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Prosecutorial Discretion and Federal Sentencing Reform

Volume 1

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PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM

Volume 1

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August, 1979

This publication is a product of a study undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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INTRODUCTION AND RECOMMENDATIONS

The proposed Federal Criminal Code passed by the Senate in the last Congress--S. 1437--contains provisions that would radically alter the structure of the federal sentencing process. The bill would create a United States Sentencing Commission that would promulgate guidelines to be used by trial judges in determining sentences. The Sentencing Commission would also promulgate guidelines for the United States Parole Commission to use in determining whether an eligible prisoner should be released on parole. The bill is intended to narrow the discretion heretofore exercised by judges and the Parole Commission, in order to "avoid . . . unwarranted sentence disparities."[1]

It is by no means clear, however, that narrowing the discretion of judges and the Parole Commission would reduce disparities or control the total amount of discretion exercised in the criminal justice system. The reforms prcposed in S. 1437 could actually aggravate the problems of discretion and sentencing disparities, because the enormous discretion exercised by

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1. S. 1437, 95th Cong., 1st Sess., at § 124 (1978) (proposed 28 U.S.C. § 991(b)(1)(B)).

prosecutors would not be brought under direct control. If judicial discretion were greatly reduced, the prosecutor's decisions regarding charge and plea agreements would be much more important in determining ultimate punishment. Although the possibility for abuse and arbitrary results at the judicial and parole stages would be greatly reduced, so would the possibility that judges or parole officials could counteract extreme decisions at the charging stage. As a result, it is possible (and some observers think likely) that the proposed system would generate even greater disparities than those resulting from our present system of three separate--but to some extent, offsetting--levels of discretion.[2] Moreover, even if overall disparity did not increase, the quality of the discretion exercised might be adversely affected because, in effect, discretion would be transferred from federal district judges

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2. See Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. Pa. L. Rev. 550 (1978); Zimring, Making the Punishment Fit the Crime, 6 Hastings Center Report, 13 (1976). During the hearings held on S. 1437 by the House Subcommittee on Criminal Justice, numerous parties, including the Federal Public and Community Defenders, took this position. See Hearings on H.R. 6869 Before the Subcomm. on Crim. Just. of the House Comm. on the Judiciary, 95th Cong., 1st & 2d Sess. 1031 (1977-78).

to assistant United States attorneys. No matter how conscientious they are, assistant United States attorneys are almost uniformly far younger and less experienced than district judges, and their decisions are typically far less visible.

The present study was designed to explore the extent of these dangers and to develop proposals for minimizing them. The report identifies three principal approaches that the Sentencing Commission could take in promulgating guidelines under S. 1437. Guidelines restricting judicial discretion (with or without sentencing provisions designed to minimize the importance of factors within prosecutorial control) seem most faithful to the spirit of S. 1437. But paradoxically, they seem likely to generate sentencing disparities more pronounced and less justified than those arising under current law. Guidelines preserving judicial discretion are technically permitted by S. 1437, though they seem essentially contrary to its spirit. Such guidelines could reduce the incidence of extreme disparities and effect modest, though by no means revolutionary, improvements in the sentencing system. Approaches controlling charging and sentencing discretion can be ef-

fectively implemented only with amendments to S. 1437, but these approaches offer the best hope for achieving a substantial reduction in sentencing disparities, as well as better assurance of sound decisions in individual cases.

The report evaluates in particular detail two methods for controlling both charging and sentencing discretion. The first, a policy basing the sentence upon the "real" offense rather than the formal offense of conviction, appears unwise and ultimately unworkable. The second method, involving formal guidelines to regulate charge-reduction decisions and explicit concessions for defendants pleading guilty, seems both sound in principle and workable in practice.

The final chapter of this report describes a guideline model reflecting the latter method. Charge-reduction guidelines of the kind proposed would provide a basis for effective control of discretion and substantial reduction of sentencing disparity. Such guidelines also appear capable of significantly improving the fairness of the plea negotiation process and the general quality of sentencing decisions.

Recommendations

The most promising approach to reform the federal sentencing process entails rather narrow, though not inflexible, restrictions upon both charging and sentencing discretion. This approach should be implemented by the creation of a Sentencing Commission directed to promulgate narrow guidelines covering all the essential elements in the sentencing decision. S. 1437, as passed by the Senate, exemplifies the specificity and coverage desirable in the statutory statement of the commission's responsibilities,[3] with one important qualification. It is essential that the bill be amended--for example in section 994(a)(1)--to require that the commission promulgate guidelines for the sentencing court to use in determining whether to accept a charge-reduction plea agreement submitted pursuant to rule 11(e)(1)(A) of the Federal Rules of Criminal Procedure.

If Congress wishes to pursue the goals of sentencing reform without empowering a Sentencing Commission to address prosecutorial charging discretion, the

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3. Volume 2, the Technical Supplement to this report, indicates certain relatively minor problems arising from the text of S. 1437.

sentencing provisions of S. 1437 should not be enacted in their present form. Rather, Congress should amend S. 1437 to express clearly its preference for imposing only modest limitations upon the scope of judicial discretion. In particular, section 994(a)(1)(A) should be amended to insure that the decision whether to incarcerate will ordinarily be left to the judge's discretion, and section 994(b)(1) should be amended to permit much broader guideline ranges for authorized terms of imprisonment. The judge should not, however, be permitted to prevent early release on parole, at least in cases of very long sentences or consecutive sentences on multiple counts. A statute of this kind would, to be sure, produce few dramatic changes in the quality of the federal sentencing process. But it would create a framework for modestly enhancing the system's consistency and substantially improving the state of available knowledge. More significant change might eventually be built upon this foundation.

The positive potential of this relatively modest reform should not, however, be permitted to obscure the advantages of the principal recommendation: control of both charging and sentencing discretion. With

relatively few changes in S. 1437, Congress could provide a basis for major improvements in the fairness and effectiveness of the federal criminal justice system.

II. THE DISTRIBUTION OF SENTENCING DISCRETION UNDER CURRENT LAW

In the federal system, sentencing discretion is presently shared by prosecutors, judges, and the United States Parole Commission.[4] The range of potential sentences is initially determined by the prosecutor's decision regarding the charge. If the defendant is convicted after trial, the trial judge selects a sentence within this range, but if a prison sentence is imposed, the defendant is eligible for early release after serving any minimum sentence imposed by the judge--or, at the latest, after serving one-third of the maximum sentence imposed.[5] The Parole Commission decides, according to formally promulgated guidelines, whether to grant early release to eligible offenders.[6]

This "normal" procedure for determining sentences applies, of course, only in a small minority of cases, since about eighty to ninety percent of all federal

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4. See generally, Alschuler, supra note 2.

5. 18 U.S.C. § 4205 (1976).

6. 28 C.F.R. § 2.20 (1977).

convictions are obtained by plea of guilty (or nolo contendere) rather than by trial.[7] Who determines punishment in a guilty plea case? Under the Federal Rules of Criminal Procedure, there are four distinct routes to the imposition of sentence:

1. The defendant may plead guilty to all of the original charges, with hopes for leniency but no official assurances

2. The defendant may plead guilty to only some of the initial charges, in exchange for the prosecutor's agreement to dismiss the remainder (rule 11(e)(1)(A))

3. The defendant may plead guilty (either to all or some of the charges) in exchange for the prosecutor's agreement to make a nonbinding recommendation on sentence (rule 11(e)(1)(B))

4. The defendant may plead guilty pursuant to an agreement specifying the sentence that must be imposed if the guilty plea is accepted (rule 11(e)(1)(C)).

In the first instance, the mix of prosecutorial, judicial, and Parole Commission roles is identical to that in contested cases. In the other three situations, it becomes difficult to generalize; solid empir-

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7. For fiscal 1974, the figure was 85% (30,679 out of 36,252 convictions). Administrative Office of the United States Courts, Federal Offenders in United States District Courts 1974, at 16 (1977).

ical evidence concerning the distribution of sentencing power is virtually nonexistent.[8] In a charge-reduction agreement (item 2.), the prosecutor controls the outer boundaries of sentencing, but since the judge will generally have the option to impose substantial prison terms even after charge reduction, the determination whether the defendant will go to prison, and if so, for how long, remains largely under judicial control.[9]

In an agreement for a recommended sentence (item 3.), the judge is, in theory, free to disregard the recommendation and impose any sentence within statutory limits. In practice, the judge cannot exercise this prerogative very often without eliminating defendants' willingness to tender this type of plea. Government recommendations therefore are probably accepted in most

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8. The Justice Department is presently undertaking a survey that will develop more information in this area, but the questionnaire being used will not yield statistics indicating the precise importance of various plea bargaining procedures in any given United States attorney's office.

9. The trial judge can retain even greater control by rejecting the plea agreement altogether, but the scope of this power is subject to some doubt under current law. See pp. 73-86 infra.

instances. It cannot be assumed, however, that the prosecution in fact controls the sentencing decision here. A few judicial decisions rejecting recommended sentences can suffice to communicate the court's preferences, and thereafter recommendations will normally conform to what the judge will accept--they must do so if the prosecutor is to retain the credibility of this inducement to plead. Thus a process of mutual accommodation between prosecutors and judges may determine the actual level of sentences imposed in "recommendation" cases. And even if the prosecutor plays the dominant role in practice, he can retain control over sentencing only with the court's continued acquiescence.

The plea agreement for a definite sentence (item 4.) appears to involve the greatest limitation upon the judicial role. Since rejection of the disposition contemplated by the agreement entitles the defendant to withdraw his plea, the court may exercise this prerogative less readily than it would in the case of a non-binding recommendation.[10] Even so, the court's ability

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10. Some judges feel that rejection of binding agreements can disrupt the docket, because such cases must be rescheduled for trial, and compliance with the Speedy Trial Act must be insured. For such reasons, some judges may even discourage binding plea agreements

to influence dispositions remains significant. Rejection of the plea in a given case may be followed quickly by a new agreement more acceptable to the judge; if not, subsequent agreements may, as in recommendation cases, tend to conform more closely to judicial preferences. Even in binding agreement cases, therefore, the ultimate pattern of sentences depends on the judge to a great degree, and prosecutorial control can predominate only with the court's express or tacit acquiescence.

The judicial role appears strongest in the first type of plea, and progressively weaker in the others, but we lack a basis for determining the precise mix of prosecutorial and judicial discretion in each of the situations, and we also lack reliable information concerning the percentage of guilty pleas entered in each of these ways.

Whatever the prevailing practice, behavior could change in response to a new sentencing system. We must understand current practice, however, if we are to know whether the results to be expected from a reform proposal will be better or worse than what we now have. It

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in favor of nonbinding recommendations, which can be rejected without disturbing the finality of the plea.

does seem possible to conclude that under present law, judicial influence over sentencing in guilty plea cases:

> is potentially quite extensive
>
> may, because of its potential, operate as a tacit check upon prosecutorial discretion, and
>
> may, at least in some districts, predominate on a day-to-day and case-by-case basis.

Beyond this, we really do not know the precise extent to which the prosecution controls the determination of sentence following conviction on a guilty plea.

III. THE FRAMEWORK FOR REFORM: S. 1437

S. 1437, the proposed Federal Criminal Code, would alter the federal sentencing system in fundamental ways. The most significant changes from present law involve the statutory ranges of punishment, the trial judge's decision, the availability of appeal, the status of parole, and the guideline process that would affect all these matters.

Statutory Ranges of Punishment

S. 1437 reduces the present multiplicity of offense categories to nine categories of seriousness, but specifies only the maximum penalty for each category. The legislatively established range for each category therefore remains wide. For a Class A felony, imprisonment may be for "life or any period of time." For a Class C felony (such as bribery or robbery), any term from zero to ten years may be imposed.[11] Unlike certain "determinate sentencing" legislation enacted or proposed in the states, S. 1437 does not seek to regu-

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11. Proposed 18 U.S.C. § 2301(b) specifies the authorized maximum terms of imprisonment. The authorized categories of fines are also greatly simplified in proposed 18 U.S.C. § 2201.

late sentencing by imposing narrow statutory limits upon the sentences available for each offense. Rather, S. 1437 attempts to structure more precisely the process by which a particular sentence is selected within the legislatively authorized range.

The Trial Judge's Decision

S. 1437 introduces three new elements into the process by which the judge makes the sentencing decision. First, the bill specifically defines the objectives of punishment.[12] Second, the bill provides for a Sentencing Commission to promulgate guidelines that will indicate a rather narrow range of possible punishments for each case.[13] The sentence imposed "shall" be within that range, unless the court finds an aggravating or mitigating circumstance not adequately considered in the formulation of the applicable guideline.[14] Third, the bill requires the court to state its reasons for imposing a particular sentence, even if the sentence is within the guideline; for sentences outside the applicable guideline, it requires a

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12. §§ 101(b), 2003(a)(1).

13. § 994(b)(1).

14. § 2003(a)(2).

statement of "the specific reason" for departure from the guideline.[15]

The three innovations established by S. 1437 provide mutually reinforcing techniques for structuring the sentencing decision. The guidelines themselves indicate, within narrow limits, the sentence that should ordinarily be imposed. The requirement of a statement of reasons helps insure both selection of the proper guideline and explicit justification for departure from the guideline. Legislative specification of the objectives of punishment provides a basis for assessing the legitimacy of reasons that may be offered for any such departures.

Appellate Review

S. 1437 grants the defendant an appeal as a matter of right, provided that the sentence was imposed for a felony or Class A misdemeanor, the sentence exceeded the maximum authorized by whichever guideline the trial court found to be applicable, and the sentence (if entered on a guilty plea) exceeded that contemplated by

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15. § 2003(b).

any plea agreement.[16] The prosecution has a right to appeal under analogous circumstances.[17]

The court of appeals may set aside sentences found to be "unreasonable";[18] earlier drafts of the bill had contained a more restrictive standard requiring affirmance of sentences not found "clearly unreasonable."[19] Nevertheless, the right of appeal granted by S. 1437 is a limited one. No appeal is provided for sentences imposed for infractions or for Class B and C misdemeanors; no appeal is provided even in the case of more serious offenses if the sentence is within guideline limits; and no appeal is provided for sentences outside guideline limits if the sentence conforms to that contemplated by a plea agreement. Finally, the bill appears not to authorize an appeal to challenge a trial court's determination that a particular guideline

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16. § 3725(a).

17. § 3725(b).

18. § 3725(d),(e)(1).

19. See Senate Comm. on the Judiciary, Criminal Code Reform Act of 1977, S. Rep. No. 95-605, 95th Cong., 1st Sess. 1056 (1977) [hereinafter cited as S. Rep. 95-605].

is the one applicable to the case, provided the sentence imposed falls within the range established by that guideline.[20]

Parole

S. 1437 sharply curtails the possibilities for parole. The bill explicitly authorizes the judge to fix a term of imprisonment "subject to the defendant's eligibility for early release"[21] but also provides that the sentencing guidelines "shall specify that the term of imprisonment is not to be subject to a defendant's early release, other than in an exceptional situation . . . ."[22]

For those few defendants who will be eligible for

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20. Challenge to the sentencing court's determination that a particular guideline is applicable can be made (by either prosecution or defense) by a motion to modify sentence, addressed to the trial court under Fed. R. Crim. P. 35(b)(2). Denial of the motion apparently can be challenged only by a petition under proposed 18 U.S.C. § 3723(b) for a discretionary leave to appeal; no appeal is available as of right. See S. Rep. 95-605, supra note 19, at 1060-61.

