DUE PROCESS OF SENTENCING

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The aspiration for consistency in criminal sentencing decisions is nearly universal. But the complexities of criminal justice administration are likely to defeat most current efforts to see this aspiration fulfilled. This Article explores the principal difficulties and develops a proposal that can bring the goal within reach. My purpose is to suggest the range of procedures necessary to ensure the effectiveness of a concrete reform proposal and then to consider whether a sentencing system so elaborated would indeed serve the values that ordinarily make consistency and formal procedural fairness worthy of pursuit.

Because my objectives require close attention to the details of law and behavior that stand between reformist goals and their attainment in the sentencing context, I must limit myself to only a brief account of the background of the sentencing reform movement. Several factors, by now familiar to a wide public, have generated a broad consensus in support of one immediate goal—the restriction of judicial sentencing discretion. These factors include disillusionment with rehabilitation, the goal that provides a major justification for discretion and individualization in sentencing.1

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This article grows out of research originally undertaken for the Federal Judicial Center and builds on findings developed in detail in the report of that initial study, S. SCHULHOFER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM (Federal Judicial Center Report 1979). I profited from extensive comment and criticism by William Eldridge and Anthony Partridge of the Center’s staff and by colleagues both at the University of Pennsylvania and at the University of California, Berkeley, where a portion of the present Article was presented to a colloquium in March, 1979. I also owe thanks for assistance to Albert Alschuler and Michael Tonry.


Perhaps equally important are objections to the moral legitimacy of behavior modification even if, or particularly if, it works. See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 34-47 (1971); J. MITFORD, KIND AND USUAL PUNISHMENT (1973); Allen, CRIMINAL JUSTICE, LEGAL VALUES AND THE REHABILITATIVE IDEAL, 50 J. CRIM. L.C. & P.S. 226 (1959).
awareness of extreme disparities in the treatment of like cases. The inconsistencies and uncertainties associated with broad, unstructured discretion are, of course, unfair in themselves; they are also thought to undermine the deterrent effectiveness of the criminal law and to promote resentment among prisoners, thereby increasing their sense of alienation and mistrust. The sentencing process has come to seem so haphazard that it generates cynicism among the public and lack of confidence in the regularity, reliability, and effectiveness of the legal system generally.

Scholars, legislators, and reformers share common ground in their belief that judicial discretion should not be entirely eliminated, but that it should operate within much narrower bounds, should be informed by meaningful standards, and should be subject to appellate review. Efforts to realize this largely unexceptionable goal will run into difficulty, however, when they confront the complex institutions and practices that comprise the criminal justice "system." Control of judicial discretion could cause many more problems than it solves, unless prosecutorial discretion and plea bargaining are also brought under control. But this is more easily said than done. I shall focus here on the practical and theoretical consequences of this unpleasant reality.

Part I of this Article provides an overview of the differing approaches to sentencing reform suggested or adopted in jurisdictions across the country. Part II analyzes the actual allocation of sentencing authority in a single jurisdiction—the federal—and traces the problems of institutional dynamics that could defeat the goals of federal sentencing reform unless effective control of prosecutorial discretion can be achieved. Part III considers in detail one process that might serve to impose order upon the prosecutor's de facto sentencing power. This process, which I call "real offense" sentencing, has received little scholarly attention, but it appears to be a strong favorite among judges and other criminal justice professionals and is already being used on a widespread, low visibility basis. I


4 See, e.g., M. FRANKEL, supra note 3; TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); A. von HIRSCH, DOING JUSTICE (1976); Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 HARV. L. REV. 904 (1962). These objectives correspond to what Professor Davis describes as the confining, structuring, and checking of discretion. K. DAVIS, DISCRETIONARY JUSTICE 52-55, 97-99, 142-43 (1969).

5 On the reasons for this choice, see note 43 infra.
conclude that this approach would seldom prove effective in a system of structured discretion and, far from furthering due process values, would compound the unfairness it is intended to remedy. Part IV describes the specifics of an alternative approach, involving formal judicial control of prosecutorial charge-reduction decisions within a framework of guidelines that I develop in detail.

The first and, for reformers, the most important question is whether the proposed approach will indeed control prosecutorial sentencing power. Although a number of factors preclude complete assurance on this score, I believe that my proposal would, within realistic limits, prove effective and would comport with traditional conceptions of equality and fairness. Despite my confidence in these conclusions, I expect that some professionals active in sentencing and corrections will dismiss the entire proposal as artificial or unfeasible. I am unwilling to regard this resistance as reflecting only a vested interest in the status quo. Part V therefore develops some of the reasons why an elaborate "due process" model, such as that proposed, might ultimately disserve the very values we associate with the rule of law. The desirability of visibility, accountability, and formal procedural fairness cannot simply be taken for granted in sentencing, or in many other domains in which conventional conceptions of due process are pressed.

I. The "DETERMINATE SENTENCING" MOVEMENT

"Determinate sentencing" has become a popular goal throughout the nation, but the term has no generally accepted meaning and the effect of some determinate sentencing statutes is almost diametrically opposed to that of others. The first step in understanding these proposed reforms is to be clear about the starting point, the complex "indeterminate" sentencing process which prevailed throughout the United States until three or four years ago and still exists in most states and in the federal system. Typically, sentencing power is shared by prosecutors, judges, and a parole board or similar administrative agency. The range of potential sentences is limited initially by the prosecutor's charging decision and by the scope of penalties authorized by statute. If the defendant is convicted after trial, the selection of sentence within this range—ordinarily a very wide one—is made by the trial judge, whose decision is not governed by any formal criteria and need not be explained, in

writing or otherwise. Generally, neither the defense nor the prosecution may appeal this sentencing decision. In the case of sentences to imprisonment, defendants ordinarily are eligible for early release after service of some predetermined minimum period, which usually represents a small portion of the total sentence. In the federal system, for example, the defendant becomes 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.\footnote{In the federal courts, there are a variety of narrow exceptions to the general rule of nonreviewability: (1) sentences constituting cruel and unusual punishment, see, e.g., Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973); (2) sentences imposed “mechanically,” without consideration of the defendant's character or the circumstances of the offense, see, e.g., Wooley v. United States, 478 F.2d 139, 143-44 (8th Cir. 1973); United States v. McKinney, 466 F.2d 1403 (6th Cir. 1972); (3) sentences based on constitutionally defective information, see, e.g., Townsend v. Burke, 344 U.S. 736 (1948) (false assumption regarding defendant's criminal record). See Coffee, The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice, 73 Mich. L. Rev. 1361, 1435-40 (1975).}

The decision whether to grant early release to eligible offenders is made by the parole agency, often without a formal hearing and usually without the benefit of any concrete standards to guide its decision.\footnote{18 U.S.C. § 4205 (1976).}

This “normal” procedure for determining sentence applies, of course, only in a small minority of cases because, in most jurisdictions, seventy to ninety percent of all convictions are obtained by plea of guilty rather than by trial.\footnote{See generally A. von Hirsch & K. Hanrahan, The Question of Parole 1-3 (1979).} In guilty plea cases, the prosecutor's role generally becomes more important: a plea agreement with the defense may specify the sentence that the judge must impose, or the prosecutor may dismiss related charges, make a sentence “recommendation” (almost always accepted by the judge), or take other action directly or indirectly affecting the ultimate punishment.\footnote{See Georgetown University Law Center Institute of Criminal Law and Procedure, Plea Bargaining in the United States 16-24 (1977). This study stresses, however, that variations in guilty plea rates, both among states and among jurisdictions within states, are much wider than previously believed. For example, the mean guilty plea rate for jurisdictions with a population over 500,000 was found to be 95.7% in New York state, but only 65.6% in Pennsylvania. Id. 21.}

This sentencing process is “indeterminate” in several respects. Crucial decisions are made by prosecutors, judges, and parole officials. In each instance the decisionmaker's power is broad and

\footnote{11 See Santobello v. New York, 404 U.S. 257 (1971).}
unstructured, and although the effect of a sentencing decision by one kind of official may be tempered by the decisions of others, the decision itself is not subject to any form of appeal.\textsuperscript{13} Finally, the sentence is not only indeterminate in terms of legal standards and controls but also indeterminate in time. Even after sentence is pronounced by the judge, the actual date of release in the case of imprisonment depends upon parole board action, and the critical decision may be years away. Indeed, after release the parolee remains subject to reimprisonment under the original sentence if he or she violates the conditions of release.

Many reform proposals focus upon this delay in determining the actual sentence, with its result of prolonged and cruel suspense for the prisoners affected. These proposals accordingly contemplate either abolition of parole or a requirement that the parole release date be fixed very early in the prisoner's term; the sentence established at the outset will then represent "flat time," the term of imprisonment that will actually be served.\textsuperscript{14} The most extreme version of this type of "determinate" sentencing is that enacted in 1975 in Maine, under which parole is abolished and trial judges select flat-time sentences from within broad statutory ranges at the time of conviction.\textsuperscript{15} This system provides certainty for the offender entering prison, but of course does nothing to make the critical decisions more uniform or predictable and, in fact, aggravates the problems of broad judicial discretion by removing the countervailing power of the parole board.

More commonly, reform proposals treat broad judicial discretion as the principal evil. One line of attack, recommended by the American Bar Association\textsuperscript{16} and long accepted in a few states,\textsuperscript{17} is appellate review of trial court sentencing. As long as legislatively authorized sentence ranges remain broad and the objectives of punishment remain diverse and in part inconsistent, however, appellate review by itself can accomplish very little.\textsuperscript{18}

\textsuperscript{13} But see note 7 supra.
\textsuperscript{14} E.g., D. Fogel, "... We Are the Living Proof ...": The Justice Model for Corrections 245-60 (1975); A. von Hirsch & K. Hanrahan, supra note 9, at 27-38.
\textsuperscript{16} ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (1967) [hereinafter cited as ABA Project on Appellate Review].
\textsuperscript{17} See Comment, Appellate Review of Sentences: A Survey, 17 St. Louis U. L.J. 221, 221 & n.4 (1972).
A more concrete and important approach has been to reduce sharply the range of punishments authorized by statute. Legislation recently enacted in California specifies within very narrow limits the sentence to be imposed for each offense.¹⁹ This approach appears promising on its face, particularly when combined, as it typically has been, with attention to the problems of parole board discretion and timing of the release decision.²⁰ But the variety and complexity of criminal conduct render specification of precise statutory penalties a prodigious task and render the resulting statutes exceedingly cumbersome. Legislative attention to the judgments reflected in each statutory rule for computation of sentence is virtually impossible, and some circumstances relevant to sentencing are bound to be overlooked. As a solution to these difficulties, the legislation commonly authorizes some residuum of judicial discretion,²¹ but the disease of excessive detail typically remains, while the attempted cure creates a loophole that could conceivably defeat the entire enterprise.²²

Legislative specification of punishment poses another problem that most reformers consider even more serious—the enactment of increasingly severe penalties. Accustomed to the long prison terms often pronounced upon conviction, the public and its representatives are generally unaware that actual time served has been very much shorter. In addition, intense concern with crime control, combined with little interest in or appreciation of the difficulties and costs of prison management, induces most legislators unhesitatingly to prefer long prison terms to shorter ones.²³ In several of the states that have chosen to rely upon legislatively prescribed sentences,

²⁰ See A. von Hirsch & K. Hanrahan, supra note 9, at 83-86.
²¹ See, e.g., CAL. PENAL CODE § 1170(a)(2) (West Supp. 1979) (authorizing court, in its discretion, to impose fine, probation, or county jail term in lieu of mandated state prison terms).
²² The sentencing reform legislation recently enacted in Indiana provides a striking example of this danger. The new statute specifies a single “presumptive sentence” for each of five grades of felonies, but authorizes substantial adjustments to the presumptive sentence when the trial judge finds an aggravating or mitigating circumstance. The vagueness of many of these circumstances provides the judge with discretion to choose a sentence of, for example, two-to-eight years’ imprisonment for a Class C felony or six-to-twenty years’ imprisonment for a Class B felony. IND. CODE ANN. §§ 35-50-1-1 to 35-50-6-6 (Burns Supp. 1979); see Lagoy, Hussey, & Kramer, A Comparative Assessment of Determinate Sentencing in Four Pioneer States, 24 CRIME & DELINQUENCY 385, 391-94 (1978).
preliminary reports suggest that penalties imposed will be quite high relative to those of previous practice.\textsuperscript{24}

The case for short sentences rests, of course, upon much more controversial values than does the case for consistent sentences. I want to consider later the implications, in terms of democratic theory, of reform efforts to frustrate or deflect the potential legislative preference for more severe prison sentences.\textsuperscript{25} For purposes of this introduction, it is enough to note several givens in the current institutional environment. First, legislatively prescribed penalties are often considered "too high" not just by civil libertarians, but also by corrections officials, parole boards, prosecutors, and even police.\textsuperscript{26} Second, any proponent of greater consistency in sentencing must recognize that pursuit of this goal through legislatively prescribed sentences may mean sentences much longer than those currently imposed, aggravation of the already severe overcrowding in prisons,\textsuperscript{27} and increased likelihood of nullification—never a very orderly or consistent phenomenon—by police, prosecutors, juries, trial and appellate judges, prison administrators, parole boards (if any), and those charged with dispensing executive clemency. These factors, together with the difficulties of achieving adequate specificity without excessive detail, render troublesome and potentially self-defeating any approach relying, as does the California statute, upon narrow, legislatively prescribed penalty ranges.

An alternative approach, which could alleviate these difficulties, is to preserve relatively broad statutory ranges of punishment and to entrust the development of narrower penalty ranges and more precise categories of offenses to a "sentencing commission," an administrative agency exercising power delegated by the legislature. A sentencing commission would have the time and resources to deal


\textsuperscript{25} See text accompanying notes 267-73, 278-307 infra.

\textsuperscript{26} I know of no polls that establish this proposition with rigor, but the observation is made over and over in decisions by these officials. For information on studies of prosecutors, see, e.g., ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 1.8(a)(iii), Commentary at 45-47 (1968) [hereinafter cited as ABA PROJECT ON GUILTY PLEAS]. Regarding judges, see, e.g., D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 112-30, 177-80 (1966). With regard to decisions by the police, see, e.g., W. Lafave, Arrest: The Decision to Take a Suspect into Custody 137-43 (1965). See also Singer, In Favor of "Presumptive Sentences" Set by a Sentencing Commission, 24 Crime & Delinquency 401, 412-13 (1978).

with the complex array of sentencing problems and, though ultimately accountable to the legislature, would be insulated to a degree from the most immediate political pressures. To be sure, reliance upon rulemaking by an administrative agency will pose serious dilemmas of its own; but this device, for all its imperfections, almost certainly provides a more promising framework for progress than either the legislative process or the present system of broad, totally unstructured delegations of authority.

The relatively sophisticated notion of reliance upon administrative rulemaking was first proposed by Judge Marvin Frankel in his incisive study of criminal sentencing, a work which provided much of the impetus for the current sentencing reform movement. The sentencing commission approach has now been adopted in Illinois, Minnesota, and Pennsylvania, and it has been included in several bills introduced in Congress, including S. 1437, the proposed federal criminal code passed by the Senate in 1978.

Although reform proposals usually do not require that a commission issue its sentencing rules in any particular form, the guideline structure adopted several years ago by the United States Parole Commission—a matrix displaying categories of offense seriousness down the vertical axis and categories of offender characteristics across the horizontal—provides a useful illustration of the kind of guidelines and categories expected to emerge as a result of delegation to a specialized agency. These reform proposals differ in

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28 In some formulations, the legislature is given a limited period of time in which to reject the commission's guidelines; if no action is taken during that period, the guidelines become effective at its expiration. E.g., 18 PA. CONS. STAT. ANN. § 1385(b), (c) (Purdon Supp. 1979-1980). When a commission is authorized to promulgate immediately effective guidelines, the legislature of course retains the power to modify them by subsequent statute.


30 See K. DAVIS, supra note 4, at 65-68.


35 The idea of a formal matrix of sentencing categories evokes hostility from many who see such "pigeon-holing" of behavior and individuals as immoral or
other particulars, including the composition of the commission and locus of power to appoint its members, the criteria the commission is directed to apply, the force of its standards, the availability of appeal from judicial sentencing decisions, and the preservation or abolition of early release on parole. Yet all of the recent sentencing commission proposals have in common the failure to address the problem of prosecutorial discretion. The reform proposals calling for legislatively prescribed penalties make the same omission. As a result, despite important differences among the many approaches to sentencing reform, all leave untouched a major area of sweeping, unstructured sentencing power.

This universal failure to deal with prosecutorial sentencing power cannot be ascribed to unawareness of its significance. Scholars and reformers who have proposed restrictions upon judicial and parole board discretion commonly concede the critical role of prosecutorial discretion but confess that they are simply not in a position to offer concrete proposals for bringing that discretion under control. The very importance of prosecutorial discretion, together with the difficulty of subjecting it to effective constraints, has prompted all proponents of sentencing reform to postpone attention to the problem until the relatively tractable issues of judicial and parole board discretion have been resolved. The next part of this Article will examine the likely consequences of this cautious strategy of taking one step at a time, restricting the discretion of judges and parole officials without simultaneously restricting the discretion of prosecutors.

dehumanizing. Even if the idea of categorization (or at least presumptive categorization) is not rejected in principle, highly sensitive moral issues are implicated in the complex methodological decisions that must be made to construct the categories and to carry out the empirical research that supports them. For thorough exploration of these problems, see Coffee, Repressed Issues of Sentencing: Accountability, Predictability and Equality in the Era of the Sentencing Commission, 66 Geo. L.J. 975 (1978); Project, Parole Release Decision-making and the Sentencing Process, 84 Yale L.J. 810 (1975). Although I need not, for present purposes, detail the substance of these problems, a task ably executed by the authorities just cited, a central premise of my analysis is that problems of this kind are better faced and resolved, whatever the resolution, rather than relegated, as at present, to unprincipled, inconsistent decisionmaking in a system of low visibility, discretionary power. See text accompanying notes 259-307 infra.

Recent amendments to the pending federal legislation take the first steps toward redressing this oversight. See note 183 infra.

E.g., Twentieth Century Fund Task Force on Criminal Sentencing, supra note 4, at 26-27; A. von Hirsch & K. Hanrahan, supra note 9, at 22-23; A. von Hirsch, supra note 4, at 106.

See text accompanying notes 89-95 infra.

See authorities cited in note 37 supra.
II. The Effect of Sentencing Guidelines on the Distribution of Sentencing Authority

Critics of recent reform proposals often charge that the failure of these proposals to address prosecutorial discretion is a fundamental weakness.\textsuperscript{40} Two independent themes in this sort of criticism must be distinguished. First is the charge that because prosecutorial discretion and plea bargaining are so important, with guilty pleas accounting for up to ninety percent of all convictions, the effort to address judicial discretion represents a difficult and ultimately trivial exercise. The second theme, implicitly contradicting the first, is that judicial sentencing power currently does play a significant role and that restraining judicial discretion will permit prosecutorial discretion to assume a dominance that it does not have today.

The first charge, that judicial sentencing power represents a trivial portion of the sentencing problem, seems quite misguided. The empirical premise of this criticism is, first of all, far from solid. Guilty pleas do, to be sure, account for the bulk of all convictions. But, as I will show presently,\textsuperscript{41} we have no clear understanding of the extent to which judges actually control or influence sentences in guilty plea cases. More important, even if this charge rests on an accurate view of the facts, it is ill-founded as a matter of principle. However small the proportion of fully contested cases, these are the ones in which expectations of fair process are at their peak. As a highly visible embodiment of an aspiration, even a seldom realized one, trial procedure assumes a symbolic importance far out of proportion to the frequency of its use.

The subtler and more important line of criticism does not claim that the judicial role is trivial, but instead stresses its significance and focuses on the interaction between the judiciary and others who exercise discretion in the system. A plan to narrow the discretion of judges and parole boards could reduce the possibility for abuse and arbitrary decisions by these officials, but it would also

\textsuperscript{40} E.g., Alschuler, Sentencing Reform, supra note 6, at 566; Coffee, supra note 36, at 979-80 & n.15; Zimring, supra note 23, at 16; Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st & 2nd Sess. 2462-73 (statement of William Anderson, U.S. General Accounting Office); 1933 (Judge James Burns, D. Ore.); 2245, 2262 (John Cleary, Nat'l Legal Aid & Defender Ass'n); 595-96 (Thomas Emerson, Professor of Law, Yale Law School); 2331-42 (Matthew Heartney, Yale Law School); 2356-57 (G. La Marr Howard, Nat'l Ass'n of Blacks in Criminal Justice); 2474 (Judge Morris E. Lasker, S.D.N.Y.); 2224 (Cecil C. McCall, Chairman, U.S. Parole Comm'n) (1978) [hereinafter cited as House Judiciary Hearings].

\textsuperscript{41} See text accompanying notes 47-67 infra.
limit their ability to counteract abuses of prosecutorial power in plea negotiation. A reformed sentencing system, controlling two of the important sources of discretion, might therefore generate even greater sentencing disparities than those resulting from the present system of three uncontrolled, but to some extent offsetting, sources of discretion.\textsuperscript{42}

Although some critics of sentencing reform assume that this possibility would materialize, it is in fact rather difficult to assess whether a reform that does not control prosecutorial discretion would, on balance, increase or reduce sentencing disparities. One must ascertain, for example, the extent to which judicial and parole commission discretion do temper prosecutorial discretion in guilty plea sentencing today and also what portion of this tempering role would remain operative under an entirely different framework. And the analysis of present conditions must, because of the limits of current knowledge, be nearly as speculative as the analysis of future conditions.

In the next few pages I will attempt to lay bare some of the details of institutional practice upon which answers to such questions depend. In order to make the analysis sufficiently concrete, I will emphasize the specifics of law and behavior in a single jurisdiction. The next section therefore focuses upon the distribution of sentencing authority in federal prosecutions, and the remainder of the Article considers issues raised by the nature of the discretion of federal prosecutors.\textsuperscript{43} Although I believe that my principal conclusions and the core of my proposal may be applied to most American jurisdictions, transposing the analysis into these contexts will require caution, together with some obvious qualifications to be described in the closing pages of this Article. But my argument will be best understood if I adhere to specifics, and the discussion thus remains rooted in the particularities of the federal system.

A. The Current Distribution of Federal Sentencing Authority

In the existing federal system, sentencing authority is shared by prosecutors, judges, and the United States Parole Commission, in the typical pattern described earlier.\textsuperscript{44} If the defendant is cons-

\textsuperscript{42} See, e.g., Alschuler, Sentencing Reform, supra note 6, at 563-64; Zimring, supra note 23, at 16.

\textsuperscript{43} I choose the federal system not because it is typical (it is not, see text accompanying notes 334-35 infra), but rather because it is in some ways more orderly than most state systems, and thus presents a somewhat less forbidding environment in which to begin exploration of a difficult problem of social control.

