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Karen Lutjen

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CULPABILITY AND SENTENCING UNDER MANDATORY MINIMUMS AND THE FEDERAL SENTENCING GUIDELINES: THE PUNISHMENT NO LONGER FITS THE CRIMINAL

KAREN LUTJEN*

I. INTRODUCTION

Since 1791, the United States Constitution has offered some assurance that sentences would be neither cruel nor unusual, excessive nor disproportionate.¹ This protection stems from the Eighth Amendment and provides the Constitutional background against which sentences are to be judged. Culpability, or the moral blameworthiness of an offender, lies at the center of this analysis. In a rational and fair system of sentencing, culpability is assessed within the context of both the offense and the offender. A truly proportionate sentence looks beyond the circumstances of a particular case to the circumstances which gave rise to the offense, and the relevant conduct and criminal history of the offender. If this link between culpability and the punishment imposed is severed, then the foundations upon which the criminal justice system are based are rendered morally suspect.

Admittedly, no system of sentencing is capable of precisely equating culpability with sentence length. Human intuitions and perceptions, however insightful, cannot enable us to equate such incommensurables as sentence length and culpability. No mental yardstick exists by which a sentence can be measured out and tailored to the moral blameworthiness of the offender. Even

* B.S., 1993, Boston University; J.D. Candidate, 1996, Notre Dame Law School; Thomas J. White Scholar, 1994-96. The author thanks Professor John Robinson and Professor Jimmy Gurule.

1. U.S. CONST., amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Supreme Court first held the Cruel and Unusual Punishments Clause applicable to federal sentencing in *Weems v. United States*, 217 U.S. 349 (1910) (holding that the punishment of *cadena temporal*, which involved hard labor, confinement and life-long civil disabilities, was disproportionate to the crime of falsifying information on a public document). The Eighth Amendment was first held applicable to state sentencing by virtue of the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660, 667 (1962) (90 day sentence for the offense of drug addiction was held disproportionate to the offense).

if *per impossible* a sentencer could conclusively say that one year in prison is the appropriate punishment for a particular offense, one year in prison means different things to different offenders. To a person who supports a family, for example, prison might have more serious implications than for an offender without a family.

These important distinctions between defendants cannot be overlooked, and should be reflected in the punishments imposed upon them. Despite this need for some degree of sentence individualization, Congress enacted mandatory minimum statutes. These statutes purport to be an accurate reflection of an offender's culpability, yet they base punishment almost solely upon a consideration of the nature of the crime committed. Therefore, a sentence based on the defendant's actual culpability is the exception and not the rule in a system of harsh sentences targeted at mid to high level participants in a crime. The unbending rigidity of mandatory minimums has led to a host of problems unanticipated or inadequately considered by their drafters, and have augmented the disparity, manipulability, and uncertainty already present in the federal sentencing system. Mandatory minimums shift the focus of sentencing away from the offender and his or her culpability to the offense and its perceived seriousness. To underemphasize the characteristics, history, and role of an offender is to sacrifice proportionality for the procedural benefits of uniformity and certainty. This is the actual role that mandatory minimums have played.

Consider also that Congress and state legislators enacted harsh mandatory minimum penalties to combat increases in crime rates for various offenses. Not only were severe sentences intended to deter others from committing those offenses, but legislators, and for the most part, the general public, believed that the seriousness of the offense justified these lengthy, mandatory penalties. But in the quest for punishments that "fit the crime," legislators failed to note that in advocating policies of general deterrence, a just and proportionate sentence for each offender only becomes more elusive.

There exists still another serious impediment to the attainment of this ideal culpability analysis. At some point, a choice must be made about what circumstances of the offense and of the offender are to be considered. Unless all relevant factors are considered, proportionality in sentencing can never be truly accomplished, yet any attempt to articulate these circumstances would necessitate either a "wide-open" rule, in which the judge has total discretion, or a finite list enumerating every possible

factor to be weighed when sentencing. The practical realities of the criminal justice system render this an impossible solution.

The reality is that the sentencing system exists in a world of degrees and imperfections. There are, for the most part, only more or less "just" results. Therefore, when given a choice, sentencers should choose a methodology that produces the most "just" sentence, though the ideal may remain unattainable. When Congress grants judges the discretion crucial to their role as sentencers, the focus of sentencing remains on the circumstances of the offense, but coupled with consideration of the individual offender. In this way, the sentencer has sufficient latitude to tailor a sentence to the moral blameworthiness and background of a defendant. Mandatory minimums, on the other hand, focus almost solely on the offense committed and have a tendency to group similarly situated defendants together. Instead of furthering the goal of proportionate sentencing, in many cases mandatory minimums have the opposite result. It is for this reason that mandatory minimums should be abolished and the current sentencing guidelines expanded to include, to the fullest extent possible, the characteristics and background of the offender.