21. Proposed 18 U.S.C. § 2301(c).

22. Proposed 18 U.S.C. § 994(b)(2) (emphasis added). The Senate report states that "eligibility for early release . . . is to be avoided as much as possible." S. Rep. 95-605, supra note 19, at 1166.

early release, the bill requires that guidelines be promulgated for the Parole Commission to use in determining whether early release should be granted and the length and conditions of parole.[23]

The Guidelines

At the heart of the structure contemplated by S. 1437 are the guidelines that play a central role in the trial judge's initial decision, in appellate review, and in determinations regarding parole. The guidelines, to be promulgated by a Sentencing Commission, are to be used by the Parole Commission in its decisions regarding release of eligible prisoners, and by the sentence judge in determining:

> whether to impose probation, a fine, or imprisonment
>
> the amount of any fine or the term of any probation or imprisonment, and
>
> whether (and when) a defendant sentenced to imprisonment should be eligible for early release.

The bill requires the commission to establish a sentencing range for each "category of offense" and each "category of defendant" and identifies the factors the commission is to consider in establishing these

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23. § 994(e)(1).

categories. The bill also imposes a narrow limit upon the range of prison terms that may be authorized for any particular category of offense and offender--the maximum sentence may not exceed the minimum by more than twelve months or 25 percent, whichever is greater.[24]

The bill gives the commission broad indications of the objectives that should inform its work. The guidelines must be "consistent with all pertinent provisions of title 18,"[25] promote the general purposes of the penal code,[26] provide certainty and fairness, and avoid unwarranted disparities "while maintaining sufficient flexibility to permit individualized sentences when warranted . . . ."[27] The commission is also directed to take into account the nature and capacity of correctional and other facilities available and to

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24. § 994(b)(1).

25. § 994(b).

26. §§ 994(f), 991(b)(1)(A).

27. § 991(b)(1)(B).

assure that available capacities will not be exceeded.[28]

It need hardly be said that such goals are inherently inconsistent and that, taken together, they provide a source of support for virtually any action the commission might take. However useful as guides to the commission, the statutory goals seem unlikely to impose significant constraints upon its ultimate decisions.

Issues Unresolved by S. 1437

The array of issues left unresolved by S. 1437 is vast. And those issues are not simply ones that the Sentencing Commission would have discretion to decide; they pose questions that in most instances must inevitably be answered, implicitly or explicitly, by the guidelines adopted.

Since the concern of this study centers on the allocation of discretion in sentencing, we can put aside those open issues that appear not to have major implications for charging and plea bargaining practices. These include questions concerning the format of the guidelines, the vitally important issue of the severity levels to be established by the guidelines, and miscel-

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28. § 994(g).

laneous, more peripheral matters. The Technical Supplement to this report develops in some detail the reasons for concluding that resolution of these questions will not have a substantial impact upon the locus of discretion in the sentencing system.

Also unresolved by the bill are at least ten important issues that do bear directly upon the allocation of sentencing discretion. The Technical Supplement discusses the specifics of text and legislative history, indicating that decision of these issues would, in effect, be delegated to the commission. Here, it will suffice to describe the questions that remain open and to summarize briefly, for each question, the range of choices available to the commission (or to Congress, if it chooses to modify the bill).

Commission decisions could explicitly preserve the sentencing judge's flexibility in a certain area, in effect carrying forward the existing system of judicial discretion on a particular, often vital, issue. In some areas, the commission could instead adopt guidelines that explicitly exclude an issue from consideration, in effect eliminating both prosecutorial and judicial discretion in those areas (without of course

insuring that this discretion will not reemerge elsewhere). Finally, on some issues, the commission could mandate particular sentencing consequences upon proof of factors normally under prosecutorial control; here the commission could, in effect, eliminate the sentencing judge's discretion while actually enhancing the discretionary power of the prosecutor.

The "in-out" decision. The commission could promulgate guidelines that, for most cases, would make no recommendation on the vitally important question whether the offender should be imprisoned. The guidelines could leave this decision to the unguided discretion of the judge and indicate only the term to be served if imprisonment were in fact imposed. Alternatively, commission guidelines could make a definite recommendation for or against incarceration in every offense-offender category, enhancing the importance of the prosecutor's characterization of the charges.

Prison sentences for nonviolent offenders. S. 1437 requires that the sentencing guidelines generally specify a sentence other than imprisonment for "a first offender who has not been convicted of a crime

of violence or an otherwise serious offense."[29] In determining which nonviolent offenses are "serious," the commission will again influence the range of cases over which imprisonment will be required, foreclosed, or left to the discretion of the sentencing judge.

Longer prison terms for certain offenders. The bill mandates a substantial term of imprisonment for offenders associated with "racketeering" or deriving a substantial livelihood from criminal activity. Proof of these factors is likely to remain within the control of the United States attorney's office, but the significance of this prosecutorial power will depend upon the commission's decision regarding the length of the additional prison term that will be triggered once the required showing is made.

Width of the guideline sentencing range. For any offense-offender category, the recommended term of imprisonment could consist of a single number, or the guidelines could be stated as a range within which choice would be left to the judge's discretion. The maximum sentence may not exceed the minimum by more

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29. § 994(i).

than twelve months or 25 percent, whichever is greater. But in cases for which the typical prison sentence would be short, the commission could adopt rather wide ranges and thus preserve most of the judicial flexibility now existing; for example, a range of three to fifteen months might be authorized.

Early release. The Senate bill requires a presumption against early release, but the guideline provisions chosen to implement this presumption could either insure very few departures from the general rule or, instead, leave decisions whether to authorize early release essentially to the discretion of the sentencing judge.[30]

Range of offense and offender information. In identifying the facts that will determine which offense and offender category applies in a given case, the commission could restrict consideration to information readily ascertainable by the probation service, so that decisions concerning the offense-offender category would be relatively immune from manipulation by prose-

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30. Similarly, for cases in which the judge does authorize early release, the Sentencing Commission is to determine the specificity of the guidelines that will govern the Parole Commission's decision regarding whether early release should in fact be granted.

cution and defense. Alternatively, the commission could cause certain facts ordinarily developed only by the prosecution (e.g., scope of the criminal enterprise) to become critical. Beyond this, the commission could require that the prosecution allege and prove all offense or offender characteristics deemed aggravating. Under this approach, the prosecution could influence the offense-offender determination even on issues for which the necessary information could be obtained without its cooperation.

Aggravating and mitigating factors not used to establish offense-offender categories. Inevitably, some relevant circumstances will not be included in the initial calculation of the offense-offender category. The commission could specify that the existence of such circumstances should normally justify variations within the authorized guideline range, specified departures from the guideline range, or even departures determined on an ad hoc basis by the sentencing judge.

Inter-district variation. S. 1437 permits the commission to preserve a substantial area of judicial sentencing discretion by authorizing departures from the guidelines on the basis of local circumstances--

either the incidence of a kind of offense or the community concern generated by a particular crime.

Guilty pleas. The commission could choose to preserve or restrict another important source of judicial discretion by specifying that the entry of a guilty plea should be given no weight, a specified weight, or a weight to be determined by the sentencing judge.

Multiple counts and charges. Over a wide range of situations involving conviction on several counts, the commission could forbid incremental penalties, eliminating a significant source of both prosecutorial and judicial discretion. And in the few areas in which the bill apears to require some incremental penalty, the commission could achieve a similar result by prescribing only a modest increase in the severity of punishment. Alternatively, commission guidelines could specify a very substantial incremental penalty in most multi-count situations. This approach would still constrain judicial discretion, but it would enormously enhance the significance of the prosecutor's charging discretion; the prosecutor's sentencing power in fact would become far greater than it is under current law. Finally, the commission could leave questions concern-

ing the existence and extent of any incremental penalty for the sentencing judge to determine on a case-by-case basis. If implemented in this way, S. 1437 would not only preserve but would probably enhance the unchecked discretionary power of the trial judge, because the Parole Commission would no longer be able to order early release for offenders receiving aberrantly long terms as a result of cumulative sentences.

IV. IMPLEMENTATION OF SENTENCING REFORM: ALTERNATIVES AND IMPLICATIONS

We have seen that S. 1437 would establish a detailed framework for sentencing reform but remit to a Sentencing Commission most of the crucial decisions concerning the continued existence and allocation of discretion in sentencing. What are the implications of alternative approaches that might be adopted? How will solutions in one area interact with those adopted in others? In the end, is a given approach likely to succeed in reducing disparity? At what cost in terms of the fairness and effectiveness of the system as a whole?

The present study was designed to suggest tentative answers to these questions. Several guideline models were postulated, each representing a different combination of solutions to the large array of open issues. The likely patterns of prosecutorial and judicial behavior under each model were then traced. This analysis of potential effects plainly offers no substitute for careful observation of the actual effect of any approach in operation. It does, however, serve to identify the most promising alternative approaches and,

perhaps more important, draws attention to certain potential consequences that might prove difficult to observe or measure in a real-world empirical test.

This chapter summarizes the results of the research, details of which are presented in the Technical Supplement to this report. The various approaches explored fall into three principal groups. In the first group are a series of models based upon guidelines restricting judicial discretion. In some of these models, however, the sentencing guidelines also have the effect of deemphasizing factors within prosecutorial control; in other models the sentencing guidelines preserve or even enhance the scope of prosecutorial influence. The second group consists of models that allow judicial discretion to survive wherever possible under S. 1437; these are referred to as guidelines preserving judicial discretion. The third group comprises models in which sentencing guidelines are combined with direct restrictions upon the charging and bargaining power of the prosecution. These are approaches controlling charging and sentencing discretion.

Under guidelines restricting judicial discretion, sentencing disparities are likely, paradoxically, to be

more pronounced and less justified than under current law. Under guidelines preserving judicial discretion, disparities could conceivably remain equivalent to those generated by the present system, but it seems more likely that such guidelines would reduce the incidence of extreme departures from the norm and also reduce some of the most inappropriate pressures to plead guilty. These guidelines could thus effect modest, though by no means revolutionary, improvements in the sentencing system. Approaches controlling charging and sentencing discretion appear to offer the best hope for achieving a substantial reduction in sentencing disparities. The final section of this chapter describes the ways in which one such approach could be rendered fair and effective, at reasonable cost.

Guidelines Restricting Judicial Discretion

Three of the models eliminate wherever possible the kinds of discretionary judicial decisions that pose a threat to uniformity in sentencing. In formulating each of these models, the in-out decision was definitively resolved for each offense-offender category, guideline ranges for imprisonment were very narrow, and grounds for discretionary departures from the guide-

lines were sharply limited. The range of sentencing possibilities under these models was then traced for a number of sample offenses.

The analysis indicated that in contested cases, models of this type would sharply reduce sentencing disparities. Indeed, these models permit virtually no sentencing variations within the terms of the guidelines themselves. The principal source of disparity would be decisions to depart from the guidelines. These decisions seem likely to be infrequent because the guideline models leave few permissible grounds for such departures and because the reasonableness of any departure could be challenged by an appeal as a matter of right.[31]

Guidelines restricting judicial discretion would produce quite different effects in uncontested cases,

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31. Another potential source of disparity in contested cases would be decisions by judge or jury not to convict on charges warranted by the evidence. This discretionary power of nullification exists under current law, of course, but its exercise might become more frequent with the reduction of discretion in sentencing. As a result, sentencing disparities under guidelines purporting to restrict judicial discretion could conceivably approach those produced by guidelines that expressly preserve judicial discretion. It seems unlikely, however, that nullification would occur on such a scale in contested cases, unless guideline sentences were set at an unusually severe level.

where sentence is imposed after a plea of guilty. It will be useful to consider first the impact of a guideline model that does not explicitly minimize the importance of factors within prosecutorial control. In this model, the sentence can be determined with virtual certainty, given the offense of conviction and any relevant aggravating and mitigating factors, but the prosecutor's charging decision and plea negotiations between the parties will in effect control these crucial variables.[32] As a result, the actual sentence in a guilty plea case could fall anywhere within a rather wide range, depending on the outcome of the plea negotiations.

The model requires, for example, a substantial term of imprisonment in the case of offenders involved in racketeering or deriving a substantial income from criminal activity. Inevitably, the distribution of this increased penalty in guilty plea cases will reflect the nature of the bargaining environment, and

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32. Such control by the parties could be partially offset by use of the "real offense" procedure, under which the judge applies the sentencing guideline indicated by actual offense characteristics rather than the formally stipulated charges. For discussion of the operation of this technique, under restricted discretion guidelines, see. pp. 49-72 infra.

there is little basis for expecting that imposition of a more severe penalty will be consistent, or properly responsive to penological concerns. Similarly, the model mandates a substantial and definitely fixed increment for each additional charge resulting in conviction. In effect, the model creates a bargainer's paradise, with every count transformed into a negotiating chip of predictable value. There is, needless to say, no assurance of consistency in the pressing or dropping of these counts, upon which the actual sentence will depend.

Given the importance of plea negotiation in the present system, all this has a familiar ring; we need to consider whether sentencing disparities in guilty plea cases would be any worse under the model than under current law. The outer boundaries of negotiation--the highest and lowest potential sentences--are more broadly spread under current law because of the unpredictability and very high maximums of the present system. We might therefore expect that negotiated dispositions would be less widely dispersed under the restricted-discretion model.

Two important factors tend to offset this possi-

bility. First, counsel ordinarily know that under present law a maximum sentence, with consecutive maximum terms on each count, is a purely theoretical prospect. The outer boundaries of negotiation must, as a practical matter, be very much narrower than current statutes would indicate. Even if current working assumptions about potential maximums and minimums yield a broader spread than the guidelines would, it seems unlikely that the spread in the two systems would differ substantially.

Second, sentencing power in current law is shared by the judge and the prosecutor. The expectations of a particular judge can and in many districts plainly do assure some consistency in the plea agreements that can be reached by the various assistant United States attorneys appearing in that court. Under the restricted discretion guidelines, by contrast, the judge has little capacity to offset the effects of a negotiated disposition; the sentence flows almost automatically from the plea to a given charge.[33] In such a system,

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33. The judge could offset some unduly lenient dispositions by refusing to approve a reduction of the charges, but the scope of this power is in doubt under present law, and action of this kind seems likely to be

bargaining and sentencing practices could vary among individual assistant United States attorneys even in the same office, or indeed among cases handled by the same assistant. The constraint involved in obtaining the agreement of opposing counsel would vary from case to case, and subject only to this limitation, guilty plea sentences would in effect be set by individual assistant United States attorneys, with at best some limited review within the prosecutor's office. The guidelines restricting judicial discretion thus would have the effect of removing even the modest existing structure for review of guilty plea sentences. The public visibility of the sentencing decision would be decreased, and the accountability of the decision maker diminished. Indeed, the tendency of the current system to lodge final sentencing authority in a single individual would be greatly increased, with the added feature that the individual would be an assistant United States attorney rather than a federal district judge. Under these circumstances it appears likely that both uniformity of sentencing and the quality of individual sentencing decisions would seriously suffer.

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infrequent unless the commission develops a detailed basis for it. See pp. 73-86 infra.

Until this point, I have considered only the guideline model that does not explicitly minimize factors within prosecutorial control. Two of the models preserve the restrictions on judicial discretion while adopting guideline provisions that sharply limit the prospects for prosecutorial control over sentencing. For example, in formulating those models, the increased penalties for racketeering and criminal livelihood that are mandated by S. 1437 were set at a modest level, and incremental penalties on multiple counts were narrowly restricted.