\textsuperscript{44} See text accompanying notes 6-9 supra.
victed after trial, the selection of sentence, within broad statutory ranges, is made by the trial judge. In the case of sentences to imprisonment, the defendant will be eligible for early release after service of any minimum sentence set by the judge or, at the latest, after service of one-third of the maximum sentence imposed.\textsuperscript{45} The decision whether to grant early release to eligible offenders is made by the Parole Commission according to formally promulgated guidelines.\textsuperscript{46}

Contested cases, of course, represent only a small part of the total: roughly eighty to ninety percent of all federal convictions are obtained by plea of guilty (or \textit{nolo contendere}) rather than by trial.\textsuperscript{47} Under the Federal Rules of Criminal Procedure, there are four distinct routes to the imposition of sentence after a plea of guilty:

(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 of the charges; \textsuperscript{48}

(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; \textsuperscript{49}

(4) the defendant may plead guilty pursuant to an agreement specifying the sentence that must be imposed if the guilty plea is accepted.\textsuperscript{50}

In the first instance the mix of sentencing authority among prosecutorial, judicial, and parole officials is identical to that in contested cases. Generalization is hazardous in the other three situations; solid empirical evidence concerning the distribution of sentencing power is virtually nonexistent.\textsuperscript{51}

\textsuperscript{45} 18 U.S.C. § 4205 (1976). In the case of a life sentence or a sentence exceeding 30 years, the defendant will be eligible for parole after serving 10 years. \textit{Id.}

\textsuperscript{46} 28 C.F.R. § 2.20 (1979).

\textsuperscript{47} For fiscal 1974, the figure was 85% (30,679 of 36,252 convictions). \textsc{Administrative Office of the United States Courts, Federal Offenders in United States District Courts 1974}, at 16 (1977).

\textsuperscript{48} \textsc{Fed. R. Crim. P. 11(e)(1)(A).}

\textsuperscript{49} \textit{Id. 11(e)(1)(B).}

\textsuperscript{50} \textit{Id. 11(e)(1)(C).}

\textsuperscript{51} See generally \textit{Note, Restructuring the Plea Bargain}, 82 \textsc{Yale L.J.} 286, 291-95 (1973). The Justice Department is presently undertaking a survey, in part to develop more information in this area. The questionnaire being used will not, however, yield statistics indicating the precise importance of various plea bargaining procedures in any given United States Attorney's office.
In evaluating the significance of prosecutorial power in these guilty plea situations, it will be useful to focus first on the relationship between the prosecutor and the judge. In a charge-reduction agreement (item 2), the prosecutor controls the outer boundaries of sentencing, but because the judge generally will have the option to impose a substantial prison term even after charge reduction, the decision whether the defendant will go to prison and the initial determination of the length of any prison term imposed remain largely in judicial hands.

When presented with 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, however, the judge cannot exercise that prerogative very often without discouraging defendants from tendering this type of plea. Government recommendations therefore are probably accepted in most instances. One should not infer, though, that the prosecution in fact controls the sentencing decision. A few judicial rejections of recommended sentences can suffice to communicate the court's preference. Thereafter recommendations will normally conform to what the judge will accept; they must if the prosecutor is to maintain the credibility of this inducement to plead. A process of mutual accommodation between prosecutor and judge may thus determine the actual level of sentences imposed in "recommendation" cases. And even when the prosecutor plays the dominant role in practice, he or she can retain control over sentencing only with the continued acquiescence of the court.

The plea agreement for a definite sentence (item 4) appears to involve the greatest limitation on the judge's discretion. Because rejection of the disposition contemplated by the agreement entitles the defendant to withdraw the plea, the court may exercise this prerogative even less readily than it would in the case of a nonbinding recommendation. Nonetheless, the court's ability 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. In any case, subsequent agreements may, as in recommendation cases, tend to conform more closely to judicial preferences.

The judicial role thus appears strongest in connection with the first type of plea and progressively weaker with the others, but we still lack a basis for determining the precise mix of prosecutorial and judicial discretion in each of the situations. We even lack reliable information concerning the percentage of guilty pleas obtained in each of these ways. Plainly, a good deal depends upon informal customs in each federal district; these have not been studied and, in any event, are subject to change. My own impression is that, in many districts, judges currently claim and exercise the paramount sentencing power in most of their cases.

The interaction between judges and prosecutors, on the one hand, and the Parole Commission, on the other, has become somewhat easier to understand with the publication of the Commission's guidelines for determining release dates. These guidelines indicate the time each prisoner will ordinarily serve, as a function of both the severity of the offense and the offender's "parole prognosis" (as determined by a few personal characteristics). The severity of the offense depends on "the overall circumstances of the present offense behavior" and may be "more severe than the offense of conviction." For example, in determining the release date for a prisoner sentenced under a charge-reduction agreement (item 2), the Commission will, if it deems "persuasive" its information about more serious offenses originally charged, base the presumptive re-

57 The parole prognosis is the predicted likelihood that the offender, if granted early release, will avoid revocation of the parole.
59 Such information may be obtained from the presentence investigation, the grand jury indictment (including counts dismissed as part of a plea agreement), and other sources. Id. Much depends upon how readily the Commission will find that evidence of the more severe offense is "persuasive." The manual mentions as indicia of persuasiveness only specificity of the allegation, corroboration of the allegation by "established facts," and the reliability of the source of the allegation. Id. The Commission's published statements suggest the likelihood that it will routinely find a more severe offense in charge-reduction situations. See 40 Fed. Reg. 41,328, 41,330 (1975). And the cases litigated to date suggest that the persuasiveness standard will be readily met in charge-reduction situations. See, e.g., Biliteri v. United States Bd. of Parole, 541 F.2d 938, 944-45 (2d Cir. 1976); Bistram v. United States Parole Bd., 535 F.2d 399 (5th Cir. 1976) (per curiam); Manos v. United States Bd. of Parole, 399 F. Supp. 1103 (M.D. Pa. 1975); Lupo v. Norton, 371 F. Supp. 156, 161-63 (D. Conn. 1974). But see Pernetti v. United States, 21 Crim. L. Rep. 2033 (BNA) (D.N.J. 1977) (holding that Parole Commission may not consider charges dismissed as part of a plea agreement).
lease date on the same category as that which would have controlled after conviction on those original charges. This focus upon the "real offense" appears on its face to negate the prosecutor's charge-reduction power: at least in a great many cases, defendants who win charge reductions will be released no sooner than those otherwise similarly situated who do not.

Likewise, plea bargains taking the form of recommendations (item 3) or binding agreements (item 4) may be essentially nullified by the parole guidelines. For example, if one defendant pleads guilty to bank robbery in return for a three-year sentence, while another convicted after trial receives a six-year sentence, and their parole prognosis is comparable (say, "very good"), the release date for both ordinarily would fall somewhere between twenty-six and thirty-six months. Moreover, within this range the Parole Commission apparently would not choose a later date for the second defendant simply because his or her initial sentence was longer; the Commission's stated policy of counteracting such differences leads it to ignore initial sentences altogether. Other things being equal, the two defendants would be released from prison on precisely the same date. Neither judge nor prosecutor would have effectively determined the sentences actually served.

The Parole Commission's power is not, however, completely unchecked. Prosecutors and judges can resort to countermoves of their own. The prosecutor may, by reducing the charges, increase the likelihood that the judge will award probation; the judge, in turn, can award probation whether or not the prosecutor so recommends. And a grant of probation cannot, of course, be counteracted by the Parole Commission, whose release guidelines apply only to offenders receiving prison sentences. Even when an offender is sentenced to prison, whether through a charge-reduction agreement, recommended sentence, or binding agreement, judges and prosecutors still retain power to outmaneuver the Parole Commission: they can use low maximum sentences to ensure the release of prisoners who should be held under the guidelines or use high minimum sentences to ensure the continued incarceration of prisoners who should be released under the guidelines. Anyone who

63 See text accompanying note 45 supra. The minimum sentence may not, however, exceed one-third of the maximum sentence imposed. 18 U.S.C. § 4205 (1976).
doubts that such maneuvering occurs should consult the numerous cases in which trial or appellate courts vacated a sentence already imposed and provided an opportunity for resentencing solely on the ground that parole guidelines adopted after imposition of the sentence generated a release date that the original sentencing judge would have considered inappropriate. Although the Supreme Court ultimately held these resentencing procedures improper, judges and prosecutors still may, and many clearly will, consider the effect of the parole guidelines before deciding how to exercise their sentencing discretion in future cases.

Who, then, determines punishment in a guilty plea case? Judges and prosecutors may in effect delegate the sentencing decision to the Parole Commission, and perhaps they frequently choose to do so. But it seems that these officials can decide to make the critical decisions themselves, within broad limits. The Commission's ability to moderate the sentencing decisions of prosecutors and judges is probably less, therefore, than it was when these officials—along with everyone else—were kept ignorant of the criteria used by the Commission to establish release dates.

The mix of decisionmaking authority between prosecutors and judges appears uncertain at best. We may conclude that judicial influence over sentencing in guilty plea cases is potentially quite extensive; that it may, because of its potential, operate as a tacit check upon prosecutors; and that it 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 judge or the prosecutor currently controls the determination of sentence following conviction on a plea of guilty in the federal courts.

B. Sentencing Authority in a Guidelines System

1. The Emergence of Prosecutorial Sentencing

At the outset of this part, I noted that sentencing reform proposals often have been criticized for their failure to deal immediately with the problem of prosecutorial discretion. In the attempt to

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67 See note 63 supra.
assess the validity of this criticism, two empirical questions arose. First, do judicial and parole board discretion in fact temper prosecutorial power in current guilty plea sentencing? Although our knowledge in this area is limited, an affirmative answer appears warranted. It remains to consider the second question, namely, whether a guidelines system would eliminate that moderating capacity.

A guidelines system, of course, could take many different forms. The kinds of guidelines typically envisaged by reformers greatly reduce judicial and parole board discretion without directly limiting discretionary decisions of the prosecutor. Guidelines of this kind would sharply reduce sentencing disparities in contested cases, in which, as explained above, judicial and parole board discretion dominate. Relatively few sentencing variations would be permitted within the terms of the guidelines themselves. Some disparities might result from judicial decisions to depart from the guidelines, but such decisions probably would be infrequent because the guidelines would leave few permissible grounds for such departures and one or both parties would have the right to challenge the reasonableness of any departures on appeal.

68 Such guidelines would, for example, leave the judge no discretion on the threshold question of probation versus imprisonment and would instead dictate this "in-out" decision for each offense-offender category in the guideline matrix. For cases requiring imprisonment, the guidelines would indicate a relatively narrow range of possible terms, or might even specify a single sentence as the term to be imposed. In addition, the judge would be directed to ignore all aggravating and mitigating factors not formally used to determine the guideline category, except in the case of the most unusual circumstances; even in such cases the sentence authorized could not differ from the guideline by more than a fixed, relatively small percentage. For detailed examples of such guidelines, see 2 Federal Sentencing Reform, supra note 52, at 89-107.

Conceivable alternatives for the guideline structure would include ones that would seek to deemphasize the sentencing significance of matters within prosecutorial control, and ones that would seek to preserve substantial amounts of judicial discretion on such matters as the in-out decision, the effect of aggravating factors, and the imposition of consecutive sentences. For detailed specification of such variations and exploration of their implications, see id. 71-88.

69 See text accompanying notes 45-46 supra.

70 Some disparities might result from inconsistent prosecutorial practice in pressing multiple counts or aggravating circumstances, but prosecutors probably would not commonly treat one fully litigated case differently from another in these respects. The principal source of inconsistency in these areas undoubtedly is plea bargaining. See Vorenberg, Narrowing the Discretion of Criminal Justice Officials, 1976 Duke L.J. 651, 680.


Another potential source of disparity in contested cases would be decisions by judge or jury not to convict despite evidence warranting conviction on the charges. This power of nullification exists, of course, under current law, but its exercise might become more frequent with the reduction of sentencing discretion. Such nullification would not likely occur on a substantial scale, however, at least if guideline sentences were set at a reasonable level.
Guidelines restricting only judicial and parole board discretion would produce quite different effects in *uncontested* cases. The sentence selected by the judge would, as in the contested cases, be determined with virtual certainty once the offense of conviction and any relevant aggravating and mitigating factors were specified, but bargaining between the parties would in effect control these crucial variables. 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. For example, the guidelines restricting judicial discretion presumably would mandate a fixed increment in penalty for each additional charge resulting in conviction. With every count transformed into a negotiating chip of predictable value, the guidelines would create a bargainer's paradise. And needless to say, nothing would ensure consistency in the pressing or dropping of these counts, upon which the actual sentence would depend.

Given the importance of plea negotiation in the present federal sentencing system, such possibilities for disparity already exist in one form or another. We must consider whether sentencing disparities in guilty plea cases would be any worse under the guidelines. The distance between the highest and lowest potential sentences—the outer boundaries of negotiation—undoubtedly would be less than under the current system, characterized as it is by unpredictability and very high statutory maximums. We might therefore expect that negotiated dispositions would be less widely dispersed under guidelines restricting judicial discretion.

Two important factors tend to offset this possibility. 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 the statutory penalty provisions would indicate.

Second, sentencing power today is shared by the judge and the prosecutor. The expectations of a particular judge can and in many districts do assure some consistency in the plea agreements reached by the various assistant United States attorneys appearing in that court. Under narrow guidelines, the judge would lose the various devices now available to control or influence the effect of a negotiated disposition. Bargaining and sentencing practices could

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72 The judge could partially counteract such control by the parties through use of the real-offense procedure. See text accompanying notes 96-158 infra.

73 See 2 FEDERAL SENTENCING REFORM, supra note 52, at 32-34.

74 See text accompanying notes 52-55 supra. Under narrow guidelines, the judge could offset some unduly lenient dispositions by refusing to approve a reduc-
then vary among government attorneys in the same office and even among cases handled by the same attorney. The difficulty of obtaining agreement of opposing counsel would vary from case to case; subject only to this constraint, however, 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. Thus, the principal effect of a system of narrow sentencing guidelines would be to transfer discretionary sentencing power in guilty plea cases from federal district judges to assistant United States attorneys.

2. The Effects of Prosecutorial Sentencing

Despite the prevailing theology that sentencing is a judicial function, prosecutors, and some others, often assert privately that United States attorneys could do a better job. This view is probably so prevalent that the prospect of more extensive prosecutorial power does not evoke serious concern among many legislators and even among some reformers. There are enough grains of truth in this attitude that it deserves to be examined with more care than it typically has received.

Because "prosecutorial sentencing" can occur only in the context of a negotiated disposition to which the defendant consents, it is somewhat misleading to suggest, as critics of sentencing reform often do, that sentencing reform will transfer to prosecutors a power exactly like that now exercised by a judge. Rather, the essential issues are whether, or to what extent, plea negotiation could itself serve as an effective check upon prosecutorial discretion, and whether bargaining in a guidelines system would operate more fairly and more consistently than the current system's combination of bargaining and unilateral, unstructured judicial sentencing.

To what extent can plea negotiation effectively constrain the sentencing decisions of prosecutors? Generalization is quite evidently not to be attempted. But one kind of case worth considering is that in which the possibilities for acquittal at trial are, for

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76 See, e.g., Determinate Sentencing, supra note 23, at 79 (similar remarks by state prosecutors in California).

77 Even Professor Alschuler's excellent analysis of prosecutorial sentencing power makes essentially this claim; it portrays the defense attorney's viewpoint merely as "one important influence on an official sentencing decision made by the prosecutor." Alschuler, Sentencing Reform, supra note 6, at 554 n.16.
all practical purposes, nil. These "dead bang" cases, according to many practitioners, account for the overwhelming majority of all guilty pleas. A defense attorney's "threat" to take such a case to trial must count for very little; in practice the defendant simply must accept whatever concession the prosecutor considers appropriate. For these cases, the prosecutor's sentencing decision is essentially a unilateral one.

In cases involving some possibility for acquittal, the prosecutor cannot merely dictate the result. For such cases, a guidelines system would improve the bargaining environment in several ways. First, the stakes would necessarily become more tangible. Despite the formal availability today of binding plea agreements for a definite sentence, prosecutors often can or will bargain only in terms of charge reduction or sentence "recommendations," both of uncertain value. Under guidelines restricting judicial discretion, the concrete sentencing implications of any plea agreement almost always would be known.

Second, the relative predictability of sentences would mean that the risks associated with the alternative of trial could be more easily assessed. At present the possibility that a judge will impose consecutive maximums on all counts may be essentially "theoretical," but practitioners often say that this prospect influences their clients. Even when it does not, defendants under the current system still must guess, over much too wide a range, what sentence will be imposed if they choose to stand trial and are convicted. Under a guidelines system both defense decisions whether to plead guilty and prosecution decisions about the concession to be offered would, to a greater extent, be independent of the defendant's tolerance for a risky trial strategy, a factor not remotely relevant to any penological purpose. Clarification of the bargaining stakes is in itself to be welcomed. But there is another side to this coin. The very certainty of the stakes would enable the prosecutor to offer a concrete inducement

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78 See, e.g., M. Heumann, Plea Bargaining 57-61, 100-03 (1978).
79 See note 55 & text accompanying notes 52-55 supra.
80 The defendant's attitudes toward risk would still play some role in his or her decision because the risk of conviction would remain an important variable. But cf. text accompanying notes 230-34 infra (concessions should not be based upon doubts about factual guilt). Of course, to the extent that potential offenders are risk averse with respect to the threshold decision to commit a crime, greater predictability in sentencing would in theory decrease deterrence, provided that all other important variables remained unaffected. This proviso is most unlikely to be fulfilled in practice, however, and most reformers believe that on balance greater certainty would tend to promote more effective deterrence. See text accompanying note 3 supra.
DUE PROCESS OF SENTENCING

that might seem irresistibly attractive. In contrast, in current practice the benefit gained, even by a plea agreement for a definite sentence, is not always certain because the defendant might receive the very same sentence, or close to it, after conviction at trial. Accordingly, pressure to plead guilty might be very much stronger under sentencing guidelines than it is today. The direct correspondence between prosecutorial charge decisions and a particular sentencing effect would put the prosecutor in a position that might seem overly dominating. The same combination of certainty and domination would arise under current law if plea negotiations were conducted directly with the trial judge; and it is primarily this element of domination which explains the prevailing view that judicial participation renders plea bargaining inherently unfair.\footnote{See Fed. R. Crim. P. 11(e)(1); ABA Project on Guilty Pleas, supra note 26, at § 3.3(a). See also United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966). For discussion of other objections to judicial participation, see ABA Project on Guilty Pleas, supra note 26, Commentary at 72-74. For persuasive criticism of the prevailing view, see Alschuler, The Trial Judge’s Role in Plea Bargaining (pt. 1), 76 Colum. L. Rev. 1059, 1103-34 (1976) [hereinafter cited as Alschuler, The Trial Judge’s Role]. Of course the combination of certainty and domination does not necessarily entail an increase in the overall pressure exerted on a defendant to plead guilty. The pressure created by an offer of concrete sentencing benefits depends on the magnitude of the concession and could be either greater or less than the pressure involved in an offer that eliminates a remote contingency. See text accompanying note 209 infra.}

Sentencing guidelines would thus work important, but not unambiguously positive, changes in the quality of the plea bargaining environment. Whether or not one prefers the shift to certainty \textit{cum} domination, the essential point for present purposes is that prosecutorial power and bargaining leverage would be sharply enhanced by guidelines restricting judicial discretion. As a result, the answer to the question whether plea negotiation could itself serve as a check upon prosecutorial discretion appears to be negative: the requirement of defense consent may not reasonably be expected adequately to constrain prosecutorial power. Instead, guilty plea sentencing under a guidelines system will be essentially a unilateral prosecutorial decision in the “dead bang” cases, and a decision very heavily dominated by the prosecution even in cases that it might lose at trial.

The question remains whether sentencing at the discretion of prosecutors, who are not very effectively constrained by the defense, might nevertheless be preferable to sentencing at the discretion of judges, who are even less constrained in this respect. Prosecutors probably do develop a better “feel” for the essentials of a criminal case than do some judges. Ordinarily, federal prosecutors are involved full time in criminal work, and to a degree they become
"experts," whose sentencing judgments could be of very high quality. The sentencing decisions of these prosecutors as a group conceivably might be rather consistent, or at least no more inconsistent than the sentencing decisions of judges operating under the current system.

One can only speculate, of course, but I believe that such expectations are unwarranted and deeply incompatible with accepted principles of institutional competence. First, as we have seen, judicial and prosecutorial power under current law serve to temper one another. Any system of shared power will likely produce more consistent results than will one without checks. Indeed, the weakness of the current system in part stems from the very fact that it already does, to such a considerable extent, lodge broad powers in a single individual, usually the judge. Guidelines restricting judicial discretion would simply aggravate that tendency toward concentration of power, while placing the prosecutor in the dominant role currently filled by the judge.

Second, if there must be unchecked discretionary power, all experience counsels against lodging it with assistant United States attorneys rather than with judges. Although prosecutorial discretion has not been subjected to as close scrutiny as judicial discretion, some evidence, from highly credible sources, suggests serious inconsistencies in the exercise of prosecutorial discretion in the federal system. Moreover, federal prosecutors are almost uniformly far younger than judges, they face much more acute personal and professional incentives to dispose of individual cases for reasons unrelated to the merits, and their decisions are made in a context that minimizes public visibility and its attendant limitations on abuse. It need hardly be added that the United States attorneys are after all prosecutors, not detached, neutral magistrates. In the nature of things, they are ordinarily more "expert." Yet in no other area of life would we even for a moment consider granting to

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82 See text accompanying notes 48-55 supra.
85 Alschuler, Sentencing Reform, supra note 6, at 564.
officials of this kind a broad, unstructured power to deprive individuals of liberty or property.\textsuperscript{86}

I conclude that guidelines restricting only judicial discretion would transfer discretionary sentencing power to prosecutors and would impair the tempering role currently exercised by the judiciary. Nor would prosecutorial power be adequately constrained by plea negotiation. The prospects for sound decisions in individual cases and for overall consistency in sentencing would be appreciably worse than in the present system of broad, unstructured judicial discretion.\textsuperscript{87}

C. Attempting to Structure Prosecutorial Decisionmaking

I have argued that guidelines restricting judicial and parole board discretion, without provisions for controlling prosecutorial discretion, would increase rather than decrease disparities in sentencing. The difficulties could be alleviated to a limited degree by guidelines that either would deemphasize the sentencing significance of matters within prosecutorial control, or would preserve enough unstructured judicial discretion to permit judges to continue to act as a check on prosecutors.\textsuperscript{88} But whatever the form of the guide-

\textsuperscript{86} Prosecutors are, of course, constrained in the sense that their sentencing power may be asserted only against those who can be proved guilty of some offense, and then only to the extent of the maximum penalty authorized. In practice, these are not very reassuring limitations, as the observations of Justice Jackson, when he was Attorney General, attest. See Jackson, \textit{The Federal Prosecutor}, 31 J. Crim. L. & Criminology 3 (1940). In any event, these limitations do not obviate the need for restrictions upon the extent of the penalty, just as restrictions upon the circumstances justifying takings of private property for public use do not obviate the need for standards on the amount of the compensation to be paid in such cases.

\textsuperscript{87} Because guidelines restricting judicial discretion would decrease disparities in contested cases, but not in guilty plea cases, see text accompanying notes 69-75 \textit{supra}, their net effect is not inevitably unfavorable. But given the overwhelming predominance of guilty plea cases, the improvements realized in the cases going to trial seem insufficient to outweigh the negative effects in the uncontested cases.