Part II of this article briefly discusses the philosophy of punishment and how those differing philosophies have traditionally shaped penal policies. Part III traces the history of mandatory minimums and their relation to recidivist statutes, as well as to the Eighth Amendment's ban on cruel and unusual punishment. Part IV highlights some of the principal failures of mandatory minimums and Part V introduces the federal sentencing guidelines, a very different approach to sentencing. Part VI contrasts the federal guidelines with state guidelines, and generally concludes that the state systems have been more successful in reaching their goals than their federal counterparts. Part VII discusses the "relative" success of the federal guidelines by comparing them to mandatory minimums. Part VIII outlines the departure and appellate review procedures under the federal guidelines, as well as some of the approaches the different circuits have taken to guideline departures. Part IX details some of the weaknesses of the federal guidelines. Part X connects mandatory minimums and the sentencing guidelines to the proportionality principle — the principle that the punishment imposed should relate as much as possible to the culpability and criminal history of the offender. Finally, Part XI suggests that mandatory minimums should be repealed and also offers ways in which a modified guideline system might result in the most proportionate sentence possible, given the practical constraints of the criminal justice

system as it exists today. The recommendations in this article focus primarily on the federal sentencing guidelines, because of their nationwide impact and also because of the attention that they have received in the literature.

II. THE PHILOSOPHY OF PUNISHMENT THROUGH MANDATORY MINIMUMS

Traditionally, philosophers have developed their theories of punishment around the different purposes that punishment can serve. Most often these theories are classified as either prospective or retrospective. Each theory has been favored at different times in the history of the American federal and state criminal justice systems, and has helped to shape sentencing and penal policies significantly.

For 200 years now, utilitarianism has provided the dominant prospective account of punishment in the West. A utilitarian sentencer weighs the deterrent benefits of punishment against the sentence imposed, and focuses on the consequences of punishing.² Under a utilitarian philosophy, punishment is justified to the extent that the aggregate benefits of punishing outweigh the incidental human or financial costs.³ Critics of utilitarianism argue that according to its doctrines, punishment of the innocent may sometimes be justified if the benefits to society as a whole are greater than any loss that individual might suffer.⁴ Similarly, the release of an individual who is guilty of a crime is also sometimes justified if his or her release would promote more good than harm in society.⁵ This obviously "unjust" result comes about because, for the utilitarian, punishment is the means for achieving a certain end, whether it be deterrence or rehabilitation. The offense itself is not essential to the justification of punishment. More important are the consequences or objectives of that punishment.⁶

2. JEREMY BENTHAM, *PRINCIPLES OF PENAL LAW* (1962); and Andrew Von Hirsch, *Proportionality in the Philosophy of Punishment*, in 16 *CRIME AND JUSTICE* 55, 57-58 (Michael Tonry ed., 1992).

3. Von Hirsch, *supra* note 2, at 57-58.

4. Igor Primoratz notes that utilitarianism also may lead to the paradoxical result that it would be morally justifiable not to punish an offender when the benefits of that punishment could be achieved through other means, such as by producing an illusion of punishment. See IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 42 (1989).

5. BENTHAM, *supra* note 2, at 396.

6. PRIMORATZ, *supra* note 4, at 41.

Throughout history, retaliation also has formed the basis for retrospective penal philosophy.⁷ It may, in fact, be the only theory of punishment which entertains notions of exact commensurability between the offense committed and the punishment imposed. "An eye for an eye" lies at the center of retaliatory theory, and a scheme of punishment can easily be constructed upon this principle. If an offender kills, his own life is taken, and so on. The fatal defect in a retaliatory system of punishment, however, is that it fails to consider the mental state, or *mens rea*, of the offender. Any morally defensible criminal code makes distinctions among those who kill maliciously, intentionally, negligently or innocently. If a person who has killed in self-defense, for example, is subjected to retaliatory death, it cannot be said that he or she has been given a punishment that is in any way proportionate to the offense committed.

Some other schools of thought advocate a "just deserts" or retributive theory of punishment, which punishes according to the gravity of the offense and the intent and prior criminal history of the offender.⁸ Retributivists argue that criminals deserve punishment, and that therefore society is morally justified in imposing it.⁹ Articulating this rationale, Immanuel Kant denounced punishment that sought to promote some other good, such as rehabilitation or deterrence, either for society or for the offender, and advocated the imposition of punishment solely because the offender had committed a crime.¹⁰ This was consistent with his Second Categorical Imperative, which stated that others were never to be treated only as means, but rather also as ends in themselves.¹¹ Kant believed that when a crime was

7. See Broadus A. Spivey, *The Code of Hammurabi*, The Advocate, (Jan. 1995) (Appendix D). See also, U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at 34 (1991) [hereinafter MANDATORY MINIMUM PENALTIES REPORT].

8. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1626 (1992).