The analysis indicated that the possibilities for prosecutorial influence over guilty plea sentences could not be eliminated by structuring the guidelines in this way. The effort to narrow prosecutorial discretion reduced the number of techniques available to influence the sentence, and in some instances reduced the number of potential negotiated outcomes to only a few specific points within the available range. But the breadth of the basic negotiating boundaries was not significantly narrowed. Thus, the effort to restrict prosecutorial discretion seemed likely to complicate bargaining without really controlling the prosecution or diminishing its power. Indeed, as long as the

guidelines provide less serious penalties for less serious offenses, and as long as conduct can plausibly be treated as either a more or a less serious offense, the prosecutor's charge-reduction power will provide an entirely adequate negotiating tool, even if all other sources of influence over the sentence are removed. With or without guideline provisions that minimize factors within prosecutorial control, guidelines restricting judicial discretion thus seem likely to generate much greater disparity in guilty plea cases than the present sentencing system does.

Since guidelines restricting judicial discretion would decrease sentencing disparity in contested cases, but not in guilty plea cases, their net effect is not inevitably unfavorable. But given the overwhelming predominance of guilty plea cases, it seems difficult to view improvements realized in cases going to trial as sufficient to outweigh the negative effects in uncontested cases. Nor would the mix of contested and uncontested cases be likely to shift substantially after the adoption of restricted-discretion guidelines. Limitations on judicial flexibility would reduce sentencing uncertainties that may currently be an impor-

tant deterrent to the exercise of the right to trial, but prosecutors could readily compensate for this effect by offering more specific sentencing concessions, and presumably they would so so, if they desired to maintain the plea rate. Indeed, under the restricted-discretion guidelines, prosecutorial proposals to reduce charges or to refrain from asserting aggravating circumstances would offer sentencing benefits so clear and concrete that a plea agreement would often seem irresistibly attractive.[34] Under these circumstances, guidelines restricting judicial discretion seem likely to impede the administration of justice much more often than they would improve it.

Guidelines Preserving Judicial Discretion

In two of the models developed, guidelines preserve important areas of judicial discretion. Guideline ranges for terms of imprisonment are broad. The models also authorize sentences above or below the guideline ranges in cases involving any circumstance

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34. These guidelines would produce one significant improvement in the plea negotiation environment, by reducing the sentencing uncertainty associated with a decision to stand trial. See pp. 45-46 infra. But this advantage seems greatly undercut by the potential for disparity and by the absence of judicial control over the extent of the concessions offered.

included on an extensive list of approved aggravating and mitigating factors. The extent of the departure from the guideline range is to be determined by the sentencing judge on a case-by-case basis. Similarly, the decision whether to impose consecutive sentences on multiple counts is left to the trial judge's discretion. One of the models preserving judicial discretion also leaves open the in-out decision for most offense-offender categories; the other model includes definite recommendations for or against incarceration in most instances.

The model including specific in-out recommendations provides a vehicle for testing the merits of a "mixed" approach: judicial flexibility in determining the term of incarceration, combined with guidelines seeking to achieve greater uniformity in the important threshold decision about which offenders will go to prison. The analysis indicated that even this limited effort to restrict judicial discretion was likely to prove self-defeating. Decisions whether to require incarceration would become relatively consistent in contested cases, but in guilty plea cases these decisions would in effect be remitted to the unguided dis-

cretion of the assistant United States attorneys, because charge-reduction agreements could guarantee probation for nearly all of the offenses analyzed.

The result was particularly striking in one tax evasion case, because S. 1437 would eliminate two offenses to which charges could be reduced under current law[35] and would thus, on its face, appear to restrict the prosecution's charge-reduction options. Nevertheless, under the "mixed" model for implementing S. 1437, the single statutory charge of tax evasion could fall in several different categories of offense seriousness, depending on the amount of tax involved; thus, the prosecutor could (without reducing the statutory charge) decrease the offense seriousness category and insure probation. Under current law, in contrast, even the misdemeanor charge of filing a fraudulent return leaves the judge free to impose up to a year's imprisonment.[36] As in the case of models restricting judicial discretion more generally, the "mixed" model that

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35. See S. Rep. 95-605, supra note 19, at 425, noting the intention that the tax evasion felony provisions of S. 1437 (§ 1401) replace a number of the criminal provisions of title 26, including the two principal lesser offenses included. 26 U.S.C. §§ 7206(1), 7207 (1976).

36. 26 U.S.C. § 7207 (1976).

limits judicial flexibility in granting probation seems likely to increase rather than reduce disparities in sentencing.

Evaluation of the model preserving judicial discretion on all the open issues proved to be more complex. The range of sentences the judge can impose under this model is uniformly narrower--for the offenses analyzed--than the range of sentences available under existing law. The apparent reduction of judicial discretion is misleading, however, in several respects. First, the extremely long sentences foreclosed by the model are rarely (if ever) imposed; it seems doubtful that the model would require a range of sentences significantly narrower than those now likely to be imposed in practice. Second, S. 1437 grants the judge the power (not available under current law) to prevent early release on parole. As a result, for several of the offenses analyzed, the judge could require a defendant to serve a longer sentence than could be effectively imposed in the current sentencing system. On balance, it could not be said that the model preserving judicial discretion would reduce, in any concrete way, the range of possible sentencing outcomes or the poten-

tial for disparity in sentencing.

The guideline model that preserves discretion on all the open issues nevertheless includes a decision-making structure that could reduce disparities in operation, even though outer sentencing boundaries would not inevitably be narrower than those currently in effect. For example, although the model permits deviation from guideline ranges under a wide variety of circumstances, the guideline range provides an authoritative indication of the "normal" sentence and a uniform point of departure for refinements of the sentencing judgment in individual cases. In this way, the model affords a means not currently available for judges to be consistent when (as in most instances) they want to be. And the added visibility resulting from the guideline model would probably generate indirect pressure for uniformity, even in instances when a judge might feel some temptation to be inconsistent.

Given these tendencies, it is possible to posit the range of sentencing outcomes that would be likely (though not inevitable), assuming that judicial attitudes were generally receptive to the spirit of a guideline system. For the offenses analyzed, the range

of sentences likely to be imposed was significantly narrower than the range available under current law. For contested cases, the length of prison terms imposed would tend to gravitate toward a norm, and a modest reduction in disparity would be achieved.

In guilty plea cases, the results should be similar. For the offenses analyzed, the range of sentences the judge would likely impose was nearly as wide after charge reduction as it was before; the prosecutors therefore could not significantly constrain judicial choice by exercise of the charge-reduction power.[37] Of course, the judge might delegate sentencing power (just as he or she can in the current system) by accepting a plea agreement for a definite sentence. But the decision whether to do this would remain under judicial control. As a result, the models preserving judicial discretion, unlike the models restricting judicial discretion, would prevent ultimate sentencing authority

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37. Where the judge in effect disregards the charge reduction and bases the sentence on his own conception of offense seriousness, uniformity is achieved only at the cost of implicit deception of some defendants and absence of full procedural regularity. See pp. 49-72 infra. These problems, however, arise to an equal or even greater extent in the existing sentencing system.

from being dispersed among a large number of relatively inconspicuous decision makers. The possibility of judicial control over plea-bargained sentences would carry forward the mildly centralizing tendency of judicial supervision in the current plea agreement system, and if judicial sentencing patterns did become more consistent in contested cases, the impact of this change would be felt in the uncontested cases as well.

Guidelines preserving judicial discretion would also tend to improve the fairness of plea negotiations. By greatly reducing the risk of an extremely long sentence after conviction at trial, these models remove a threat that, although essentially "theoretical," may play an important role in inducing many guilty pleas. Of course, prosecutors could offer plea agreements involving specific and perhaps substantial sentencing concessions, but the alternative of rejecting any prosecution proposal would be far less dangerous than under current law. The result might be some increase in the proportion of cases going to trial, or some increase in the concessions offered by the prosecution to induce guilty pleas. In either event, the plea negotiation system would center to a greater extent on concrete

sentencing benefits rather than on the deployment of seldom-implemented threats that can unfairly affect the plea decision of the "risk-averse" defendant.[38]

In sum, guidelines preserving judicial discretion might produce relatively little change in the extent of sentencing disparities, but it seems more likely that some improvements would be realized. In particular, for sentences involving incarceration, there should be a significant decrease in extreme variations in the length of terms imposed. At best, however, these guidelines would lead to only modest success in eliminating unwarranted disparities in prison time served, and they would have essentially no impact on the extensive and troublesome disparities currently observed regarding the selection of offenders to be incarcerated. These guidelines would also perpetuate current conditions that make possible the controversial and troublesome low-visibility practice in which a judge sometimes disregards the formal offense of conviction and bases the sentence upon his own conception of the seriousness

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38. Of course, the pressure represented by an offer of concrete sentencing benefits can be as great (or greater) than that involved in an offer that merely eliminates a remote contingency. Guidelines preserving

of the defendant's behavior.[39] Significant improvements in these areas seem possible only through restrictions upon both charging and sentencing discretion.

Approaches Controlling Charging and Sentencing Discretion

We have seen that restrictions on judicial sentencing discretion are likely to increase rather than decrease disparities in sentencing, unless such restrictions are accompanied by some controls over prosecutorial charging decisions. Controls of this kind could emerge from policies and guidelines developed internally by the Department of Justice. This important subject, which affects many matters other than sentencing, warrants careful study in its own right.[40] But given the practical and political obstacles to

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judicial discretion would not insure a reduction in the overall amount of pressure that could be brought to bear, but defense decisions about whether to plead guilty and prosecution decisions about the concession to be offered would be influenced to a lesser extent by the defendant's tolerance for a risky trial strategy--a factor not remotely relevant to any penological purpose.

39. See note 37 supra.

40. See, e.g., Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 U.C.L.A. L.

effective control by this means,[41] Congress (and the proposed Sentencing Commission) should first consider the possibilities for reducing sentencing disparities through more limited devices.

In this section I identify and evaluate the possibilities for limiting the impact of prosecutorial charging decisions through judicial action at the time of conviction. I reject as unwise and unworkable the often-proposed technique of basing the sentence upon "real" offense behavior rather than the formal offense of conviction. I suggest an alternative approach requiring formal judicial rejection of inappropriate charge-reduction plea agreements and show how this ap-

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Rev. 1 (1971); Kuh, Plea Bargaining: Guidelines for the Manhattan District Attorney's Office, 11 Crim. L. Bull. 48 (1975); White, A Proposal for Reform of the Plea Bargaining Process, 119 U. Pa. L. Rev. 439, 453-62 (1971). See generally K. Davis, Discretionary Justice: A Preliminary Inquiry (1969); Vorenberg, Narrowing the Discretion of Criminal Justice Officials, 1976 Duke L.J. 651, 678-83.

41. The Justice Department's standards for the exercise of discretion, recently made public, seem to impose few concrete limitations; even so, they are cautiously labelled "materials": "these materials are not to be construed as Department of Justice 'guidelines' and . . . they impose no obligations on . . . attorneys for the government. Of course, they confer no rights or benefits . . ." See 24 Crim. L. Rep. 3001 (Nov. 22, 1978).

proach could be effectively implemented.

Use of "Real" Offense Rather Than Offense of Conviction

To offset the distorting effects of charge-reduction bargaining, judges could use actual offense behavior, rather than the formal offense of conviction, to determine the "category of offense" applicable for guideline purposes.[42] Available empirical evidence strongly suggests that sentencing judges currently place great emphasis on actual offense behavior,[43] and in a major recent effort to formulate sentencing guidelines, there was "unanimous agreement among the [state] judges that the 'real' offense must be con-

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42. A variation of this approach would be for the judge to start his analysis from the formal offense of conviction, but then consider the extent to which actual behavior makes the conduct more serious than the "ordinary" type of conviction offense. Application of this technique, however, often would require considerable mental gymnastics. See Alschuler, The Trial Judge's Role in Plea Bargaining, Part I, 76 Colum. L. Rev. 1059, 1139 (1976). Moreover, if this approach were taken, the sentence imposed would concededly be outside the "applicable guideline" and, at least under S. 1437, the defendant could appeal as a matter of right. See S. 1437, supra note 1, at § 101 (proposed 18 U.S.C. §§ 2003(a)(2), 2003(b), 3725(a)). The variation suffers from essentially the same defects as the technique discussed in the text, but appears even more cumbersome to implement.

43. See, e.g., J. Eisenstein & H. Jacob, Felony Justice: An Organizational Analysis of Criminal Courts 131-34, 160, 279-83 (1977); Rhodes, Plea Bargaining:

sidered at sentencing."[44] Similarly, the United States Parole Commission has directed that for purposes of applying its parole release guidelines, offense severity is to be determined by the "overall circumstances of the present offense behavior" rather than by the formal offense of conviction.[45] The commission concluded that focusing solely upon the offense of conviction "would place excessive reliance upon convictions obtained more often by negotiation of pleas than by trial of the facts. Neither justice nor uniformity of treatment could be achieved with such a system. . . ."[46]

In applying this approach to sentencing guidelines, both the "real" offense and the formal offense

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Who Gains? Who Loses?, at V-8 to V-10 (Law Enforcement Assistance Administration 1978); Wilkins, Kress, Gottfredson, Caplin, & Gelman, Sentencing Guidelines: Structuring Judicial Discretion 86 (Law Enforcement Assistance Administration 1976). Contra, Shin, Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes, 1 J. Crim. Just. 27, 34-35 (1973).

44. Wilkins et al., supra note 43, at 75 (emphasis in original).

45. U.S. Parole Commission, Guideline Application Manual app. 4.08 (May 1, 1978).

46. 40 Fed. Reg. 41330 (1975).

of conviction would necessarily play some role in determining actual punishment. The outer boundary of the potential sentence would be set by the statutory maximum for the offense of conviction, but subject to this limitation, the actual sentence would be the one indicated for the "real" offense.[47] Thus for a defendant committing robbery and pleading guilty to theft, a Class D felony, the sentence could not exceed the 5 years' imprisonment authorized by statute for the latter offense. Referring to the guidelines, the sentencing judge might find that the prison term indicated for this defendant's offender category was 2 1/2 years for an actual theft and 5 1/2 years for robbery. In such a case, a 5-year sentence would be imposed upon the theft conviction; a 5 1/2-year sentence would have been imposed upon conviction for robbery. If the guideline sentence for robbery were only 4 1/2 years, that sentence would be imposed regardless of whether the formal conviction was for robbery or theft.

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47. More sophisticated methods for giving weight to the real offense, in either the offense or offender score, could also be designed. See Wilkins et al., supra note 43, at 53, 78.

A guideline system would obviate many of the difficulties associated with reliance upon the "real" offense in current sentencing practice. Since the policy relating to actual offense behavior would be well known, defendants would no longer be misled about the value of a charge-reduction bargain. And because the sentencing significance of actual offense behavior would be clear, the defense would be certain to focus attention upon whether or not the "real" offense really occurred.

It is apparent, nonetheless, that a decision to divorce the guideline offense from the formal offense of conviction would raise troublesome problems. The constitutional issues warrant more extended analysis than can be provided here. In the following section, I briefly summarize my reasons for concluding that use of the actual offense behavior would be constitutional, and then examine the policy considerations that in my view argue decisively against reliance upon the "real" offense.[48]

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48. The real offense procedure also might be held impermissible under the statute, at least if S. 1437 were enacted in its present form. Section 994(i) forecloses imprisonment in the case of a "first offender who has

Constitutionality

Although the sentencing proceeding is a "critical stage," at which the defendant is entitled to representation by counsel,[49] the proceeding need not involve all the attributes of a criminal trial. There is plainly no right to a jury or to proof of factual issues beyond a reasonable doubt; the presentence report may, at least in some instances, be kept confidential;[50] and there is no constitutional right to confront and cross-examine all the witnesses. Emphasizing that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses sub-

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not been convicted of a . . . serious offense." (emphasis added). This section appears to preclude the real offense procedure in the situation in which its terms apply, and the language could even be held to reflect a congressional assumption that the guideline category of offense seriousness would always be determined by the formal offense of conviction. (I am indebted to Anthony Partridge for drawing my attention to this problem.)

