problem for which the lawyer is rarely any better fitted than a real estate agent or a plumber." HARRY

Beginning in 1910, the U.S. Parole Board,<sup>39</sup> later renamed the U.S. Parole Commission,<sup>40</sup> performed this release function. Initially it made decisions on an ad hoc basis predicated on the initial sentence, the presentence investigation, the classification studies following commitment, the history of the inmate in prison, and periodic interviews at the prisons by Parole Board staff.<sup>41</sup> In order to reduce disparity of treatment and make the process more predictable and fair, the Parole Board developed comprehensive guidelines for determining release dates.<sup>42</sup>

Although almost ubiquitous in state and federal systems by the 1960s, the indeterminate sentence became the subject of intense criticism. Prisoners complained of the uncertainty of their situation and disparate sentences imposed by judges.<sup>43</sup> Law and order advocates worried about the possibility of quick parole.<sup>44</sup> Libertarians expressed concern with the length of time inmates spent prior to parole.<sup>45</sup> Social scientists complained about the lack of empirical support for the proposition that prisons were rehabilitative institutions.<sup>46</sup> Other critics pointed out that prison behavior correlated poorly

E. BARNES, *THE STORY OF PUNISHMENT* 265-66 (1930), *quoted in* FRANKEL, *supra* note 1, at 54.

39. Act of June 25, 1910, ch. 387, 36 Stat. 819.

40. Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976) (codified at 18 U.S.C. §§ 4201-4218 (1988)) (repealed Nov. 1, 1987, SRA, Pub. L. No. 98-473, tit. II, ch. II, §§ 218(a)(5), 235, 98 Stat. 1976, 2027, 2031 (1984)).

41. *See* Hoffman & Stover, *supra* note 36.

42. *See* Peter B. Hoffman & Lucille K. DeGostin, *Parole Decision-Making: Structuring Discretion*, FED. PROBATION, Dec. 1974, at 7, *passim*.

43. Some judges complained as well. *See, e.g.*, FRANKEL, *supra* note 1.

44. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 884 (1990) (“[S]entences pronounced by the court were, with rare exception, never served: twelve years meant four, eighteen meant six, thirty meant ten. The court and defendants were privy to the numerical symbolism; only the public and the victim were duped by the sham.”) (footnotes omitted).

45. *See, e.g.*, FRANKEL, *supra* note 1, at 86-102; ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 31 (1976). “Indeterminate sentencing creates a situation of misery for inmates who are forced to suffer through the uncertainty of not knowing the time of their release.” *Id.*

46. *See, e.g.*, Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22, 25 (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.” (emphasis removed)); *see also* Isaac Ehrlich, *On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence*, 71 AM. ECON. REV. 307, 314 (1981) (“rehabilitation may be quite costly to achieve”); Donald J. Harris, *Research on Sentencing: The Search For Reform*, 75 J. CRIM. L. & CRIMINOLOGY 1025 (1984) (book review) (“[T]he theory of rehabilitation after dominating correctional thinking for more than half a century, has in the past decade faltered under empirical examination and now appears discredited.”). Later, Martinson slightly moderated his view. *See* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

with post-release recidivism and that the best predictors were factors known at the time of the original sentences.<sup>47</sup> Thus, if guidelines could be directed at the courts, rather than the parole boards, the uncertainty and potential deceptiveness of indeterminate sentences could be avoided.

The failure of efforts, which extended over a generation, to reform the federal criminal code complicated sentencing reform.<sup>48</sup> The code is a product of ad hoc congressional actions over the two centuries of our national life. It also reflects the gaps, overlaps, and inconsistencies of this body of legislation. At the recommendation of President Lyndon Johnson, a National Commission on Reform of Federal Criminal Laws was established in 1966.<sup>49</sup> Former governor Edmund G. Brown of California chaired the Commission, which included members of Congress, federal judges, and others. The Commission forwarded a final report to Congress and the President in 1971.<sup>50</sup> The report proposed the replacement of all of the existing federal criminal laws with a modern, systematic code, closely modeled on the highly respected Model Penal Code of the American Law Institute.<sup>51</sup> While it provided an enormously valuable starting point for the work of the Brown Commission, the Model Penal Code needed substantial modifications and additions to fit the circumstances of federal criminal jurisdiction and to reflect additional thought and experience in the states during the years since its completion.<sup>52</sup> Following the Model Penal Code, the Brown Commission recommended felonies be divided into three categories, in terms of severity, and misdemeanors into two categories.<sup>53</sup> Upper range federal felony

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47. See, e.g., ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 251 (1975) (Recidivists "can be identified and their activities predicted with a high degree of certainty."); see also PETER W. GREENWOOD & ALLEN ABRAHAMSE, SELECTIVE INCAPACITATION at vii (Rand Corp. No. R-2815-NIJ, 1982) (urging "a strategy that attempts to use objective actuarial evidence to improve the ability of the current system to identify and confine offenders who represent the most serious risk to the community"); Brian Forst, *Selective Incapacitation: An Idea Whose Time Has Come?*, FED. PROBATION, Sept. 1983, at 19 (discussing selective incapacitation).

48. See Stith & Koh, *supra* note 10, at 231-36.

49. Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516, amended by Act of July 8, 1969, Pub. L. No. 91-39, 83 Stat. 44.

50. FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1971) [hereinafter FINAL REPORT].

51. *Id.* § 101 (The recommendation did not include a reform of the Uniform Code of Military Justice, the District of Columbia Code, or the Canal Zone Code). It is perhaps not coincidental that the staff director of the Brown Commission, Professor Louis B. Schwartz, had also been co-reporter of the Model Penal Code.

52. The Model Penal Code was completed in 1962. *Forward in MODEL PENAL CODE* (1962).

53. FINAL REPORT, *supra* note 50, § 3002; MODEL PENAL CODE §§ 1.04, 6.01 (1962).

sentencing would depend on special findings, in addition to the elements of the crime charged.<sup>54</sup> However, the Commission recommended that both parole authority and substantial judicial sentencing discretion be continued, subject to limits established by minimum terms included in the sentence.<sup>55</sup>

Despite repeated attempts during the dozen years following the Brown Commission report to secure enactment of its comprehensive revision of federal criminal laws, a congressional consensus failed to develop to the degree necessary to achieve passage. Instead, in 1984, Congress superimposed a more radically innovative sentencing scheme on the preexisting body of federal criminal statutes.<sup>56</sup> This scheme, the SRA, severely limited judicial sentencing discretion. Under the SRA, judges can depart from the Guideline range prescribed by the Sentencing Commission only in exceptional cases.<sup>57</sup> Furthermore, such departures automatically trigger a right to appellate review.<sup>58</sup>

### III. FEDERAL PROSECUTIVE DISCRETION

State and federal prosecutors traditionally have had broad, and largely unreviewable, discretion as to whether to authorize a criminal prosecution, the charges to file, and the compromises to accept in the course of plea agreements.<sup>59</sup> Federal prosecutors have a particularly wide range of choices. Most federal offenses also constitute state offenses. Thus, for example, a federal attorney can decline a bank robbery or a narcotics case, knowing that the investigative file may be presented to a local prosecutor, who can proceed

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54. See FINAL REPORT, *supra* note 50, § 3202.