\textsuperscript{88} The sentencing impact of factors within prosecutorial control could be deemphasized, for example, by excluding from the sentencing computation certain aggravating and mitigating factors that are relatively easy to manipulate. See text accompanying note 222 \textit{infra}. Detailed examples of such guidelines are presented in 2 \textit{FEDERAL SENTENCING REFORM}, \textit{supra} note 52, at 40-42, 98-107. Such guidelines, however, would have relatively little effect on the scope of prosecutorial sentencing power. No matter how narrowly the offense and offender categories were limited, most kinds of criminal conduct could still plausibly be placed in any of several remaining categories. And ordinarily the breadth of the basic negotiating boundaries would not be significantly narrowed. The prosecutor's charge-reduction power would, as a result, provide an entirely adequate negotiating tool even if all other sources of influence over the sentence were removed. See 1 \textit{id.} 37-39.

The alternative approach would be to preserve judicial discretion—for example, by leaving the judge free to choose either imprisonment or probation for most offense-offender categories in the guideline matrix, by providing a relatively broad range of possible prison terms for each category, by leaving the judge discretion to impose concurrent or consecutive terms on multiple charges, and so on. Detailed
lines and whatever one’s assumptions about their net effect, a large portion of the disparity problem unquestionably will remain unless prosecutorial discretion in charging and bargaining can be brought under control.

The needed controls could emerge from comprehensive policies and guidelines directly governing decisionmaking by prosecutors. Prosecutorial discretion, of course, affects many vital matters other than sentencing. The case for subjecting all facets of that discretion to better control has received extended attention over many years. Despite repeated calls for action, direct restrictions on prosecutorial discretion still seem a distant hope. No doubt many factors have contributed to this standstill, including prosecutors’ resistance to dilution of present powers, warranted and unwarranted concerns about litigation resulting from the adoption of any standards, and the sheer difficulty of formulating standards that can usefully focus the myriad factors that should play a part in prosecutorial decisionmaking. The last problem seems particularly significant for present purposes: virtually any standards one can imagine would refer to the strength of the evidence or other factors so vague as to impose no effective constraint upon the prosecutor’s sentencing power.

Examples of such guidelines are presented in 2 id. 37-39, 71-88. Guidelines of this kind would carry forward the judges’ power to offset the effects of prosecutorial charging decisions, and yet would provide enough guidance to judges to promise some reduction in sentencing disparities. Analysis suggests, however, that the reduction of disparities achieved by this approach would be quite modest. See 1 id. 39-47; 2 id. 43-57.

Even a short list of matters involving serious potential for unfairness or inconsistency would include prosecutors’ decisions when not to prosecute, when to grant immunity, when and how to investigate, when to discuss possible charges with a defendant’s lawyer, and when to publicize positive or negative results of an investigation.


The Justice Department’s standards for the exercise of discretion, recently made public, seem to impose few concrete limitations, and 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 . . . .” United States Dep’t of Justice, Materials Relating to Prosecutorial Discretion, 24 Crim. L. Rptr. 3001, 3001 (BNA) (1978).


See Alschuler, Sentencing Reform, supra note 6, at 575-76 & n.73.
The problem of devising adequate controls over prosecutorial decisionmaking undoubtedly warrants continuing study. Over the very long run, the solution to disparity in sentencing and in other areas of prosecutorial activity may lie in the development of comprehensive standards. But given the many present obstacles to effective control of this kind, it seems preferable to focus attention on less sweeping change. Parts III and IV discuss two more limited approaches for effecting structured judicial control over segments of prosecutorial activity that most heavily influence the determination of sentence.

III. CONTROL OF PROSECUTORIAL SENTENCING POWER: "REAL OFFENSE" SENTENCING

In a system of guidelines restricting judicial discretion, prosecutorial sentencing power would be exerted primarily through the initial charging decision and through charge-reduction plea agreements. Judges could seek to offset the effects of these charging decisions by simply ignoring the formal offense of conviction and determining the "category of offense" applicable for guidelines purposes according to their own conception of the offense actually constituted by the defendant's conduct, that is, the "real offense."

Available evidence suggests that criminal sentencing decisions already are based heavily upon actual offense behavior as distinguished from the formal offense of conviction. Empirical studies of judicial sentencing indicate that in many jurisdictions prosecutorial decisions to reduce pending charges appear to have little or no impact on the sentence ultimately imposed. Efforts to study the same phenomenon by interviewing and other nonstatistical techniques confirm the impression that many judges currently disregard charge-reduction agreements and treat the defendant much the same as if he or she had been convicted on the initial charges. Parole boards have long been suspected of following the same practice.

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96 On "fact bargaining" that could affect sentencing through considerations other than that of the charge, see text accompanying notes 220-22 infra.


98 Wilkins et al., supra note 97, at 75.

99 See, e.g., Foote, supra note 23, at 135.
This process of real-offense sentencing provides a means through which the prosecutor's formally uncontrolled sentencing powers can, to some degree, be held in check. But the broad judicial and parole board discretion that currently afford the opportunity for real-offense judgments serve at the same time to obscure the very existence of this practice, as well as its many potentially unfair effects. A judge's or parole official's impressions about the seriousness of the actual offense behavior need not be made explicit and rarely can be challenged in a way that would ensure their reliability. Defendants and defense counsel unaware of the practice or uncertain about its precise extent may greatly overestimate the advantages of a charge-reduction plea agreement. In current practice, real-offense sentencing thus neutralizes part of the threat to fair process posed by untrammeled prosecutorial powers, but it creates new problems of fairness at least as serious as those it seeks so crudely and unsystematically to remedy.¹⁰⁰

In a reformed system built on narrow judicial discretion, the real-offense concept could be used in a more formal, orderly fashion. Both the real offense and the offense of conviction would necessarily play some role in determining actual punishment. The ceiling for the potential sentence would be set by the statutory maximum for the offense of conviction; subject to this limitation, the actual sentence would be the one specified by the guideline for the real offense.¹⁰¹ Thus, for a defendant committing robbery and pleading guilty to theft, the sentence under the proposed Federal Criminal Code could not exceed five years' imprisonment, the statutory maximum for theft.¹⁰² Referring to the guidelines, the sentencing judge might find that the prison term indicated, for this defendant's offender category, was two and one-half years for an actual theft and five and one-half years for robbery. In such a case, a real-offense policy would call for a five-and-one-half-year sentence, regardless of the formal characterization of the offense. Because the statutory maximum may not be exceeded, however, a five-year sentence would be imposed on the "theft" conviction, while five and one-half years

¹⁰⁰Because the real-offense practice is inherently difficult to isolate or challenge when sentencing discretion is broad and unstructured, the validity of the practice is seldom considered in current case law. When the issue has surfaced, the courts have simply accepted real-offense evaluations as one of many permissible kinds of informal judicial sentencing judgments. See, e.g., cases cited in note 139 infra.

¹⁰¹More sophisticated methods for giving weight to the real offense in the formal guideline computation also could be designed. See Willkins et al., supra note 97, at 53, 75. On use of the real offense to justify departure from the guidelines, see note 103 infra.

¹⁰²See proposed Federal Criminal Code, supra note 71, at §§ 1731(b)(2), 2301(b)(4).
would have been imposed upon formal conviction for robbery. If the guideline sentence for robbery were only four and one-half years, that sentence would be imposed whether the formal conviction was for robbery or theft.103

A guidelines system would obviate many of the difficulties associated with reliance upon the real offense under current sentencing procedures. Because the policy relating to actual-offense behavior presumably would be well-known,104 defendants would no longer be misled about the value of a charge-reduction bargain. And because the sentencing significance of the offense characterization would be clear, the defense would be certain to focus attention upon the question whether the real offense really occurred. Real offense sentencing in a guidelines system thus provides a potential

103 A variation on this approach would have the judge start his or her analysis from the guideline for the formal offense of conviction, but then consider the extent to which the defendant's actual offense behavior makes the conduct more serious than that involved in the “typical” case of the offense represented by the formal conviction. The American Bar Association has suggested a preference for this use of the real offense, rather than reliance on the real offense to invoke a guideline category higher than that for the offense of conviction. ABA PROJECT ON STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES § 18-3.1, Commentary at 71 (2d ed.) (Approved Draft, Aug. 14, 1979). Judicial application of this technique, however, often would require considerable mental gymnastics, see Alschuler, The Trial Judge's Role, supra note 81, at 1139, without significantly alleviating the basic problems of factfinding and appellate review. See text accompanying notes 131-37 and 149-54 infra.

The A.B.A. recommendation reflects in any event a fundamental ambivalence, and perhaps a serious confusion. The A.B.A. suggests that, by use of this variation rather than the basic approach discussed in the text, “a practice is not institutionalized that risks infringing the appearance of justice.” Of course, the “appearance of justice” would indeed be less threatened if this variation operated without formal recognition or structure, under conditions of relatively low visibility. But it is difficult to believe that the thoughtful A.B.A. report intended to endorse a continuation of the sporadic or covert real-offense practices that currently threaten such serious deception in connection with plea bargaining. Presumably the A.B.A. intended that the existence and effects of the recommended procedure would be well understood; in this event, however, concerns about the “appearance of justice” (which I share, see text accompanying notes 138-48 infra) arise with precisely the same force as they do under the more direct approach. The variation thus raises essentially the same problems as the technique discussed in the text, but would in all likelihood be more cumbersome to implement.

104 It is far from clear, however, that the real-offense practice is fully understood by defendants today, even when the practice has been implemented under formal guidelines. The United States Parole Commission's decision to use the real offense in its parole release decisionmaking guidelines has been made public in the Federal Register, see 40 Fed. Reg. 41,330 (1975), but the policy is not disclosed in the guideline tables published in the Code of Federal Regulations, see 28 C.F.R. § 2.20 (1979), and current law does not require that such details of parole release be explained to a defendant before his or her decision whether to plead guilty. See note 148 infra. It seems difficult to defend such an absence of full disclosure at the time of plea now that a parole release decision, channeled by guidelines, is no longer seen as a matter of grace. The injustice of incomplete disclosure will become even more obvious if the real-offense policy becomes a part of the principles governing sentencing, rather than parole release. See generally text accompanying notes 146-48 infra.
means for mitigating, without obvious procedural impropriety, some of the effects of disparate prosecutorial charging practices and of unwarranted concessions in plea bargaining. Because of this promise, use of the technique in a guidelines context has won the endorsement of an impressive series of authorities, including the United States Parole Commission, the New York State Parole Board, the National Conference of Commissioners on Uniform State Laws, and the American Bar Association. Unfortunately, and despite these respectable views to the contrary, an official policy divorcing the guideline category of offense severity from the formal offense of conviction would, like a covert real-offense policy, raise serious new difficulties in the very process of solving the old ones. Although the constitutional problems posed by use of actual-offense behavior would not be insurmountable, I conclude that policy considerations argue decisively against reliance upon real-offense sentencing in a guidelines system.

A. Constitutionality

Although the sentencing proceeding is a "critical stage," at which the defendant is entitled to representation by counsel, it need not involve all the attributes of a criminal trial. The defendant has 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; 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


107 Model Sentencing and Corrections Act § 3-115, Comment at 144; § 3-205(d) (1978).

108 ABA Project on Standards Relating to the Administration of Criminal Justice, Sentencing Alternatives and Procedures § 18-3.1(c)(iii) & Commentary at 71 (2d ed.) (Approved Draft, Aug. 14, 1979) (expressing some discomfort with the real-offense approach, but concluding that "the need to control prosecutorially caused disparities may justify experimentation with this and other options").


110 See generally ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures § 4.3(a), Commentary at 211-12 (1968) [hereinafter cited as ABA Project on Sentencing Alternatives]. But cf. United States v. Fatico, 458 F. Supp. 388, 408-12 (E.D. N.Y. 1978), aff'd on other grounds, 603 F.2d 1053 (2d Cir. 1979) (under certain circumstances, facts triggering higher sentence must be proved by "clear, unequivocal and convincing evidence").
information were restricted to that given in open court by witnesses subject to cross-examination,” 111 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.” 112 Courts have invoked these principles in upholding the trial judge’s power to give weight in sentencing to the seriousness of the real offense, as determined informally by the judge. 113

Could the procedural flexibility granted by Williams be retained in a guidelines system? An American Bar Association Advisory Committee once observed, “[i]t would indeed be ironic if procedural due process required the absence of legislative guidance in order for the sentencing proceeding to be informal.” 114 But our conceptions of fair process often do imply a need for more rigorous procedural safeguards when more definite substantive standards are introduced. 115 Specht v. Patterson 116 illustrates the problem in a sentencing context. The Supreme Court was presented there with a Colorado statute permitting imposition of an indeterminate sentence of one day to life, even after conviction of a defendant on a charge normally carrying a shorter maximum sentence, if the judge 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.” 117 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.” 118 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.” 119

112 Id. 251.
113 See, e.g., cases cited in note 59 supra and note 139 infra.
114 ABA Project on Sentencing Alternatives, supra note 110, at § 5.5(c), Commentary at 264 (emphasis in original).
118 386 U.S. at 609 (quoting United States ex rel. Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).
119 386 U.S. at 608.
At another point the Court stressed that the statute involved "a new charge" comparable to a recidivist charge, for which the prior offenses constitute a "distinct issue" on which the defendant is entitled to notice, a hearing, confrontation, and cross-examination.\textsuperscript{120}

On its face, Specht appears to hold that the right to full criminal trial procedures is triggered when the subsequent proceeding requires a "new finding of fact" and poses a "distinct issue." Focusing on this facet of the case, some courts have required full procedural safeguards for post-trial dispositions dependent on finding the defendant "insane"\textsuperscript{121} or a "dangerous special offender."\textsuperscript{122} Determination of the real offense in a guidelines system would seem even more directly controlled by Specht because this inquiry concerns not only a "distinct issue," but the kind of issue traditionally thought to involve a new criminal charge.\textsuperscript{123} And reliance on Williams would seem particularly difficult because the Court's approval of flexible procedures in that case was quite explicitly grounded on their importance for the effective operation of a regime of indeterminate sentences, involving assessment of diverse facets of the offender's personality and "an increase in the discretionary powers exercised in fixing punishments."\textsuperscript{124} As applied to a sentencing reform system designed to limit the general range of information considered relevant in sentencing, to narrow the judge's discretion, and to exclude rehabilitative concerns in most instances, Williams could be considered thoroughly anachronistic.\textsuperscript{125}

\textsuperscript{120}Id. 610.
\textsuperscript{121}E.g., Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968).
\textsuperscript{123}The traditional characterization of the issue seems to play some role in determining whether the legislature may remove the issue from the government's case-in-chief and thus ease its burden of proof. Compare Mullaney v. Wilbur, 421 U.S. 684 (1975), with Patterson v. New York, 423 U.S. 197 (1977).
\textsuperscript{124}337 U.S. 241, 249 (1949). See also id. 250-51.
\textsuperscript{125}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 and voted to vacate a death sentence imposed by a trial judge who relied on a confidential presentence report. The plurality opinion noted "two constitutional developments" since Williams that mandated a more formal sentencing procedure. The first was heightened scrutiny of capital sentencing. The opinion also mentioned, as a second, independent development, the applicability of due process requirements to all sentencing and cited as support Mempa v. Rhay, 389 U.S. 128 (1967), and Specht v. Patterson, 386 U.S. 605 (1967), neither a capital case. 430 U.S. at 358 (plurality opinion per Stevens, J.). The opinion also distinguished Williams as a case in which the facts contained in the presentence report were "described in detail" by the judge and never actually challenged by the defense. Id. 356. These views, explicitly disclaimed only by Justices White and Rehnquist, id. 364, 371, although Chief Justice Burger and Justice Blackmun concurred only in the judgment of the plurality, portend more
The real-offense determination nevertheless differs in critical respects from the factual issue involved 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 guidelines sentencing the findings could, under no circumstances, result in a sentence outside the normal statutory range for that offense.\textsuperscript{126} Second, even when sentencing is channeled by guidelines, the real offense remains but one of several interrelated factual issues used to generate a sentencing range. The process of decision is not easily adapted to the process of 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.\textsuperscript{127} Separating actual offense behavior from other guideline elements might, of course, be possible; this one issue is plainly capable of resolution in a criminal trial. But if guideline computations (and, indeed, decisions to depart from the guidelines) may, like current sentencing decisions, give some weight to prior convictions and prior arrests on charges eventually dismissed,\textsuperscript{128} the separation of any charges currently being dismissed becomes somewhat artificial. Considerations like these have led the lower courts to hold—in my view, correctly—that the "full panoply" of criminal trial procedures ought not to govern the ascertainment of actual offense behavior in a guidelines system.\textsuperscript{129}

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."\textsuperscript{130} In determining what process is due, there can scarcely be any doubt that the courts

\textsuperscript{126} See ABA Project on Sentencing Alternatives, supra note 110, at § 5.5(c), Commentary at 265-66.

\textsuperscript{127} On the unsatisfactory nature of sentencing by a jury in noncapital cases, see generally id. 43-48.


\textsuperscript{129} See cases cited in note 59 supra. Cf. United States v. Grayson, 438 U.S. 41 (1978) (upholding the trial judge's power to base harsher sentence on his or her belief that the defendant committed perjury at the trial, even though such perjury is not formally proved).

\textsuperscript{130} Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion per Stevens, J.).
would require notice and an opportunity to be heard, as indeed rule 32 of the Federal Rules of Criminal Procedure provides.\textsuperscript{131} Similarly, full disclosure of the basis for any real-offense findings would presumably be obligatory; again rule 32 probably would be read to prohibit confidentiality for the type of information involved in real-offense determinations.\textsuperscript{132}

Such dispute as there might be would likely center on the question whether the defendant would have the rights 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\textsuperscript{133} and to limit defense counsel to informal "comment" upon alleged inaccuracies in the presentence report.\textsuperscript{134} The American Bar Association recommends, in contrast, full rights to present and cross-examine witnesses on any disputed factual issues.\textsuperscript{135} Whatever the conception of sound policy for the present sentencing system, the determination of offense severity in a guidelines context would call for particular care. Because a finding adverse to the defendant would result in a "grievous loss," measurable precisely in added months of confinement, procedures of high reliability would be required. The Supreme Court's analysis of the process due in parole revocation proceedings\textsuperscript{136} suggests that in guidelines sentencing the rights to present and to cross-examine witnesses with respect to the real offense would be constitutionally mandated.\textsuperscript{137}

\textsuperscript{131}\textsc{Fed. R. Crim. P. 32(c)(3)(A)}.


\textsuperscript{135}ABA \textit{Project on Sentencing Alternatives}, supra note 110, at § 5.4(b).


\textsuperscript{137}This conclusion is not affected by the Court's recent tendency to approach the due process issue in "positivist" terms and to permit state action adversely affecting liberty or property, without full procedural safeguards, as long as the state law itself creates no "entitlement" to the liberty or property interest. \textit{E.g.}, Meachum v. Fano, 427 U.S. 215 (1976); Bishop v. Wood, 426 U.S. 341 (1976). Even if the state is given flexibility in defining liberty or how it will be protected in such fringe matters as confinement conditions and privileges, the initial imposition of sentence infringes a protected liberty that government is not free to define away. \textit{See L. Tribe, American Constitutional Law} 535-36 (1978); text accompanying note 109 & note 125 supra. Even in the "fringe" 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 or the occurrence of other events." \textit{Meachum}, 427 U.S. at 216.
The imposition of these requirements concerning evidence and cross-examination does not, of course, impair the constitutionality of the basic concept. Reliance by the sentencing judge on actual offense behavior, properly ascertained, would likely survive constitutional attack. It remains to consider whether a policy of focusing upon the real offense would be sound.

B. Policy Considerations

Implementation of a real-offense approach creates a good 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 ultimately would prove self-defeating. The principal difficulties involve considerations of fairness, procedural efficiency, the effect upon plea negotiation, and the likelihood of evasion.

1. Fairness

The drive to eliminate sentencing disparity 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 have generated cynicism among the public and prisoners alike and have undermined confidence in the reliability and integrity of the legal system.\textsuperscript{138} 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 mistrust of its own processes.

Any claims to the legitimacy of giving weight to actual offense behavior rest on the notion that informal procedures can establish what "really" happened with a level of confidence adequate for sentencing purposes. The same reasoning would permit the judge to infer guilt even from an acquittal, which implies only reasonable doubt; a few cases appear, in fact, to uphold just such a practice.\textsuperscript{139}

\textsuperscript{138} See M. Frankel, supra note 3, at 39-49.

\textsuperscript{139} United States v. Cardi, 519 F.2d 309, 314 n.3 (7th Cir. 1975); United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972). Contra, Cwikla v. New York State Board of Parole (N.Y. Sup. Ct., Dutchess County, June 9, 1978). The soundness of the decisions permitting the sentencing judge to give weight to charges resulting in acquittal appears extremely tenuous, even in the existing system of broad sentencing discretion. On a closely related issue, the lower courts have held that the sentencing judge (or parole agency) may not give weight to a conviction shown to be invalid. Monks v. United States Parole Comm'n, 463 F. Supp. 859 (M.D. Pa. 1978) (conviction based on involuntary confession); Majchszak v. Ralston, 454 F. Supp. 1137 (W.D. Wis. 1978) (uncounseled juvenile adjudication); Wren v. United States Bd. of Parole, 389 F. Supp. 938 (N.D. Ga. 1975) (uncounseled
However tolerable these judgments may seem while they remain largely hidden from view, they would not easily survive the visibility provided by a guidelines system. Suppose that in a robbery prosecution the jury convicts only of theft. If the judge is persuaded that robbery "really" occurred, could he or she impose sentence on the basis of the robbery guideline, even after the express acquittal on that charge?

In *Giacco v. Pennsylvania*, the Supreme Court invalidated, on vagueness grounds, a state statute permitting the jury to impose court costs on a defendant acquitted of criminal charges. Although *Giacco* does not reach the question whether a state could impose penalties upon a person after acquittal if different procedures were used, the decision makes clear that any such penalty must, at a minimum, be administered under well-defined standards. Sentencing guidelines therefore could not leave to the judge's unguided discretion the decision whether to rely upon the real offense in sentencing despite acquittal on that more serious charge. The guideline policy would have to be spelled out. But this requirement precipitates a dilemma: whatever the policy specified, the resulting procedures will severely threaten the appearance of fairness and the constitutionality of the system.

One alternative would have guideline policy require that the sentencing judge base offense severity upon actual offense behavior in all cases; "lesser offense" convictions resulting from a contested trial and partial acquittal would be treated no differently from "lesser offense" convictions obtained by guilty plea and partial dismissal. The New York State Parole Board for a time followed this rule in applying its parole release guidelines. Such a refusal to

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conviction). If the defendants in these cases were retried and acquitted, it seems implausible that these courts would then permit the sentencing and parole authorities to draw an adverse inference from the charges.