9. PRIMORATZ, *supra* note 4.

10. IMMANUEL KANT, *The Metaphysical Elements of Justice* 100 (1965). Kant wrote that "[j]uridical punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime." *Id.*

11. CARL J. FRIEDRICH, *THE PHILOSOPHY OF KANT* 178 (1949). The Second Categorical Imperative is as follows: "Act in such a way that you always treat humanity, whether on your own person or in the person of any other, never simply as means, but always at the same time as an end." *Id.* His First Categorical Imperative states that an individual should "[a]ct as if the maxim of your action were to become by your will a general law of nature." *Id.* at 170.

committed, punishment of the offender was not only warranted, but required, regardless of its consequences.¹² For Kant, punishment depended solely upon the offender's culpability and not any perceived societal benefits.¹³ Retributive theories focus on the crime itself as the most important factor in sentencing, and these theories understand crime to involve both a wrongful act (*actus reus*) and a culpable mental state (*mens rea*). Prior history then tempers or aggravates the initial culpability determination.¹⁴

A combination of retributive and retaliatory philosophies fathered the outburst of mandatory minimum statutes. Mandatory minimums are retaliatory in the sense that they often were enacted in a political climate which demanded "tough on crime" measures from the legislatures. The response of the federal and state legislatures to that demand was reminiscent of the "eye for an eye" mentality of retaliatory theorists. However, mandatory minimums incorporate retributive principles in that the primary determinant of punishment is the offense itself, and in some cases, the prior history of the offender.¹⁵ Through the use of mandatory minimums, Congress sought to reduce uncertainty and disparity in the sentencing process and to bring the sentence into line with the culpability of the offender.¹⁶

12. "The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it . . ." KANT, *supra* note 10.

13. According to Kant, even if a criminal who was condemned to death would agree to subject himself to dangerous, but potentially ground-breaking medical experiments in exchange for a pardon, that criminal must be punished, regardless of the potential benefits to society. *Id.* at 100-101. This philosophy rejects utilitarianism insofar as utilitarianism would not punish the criminal if the benefits to society were at all greater than the harm caused by a criminal going unpunished. See *supra* notes 5 and 6 and accompanying text.

14. Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773, 1781 (1992). In fact, one of the primary ways in which retributivism differs from retaliatory theories is the distinctions that retributivists draw between different levels of culpability based on the mental state of the offender. Both theories focus on the crime itself as the primary indication of culpability; with retaliation, it is the sole determinant.

15. See MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 5-6. Other proponents of a retributive philosophy are more properly called "limiting retributivists," and would use the circumstances of the offender and the offense to impose a ceiling on the punishment imposed. NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982).

16. This is not to be taken out of context, however, as a "culpability" determination under mandatory minimums focuses on the characteristics of the offense (amount of drugs, use of a weapon, etc) and the criminal history of the offender, and NOT specific defendant characteristics like childhood, age,

Mandatory minimums were also shaped by another purpose of punishment - to deter the offender from committing future crimes (special deterrence) and other potential offenders from committing targeted offenses (general deterrence.)¹⁷ Originally, legislators thought that a severe and certain sentence would effectively deter others from committing crimes.¹⁸ This belief led to the use of mandatory minimums to target those classes of offenses which were thought to pose the greatest threat to society.¹⁹ Though some judges, legislators, and others involved in sentencing now have serious doubts about the ability of mandatory minimums to deter, the idea that punishment is a useful deterrent persists and is continually used to justify sentencing under these statutes.²⁰

III. A BRIEF HISTORY OF MANDATORY MINIMUMS

Mandatory minimum statutes on the federal level can be traced back as early as 1790,²¹ but were a rarity in the criminal justice system until the 1950s. Like Congress, most states preferred to grant sentencing discretion to the trial courts to avoid the rigidity of a fixed sentencing scheme.²² However, throughout the early part of the 19th Century, federal and state mandatory minimums were enacted more frequently, on a piecemeal basis, depending on the particular penal policies at the time. The 1950s witnessed a resurgence of federal support for harsh penal policies, and the Narcotic Control Act of 1956²³ used mandatory minimums in a completely new way - to target an entire class of offenses.²⁴ Their apparent potential to deter certain offenses was thought to justify the severity of the sentence.²⁵

education, etc.) Thus, a culpability determination under mandatory minimums is only part of a defendant's total blameworthiness.

17. Dolinko, *supra* note 8, at 1626.

18. *Id.* See also MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 6 (quoting an excerpt from THE REPORT OF THE PRESIDENT'S INTERDEPARTMENTAL COMMITTEE ON NARCOTICS, S. REP. NO. 1997, 84th Cong., 2d Sess. 6 (1956).

19. See *infra* note 24 and accompanying text.

20. See MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 93-110. See also Robert S. Mueller, III, *Mandatory Minimum Sentencing*, 4 FED. SENTENCING REP. 230 (1992).

21. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 5.

22. Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 68 (1993).