55. See *id.* §§ 3201, 3401-3406.

56. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, §§ 212(a)(1), 235(a)(1), 98 Stat. 1976, 1987, 2031 (1984) (codified as amended at 18 U.S.C. §§ 3551-3586 (1994)).

57. The range is specified by locating the case on the Sentencing Table, a grid composed of 43 offense levels on one axis and six levels of criminal history (based on prior sentences) on the other. UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 5A (Nov. 1995) [hereinafter USSG].

58. 18 U.S.C. § 3742 (1994).

59. *Wayte v. United States*, 470 U.S. 598 (1985); *United States v. Goodwin*, 457 U.S. 368 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion."); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. LAW 532 (1970); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994) ("Prosecutorial discretion is a tenet of the adversarial criminal justice system. The prosecutor has broad discretion to decide whether to charge, what to charge, and whom to charge." (footnote omitted)).

under state law.<sup>60</sup> Even if federal charges are filed, the unsystematic and overlapping provisions of the federal statutes often permit the selection of a variety of different charges, especially when a course of criminal conduct is closely scrutinized. This chaos is partly attributable to the historical origins of the federal criminal code, in which statutes have been added haphazardly over the years of our national existence.<sup>61</sup> Partly, the structure is also attributable to enacting statutes concentrating on the various bases of federal jurisdiction,<sup>62</sup> resulting in multiple federal criminal statutes that are both broad and widely overlapping as to a particular course of criminal conduct. Thus, the interstate and foreign commerce power,<sup>63</sup> the taxing power,<sup>64</sup> and the authority to establish postal facilities<sup>65</sup> provide pegs on which criminal statutes have been hung. Federal prosecutors inevitably must choose which statutes to invoke and the number of charges to pursue. An example is the mail fraud statute<sup>66</sup> which makes each mailing sent or received pursuant to "any scheme or artifice to defraud" subject to a separate felony penalty.<sup>67</sup> Therefore, a single fraudulent advertisement in a periodical may create liability for thousands of felony charges. Other statutes, enacted at other times and with other penalties, frequently overlap. RICO, the Racketeer-Influenced and Corrupt Organizations statute, incorporates thirty-five other federal and state crimes.<sup>68</sup> The money laundering statute is even broader.<sup>69</sup> The code reform proposal of the Brown Commission would have replaced the grotesque structure of the federal criminal statutes with a more rational one, setting forth offenses in

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60. As Congress continues to enact new federal penal statutes, the overlap with state proscriptions increases. Yet limitations on federal resources force the exercise of discretion in deciding whether to file federal charges. See Daniel J. Freed & Marc Miller, *Guiding the Discretion of U.S. Attorneys: Department of Justice Policies, 1980-1994*, 6 FED. SENTENCING REP. 299 (1994); see also Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980-83 (1995) (discussing the overlap of federal and state criminal jurisdictions and the disparities thereby produced).

61. See, e.g., 18 U.S.C. § 1201 (1994) (superseding 18 U.S.C. §§ 408a, 408c (1940) and originally enacted in 1932 following the Lindbergh kidnapping, Act of June 22, 1932, ch. 271, 47 Stat. 326); 18 U.S.C. § 1751 (1994) (originally enacted in 1965 following the death of President John F. Kennedy by Act of Aug. 28, 1965, Pub. L. No. 89-141, 79 Stat. 580).

62. See, e.g., NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 16-47 (2d ed. 1993).

63. U.S. CONST. art. I, § 8, cl. 3.

64. *Id.*, cl. 1.

65. *Id.*, cl. 7.

66. 18 U.S.C. § 1343 (1994).

67. *Id.*

68. 18 U.S.C. §§ 1961-1968 (1994).

69. 18 U.S.C. §§ 1956, 1957 (1994).

conventional, state-law terms, and then listing the applicable bases of federal jurisdiction over the offenses.<sup>70</sup>

The availability of a plethora of federal criminal statutes, some of which carry heavy mandatory minimum sentences, provides a important area for prosecutive decision-making.<sup>71</sup> Agreements between both parties as to the crimes of conviction that are acceptable and the charges that the prosecutor is willing to forgo can strongly encourage guilty pleas.<sup>72</sup>

The SRA, as amended, added yet a new area of prosecutive discretion:

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission. . . .<sup>73</sup>

The Sentencing Commission extended this authority, authorizing unlimited downward departure from the Guideline constraints as well as statutory minimum sentences.<sup>74</sup> Again, a motion of the government is

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70. See FINAL REPORT, *supra* note 50, § 201 (listing common jurisdictional bases separately and then referring to them in the definition of the various substantive offenses).

71. For example, in the drug sentencing area, heavy mandatory minimums can be avoided by substituting a conviction on a "telephone count" under 21 U.S.C. § 843(b), which carries no statutory minimum and a much lower maximum than a conviction under § 841, the ordinary drug trafficking statute. Compare 21 U.S.C. § 843 (1994) with *id.* § 841.

72. See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 190 (1991). Former Chairman of the Sentencing Commission, William W. Wilkins, Jr. has criticized Judge Heaney's empirical study of Guideline sentencing failures. William W. Wilkins, Jr., *Observations on Judge Heaney's Study*, 4 FED. SENTENCING REP. 145 (1990).

73. 18 U.S.C. § 3553(e) (1994). The substantial assistance motion may provide an even larger area for prosecutive discretion because what constitutes "substantial assistance" is undefined. Yet it forms, by far, the largest reason given for departures from the Guidelines. There were 6827 downward departures in 1993 alone. See Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 184 (1995).

The courts of appeal were divided on whether both a Guideline minimum and a statutory minimum are waived when a prosecutor's motion does not refer to both the Guideline and the statute. This conflict was recently resolved in *United States v. Melendez*, which held that a substantial assistance motion referring specifically only to the Guideline minimum did not permit a court to disregard a statutory minimum. 116 S. Ct. 2057 (1996). The consequence is that the prosecutor can lower the Guideline minimum while keeping the judge controlled by the statutory minimum, or the prosecutor can elect to remove both minima.

74. The SRA elsewhere encourages the Commission to urge a lower sentence in cases where a defendant substantially assists in the investigation or prosecution of others. 28 U.S.C. § 994(n) (1994).

required.<sup>75</sup> The combination of statutory mandatory minimum provisions,<sup>76</sup> common in federal drug<sup>77</sup> and firearm<sup>78</sup> statutes, and the restrictive parameters of judicial discretion of the Sentencing Guidelines makes substantial assistance motions particularly potent weapons in the armamentaria of federal prosecutors, when added to the charge selection and plea agreement authority. The frequency of filing such motions varies widely from district to district, and doubtlessly from prosecutor to prosecutor.<sup>79</sup> Indeed, actual assistance is not required if a prosecutor believes a defendant is “deserving” of leniency.<sup>80</sup> The only prerequisite of this lifting of Guideline restrictions is a motion of the prosecutor.<sup>81</sup> Despite its potentially great effect, the decision of whether to file such a motion is almost always nonreviewable.<sup>82</sup> Substantial assistance departures constituted over seventy percent of all departures from the Guideline range in 1994, the most recent year for which statistics are

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75. USSG, *supra* note 57, § 5K1.1.