The Supreme Court, however, continues to flirt with the possibility of real-offense determinations in the context of invalid convictions. United States v. Tucker, 404 U.S. 443 (1972), if read narrowly, holds only that resentencing is required when a sentencing judge gave weight to a prior conviction without realizing its invalidity; conceivably it would be permissible on remand for a judge, after taking account of the constitutional infirmity, to impose a greater sentence because of the behavior suggested by the charge. And in Lewis v. United States, 48 U.S.L.W. 4205 (U.S. Feb. 27, 1980), the Court held that a constitutionally invalid conviction provided sufficient evidence of dangerousness to warrant treating the defendant within the coverage of the federal law that prohibits ownership of a gun by someone who has been "convicted" of a felony.

140 382 U.S. 399 (1966).

141 See *State of New York, Board of Parole, Memorandum: Interim Guidelines for Parole Board Decision Making* 1 (Jan. 13, 1978) (copy on file with author). In Cwikla v. New York State Bd. of Parole (N.Y. Sup. Ct., Dutchess County, June 9, 1978), the court held that the Board could not consider, in setting periods of confinement, any acts for which a defendant was acquitted.
treat the acquittal as completely wiping the slate clean probably cannot be condemned as inappropriate in all contexts. For example, public agencies should be entitled, for purposes of hiring, discharge, or possibly even parole revocation,\textsuperscript{142} to treat criminal behavior as adequately proved despite a formal acquittal in a criminal prosecution. But imposition of an additional term of confinement in the criminal prosecution itself may not be justified on the same grounds—it does not result from a different governmental process, designed to carry out an arguably distinguishable function. Instead, it serves only to accomplish precisely what the government can obtain, and ordinarily is expected to obtain, by seeking criminal conviction for the alleged actual behavior. Considerations like these probably were at the root of Justice Stewart's position, expressed in his concurrence in \textit{Giacco}, that imposition of a penalty following an acquittal would violate "the most rudimentary concept of due process."\textsuperscript{143} The same considerations also suggest that reliance upon real-offense behavior to justify a higher sentence, after formal acquittal on the more serious charge, should be held to constitute impermissible double jeopardy.\textsuperscript{144}

This horn of the dilemma could be avoided by specifying in the guidelines that real-offense determinations may not extend to charges resulting in a formal acquittal. The United States Parole Commission has established such an exception to its real-offense policy.\textsuperscript{146} Once this exception is made, however, it becomes apparent that the sentencing judge or parole agency is not simply making a factual judgment based on all available evidence, according to a less stringent standard of proof. Rather, the sentencing authority is singling out charge-reduction cases for special treatment


\textsuperscript{143} \textit{382 U.S. 399, 405 (1965) (Stewart, J., concurring); see also id. (Fortas, J., concurring).}

\textsuperscript{144} Cf. \textit{Breed v. Jones}, 421 U.S. 519 (1975) (double jeopardy clause bars prosecution as adult after juvenile court prosecution on same charge); \textit{Ex parte Lange}, 85 U.S. (18 Wall.) 163 (1873) (double jeopardy clause bars resentencing after first sentence has become final, even though first sentence was erroneous).

\textsuperscript{145} \textit{United States Parole Commission}, \textit{supra} note 58, at 4.08.
and imposing a more severe sentence than it would consider proper were a mere "reasonable doubt" to be established by trial. Such differential treatment presumably would be explained in terms of lack of confidence in the plea negotiation process. But the explanation does not make the result much more comprehensible. The system created permits the sentencing authorities, and perhaps a single judge, simultaneously to dismiss a charge and to give it credence; the system relies upon charging concessions to induce pleas and, at the same time, proclaims the impropriety of those concessions; the system demands that plea commitments to the defendant be honored and then treats the sentencing consequences of charge reduction as an undesired side effect, rather than a commitment to be respected. A sentencing system that permits conflicting policies to be pursued by independent authorities, prosecutors on the one hand and sentencing or parole officials on the other, seems vulnerable to multiple constitutional objections. But whether or not such attacks successfully surmount the doctrinal hurdles, the feeling will persist that this is not a seemly way to render justice.

146 The United States Parole Commission has explicitly premised its real-offense policy on this ground: emphasis on the offense of conviction "would place excessive reliance on 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 . . . ." 40 Fed. Reg. 41,328, 41,330 (1975).


148 An equal protection claim could be based on the differential treatment of those defendants who win dismissals and those who win acquittals. The Supreme Court might not, however, consider strict scrutiny appropriate in this context, cf. Marshall v. United States, 414 U.S. 417 (1974) (exclusion from narcotics addiction treatment program of individuals with two prior felony convictions examined under low-level rationality standard and held constitutional even though exclusion resulted in imprisonment); in any event, the discrimination seems necessary to further the usually stated objective of counteracting the effects of plea bargaining. The question then would become whether the objective is a legitimate one, given the obligation to honor plea commitments, see Santobello v. New York, 404 U.S. 257 (1971); or whether the objective, even if legitimate, properly falls within the purview of the parole or sentencing agency given that the agency would not then be claiming to exercise its assigned function of judging the behavior of all offenders (after both dismissal and acquittal). Cf. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (Civil Service Commission regulation may not be justified by reference to governmental objectives outside the function of the Commission).

A real-offense sentence would be invalid under Santobello if the prosecutor or judge had assured the defendant that dismissed charges would not be considered in sentencing. In the likely absence of such an explicit assurance, an attack on the plea would have to be based on the requirement that the waiver of trial be "knowing and intelligent." But as the law stands, failure of the trial judge to explain the workings of a real-offense policy probably would not be held a fatal flaw. Compare the cases discussed in Y. Kamisar, W. Lafave & J. Israel, Modern Criminal Procedure 1173-75 (4th ed. 1974). Rule 11(c) of the Federal Rules of Criminal Procedure requires only that the judge explain the maximum and minimum sentences provided by law. The existing principles, already somewhat more restrictive than fairness could be said to demand, plainly will require reworking when unstructured sentencing discretion gives way to a guidelines system.
2. Efficiency

Presentence report characterizations of the real offense enjoy today a measure of freedom 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 also caution restraint by the defense—only limited tools for challenging the presentence report are available; a successful challenge produces no certain sentencing benefit; and indeed there is no practical way to ensure that the challenge, whether successful or unsuccessful, will not in some way trigger a harsher sentence. A defendant who pleads guilty to a lesser count, declares his or her contrition, and seeks the mercy of the court ordinarily has every reason to avoid what might appear to be “quibbling” with the probation officer’s description of the offense.

In a guidelines system, challenges to the presentence report’s characterization of the real offense would likely 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 ability of the judge consciously or unconsciously to penalize the contentious defendant would be limited by the sentencing guidelines. Resolution of these challenges would give rise to further procedural burdens. In the absence of formal testimony and cross-examination, a conscientious judge would find it difficult to resolve genuinely disputed issues of fact. Indeed, due process probably requires that the defendant be granted the rights to present evidence and to cross-examine opposing witnesses. And, in the event of a sentencing decision based on the real offense rather than the formal offense of conviction, efforts to appeal could be expected.

149 See text accompanying notes 110-13 and 133-34 supra.


151 See, e.g., United States v. Duardi, 384 F. Supp. 874, 881 (W.D. Mo. 1974), aff’d on other grounds, 529 F.2d 123 (8th Cir. 1975). It may be possible to narrow the areas of dispute by a pre-hearing conference procedure, see ABA Project on Sentencing Alternatives, supra note 110, at § 4.5(b); as Judge Friendly commented in another context, however, 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).

152 See text accompanying notes 133-37 supra.

153 Under the proposed Federal Criminal Code, if the judge’s sentence is within the range for the applicable guideline, the defendant has no right to appeal but may seek leave to file a discretionary appeal if his or her initial avenue of
These procedural burdens would be incurred, it must be remembered, on an issue that both prosecution and defense would rather not litigate at all. If their preference is to be disregarded in the interest of accurate factfinding, why not determine the offense in the ordinary manner—by trial? Deferring the matter to the sentencing stage would avoid the involvement of a jury, ease the burden of proof,154 and normally narrow the scope of appeal. But these advantages would be obtained at a price. The significance of the formal conviction would be depreciated, the defendant might feel he or she had been "had," and society would lose the effect of the longer statutory sentence range that would have applied if the actual offense behavior had been determined by trial. Because the "streamlined" process would itself impose a significant burden, it seems to combine the worst features of the available procedural alternatives. More efficient in most instances would be a forthright decision by the judge either to accept the full implications of the charge-reduction agreement or to reject the agreement and hold a formal trial.

3. Plea Negotiation

At least on the surface, opportunities for plea negotiation would be sharply curtailed in a guidelines system using actual offense behavior to determine sentences. Charge reduction would still constrict the statutory sentencing boundaries applicable to the case; when this affected the actual guideline sentence available,155 plea negotiation could continue, and the real-offense procedure would have limited value in correcting its consequences. In a great many instances, however, the guideline sentence for the real offense would probably fall within the statutory boundaries for both the original and the reduced charge. Charge reduction in these instances would serve only to curtail the defendant's potential exposure to extra-guideline sentences. But a guidelines system presumably would limit the grounds for imposing extra-guideline sentences and also afford appellate review.156 Absent unusual aggravating circumstances, the risks avoided by charge reduction would therefore be minimal in most instances.

relief, a motion to modify sentence addressed to the trial court, is blocked by denial of the motion. See proposed Federal Criminal Code, supra note 71, at § 3725(b); CRIMINAL CODE REFORM ACT OF 1977, S. REP. No. 605, 95th Cong., 1st Sess. 1163 (1977).

154 The courts might hold, however, 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 123 supra.

155 See text accompanying notes 101-03 supra.

156 See note 153 supra.
The disappearance of benefits to the defense from the typical charge-reduction agreement would not go unnoticed. Before long prosecution and defense doubtless would begin 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 under the proposed Federal Criminal Code.\footnote{Proposed Federal Criminal Code, supra note 71, at § 1731(b)(3).} Despite the real offense, the judge could impose at most the statutory maximum for the offense of conviction, here one year in prison. Or, if the prosecution found such a concession excessive, the case would likely go to trial. Use of the real offense would not offset the distortions of plea bargaining and, in fact, would likely 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 of enforcing—a genuine prohibition of plea bargaining. But then real-offense determinations would no longer be necessary. Until that is done, the effect of such determinations would be quickly neutralized by compensating actions elsewhere in the system.

4. Evasion

Until now I have considered only problems engendered by good faith administration of a real-offense system. Prosecutors could seek to avoid the thrust of the system, however, by agreeing to concede, or not to oppose, the defendant's characterization of the offense. And given inevitable uncertainties of fact and evidence, tacit understandings between prosecution and defense could develop even without conscious bad faith. A real-offense system would produce what amounts to bargaining, but force it underground, thus encouraging cynicism about the process and frustrating efforts to preserve for the defendant the benefit of any tacit bargain.\footnote{Recognizing the destructive potential of such a situation, the Supreme Court has on several occasions refused to adopt plea bargaining principles that it considered not susceptible to reliable enforcement. See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); Blackledge v. Allison, 431 U.S. 63, 76-78 (1977).}

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 prosecutor's cooperation. 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 strenuously to defend the point would rest again with the United States Attorney.

I do not suggest that judicial efforts to determine the real offense would be manipulated with any great frequency. Given the importance assumed by those determinations, however, pressures would plainly arise, and no readily available mechanism would guarantee the integrity of the real-offense procedure. Under these circumstances, further distortions of the system inevitably would occur. Together with the problems of fairness, procedural efficiency, and the impact of permitted forms of plea negotiation, these difficulties point—definitively, in my judgment—to the unsoundness of any attempt to base guideline sentences upon the real offense.

IV. CONTROL OF PROSECUTORIAL SENTENCING POWER: JUDICIAL CONTROL OF CHARGE-REDUCTION AGREEMENTS

In the part of this Article just concluded, I noted that prosecutorial sentencing power in a guidelines system would be exercised primarily through prosecutorial charging decisions and charge-reduction plea agreements. Judges and parole officials have been accustomed to neutralizing that power by the low visibility device of real-offense sentencing. But as the previous part indicates, efforts to counteract charging decisions by that device are likely to falter in a guidelines system.

All of the difficulties of real-offense sentencing could be avoided by authorizing judges to do formally and unambiguously what real-offense sentencing attempts to do by the back door—namely, to forbid or restrict charge bargaining and to reject charge-reduction plea agreements. This candid, conceptually straightforward approach would, perhaps because of its candor, run counter to many conventional assumptions about criminal sentencing. Nevertheless, this approach could successfully reduce unfairness, inconsistency, and excessive discretion in the criminal sentencing process. In the first section of this part, I discuss three general issues raised by judicial control of charge-reduction agreements—the propriety of judicial supervision of the charging power, the implications for plea bargaining, and the prospects for evasion of judicial control. In the second section, I suggest specific ways to implement judicial control and analyze the narrower issues that would be raised by the particular implementing framework that I favor.
A. General Considerations

1. The Propriety of Judicial Control of Charge Bargaining

Can a trial judge reject a charge-reduction plea agreement without improperly intruding upon the responsibilities of the prosecutor? The case for an affirmative answer should be quite clear, but given the frequent misunderstanding about prosecutorial prerogatives in this area, the subject warrants careful attention.

In the federal system the sentencing judge's authority to reject a disposition acceptable to both parties is specifically acknowledged by rule 11 of the Federal Rules of Criminal Procedure. But the scope of this authority is not made explicit by the rule. When the judge concludes that the plea is involuntary, is made without full understanding of the charge, or lacks a factual basis, the authority to reject the plea is unquestioned; indeed, the judge has no discretion to do otherwise.

Difficulty arises, however, when 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 a guilty plea accepted by the court, it seems equally clear that the trial court does not have absolute discretion to reject a plea: a legitimate reason must support the rejection.

What has remained controversial is the question that is central for present purposes—namely, whether the judge may reject a plea on the ground that the offense pleaded to does not, in the court's judgment, adequately reflect the seriousness of the defendant's misconduct.

In United States v. Ammidown, a defendant charged with the first-degree murder of his wife, under exceptionally sordid circumstances, offered with the prosecutor's consent to plead guilty to murder in the second degree. The trial judge rejected the agreement, and the defendant was convicted on the first-degree charge.

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160 See id. 11(c), (d), & (f). The cases have split on the propriety of rejecting 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).


163 497 F.2d 615 (D.C. Cir. 1973).
On appeal, the United States Court of Appeals for the District of Columbia Circuit held that rejection of the guilty plea had been improper, vacated the first-degree conviction, and ordered that the plea to second-degree murder be accepted.

Judge Leventhal's opinion for the court announced principles that would confine judicial discretion over a wide range of very common situations. The court recognized that rule 11 authorizes the judge to reject a guilty plea and found, in commentaries supporting this judicial role, "isolated phrases voicing the fear that the judge should not permit the plea bargain to become the means whereby the hardened criminal escapes justice." It 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. Nevertheless, the court stressed the need to harmonize the judge's traditional 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." The court then narrowly limited 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.

[A] dropping of an offense that might be taken as an intrusion on the judicial function if it were not

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164 The specific holding in Ammidown was an extremely narrow one. Because the trial judge had not formally given reasons for rejecting the plea, 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 subsequent to the judge's initial action, Furman v. Georgia, 408 U.S. 238 (1972), 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.

165 497 F.2d at 619.
166 Id. 621.
168 497 F.2d at 621.
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 another felon to justice, or other similar consideration.\footnote{169}

Under this reasoning, 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, adding 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."\footnote{170} With this notion of legitimate prosecutorial purpose, 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 cited Ammidown with apparent approval,\footnote{171} Judge Leventhal's conclusion that prosecutorial charging discretion should normally prevail over judicial sentencing discretion has not won general acceptance.\footnote{172} But whatever the current state of federal law, the proper reconciliation of prosecutorial and judicial discretion poses some difficulties in the context of charge-reduction plea agreements. On the one hand, the Ammidown approach, requiring judicial deference to the prosecutorial judgment in reaching a charge-reduction plea agreement, grants the prosecutor a very large voice in the determination of sentence, a long-recognized sphere of judicial authority. On the other hand,

\footnote{169} Id. 622-23.  
\footnote{170} Id. 621.  
\footnote{172} Most of the other federal courts of appeals have yet to rule explicitly on the issue, although a Fifth Circuit decision holds that rejection for excessive leniency is proper. United States v. Bean, 564 F.2d 700 (5th Cir. 1977).  

The 1974 amendments to rule 11, though not free of ambiguity, appear to reflect the same view and thus probably supersede Ammidown even for the D.C. Circuit. See Fed. R. Crim. P. 11(e)(2) and Advisory Committee notes (decision whether to accept or reject plea agreement left to discretion of trial judge). Nearly all state courts passing on the question appear to have upheld the trial judge's authority to reject charge-reduction agreements considered excessively lenient. E.g., People v. McCartney, 72 Mich. App. 580, 250 N.W.2d 135 (1976) (dictum); State v. Belton, 48 N.J. 432, 226 A.2d 425 (1967) (dictum); People v. Fortanova, 56 A.D.2d 263, 392 N.Y.2d 123 (1977).
the cases affirming judicial discretion to reject charge-reduction agreements for excessive leniency are not easily reconciled with other principles—the prosecutor's virtually unreviewable discretion to forego prosecution entirely173 and the very limited scope of judicial authority to deny prosecution motions for outright dismissal under rule 48(a).174 The United States Attorney could, in other words, have declined to prosecute Ammidown at all or could have declined to bring charges greater than second-degree murder. Even 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” 175 under rule 11?

That the greater power does not always include the lesser is a familiar principle in law, if not in logic.176 In the present instance, several reasons justify 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 decisions not to prosecute and of outright dismissals seems to grow out of difficulties, both practical and constitutional, in compelling prosecution when the government is unwilling to go forward.177 But a rule 11 dismissal pursuant to a plea agreement involves conviction and imposition of sentence. When the judicial machinery is invoked and the prestige of the courts enlisted, mere judicial acquiescence in the prosecutorial judgment seems plainly inappropriate.178

One other difference between rule 11 dismissals and outright 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

176 For example, the government has great flexibility in deciding to exclude factual elements from the definition of the offense; once an element is included, however, 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 (1943). See also Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 YALE L.J. 1299, 1317-20 (1977); text accompanying notes 115-20 supra.
178 As the Fifth Circuit stated in United States v. Bean, 564 F.2d 700, 703 n.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.”
its judgment about whether a case warrants prosecution and whether the admissible evidence will be sufficient to convict. The prosecution here is bargaining with the defense. This obvious point is important because it suggests the inadequacy 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 when it was prompted by "an insufficiency of evidence." A prosecutor's assessment of the weight of the evidence, though entitled to deference, calls for dismissal of the unprovable charges, whether or not the defendant pleads guilty to another charge. 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 case is strong, but not airtight; 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 that the government considers half a loaf better than none. Here are situations involving legitimate prosecutorial goals that cannot be achieved by an unconditional dismissal. Although these examples argue for rather great deference to the prosecutor, the prosecution nevertheless is seeking to attain its legitimate ends through the use of sentencing concessions. The dismissal decision necessarily involves determinations that such concessions are required to achieve the government's objectives and that achievement of those goals 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.

180 Under the prevailing view, the prosecutor is not considered ethically bound to seek dismissal unless he or she concludes that probable cause is lacking. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION§ 3.9(a)-(b) (1971).
181 The reasons that justify this traditional view are developed at text accompanying notes 76-86 supra.
182 The trial judge presumably should give great weight to the prosecutor's judgment on the first of these issues, the need for concessions to achieve prosecutorial objectives. There seems to be no basis for deference to the prosecutor, however, on the second issue, the importance of the prosecutorial objectives in relation
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 readiness to save the government the time and expense of trial is in the final analysis a matter for the sentencing court to determine.

2. Plea Bargaining After the Control of Prosecutorial Power: Charge-Reduction Guidelines and Explicit Guilty Plea Concessions

Acknowledgment and active use of the judge's discretion to reject charge-reduction agreements would help to reduce disparities traceable to inconsistent prosecutorial decisions. But what safeguards, in turn, would ensure consistency in the exercise of the judge's discretion? Proposals for federal sentencing reform initially focused upon eliminating disparities in the exercise of judicial discretion. Controls upon judges may simply transfer discretion to the prosecutors, but even if we can fill this loophole by judicial control over charge reduction, we still would have managed only to return to "square one." Sentence would be dictated primarily by the offense of conviction. For guilty plea cases, representing the vast majority of total dispositions, sentencing would be transmuted into a decision whether to accept the charge-reduction agreement proposed by the parties, and this decision would be committed to the unguided discretion of the sentencing court. That discretion should itself be channeled by guidelines.\(^{183}\)

A system structured by rather specific guidelines covering both charge-reduction and sentencing decisions would afford few, if any, possibilities for leniency in guilty plea cases, unless the guidelines to other goals of punishment, such as retribution, isolation of the defendant, and equality of treatment.

included explicit provisions for a guilty plea concession. Difficult
questions about plea bargaining would thus be driven to the fore.
Many people undoubtedly would be happy to see guilty plea con-
cessions abolished completely and would find charge-reduction and
sentencing guidelines attractive precisely because they could pro-
vide a means of achieving that end. Consideration of the argument
for abolition of plea bargaining would require attention to many
difficult and important issues. I do not by any means consider
the preservation of plea bargaining inevitable, politically or other-
wise. But for present purposes, it will be more fruitful to assume
that, at least for the immediate future, some form of guilty plea
concession will continue to have a place in criminal sentencing.

Effective remedies for the vice of excessive discretion, my prin-
cipal concern here, need not entail the abolition of all guilty plea
concessions; they require only that the plea negotiation system be
insulated from excessive discretion, to ensure reasonable consistency
in guilty plea sentences. One would not wish, however, to pursue
this solution to the disparity problem without considering its side
effects, and particularly its potential for aggravating the already
troublesome state of guilty plea practice.

At the risk of oversimplifying an extraordinarily complex and
elusive phenomenon, I believe that one can group into three cate-
gories the principal concerns raised by plea bargaining. First are
the symbolic and doctrinal difficulties associated with putting any
"price" on the exercise of a constitutional right. Second is the
danger that the concession system will be unsoundly administered;
negotiated agreements may be inconsistent, skewed by conflicts of
interest and tainted by the influence of irrelevant or even invidious
considerations. Finally, the concession on some occasions may
simply be "too attractive," exerting unfair pressure for self-con-
demnation and risking possible conviction of the innocent. The
first of these problems is inherent in any type of guilty plea
concession. The second, unsound administration, is largely the con-
sequence of excessive discretion, and it could be alleviated by
charge-reduction and sentencing guidelines, at least if the guidelines

184 At a minimum, one would wish to know to what extent the number of
cases to be tried would increase, at what cost, and with what means for paying
that cost. Whether a proposal abolishing all concessions would arouse insurmount-
able political opposition must also be considered. For a thoughtful development of
the justifications for some form of plea bargaining, see Enker, supra note 54, at
112-17.