23. Pub. L. No. 84-728, 70 Stat. 651 (1956).

24. These offenses included those involving drugs or violent crimes.

25. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 5.

Another shift in ideology resulted in the Comprehensive Drug Abuse Prevention and Control Act of 1970.²⁶ Congress found that mandatory penalties often did not correspond to the seriousness of the offense and did not allow the individual circumstances of each case to be considered.²⁷ More importantly, as a deterrent mandatory minimums had questionable effects on reducing the rate of drug law violations.²⁸ Consequently, almost all mandatory minimums addressing drug-related crimes, with the exception of Continuing Criminal Enterprise offenses, were eliminated.²⁹ In their stead Congress instituted discretionary sentencing, which gave sentencers significantly more control over the process.³⁰

During this period, states also began moving towards a more discretionary system of sentencing. By the early 1980s, voluntary sentencing guidelines existed in most states.³¹ These guidelines were often developed at the state level, but more frequently they were promulgated at the county or judicial district level.³² Unfortunately, most of these voluntary guidelines were quickly abolished, as they were found to have very little effect on the sentences imposed.³³ Nevertheless, many state legislators and

26. Pub. L. No. 91-513, 84 Stat. 1236 codified at 21 U.S.C. § 801-1509 (1970). See also, 3 FED. SENTENCING REP. 108 (1990) (reprinting the statements of then Representative George Bush from the Congressional Record in which he said "The bill eliminates mandatory minimum penalties, except for professional criminals. Contrary to what one might imagine, however, this will result in better justice and more appropriate sentences.")

27. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 6-7.

28. *Id.* at 6.

29. *Id.* at 7. See also 21 U.S.C. § 848 (1994).

30. There are generally five types of sentencing schemes: (1) determinate — which specifies the sentence to be imposed (and actually served, i.e. because of the absence of the availability of parole) for a given offense; (2) indeterminate — which specifies a sentence to be imposed and provides for parole as a means of reducing a sentence; (3) discretionary — in which the judge is virtually unconstrained in fashioning a sentence; (4) guidelines — which specify the factors which may be considered by a sentencer as well as their impact on the final sentence, and also provide a range in which the offender should be sentenced in the absence of aggravating or mitigating circumstances; and (5) mandatory minimums — which state the sentence to be imposed for the commission of an offense, but permit certain adjustments for assistance to the authorities, drug quantities, or whether or not a weapon was used during the commission of the offense. *United States v. Mistretta*, 488 U.S. 361 (1989) (discussing the difference between determinate and indeterminate sentencing).

31. Michael Tonry, *Sentencing Commissions and Their Guidelines*, in 17 CRIME AND JUSTICE 140 (Michael Tonry ed., 1993).

32. *Id.*

33. *Id.*

sentencers thought that the problems with determinate sentencing, mainly overly harsh and disproportionate sentences, demanded an alternative solution to mandatory minimums as the sentencing method of choice.³⁴ Similarly, the problems with indeterminate sentencing, particularly the wide variations in sentences for similarly situated offenders, also influenced the creation of guideline sentencing systems both in some states and on the federal level.

It was this dissatisfaction with both determinate sentencing and past experience with indeterminate sentencing that prompted the states to devote substantial efforts to developing sentencing guidelines, despite the initial disappointment with the voluntary guidelines.³⁵ States wanted to preserve enough discretion in sentencing to maintain elements of flexibility in the system, but at the same time, structure the process to rid the system of unfettered discretion.³⁶ Guidelines are significantly more discretionary than mandatory minimums insofar as they allow a judge a certain amount of latitude in fashioning a sentence to accurately reflect the culpability and criminal history of the offender. More factors relating to both the offense and the offender may be considered by the sentencer when reaching a punishment, and there is a range of appropriate sentences, as opposed to just one. Guidelines are still less discretionary than the previous system of indeterminate sentencing because of the often substantial restrictions placed on the factors that a sentencer may properly consider when sentencing. Nevertheless, even at their most restrictive, sentencing guidelines are more discretionary than mandatory minimums.

The acceptance of sentencing guidelines in place of determinate sentencing can be partly attributed to then-U.S. district judge Marvin Frankel's influential book, *Criminal Sentences: Law Without Order*.³⁷ Judge Frankel proposed that sentencing commissions be established to research sentencing practices, prosecutorial charging policies, and other aspects of sentencing in order to create a system of guidelines for judges to use when sentencing. These guidelines would be mandatory, in the sense that judges had to consult the guideline manual when sentencing, but the judge would have discretion to increase or decrease

34. *Id.* Tonry writes that "[t]he voluntary guidelines were often created by judges in hopes that by putting their own houses in order they would forestall passage of mandatory or determinate sentencing laws." *Id.* (citation omitted).

35. Tonry, *supra* note 31, at 140.

36. *Id.*

37. MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

the sentence based on various aggravating or mitigating factors.³⁸ The sentence would then be appealable by dissatisfied parties. Judge Frankel's proposal had widespread appeal and helped a limited version of discretionary sentencing (as opposed to unfettered discretion) regain a strong foothold in both federal and state sentencing systems.