49. Mempa v. Rhay, 389 U.S. 128 (1967).

50. See generally ABA Standards Relating to Sentencing Alternatives and Procedures § 4.3, commentary at 211-12 (1968). Compare Gardner v. Florida, 430 U.S. 349 (1977).

ject to cross-examination.,"[51] the Supreme Court held in Williams v. New York that the "due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."[52] Would the procedural flexibility granted by Williams remain available in the administration of a guideline system? As an American Bar Association Advisory Committee has observed, "[i]t would be ironic indeed if procedural due process required the absence of legislative guidance in order for the sentencing proceeding to be informal."[53] Nevertheless, recent decisions raise just this possibility. In Specht v. Patterson,[54] the Court was presented with a Colorado statute permitting imposition of an indeterminate sentence of one day to life, after conviction on a charge normally carrying a ten-year maximum, if the judge

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51. 337 U.S. 241, 250 (1949).

52. Id. at 251.

53. ABA Standards, supra note 50, at 264. The point has limited force, however, because our tradition of procedural regularity does imply a need for more rigorous procedural safeguards when more definite substantive standards are introduced. See, e.g., Meachum v. Fano, 427 U.S. 215, 226-27 (1976).

54. 386 U.S. 605 (1967).

found that the defendant "at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." The Court held that "[a] defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings."[55] Williams was distinguished on the ground that the Colorado statute "does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding . . . [requiring] a new finding of fact . . . that was not an ingredient of the offense charged."[56] At another point, the Court stressed that the statute involved "a new charge" comparable to a recidivist complaint; there the prior offenses constitute a "distinct issue" on which the defendant is entitled to notice, a hearing, confrontation, and cross-examination.[57]

On its face, Specht appears to hold that full trial procedures are triggered because the subsequent

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55. Id. at 609 (quoting Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1965)).

56. 386 U.S. at 608.

57. Id. at 610.

proceeding requires a "new finding of fact" and poses a "distinct issue." Focusing on this facet of the case, some courts have held that full procedural safeguards are required for posttrial dispositions dependent on finding the defendant "insane"[58] or a "dangerous special offender."[59] Determination of the "real" offense in a guideline system would seem even more directly controlled by Specht, since such an inquiry concerns not only a "distinct issue" but also the kind of issue traditionally thought to involve a new criminal charge.[60] And reliance on Williams would seem particularly difficult because the Court's approval of flexible procedures in that case was quite explicitly grounded in the importance of these procedures for the effective operation of a regime of "indeterminate sentences," involving assessment of diverse facets of the

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58. E.g., Bolton v. Harris, 395 F.2d 642, 650 (D.C. Cir. 1968).

59. United States v. Duardi, 384 F. Supp. 874, 884 (W.D. Mo. 1974), aff'd on other grounds, 529 F.2d 123 (8th Cir. 1975). Contra, United States v. Stewart, 531 F.2d 326 (6th Cir. 1976), cert. denied, 426 U.S. 922 (1976).

60. The traditional characterization of the issue seems to play some role in determining whether the legislature may remove the issue from the government's

offender's personality and "an increase in the discretionary powers exercised in fixing punishments."[61] As applied to a sentencing reform system designed to limit the general range of relevant information, narrow the judge's discretion, and exclude rehabilitative concerns in most instances, Williams could be considered thoroughly anachronistic.[62]

The "real" offense determination nevertheless differs in critical respects from the factual determina-

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case-in-chief and thus ease its burden of proof. Compare Mullaney v. Wilbur, 421 U.S. 684 (1975) with Patterson v. New York, 432 U.S. 312 (1977).

61. 337 U.S. at 249. See also id. at 250-51.

62. The force of Williams seems further eroded by the decision in Gardner v. Florida, 430 U.S. 349 (1977). On facts virtually identical to those in Williams, the Court reached the opposite result. The plurality opinion noted "two constitutional developments" since Williams that required a more formal sentencing procedure. The first was heightened scrutiny of capital sentencing, but the opinion also mentioned as a second, independent development the applicability of due process requirements to all sentencing, citing Mempa v. Rhay, 389 U.S. 128 (1967) and Specht (neither was a capital case). See 430 U.S. at 358 (Stevens, J.). The prevailing opinion also distinguished Williams as a case in which the relevant facts were "described in detail" by the judge and never actually challenged by the defense. Id. at 1204. These views, explicitly disclaimed only by Justices White and Rehnquist, see id. at 1207-08, 1211, portend more stringent constitutional requirements for sentencing even in noncapital cases. See also text accompanying notes 65-71 infra.

tions at issue in Specht and its progeny. First, the sanction triggered by the "new finding" in each of those cases was greatly disproportionate to the severity of the actual offense of conviction; in guideline sentencing, under no circumstances could the findings result in a sentence outside the normal statutory range for that offense.[63] Second, even when sentencing is channeled by guidelines, the "real" offense determination remains only one of many interrelated factual issues used to generate a sentencing range. The process of decision is difficult to assimilate to the resolution of a criminal charge, in which the existence of each element is an indispensable prerequisite to conviction. Jury trial and reasonable doubt requirements thus seem quite out of place. It might be possible, of course, to separate actual offense behavior from other guideline elements; this one issue is plainly susceptible to resolution in a criminal trial. But if guideline decisions (and indeed decisions to depart from the guidelines can--like current sentencing decisions--give some weight to prior convictions and

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63. See ABA Standards, supra note 50, at 265-66.

prior arrests on charges eventually dismissed,[64] the separation of any charges currently being dismissed becomes somewhat artificial. Although one cannot predict with assurance that these considerations would prove decisive for the courts--and this uncertainty might itself caution against use of the "real" offense approach--my own judgment is that the "full panoply" of criminal trial procedures ought not to govern the ascertainment of actual offense behavior in a guideline system.

A distinct problem is whether particular rights must be granted as a matter of procedural due process. Even if the "real" offense determination does not amount to the disposition of a new criminal charge, "it is now clear that the sentencing process . . . must satisfy the requirements of the Due Process Clause."[65] In determining what process is due, there can scarce-

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64. United States v. Atkins, 480 F.2d 1223 (9th Cir. 1973); United States v. Metz, 470 F.2d 1140 (3d Cir. 1972), cert. denied sub nom. Davenport v. United States, 411 U.S. 919 (1973); United States v. Cifarelli, 401 F.2d 512 (2d Cir. 1968), cert. denied, 393 U.S. 987 (1968). Contra, United States ex rel. Jackson v. Meyers, 374 F.2d 707 (3d Cir. 1967).

65. Gardner v. Florida, 430 U.S. 349, 358 (Stevens, J.).

ly be any doubt that the courts would require notice and an opportunity to be heard, as rule 32 provides.[66] Similarly, full disclosure of the basis for any "real" offense findings would presumably be required; again, rule 32 apparently would not permit confidentiality for the type of information involved here.[67]

Any dispute that might exist would likely center on the question whether the defendant has the right to present formal testimony and to cross-examine opposing witnesses. In present practice under rule 32, it is apparently not uncommon to deny cross-examination[68] and to limit defense counsel to informal "comment" upon alleged inaccuracies in the presentence report.[69] The American Bar Association, in contrast, recommends full

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66. Fed. R. Crim. P. 32(c)(3)(A).

67. Id.

68. United States v. Needles, 472 F.2d 652 (2d Cir. 1973); Fernandez v. Meier, 432 F.2d 426 (9th Cir. 1970); United States v. Fischer, 381 F.2d 509 (2d Cir. 1967), cert. denied, 390 U.S. 973 (1968).

69. United States v. Hodges, 547 F.2d (5th Cir. 1977); United States v. McDuffie, 542 F.2d 236 (5th Cir. 1976); United States v. Horsley, 519 F.2d 1264 (5th Cir. 1975), cert. denied, 424 U.S. 944 (1976); United States v. Rosner, 485 F.2d (2d Cir. 1973), cert. denied, 417 U.S. 950 (1973).

rights to present and cross-examine witnesses on any disputed factual issues.[70]

Whatever the conception of sound policy for the present sentencing system, the determination of offense severity in a guideline context would call for particular care. Since a finding adverse to the defendant would result in a "grievous loss," precisely measurable in added months of confinement, procedures of high reliability are required. The Court's analysis of the process due in parole revocation proceedings[71] suggests, if anything a fortiori, that the rights to present and to cross-examine witnesses would be constitutionally mandated, with respect to the "real" offense, in guideline sentencing.[72]

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70. ABA Standards, supra note 50, § 5.4(b).

71. Morrissey v. Brewer, 408 U.S. 471, 487-89 (1972).

72. This conclusion is not affected by the Court's recent tendency to approach the due process issue in "positivist" terms, permitting state action that has a substantial adverse impact on liberty or property, provided the state law itself creates no "entitlement" to the liberty or property interest. E.g., Meachum v. Fano, 427 U.S. 215 (1976); Bishop v. Wood, 426 U.S. 341 (1976). Whatever the state's flexibility to define the liberty that will be protected in such fringe matters as confinement conditions and privileges, there is no doubt that the initial imposition of sentence infringes a protected liberty that government is not free to de-

These constraints concerning evidence and cross-examination of course do not impair the permissibility of the basic concept. Reliance on properly ascertained, actual offense behavior would likely survive constitutional attack. What remains to be considered is whether a policy of focusing upon the "real" offense would be sound.

Policy considerations

Implementation of a "real" offense approach creates many more difficulties than it solves. In essence, the approach attempts to offset plea bargaining distortions by introducing distortions elsewhere in the system. I conclude that the effort is conceptually unsound and would ultimately prove self-defeating. The principal difficulties involve considerations of fairness, procedural efficiency, the effect upon plea negotiation, and the likelihood of evasion.

Fairness. The drive to eliminate disparities in

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fine away. See page 59 supra; L. Tribe, American Constitutional Law 535 (1978). And even in the context of prisoner transfers, the Court was careful to base its permissive holding upon the absence of any state rule "conditioning such transfers on proof of serious misconduct." Meachum, 427 U.S. at 216.

sentencing has in large measure been motivated by the need to restore both the appearance and the actuality of fairness in the criminal justice process. Unwarranted disparities promote resentment among prisoners, increasing their sense of alienation and mistrust, and generate cynicism among the public and lack of confidence in the regularity and reliability of the legal system generally.[73] A declared policy placing greater weight upon the judge's conception of offense behavior than upon the formal offense of conviction seems likely to reinforce rather than dispel these attitudes. Indeed, it is hard to imagine a more striking way for the legal system to proclaim its mistrust of its own processes.

The legitimacy of giving weight to actual offense behavior rests on the notion that informal procedures can establish what "really" happened with a confidence adequate for sentencing purposes. The same kind of thinking would permit the judge to draw adverse inferences from an acquittal, since this implies only a reasonable doubt, and the cases in fact uphold this more-

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73. See M. Frankel, Criminal Sentences: Law Without Order 39-49 (1972).

than-dubious practice.[74] However tolerable these judgments may seem while they remain largely hidden from view, they will not easily survive the visibility imposed by a guideline system. Suppose that in a robbery prosecution the jury convicts only of theft. If the judge is persuaded that robbery "really" occurred, would guideline policy permit (or indeed require) use of the robbery guideline even after the express acquittal on that charge?[75] Constitutional difficulties aside, such a policy could not for a moment be seriously entertained. Use of "real" offense behavior in guilty plea cases is less strikingly offensive, but it similarly depreciates the validity of the offical record--in this instance, the record of the same judge's decision to approve dismissal of the higher

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74. United States v. Cardi, 519 F.2d 309, 314n.3 (7th Cir. 1975); United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972).

75. At a minimum, the guideline policy could not leave to the judge's unguided discretion the decision whether to base sentence upon the real offense. Giacco v. Pennsylvania, 382 U.S. 399 (1966). And even if channeled by standards sufficiently clear to withstand a vagueness challenge, the imposition of punishment following acquittal might be held to violate "the most rudimentary concept of due process of law." Id. at 405 (Stewart, J., concurring). See also id. (Fortas, J., concurring).

charges. Whatever the pragmatic justification for reliance upon the "real" offense, it is difficult to regard this as a seemly way to render justice.

Efficiency. At present, presentence report characterizations of the "real" offense probably are, to some extent, free from scrutiny and litigation. Their importance is perhaps not understood by some defense lawyers, and their concrete effect upon the ultimate sentence is in any event difficult to predict. Tactical considerations caution restraint by the defense; only limited tools for challenging the presentence report are available,[76] a successful challenge produces no certain sentencing benefit, and indeed there is no practical way to insure that the challenge, whether successful or unsuccessful, will not in some way trigger a harsher sentence.[77] When the defendant pleads guilty to a lesser count, declares his contrition, and seeks the mercy of the court, there is ordinarily every reason to avoid what might appear to be "quibbling"

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76. See text accompanying notes 68-69 supra.

77. See M. Heumann, Plea Bargaining: The Experience of Prosecutors, Judges and Defense Attorneys 61-69 (1978). Cf. United States v. Grayson, 98 S. Ct. 2610 (1978) (judge's impression that defendant committed perjury at trial justifies harsher sentence).

with the probation officer's description of the offense.

In a guideline system, challenges to the presentence report characterization of the "real" offense would probably be a daily occurrence. The sentencing significance of actual offense behavior would be clear, the judge would be obliged to make an unequivocal finding, and the possibilities for the judge to penalize the the contentious defendant--consciously or unconsciously--would be most limited.

By what procedures would such challenges be resolved? In the absence of formal testimony and cross-examination, it would seem difficult for a conscientious judge to resolve genuinely disputed issues of fact.[78] Indeed, due process probably requires that the defendant be granted the right to present evidence

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78. See, e.g., United States v. Duardi, 384 F. Supp. 874, 881 (W.D. Mo. 1974). Although it may be possible to narrow the areas of dispute through a prehearing conference procedure, see ABA Standards, supra note 50 § 4.5(b), Judge Friendly has commented in another context that the potential for delay associated with cross-examination is "not really answered, as any trial judge will confirm, by the easy suggestion that the hearing officer can curtail cross-examination." Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1285 (1975).

and to cross-examine opposing witnesses.[79] In the event of a decision to invoke any offense category more serious than the formal offense of conviction, efforts to appeal could be expected.[80]

These procedural burdens are incurred, it should be remembered, on an issue that both prosecution and defense would prefer not to litigate at all. If their preference is to be disregarded in the interest of accurate fact-finding, why not determine the offense in the ordinary manner--by trial? Remission of the matter to the sentencing stage avoids the involvement of a jury, eases the burden of proof,[81] and normally narrows the scope for appeal. But these advantages are obtained at a price. The significance of the formal conviction is depreciated, the defendant may feel he has

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79. See text accompanying notes 68-71 supra.

80. Under S. 1437, if the judge's sentence were within the range for the guideline found to be applicable, the defendant could not appeal as of right but could seek leave to file a discretionary appeal. See note 20 supra.