185 See D. Newman, supra note 26, at 200-05; Alschuler, The Defense Attor-
ney's Role in Plea Bargaining, 84 Yale L.J. 1179 (1975) [hereinafter cited as
Alschuler, The Defense Attorney's Role]; White, supra note 75, at 449-52. See also
text accompanying notes 206-07 infra.
system effectively controlled behavior. But if the guidelines authorized substantial guilty plea concessions, they would perpetuate the third problem of undue pressure upon defendants. In fact, they probably would aggravate that problem because the very certainty and clarity of the concession system could intensify the pressure to plead guilty and enhance the prosecutor's position of dominance.186

In order to eliminate sentencing disparities without creating new difficulties in plea bargaining, the guidelines developed must provide uniform standards for charge reduction, while also ensuring that the concession will be small. Such guidelines could, if well-designed, eliminate excessive discretion. They would also avoid the certainty cum dominance dilemma by clarifying the bargaining stakes without imposing undue pressure on defendants or increasing the prosecutor's bargaining leverage. Even the doctrinal problem of imposing a "price" on the right to trial would be mitigated, though not of course solved in principle, because the price would at least be a small one.

The concept of "effective" guidelines with a "small" concession is much too easy to state. The notion would scarcely be worth proposing unless accompanied by specifics about how the guidelines would be rendered effective; how the size of the concession would be fixed; and how, if the concession were indeed "small," the perceived need to maintain a high proportion of guilty pleas would be satisfied. These problems are considered in detail below,187 but we must first consider the desirability of explicit guilty plea concessions as a matter of principle. I conclude that explicit concessions should and would be held constitutional. Although such concessions would raise difficult issues of policy, I argue that these issues are better faced and resolved, whatever the resolution.

a. The Constitutionality of Explicit Guilty Plea Concessions

The propriety of guidelines granting explicit sentencing concessions in exchange for pleas of guilty is clouded by uncertainties of constitutional doctrine because the Supreme Court has kept alive two lines of decision difficult to reconcile with each other. Plea bargaining is considered legitimate,188 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.189

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186 See text accompanying note 81 supra.
187 See text accompanying notes 214-49 infra.
Guilty plea concessions therefore seem potentially vulnerable when 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*, decided during the October, 1978 Term, involved state statutes providing the following penalties for murder:

—mandatory life imprisonment, when the defendant pleads not guilty and the jury finds the murder to be first degree; and

—life or any term up to thirty years, at the judge's discretion, when 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 it 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." Justice Stevens distinguished 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 a punishable offense.

Justice Stewart, concurring only in the result, voted to uphold the statute on the ground that defendants going to trial might re-
ceive less than the mandatory sentence of life imprisonment (if acquitted or convicted only of offenses less serious than first-degree murder), while defendants pleading no contest might receive the maximum sentence of life imprisonment despite the plea. "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." When he turned, however, to the problem posed when differences in treatment based on the plea are indeed clear, Justice Stewart was as pointed as the three dissenters:

While a prosecuting attorney, acting as an advocate, necessarily must be able to settle an adversary criminal lawsuit through plea bargaining with his adversary, 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 unconstitutional . . . .

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," the Court seemed to give particular weight to the fact that even in the non vult cases, "there is discretion to impose life imprisonment. The statute leaves much to the judge and to the prosecutor and does not mandate lesser punishment for those pleading non vult than is imposed on those who go to trial." The Corbitt opinions, taken at face value, indicate that the Court would uphold a guidelines system providing separate sentenc-

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194 Under the New Jersey statutory scheme, the judge does not classify a murder as first- or second-degree when accepting a no contest plea, and could therefore impose life imprisonment even though the underlying facts would have supported no more than a second-degree murder conviction at trial. Id. 218 & n.7, 226.

195 Id. 227 (footnote omitted).

196 The majority made clear in Corbitt, as the Court has done on numerous prior occasions, that "[t]he States and the Federal Government are free to abolish guilty pleas and plea bargaining." Id. 223. It seems unlikely that Justice Stewart intended to express disagreement with this principle.

197 Id. 227.

198 Id. 224 n.14.

199 Id. (emphasis added). See also id. 215-16.
ing ranges for contested and uncontested cases, at least if the two ranges overlapped. A defendant pleading guilty in such a system might receive a prison term as long as, 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 adequate such a loosely structured framework.

Effective controls upon discretion require rather narrow—and thus essentially non-overlapping—penalty ranges for offenses of different severity. Guilty plea concessions under such guidelines might be afforded by a provision, applicable to all guilty plea cases, either reducing the severity level of the offense or granting a specific reduction of the sentence after adjustment of the sentence for all other relevant factors. These approaches would apparently be condemned by at least four members of the Court, 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. Under these circumstances, a 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. Use of guilty plea concessions should not be ruled out 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 developed system of guilty plea discounts. Difficulty arises, first of all, with 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 individual factors relevant to the circumstances.

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

In discussing prosecutorial plea negotiations, the Corbitt opinion mentioned approvingly the "probability or certainty" of leniency, 439 U.S. at 221, but its references to permissible statutory concessions are all couched only in terms of "the possibility" of leniency, id. 224-25 nn.14 & 15. In fact, the Court seemed to rely on the absence of certainty as a decisive factor, see text accompanying notes 198-99 supra, and treated that factor as critical for purposes of distinguishing United States v. Jackson, 399 U.S. 570 (1969). See 439 U.S. at 217.

See 439 U.S. at 227, 231-32 (Stevens, J., dissenting).
This view might be tenable if prevailing doctrine authorized sentencing concessions only in response to lesser culpability, demonstrated remorse, or other penologically relevant considerations. But the law now clearly permits the prosecutor to offer a concession, or to threaten to file additional charges supportable by the evidence, solely for purposes of encouraging a plea. Whatever else may influence the give-and-take of plea negotiations, the plea may now be given weight in its own right. 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.

If the state may indeed make it “expensive” to contest a criminal charge, is a price set by statute or administrative regulation significantly more offensive than one negotiated by opposing attorneys in the context of an adversary system? Implicit in the Stevens and Stewart opinions seems to be a concern that statutory concessions, imposed unilaterally by a legislature holding “all the cards,” are less fair than those agreed upon by adversaries bargaining on a relatively equal footing. Certainly a legislatively established penalty structure could impose “nonnegotiable” trial penalties substantial enough to be unfairly coercive. But prosecutorial concessions can be unfairly coercive as well. In fact, while warning repeatedly that guilty plea concessions must not be so great as to coerce inaccurate pleas, the Court has approved prosecutorial inducements unlikely ever to be exceeded by explicit legislative penalty structures.

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 when 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 disposition of individual cases. Prosecutors have a variety of career-oriented incentives for wanting to try or to avoid trying specific cases. For defense counsel an even sharper divergence


205 See, e.g., Bordenkircher v. Hayes, 434 U.S. 357 (1978) (prosecutor threatened to seek indictment under habitual offender statute, mandating life imprisonment upon conviction, if defendant insisted on trial on charge of forging check for $88.30).

206 See White, supra note 75, at 449-52.
arises between their own professional and financial interests on the one hand and the interests of their clients on the other. To be sure, an attorney may not ethically permit such personal considerations to intrude upon the performance of his or her duty. But, in 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. Indeed, case-by-case negotiation is so flawed by these structural problems that the process seriously undermines the defendant’s right to make a well-informed, voluntary plea decision with the effective assistance of counsel. Whatever the Court’s willingness to take account of such realities when judging 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 statutes in Corbitt seemed to think that mandatory concessions would raise much more difficult problems. This view may reflect in part 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 upon the extent of the concession, as well as upon its certainty. If the penalty for contested cases is mandatory life imprisonment, even a slim possibility 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, the defendant might find the pressure to plead guilty much less intense. There is simply no basis for considering precisely specified concessions more coercive, in general, than vague possibilities for leniency.209

Considerations of coerciveness to one side, loosely defined possibilities for leniency raise many more problems of fairness than do concrete concessions. Ordinarily, the defendant wants to know the actual length of his or her sentence. Systems offering only the pos-

207 See Alschuler, The Defense Attorney’s Role, supra note 185.
208 See id. 1903 (footnote omitted): “[A] recommendation of a guilty plea almost always reflects a plausible evaluation of the defendant’s interests.”
209 See text accompanying notes 79–81 supra.
sibility of leniency put defense and prosecution attorneys under tremendous pressure when they attempt to estimate what the possibilities in fact are. The defendant may receive poor advice, but even if the probabilities are accurately described, the sentence actually imposed may be more severe than the one that seemed 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 it will be impossible to convince the defendant that “he got what he bargained for.”

To avoid such uncertainties, opposing counsel could negotiate a concrete plea agreement guaranteeing a specific concession within the legislatively authorized range of possibilities. Indeed, by facilitating binding plea agreements under the current sentencing system, recent amendments to the Federal Rules of Criminal Procedure plainly recognize the advantages of greater certainty. But this solution tends to defeat the very goals of a system of statutory concessions. The principal objectives are to reduce disparities and to ensure proper disposition of individual cases by minimizing the role of case-by-case negotiation. These goals can at best be only partially realized as long as the statutory provisions simply permit guilty plea concessions and remit determination of their extent to bargaining by the parties in individual cases.

A sentencing commission might decide that some degree of flexibility in guilty plea concessions is desirable or unavoidable. As a constitutional matter, a commission ought to be free, however, to adopt guidelines mandating the greatest feasible degree of uniformity in plea-related concessions.

b. Other Objections to Explicit Guilty Plea Concessions

The drafting of guilty plea guidelines would pose formidable problems of policy. The extent of the concession would have to be determined, either in general terms or separately for each offense-
offender category. Additional difficulties would arise when the normal guideline sentence for a contested case was 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 to plead guilty might seem unusually coercive and thus unusually likely to result in conviction and stigmatization of the innocent. But concessions to defendants who would in any event serve some time would also warrant careful scrutiny; the need for certainty in ascertaining guilt is, of course, at least as strong in such cases as in those not involving incarceration. Finally, a sentencing commission would have to consider whether meaningful but fair inducements could be designed for cases in which, whatever the plea, imprisonment should not be imposed.

Given the sensitivity of these issues, some might prefer to avoid guidelines explicitly addressing the problem of guilty plea concessions.\textsuperscript{212} Such a "solution," however, does not eliminate the issues; it merely hides them from view, thus permitting adoption of ill-advised and disparate approaches to questions that are central to the fair and effective administration of justice. The difficulty of the questions cannot be denied, but it is hard to see how we are well-served by a system that currently prevents any public examination of the issues posed countless times each day as guilty plea sentences are negotiated and pronounced.\textsuperscript{213} Guilty plea guidelines would provide a framework within which answers to these important questions could be developed and continuously refined.

3. Evasion of Judicial Control

If the sentencing system regulates charge reduction and if guilty plea concessions are controlled, pressures to evade these requirements could arise. For reasons already discussed,\textsuperscript{214} it would be unwise to rely upon control devices too readily circumvented. Guidelines governing the allowable charge reduction, when combined with a rule against informal charge bargaining, would, how-

\textsuperscript{212} Compare Tribe, \textit{Structural Due Process}, 10 Harv. C.R.-C.L. Rev. 269, 306-07 (1975), arguing that it may be wise, in some situations involving important interests, moral flux, and absence of consensus, to avoid "freezing" policy in concrete rules. It seems central to Professor Tribe's thesis, however, that the alternative of case-by-case decisionmaking could afford a visible forum for development and refinement of consensus on the issues in question. See id. 308-10. This condition is far from satisfied in the sentencing context.

\textsuperscript{213} Possible qualifications to this conclusion are explored in the text accompanying notes 259-307 infra.

\textsuperscript{214} See note 158 supra & accompanying text.
ever, 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 more serious charge. Indeed, the absence of evidence supporting the more serious offense would provide firm ground for rejecting the charge-reduction agreement because, in that circumstance, the government should seek an unconditional dismissal under rule 48 without attempting to foreclose litigation on the remaining charges.\(^{215}\)

A prosecutor seeking to ensure punishment less severe than that indicated by the charge-reduction guidelines could, from the outset, file charges fewer or less serious 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.\(^{216}\) 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 arises if decisions to forego prosecution on certain charges are tacitly linked to a defendant's promise to plead guilty to other charges. Manipulation of this kind, however, would be much riskier under charge-reduction guidelines than under the present system. Currently, if a defendant pleads guilty in exchange for a tacit commitment, the prosecution must honor that commitment in order to maintain the flow of pleas. Under a guidelines system, the prosecutor would be required to make the first move—either by filing fewer than all the charges or by moving for a rule 48(a) dismissal before the defendant's guilty plea had been tendered. The prosecution would then be dependent on the defendant's willingness to stick to the bargain and would not have immediate recourse against defendants who reneged. Reinstatement of dismissed charges would present problems under the Speedy Trial Act,\(^{217}\) and, in any event, the courts would presumably require some nonbargaining explanation for the reinstatement. Similarly, if the prosecutor filed charges previously withheld, the courts could require a legitimate explanation for the delay in filing.\(^{218}\)

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\(^{215}\) See text accompanying notes 179-80 supra.

\(^{216}\) See cases cited in note 173 supra.


\(^{218}\) Double jeopardy doctrine already forbids prosecution on a more serious offense after trial on a lesser included offense unless, at the time of the previous
The prosecution might avoid these risks by employing a more subtle means for inducing the defense to comply with a covert, impermissible agreement—the tacit threat not to bargain in future cases with defense attorneys perceived as unreliable or unable to "control" their clients. The potential effectiveness of this threat in a guidelines system is difficult to gauge. A defendant would have an 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 in a guidelines system of the kind described than in the current sentencing system, in which a hortatory prohibition of bargaining would run counter to the personal interest of every individual directly involved in the process.

Determination of the offense category is only one of the steps 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, aggravating or mitigating circumstances explicitly made relevant by the guidelines, and any factors that might prompt a departure from the guidelines. When providing the information necessary for any of these judicial decisions, the prosecutor might decline to allege potentially aggravating facts or decline to challenge defense claims with respect to mitigating circumstances.

To prevent distortion of these judgments, a sentencing commission could condemn as impermissible any such prosecutorial commitment given in exchange for the defendant's agreement to plead guilty. Standing alone, however, this rule would involve unacceptably high risks of evasion. A rule against bargaining over aggravating and mitigating factors could be supplemented by exclusion from the sentencing calculation of those factors particular to the trial, "the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977). To preserve the integrity of charge-reduction guidelines, a sentencing commission could require the same type of showing whenever the government files a charge that could have been joined with a prosecution that has already proceeded beyond, say, formal arraignment.

In the current system, even when going to trial conceivably could be in the defendant's interest, the possible advantages of a guilty plea are almost always sufficient to permit defense counsel to rationalize the latter course as being in their client's, as well as in their own, interest. See note 208 supra.

See text accompanying note 158 supra.
larly susceptible to manipulation. But such an approach would impair the sentencing judge's ability to tailor sentences to concededly relevant offense and offender circumstances.

To ensure that the substance of the sentencing judgment is not unduly restricted, the problem of distortion resulting from the inconsistent presentation of aggravating and mitigating circumstances probably is best handled 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 critical might be permitted even when possibilities for bargaining-related distortions could not be entirely excluded. Of course, even rather narrow guidelines of this kind would prove inadequate to control discretion in the absence of limitations on the scope of bargaining over the charge. In recognition, then, of the inadequacy of any reform that controls only the content of the sentencing computation, the next section develops a guideline model that combines this approach—restricting discretion with respect to sentencing variables—with explicit standards controlling charge-reduction agreements. The resulting guidelines system should minimize the prospects for evasion of uniform plea bargaining policies adopted by a commission.

Some possibilities for evasion of charge-reduction controls undoubtedly would remain. Actual experience would be necessary for a definitive assessment of the evasion problem. As matters stand, however, the obstacles to outright manipulation seem sufficiently formidable that, together with the expectation of good-faith compliance by the overwhelming majority of prosecutors and defense attorneys, instances of evasion would probably be too rare to jeopardize the integrity of the governing guideline principles.

221 For example, the offender category could be governed solely by circumstances of employment, prior record, and other background characteristics readily ascertained by the Probation Service.

222 See note 88 supra.

223 Commentators and reformers often seem to assume that formal rules to regulate or prohibit plea bargaining inevitably would be circumvented by resourceful courthouse regulars. For example, Milton Heumann concludes an otherwise thoughtful and provocative study by asserting flatly: "abolition [of plea bargaining] is an impossibility. . . . [T]o speak of a plea bargaining-free criminal justice system is to operate in a land of fantasy." M. HEUMANN, supra note 78, at 157, 162. The manipulation and the "no threats or promises" charade of past years occurred, though, in a system that never explicitly addressed the relationship of negotiated pleas to the acknowledged principle of voluntariness and that, for the most part, attempted to ignore the bargaining system entirely. We have no basis for assuming that attorneys would systematically pursue an unethical and dishonest course in a system that imposed clear bargaining restrictions and at the same time made realistic provision for processing all cases within the formal rules.

224 Additional considerations may affect the prospects for evasion in state prosecutions. See text accompanying notes 334-35 infra.
B. Implementation

I have thus far identified a general approach for bringing the interrelated processes of sentencing under systematic control. In this section I shall discuss the specifics entailed in implementing that general approach. In its most concrete form, the plan has two principal components: sentencing guidelines that narrowly restrict judicial sentencing discretion, while deemphasizing factors within prosecutorial control; and charge-reduction guidelines that restrict the form and substance of plea bargaining. For present purposes, the content of these two sets of guidelines may be described briefly, with a focus on the nature of the guilty plea concession, the procedure for entering a plea, and various practical ramifications. To complete the illustration in concrete terms, the Appendix to this Article provides a full text of model charge-reduction and sentencing guidelines.

1. The Guilty Plea Concession

A guidelines approach could accommodate any number of judgments about the appropriate extent of the guilty plea concession and the circumstances that should trigger it. The substantive resolution of these issues has not been a primary concern in this Article, and, unfortunately, the plea bargaining literature has not pursued them in depth, probably because the concession system has until now been so utterly unstructured. The approach chosen for illustration must therefore be considered quite tentative in its particulars. It contemplates a small minimum discount for every guilty plea, together with the possibility of a small additional concession in cases involving difficulties of proof that do not cast doubt on factual guilt and in cases in which the defendant agrees to cooperate in other prosecutions. Beyond these discounts, the

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225 In building a concession into guideline tables, a commission could treat a guilty plea as a factor reducing offense severity, as in a charge-reduction agreement, or as a favorable offender characteristic, improving the guideline evaluation of the defendant's overall background, in much the same way as would absence of a prior criminal record. Alternatively, the plea could operate independently of the offense and offender calculations and provide a defined reduction from a sentence determined without regard to the plea. The independent plea discount is the most logical approach and avoids the mislabelling associated with charge reduction. But this approach would require a total prohibition on charge-reduction agreements and therefore would do the greatest violence to established modes of plea negotiation practice.

Because it seems prudent to choose forms of implementation that, at least whenever possible, seek to regulate rather than displace current practice, the model guidelines set forth in the Appendix reject the concept of an independent plea discount. They instead provide a minimum concession for every guilty plea case, linked to the offender background computation. A guilty plea adds three points to the offender's salient factor score, see Appendix § II(D) infra, and thus has the effect of
charge-reduction guidelines expressly prohibit further sentencing concessions based, for example, on the savings of time and expense resulting from avoidance of trial or on problems of proof that raise a doubt about factual guilt. These guidelines do, however, include a safety-valve provision, authorizing the trial court to depart from their terms in the interests of justice, provided that the judge's reasons are made public and communicated to the sentencing commission for use in refining the guidelines.

The central substantive judgment underlying this approach is that the plea concession ordinarily should be rather small; the reasons for this conclusion have already been developed. The proposal rejects, however, the frequently advanced notion of a fixed discount applicable across-the-board in all guilty plea cases. Instead, the model guidelines make a rudimentary attempt to distinguish among the various legitimate motivations for leniency.

Savings of time and expense are common to every guilty plea, and the guidelines therefore provide a small, automatic discount for every guilty plea. Beyond this minimum discount, the guidelines bar further concessions based on doubts about factual guilt, such as ambiguity concerning the historical facts or uncertainty in apprais-. 

shifting every case one category to the left on the table of presumptive sentences. As a result, the automatic plea concession would be, for example, a sentence reduction of five months for an offense of "low moderate" severity after conviction at trial, or a sentence reduction of twelve months for an offense of "very high" severity carrying a five-and-one-half-year sentence after conviction at trial. See Appendix §II(A) infra.

The guidelines permit a further concession to be extended, under certain limited circumstances, by the charge-reduction device. See Appendix §I(B) infra. When the guidelines would permit the offense severity category to be reduced by one level of seriousness, such a charge reduction in effect would provide an additional sentencing concession of five months in the case of a "low moderate" offense carrying a sixteen-month sentence after conviction at trial, or an additional sentencing concession of twelve months in the case of a "very high" offense carrying a five-and-one-half-year sentence after conviction at trial. See Appendix §II(A) infra.

226 The typical guilty plea concession would be, for example, five months for an offense carrying a thirteen-month sentence after conviction at trial, or twelve months for an offense carrying a five-and-one-half-year sentence after conviction at trial. See note 225 supra.

227 See text accompanying notes 186-87 supra.

228 The most fully developed of the "fixed discount" proposals appears in Note, Restructuring the Plea Bargain, 82 YALE L.J. 286, 301-02 (1972) [hereinafter cited as Yale Note].

229 Although some cases will require more time in trial than others, a discount explicitly linked to expected savings in trial time would have perverse effects. Cases involving more serious offenses usually require more time in trial than those involving less serious ones, and the discount suggested would increase as the expected sentence increased. But within any group of cases involving comparably serious offenses, to extend a greater discount to the cases expected to consume the most trial time would, in effect, impose the greatest pressures to plead guilty in the closely contested cases. These are precisely the cases that should be tried. See notes 230-34 infra & accompanying text.
ing the legal sufficiency of an insanity or self-defense claim.\textsuperscript{230} Although it is sometimes argued that compromise on such ultimately unknowable matters is sensible,\textsuperscript{231} the proposal reflects the view that the inducement to plead guilty should not become most intense in those cases in which the defendant might in fact be innocent.\textsuperscript{232} Rather, if uncertainties relating to a particular charge are genuine and substantial, the prosecution should dismiss that charge unconditionally.\textsuperscript{233} If the prosecution sees no reasonable doubt about factual guilt, but the defense disagrees, the dispute should be resolved in the way considered most reliable—by trial.\textsuperscript{234}

Some problems of proof, such as those resulting from possible exclusion of evidence gathered in allegedly illegal searches and seizures, cast no doubt on factual guilt. In such situations additional concessions may be permitted. The stronger inducement to

\textsuperscript{230} Whether certain problems of proof do or do not raise a doubt about factual guilt will of course remain open for debate. With respect to confessions (and their fruit) obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), compare the majority, concurring, and dissenting opinions in Michigan v. Tucker, 417 U.S. 433 (1974). With respect to a missing witness, compare White, supra note 75, at 458-59, with Alschuler, The Trial Judge's Role, supra note 81, at 1127-28 n.226. For present purposes, I take no position on these subsidiary issues; I claim only that factual guilt is the relevant criterion for determining whether concessions based on problems of proof should be allowed.

\textsuperscript{231} E.g., Enker, supra note 54, at 113; Specter, Book Review, 76 YALE L.J. 604, 606-07 (1967) (D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial).