Judge Frankel believed that a limited form of discretionary sentencing was superior to mandatory minimums to the extent that the sentencer was able to particularize punishment depending on the needs and culpability of each offender.³⁹ In reaching a sentence, one prominent factor considered by the courts was the offender's potential for rehabilitation.⁴⁰ Once an offender was imprisoned, parole authorities assessed the actual progress that he or she made and prepared a report on that progress. The various state or federal parole boards, aided by this report, then could reduce a sentence further for "good behavior."⁴¹ Discretionary sentencing and its accompanying parole system, however, soon became the objects of much criticism.⁴²

In the early 1980s, mandatory minimum statutes were re-enacted to combat the ever-increasing crime rate. Instead of controlling and deterring crime, discretionary sentencing had resulted only in uncertain and widely disparate sentences.⁴³ The problem apparently rested in unfettered judicial discretion.⁴⁴ While providing wide ranges within which to sentence, indeterminate sentencing furnished no point at which to begin the analysis of an offender's culpability.⁴⁵ Some judges began at the bottom of the range while others began at the top, with each then adjusting the sentence depending on the particular incidents of the crime and the offender.⁴⁶ These differing approaches had proven costly in terms of uniformity and cer-

38. *Id.*

39. *Id.* at 118-124. See *supra* note 30 (outlining the differing sentencing schemes).

40. William J. Genego et al., *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 817-833 (1975) (discussing the review powers of the United States Parole Board and the process for release).

41. *Id.*

42. Andrew Von Hirsch, *The Sentencing Commission's Functions*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 3-4 (1987).

43. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687 (1992).

44. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 7.

45. Kenneth G. Dau-Schmidt, *An Agency Cost Analysis of the Sentencing Reform Act: Recalling the Virtues of Delegating Complex Decisions*, 25 U.C. DAVIS L.R. 659, 669-672 (1992). See also, Freed, *supra* note 43, at 1687-88.

46. Freed, *supra* note 43, at 1687.

tainty. In the end, personal preferences of individual judges often represented the overriding factors in determining the length of a sentence.⁴⁷

Even more damaging to uniformity was the uncertainty surrounding parole. Judges, hoping time served would not be unreasonably reduced, would try to factor parole into a sentence.⁴⁸ Unfortunately, the sentence could not be amended if this estimation proved faulty. As a result, offenders guilty of only minor crimes might be sentenced to a lengthy term, and similarly situated defendants might receive substantially different sentences, depending on how the judge viewed the purposes of punishment or the availability of parole.⁴⁹ Some of these sentences appeared to be overly severe, and because accounting for parole in a sentence was not on the record, the sentence was not appealable on that ground.⁵⁰

By returning to mandatory minimum statutes, legislators sought to structure the sentencing process so as to eliminate disparity and uncertainty and to improve and refine the entire system.⁵¹ Congress also sought to ensure that incorrigible offenders would not return to the streets after serving only a small portion of their sentence due to model behavior while in prison. By 1983, 49 of the 50 states had enacted their own mandatory minimum provisions.⁵² Federal mandatory minimum statutes continued to multiply, with their focus being drug offenses, violent crime, and serious felonies.⁵³

A. *How Mandatory Minimums Work*

Mandatory minimums appear in a variety of statutes spanning a host of criminal activity. Some of these statutes impose a single sentence for a given offense, such as life imprisonment for

47. *Id.*

48. *Id.* at 1688.

49. *Id.* at 1685. For example, if the purpose is to rehabilitate an offender, a shorter sentence may be imposed than if the purpose is to deter through severity of the sentence. If parole is a factor added to this consideration, the variations are compounded.

50. *Id.* at 1688.

51. *Id.*

52. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 8.

53. *Id.* See also Pub. L. 99-570, 100 Stat. 3207 (1986) (the Anti-Drug Abuse Act of 1986 set up a series of mandatory minimums for drug offenses that tied the sentence to the amount of drugs involved). See also the Omnibus Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, 4393-94 (1988). The Violent Crime Control Act of 1991, H.R. 1400, 102d Cong., 1st Sess., 137 Cong. Rec. 1669 (1991), also provided a substantial increase in mandatory minimum statutes.

first degree murder,⁵⁴ some impose both a prison term and a fine, and others impose a mandatory range of sentences.⁵⁵ One federal mandatory minimum statute provides that for the first offense of simple possession of a controlled substance which has a cocaine base and weighs more than 5 grams, the minimum prison sentence is five years and the maximum sentence is twenty years.⁵⁶ Upon a motion by the prosecution, however, the sentence imposed can be lowered for "substantial assistance."⁵⁷ If the defendant assists the government in the investigation or prosecution of other individuals, the statutory minimum can be reduced.⁵⁸ This is the only exception available to a defendant and depends upon whether the defendant is, in fact, able to assist the government, and whether the prosecution is willing to bring such a motion.