76. For examples of criticisms of mandatory minimum sentences and their addition to the distortion of the Guidelines, see U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 57 (1991); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993); and *Report of the Federal Courts Study Committee*, 2 FED. SENTENCING REP. 232 (1990) (calling for a repeal of mandatory minima, followed by reconsideration of the Guidelines applicable to those offenses by the Commission). See also Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851 (1995); Book Note, 108 HARV. L. REV. 947 (1995) (reviewing LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING (1994)). A survey of U.S. District Court Judges by the House Judiciary Subcommittee on Civil and Constitutional Rights indicated that 92% opposed mandatory minimum sentences. *Unintended Consequences: Sentencing Guidelines Need Changing*, SAN DIEGO UNION-TRIB., Nov. 8, 1993, at B-6, available in 1993 WL 11764906.

77. See, e.g., 21 U.S.C. §§ 841, 960 (1994).

78. See, e.g., 18 U.S.C. § 924(c) (1994).

79. 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, 550 (1992). In the Eastern District of Pennsylvania, substantial assistance departures occurred in 49.2% of the cases; but, in the Central District of Illinois, such departures occurred in only 1.3% of the cases. U.S. SENTENCING COMM’N, ANNUAL REPORT 83 (1994) [hereinafter ANNUAL REPORT].

80. See Nagel & Schulhofer, *supra* note 79, at 531.

81. See 18 U.S.C. § 3553(e) (1994). The great weight of authority forecloses a judicial departure for substantial assistance without a motion from the government. *United States v. Torres*, 33 F.3d 130 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 767 (1995); *United States v. Kuntz*, 908 F.2d 655 (10th Cir. 1990). “[I]n both § 3553(e) and § 5K1.1 the condition limiting the court’s authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted.” *Wade v. United States*, 504 U.S. 181, 185 (1992). A narrow exception occurs if the failure to file a substantial assistance motion is based on unconstitutional factors, such as failure to follow a plea agreement or considerations of race or religion. *Id.*; *United States v. Treleven*, 35 F.3d 458 (9th Cir. 1994).

82. See *Wade*, 504 U.S. at 185-86; *United States v. Zackson*, 6 F.3d 911, 923 (2d Cir. 1993).

available.<sup>83</sup>

Although there is obviously a rational basis for providing incentives to assist in the prosecution of others, one effect of the formalized incentives is to reward higher-ups in a criminal group, rather than the foot soldiers. For example, a lowly “mule”—one transporting drugs on his or her person—or a drug courier is much less likely to have useful information to exchange for leniency.

#### IV. EFFORTS TO REDUCE THE EFFECTS OF PROSECUTIVE DISCRETION

##### A. Modified “Real Offense” Sentencing

A basic issue in imposing sentences is whether to punish a convicted person merely for the offense or offenses for which they are convicted—a “charge offense” system—or whether to extend punishment to the actual conduct of the defendant—a “real offense” system—or a combination of the two.<sup>84</sup> Due process, of course, requires that punishment not exceed the statutory limits of the offenses of conviction.<sup>85</sup> Yet the allocation of a position within that normally wide range was, and continues to be, usually made after a presentence investigation that included a report on the full range of harms committed.<sup>86</sup> Thus, federal criminal law has traditionally included substantial real offense elements. On the other hand, a pure real offense system is not practical.<sup>87</sup> For example, the limitless variation in the number and sort of

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83. ANNUAL REPORT, *supra* note 79, at 83.

84. See, e.g., David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 404 (1993) (“Rather than binary alternatives, charge- and real-offense sentencing represent the end points on a continuum of possible sentencing information.”).

85. See *Specht v. Patterson*, 386 U.S. 605 (1967).

86. FED. R. CRIM. P. 32(b).

The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless;

(A) the court finds that the information in the record enables its sentencing authority meaningfully under 18 U.S.C. § 3553 [part of the SRA]; and

(B) the court explains this finding on the record.

*Id.*; see *United States v. Grayson*, 438 U.S. 41, 50 (1977); *Williams v. New York*, 337 U.S. 241 (1948).

87. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1530 (1993) (“Any system of criminal sentencing that pervasively relied upon these nonadjudicated real sentencing factors to determine outcomes would implicate the defendant’s constitutional due process rights.”).

harms that may be committed in the course of a bank robbery make any effort to control discretion by construction of a sentencing table endlessly complex. Furthermore, not only must the upper limit of punishment not exceed the crimes of conviction, but procedural fairness requires a process of determination of sentencing facts that is both adequately protective with respect to the accused and administrable by overburdened federal judges.<sup>88</sup>

Charge offense sentencing, on the other hand, raises different fairness concerns. It ignores aggravating and mitigating circumstances in the commission of a crime. A sadistic murderer ought not be sentenced to the same term as a mercy killer who acts on the pleading of a terminally ill spouse. Charge sentencing has a further problem: it gives too much power to the prosecutor, who selects the charges to file, the number of counts in the indictment, and the plea bargains to accept.<sup>89</sup>

The Sentencing Commission compromised between these two approaches.<sup>90</sup> The Guidelines include significant real offense elements. First, the sentencing judge must begin with the Guideline category most applicable to the offense-of-conviction conduct in Chapter Two of the Guidelines.<sup>91</sup> Unless otherwise required by law, sentences on multiple counts run concurrently, rather than consecutively, as was previously possible.<sup>92</sup> For example, multiple uses of the mails in furtherance of a single scheme to defraud does not result in a possible pyramiding of sentences,<sup>93</sup> nor would the use of other bases of federal jurisdiction such as the false statement statute,<sup>94</sup> the bank fraud statute,<sup>95</sup> or the wire fraud statute.<sup>96</sup> Frauds are joined in a single Guideline section.<sup>97</sup> While the process begins by considering the Guideline most applicable to the offense of conviction, the sentencing

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88. See Yellen, *supra* note 84, at 404. "Real-offense sentencing may be overly complex, administratively burdensome, and manifestly unfair in at least some of its applications." *Id.*

89. *Id.* "Charge-offense sentencing may fail to adequately distinguish offenders based on their culpability and may shift sentencing discretion to the prosecutor." *Id.*

90. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

91. USSG, *supra* note 57, § 1B1.1.

92. *Id.* § 5G1.2.

93. While the SRA replaced the unlimited cumulation of sentences, the Guidelines contain complex aggregation rules. For example, with respect to fraud, sentencing is based on the aggregate harm, defined in monetary terms. *Id.* §§ 3D1.3(b), 2.B2.1(b)(2). The result is a more limited potential increase in penalty than under pre-SRA law.

94. 18 U.S.C. § 1001 (1994).

95. *Id.* § 1344 (1994).

96. *Id.* § 1343 (1994).