\textsuperscript{232} See generally Alschuler, The Prosecutor's Role, supra note 84, at 69-79; White, supra note 75, at 458-62. I do not imply that it is possible to know in any given case what "really" occurred; I use innocence here only to indicate cases involving at least a reasonable doubt about the defendant's factual guilt.

\textsuperscript{233} See text accompanying notes 179-80 supra.

\textsuperscript{234} One reason for regarding a trial as the most reliable procedure is the structure of the process, including its visibility and the neutrality of the decisionmaker. Commentary defending compromise in close cases, see sources in note 231 supra, often rests on thinly disguised distrust of the jury system. Although such distrust is of course justified in some instances, our system's preference for open decision by disinterested officials is, on balance, a sound one. See Alschuler, The Prosecutor's Role, supra note 84, at 78-79; text accompanying notes 83-86 supra.

Another, more fundamental factor is that only trial procedure requires full development of the available facts prior to judgment. Even if one had confidence in the guilty plea decisionmakers, their judgments still would be based on preliminary investigations, cold files, and statements not tested by cross-examination. Under these conditions, bargains in close cases cannot be regarded as plausible compromises by fully informed decisionmakers confronting the "unknowable." The difficulty, moreover, is not a curable one, but rather an inevitable characteristic of a system that depends for its efficiency upon short-circuiting the available techniques for careful evidentiary development; a pre-plea hearing procedure that provided all appropriate factual safeguards would simply reinvent the trial under another name. On the general problem of information development in informal settings, compare Eisenberg, Private Ordering Through Negotiation: Dispute-Settlement and Rule-making, 89 HARV. L. REV. 637, 657-58 (1976) (discussing richness of techniques for informal factfinding), with H. RAFFA, DECISION ANALYSIS 27-33, 39-50, 157-50 (1968) (discussing conditions under which a rational actor will forego opportunities to acquire relevant information).
plead seems more acceptable because factual guilt is not in dispute. Moreover, in search and seizure situations, for example, the additional sentence reduction would penalize the government for conduct of questionable legality.\textsuperscript{235}

The substantive judgments underlying these guidelines necessarily must be presented in exploratory and tentative form. Experience with the operation of structured discretion in bargaining and sentencing could well provide support for a different or more discriminating approach. The possibility of disagreement about these particulars only highlights the need for guidelines to expose the relevant issues, to develop a better understanding of them, and to foster a degree of consistency in their resolution.\textsuperscript{236}

Because of the exploratory nature of the enterprise, the proposed guidelines include a safety-valve provision, permitting departure from the guidelines for publicly stated reasons. By preserving some flexibility for the sentencing judge and some negotiating room for the parties, the proposal should permit the sentencing system to respond more sensitively to genuine differences among cases and should reduce pressures for covert evasion of the governing rules. The safety-valve provision would also provide a mechanism, now sorely lacking, for developing information likely to facilitate a more sophisticated approach. Whether the narrow exception would in practice swallow all the rules would, of course, remain to be seen. My own judgment is that the proposed framework provides enough concrete guidance and enough visibility to prevent most bargaining-related disparities and to mitigate other problems of fairness posed by the present system of virtually unrestricted plea negotiation.

2. The Plea Hearing

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.\textsuperscript{237} The commentators differ with regard to whether discussions between the
parties should be permitted prior to the formal proceeding,\textsuperscript{238} whether the proceeding itself should be on the record,\textsuperscript{239} and whether the judge's role in the proceeding should be one of active negotiator or neutral arbiter.\textsuperscript{240}

Whether such a proceeding could alleviate any of the principal problems of plea negotiation is itself subject to some dispute.\textsuperscript{241} Under the most favorable assumptions, however, these proposals by themselves offer little hope for reducing sentencing disparities or the coercive effects of powerful inducements to plead guilty. As long as the authorized range of sentences remains broad and judicial discretion largely unguided, courts would have scarcely any basis for assessing the propriety of particular concessions proposed; neither uniformity nor effective limits on the extent of the concessions could therefore be expected to emerge from formal pretrial hearings.

The model guidelines reflect an attempt to achieve greater uniformity and sounder results in individual cases by adapting the pretrial hearing proposals to the framework of a guidelines sentencing system. The guideline limitations on the extent of permissible bargaining outcomes make unnecessary any attempt to forbid discussions between the parties prior to the plea hearing or to transfer responsibility for negotiations to the judge. The proposed procedure would instead preserve 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 that possibility in an unstructured setting. Any agreement reached would, as in the current system, be submitted to the court for approval. The proposal includes guidelines for the exercise of this judicial discretion, but otherwise preserves the framework of present practice under rule 11.

3. Feasibility

The impact of the proposed guidelines upon the guilty plea rate seems impossible to predict a priori. Because the permissible

\textsuperscript{238} Yes: White, \textit{supra} note 75, at 464; \textit{Yale} Note, \textit{supra} note 228, at 300 (but to be "discouraged"). No: N. Morriss, \textit{supra} note 237, at 53-55; Alschuler, \textit{The Trial Judge's Role}, \textit{supra} note 81, at 1147.

\textsuperscript{239} Yes: \textit{Yale} Note, \textit{supra} note 228, at 301. No: N. Morriss, \textit{supra} note 237, at 54.

\textsuperscript{240} Compare \textit{Harv.} Note, \textit{supra} note 237, at 588-91 (active involvement by "magistrate"), with \textit{Yale} Note, \textit{supra} note 228, at 301 (passive judicial role). See also Alschuler, \textit{The Trial Judge's Role}, \textit{supra} note 81, at 1123-24, 1147 (judge should assume the dominant role, but not an "adversary posture" toward defendant and should remain "essentially passive" regarding exchanges between parties and evaluation of strength of evidence).

guilty plea concession generally would be rather modest, guilty pleas
would be most likely in cases involving no plausible defense. Defenders of plea bargaining often assert that these "dead bang" cases account for the great bulk of all guilty pleas in current practice; 242 if so, guidelines like those proposed might produce little change in the percentage of cases going to trial. But if prosecutors typically offer their most attractive deals in their weakest cases and if the resulting pleas represent a major part of the total, 243 then the trial rate could increase. The proposed guidelines of course reflect a deliberate judgment that cases of this kind should be tried.

Ultimately, experience would indicate whether the number of contested cases increased, either generally or for certain offenses, and in the event of an increase of either sort, whether modifications were required. Corrective action might take the form of either an increase in the concession or an expansion of the system's trial capacity. Because it is conceivable—though, in my judgment, unlikely—that adoption of such guidelines could produce a drastic and unmanageable increase in the trial rate before any corrective action could take effect, implementation on an experimental basis in a few districts seems desirable. A sentencing commission could also adopt a "judicial emergency" provision, comparable to the one in the Speedy Trial Act of 1974, 244 enabling prompt suspension of the entire guidelines procedure in the event of a genuine crisis. The remote prospect of a breakdown in the judicial machinery is, however, inherent in any proposal for constraints on discretion and should not in itself forestall adoption of controls.

A related problem is the impact of the guidelines on the proportion of bench trials to jury trials. Some statistical evidence suggests that substantial sentencing concessions are currently granted to defendants who waive their right to a jury trial and agree to a trial before a judge. 245 If the guidelines authorize no concession for such jury waivers, defendants formerly electing a bench trial might plead guilty (if the guilty plea concession appeared attractive) or elect a jury trial (if the plea concession were considered too small). Either procedure is arguably less satisfactory than the relatively efficient, but nonetheless definitive, resolution of guilt by an adversary trial to the court.

242 See text accompanying note 78 supra.

243 See Alschuler, The Prosecutor's Role, supra note 84, at 60.


If guidelines did substantially reduce the proportion of contested cases tried without jury, a 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 an expeditious but fair procedure for ascertaining guilt attractive to some defendants who might otherwise plead guilty. In fact, by making the jury waiver concession much larger than the guilty plea concession, a sentencing commission could establish a framework for eventually replacing guilty plea dispositions by the somewhat more costly, but plainly more dignified and reliable, procedure of a formal bench trial.

Jury waiver concessions nevertheless raise troublesome issues. Their constitutionality is not self-evident, and the feasibility of tailoring them to the costs of, or the need for, jury trials in certain kinds of cases is not obvious. Even their contribution to efficient court administration is unclear: the Federal Rules of Criminal Procedure permit the defendant in a bench trial to demand formal findings of fact, and under the present rules, this right cannot be waived prior to conviction. It would be instructive to know whether a bench trial with formal findings "costs" 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 ensure a greater sentence benefit for such cases. At that point, new questions of fairness and constitutionality could justifiably be raised. These questions are typical of the difficult substantive issues inherent in

246 If the plea bargaining system is ignored, the discrepancy between penalties applicable to bench and jury trials presumably would 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 were to shift cases from disposition by guilty plea to disposition by a more formal procedure, the result could well be different. Of course, because the defendant seeking a bench trial is not "ready and willing to admit his crime and to enter the correctional system in a frame of mind that 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 the decision in North Carolina v. Alford, 400 U.S. 25 (1970), and the Court now explicitly justifies plea concessions by the mutual advantages flowing from the system, see Corbitt v. New Jersey, 439 U.S. 212, 222 n.12, 222-23 (1978). Such mutual advantages equally characterize a system of concessions for waivers of a jury or indeed for waivers of nearly any constitutional right. The constitutional problem must for the present remain a murky one, however, 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 text accompanying notes 188-99 supra.

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

248 United States v. Livingston, 459 F.2d 797 (3d Cir. 1972); Howard v. United States, 423 F.2d 1103 (9th Cir. 1970).
any effort to make explicit the premises upon which the federal system of criminal justice presently operates. If a guidelines system and formal guilty plea concessions did expose problems concerning the legitimacy of the factors currently inducing defendants to seek a bench trial, then the preferable solution would be to confront those problems directly.249

V. Will Visibility and Regularity Enhance the Quality of the Sentencing Process?

The preceding sections explained how excessive discretion can be eliminated and procedural regularity achieved in the loosely organized criminal sentencing system. I wish now to explore some difficulties that could be created by the attainment of these goals. I have in mind not the comparatively well-known disadvantages of all formal rules, but rather some ways in which sentencing reform could actually impair the values that formal procedure and the rule of law ordinarily are expected to promote. Because the difficulties that concern me are relatively unfamiliar and intangible, I begin by identifying those more familiar problems that will not be a part of my subject.

We have become accustomed to hearing that compliance with the standard requirements of procedural due process—notice, an opportunity to respond, and "some kind of hearing"—can be time-consuming and expensive. In certain areas, cost and delay are said to prevent accurate and effective decisionmaking or at least to outweigh the limited potential for gains from formal procedures.251

More recently, we have heard that imposition of due process requirements may undermine trust and community spirit between those responsible for and those affected by certain kinds of decisions.252 None of these concerns has any plausible application to criminal sentencing. The constitutional text leaves no room for debate about whether or not due process requirements should apply

249 Limited qualifications to this general preference for visibility are developed in the text accompanying notes 259-307 infra.


251 In recent decisions the Court has not explicitly considered these factors in deciding whether or not due process applies; in deciding what process is due, however, the Court has relied heavily upon them, even to support the denial of any predeprivation hearing. E.g., Ingraham v. Wright, 430 U.S. 651, 680-82 (1977); Mathews v. Eldridge, 424 U.S. 319, 334-35, 348 (1976).

to sentencing: in any event, few would deny that traditional procedural safeguards can contribute to the accuracy of sentencing judgments and that the high cost of inaccuracy mandates use of reliable procedures. And, at least under the assumptions of the American adversary system, there is obviously no shared enterprise, no bond of "community" between government and the criminal offender, that could be relevant to the decision about punishment.

Despite acceptance of the need for procedural due process in the form of notice and some kind of hearing, the law sometimes permits the decisionmaker rather wide substantive latitude, that is, latitude with respect to the results that may be reached and the reasons, if any, that need be adduced in support of those results. Until recently, this was uniformly the case in criminal sentencing. Movement away from such broad discretion and towards clear, binding rules may entail other familiar costs—in this instance, rigidity and inadequate individualization. Clear rules will, almost inevitably, be overinclusive or underinclusive, failing to capture all factors that should affect the result. In the interest of excluding impermissible considerations and preventing arbitrary results, restrictions on discretion necessarily exclude some legitimate considerations and some enlightened modifications of otherwise arbitrary results.

Concerns about inadequate individualization, though obviously relevant to any rigid sentencing rules, have little application to the kinds of sentencing guidelines typically proposed. These guidelines set a presumptive sentence, given certain presumptively relevant circumstances, but permit judges wide latitude to depart from that sentence whenever the situation warrants. Because discretion

253 See text accompanying notes 130-32 supra.
254 Such procedures need not include all the attributes of a formal criminal trial. See text accompanying notes 109-13 supra.
255 Bonds of community between society and the offender do remain real, however, and help to define reciprocal rights and duties that continue even during confinement; most states, though by no means all, have now abandoned the harsh fiction that the prisoner is "civilly dead." See Special Project, The Collateral Consequences of Criminal Convictions, 23 VAND. L. REV. 929, 1030 (1970). But cf. President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 88-91 (1967) (discussing numerous civil disabilities still imposed on convicted persons). At the time of sentencing, the adversary stance is traditionally considered paramount, but this attitude has been questioned even in the context of American procedure, see Enker, supra note 54, at 118-19, and quite different conceptions seem to prevail in other cultures, see, e.g., K. Llewellyn, Jurisprudence 439-48 (1962).
257 Some restrictions upon justified individualization would result to the extent that a sentencing commission attempted to forbid variations based on relevant, but too easily manipulated, factors. See text accompanying notes 221-22 supra.
is guided and controlled, but not eliminated, ample opportunities for proper individualization ordinarily remain.

Although a guidelines sentencing system would not be vulnerable to these kinds of objections, it could present more troublesome problems. Efforts to reduce disparity might, we have seen, generate greater disparity, given the complicated dynamics of the sentencing process. Even if uniformity and procedural regularity can be achieved, the political and institutional complexities of sentencing could generate new difficulties in the very areas in which uniformity and regularity are expected to be helpful. The problems that concern me fall into two broad groups. First is the question whether guided discretion, with enhanced visibility and accountability, will produce wiser sentencing policy. I believe that much resistance to sentencing reform reflects an intuition that current conditions of low visibility help to produce more sensible sentencing decisions. I shall argue that there is some truth to this view; efforts to obscure results and to minimize the accountability of decisionmakers, which I call "low visibility politics," are not necessarily unprincipled or incompatible with democratic theory.

The second set of problems focuses not on the instrumental value of structured discretion—its ability to produce sound policy—but rather on the value of such a system to the defendant. Will an elaborate guidelines system, such as the one described in the preceding section, promote the sense of participation and involvement that we expect due process rights to foster? Again, I believe that resistance to sentencing reform on the part of many practitioners reflects an instinct that the present unstructured system provides for this qualitative dimension of fair procedure much more satisfactorily than would a regime of formal guidelines.

The next two sections explore these concerns about visibility and participation. I conclude that the conventional conception of the rule of law retains most of its traditional virtues in the sentencing context, but that departures from formal due process can sometimes enhance the efficacy and fairness of the sentencing system.

A. Low Visibility Politics

A sentencing guidelines system would render highly visible a host of troublesome issues. These would include, for example,
such substantive questions as whether longer sentences should be imposed on unemployed offenders, when a characteristic of this kind may be predictive of future dangerousness but may also be closely linked to involuntary status or race.260 The proposal developed in part IV to regulate charge reduction and plea bargaining would expose equally troublesome procedural issues, including the problem of fixing the exact price of exercising the right to trial, the propriety of offering probation as a guilty plea inducement, and the propriety of granting concessions in contested cases in exchange for waiver of particular trial rights.261 Not surprisingly, many persons sympathetic to the goals of sentencing reform prefer not to stir up these hornets’ nests or doubt that those who do so will be in a position to produce thoughtful solutions.

1. Some Costs and Benefits of Low Visibility Decisionmaking

The dangers of visibility in a fully developed sentencing reform proposal involve several distinct dimensions. Visibility poses dilemmas both for those who claim to know the proper solution to the issues presented and for those who admit that they do not. The dilemma faced by the agnostics is apparent: a world of high visibility sentencing decisions will present them with issues on which they remain quite perplexed. As decisionmakers—judges, sentencing commissioners, academic consultants—they can avoid the necessity of decision by presenting the issues to the political institutions and awaiting the judgment of the body politic, as their professional tradition instructs them to do. But is it inevitably wise to expose public awareness undoubtedly will be much greater for a particularly noteworthy individual case than it ordinarily will for generally applicable sentencing regulations, however controversial and however openly adopted. I do not focus here on such problems of public attention to the final sentencing judgment itself. Rather, my concern is with the visibility of the operative legal rules or principles according to which concrete decisions are rendered. From this perspective, a system of broad, unstructured discretion inevitably obscures the governing criteria (if any), not only from the general public but also from scholars, from the affected parties, and often from the decisionmakers themselves. (For example, the United States Parole Board eventually discovered, with the aid of sophisticated empirical research, that for years it had unknowingly based release decisions primarily upon a small number of criteria. See Coffee, supra note 36, at 997.) Conversely, a guidelines system mandating a definite incremental penalty for all offenders previously convicted, or for all unemployed offenders, would be “visible” for my purposes. Most citizens might be wholly unaware of the principles adopted, but the rules would be readily available to anyone who did take an interest in discovering the premises upon which decisions were being made.

260 This problem is usefully explored in Coffee, supra note 36; Project, Parole Release Decisionmaking and the Sentencing Process, 84 YALE L.J. 810, 872-77 (1975).

261 See text following note 211 and text accompanying notes 225-36, 245-49 supra.
the problems and demand a political solution when the questions mix value-laden elements with empirical assessments that the public is unlikely to appreciate; when public opinion in any event is volatile, unformed, or ill-informed; when the issues are emotionally charged and socially divisive? In countless areas society finds a way to obscure such issues and avoid deciding them publicly. The tactical advantages of such a course often seem so clear that reservations based on the niceties of political and constitutional theory may simply be dismissed out of hand.

Those who do "know"—and care—about choosing the wise course confront an even sharper dilemma. On such issues as the guilty plea discount, for example, public resistance and the press of circumstances could preclude an ideal solution—the abolition of all concessions. Premature adoption of this ideal could simply make the inevitable nullification process more visible; and the resulting cynicism might be much more destructive than low visibility disregard of the ideal. Yet, if the idealist instead chooses to condone the inevitable "realities," while attempting to minimize their worst effects—as has been done in the past by critics of both plea bargaining and preventive detention—then the "realities" assume a legitimacy they may never have enjoyed in the amorphous world of low visibility decisions. Better perhaps to keep the ideal alive, in hibernation, until the social climate permits it to re-emerge as an active force. This kind of hope might, for example, underlie the position of Justice Powell in Bakke, an uneasy compromise between an ideal that condemns racial quotas and a reality likely to entail low visibility, de facto quotas, a compromise which four Justices saw as little short of hypocrisy.

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263 See text accompanying note 290 infra.


265 Justice Powell allows that the presumption of regularity in programs he would condone could be overcome by proof that a covert quota was in effect. But he does not appear to place primary importance on verifying the actual workings of such programs. Instead, he repeatedly stresses their "facial" appearance and emphasizes the importance of whether a program is "viewed as inherently unfair by the public generally... "Justice must satisfy the appearance of justice."" Id. 319 n.53 (emphasis added) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

266 "[T]here is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public." Id. 379 (Brennan, J., concurring & dissenting).
Another cost of explicit, highly visible policymaking is suggested by the controversy surrounding establishment of offense severity levels. Criminal justice officials, along with many others, often conclude that legislatively prescribed penalties are far too severe and that even the current, diffuse process of divided judicial and parole powers fails adequately to mitigate the harshness of our penalty structure: average time served is simply too long. Reduced discretion and more direct legislative decisionmaking could aggravate this already serious problem.

Although such considerations suggest that the adoption of a low visibility approach should not be condemned as inevitably unsound, their force seems to me insufficient to override the traditional virtues of exposure and accountability in the context of the current debate over sentencing reform. The tendency of visibility to generate unduly severe sentences presents the most troublesome problem. We should not too readily assume, however, that current conditions of broad discretion and low visibility do, on balance, generate shorter prison terms. Introduction of the parole system was, to be sure, accompanied by hopes that it would serve to mitigate harsh sentences, and parole boards probably have had this effect in some jurisdictions at some times. But there is also disturbing evidence that indeterminacy may have lengthened time served. The verdict simply is not in yet on this crucial issue.

A related concern that visible rules may legitimate and perpetuate controversial values at a time of moral flux is developed in Tribe, supra note 212. That concern prompted Professor Tribe to urge, for some circumstances, an unconventional requirement of individualized decisionmaking unconstrained by rules; the proposal nevertheless presumes that conventional demands for visibility and accountability will be satisfied in connection with the individualized decision. See note 212 supra. The perspective developed in the text suggests that this proposal may not go far enough and that in some situations individualization under conditions of low visibility may be required to prevent legitimation of controversial values. Cf. M. KADISH & S. KADISH, supra note 262, at 77 (Low visibility nullification by the police "has the advantage of allowing the official rule of full enforcement to be maintained. This is not idle ceremony. A criminal code has symbolic offices to fill. . . . Relying on police [nullification] avoids proclaiming outwardly that the law is not meant to be taken literally.").


As Professor Zimring has warned, "[O]nce a determinate sentencing bill is before a legislative body, it takes only an eraser and a pencil to make a one-year presumptive sentence into a six-year sentence for the same offense." Zimring, supra note 23, at 17. See also text accompanying note 24 supra.

See, e.g., Foote, supra note 23, at 134.

See Messenger, Introduction, to A. von HIRSCH & K. HANRAHAN, supra note 9, at xxii-xxvi.
Despite its inherent dangers, greater visibility also creates checks that help to avoid high averages in time served and, of course, to reduce the high incidence of unfortunates who would be among the "above average" statistics. Low visibility has prevented advocates of a less brutal system from painting a clear picture of the actual pattern of punishment, its fiscal and other consequences, and the precise differences that would flow from specific policy changes. A proposal for narrow discretion and presumptive sentences would enable criminal justice planning agencies to predict, within useful limits, the effect on cost and prison population of any given penalty structure. Rather than facing the abstract question whether the typical burglar should serve one year or six, legislators could be confronted directly with the budgetary consequences of an otherwise attractive punitive stance. In Illinois, for example, corrections specialist David Fogel and his staff used computer models to determine the effects, under a variety of alternative assumptions, of several different penalty levels in a "flat time" sentencing system. They found that, in a sentencing structure with four penalty categories, moving from a scheme of two-, three-, five-, and eight-year terms to a more severe "four-six-ten-sixteen" scheme would triple the Illinois prison population.271

The dangers of a brutal legislative response thus are not unbounded. At the same time, visibility offers considerable benefits in terms of effective planning, better public awareness of the underlying dilemmas of crime control, and more responsible political decisionmaking. These benefits could make the risks worth running, even for those deeply committed to lenity. Of course, one would have to have great confidence in one's reading of the political pulse in a particular jurisdiction to venture a firm conclusion.272 The point is simply that, given the inevitable vagaries of politics, the threat to leniency caused by high visibility is not necessarily more acute than the easily overlooked dangers of the low visibility approach.