Mandatory minimum statutes also contain sentence enhancement provisions, which are triggered by the presence of certain circumstances of the offense or offender. Some of these provisions require a lengthier sentence if a weapon is used during the offense. In the above example, 21 U.S.C. § 841(b)(1)(A) adds five years prison time, in addition to the mandatory minimum term, if a weapon or explosive is used during the commission of the offense.⁵⁹ Sentences are also enhanced if the offender has a prior criminal history,⁶⁰ if the crime involves a vulnerable victim or a substantial risk of bodily harm to others,⁶¹

54. 18 U.S.C. § 1111 (1988).

55. See, e.g., 16 U.S.C. § 414 (1994) (5 days or fine or both for trespassing on federal land for hunting or shooting).

56. 21 U.S.C. § 844(a) (1989).

57. Mueller, *supra* note 20, at 230. What qualifies as "substantial" requires a factual determination by the sentencing judge. There are a variety of factors which are to be considered, such as how much information was provided, the usefulness of that information, or the timeliness of the assistance.

58. *Id.*

59. 21 U.S.C. § 844(b)(1)(A) (1989).

60. Recidivist or "three-strikes" statutes greatly enhance the penalties imposed on career criminals and repeat offenders. See, e.g., TEX. PENAL CODE ANN. § 12.42 (West 1994 & Supp. 1995) (increased prison terms for repeat offenders); ILL. ANN. STAT. ch. 720, para. 5/5-33-1 and ILL. ANN. STAT. ch. 730, para. 5/5-5-3 (Smith-Hurd 1992 & Supp. 1995) (certain repeat offenders given harsher penalties); and N.Y. PENAL LAW §§ 70.04-10 (McKinney 1987 & Supp. 1995) (increasing both maximum and minimum penalties for repeat offenders).

61. See CAL. PENAL CODE § 667.9(a) (West 1988 & Supp. 1995) (providing a two year sentence enhancement if the offender has a prior conviction and the victim is over the age of 65, blind, paraplegic, quadriplegic, or under the age of 14).

or if a certain amount of drugs are present.⁶² Additionally, certain categories of offenses are given lengthier sentences if they involve a crime that society views as particularly intolerable, such as sex offenses committed by a day-care provider.⁶³

A problem in uniformity of sentencing arises, however, when certain communities consider a particular offense to be especially threatening to their citizens. For example, New York may consider drugs a much greater problem than do other states, where different offenses are more prevalent. In this situation, New York's drug laws are likely to be much harsher and more far-reaching than those of those other states. Similarly situated defendants may then receive more severe and lengthy sentences in New York than they would have elsewhere. Of course, unless the Federal Constitution is interpreted to allow state sentences to be dictated by a central body so as to achieve uniformity, some disparity between the states in sentencing is to be expected and is also desirable. Different states must have the ability to react to the crimes that are particularly prevalent in their areas, and a crucial component of American federalism must be preserved. The trade-off however, is that inter-state uniformity in sentencing can not be a realistic goal of a determinate sentencing scheme, especially when each state enacts its own mandatory minimums statutes.

Mandatory minimums have other undesirable effects as a result of their normal operation. First, mandatory minimums have a "tariff-like" approach to sentencing.⁶⁴ A tariff sentence is like a flat tax — imposed almost equally on anyone who commits the proscribed criminal conduct (or in the case of the flat tax, anyone who falls within the applicable income range). Mandatory minimums equate a particular punishment with a given offense and do not take account of gradations in offense seriousness or in the culpability of the offender. Second, mandatory minimums often result in sharp "cliffs" in sentences based on small differences in offense conduct or criminal history.⁶⁵ Sentence cliffs have the opposite effects of tariffs. Instead of grouping dissimilar defendants together and imposing the same sentence on them all, mandatory minimums can draw too

62. *E.g.*, under 21 U.S.C. § 841(a) (1989), when the quantity of drugs increases from five grams to 500 grams or more, the statute enhances the term from a minimum of five years to a maximum of forty. When the weight is five kilograms or more, the mandatory minimum becomes ten years imprisonment to a maximum of life.

63. CAL. PENAL CODE § 674 (West 1988 & Supp. 1995).

64. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 27-35.

65. *Id.*

fine a distinction between offenders who are not significantly dissimilar. The "cliff" is the sharp increase in sentence length for relatively insignificant differences in offense seriousness.

Mandatory minimums commonly account for only one (or sometimes two) factors in determining the seriousness of an offense.⁶⁶ For example, with many drug crimes, only one offense-related factor determines whether or not a mandatory minimum statute applies.⁶⁷ This factor is the weight or amount of the drug.⁶⁸ Other considerations, such as whether the offender played a substantial role in the offense, used a weapon, harmed a victim, or accepted responsibility play no role in sentencing that offender. As a result, offenders who are significantly different in their participation in the offense or criminal histories may receive the same sentence.