97. USSG, *supra* note 57, § 2F1.1.

category is then modified by considering other “relevant conduct.”<sup>98</sup> This may include offense conduct under Chapter Two of the Guidelines and “adjustments” under Chapter Three. For example, if the fraud involved “more than minimal planning,” Chapter Two requires an increase in the penalty by two levels.<sup>99</sup> If the defendant abused a position of public trust, Chapter Three calls for another two level increase.<sup>100</sup> Relevant conduct may include offenses for which the defendant has neither been convicted nor even charged.<sup>101</sup> Enhancing punishment on the basis of such conduct does not bar later independent prosecution for it.<sup>102</sup>

### *B. Disregarding Offender Characteristics and Limiting Departure Authority*

Empirical studies indicate that crime rates in the United States strongly correlate with age, gender, stability of employment record, criminal history, and drug use.<sup>103</sup> Yet the SRA cautioned that the Sentencing Commission should take these factors into account “only to the extent that they do have relevance,” and in the case of employment skills and record, that the Commission should regard these factors as “generally inappropriate” considerations in recommending imprisonment.<sup>104</sup> The Commission went even further, and, in policy statements,<sup>105</sup> strongly discouraged, as a basis for

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98. *Id.* § 1B1.3.

99. *Id.* § 2F1.1(b)(2).

100. *Id.* § 1B1.3; see William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990). Judge Wilkins is a former Chairman of the United States Sentencing Commission.

101. See USSG, *supra* note 57, §§ 4A1.3, 5H1.8.

102. *Witte v. United States*, 115 S. Ct. 2199 (1995) (rejecting double jeopardy claim).

103. See GENNARO F. VITO & RONALD M. HOLMES, *CRIMINOLOGY—THEORY, RESEARCH AND POLICY* 238-43 (1994); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 104-21, 139-47, 355-72, 512 (1985).

104. 28 U.S.C. § 994(d), (e) (1994). The Senate Judiciary Committee Report makes it clear that the “generally inappropriate” language was intended to leave ultimate authority, as to the use of factors, with the Commission. S. REP. NO. 225, *supra* note 7, at 175.

105. In general, guidelines are quasi-mandatory, while policy statements ostensibly are not. See 18 U.S.C. § 3553(b) (1994); U.S. JUSTICE DEP’T, *PROSECUTOR’S HANDBOOK OF SENTENCING GUIDELINES AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984*, at 6 (1987). However, except in the plea bargaining context the policy statements are strong evidence of what factors have been “adequately taken into consideration” in promulgating a Guideline, and hence proscribed as a basis for departure by 18 U.S.C. § 3553(b) (1994). In its promulgation of policy statements, the Commission can control the decisions of federal district and appellate courts. See *Koon v. United States*, 116 S. Ct. 2035 (1996). Indeed, the Commission can, in effect, resolve conflicts between the courts of appeals by issuing policy statements.

departure from the Guidelines, consideration of an offender's age,<sup>106</sup> education and vocational skills,<sup>107</sup> drug (including alcohol) dependence or abuse,<sup>108</sup> and gender.<sup>109</sup> It did so by declaring these factors not ordinarily relevant in the determination of a sentence.<sup>110</sup> This triggers the provision of the SRA that requires that

[t]he court shall impose a sentence of the kind, and within the range . . . [established by the applicable sentencing guideline] unless the court finds that an aggravating or mitigating circumstance of a kind . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.<sup>111</sup>

If the court departs from the range prescribed by the Guidelines, it must state the specific reason for doing so.<sup>112</sup> A departure also creates a right to appellate review of the sentence at the insistence of the defendant for upward departures or the government for downward departures.<sup>113</sup> The Supreme Court apparently narrowed the basis for judicial departure from the Guidelines by stating:

Construing the plain language of the Guidelines Manual and the governing statute, we conclude that it is an incorrect application of the Guidelines for a district court to depart from the applicable sentencing range based on a factor that the Commission has already *fully considered* in establishing the guideline range or, as in this case, on a

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106. USSG, *supra* note 57, § 5H1.1.

107. *Id.* § 5H1.2.

108. *Id.* § 5H1.4.

109. *Id.* § 5H1.10.

110. *See id.* §§ 5H1.1-.12 (listing offender characteristics to be considered). Professor Albert W. Alschuler suggested an additional reason for disregarding offender characteristics in the Guidelines:

Situational and offender characteristics are as important as social harm in assessing sentences even from a "just deserts" perspective, but these characteristics are almost impossible to quantify and to describe in general language. In the world of sentencing guidelines, form dictates function, and guidelines have disregarded difficult-to-describe sentencing considerations. Apparently for linguistic and bureaucratic as well as criminological reasons, guidelines have focused on social harm and have dehumanized the sentencing process.

Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902-03 (1991).

111. 18 U.S.C. § 3553(b) (1994).

112. *Id.*

113. *Id.* § 3742.

factor that the Commission has expressly rejected as an appropriate ground for departure.<sup>114</sup>

While the SRA provides for jurisdiction of appeals in cases in which district courts depart from Guideline range sentences, it does not authorize appeals in the far larger number of cases in which no departures occur and no formal legal error otherwise appears.<sup>115</sup> On the other hand, where a departure occurs, an often heavy burden is assumed by the sentencing judge to show that the circumstances of the case are so exceptional as to be beyond those adequately considered in establishing the Guidelines.<sup>116</sup> With the narrow twenty-five percent range between the minimum and maximum term of imprisonment in the Guidelines and the limited departure authority, federal judicial sentencing has become one where consideration of the crime committed is paramount and consideration of individual offender characteristics is minimized to a distressing degree.

This remains true notwithstanding the recent rather marginal recognition by the Supreme Court of continuing district court sentencing discretion in the celebrated case of *Koon v. United States*.<sup>117</sup> Stacey Koon and Lewis Powell were police officers convicted of civil rights violations in the beating of Mr. Rodney King in Los Angeles.<sup>118</sup> Initially, a local jury rejected California assault charges.<sup>119</sup> Widespread rioting followed, resulting in more than forty deaths, thousands of injuries, and the destruction of nearly one billion dollars in property.<sup>120</sup> A federal prosecution was then authorized. The district court departed downward because of the provocations of the victim, the defendants' unusual susceptibility to abuse in prison, the employment consequences of their convictions, their lack of future menace to the public, and the "specter of unfairness" of their prosecution in federal court following

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114. *Williams v. United States*, 503 U.S. 193, 200 (1992) (emphasis added).

115. *United States v. Brown*, 14 F.3d 337 (7th Cir. 1994); *United States v. Holsey*, 995 F.2d 960 (10th Cir. 1993); *United States v. Bauer*, 995 F.2d 182 (10th Cir. 1993); *United States v. Lovis*, 993 F.2d 1244 (6th Cir. 1993).

116. *See United States v. Warner*, 43 F.3d 1335 (10th Cir. 1994) (downward departure reversed); *United States v. Pelkey*, 29 F.3d 11 (1st Cir. 1994) (upward departure reversed); *United States v. Hendrickson*, 22 F.3d 170 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 209 (1994); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 864 (1992).