81. The Supreme Court might, however, hold that the "real offense" issue is so traditionally a part of the prosecutor's case that the legislature is not free to dilute the burden of proof. See note 60 supra.

been "had," and society loses the effect of the longer statutory sentence range that would have applied if the actual offense behavior had been determined by trial. Since the "streamlined" process itself imposes a significant procedural burden, it seems to combine the worst features of the available procedural alternatives. In most instances, it would probably be more efficient for the judge to decide forthrightly either to accept the full implications of the charge-reduction agreement or to reject the agreement and hold a formal trial.

Plea negotiation. Opportunities for plea negotiation would be sharply curtailed in a guideline system using actual offense behavior to determine the sentence. Charge reduction would still constrict the statutory sentencing boundaries applicable to the case; where this affected the actual guideline sentence available,[82] plea negotiation could continue, and of course the "real" offense procedure would be of limited value in correcting the consequences of plea negotiation. In many instances, however, the guideline sentence for the "real" offense would probably fall within the statutory boundaries for both the original and the

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82. See text accompanying note 47 supra.

reduced charge. Charge reduction in these instances would serve only to curtail the defendant's potential exposure to extra-guideline sentences, and since a guideline system would sharply restrict judicial freedom to impose such sentences and would insure appellate review in such cases,[83] the risks avoided by charge reduction would be minimal, in the absence of unusual aggravating circumstances.

What can be expected to happen when typical charge-reduction agreements no longer yield benefits to the defense? Presumably it would not be long before prosecution and defense began agreeing upon even greater reductions. A serious theft (or even a robbery) could, for example, be reduced to theft under $500, a Class A misdemeanor. In light of the "real" offense, of course, the judge would impose the statutory maximum for the offense of conviction--in this case, one year in prison. Or the prosecution might find such a concession excessive, and the charges would likely go to trial. The point is that use of the "real" offense cannot offset the distortions of plea

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83. See S. 1437, supra note 1, at § 101 (proposed 18 U.S.C. § 3725(a)).

bargaining, and in fact it is likely to aggravate them by rendering the nominal offense of conviction even less realistic than it is now.

This difficulty could be avoided by declaring (and developing a way to enforce) a genuine prohibition of plea bargaining. Once that is done, however, "real" offense determinations would no longer be necessary. Until that is done, the effect of such determinations would be quickly neutralized by compensatory actions elsewhere in the system.

Evasion. Until this point, only problems engendered by good-faith administration of a "real" offense system have been considered. Prosecutors could seek to avoid its thrust, however, by agreeing to concede---or not to oppose--the defendant's characterization of the offense. It should be assumed that few if any prosecutors would directly flout their legal and ethical obligations, but given the inevitable uncertainties of fact and evidence, tacit "understandings" between prosecution and defense could develop even without conscious bad faith. This kind of system would produce what amounts to bargaining, but would force it underground, thus encouraging cynicism about the process, along with

greater difficulty in preserving for the defendant the benefit of any tacit bargain. Recognizing the destructive potential of such a situation, the Supreme Court on several occasions has refused to adopt plea bargaining principles that could not be reliably enforced.[84]

A possible check upon conscious or subconscious evasion by the prosecuting attorney would be the probation officer's presentence investigation. But the probation service normally relies heavily upon the cooperation of the prosecutor. It hardly seems desirable to convert that agency into an independent prosecutorial arm, capable of overseeing evidentiary assessments made by the United States attorney's office. Suppose, moreover, that the probation service did learn of facts suggesting a more serious "real" offense. If the defendant challenged the evidence, responsibility for determining how vigorously to defend the point would again rest with the United States attorney.

It is not my purpose to suggest that judicial efforts to determine the "real" offense would be cynically manipulated with any great frequency. But given

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84. See Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); Blackledge v. Allison, 431 U.S. 63, 76 (1977).

the importance assumed by those determinations, it is clear that pressures would arise, and there is no readily available mechanism to guarantee the integrity of the "real" offense procedure. Under these circumstances, further distortions of the system would inevitably occur. Together with the problems of fairness, procedural efficiency, and the impact on plea negotiations, these difficulties point--definitively, in my judgment--to the unsoundness of any attempt to base guideline sentences upon the "real" offense.

Formal Rejection of Charge-Reduction Agreements

An alternative technique for avoiding distortions due to prosecutorial charging discretion is to prohibit charge bargaining and to require sentencing judges to reject plea agreements that are contingent upon dismissal of a portion of the charges. In such a system, guilty plea concessions might be authorized by the applicable guidelines, but defendants unwilling to accept the specified concessions would be required to stand trial. The propriety of judicial refusals to accept charge-reduction agreements is subject to some question under current law, but I conclude that such judicial action is legitimate and would provide a workable

technique for minimizing the impact of plea negotiation upon guideline sentencing.

Charge-reduction agreements under present law

Can a trial judge reject a charge-reduction agreement without improperly intruding upon the responsibilities of the prosecutor? Congress could address this question directly and thus obviate any need for attention to present law. But S. 1437 does not seem to envision a major shift of authority from prosecutors to judges, and in any sentencing reform such an arrangement ought to be contemplated only as a last resort. The prevailing allocation of responsibilities between judge and prosecutor must therefore receive careful attention.

The sentencing judge's authority to reject a disposition acceptable to both parties is specifically acknowledged by Federal Rule of Criminal Procedure 11,[85] but the rule does not explicitly state the scope of this authority. Where the judge concludes that the plea is involuntary, is made without full understanding of the charge, or lacks a factual basis, his authority to reject the plea is unquestioned; indeed he

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85. Fed. R. Crim. P. 11(e)(2).

has no discretion to do otherwise.[86] Difficulty arises, however, where the trial judge rejects a plea despite full compliance with the voluntariness, understanding, and factual basis prerequisites. Although the Supreme Court has repeatedly stated that a defendant has no absolute right to have his guilty plea accepted by the court,[87] it seems equally clear that the trial court does not have absolute discretion to reject a plea--there must be a legitimate reason for rejection of the plea.[88] What has remained controversial is the question that is central for present purposes: whether it is legitimate for the trial court to reject a plea

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86. See Fed. R. Crim. P. 11(c), (d), & (f). Courts have differed on the question whether it is proper to reject a plea merely because of the judge's "doubt" about whether these requirements are met. Compare United States v. Navedo, 516 F.2d 293 (2d Cir. 1975) (doubt about factual basis; rejection proper) with United States v. Martinez, 486 F.2d 15 (5th Cir. 1973) (doubt about voluntariness; rejection improper).

87. North Carolina v. Alford, 400 U.S. 25, 38n.11 (1970); Lynch v. Overholser, 369 U.S. 705, 719 (1962).

88. E.g., United States v. Gaskins, 485 F.2d 1046 (D.C. Cir. 1973). Compare United States v. Bednarski, 445 F.2d 364 (1st Cir. 1971) (judge must give "serious consideration" to accepting plea); United States v. Bean, 564 F.2d 700, 702n.3 (5th Cir. 1977) (formal statement of reasons for rejection held unnecessary).

on the ground that the offense pleaded to does not adequately reflect the seriousness of the defendant's conduct.

In United States v. Ammidown,[89] a defendant charged with the first-degree murder of his wife, under exceptionally sordid circumstances, offered to plead guilty to murder in the second degree, with the prosecutor's consent. The trial judge rejected the agreement, and the defendant was convicted on the first-degree charge. On appeal, the United States Court of Appeals for the District of Columbia Circuit held that rejection of the guilty plea had been improper; the court vacated the first-degree conviction and ordered that the plea to second-degree murder be accepted.

The specific holding in Ammidown was an extremely narrow one. Since the trial judge had not formally given reasons for rejecting the plea, a remand--at the least--was required. The appellate court's further conclusion that the judge could not legitimately reject the second-degree plea rested on the fact that, subse-

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89. 497 F.2d 615 (D.C. Cir. 1973), 341 F. Supp. 1355 (1972).

quent to the judge's initial action, the Furman decision[90] had eliminated the possibility of capital punishment on the first-degree charge; hence the judge's sentencing power was no longer significantly circumscribed by the charge-reduction agreement.

Despite its unusual procedural setting, the Ammidown decision announces principles that would confine judicial discretion over a wide range of commonly occurring situations. The court's opinion, by Judge Harold Leventhal, recognized that rule 11 authorizes the judge to reject a guilty plea. In commentaries supporting this judicial role, the court found "isolated phrases voicing the fear that the judge should not permit the plea bargain to become the means whereby the hardened criminal escapes justice."[91] The court also recognized as "axiomatic" that "within the limits imposed by the legislature, imposition of sentence is a matter for the discretion of the trial judge" rather than the prosecutor.[92] Nevertheless, the court stressed the need to harmonize the judge's tradi-

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90. Furman v. Georgia, 408 U.S. 238 (1972).

91. 497 F.2d at 619.

92. Id. at 621.

tional primacy in sentencing with the traditionally broad power of the prosecutor to determine when to file or dismiss charges. The court concluded that both for rule 11 dismissals pursuant to a plea agreement and for rule 48(a) dismissals outright, the starting point must be a "presumption that the determination of the United States Attorney is to be followed in the overwhelming number of cases."[93] The court then limited, within narrow bounds, the circumstances under which the trial judge might justifiably reject a charge reduction acceptable to both prosecution and defense:

> [A] judge is free to condemn the prosecutor's agreement as a trespass on judicial authority only in a blatant and extreme case. In ordinary circumstances, the change of grading of an offense presents no question of the kind of action that is reserved for the judiciary.
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> . . .
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> . . . [A] dropping of an offense that might be taken as an intrusion on the judicial function if it were not shown to be related to a prosecutorial purpose takes on an entirely different coloration if it is explained to the judge that there was a prosecutorial purpose, an insufficiency of evidence, a doubt as to the admissibility of certain evidence under exclusionary rules, a need for evidence to bring

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93. Id.

> another felon to justice, or other similar consideration.[94]

Under the reasoning of Ammidown, in other words, a judge seems free to reject charge-reduction agreements thought to be too lenient only when they appear to serve no legitimate prosecutorial purpose. And since, in addition to the examples of prosecutorial purpose already quoted, the court at another point stressed that "the United States Attorney . . . alone is in a position to evaluate the government's prosecution resources and the number of cases it is able to prosecute,"[95] there would appear to be few instances, short of those involving corrupt motives, in which a judge could properly reject a charge-reduction agreement on grounds of excessive leniency.

Although subsequent cases have frequently cited Ammidown with apparent approval, Judge Leventhal's conclusion that prosecutorial charging discretion should generally prevail over judicial sentencing discretion has not won general acceptance. Most of the other federal courts of appeals have yet to rule explicitly on

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94. Id. at 622, 623.

95. Id. at 621.

the issue, but Ninth Circuit cases have stated, and a Fifth Circuit decision holds, that rejection for excessive leniency is proper.[96] The 1974 amendments to rule 11, though not entirely free of ambiguity, appear to adopt the same view, and thus render the Ammidown rule obsolete even in the District of Columbia Circuit.[97] In the state courts, the Ammidown approach has been

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96. United States v. Melendrez-Salas, 466 F.2d 861 (9th Cir. 1972) (dictum); Maxwell v. United States, 368 F.2d 735 (9th Cir. 1966); United States v. Bean, 564 F.2d 700 (5th Cir. 1977).

97. Fed. R. Crim. P. 11, as amended, now states explicitly in paragraph (e)(2) that the judge may "accept or reject" the plea agreement, and the Notes of the Advisory Committee on Rules indicate that the decision whether to accept a plea agreement is left to the trial judge's discretion. See 18 U.S.C.A., Fed. R. Crim. P. 10-17, at 26. It could be argued that Ammidown is not inconsistent with the new rule 11 because Judge Leventhal's opinion grants the existence of judicial discretion and simply lays down standards for its exercise. Ammidown is more difficult to reconcile with the House report on the amendments, since that report stresses that the court need not permit plea agreements to be presented at all. Id. at 17-18. Nevertheless, the focus of the House report is upon preserving the judge's power to forbid plea negotiations entirely. It might be argued that to the extent a court chooses to allow plea bargaining, its discretion to reject particular charge-reduction agreements should, for the reasons outlined by Judge Leventhal, be narrow. The new rule thus does not reject Ammidown unequivocally, but on balance the legislative history is most plausibly read as granting much greater judicial control and independence that Ammidown had allowed.

adopted in dicta in a Florida decision,[98] and it was explicitly approved and followed in Michigan,[99] but the Michigan decision appears subsequently to have been overruled,[100] and all other states passing on the question appear to have upheld the trial judge's authority to reject charge-reduction agreements considered excessively lenient.[101]

Whatever the current state of the case law, it is apparent that the proper reconciliation of prosecutorial and judicial discretion poses considerable difficulties in the context of charge-reduction plea agreements. The Ammidown approach, requiring judicial deference to the prosecutorial judgment, plainly grants

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98. Reyes v. Kelly, 224 So. 2d 303 (Fla. 1969) (dictum).

99. People v. Matulonis, 60 Mich. App. 143, 230 N.W.2d 347 (Ct. App. 1975).

100. People v. McCartney, 72 Mich. App. 580, 250 N.W.2d 135 (Ct. App. 1977).

101. See, e.g., State v. Fernald, 248 A.2d 754 (Me. 1968); State v. Belton, 48 N.J. 432, 226 A.2d 425 (1967) (dictum); People v. Portanova, 56 App. Div. 265, 392 N.Y.S.2d 123 (1977); State v. Brumfield, 14 Or. App. 129, 511 P.2d 1256 (Ct. App. 1973) (dictum); Commonwealth v. Garland, 475 Pa. 389, 380 A.2d 777 (1977) (dictum).

the prosecutor a very large voice in the determination of sentence. On the other hand, the cases affirming judicial discretion to reject charge-reduction agreements are not easily reconciled with other principles: the prosecutor's virtually unreviewable discretion to forego prosecution altogether[102] and the very limited scope of judicial authority to deny prosecution motions for outright dismissal under rule 48(a).[103] The United States attorney might, in other words, have declined to prosecute Ammidown at all or declined to bring charges greater than second-degree murder. After first-degree charges in fact were filed, the government could have obtained a rule 48 dismissal of either the first-degree count or the entire case. Why should judicial authority be the least bit broader when the prosecutor seeks only what Judge Leventhal called a "diluted dismissal" under rule 11?[104]

That the greater power does not always include the

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102. See Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

103. E.g., United States v. Cowan, 524 F.2d 504 (5th Cir. 1975).

104. Ammidown, 497 F.2d at 622.

lesser is a familiar principle in law, if not in logic.[105] In the present instance there are many reasons for recognizing greater judicial control over rule 11 "diluted dismissals" than over rule 48 outright dismissals. To some extent the absence of meaningful judicial review of initial charging and outright dismissals seems to grow out of difficulties (both practical and constitutional) in compelling prosecution when the government is unwilling to go forward.[106] Even if broad prosecutorial discretion can be defended in principle when the government proposes complete inaction, rule 11 dismissals pose an altogether different question. The dismissal pursuant to a plea agreement involves a conviction and the imposition of sentence; the court is inescapably involved in the application of

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105. For example, the government has great flexibility to exclude factual elements from the definition of the offense, but once an element is included, it must be proved beyond a reasonable doubt, Mullaney v. Wilbur, 421 U.S. 684 (1975), and inferences used to supply that proof must be rational, Tot v. United States, 319 U.S. 463 (1942). See also note 53 supra.