The multiple political uncertainties of both high and low visibility recommend a political structure that avoids the most serious dangers of each. Visible, conscious choice of governing principles need not imply that the choice is made by, or even readily subject to control by, elected political representatives. In

271 D. Fogel, supra note 14, at 259-60.

272 In states that have recently moved toward greater determinacy in sentencing, preliminary indications suggest that average time served will be substantially higher than that under the sentencing systems previously in effect. See sources cited in note 24 supra.
the administrative process, both rulemaking and adjudication can, in some settings, permit a quite explicit choice between definite, politically controversial alternatives without inevitably generating the solution that Congress would have selected. It is possible, in other words, to provide for high visibility of legal principles (to scholars, lawyers, and the public), but to temper the political accountability of those who make the crucial, high visibility decisions.

In the sentencing context such an approach would entail delegating to a sentencing commission the power to make basic severity judgments in formally promulgated rules. The commission’s determinations, of course, would remain subject to review and revision by the legislature, but the initial decision would be insulated from the most direct political pressures, and the realities of the legislative process would limit to a degree, though not eliminate, the prospects for vigorous oversight by the elected body. It might even be considered desirable to deflect further the political pressure for long sentences and to provide time for the public to become accustomed to sentences that seem short by contemporary standards but require just as much time actually to be served. If so, the legislature could authorize a “bark and bite” system: sentencing guidelines would require that seemingly severe sentences be pronounced upon conviction, but parole guidelines then would provide for an automatic reduction through rules granting early release. Devices of this kind would enhance the prospects for a responsible severity policy, while affording enough visibility to permit conscious planning, comprehensive evaluation of related problems, and examination and criticism by all interested persons.

The tendency of visibility to effect legitimation of doubtful values raises another difficult problem. Were the constitutionality of plea bargaining still an open question, this tendency might argue for condemning the practice in principle and hoping that disregard of the ideal would remain largely invisible. But as matters now stand, concessions for waiving the right to trial do enjoy an imprimatur of legitimacy. At least for the time being, therefore, effort should be directed toward identifying and, if possible, eliminating the worst of the evils fostered by plea bargaining. This goal is scarcely furthered by concealing the details of the concession system. Exposure and accountability, as made possible, for example, by the proposed system of charge-reduction guidelines, will focus

275 See text accompanying notes 184-87 supra.
attention on these concessions and facilitate informed action to impose constructive limits on their extent.

The potential sensitivity and social divisiveness of the issues at stake seems to me too easily exaggerated. We regularly debate and decide at the polls questions concerning the death penalty or the extent to which the affluent will be taxed to provide better food, shelter, and education for the poor. The political and social fabric would easily withstand the tensions resulting from the public consideration and resolution of “delicate” sentencing issues. In this area the conventional assumption that the health of our political institutions is promoted by public involvement in the resolution of sensitive problems seems to me quite sound.

It remains true that many of us simply have no idea how properly to resolve some of these issues. In part, however, this is because low visibility prevents us from learning very much about the context in which they arise. A principal goal of sentencing reform is to create a framework that will generate this kind of information. The assumption that additional knowledge will be useful may prove naive. Indeed, the current reform effort is in large measure sparked by the conclusion that after years of experimentation with treatment techniques, we really do not know how to “rehabilitate” criminal offenders. But there will be time enough to admit another failure after we can genuinely claim to understand what sentencing and guilty plea decisions actually entail.

2. The Structure of Political Accountability

In arguing against a low visibility approach in the sentencing context, I have concluded that the decisive considerations are essentially pragmatic: unstructured judicial discretion reduces visibility much more than necessary to further the substantive priorities of the reformers. This conclusion has made it unnecessary to consider the more elusive question whether low visibility techniques, even if attractive on tactical grounds, are consistent with accepted principles of democratic government. Yet my own “solution” to the various visibility problems involves delegation of lawmaking authority to an agency insulated to a degree from the legislature.

276 See Vorenberg, supra note 70, at 670-74.
277 See note 1 supra.
The insulation is affirmatively sought, rather than a mere by-product of a structure preferred on other grounds, and I have argued that, if need be, steps should be taken to see the insulation enhanced.\textsuperscript{279} Is there adequate justification for choosing a decisionmaking structure that will dilute political accountability and enable administrators to pursue policies, especially with respect to leniency, without direct popular participation and control?

The constitutional side of the problem involves no real obstacle, at least in terms of formal doctrine and concrete decisions likely to be rendered by courts.\textsuperscript{280} The absence of a practically effective judicial sanction does not, however, absolve us from considering whether an administrative structure designed to delegate a fundamental policy choice to experts would violate the spirit of our constitutional system and the democratic principles underlying it.

Critics of delegation, who insist on choice by the legislature when possible, sometimes rest their case primarily on the language of the Constitution, which vests "[a]ll legislative powers" in Congress.\textsuperscript{281} When opponents of delegation go beyond that text, they nearly always base their argument on majoritarian principles. Judge J. Skelly Wright thus observes: "An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy."\textsuperscript{282} Justice Harlan explains that the nondelegation doctrine "insures that the fundamental policy decisions of our society will

\textsuperscript{279} See text accompanying note 273 supra.

\textsuperscript{280} The essence of the constitutional problem is that a delegation readily justified in terms of the legislature's limited time and expertise, see text following note 20 supra, is actually preferred not on these grounds, but largely because the delegation enables the legislature to avoid a political choice (on severity issues, for example) that the legislature is in fact perfectly capable of making. The latter motivation may be obvious enough to various reform groups, but it is unlikely to emerge with sufficient clarity in the formal legislative history. Even if it were to do so, the courts would likely be unwilling to invalidate the statutory plan on that basis. \textit{See generally} Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970). One vigorous opponent of delegation has suggested implementing a more stringent doctrine by requiring courts to focus not on the nature of the power delegated, but rather on the legislative context in which the decision to delegate was made. A delegation would be upheld if the statute authorizing the delegation indicated a clear choice among the policy alternatives perceived by Congress when it acted; it would be struck down if the legislative history indicated an abdication of choice. S. Barber, The Constitution and the Delegation of Congressional Power 41-49 (1975).

\textsuperscript{281} \textit{E.g.}, H. Friendly, supra note 278, at 21. Closely related is Professor Barber's argument that the premises of a written constitution are violated if a temporary legislative majority can alter the basic constitutional structure ordained by the framers. S. Barber, supra note 280, at 14-18. For development of this theme, see Freedman, Delegation of Power and Institutional Competence, 43 U. Chi. L. Rev. 307 (1976).

\textsuperscript{282} Wright, supra note 278, at 585.
not be made by an appointed official but by the body immediately responsible to the people." Judge Henry Friendly, in his influential Holmes lectures, Justice Brennan, writing separately in United States v. Robel, and the principal older authorities sound the same majoritarian theme.

Professors Davis and Jaffe, perhaps the leading enthusiasts of delegation, recognize that opposition to delegation rests on majoritarian concerns, but they use this perspective to drain the objection almost entirely of its moral force. Professor Jaffe writes,

large decisions of policy should be grounded in consent. Consent is the product of compromise and can only be arrived at through representation. . . . We must not, however, overstate the proposition concerning "consent" . . . . The aim of government is to gain acceptance for objectives demonstrated as desirable and to realize them as fully as possible. We should recognize that legislation and administration are complementary rather than opposed processes; and that delegation is the formal term and method for their interplay. Finally we should demand no more than that in the total process we achieve government by consent. Both representation and consent are in this view matters of degree, and the decision to delegate is itself a part of consensual government. Indeed, when Professor Davis, himself a strong supporter of delegation, severely criticizes the wisdom of delegating broad low visibility powers to the police, Professor Jaffe responds that "[t]his under-the-counter approach may offend the Puritan, it may offend the legal theorist, but I am sure that those who are offended are in a rather small minority, and if a society—a democracy if you will—chooses to operate that way, the appeal to general principles of equal protection and legal formality does not seem to me to be sufficient."

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284 H. Friendly, supra note 278, at 21-22.
286 E.g., E. Freund, Administrative Powers over Persons and Property 218-21, 592-93 (1928).
288 See K. Davis, supra note 4, at 47 ("the words 'all legislative powers' . . . include the power to determine how much delegation is desirable").
289 Id. 80-96.
290 Jaffe, supra note 94, at 777.
The majoritarian perspective therefore provides a somewhat problematic basis for the antidelegation position. Yet Professor Jaffe's approach does not seem altogether satisfying either: if majoritarianism and consent are logically incapable of explaining the needs so strongly felt by Judge Wright, Judge Friendly, and others, then perhaps their concern reflects more complex values.

Sensitivity to the implications of interest group politics no doubt accounts for much of the intensely perceived illegitimacy of delegated policymaking. Judge Wright, for example, explicitly charges that delegation enables "special-interest groups to effect the transfer of governmental power away from the large public to the special-interest small publics." Many other critics of the administrative process similarly tend to view administrative agencies as peculiarly vulnerable to "capture" by the interests ostensibly being regulated, while they see the legislative process as more broadly representative of the public at large. Yet these perceptions may stem primarily from the particular focus or experience of individual scholars. Professor Jaffe takes just the opposite view—"[d]elegation as the handmaiden of regulation is distasteful to holders of economic power"—and recent years have seen numerous important instances in which special interests, having "captured" Congress, have succeeded in overturning by legislation an agency policy that favored widely dispersed, relatively powerless members of the general public. Such instances only make vivid what empirical political science has reported for years: that the legislative process is

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291 Opposition to delegation proves equally problematic when it is premised on what amounts to an antimajoritarian philosophy—namely, that separation of powers and the rule against delegation are intended to protect minority rights and prevent tyranny by a legislative majority. This view might indeed explain much of the attraction of separation of powers and "checks and balances" for those among the framers who were concerned to safeguard privileges of wealth and status from the potential political power of the popular majority. But the logical connection between separation of powers and the protection of minorities, however they be defined, breaks down completely. See R. Dahl, A PREFACE TO DEMOCRATIC THEORY 11-22 (1956). Moreover, the implicit preference for legislative inertia and preservation of the status quo, however natural it may have seemed under the sway of laissez-faire attitudes of the eighteenth century, seems difficult to support given contemporary assumptions about the need for affirmative steps by government to protect many essential human rights and to give content to formal freedoms.

292 Wright, supra note 278, at 585 (quoting J. Appelby, POLICY AND ADMINISTRATION 162 (1949)).


294 L. Jaffe, supra note 287, at 33.

itself dominated by myriad "special-interest small publics." The balance of forces acting on an administrative agency will likely be different from that acting on a legislature, but one cannot say that policymaking delegations always—or even generally—will favor political forces that are less representative of the broad public interest or that the delegate will be less responsive to unorganized, economically powerless groups than the legislature would be.

The case that concerns us, that of administrative policymaking in criminal justice, illustrates these ambiguities. Delegation often seems to serve a broader, more long-range conception of the "public interest" than would legislative decisionmaking; if the former favors any group, those favored are probably convicted defendants, a group that typically lacks organization and political and economic power perhaps more than any other. Yet the enhanced influence of this group on a sentencing or parole agency in some respects parallels traditional forms of agency "capture." Of course, criminal defendants, unlike a regulated industrial group, do not have special access to the technical information and analysis on which regulatory decisions may depend. And although public defender agencies provide a degree of organization and common representation for indigent defendants, law enforcement interests ordinarily are organized at least as effectively. But limitations on resources available to prosecutors, to the courts, and to corrections agencies require that sentencing policy be shaped with a view toward maximizing guilty pleas, avoiding unmanageable growth in prison population, and maximizing incentives—for example, through early release and "good time"—for good behavior and "voluntary" self-control among prisoners. In these ways the position of sentencing and parole authorities resembles that of many other regulatory agencies, which lack the resources necessary for aggressive enforcement and therefore come to rely upon compromise and industry cooperation in order to achieve more modest objectives.

See the research collected in American Legislative Behavior 213-320 (S. Patterson ed., 1968). For a rigorous theoretical approach implying that this situation is virtually inevitable under contemporary conditions, see R. Dahl, supra note 291, at 63-84, 124-51.

For analysis of some of the factors that tend to make agencies particularly susceptible to capture by highly organized special interests, see M. Edelman, supra note 293, at 44-68; Stewart, supra note 29, at 1685-86. The agency's opportunities to avoid capture, by actively developing a constituency supportive of vigorous regulation, are explored in Sabatier, Social Movements and Regulatory Agencies: Toward a More Adequate—and Less Pessimistic—Theory of "Clientele Capture," 6 Pol'y Scr. 301 (1975).

Concern about capture by "special-interest small publics" thus seems to explain much of the intense opposition to administrative resolution of basic policy issues, and in a sense, this misgiving appears applicable to the delegation of policymaking authority in sentencing. Yet the parallels obviously are superficial. The essence of the concern lies in the prospect of a small, highly organized group subverting a popular judgment that is rather clearly expressed—or would be if the legislature were denied the power to avoid the issue by delegation.\(^2\) Deference to prisoner interests in sentencing flows almost entirely from the severely limited resources of the criminal justice system, and this circumstance remains under undiluted popular control.\(^3\) It seems inaccurate, then, to portray sentencing and parole commissions as subverting a popular preference for severity. Rather, those agencies often seek to reconcile, and in any event are ultimately forced to obey, two quite contradictory expressions of the popular will—punish severely but punish inexpensively. When the legislature chooses to delegate in order to facilitate a more orderly reconciliation of these two objectives, it is, of course, delegating a fundamental value choice. But if the decision to do so commands majority support, it should not be be seen as antidemocratic in the sense of relegating the issue to a forum in which the balance of political forces will be skewed against the broad general interest.

A delegation of this kind nevertheless might be considered antidemocratic in other significant senses. When important value choices are made by experts in the administrative process, the public and its representatives ordinarily will remain relatively unfamiliar with real-world problems and their interdependencies; they will not to the same degree confront the hard choices or participate in the compromises and sacrifices that make politics "the art of the possible." Surely a society loses something when the public aspects of its political process approach an empty ritual or charade, partially or wholly detached from the difficult business of running a government.\(^3\)

\(^2\) The consequences of delegation in such a situation are thoughtfully explored in Rosenblatt, Health Care Reform and Administrative Law: A Structural Approach, 88 Yale L.J. 243 (1978).

\(^3\) Because resources are never unlimited, the electorate cannot, of course, totally nullify the leverage and pressure for conciliation that can be exerted by the regulated group. But within such constraints, the public chooses just how vulnerable to such pressures the enforcement agency will be.

\(^3\) Compare M. Edelman, supra note 293. Edelman provides a comprehensive description of the extent to which our politics already approaches this state, but he appears to accept the condition as an inevitable consequence of society's inability to achieve complete solutions to complex, threatening situations, and he
Unfortunately, one cannot hope to explore this concern fully, given the inadequate state of contemporary democratic theory. Representative government necessarily entails, even at the legislative level, a dilution of immediate accountability. As long as the legislature is viewed as a deliberative body rather than merely an assembly of explicitly instructed ambassadors, some such dilution is entirely desirable and in no sense antidemocratic.\footnote{The classic statement is Edmund Burke's Speech to the Electors of Bristol, \textit{reprinted in Legislative Politics U.S.A.} 11-12 (2d ed. T. Lowi 1962).} Normative political science continues to struggle with the seemingly insoluble dilemmas involved in determining when representatives should vote their constituents' as opposed to "their own" views. If anything, there seems to be increasingly less consensus on the nature of the interests that representatives should represent and how they should conceive their role in representing those interests.\footnote{\textit{See} Gilbert, \textit{Operative Doctrines of Representation}, 57 \textit{Am. Pol. Sci. Rev.} 604 (1963).} Beyond these difficulties are other intractable problems, including those of accounting for the intensity of preferences and identifying the time period to be allowed for investigation and discussion of majority preferences before translating them into action.\footnote{\textit{See} R. Dahl, \textit{supra} note 291, at 56-60, 90-119.} Because no clear criteria for the resolution of these problems emerge within the framework of democratic theory, it seems dogmatic to stigmatize a delegation as antidemocratic when it is designed to afford fuller consideration to the more intensely held preferences or when it is designed to postpone legislative action until better public understanding materializes and preferences shift. And, of course, delegation of policymaking authority in sentencing may be justified on precisely these grounds.\footnote{An analysis in terms of intensities may appear all but hopelessly subjective, but arguably preferences for severity expressed at the legislative level are in some sense superficial or cavalier when they are not explicitly linked to budgetary decisions that will enable the severity preferences actually to be carried out. At the administrative level, the legislatively authorized penalties are inevitably adjusted according to the resources society has made available; the resource decision thus provides a relatively concrete measure of how serious society is about its preferences for severity. With respect to the need to allow time for public perceptions and expectations about severity to adjust to sentencing terms that will actually be served, see text accompanying note 273 \textit{supra}.}
It is unrealistic and ultimately unconvincing to maintain, as proponents of delegation sometimes appear to do,\textsuperscript{306} that political structures diluting popular accountability are everyday devices of good government, which impair no significant values in a democratic community. But the delegation of politically sensitive questions should, according to any theory of democracy, be legitimate under certain conditions, and the sentencing problem involves an unusually favorable set of these conditions. Delegation is likely to afford time and opportunity for public perceptions about sentencing to adjust to a system that will no longer present an appearance so sharply different from its reality; delegation is likely to generate law premised on a more long-range, more multifaceted view of the public interest; and delegation is unlikely to disadvantage the least organized and least powerful of the various groups affected. Larger questions concerning the dilution of accountability remain, needless to say, in other fields of public concern and even in other criminal justice matters.\textsuperscript{307}

I conclude that the techniques of delegation may legitimately serve to curb the potential vagaries and excesses of the political process and that, with the aid of these techniques, we need not fear the enhanced visibility that sentencing reform will bring. Ultimately, there is little to be lost and much to be gained in knowledge, progress, fairness, and consistency by exposing and examining the many difficult issues central to the actual quality of justice and presently hidden from view.

B. Participation, Autonomy, and Procedural Due Process

Under contemporary constitutional doctrine, the procedural due process guarantee has been viewed as serving primarily to assure accurate implementation of substantive rules, not necessarily to afford participants in the process a personally satisfying role for its own sake.\textsuperscript{308} When there is no concrete entitlement to a particular result under given circumstances, or when, for other reasons, formal procedure cannot adequately improve the accuracy of outcomes, the

\textsuperscript{306} See text accompanying notes 287-90 supra.

\textsuperscript{307} Related problems concerning the proper role of popular attitudes in determining the scope of criminal punishment are tentatively explored in Schulhofer, Book Review, 68 CALIF. L. REV. 181, 196-201 (1980) (G. Fletcher, \textit{Rethinking Criminal Law}).

\textsuperscript{308} See Mathews v. Eldridge, 424 U.S. 319, 343-47 (1976); Fuentes v. Shevin, 407 U.S. 67, 97 (1972); L. TRIBE, supra note 137, at 501-06. The Court seems not to have considered how its acceptance of this generalization can be reconciled with the acknowledged principle that sentencing procedures must comport with due process, even when no substantive rules and no conceivable "entitlements" affect the judge's choice within a broad statutory sentencing range.
courts ordinarily find no constitutional right to due process. But when due process is guaranteed in the interests of accuracy, it ordinarily does serve the further purpose of giving "to the individuals or groups against whom government decisions operate the chance to participate . . . , an opportunity that expresses their dignity as persons."  

Even when the constitutional guarantee is altogether inapplicable, as in the countless areas of policy formulation in which interested parties have no vested right to any particular result, the law often does recognize a statutory or common law right to some form, and frequently a very substantial form, of participation. This subconstitutional tradition, now very much a part of the fabric of American administrative law, undoubtedly serves, in part, to foster sound decisionmaking. It also seems to reflect a widespread assumption that, regardless of its impact on the result, direct interaction between decisionmakers and those immediately affected is inherently desirable, a way of proceeding closely identified with the essentials of liberty and democratic government.  

Because guidelines would bring structure and focus to the trial judge's sentencing decision, the defendant would, under given circumstances, have a presumptively valid claim to a particular sentence. This move in the direction of more definite substantive "rights" will bring with it a requirement of greater procedural

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safeguards. Sentencing procedure is already subject to the due process clause, but in deciding what process is due, courts will be more likely to require formal testimony and cross-examination in a guidelines system. Beyond this, my proposal for charge-reduction guidelines would impose upon the plea bargaining process substantive limitations heretofore unknown. Although negotiations could proceed in an unstructured setting, compliance with the substantive requirements would be verified at a formal hearing. In sum, a sentencing reform package of the kind I have described would produce a quantum increase in the formal rights, both substantive and procedural, conferred on the criminal defendant.

Will these changes enhance the defendant's opportunities for meaningful participation in the sentencing process? Their effect probably will be just the opposite. In current practice, to be sure, the defendant's right to participate in the judicial sentencing decision has minimal content: a limited hearing is mandatory, and the defendant has the right to speak, but not the right to be apprised of reasons for the result. In guilty plea cases, however, the defendant's involvement is, or can be, quite significant. Arnold Enker, in a thoughtful defense of plea bargaining, has stressed this facet of the plea negotiation process:

While the negotiated plea may be of low visibility to the public at large (and to law professors), it is highly visible to the defendant. Whether the factors entering into the bargain are or are not meaningful as sentencing goals, they are at least visible to the defendant and his attorney. The defendant is able to influence the sentence, he may set forth bargaining factors and determine their relevance to the decision, and he may use his bargaining power to eliminate the grossest aspects of sentencing harshness and arbitrariness, be they legislative or judicial. The defendant, if he does not like the bargain, may reject it and stand trial. If he accepts the bargain, he cannot help but feel that his sentence is something that he consented to and participated in bringing about, even if he at the same time resents the process that induced his consent.

There is, of course, much room for debate about how well or how often plea bargaining in reality comports with Enker's assump-

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314 See text accompanying note 130 supra.
315 See text accompanying notes 133-37 supra.
316 See text accompanying notes 225-35 and following note 241 supra.
317 See text following note 6 supra and text accompanying notes 130-34 supra.
318 Enker, supra note 54, at 115.
tions about the extent of the defendant's influence, about the
degree of personal participation by the defendant in discussions be-
tween counsel, and about the actual balance between satisfaction
and the resentment Enker also acknowledges. For the moment, the
essential point is that plea bargaining, though a totally unstructured
and informal process, potentially can afford a very satisfactory vehicle
for participation and valuable human interaction.

In any movement from a regime of unstructured discretion to
one of rules, an inevitable—and ordinarily a desired—consequence
is a degree of depersonalization. Critical judgments are made by a
distant legislature or agency, and possibilities for unconstrained
decision by participants operating face-to-face are greatly reduced.
The process is bound to seem less "human"; in a sense, this is pre-
cisely the reason for moving to rules (a "government of laws") from
discretion (a "government of men"). Nevertheless, introduction of
substantive rules and formal procedure into a previously unstruc-
tured area ordinarily does not represent a loss for participation
and humanization because in the unstructured setting, private
parties affected by government action are largely without formal
power to protect their interests. Essentially at the mercy of the
official's broad discretion in such cases, a private party can speak,
but normally has no means for ensuring that he or she will be
listened to, reckoned with, and accepted as a force whose participa-
tion really counts.