117. 116 S. Ct. 2035 (1996).

118. *See id.* at 2041.

119. *Id.*

120. *Id.* at 2041-42.

their state court acquittals.<sup>121</sup> The court of appeals reversed.<sup>122</sup> It held that it had authority to review de novo whether the district court had authority to depart and decided in the negative.<sup>123</sup> The Supreme Court partially upheld the district court and partially upheld the court of appeals. Stating that application of the Guidelines to the facts of a particular case, in determining whether to depart from the Guidelines, should be reviewed on an abuse of discretion standard, the Court upheld the decision to depart because of Mr. King's provocations, the unusual vulnerability of the defendants to abuse in prison, and the burden of undergoing federal convictions following state acquittals for the same underlying conduct.<sup>124</sup> On the other hand, the Supreme Court upheld the decision of the appellate court in part, holding that it was an abuse of discretion to consider the defendants' loss of their law enforcement careers and the unlikelihood of recidivism, because these factors were fully considered by the Sentencing Commission in the development of the Guidelines.<sup>125</sup>

While the decision in *Koon* may be properly read to somewhat encourage district courts to consider departing from the normal Guideline ranges, its likely effect is quite limited. First, *Koon* quoted with approval Commission statements that the Guidelines are to cover a "heartland" of typical cases and that it was expected that departures would be "highly infrequent."<sup>126</sup> Surely the prosecution in *Koon* involved quite extraordinary factors. Second, the Guidelines specifically encouraged the departure of the district court for provocation by the victim.<sup>127</sup> This encouraged departure is an unusual situation, because the Commission on the basis of consideration of thousands of pre-Guideline cases sought to control discretion in the great bulk of factual situations. Third, the Court affirmed the rejection by the court of appeals of two of the district court's bases for departure, even under an abuse of discretion standard, as having been adequately considered in the development of the Guidelines. Fourth, the Court emphasized that before such departures were authorized, the Court must find that material factors existed which the Commission had not adequately taken into consideration.<sup>128</sup> These findings

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121. *Id.* at 2042.

122. *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994).

123. *Id.* at 1451.

124. *Koon*, 116 S. Ct. at 2050.

125. *Id.* at 2053.

126. *Id.* at 2044-45.

127. USSG, *supra* note 57, § 5K2.10.

128. *Koon*, 116 S. Ct. at 2044-45.

are likely to become increasingly rare because the Commission, as a continuing body that reviews decisions by both sentencing and appellate courts, engages in an ongoing process of amending the Guidelines to take additional factors into consideration. If the Commission does so, the Supreme Court emphasized in *Koon*, its decision is binding on the district courts.<sup>129</sup> Finally, statutory as well as Guideline restraints often confront district courts. Four days after its decision in *Koon*, the Supreme Court held that to avoid statutory minima, a prosecutor must elect to file a substantial assistance motion specifically authorizing a downward departure.<sup>130</sup> Therefore despite *Koon*, the prosecutors' and the Commission's supremacy over the district courts remains almost complete.

Thus, by tying the hands of the judiciary, the hands of the prosecution, now officially loosened by the Reno Bluesheet to make unlimited use of its view as to the appropriate sentence, become more powerful. Charging decisions, charge selection, and plea agreements can allow the prosecutor to determine the resulting sentence to a far greater degree than the federal judiciary.

An extensive study by *The Washington Post* of federal sentencing under the Guidelines concluded:

[F]ederal sentencing guidelines . . . have shifted much of the power in the courtroom from judges to prosecutors and law enforcement. Instead of a judge deciding the pertinent facts about a criminal and a crime and handing down a sentence based on them, prosecutors now make these calls.

The charge, in essence, determines the sentence. And it is the prosecutor who decides the charge.<sup>131</sup>

### C. Judicial Supervision of Plea Agreements

Most federal convictions are by guilty pleas.<sup>132</sup> Rule 11(e) of the Federal

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129. *Id.*

130. *Melendez v. United States*, 116 S. Ct. 2057 (1996).

131. Mary P. Flaherty & Joan Biskupic, *Prosecutors Can Stack the Deck; Sentencing Powers Shift from Judges*, WASH. POST, Oct. 7, 1996, at A1, available in 1996 WL 13425230.

132. The Sentencing Commission's *Guideline Manual*, states: "Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement." USSG, *supra* note 57, ch.1, pt. A, § 4(c).

Rules of Criminal Procedure requires disclosure of plea agreements.<sup>133</sup> Furthermore, if the agreement calls for judicial implementation, it must be accepted or rejected by the court.<sup>134</sup> To discourage this process from resulting in enhanced prosecutive discretion and evasion of the Guidelines, the SRA requires the Sentencing Commission to issue policy statements<sup>135</sup> that guide trial judges in exercising their Rule 11 authority to accept or reject plea agreements.<sup>136</sup> The Commission, in turn, issued policy statements providing that a court may accept a plea agreement providing for dismissal of any charges—or an agreement not to pursue potential charges—if “the remaining charges adequately reflect the seriousness of the actual offense behavior and . . . accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.”<sup>137</sup> This section also provides that the dismissed charges can still be considered as “relevant conduct” in the enhancement of the sentence.<sup>138</sup> With respect to a plea agreement that the prosecutor will make a nonbinding or binding sentencing recommendation to the court, the Guidelines require that the recommended sentence be within the applicable Guideline range or depart from the applicable range only “for justifiable reasons.”<sup>139</sup> The Commission’s Commentary on this section defines “justifiable reasons” as ones that would authorize a departure under the SRA.<sup>140</sup>

Because federal sentencing depends on factual determinations in addition to the elements of the crime of conviction, stipulations accompanying a guilty plea can have real importance in the application of the Guidelines. In order to provide accurate information to the court, the Guidelines require the parties to

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133. FED. R. CRIM. P. 11(e).

134. *Id.*

135. *See supra* note 105 and accompanying text.

136. 28 U.S.C. § 994(2)(E) (1994).

137. USSG, *supra* note 57, § 6B1.2.

138. *Id.* § 1B.1.3.

139. *Id.*

140. *Id.* § 6B1.2 Commentary (indicating that “justifiable reasons” are those reasons authorized under 18 U.S.C. § 3553(b) (1994)). On the other hand, Judge Jack Weinstein interpreted the Guidelines, taken as a whole, as authorizing continuation of judicial authority under Federal Rule of Criminal Procedure 11(e)(1)(C) of acceptance of plea agreements for a specific sentence, even though that sentence is a departure from the Guideline and the normal requirements for departures are not met. *United States v. Aguilar*, 884 F. Supp. 88 (E.D.N.Y. 1995). If followed, this will open up another broad opportunity for prosecutive discretion to avoid the Guidelines. *See Dan Freed & Marc Miller, Plea Bargained Sentences, Disparity and “Guideline Justice”, 3 FED. SENTENCING REP. 175 (1991) (“[C]ongress decided not to permit the Sentencing Commission to issue guidelines for prosecutors or the plea bargaining process.”).*

fully and accurately disclose the facts relevant to sentencing.<sup>141</sup>

In summary, the Guidelines make a serious effort to encourage judicial supervision of plea agreements so as to reduce the possibility of their use to evade the Guidelines. However, this effort is incomplete, particularly with respect to agreements to dismiss, or not to pursue, charges, a matter which is largely within the control of the prosecution except in extraordinary situations.<sup>142</sup> Irrespective of exhortations by the Commission to conduct independent inquiries, facts are often elusive, docket pressures are insistent, and agreements of the parties are usually seductive to busy courts.<sup>143</sup> Furthermore, the parties are not likely to encourage such efforts. A defense counsel commonly feels obliged to obtain as much leniency for the client as possible,<sup>144</sup> and prosecutors are commonly more interested in obtaining a conviction than with the severity of the sentence.<sup>145</sup> The systemic pressures to evade the more uniform sentencing thrusts of the Guidelines are powerful and not easily resisted.