106. See, e.g., United States v. Cowan, 524 F.2d 504, 511 (5th Cir. 1975); United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483, 489-90 (S.D.N.Y. 1964).

coercive sanctions to an individual. When the judicial machinery is invoked and the prestige of the courts enlisted, mere judicial acquiescence in the prosecutorial judgment seems plainly inappropriate; indeed, the court is ordinarily thought to be obliged to insure fairness, rationality, and evenhandedness in situations involving coercive action.[107]

One other factor affecting rule 11 dismissals requires consideration. When the United States attorney's charge-reduction decision is conditional upon the defendant's agreement to plead guilty, the prosecution is not simply exercising its judgment about whether a case warrants prosecution and whether the admissible evidence will be sufficient to convict. Quite plainly, the prosecution here is bargaining with the defense. This obvious point is important because it suggests the impropriety of certain common justifications for rule 11 dismissals. Consider, for example, the Ammidown court's suggestion that a charge-reduction agreement would not intrude on the judicial sentencing function

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107. As the court stated in United States v. Bean, 564 F.2d 700, 703n.4 (5th Cir. 1977), "once the aid of the court has been invoked the court cannot be expected to accept without question the prosecutor's view of the public good."

if it were prompted by "an insufficiency of evidence."[108] Concededly, the prosecutor's assessment of the evidence is entitled to great deference in this context, but the assessment calls for dismissal of the unprovable charges whether or not the defendant pleads guilty to something else.[109] By rejecting a rule 11 dismissal and leaving the prosecution free to obtain a dismissal outright, the court can protect its sentencing authority without in any way intruding upon the proper exercise of the prosecutorial function.

Other possible justifications for a rule 11 dismissal pose more difficult questions. Suppose the government believes its evidence is strong, but not airtight, and both sides are willing to compromise rather than risk total defeat. Or suppose the defendant's cooperation is needed and cannot be obtained while contested charges remain outstanding. Suppose that the United States attorney's resources simply do not permit full trial of all pending cases and the government con-

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108. 497 F.2d at 623.

109. The prosecutor is not formally bound to seek dismissal unless he concludes that probable cause is lacking. See ABA Standards Relating to the Prosecution Function and the Defense Function § 3.9(a) (1971).

siders half a loaf better than none. These are situations involving legitimate prosecutorial goals that cannot be achieved through an unconditional dismissal. Although this fact argues for rather great deference to the prosecutor, the prosecution seeks to achieve its legitimate ends not through prosecutorial tools (witness immunity, unconditional dismissal, etc.), but rather through the use of concessions regarding the sentence. The dismissal decision in these situations necessarily involves determinations that sentencing concessions are required to achieve the government's objectives, and that achievement of those prosecutorial objectives outweighs any adverse impact on other interests inevitably implicated by the imposition of punishment. As long as it remains "axiomatic" that imposition of sentence is a matter for the court, these determinations are ones on which the trial judge properly has the final word.[110]

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110. The trial judge would presumably give great weight to the prosecutor's judgment on the first of these issues (the need for concessions to achieve the prosecutorial objective), but there seems to be no basis for deference to the prosecutor on the second issue (the relative importance of the prosecutorial objectives in relation to other goals of punishment--retribution, isolation of the defendant, equality of treatment, etc.).

In the existing sentencing system, in short, a judge's decision to reject a charge-reduction agreement considered excessively lenient should not be seen as an improper intrusion upon the responsibilities of the prosecutor. Ammidown notwithstanding, the significance, for sentencing purposes, of the defendant's willingness to cooperate in other prosecutions or of the defendant's readiness to save the government the time and expense of trial is ultimately a matter for the sentencing court to determine.

Charge-reduction agreements in a guideline system

Although I have argued that it is proper, in the current sentencing system, for judges to reject excessively lenient charge-reduction agreements, a guideline process would place increased strains upon this principle. Several interrelated problems are involved: the likelihood of a substantial increase in the frequency of rejections; the possibility that judicial discretion to reject would or should become a judicial obligation to reject; the need, resulting from the first two problems, to replace charge reduction with other guilty plea concessions, at least if maintenance of a high rate of guilty pleas is desired; and the increased in-

centives, resulting from the first three problems, to evade the new system by covert forms of prosecutorial charge bargaining.

Frequency. Judicial rejection of charge-reduction agreements may occur rather infrequently in the present federal system, not only because United States attorneys know what charge-reduction agreements they can successfully propose,[111] but also because charge-reduction agreements ordinarily do not confine sentencing discretion to an extent that has practical significance for most federal prosecutions.[112] Sentencing guidelines might or might not alter this situation. In guidelines preserving judicial discretion, a significant range of sentencing options would remain available even after charge reduction; as under present law, the power to reject charge-reduction agreements would have limited practical importance. In any guideline structure imposing substantial constraints on judicial sentencing discretion, however, the judge would be much more likely to object to reduction of the charges.

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111. See pp. 10-11 supra.

112. See Volume 2, at 47.

If very active, judicial scrutiny of charge-reduction agreements could affect the proper performance of prosecutorial functions in ways not felt today. We cannot at this point gauge with certainty the impact of judicial control upon expeditious processing of cases, flexibility in plea negotiations, success in inducing defendants to provide testimony against others, and so on. The mere statement of this concern, however, should not suffice to justify abandonment of judicial controls. The importance of any charge-reduction agreement to the successful discharge of prosecutorial functions could ordinarily be aired fully at the hearing on the plea; there is no reason to believe that federal judges, in determining whether sentencing concessions are warranted, would be insensitive to legitimate prosecutorial needs.

Any difficulties of a more general nature should, of course, remain under study by the Sentencing Commission and the Department of Justice; charge-reduction controls, like other sentencing regulations, could generate unforeseen problems. There is no reason, however, to believe that difficulties in the charge-reduction area are unique. Indeed, if charge reduction

differs from other steps in the sentencing process, the difference lies primarily in the overarching importance of the charge-reduction decision for uniformity under a guideline system.

Could rejection remain merely discretionary? Reaffirmation and active use of the judge's discretion to reject excessively lenient charge reductions could greatly reduce the potential for inconsistent prosecutorial action that would erode the integrity of sentencing guidelines. But what safeguards, in turn, would insure consistency in the exercise of the judge's discretion? Proposals for reform of the current federal sentencing system initially focused upon eliminating disparities in the exercise of judicial discretion. Controls upon judges may simply transfer discretion to the prosecutors, but if we can plug this loophole by judicial control over charge reduction, we still have managed only to return to "square one.", Sentence would be largely dictated by the offense of conviction, but for uncontested cases (and these currently represent 80 to 90 percent of the total) the decision on sentence would be transmuted into a decision whether to accept the charge-reduction agreement pro-

posed by the parties, and this decision, in turn, would be committed to the unguided discretion of the sentencing court.

It is apparent that the judge's decision whether to accept a charge-reduction agreement should itself be channeled by guidelines. S. 1437 does not explicitly require the promulgation of such guidelines, and indeed the bill probably would be construed to permit Sentencing Commission action in this area only through less authoritative "general policy statements."[113] Congressional attention to this significant oversight should be an important priority. On the assumption that the commission will be empowered to address this problem in an authoritative fashion, the next chapter includes a proposed guideline model with explicit provisions structuring the judge's decision whether to accept a charge-reduction agreement.

Concessions for guilty pleas. Given judicial control over charge-reduction agreements, and guidelines

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113. The formal "guidelines" that the commission is empowered to promulgate are described in §§ 994(b) through 994(d) and 994(f) through 994(m). See § 994(a)(1). These sections contemplate guidelines "for each category of offense" on the apparent assumption that the existing routes to conviction will remain unchanged.

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to structure the exercise of that control, questions concerning the propriety of guilty plea concessions will be forced to the fore. In the absence of explicitly authorized concessions, there would remain few, if any, possibilities for conferring sentencing benefits in return for a guilty plea. Therefore, unless the Sentencing Commission were prepared to accept a substantial increase in the proportion of cases going to trial, it would be required to include in the guidelines some provisions for leniency in guilty plea cases.

The drafting of guilty plea guidelines will pose formidable problems of policy. The extent of the concession will of course have to be determined, either in general terms or separately for each offense-offender category. Additional difficulties will arise in situations where the guideline sentence for a contested case would normally be a very short prison term. Should entry of a guilty plea in such a case reduce the sentence to probation? It seems particularly disturbing for the symbolically and practically vital decision whether to incarcerate to be so heavily affected by the plea. In addition, the inducement might seem unusually

coercive and thus unusually likely to result in conviction and stigmatization of the innocent. On the other hand, careful scrutiny is also required concerning the potential coerciveness of concessions to defendants who must in any event serve some time; the need for certainty in ascertaining guilt is of course at least as strong in such cases as in cases not involving incarceration. Finally, the commission will have to consider whether meaningful but fair inducements can be designed for cases in which imprisonment should not be imposed, regardless of the plea.

Given the sensitivity of these issues, some might prefer to avoid guidelines explicitly addressing the problem of guilty plea concessions. It is apparent, however, that such a "solution" does not eliminate the issues but merely hides them from view, permitting the adoption of ill-advised and disparate approaches to questions that are central to the fair and effective administration of justice. There is no denying the difficulty of the questions, but it is hard to see how we are well served by a system that currently prevents any examination of the issues posed countless times each day as guilty plea sentences are negotiated and

pronounced. Guilty plea guidelines would provide a framework within which answers to these important questions could be provided and continuously refined.

The constitutionality of explicit guilty plea concessions. The propriety of guidelines granting explicit guilty plea concessions is presently clouded by difficulties of constitutional doctrine. The question requires more extended examination than is feasible here, but a summary of the nature of the problem will indicate the principal reasons why such guidelines should and would be held constitutional.

Uncertainty arises because the Supreme Court has persistently kept alive two lines of doctrine that are difficult to reconcile with one another. Plea bargaining is considered legitimate,[114] but governmental actions that have the sole purpose and effect of penalizing the exercise of a constitutional right (or any legal right) violate due process.[115] In the current state of the case law, guilty plea concessions seem potentially vulnerable under the latter principle when

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114. Bordenkircher v. Hayes, 434 U.S. 357 (1978); Brady v. United States, 397 U.S. 742 (1970).

115. North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. Jackson, 390 U.S. 570 (1968).

they flow not from the give-and-take of negotiation but solely from differences in the statutory treatment of contested and uncontested cases. Corbitt v. New Jersey[116] involved a state statute providing the following penalties for murder:

> mandatory life imprisonment, where the defendant pleads not guilty and the jury finds the murder to be first degree
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> life or any term up to thirty years, at the judge's discretion, where the defendant pleads non vult (no contest).

This statutory scheme was upheld in an ambiguous and highly qualified opinion joined by five members of the Court, but there was no ambiguity in the position taken in the concurring and dissenting opinions. Justice Stevens, in a dissent joined by Justices Brennan and Marshall, approved ordinary plea negotiation on the ground that such a system permits consideration of individual factors relevant to the particular case, regardless of the defendant's plea; "the process does not mandate a different standard of punishment depending solely on whether or not a plea is entered."[117] In

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116. 99 S. Ct. 492 (1978).

117. Id. at 504.

contrast, Justice Stevens argued, under the New Jersey statute:

> a defendant who faces a more severe range of statutory penalties simply because he has insisted on a trial, is subjected to punishment not only for the crime the State has proved, but also for the "offense" of entering a "false" not guilty plea. . . . [Invocation of the] right of the defendant to stand absolutely mute before the bar of justice and to force the government to make its case without his aid . . . cannot retain the protection of the Fifth Amendment and be simultaneously punishable as an offense.[118]

Justice Stewart, concurring only in the result, voted to uphold the statute on the ground that defendants going to trial might receive lesser punishment too (if convicted of lesser included offenses) while defendants pleading no contest might receive the maximum. "It is therefore impossible to state with any confidence that the New Jersey statute does in fact penalize a defendant's decision to plead not guilty."[119] When he turned to the problem posed where it is indeed clear that differences in treatment are based on the plea, Justice Stewart was as pointed as the three dissenters:

> While a prosecuting attorney, acting as an advocate, necessarily must be able to settle

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118. Id. at 504-05.

119. Id. at 501.

> an adversary criminal lawsuit through plea bargaining with his adversary,[120] a state legislature has quite a different function to perform. Could a state legislature provide that the penalty for every criminal offense to which a defendant pleads guilty is to be one-half the penalty to be imposed upon a defendant convicted of the same offense after a not guilty plea? I would suppose that such legislation would be clearly unconsitutional. . . .[121]

The opinion of the five-member majority in Corbitt, written by Justice White, devoted a long and troublesome footnote to the question whether a system of statutory concessions ought to be treated differently from systems of prosecutorial bargaining. Rejecting such a distinction "for the purposes of this case,"[122] the Court seemed to give particular weight to the fact that even in the non vult cases, "there is discretion to impose a life sentence. The statute leaves much to the judge and to the prosecutor and does not mandate lesser punishment for those pleading non

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120. The majority made clear in Corbitt, as the Court has done on numerous prior occasions, that "[the] States and the Federal Government are free to abolish guilty pleas and plea bargaining . . ." 99 S. Ct. at 499. It seems unlikely that Justice Stewart intended to express disagreement with this principle.

121. Id. at 501-02.

122. Id. at 500n.14.

vult than is imposed on those who go to trial."[123]

Taking the Corbitt opinions at face value, it seems clear that the Court would uphold a guideline system providing separate sentencing ranges for contested and uncontested cases, as long as the two ranges overlapped to a significant degree. A defendant pleading guilty in such a system might receive a prison term as long, or even longer than, that imposed on some defendants who stand trial. But a Sentencing Commission intent upon control of charging and sentencing discretion is unlikely to find such a loosely structured framework adequate.

Effective controls on discretion require rather narrow (and thus essentially non-overlapping) penalty ranges for offenses of different severity.[124] Guilty plea concessions under such guidelines might be afforded by a provision reducing the severity level of the offense or a provision that after adjustment of the sentence for all other relevant factors, a specific reduction of the term would be granted in guilty plea cases. These approaches would apparently be condemned

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123. Id. (emphasis added). See also id. at 496.

124. See pp. 39-47 supra.

by at least four members of the Court,[125] and even the Corbitt majority might see them as going a small but critical step beyond the "possibility of leniency" involved in the New Jersey scheme.[126]

Under these circumstances, the Sentencing Commission might with some reason prefer not to tackle the thorny problem of explicit guilty plea discounts. But the stakes are extraordinarily high. Effective constraints upon sentencing discretion simply cannot be achieved without either a quantum jump in the percentage of cases going to trial or a specific guideline concession for defendants who plead guilty. The com-

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125. Justice Stewart might conceivably be persuaded that the existence of judicial discretion to depart from the guidelines provides the uncertainty that would render plea-related distinctions permissible, in his view. But an argument of that kind would seem quite unconvincing in the context of a guideline system designed to limit such departures to unusual situations.

126. In discussing prosecutorial plea negotiations, the Corbitt majority opinion refers approvingly to the "possibility or certainty" of leniency, 99 S. Ct. at 498, 499, but its references to permissible statutory concessions are all couched only in terms of "the possibility." Id. at 500nn.14&15. In fact, the Court seemed to rely on the absence of certainty as a decisive factor. See pp. 96-97 supra. The Court treated the same factor as critical for purposes of distinguishing United States v. Jackson, 390 U.S. 570 (1968). See 99 S. Ct. at 496.

mission should not rule out the latter course unless the constitutional barrier is insuperable.

In my view, the concerns about explicit statutory concessions expressed by several of the justices in Corbitt are not soundly based, and the Court could ultimately be persuaded to uphold a thoughtfully considered system of guilty plea discounts.