On the opposite side of the tariff problem lies the cliff effect — defendants who do not differ significantly in the seriousness of their offense conduct or criminal histories may receive substantially different sentences.⁶⁹ In some cases, mandatory minimums fail to distinguish between offenders, and in others, they distinguish too much. For example, the mandatory minimum provision in 18 U.S.C. § 924(c) produces a sentencing cliff of 25 years between a defendant convicted of robbing a bank with an unloaded gun and a defendant who robbed a bank with a toy gun.⁷⁰ Though the culpability of the offenders, the offense, and the effect on the victims are the same, mandatory minimums would sentence the first offender to 25 years more than the second.

B. *Mandatory Minimums, Recidivist Statutes, and the Eighth Amendment Proportionality Requirement*

Closely related to mandatory minimums are recidivist or "three strikes and you're out" statutes.⁷¹ Recidivist statutes are

66. *Id.* at 27.

67. *Id.*

68. *See, e.g.,* Harmelin v. Michigan, 501 U.S. 957 (1991). In this case, the defendant was convicted of possessing more than 650 grams of cocaine and sentenced to life imprisonment under a Michigan mandatory minimum statute. For a more detailed analysis of this case, *see infra* notes 110-132 and accompanying text.

69. *Id.* at 31.

70. This example is borrowed from the MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 32.

71. Nkechi Taifa, "Three-Strikes-and-You're-Out" - Mandatory Life Imprisonment for Third Time Felons, 20 DAYTON L. REV. 717 (1995). *See also*, Robert Heglin, Note, A Flurry of Recidivist Legislation Means: "Three-Strikes-and-You're-Out," 20 J. LEGIS. 213 (1994).

also part of the "get tough on crime" mentality of the American electorate and impose a mandatory life sentence for an offender who commits a third, and sometimes a fourth, violent offense.⁷² "[T]he clamor from the public for political leaders to 'do something' . . . reached a fever pitch . . . in 1994"⁷³ Against the backdrop of heightened pressure for harsher, lengthier penalties, President Clinton signed the Violent Crime Control and Law Enforcement Act of 1994.⁷⁴ This statute is the first federal "three-strikes" law to be enacted, and imposes a life sentence for a defendant convicted in federal courts of a serious violent felony if that person has two or more final convictions for a serious violent felony or one prior conviction for a serious drug offense and one or more convictions for a serious violent felony.⁷⁵

The Supreme Court has had occasion to address the issue of whether mandatory minimums and recidivist statutes violate the Eighth Amendment's prohibition on cruel and unusual punishment. Several convicted offenders have argued that their sentences were "grossly disproportionate" to their crimes, and ultimately, to their culpability, and that they therefore constituted cruel and unusual punishment within the meaning of the Eighth Amendment. In most of these cases the Court has found that the sentences imposed under a mandatory minimum or recidivist statute were not cruel and unusual by reason of their alleged disproportionality. The first of these cases involved a state recidivist statute, and highlighted the federalism concerns necessarily implicated when a state sentence becomes subject to federal review.

72. See ALA. CODE § 13A-5-9 (1995); ARIZ. REV. STAT. ANN. § 13-604(A)-(C) (1995); CAL. PENAL CODE § 667 (West 1988 & Supp. 1995); COLO. REV. STAT. § 16-13-101 (West 1990); ILL. ANN. STAT., ch. 730, para. 5/5-5-3 (Smith-Hurd 1992 & Supp. 1995); IOWA CODE ANN. § 902.8 (West 1994); N.Y. PENAL LAW §§ 70.04-10 (McKinney 1987 & Supp. 1995); OHIO REV. CODE ANN. § 2929.11(B) (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 51 (West 1983 & Supp. 1995); 42 PA. CONS. STAT. ANN. § 9714 (1995); TEX. PENAL CODE ANN. 12.42 (West 1994 & Supp. 1995); WYO. STAT. § 6-10-201 (1995); and on the federal level, Pub. L. 103-322, 108 Stat. 1902 to 1955 (codified at 18 U.S.C. § 3559 (c)) (1994).

73. Heglin, *supra* note 71, at 213.

74. Pub. L. 103-322, 108 Stat. 1902-1955 (codified in 18 U.S.C. § 3559 (c)) (1994).

75. 18 U.S.C. § 3559 (c)(2)(F)(ii) (1994). The offenses must occur on separate occasions and be separated by a conviction. A "serious violent felony" is one punishable by a maximum term of imprisonment of ten years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense. *Id.*

1. The *Rummel* Case

The Texas statute at issue in *Rummel v. Estelle*⁷⁶ imposed a mandatory life sentence with a possibility of parole for a third non-violent felony conviction. The defendant, William Rummel, had been convicted of obtaining \$120.75 by false pretenses, which was his third felony conviction. He had previously been convicted of obtaining \$80 with a stolen credit card and \$28.36 by forging a check. As required by the statute, the court sentenced Rummel to life imprisonment.