A highly experienced and respected former federal prosecutor, presently in defense practice, has observed that many cases that formerly would be litigated in the courtrooms are presently negotiated and settled in the offices of the prosecutors to avoid the sentencing risks to the accused posed by the Guidelines.<sup>146</sup>

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141. USSG, *supra* note 57, § 6B1.4. Another major source of sentencing facts is the presentence report prepared by the probation officer. In preparing the report, the officer often resolves issues of fact. A Sentencing Commission study indicates "some officers report difficulty in securing relevant information from prosecutors if that information contradicts the plea agreement." U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY OF SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 190 (1991).

142. See FED. R. CRIM. P. 48(a); USSG, *supra* note 57, § 6B1.2 Commentary.

143. The court is likely to substantially rely on the presentence report of the probation officer. Although the judiciary, not the prosecution, employs this person, the primary source of his or her information is the latter's investigative files. Writing the report often involves tacit fact-finding by the probation officer (in the context of agreements by the parties). While this fact-finding is challengeable at the time of sentencing, the trial judge will likely give heavy weight to the officer's conclusions. See Heaney, *supra* note 72, at 200.

144. See AMERICAN BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION § 1.6 (1974).

145. See Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 283 (1989).

146. Roger Adelman, Remarks at George Washington University Law School (Oct. 25, 1996).

## V. WHAT IS TO BE DONE?

The present situation should be regarded as intolerable. Relatively inexperienced and casually appointed Assistant United States Attorneys hold the greatest power to determine the targets, the nature, and the extent of the coercive power of the United States.<sup>147</sup> Possible remedies include returning to the charging and bargaining limitations of the Thornburgh Bluesheet, enlarging appellate review of sentences, reducing federal sentence severity, returning to the indeterminate sentence and the parole board, making the Guidelines presumptive, rather than largely mandatory, and broadening judicial departure authority.

### A. Restoring the Discipline of the Thornburgh Memorandum

Much can be said for withdrawing the Reno Bluesheet. The Thornburgh Memorandum represents Congress's original understanding in enacting the SRA. It articulates a reasonably determinate standard in charging and bargaining situations. In contrast, the Reno approach of asking prosecutors to simply consider whether the sentencing range under the Guidelines yielded by the charge is "proportional to the seriousness of the defendant's conduct"<sup>148</sup> and achieves objectives such as "punishment, protection of the public, specific and general deterrence, and rehabilitation"<sup>149</sup> does not. Thus, the Thornburgh approach furthers consistency by making it more likely that similar cases will be treated similarly.

On the other hand, the extent that the Thornburgh approach achieves both adequate uniformity and fairness can be easily overstated. Federal prosecutors have resources far more finite than their prospective tasks. Most cases presented to them are not accepted for federal action.<sup>150</sup> The Thornburgh Memorandum does not address this issue. However, it is discussed in "Principles of Federal Prosecution,"<sup>151</sup> a directive of former Attorney General

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147. The writer makes this point with humility; in his youth he was one of them.

148. Reno Bluesheet, *supra* note 27, at 352.

149. *Id.*

150. "Declinations are the rule, not the exception. Of 171,000 criminal matters referred to federal prosecutors in Fiscal Year 1976, 108,000 were declined—a declination rate of 63 percent. Many other uncounted declinations are made by the investigative agencies, in accord with guidelines agreed on with federal prosecutors." Philip B. Heymann, Assistant Attorney General, Criminal Division, Department of Justice, Statement Before the Committee on the Judiciary, United States Senate (Apr. 23, 1980), *excerpted in* 6 FED. SENTENCING REP. 330, 330 (1994).

151. UNITED STATES ATTORNEY'S MANUAL, tit. 9, ch. 27 (1995), *reprinted in* 8 Dep't Just. Man.

Civiletti issued in 1980 that remains in effect, largely unmodified to this day. The principles are very general. In addition to the strength of the potential government case, the federal attorney is to consider federal law enforcement priorities; the nature and seriousness of the case including the public attitude toward prosecution; the deterrent effect of a prosecution, the culpability of the person, his criminal history, and his willingness to cooperate in the investigation or prosecution of others; the probable sentence; the possibility of effective prosecution in another jurisdiction; and whether there is an adequate non-criminal alternative to prosecution.<sup>152</sup>

These rather indeterminate considerations permit a great deal of disparity in the exercise of prosecutive discretion. Such a disparity cannot be adequately moderated by a judiciary limited by the Guidelines, statutorily-mandated sentences, and the SRA.

Additional leeway is contained in the Thornburgh Memorandum requirement that the prosecutor charge the most serious "readily provable" offense.<sup>153</sup> This involves a prediction and provides opportunity for discretion. Furthermore, the Thornburgh Memorandum contains an escape hatch: readily provable charges may be dropped because a trial would be time-consuming and the office is overburdened—an ubiquitous problem.<sup>154</sup>

There is also elbow room in the context of plea agreements and stipulations. While under the Thornburgh approach, plea agreements should be made only in the context of the Guidelines, it is unlikely that there will be an appellate challenge if the agreement is accepted by the sentencing court. This lack of review invites the parties and the court to take more unrestrained attitudes toward conceiving their authority in the context of plea agreements. The sentencing judge's conclusions with respect to such matters as uncharged misconduct and offense-of-conviction characteristics may also affect Guideline sentences.<sup>155</sup> These may be established by stipulations or hearsay, and a preponderance of the evidence burden of persuasion applies.<sup>156</sup> While the Thornburgh Memorandum stresses the prosecutor's duty of full disclosure of accurate information to the court, such facts are often fuzzy, inviting

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(Aspen Law & Business) § 9-27.000 to .750 (1996) [hereinafter DOJ Manual].

152. *Id.* §§ 9-27.210 to .260.

153. *Supra* note 23 and accompanying text.

154. DOJ Manual, *supra* note 151, § 9.27.410.

155. *See, e.g.,* *Witte v. United States*, 115 S. Ct. 2199, 2205-07 (1995) (A sentencing court's conclusion that defendant committed an uncharged offense may be used to increase the sentence without double jeopardy preclusion of later prosecution for the offense).