A starting point is the notion expressed in the Stevens and Stewart opinions that negotiated concessions do not penalize the right to trial as such, because they are adjusted on a case-by-case basis in response to myriad factors. This might be a tenable view if prevailing doctrine authorized sentencing concessions only in response to lesser culpability, demonstrated remorse, or other penologically relevant considerations. But the law is now clear that the prosecutor may offer a concession (or threaten to file additional charges that evidence could support) solely for purposes of encouraging a plea.[127] Whatever else may influence the give-and-take of plea negotiations, the plea may now be given weight in its own right.

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127. See Bordenkircher v. Hayes, 434 U.S. 357 (1978).

Thus, the existing plea negotiation system ordinarily does precisely what Justice Stevens argued the legislature may not do: impose additional punishment based solely on the nature of the plea. It need scarcely be said that the doctrinal step the Court has taken in this respect is a troubling and controversial one: the government may now put a price on the exercise of the right to trial--an action justified solely by the mutual advantages to the defendant and the state said to result from the system.[128] But since the Court has taken this decisive step, statutory sentencing provisions cannot be considered invalid simply because they lead to more severe sentences in contested cases.

If the state may indeed make it "expensive" to contest a criminal charge, is it significantly more offensive for the price to be set by statute (or administrative regulation) rather than negotiated by opposing attorneys in the context of an adversary system? The Stevens and Stewart opinions seem to imply a concern that statutory concessions, imposed unilaterally by a legislature "holding all the cards," are less fair

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128. See Corbitt, 99 S. Ct. at 499 & n.12; Blackledge v. Allison, 431 U.S. 63, 71 (1977).

than those agreed upon by adversaries bargaining on a relatively equal footing. Certainly a legislatively established penalty structure could impose "nonnegotiable" trial penalties so great as to be unfairly coercive. But prosecutorial concessions can be unfairly coercive as well. Indeed, although it has warned repeatedly that guilty plea concessions must not be so great as to coerce inaccurate pleas,[129] the Court has approved prosecutorial inducements unlikely ever to be exceeded by explicit legislative penalty structures.[130]

Given comparable, poorly defined limits on the permissible extent of both prosecutorial and legislative inducements, the potential for unfairness is, if anything, much greater in case-by-case bargaining. Lack of uniformity is of course one major problem. Particularly where dispositions are negotiated by constantly changing pairs of adversaries, considerable disparity in the treatment of like cases is virtually inevitable. Much worse is the potential for improper dispositions in individual cases. Prosecutors have a

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129. See, e.g., Corbitt, 99 S. Ct. at 500 & n.15; Brady v. United States, 397 U.S. 742, 758 (1970).

130. See Bordenkircher v. Hayes, 434 U.S. 357 (1978).

variety of career-oriented incentives for wanting to try or not try particular cases.[131] Defense counsel probably face an even sharper divergence between their own professional and financial interests on the one hand and the interests of their clients on the other.[132] It is, to be sure, unethical for attorneys to permit such personal considerations to intrude upon the performance of their duty. But given an unstructured bargaining situation, in which the criteria of a "proper" outcome are at best vaguely specified, the tangible conflicts of interest faced by guilty plea negotiators could well skew the results.[133] Indeed, case-by-case negotiation is so flawed by these structural problems that the process raises serious problems

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131. See White, supra note 40, at 449.

132. See Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L.J. 1179 (1975).

133. Case-by-case negotiation also seems bound to be strongly affected by the strength of the case, and prosecutors typically regard consideration of this factor as entirely legitimate. See Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 60 (1968); White, supra note 40, at 447-48. As a result, the greatest concessions (and the strongest pressures to plead guilty) are likely to arise in cases in which the defendant may be factually innocent or legally unconvictable.

concerning the defendant's right to make a well-informed, voluntary decision about plea, with the effective assistance of counsel. Whatever the Court's freedom to take account of such realities in its own judgments about the constitutionality of case-by-case negotiation, the legislature (or a specialized sentencing agency) is surely entitled to conclude that these circumstances warrant restrictions on case-by-case bargaining, and formal guidelines to provide greater consistency in the extent of plea-related concessions.

If statutory concessions of some kind are permissible, should it make any difference whether the legislation merely provides for the "possibility" of leniency or instead "mandates" leniency in guilty plea cases? All of the justices voting to uphold the New Jersey statute in Corbitt seemed to think that mandatory concessions would raise much more difficult problems. In part, this view may reflect an assumption that a concrete offer of leniency will exert more pressure upon the defendant than an offer phrased in terms of more loosely specified possibilities. But the validity of this assumption depends entirely upon the kind of possibilities being considered. If the penalty

for contested cases is mandatory life imprisonment, even a vague hope of receiving a five-to-ten-year term could represent a powerful inducement to plead guilty; if instead the statute mandates a sentence concession of exactly twelve months, no more and no less, the defendant might find the pressure to plead guilty much less intense. There is simply no basis for considering vague possibilities for leniency to be less coercive, in general, than precisely specified concessions.

Considerations of "coerciveness" aside, loosely defined possibilities for leniency raise many more problems of fairness than do concrete concessions. Ordinarily, the defendant wants to know what the actual sentence will be. Systems offering only the "possibility" of leniency put the lawyers under tremendous pressure in their attempts to estimate what the possibilities in fact are. The defendant may receive poor advice, but even if the probabilities are accurately presented to him, the actual sentence imposed may be more severe than the one that seemed very likely when the plea was entered. In such a case our system insists, with rigorous logic, that no misrepresentations have been made and no promises broken, but there will

be no way to convince the defendant that he got what he bargained for.

One way to avoid such uncertainties would be for opposing counsel to negotiate a concrete plea agreement guaranteeing a specific concession within the legislatively authorized range of "possibilities." Indeed, recent amendments to the federal rules recognize the advantages of greater certainty, by facilitating definite plea agreements under the current sentencing system.[134] But here we must return to the underlying justification for a system of statutory concessions. The principal objective, as we have seen, is to reduce disparities, and improve results in individual cases, by minimizing the role of case-by-case negotiation. Pursuit of this goal can be only partially successful at best, as long as the statutory provisions simply permit leniency and remit the determination of its extent to bargaining by the parties in individual cases.

The Sentencing Commission might decide that some degree of flexibility in the guilty plea concession is

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134. Fed. R. Crim. P. 11(e)(1)(C).

desirable or unavoidable. But as a constitutional matter, the commission surely ought to be free to adopt guidelines mandating the greatest feasible degree of uniformity in the extent of plea-related concessions.

Evasion. If the sentencing system regulates charge reduction and if guilty plea concessions are either prohibited or controlled, pressures to evade these requirements could arise. For reasons already discussed,[135] it would be unwise to place reliance upon control devices that could be circumvented too readily. However, guidelines governing the allowable charge reduction, when combined with a rule against informal charge bargaining, would be difficult to evade. Unlike a "real" offense determination, a judge's decision to disapprove charge reduction would not depend on the existence of substantial evidence (largely obtainable only from the prosecution) to support the higher charge. Indeed, the absence of evidence supporting the higher offense would provide strong grounds to reject the charge-reduction agreement, since in this circumstance the government should seek a rule 48 dismissal

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135. See pp. 70-71 supra.

without attempting to foreclose litigation on the remaining charges.[136]

A prosecutor seeking to insure punishment less severe than that indicated by the charge-reduction guidelines could, from the outset, file fewer or less serious charges than those justified by the evidence. The government could also obtain an unconditional dismissal of any charges already filed. Although such action can result in disparate treatment of similar criminal conduct, it involves the exercise of a kind of unilateral clemency that has always been considered the prerogative of the prosecutor.[137] The problem of controlling this discretion warrants attention in its own right, but as long as these decisions are genuinely independent of the defendant's plea on any remaining charges, they should not be seen as undermining the uniformity of sentencing in prosecuted cases.

A different problem is presented if decisions to forego prosecution are tacitly linked to a defendant's promise to plead guilty to other charges. Manipulation

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136. See pp. 83-84 supra.

137. See cases cited in note 102 supra.

of this kind, however, would be much riskier under charge-reduction guidelines than under current law. In the present system, if a defendant pleads guilty in exchange for a tacit commitment, the prosecution generally must honor the commitment to maintain the flow of pleas. Under a guideline system, the prosecutor would be required to make the first move--either by not filing the full charges or by moving for a rule 48(a) dismissal before the defendant's guilty plea is tendered. Once the prosecution had acted, it would be dependent on the defendant's willingness to stick to the bargain, and it would not have immediate recourse against defendants who reneged. Reinstatement of dismissed charges would present severe problems under the Speedy Trial Act,[138] and in any event the courts would presumably require some non-bargaining explanation for the reinstatement.

Similarly, if the prosecutor filed charges previously withheld, the courts could require an explanation for the delay. Double jeopardy doctrine already forbids prosecution on a greater offense after trial on a lesser included offense (or in some states, an offense

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138. See 18 U.S.C. §§ 3161(c), 3161(h)(6)) (1975).

arising out of the same transaction,[139] unless at the time of the previous trial "the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence."[140] To preserve the integrity of charge-reduction guidelines, the Sentencing Commission could develop a requirement that the same type of showing be made whenever the government files charges that could have been joined with a prosecution that has already proceeded beyond, say, formal arraignment.[141]

The prosecution would also have a more subtle means for insuring performance by the defense of covert, impermissible agreements: the tacit threat not to bargain in future cases with defense attorneys perceived as unreliable or unable to "control" their

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139. See, e.g., People v. White, 390 Mich. 245, 212, N.W.2d 222 (1973); State v. Brown, 262 Or. 442, 497 P.2d 1191 (1972); Commmonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973).

140. Brown v. Ohio, 432 U.S. 161, 169n.7 (1977).

141. Whether or not the Sentencing Commission developed a specific requirement of this kind, the trial judge would have power under Fed. R. Crim. P. 48(b) to dismiss any indictment or information filed after unnecessary delay.

clients. It is difficult to gauge the potential effectiveness of this threat in the context of a guideline system. Defendants would have a very obvious personal interest in disregarding a covert agreement, and defense attorneys often would be unwilling or unable to pursue their own goals in the face of the unequivocal interests of a particular client. Perhaps the most that can be said is that the emergence of informal, illegal ways of doing business would be much less likely than in the current sentencing system, where any hortatory prohibition against bargaining would run directly counter to the personal interest of every individual directly involved in the process.

Determination of the offense category is not the only step in the sentencing computation upon which prosecutorial influence may be brought to bear. Also potentially subject to bargaining-related distortions are judicial decisions concerning: the proper offender category, any aggravating or mitigating circumstances explicitly made relevant by the guidelines, and any factors that might prompt a departure from the guidelines. With respect to any of these elements, the prosecutor may decline to allege potentially aggravat-

ing facts or decline to challenge defense claims regarding mitigating circumstances.

One technique for preventing distortion of these judgments would be for Congress (or the Sentencing Commission)[142] to condemn as impermissible any such prosecutorial commitment given in exchange for the defendant's agreement to plead guilty. Such a policy, however, presents unacceptably high risks of evasion, and the probation service should not be expected to oversee and control the judgments of the United States attorney's office in all of these matters.[143]

An alternative approach would be to exclude from the sentencing calculation the kinds of circumstances that particularly lend themselves to manipulation. The offender category could be governed solely by circumstances of employment, prior record, and other background characteristics readily ascertained by the probation service. Consideration of other kinds of recur-

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142. As S. 1437 now stands, the Sentencing Commission could issue a "general policy statement" on this subject, see § 994(a)(2), but it apparently could not issue an authoritative prohibition without an additional grant of power from Congress.

143. See p. 71 supra.

ring aggravating and mitigating factors could be barred and guideline departures authorized only for circumstances that rarely arise and were not adequately considered in the formulation of the guidelines.

This solution would involve a significant cost. Judicial flexibility in tailoring the sentence to concededly relevant offense and offender circumstances would necessarily be restricted. This cost, however, would be present to some degree in every restriction of judicial discretion adopted in connection with sentencing reform. Such restrictions could be justified only on the basis of a judgment that the relevance of the circumstances in question--and the likelihood of consistent, discerning applications of them--are less substantial than the associated potential for disparities and abuse.

Plainly, the Sentencing Commission ought to approach this problem on an item-by-item basis. Factors easily manipulated and only marginally relevant should be excluded from consideration. Some reliance on circumstances perceived to be critically important might be permitted, even when possibilities for bargaining-related distortions cannot be entirely excluded.

Guidelines illustrating this approach to the problem were developed in connection with the current research, but they seemed inadequate to control discretion in the absence of limitations on the scope of bargaining over the charge.[144] The next chapter presents a guideline model combining this restricted-discretion approach to sentencing variables with explicit standards for the control of charge-reduction agreements. The resulting guideline system appears capable of achieving significant and substantially effective restrictions upon the sentencing discretion of both the courts and the prosecution.

No doubt some possibilities for evasion would remain. Actual experience with charge-reduction controls would be required to support any definitive assessment of the evasion problem. As matters stand, the obstacles in the way of outright manipulation seem sufficiently bothersome that, together with the expectation of good-faith compliance by the overwhelming majority of United States attorneys, instances of evasion would probably be too rare to jeopardize the integrity of the governing guideline principles.

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144. See pp. 37-38 supra.

V. GUIDELINE CONTROL OF PROSECUTORS AND JUDGES: THE STRUCTURED-DISCRETION MODEL

This chapter describes and evaluates a specific guideline model that channels, within narrow bounds, the sentencing discretion of both prosecutors and judges.

Specification of the Model

The model includes two principal components: a set of standards to guide the judge's selection of sentence after conviction, and a second set of standards to guide the judge's decision whether to accept a guilty plea contingent upon dismissal of a portion of the charges.

The first component consists of sentencing guidelines restricting judicial discretion and minimizing the effect of factors within prosecutorial control, in terms previously discussed.[145]

The second component of the guideline model is the following set of charge-reduction guidelines.

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145. See pp. 37-38 supra. The detailed content of these sentencing guidelines can be found in Volume 2, at 103-07 (Model E).

Charge-Reduction Guidelines

A. When any plea agreement described in rule 11(e)(1)(A) of the Federal Rules of Criminal Procedure[146] is submitted for the Court's approval pursuant to rule 11(e)(2), the Court shall require the attorney for the government to disclose the considerations thought to warrant dismissal of any charges pursuant to the plea agreement. Such disclosure shall be made in open court on the record, except as provided in paragraph B.4.

B. In determining whether to accept or reject such plea agreement, the Court shall be guided by the following principles:

(1) Dismissal of any pending charges shall not be justified by the savings of time and expense for

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146. Fed. R. Crim. P. 11(e)(1)(A) presently covers charge-reduction agreements involving the dismissal of pending charges, but does not expressly refer to agreements to withhold a charge in return for the defendant's plea. Although the House report on the 1974 amendments to the rule indicates that the reach of rule 11(e) was not intended to be limited to the kinds of agreements expressly described (see 18 U.S.C.A., Fed. R. Crim. P. 10-17, at 18), it would be preferable to avoid ambiguity by including explicitly in rule 11(e)(1) any plea agreement contingent upon a prosecutor's promise to withhold charges, and by making the court's approval of such plea agreements subject to the same standards as would apply in the case of a charge-reduction agreement relating to charges already filed.

witnesses, the parties, and the court resulting from disposition by guilty plea. The sentencing guidelines provide for a sentencing adjustment that gives appropriate weight to this consideration.

(2) Dismissal of any pending charges shall not be justified by ambiguities of fact or difficulties of proof that raise a question concerning factual guilt.

(a) If the government concludes that there is no reasonable doubt concerning factual guilt, and the defense disputes this position, the charge-reduction agreement shall be rejected and the dispute shall be resolved by trial.