Plea bargaining differs from other areas in which recognition
of due process rights is urged because unstructured plea bargaining
operates against the background of formal trial rights already con-
ferred. Entering the unstructured setting with something valuable
to trade and some leverage, however small, the defendant has a
genuine basis for participation as a person whose preferences must,
to a degree, be taken seriously.

This is not to say, of course, that private parties in such a situation have no
effective negotiating power whatsoever. A regulatory agency's dependence upon
voluntary compliance and upon congressional support often means that some private
parties can take advantage of economic and political realities to develop considerable
negotiating leverage. In such a situation, introduction of substantive rules and
formal procedure could, as in the other cases considered in the text, reduce the
scope of these private parties' participation and influence. See also Eisenberg,
supra note 234, at 672-80.

See text accompanying note 78 supra.

Cf. Dauer & Gilhool, The Economics of Constitutionalized Repossession:
A Critique for Professor Johnson and a Partial Reply, 47 S. Cal. L. Rev. 116, 144-45,
145 n.92 (1973) (conferral of formal hearing rights upon debtor facing repossession
of goods opens channels of informal communication and provides source of
negotiating power).
A successful structuring of the bargaining process would eliminate much of this potential for active and effective personal involvement by the defendant. The possible guilty plea concessions and circumstances justifying them would be specified within narrow limits. By comparison with current practice, the scope of discussions and the areas for argument and negotiation would be vastly reduced. Indeed, in a typical case under sentencing guidelines, little could be negotiated: determination of the offense and offender categories applicable to the case usually would be a routine matter; a guilty plea would automatically produce a fixed discount from the essentially fixed sentence determined by the applicable categories; at most, an additional discount, also fixed in extent, might be possible in certain defined circumstances. But if compromise is prohibited in "weak" cases, as I propose, the principal source of defense leverage and influence on the sentence would be eliminated.

Because effective control of plea bargaining will reduce opportunities for participation and thereby increase the already great feeling of helplessness experienced by many criminal defendants, it is a fair question whether such a reform will further the values that the rule of law is expected to promote. Sentencing guidelines would not prevent a criminal defendant from seeking leniency by urging any available ground for a sentence less than the presumptive guideline term. But by limiting the defendant's role almost exclusively to this sort of humble plea for mercy, guidelines, together with plea bargaining controls, would strip away whatever power the defense may have had and preclude forceful and effective involvement as a more-or-less equal party to the sentencing decision. Why should a criminal defendant be denied the opportunity to trade constitutional rights for the greatest sentencing benefit he or she can obtain? Why should a defendant (and a prosecutor) be confronted with an all-or-nothing choice when conviction and a mild sentence are satisfactory to all persons immediately involved? What will sentencing reform have achieved if individual dignity and autonomous personal choice must be sacrificed to this extent?

322 The decision would be particularly routine if the sentencing guidelines were deliberately cast in terms of factors easily ascertained and if factors subject to prosecutorial control were deemphasized. See text accompanying notes 221-22 supra.

323 See text accompanying notes 230-34 supra.

324 Opportunities for participation would be immeasurably enhanced in contested cases, however, because the guidelines would indicate the kinds of facts and arguments necessary to influence the judicial sentencing decision. This rudimentary information is now largely unavailable, see Enker, supra note 54, at 115, and the defendant, once convicted, is of course in no position to "negotiate."
These concerns are not easily placed in perspective when the values at stake are so elusive and the process in question is as yet untried. But three points warrant discussion. First, the concerns mentioned arise, to an extent, in all efforts to promote uniformity. Second, their force is particularly weak in the sentencing context, because deceptively few defendants benefit from the present system of individual autonomy, and fewer still benefit for arguably legitimate reasons. Finally, restrictions on participation—in its fullest sense of effective defense influence on the sentencing decision—seem to me appropriate rather than lamentable in a soundly functioning sentencing system.

A central premise of the sentencing reform movement is, first of all, that like cases currently are not treated alike. Elimination of disparity obviously cannot be beneficial to everyone; defendants currently able to obtain unusually advantageous treatment inevitably must suffer from successful reform. Supporters of reform need not, however, rest their case on an unqualified preference for egalitarianism over individualism. It is enough to claim that the extent of the present inequalities is so great, and their side effects so destructive, that movement toward a substantially greater degree of consistency is the prudent and fair course. Available evidence provides more than ample support for this limited claim.325

The group of defendants who would suffer from a more consistent process is, in any event, probably much smaller than Enker's discussion implies.326 The appearance of effective participation, however real in psychological terms, likely proves misleading much of the time. Prosecutors often are able to tell dozens of defense attorneys that although the going rate for a given case is five years, "for you . . . ." 327 Extensive empirical evidence of real-offense sentencing328 likewise suggests that large numbers of defendants do not really get the break that they believe a charge-reduction agreement will produce for them. It could conceivably be argued that the appearance of effective participation, even though essentially an illusion, should be preserved for its psychological value. That view seems to me unsound even from an instrumental perspective; it certainly cannot be defended as a reflection of respect for the dignity and personal worth of the individual defendant.

Some defendants undoubtedly do succeed in using the unstructured bargaining system to their advantage. One could conceivably

325 See text accompanying notes 2-3 supra.
326 See text accompanying note 318 supra.
327 Alschuler, Sentencing Reform, supra note 6, at 576 n.73.
328 See text accompanying note 97 supra.
defend from an individualistic perspective the legitimacy of unusually lenient treatment explained only by the defendant's (or the lawyer's) skill in evoking sympathy or by effective defense exploitation of an evidentiary weakness in the case. The plea bargaining system is so flawed by conflicts of interest and other structural problems, however, that differences in treatment cannot be expected to flow solely from legally relevant factors or arguably relevant differences in the effectiveness of presentation of an individual's case.\(^{329}\) Albert Alschuler has forcefully summarized the problems:

\[\text{[T]he "break" that follows the entry of a guilty plea . . . [is commonly influenced] by a prosecutor's feelings of friendship for particular defense attorneys, by his desire to go home early on an especially busy day, by his apparent inability to establish a defendant's guilt at trial, by his (or the trial judge's) unusually vindictive attitude toward a defendant's exercise of the right to trial, by the race, wealth or bail status of the defendant, by a defense attorney's success in threatening the court's or the prosecutor's time with dilatory motions, by the publicity that a case has generated, or by any of a number of other factors—irrelevant to the goals of the criminal process . . . .}\(^{330}\)

If one finds this diagnosis convincing, as I do, then uniform standards for guilty plea sentencing—that is, restrictions upon the bargaining autonomy of the individual parties—become imperative.\(^{331}\) The defendant can still play a role by ensuring that all legally relevant factors are accurately ascertained. If this role seems pale and insignificant, it is only because the factors that should influence the guilty plea concession ultimately are judged to be rather few and rather easy to identify. Once the legally relevant inquiry, however narrow, has been concluded, the defendant's only legitimate influence upon the sentence has been exercised. By providing additional sources of leverage and autonomous action, the present plea bargaining system affords not an avenue for appropriate participation, but rather simply a means for manipulation. The result is not only to frustrate the criminal law's expressed goals, but also to

\(^{329}\) See text accompanying notes 185 and 206-07 supra.

\(^{330}\) Alschuler, Sentencing Reform, supra note 6, at 575.

\(^{331}\) An alternative, currently fashionable in the economic sphere, is to eschew direct regulation of the terms and conditions of trade, but to effect structural changes in such matters as information flow, barriers to entry, and the market power of individual firms, so that results will more nearly approximate those of a free market. Until practical means can be developed for making analogous structural changes in the plea bargaining system, more regulation rather than "deregulation" must remain the answer.
encourage among defendants both cynicism and disrespect for the effectiveness of the legal order \(^{332}\) at precisely the point at which the opposite message should be forcefully conveyed.

I conclude that guilty plea guidelines would restrict effective participation for only a relatively small group of defendants and that reduction of their sense of influence and control is not undesirable. The dangers of dehumanization are nevertheless real. Plea bargaining guidelines, particularly at their inception, must be rather flexible ones, and the system's capacity to respond to any relevant, openly identified circumstances must be stressed. The specific proposal developed in this Article satisfies this requirement,\(^{333}\) and other guilty plea guidelines proposals that include comparable safety-valve features will likewise adequately preserve the participatory dimension of procedural due process.

VI. CONCLUSION

In directing my attention to sentencing in the federal courts, I have chosen to focus upon a single, comparatively well-managed segment of American criminal justice. Sentencing disparities remain an urgent problem in the more than fifty other American jurisdictions.

Several factors suggest that sentencing reform legislation might not pose the same risk of aggravating disparities in the context of a state court system as it does in the federal system. In some states, plea agreements for a definite sentence probably are more common than they seem to be in the federal courts, and judges there may assert their sentencing authority less frequently and less forcefully than do their federal counterparts. In such jurisdictions, guilty plea sentencing may already be primarily a prosecutorial function, and restrictions on judicial discretion might not transfer significant additional power to the prosecutors. If so, control of judicial discretion could conceivably improve sentencing in contested cases without making matters worse in guilty plea cases, even without simultaneous limitations on prosecutorial sentencing power. Restraints on prosecutorial discretion would still remain essential, of course, for addressing the core of the disparity problem.

\(^{332}\) Professor Alschuler writes, "[p]lea bargaining reinforces the view of offenders who see the world as a network of processes and connections and who assume that justice is all a matter of whom you know." He quotes a prominent Chicago defense attorney as stating: "'Plea bargaining . . . encourages the defendant to believe that he has sold a commodity and that he has, in a sense, gotten away with something.'" Alschuler, Book Review, 46 U. Chi. L. Rev. 1007, 1041 (1979) (C. Silberman, Criminal Violence, Criminal Justice) (footnote omitted).

\(^{333}\) See text following note 236 supra.
My proposal for limitation of prosecutorial sentencing power contemplates sentencing guidelines that deemphasize factors within prosecutorial control, charge-reduction guidelines that restrict charge bargaining, and explicit criteria that regulate guilty plea concessions. The proposal is in principle suitable for any state system. Prospects for evasion of the plea bargaining controls must be examined closely, however, in light of the procedure, traditions, and personalities in particular jurisdictions.

Evasion may be a much more serious danger in state than in federal courts. Federal prosecutions normally grow out of formal investigations by either the F.B.I. or one of the many other federal agencies with enforcement responsibilities. These agencies cannot themselves impose criminal sanctions upon suspected violators. They must refer the matter to the United States attorney for prosecution, he or she must agree to proceed, and paperwork is inevitably generated. Informal bargaining by the investigating agency could occur, particularly with respect to the possibility of a noncriminal disposition, but covert agreements contemplating charge reduction in exchange for a guilty plea to formal criminal charges would be awkward and unstable at best. State prosecutions, in contrast, most typically are triggered by an arrest at the scene of the crime. If formal sentencing and plea bargaining standards were perceived as inappropriate or inconvenient, offenders and the police probably could avoid them by understandings implemented at or shortly after arrest. This danger seems less acute when the defendant's conduct, no matter how it would normally be characterized by the arresting officer, would call for formal prosecution and a substantial prison term. Nevertheless, the possibility of evasion and other problems related to successful implementation of charge-reduction guidelines in a specific state system plainly require careful analysis of the legal and institutional particularities of the jurisdiction in question.

Criminal justice administration, for all its unique complexities, is but one of many social processes capable of deflecting or defeating well-intentioned, highly sophisticated efforts to promote change. I have used sentencing procedure to illustrate some of the reasons why it is not so easy to move from discretion to rule, or even from unstructured discretion to structured discretion; why incremental movement along these continuums may be unproductive or self-defeating; and why an extraordinarily elaborate structure may be the only sound alternative to no structure at all. I have also de-

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335 See text accompanying notes 214-19 supra.
scribed how the elaborate "rule of law" approach, even if feasible, raises the further question whether added visibility and more formal procedure can, under such highly structured conditions, produce wiser policy and more satisfactory possibilities for participation by affected parties. My answer with respect to sentencing procedure is, with some qualifications, affirmative. The same inquiry could usefully be pursued across a wide range of regulatory and private law subjects. We await the understanding of law, administration, and politics, and of their diverse interactions, that will permit aspirations for social change to be pursued confidently and without unpleasant surprises.

I. Model Charge-Reduction Guidelines

II. Model Sentencing Guidelines

A. Guideline Table: Presumptive Sentences
B. Notes to the Guideline Table
C. Aggravating and Mitigating Factors
D. Computation of Salient Factor Score

I. Model Charge-Reduction Guidelines

A. When any plea agreement described in rule 11(e)(1)(A) of the Federal Rules of Criminal Procedure 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) The savings of time and expense for witnesses, the parties, and the court resulting from disposition by guilty plea shall not justify the dismissal of any pending charges. The sentencing guidelines provide for a sentencing adjustment that gives appropriate weight to this consideration.

(2) Ambiguities of fact or difficulties of proof that raise a question concerning factual guilt shall not justify dismissal of any pending charges.

(a) If the government concludes that there is no reasonable doubt concerning factual guilt and the defense disputes this position,

337 The proposed sentencing guidelines were adapted from guidelines in use by the United States Parole Commission in parole release decisions. See 28 C.F.R. § 2.20 (1979). To permit stricter limitations on discretion, additional offense and offender categories were introduced, and the punishment presumptively indicated for each category was restricted to a narrower range. (The guidelines developed here are also more refined, in these respects, than an earlier proposal I presented in 2 Federal Sentencing Reform, supra note 52, at 98-102.) I stress that I have not addressed any of the many substantive judgments implicit in the Parole Commission's guidelines: severity levels, the relative seriousness of different offenses, and the factors used to rate the offender's background all follow or roughly approximate the approaches adopted by the Commission. By including these approaches in the model guidelines, I do not in any sense suggest that these substantive judgments are the ideal ones. I claim only that the guidelines provide an appropriate framework within which these or plausible competing policy choices may be expressed.

338 The statement of these factors was adapted from those developed by the California Judicial Council. See Cal. R. 421, 423.
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 with respect to 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 any 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 any 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.*

(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.* The justification set forth in this paragraph may, in unusual cases, be presented to the court in 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 (3).

C. In determining the sentence to be imposed following conviction pursuant to any plea agreement described in paragraph B(3) or (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 paragraph B, or reject a plea agreement required to be accepted by paragraph 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 paragraph B and shall submit a copy of that 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 on the condition that the defendant plead guilty to any other federal charge. The court shall ensure 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.

* When 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.
II. MODEL SENTENCING GUIDELINES

A. Guideline Table: Presumptive Sentences

(Time to be served indicated in months; “non-inc.” indicates a non-incarcerative sanction is to be imposed.)

<table>
<thead>
<tr>
<th>Offense characteristics: severity of offense behavior (examples)</th>
<th>Offender characteristics: (salient factor score)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Very Good</td>
</tr>
<tr>
<td></td>
<td>Good</td>
</tr>
<tr>
<td></td>
<td>Fair</td>
</tr>
<tr>
<td></td>
<td>Poor</td>
</tr>
<tr>
<td></td>
<td>Very Poor</td>
</tr>
<tr>
<td></td>
<td>Poor</td>
</tr>
<tr>
<td>LOW</td>
<td>12-10</td>
</tr>
<tr>
<td></td>
<td>9-7-</td>
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<td></td>
<td>6-5-</td>
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<td></td>
<td>4-3-</td>
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<tr>
<td></td>
<td>2-0-</td>
</tr>
<tr>
<td>LOW MODERATE</td>
<td>non-</td>
</tr>
<tr>
<td></td>
<td>inc.</td>
</tr>
<tr>
<td></td>
<td>6-11-</td>
</tr>
<tr>
<td></td>
<td>16-</td>
</tr>
<tr>
<td></td>
<td>non-</td>
</tr>
<tr>
<td></td>
<td>inc.</td>
</tr>
<tr>
<td></td>
<td>mo.</td>
</tr>
<tr>
<td></td>
<td>mo.</td>
</tr>
<tr>
<td></td>
<td>mo.</td>
</tr>
<tr>
<td>MODERATE</td>
<td>non-</td>
</tr>
<tr>
<td></td>
<td>8-13-</td>
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<td></td>
<td>18-24-</td>
</tr>
<tr>
<td></td>
<td>non-</td>
</tr>
<tr>
<td></td>
<td>inc.</td>
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<tr>
<td></td>
<td>mo.</td>
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<tr>
<td></td>
<td>mo.</td>
</tr>
</tbody>
</table>

- Escape (open institution or program (i.e., CTC, work release)—absent less than 7 days)
- Alcohol law violations
- Counterfeit currency (passing/possession less than $1,000)
- Immigration law violations
- Income tax evasion (less than $10,000)
- Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) less than $1,000
- Bribery of a public official (offering or accepting)
- Counterfeit currency (passing/possession $1,000 to $19,999)
- Escape (secure program or institution, or absent 7 days or more—no force or threat used)
- Firearms Act, possession/purchase/sale (single weapon—not sawed-off shotgun or machine gun)
- Income tax evasion ($10,000 to $49,999)
- Mailing threatening communication(s)
- Misprision of felony
- Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) $1,000 to $19,999
- Smuggling/transporting of alien(s)
- Theft of motor vehicle (not multiple theft or for resale)
- Counterfeit currency (passing/possession $20,000 to $100,000)
- Explosives, possession/transportation
- Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons)
- Income Tax Evasion ($50,000 to $100,000)
- Mann Act (no force—commercial purposes)
- Theft of motor vehicle for resale
- Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) $20,000 to $100,000

- Non-incarcerative sanction is to be imposed.
II. Model Sentencing Guidelines (Continued)

A. Guideline Table: Presumptive Sentences (continued)

(Time to be served indicated in months; "non-inc." indicates a non-incarcerative sanction is to be imposed.)

<table>
<thead>
<tr>
<th>Offense characteristics: severity of offense behavior (examples)</th>
<th>Offender characteristics: (salient factor score)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Very Good 12-10</td>
</tr>
<tr>
<td><strong>HIGH</strong></td>
<td></td>
</tr>
<tr>
<td>Counterfeiting (manufacturing)</td>
<td></td>
</tr>
<tr>
<td>Income Tax Evasion (over $100,000)</td>
<td></td>
</tr>
<tr>
<td>Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over $100,000 but not exceeding $500,000</td>
<td>18 24 31 42 52</td>
</tr>
<tr>
<td><strong>VERY HIGH</strong></td>
<td></td>
</tr>
<tr>
<td>Robbery (weapon or threat)</td>
<td></td>
</tr>
<tr>
<td>Breaking and entering (bank or post office entry or attempted entry to vault)</td>
<td>24 32 40 54 66</td>
</tr>
<tr>
<td>Extortion</td>
<td></td>
</tr>
<tr>
<td>Mann Act (force)</td>
<td></td>
</tr>
<tr>
<td>Property offenses (exceeding $500,000)</td>
<td></td>
</tr>
<tr>
<td><strong>GREATEST I.</strong></td>
<td></td>
</tr>
<tr>
<td>Aggravated felony (e.g., robbery, sexual act, aggravated assault)—weapon fired or personal injury</td>
<td>36 44 52 66 80</td>
</tr>
<tr>
<td>Explosives (detonation)</td>
<td></td>
</tr>
<tr>
<td>Sexual act (force)</td>
<td></td>
</tr>
<tr>
<td><strong>GREATEST II.</strong></td>
<td></td>
</tr>
<tr>
<td>Aircraft hijacking</td>
<td></td>
</tr>
<tr>
<td>Espionage</td>
<td></td>
</tr>
<tr>
<td>Kidnapping</td>
<td></td>
</tr>
<tr>
<td>Willful homicide</td>
<td></td>
</tr>
</tbody>
</table>

(B) Notes to the Guideline Table

1. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.

2. If the sentencing judge finds that one or more of the aggravating factors specified in section C of these guidelines are present, and that these aggravating factors outweigh any mitigating factors determined to be present, the sentence prescribed for the applicable guideline category may be increased by not more than 20% of the prescribed sentence, or by not more than six months, whichever limit is the lower. If the sentencing judge finds that one or more of the mitigating factors specified in section C of these guidelines are present, and that these mitigating factors outweigh any aggravating factors determined to be present, the sentence prescribed for the applicable guideline category may be reduced by not more than 20% of the prescribed sentence, or by not more than six months, whichever limit is the lower.

3. Aggravating and mitigating factors not specified in section C of these guidelines may not be relied upon as a basis for departure from
sentences prescribed in the guideline table, unless the court finds that the factor is one that rarely arises and that was not adequately taken into consideration in the formulation of these guidelines.

4. In the case of a defendant convicted of multiple offenses committed at different times, an incremental penalty shall be imposed as follows:

(a) the base penalty shall be that prescribed for the most serious offense committed;

(b) the base penalty shall be increased by 50% of the penalty prescribed for the second most serious offense committed;

(c) the penalty indicated by paragraph (b) shall be increased by 25% of the penalty prescribed for the third most serious offense committed;

(d) any penalties imposed other than for the first three most serious offenses shall run concurrently with the penalty indicated by paragraph (c).

For purposes of this note 4, offenses shall not be deemed committed at "different times" if they are part of the same transaction, even if the transaction extends over several months or years, or if they involve offenses of the same general character committed in separate transactions involving the same offender(s) and the same victim(s).

C. Aggravating and Mitigating Factors

1. Circumstances in Aggravation include the fact that:

(1) The crime involved great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty or callousness.

(2) The defendant was armed with a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The crime involved multiple victims.

(5) The defendant induced others to participate in the crime or occupied a position of leadership of or dominance over other participants in its commission.

(6) The defendant threatened witnesses, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The planning or sophistication with which the crime was carried out, or other facts, indicate premeditation.

(8) The defendant involved minors in the commission of the crime.

(9) The defendant took advantage of a position of trust or confidence to commit the offense.

2. Circumstances in Mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator, willing participant, or provoker of the incident.

(3) The defendant participated in the crime under circumstances of coercion or duress, or the conduct was partially excusable for some other reason not amounting to a defense.
(4) The defendant believed he had a claim or right to the property taken, or for other reasons mistakenly believed the conduct was legal.

(5) The defendant was motivated by a desire to provide necessities for his family or himself.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant was suffering from a mental or physical condition that significantly reduced his culpability for the crime.

(2) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(3) The defendant made restitution to the victim.

D. Computation of Salient Factor Score

Salient Factor Score

Item A ................................................................. ☐

No prior convictions (adult or juvenile) = 2
1 prior conviction = 1
2 or more prior convictions = 0

Item B ................................................................. ☐

No prior incarcerations (adult or juvenile) = 2
1 or 2 prior incarcerations = 1
3 or more prior incarcerations = 0

Item C ................................................................. ☐

Age at first commitment was 26 or older = 1
25 or younger = 0

Item D ................................................................. ☐

Commitment offense did not involve auto theft or check(s) = 1
Otherwise = 0

Item E ................................................................. ☐

Has never had parole revoked nor been committed for a new offense while on parole, and not a probation violator this time = 1
Otherwise = 0

Item F ................................................................. ☐

No history of heroin or opiate dependence = 1
Otherwise = 0

Item G ................................................................. ☐

Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

Item H ................................................................. ☐

Plea of guilty or nolo = 3
Otherwise = 0

Total score ....................................................... ☐