156. *Id.*

various characterizations and evasions.<sup>157</sup>

To oppose simply returning to the status quo prior to the Reno Bluesheet is not to favor the latter's retention. If the Department of Justice refuses to withdraw its *carte blanche* to prosecutive manipulation of sentences, Congress should do so.

### *B. Returning to the Indeterminate Sentence*

Another option would be to restore the possibility of parole. A national parole board could significantly reduce sentencing disparity, provide relief to inmates serving oppressively long sentences, and address problems of federal prison overcrowding.<sup>158</sup> Also, it could do so in an administratively feasible manner, with significant insulation from political pressure to become ever tougher on crime, as it did for much of this century.<sup>159</sup>

The negatives that led Congress to abolish parole under the SRA would continue, however.<sup>160</sup> Disparity would return, if, as the high volume of the cases makes likely, much of the decisional authority is delegated to a large number of individual parole officers. Also, disparity reflected in unjustifiably short terms and probation would remain unaddressed. The anxiety of inmates

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157. See *supra* notes 59-61 and accompanying text.

158. At the sentencing end of the process, a commission must estimate future crime rates, their mix, the clearance rate, the prosecutive decisions, and sentences to project future prison populations. A parole board can simply look at the existing level of crowding in prisons and act accordingly.

159. See Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773 (1992) (finding state guideline systems sometimes more effective in protecting elected officials from political pressures to increase sentences). The fiscal implications of building new prisons are likely more acutely felt in state systems, rather than in the federal system. In a statistical study of the effect of sentencing guidelines in nine states instituting them, prison population growth significantly moderated in six of them. Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 697, 703-04 (1995). These six were the ones in which the legislature instructed the sentencing commission to adjust the guidelines to prison capacity. *Id.* at 704.

Another ordinarily low visibility institution with discretionary release authority is the U.S. Justice Department Federal Bureau of Prisons. Under its "furlough" policies, approximately two percent of federal prisoners receive unsupervised release from federal facilities each month, for varying periods of time and for a variety of reasons. Telephone Interview with Ina Ware, Office of Research and Evaluation, Federal Bureau of Prisons (Mar. 29, 1996). In 1995, 24,360 furloughs (sometimes including multiple furloughs to the same inmate) were granted. *Id.*; see also 18 U.S.C. §§ 751, 3622, 4082 (1994).

"Truth in sentencing," commonly lauded as an achievement of the elimination of parole, is a mixed blessing. Long imposed sentences may serve important general deterrent purposes, as well as provide political cover for elected officials, even if substantial portions of the sentences are not served.

160. See *supra* notes 43-47 and accompanying text.

faced with uncertain terms would return. Finally, law and order voices in the administration and Congress would make enactment unlikely, especially if authority to disregard statutory minima were included.

### *C. Appellate Judicial Review*

Broader review authority, perhaps full review of sentences both inside and outside the Guidelines, is yet another alternative. Its absence in most American jurisdictions has been seen as an unjust anomaly.<sup>161</sup> It has often been argued that appellate review would result in the creation of a body of sentencing principles that could guide the process in ways similar to conventional issues of law.<sup>162</sup> The task, however, is an imposing one, which would require substantial increases in the judicial resources of the United States Courts of Appeals and acceptance of much further delay in the processing of criminal cases.<sup>163</sup> Furthermore, it is doubtful if the almost limitless permutations in the personnel of appellate panels (and their law clerks) could adequately address the disparity problem, despite all of their labors.<sup>164</sup> In addition, the variations in the way a crime can be committed are limitless. As then-Judge and Sentencing Commission member Stephen Breyer wrote, “[T]he number of possible relevant distinctions is endless. One can always find an additional characteristic *X* such that if the bank robber does *X*, he is deserving of more punishment.”<sup>165</sup> In view of the highly individual nature of offense conduct, the elusiveness of relevant facts, the vague and often conflicting goals of criminal sanctions, the subtle considerations of the circumstances of the parties, the docket situation of the trial court, and our poor abilities to predict the individual and social consequences of alternative sentencing possibilities in criminal cases, the

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161. See 4 AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE § 20-1.1 (1974 & Supp. 1986) (calling for appellate review of sentences).

162. See FRANKEL, *supra* note 1, at 83-85.

163. Even with limited rights to appellate review, U.S. Courts of Appeal annually address about 1000 cases challenging application of the Guidelines. See Alschuler, *supra* note 110, at 906. Another observer concludes that more than 10,000 judicial opinions on the Guidelines have been issued. Lincoln Caplan, *Unequal Loyalty*, 81 A.B.A. J. 54, 56 (1995). As 71.7% of defendants are sentenced within Guideline ranges, extension of a right to appellate review to the remainder could greatly increase the burden on appellate courts. See ANNUAL REPORT, *supra* note 79, at 83.

164. A variation of this proposal would establish a special tribunal to handle sentence appeals. This would require a bifurcated appeals process, and the volume of cases in sentence review would require division of cases among a number of panels of sentence review court judges.

165. Breyer, *supra* note 90, at 13-14.

sentencing decision is not subject to the sort of principled guidance that is characteristic of most appellate work. It is necessarily highly subjective, and full appellate review would be likely largely to substitute the hunches of the appellate panels for those of the trial judges.

#### *D. Reducing the Severity of Federal Sentences*

There is a near consensus that today's federal penalties are often draconian and commonly too severe.<sup>166</sup> This view is partly a product of widespread mandatory minima in federal statutes,<sup>167</sup> and it is partly a result of efforts by the Sentencing Commission to avoid disparities between those offenders sentenced under such minima and those sentenced on counts not subject to the minima.<sup>168</sup> By raising penalty levels for the latter, such disparities are reduced at the expense of a de facto expansion of the minima even further. However, the problem is a broader one: the Sentencing Commission's Guidelines have increased the severity of federal sentences.<sup>169</sup>

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166. In the year beginning October 1, 1993, federal judges departed downward in 10,456 cases and upward in 451 cases, a ratio of 43 to 1. ANNUAL REPORT, *supra* note 79, at 83. On the other hand, substantial assistance motions presumably filed when the government thought downward departure was appropriate, authorized most of the departures. During the same year 27,591 sentences were within the Guideline range, 71.7% of the total. *Id.* The Reno Bluesheet must also be seen as an effort to moderate the severity of the Guidelines. *See supra* note 27 and accompanying text.

167. The largest single category of federal sentences is for drug trafficking, which comprises 38.8% of the total. ANNUAL REPORT, *supra* note 79, at 39. This is also the most important area dominated by mandatory minima. *See, e.g.*, 21 U.S.C. §§ 841(b), 960(d) (1994); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 90105(a)-(c), 180201(b)(2)(A), 108 Stat. 1796, 1987-88, 2046-47. A study for the Federal Judicial Center in 1994 concluded that 91% of the defendants sentenced under statutes with mandatory minimum provisions, during a six-year period, committed drug offenses. Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 7 FED. SENTENCING REP. 33, 33 (1994). Seventy percent of the growth in federal prison populations is attributed to drug sentence length, resulting in a projected increase by 1997 to two-and-one-half times the number of inmates a decade earlier. *Id.*

168. *See* USSG, *supra* note 57, § 2D1.1 Background Note ("The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking."). The result extends the harsh penalties of the 1986 statute to the base level of designated drug offenses and to other crimes, rather than to confine the effect of the statute to its terms. Indeed, the Guidelines follow the statutory minima only as to the least culpable offenders, to permit subtraction for mitigation factors. *See* Vincent & Hofer, *supra* note 167, at 33. A less severe alternative would be the promulgation of guidelines without regard to the statutory minima, except where specifically applicable.