(b) If the government concludes that there is a reasonable doubt regarding factual guilt on any charge, it may move for dismissal of that charge under rule 48(a). Such motion shall not be contingent upon the defendant's plea with respect to the remaining charges, and if any such motion is granted, the Court shall enter an order continuing for at least seven days any proceeding involving the defendant's decision whether to tender a guilty plea to the remaining charges.

(3) If the availability or admissibility of significant evidence is substantially in doubt, for reasons not related to factual guilt, the Court shall accept the plea agreement to the extent that it provides for reduction of the charges by one level of seriousness.[147]

(4) If the defendant has agreed, upon acceptance of the plea agreement, to cooperate in the investigation and/or prosecution of other persons, and if the attorney for the government certifies that such cooperation is expected to be of significant value and cannot be obtained by other means, the Court shall accept the plea agreement to the extent that it provides for reduction of the charges by one level of seriousness.[148] The justification set forth in this paragraph may, in unusual cases, be presented to the Court in

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147. Where multiple charges are pending, the Court may dismiss any charge or charges to the extent that such dismissal has the effect of decreasing the potential punishment by an amount not to exceed 25% of the penalty prescribed for the most serious offense committed. If the Court approves a dismissal or reduction in grade that reduces by one seriousness level the most serious offense charged, the Court may not in addition approve the dismissal of any other charges pursuant to this paragraph.

148. Id.

camera under seal, but such justification shall remain part of the record. The charge reduction authorized by this paragraph shall be in addition to any charge reduction authorized pursuant to paragraph B.3.

C. In determining the sentence to be imposed following conviction pursuant to any plea agreement described in paragraphs B.3 and B.4, the Court shall also give to the guilty plea the weight specified in the sentencing guidelines.

D. The Court may, in the interests of justice, accept a plea agreement in circumstances not authorized by section B, or reject a plea agreement required to be accepted by section B, but in any such case the Court shall state in open court, for the record, its reasons for departure from the principles set forth in section B, and shall submit a copy of such statement to the Sentencing Commission on the form prescribed for this purpose.

E. Except pursuant to a plea agreement formally disclosed to the Court as required by rule 11(e)(2), the attorney for the government shall not agree either to refrain from presenting any charge or to seek dismissal of any pending charge, upon condition that the

defendant plead guilty to any other federal charge. The Court shall insure compliance with rule 11(e)(2) and with this paragraph by appropriate scrutiny of the circumstances surrounding any indictment or information on related charges filed subsequent to the defendant's arraignment.

Discussion

Analysis of plea bargaining has frequently generated proposals that the circumstances prompting a plea agreement be presented to the judge in some formalized pretrial proceeding.[149] The commentators differ about whether discussions between the parties should be permitted prior to the formal proceeding,[150] whether the proceeding itself should be on the record,[151] and whether the judge's role in the proceeding should be

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149. See, e.g., N. Morris, The Future of Imprisonment 54 (1974); Alschuler, supra note 42, at 1123-36; White, supra note 40, at 462-65; Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv. L. Rev. 564, 585-94 (1977); Note, Restructuring the Plea Bargain, 82 Yale L.J. 286, 300-312 (1972).

150. Yes: White, supra note 40; Note (Yale L.J.), supra note 149, at 300 (but "discouraged"). No: Morris, supra note 149; Alschuler, supra note 42, at 1147.

151. Yes: Note (Yale L.J.), supra note 149, at 301. No: Morris, supra note 149.

one of active negotiator or neutral arbiter.[152]

Whether such a proceeding could effectively mitigate any of the principal problems of plea negotiation is itself subject to some dispute.[153] Under the best assumptions, however, proposals of this kind offer little hope for reducing sentencing disparities or the destructive effects of extremely strong inducements to plead guilty. As long as the authorized range of sentences remains broad and judicial discretion largely unguided, courts would have little basis for assessing the propriety of the particular concessions proposed, and neither uniformity nor effective limits on the extent of the concessions could be expected to emerge.

The proposed model seeks to achieve greater uniformity and more appropriate results in individual cases, by adapting the pretrial hearing proposals to

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152. Compare Note (Harv. L. Rev.), supra note 149, at 588-91 (active involvement by "magistrate") with Note (Yale L.J.), supra note 149, at 301 (passive judicial role). See also Alschuler, supra note 42, at 1123-24, 1147 (judge should assume the dominant role, but not an "adversary posture"; should remain "essentially passive.").

153. See, e.g., Kaplan, American Merchandizing and the Guilty Plea: Replacing the Bazaar with the Department Store, 5 Am. J. Crim. L. 215 (1977).

the framework of a guideline sentencing system. The model explicitly assumes the legitimacy of guilty plea concessions, but rejects as unduly rigid the often-proposed notion of a fixed discount to be extended in exchange for every plea.[154] Instead, the model includes, for every case, a minimum discount (specified in the sentencing guidelines) together with specified additional concessions (¶¶ B.3 and B.4) and an escape clause authorizing departure from the presumptively applicable principles (§ D). By preserving opportunities for negotiation concerning concessions in these areas, the model should permit the sentencing system to respond more sensitively to genuine differences among cases and should help reduce pressures for covert manipulation of the governing rules. The guidelines would, however, restrict the possible concessions, within a framework sufficiently concrete to prevent most bargaining-related disparities and to mitigate other potential problems of fairness posed by the present system of virtually unrestricted plea negotiation.

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154. The most fully developed of the "fixed discount" proposals appears in Note (Yale L.J.), supra note 149, at 301-02.

Although the model could accommodate any number of judgments about the extent of the plea concessions to be offered, the proposal by no means implies that concessions should be substantial or that they should be permanent features of a sound criminal justice system. On the contrary, an express premise of the proposal is that the concessions initially established should be quite small, at least for the typical case.[155] Experience with the operation of guided discretion in guilty plea sentencing may suggest the desirability of further reducing or even eliminating plea concessions for many kinds of cases. The model affords a framework for simultaneously developing the required information and

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155. Using the guideline tables constructed for preliminary exploration of these problems, the minimum discount for every guilty plea would, for example, be three months (for an offense carrying a fifteen-month sentence upon conviction by trial) or eight months (for an offense carrying a five-year sentence after conviction by trial). A relatively significant concession, however, was specified where the prison sentence after trial would be quite short, because a guilty plea shifted the penalty to probation. See Volume 2, at 62-64. The additional concession involved, where a reduction by one level of seriousness is authorized, was somewhat larger, with a concession of, for example, five months for an offense carrying a sixteen-month sentence after trial. See id. at 104.

adjusting the substantive judgments gradually in the direction indicated by experience.

Given the model's limitations on the extent of permissible bargaining outcomes, it seems unnecessary to attempt to forbid prehearing discussions between the parties or to transfer responsibility for negotiations to the judge. The proposed procedure would instead carry forward current practice by granting the prosecutor discretion to determine whether concessions beyond the small automatic discount are warranted, and by permitting the parties to discuss the matter in an unstructured setting. Any agreement reached would be submitted to the court for approval as in the current system; the model provides guidelines for the exercise of this judicial discretion but otherwise preserves the substance of present practice under rule 11.

In limiting the range of permissible plea agreements, the model makes a rudimentary attempt to distinguish among different circumstances that might motivate a charge-reduction proposal. Further analysis and experience in the application of the guidelines might lead to a more discriminating approach. For doubts about admissibility under search and seizure princi-

ples, a reduction of several levels could be authorized; the strong inducement to plead guilty would be acceptable since factual guilt would not be in dispute, and substantial penalties would be provided for government conduct of questionable legality.[156] For doubts about identification of the defendant, the validity of a self-defense claim, or the constitutionality of the statute defining the offense, reductions might be barred, since these issues arguably require all-or-nothing resolution rather than mitigation of punishment.[157] Whether or not the Sentencing Commission could agree on further refinements of this kind, the structure of the model would permit considerable limitations upon charge-reduction practices, as well as a mechanism (spelled out in paragraph D of the guidelines) for developing information likely to facilitate a more sophisticated approach.

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156. But see Tigar, Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv. L. Rev. 1, 21-24 (1970).

157. Cf. Menna v. New York, 423 U.S. 61 (1975) (double jeopardy claim not waived by guilty plea); Blackledge v. Perry, 417 U.S. 21 (1974). See also Bannister v. United States, 446 F.2d 1250 (3d Cir. 1971).

Implications

Although the guideline model appears capable of substantially reducing sentencing disparities in both contested and uncontested cases, its impact on several important variables is difficult to predict. The uncertainties can be explored by experimental tests of the model or by careful monitoring during the first years following formal adoption of similarly structured guidelines. None of the uncertainties casts doubt on the basic feasibility of the proposal.

The severity of guilty plea sentences seems likely to increase in some instances but decrease in others. Several observers have found that defendants pleading guilty pursuant to charge-reduction agreements currently receive little or no actual sentencing benefit.[158] Under the model, defendants formerly in that position would instead receive a definite concession, as specified in the sentencing guidelines. The sentence reduction proposed would generally be a small one,[159] probably a reasonable price to pay for elimi-

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158. See note 43 supra.

159. See note 155 supra.

nating the deception implicit in the present system of "concessions."

Other observers have reported that present charge bargaining has precisely the opposite effect--concessions actually received must be larger, on the average, than in a system of definite sentencing commitments, to compensate for the uncertain value of a promised charge-reduction bargain.[160] In cases where this uncertainty factor is at work, the model could maintain the current plea rate with a smaller concession, and sentences in these guilty plea cases would thus tend to become somewhat more severe. The model would also prohibit the most substantial guilty plea concessions, and as a result, some defendants might choose to stand trial and win acquittal; the remaining defendants of course would face sentences more severe than those they could have obtained under the current system of unrestricted concessions.

Although the impact on the "average" sentence is difficult to predict, it seems significant that in cases presently involving deceptively small (or nonexistent) concessions, the defendant might receive some

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160. E.g., Alschuler, supra note 42, at 1140-41.

genuine benefit, while in guilty plea cases now involving especially lenient sentences (and the strongest pressures to waive trial), the concessions would be substantially reduced.

The fairness of plea bargaining would be enhanced in other respects as well. Because the permissible guilty plea concession is generally quite modest, plea agreements would probably be most common in cases involving no real defense. These may be the cases in which pleas are most commonly tendered now, as defenders of plea bargaining often assert, but if it is true that prosecutors typically offer the most attractive deals in their weakest cases,[161] this type of bargaining will be largely precluded. Similarly, the guideline requirement of open disclosure of certain problems of proof (¶ B.3) will impair the tactics of mutual deception and bluff that some courts currently permit as part of legitimate adversarial behavior.

The impact of the proposal on the guilty plea rate seems impossible to predict a priori. Experience would indicate whether the number of contested cases increased either generally or for certain offenses and if

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161. See Alschuler, supra note 133.

so, whether corrective action in the form of either an increase in the concession or an increase in trial capacity was required. Because it is conceivable (though in my judgment not likely) that adoption of the model could produce a drastic and unmanageable increase in the trial rate before any corrective action could make itself felt, implementation of the model on a trial basis in a few districts seems desirable. In any event, the Sentencing Commission could adopt a "judicial emergency" provision, comparable to the one in the Speedy Trial Act,[162] so that the entire guideline procedure could be promptly suspended in the event of a genuine crisis. The remote prospect of a breakdown in the judicial machinery is inherent in any proposal for substantial constraints upon discretion and should not in itself forestall the adoption of significant controls.

A related problem is the impact of the model on the proportion of bench trials to jury trials. Some statistical evidence suggests that substantial sentencing concessions are currently granted to defendants who

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162. 18 U.S.C. § 3174 (1975).

waive a jury and agree to a trial before the judge.[163] If the guidelines authorize no concession for such jury waivers, defendants formerly electing a bench trial might either plead guilty (if the guilty plea concession appears attractive) or elect a jury trial (if the plea concession is considered too small). In either event the procedure is arguably less satisfactory than that provided by the relatively efficient but nonetheless definitive resolution of guilt by an adversary trial before a judge.

If the model did substantially reduce the proportion of contested cases tried without jury, the Sentencing Commission might feel impelled to explore the possibility of an explicit concession for waiver of a jury. Formal authorization of such a concession might have the constructive effect of making attractive to some defendants--who might otherwise plead guilty--an expeditious but fair procedure for ascertaining guilt. In fact, by making the jury-waiver concession very much

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163. Tiffany, Avichai, & Peters, A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-68, 4 J. Legal Stud. 369 (1975). Contra, J. Eisenstein & H. Jacob, Felony Justice: An Organizational Analysis of Criminal Courts 276-84 (1977) (three state systems).

larger than the guilty plea concession, the Sentencing Commission could establish a framework for eventually replacing guilty plea dispositions with the somewhat more costly but plainly more dignified and reliable procedure of formal bench trials.

Jury-waiver concessions nevertheless raise troublesome problems. Their constitutionality is not self-evident,[164] and the feasibility of tailoring them

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164. If the plea bargaining system is ignored, the distinction between penalties applicable to bench and jury trials would plainly be seen as imposing a deliberate and impermissible penalty upon exercise of the right to jury trial. But if the purpose and effect of a jury-waiver concession is to draw cases from disposition by guilty plea to disposition by a more formal procedure, the result could well be different. Of course, since the defendant seeking a bench trial is not "ready and willing to admit his crime and . . . enter the correctional system in a frame of mind which affords hope for success in rehabilitation," Brady v. United States, 397 U.S. 742, 753 (1970), the initial basis for the Supreme Court's approval of plea concessions would be lacking. But this "remorse" rationale, never a very realistic one, was thoroughly exploded by North Carolina v. Alford, 400 U.S. 25 (1970), and the Court is now explicit in justifying plea concessions by the mutual advantages flowing from the system. See Corbitt, 99 S. Ct. at 499 & n.12. This feature equally characterizes a system of concessions for waivers of a jury or indeed for waivers of nearly any constitutional right. The constitutional problem must remain murky for the present, because the Court has yet to reconcile its approval of plea bargaining with its disapproval of penalties designed to discourage the exercise of constitutional rights. See pp. 93-97 supra.

to the costs of (or need for) jury trial in certain kinds of cases is not obvious. Even their contribution to efficient court administration is unclear, because the Federal Rules of Criminal Procedure permit the defendant in a bench trial to demand formal findings of fact,[165] and it has been held that under the present rules this right cannot be waived prior to conviction.[166] It would be instructive to know whether a bench trial with formal findings does "cost" less than a jury trial. In any event, jury-waiver concessions are unlikely to encourage choice of the "most efficient" option--bench trials without formal findings--unless the concession is further refined to insure a greater sentencing benefit for such cases. At that point, new questions of fairness and constitutionality justifiably arise. These issues suggest the difficult questions of substance inherent in any effort to make explicit the premises upon which the federal system of criminal justice presently operates. If a guideline

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165. Fed. R. Crim. P. 23(c).

166. United States v. Livingston, 459 F.2d 797 (3d Cir. 1972); Howard v. United States, 423 F.2d 1102 (9th Cir. 1970).

system and formal guilty plea concessions do expose problems concerning the reasons why some defendants currently seek bench trials, then it seems preferable to confront those problems directly and to attempt candid solutions.

"This publication printed by Federal Prison Industries, Inc., Printing Plant, Federal Correctional Institution, Lompoc, California."

"Training in the Printing Plant at Lompoc includes an apprenticeship program in composition, camera, plate making and offset printing. This program is approved by the United States Department of Labor, Bureau of Apprenticeship and Training and the Los Angeles, California Area Multi-Trades Joint Apprenticeship Standards."

FPI-LOM-10-79-1M-2560

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