169. *See* U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING (Dec. 1991), *excerpted in* 5 FED. SENTENCING REP. 126, 130-31 (1992) [hereinafter OPERATION REPORT]. "[T]he

Characteristically, Congress gave the Commission contradictory directives. For example, it required that “[t]he sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.”<sup>170</sup> On the other hand, Congress also directed the Commission to “insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.”<sup>171</sup> The first directive seemingly endorses the status quo in relation to severity of sentences, while the second encourages a departure from the status quo on severity. The Commission decided in general to base the Guidelines on past practice.<sup>172</sup> However, the Commission may have miscalculated past practice. By averaging the time served in imprisonment without adequate adjustment for probation sentences and perhaps by other means, the Commission may have overestimated past severity levels and issued more punitive Guidelines.<sup>173</sup>

#### *E. Enlarging Departure Authority*

Departure authority could be increased by statute or by action of the Commission. The SRA allows sentencing outside the Guideline range upon a finding “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”<sup>174</sup> This language could be modified to

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incidence of probation since the guidelines has been cut by more than half.” Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1707 & n.146 (1992).

170. 28 U.S.C. § 994(g) (1994). Congress added that the Commission should use “the average sentences imposed . . . prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served” as a non-binding “starting point.” 28 U.S.C. § 994(m) (1994).

171. 28 U.S.C. § 994(m) (1994).

172. See Breyer, *supra* note 90, at 17. Justice Breyer, a former member of the Commission, added that they decided to increase the previous penalties for white-collar crime. *Id.* at 20-21.

173. Paula Yost, *The Long Term Debate: Charges of Politics Dog Sentencing Panel*, WASH. POST, July 4, 1989, at A21, available in 1989 WL 2046264.

174. 18 U.S.C. § 3553(b) (1994). Most state guideline systems permit broader consideration of offender characteristics. See Richard S. Frase, *Lessons of State Guideline Reforms*, 8 FED. SENTENCING REP. 39, 39 (1995). For a conclusion by two knowledgeable commentators that the state guideline systems are generally more successful than the federal one, see Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679 (1992).

authorize departures when the sentencing court concludes that the general sentencing purposes set forth in the SRA would be served.<sup>175</sup> The result would make the Guidelines presumptive, rather than effectively mandatory, and would restore judicial discretion to a substantial degree. Reasons for departures could still be required, with appellate reversal limited by an abuse of discretion standard. Similar treatment might be extended to offenses presently carrying mandatory minimum sentences. While such changes would be salutary, it is difficult to anticipate their enactment. The tide of recent legislation has moved in the opposite direction.<sup>176</sup>

The Sentencing Commission could itself institute a more feasible, if less sweeping, reform. In its apparent egalitarian enthusiasm, the SRA requires that the Guidelines and policy statements of the Commission reflect the "general inappropriateness" of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.<sup>177</sup> On the other hand, the SRA requires that these factors be "taken into account . . . to the extent that they do have relevance" in the preparation of the Guidelines and policy statements.<sup>178</sup> Furthermore, the SRA elsewhere lists as a major factor for a court to consider in the imposition of sentence "the protection of the public from further crimes of the defendant."<sup>179</sup> As a result of this rather contradictory and imprecise set of directives, the Sentencing Commission had much more opportunity to provide flexibility in consideration of individual offender characteristics in departing than it used.<sup>180</sup> Rather than simply repeating the statutory language and thus discouraging departures, the Commission could permit departures when the circumstances of the offense or the personal characteristics of the

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175. 18 U.S.C. § 3553(a) (1994) articulates the conventional retributive, deterrent, incapacitative, and reformatory purposes, plus consideration of the Guidelines and policy statements of the Sentencing Commission, the need to avoid unwarranted sentence disparities, and victim restitution.

176. See, e.g., Federal Death Penalty Act of 1994, Pub. L. No. 103-322, tit. VI, secs. 60002-60026, 108 Stat. 1959, 1959-86 (codified in scattered sections of 18 U.S.C.) (greatly expanding the situations in which a federal conviction may be punished by death). Congress and the President rejected a Sentencing Commission recommendation to reduce the present 100 to one ratio in the amount of powder versus crack cocaine required for the 10-years-to-life ordinary penalty for possession with intent to distribute under the Guidelines, USSG, *supra* note 57, § 2D1.1, and 21 U.S.C. § 841(b)(1)(A)(ii), (iii) (1994). See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334 (disapproving Sentencing Commission's proposed amendments which would have lowered crack sentences).

177. 28 U.S.C. § 994(e) (1994).

178. *Id.* § 994(d).

179. 18 U.S.C. § 3553(a)(2)(C) (1994).

180. See USSG, *supra* note 57, § 5H.

offender, in the opinion of the court, make recidivism unlikely and other purposes of sentencing would not be unduly compromised, or the interests of proportionality, fairness, and justice otherwise required.

## VI. CONCLUSION

In the eloquent words of Professor Herbert Wechsler:

[P]enal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or the individual.<sup>181</sup>

The SRA and the Guidelines are premised on a mistaken notion that the largest problem in federal sentencing is disparity in the sentences judicially imposed on different defendants, not in erecting a system that is rational and just. Further rigidities have been added by enactment of harsh mandatory minimum statutes, most importantly in the drug enforcement area. The Reno Bluesheet, authorizing federal prosecutors to exercise the broad bases for judgment which are now denied to the judiciary, makes the partially effective<sup>182</sup> limiting of federal judges' attempts to individualize the process of sentencing intolerable.<sup>183</sup> Open-ended prosecutive discretion should be ended and substantial discretion of federal judges restored.

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181. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

182. A 1990 study by the Sentencing Commission, asking various groups of actors in the criminal courts whether the Guidelines had increased or decreased unjustified disparity, found judges closely divided but probation officers strongly persuaded that disparities had decreased. OPERATION REPORT, *supra* note 169, at 133 tbl.29. Federal prosecutors agreed with the probation officers, while federal defenders felt that such disparities had greatly increased. *Id.*

183. Former U.S. Attorney General William P. Barr has been quoted as stating, with reference to the Reno Bluesheet: "By reintroducing discretion to prosecutors, judges will become angry and wonder why the discretion isn't left up to them. I think that will ultimately lead to a full-scale assault on sentencing guidelines, which I think will weaken the federal system." Hank Grezlak, *Ex-Attorney General Knocks Justice Dept.: Clinton Retreating from Drug War, Violent Crime, Barr Says*, THE LEGAL INTELLIGENCER, Jan. 27, 1994, at 136, available in LEXIS, News Library, Lglint File.