Rummel challenged his sentence as excessive and disproportionate, and argued that the recidivist statute, as applied, was unconstitutional. Rummel had been sentenced in a state court, and his direct appeals and subsequent collateral attacks on his sentence were rejected by the Texas appellate courts. Rummel then sought *habeas corpus* relief in the federal courts, which was granted. The federal district court and the court of appeals rejected the argument that his sentence was cruel and unusual punishment, and Rummel appealed to the Supreme Court. Rummel claimed that a life sentence was so disproportionate to the crimes he had committed that his rights under the Eighth Amendment's cruel and unusual punishment clause had been violated.⁷⁷ Rummel cited *Weems v. United States*⁷⁸ in support of his argument that all punishments had to be reviewed for proportionality. The Court, however, distinguished *Weems* based on the uniqueness and severity of the punishment imposed in that case.⁷⁹ For sentences other than capital punishment or cases of extremely obvious disproportionality,⁸⁰ the Court left sentence lengths as a matter for legislatures to decide. In a now famous quote, Justice Rehnquist, speaking for the majority, stated that "... one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."⁸¹

76. 445 U.S. 263 (1980). See also, TEX. PENAL CODE ANN. § 12.42 (West 1994 & Supp. 1995).

77. *Rummel*, 445 U.S. at 267.

78. 217 U.S. 349 (1910).

79. *Rummel*, 445 U.S. at 274. In *Weems*, the punishment imposed was *cadena temporal* — hard labor, confinement, and life-long civil disabilities. He received 15 years imprisonment in hard labor with chains for two false entries in a customs book. *Id.*

80. See *Rummel*, 445 U.S. at 275.

81. *Id.* at 274.

Rummel then argued that in other cases such as *Coker v. Georgia*,⁸² the Court had undertaken a proportionality review which had been guided by objective criteria.⁸³ Rummel reasoned that because the Court had conducted proportionality reviews in capital punishment cases such as *Coker*, the Court therefore was able to, and should, conduct such reviews for terms of imprisonment. He asserted that the Court had several objective criteria by which the proportionality of his sentence could be judged, such as the fact that his crime did not involve violence, that no other state punished repeat offenders as harshly as Texas, and that the amounts involved were "small."⁸⁴ Nevertheless, the Court distinguished *Coker* in that it involved capital punishment, stating that a "bright line" existed between capital punishment and other "permutations and commutations of punishments short of that ultimate sanction."⁸⁵ The Court stated that the criteria cited by Rummel were not dispositive of the disproportionality of Rummel's sentence, and were in fact, highly subjective criteria that turned upon the viewpoints of the individual justices.⁸⁶ The Court flatly rejected Rummel's argument that disproportionality would be established if Texas punished repeat offenders more harshly than any other state, saying that such an outcome is virtually inevitable under a federal system of government.⁸⁷ The Court validated the proposition that it was the province of the state legislature and not the federal courts to determine appropriate sentence lengths for defendants found guilty of state law felonies.

Justice Rehnquist drew another distinction between Rummel's case and those involving capital punishment or life sentences. He reasoned that because Rummel had the possibility of parole within 10-12 years of conviction, his sentence was not comparable to the capital punishment cases, which represented

82. 433 U.S. 584 (1977). See *Rummel*, 445 U.S. at 295.

83. The objective factors cited in *Coker* were taken from three different sources. The first factor that the court in *Coker* considered was the nature and gravity of the offense. This factor was taken from the case of *Gregg v. Georgia*, 428 U.S. 153, 179-180. The second factor, how similar offenders are sentenced in other jurisdictions, was taken from *Weems*, 217 U.S. at 380. The third factor that the *Coker* court relied upon was how other offenders are sentenced in the same jurisdiction. This factor also came from *Weems*, 217 U.S. at 380-81.

84. *Rummel*, 445 U.S. at 275.

85. *Id.*

86. *Id.*

87. *Id.* at 277-281. Justice Rehnquist stated that "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Id.* at 282.

the ultimate and permanent interference with personal liberty.⁸⁸ The Court upheld the policy behind recidivist statutes which sought to deal harshly with habitual offenders who have repeatedly shown that they are incapable of conforming to the norms of society.⁸⁹ In a sharply divided opinion, the Court held that the Texas repeat offender statute, as applied, did not impose cruel and unusual punishment within the meaning of the Eighth Amendment, even though life imprisonment was imposed for a third non-violent, property-related offense.⁹⁰

Justice Powell authored the dissent in *Rummel*, and strongly disagreed with the majority.⁹¹ Powell opined that the Court was able to, and in fact ought to, make conclusions about the proportionality of a sentence in cases other than capital cases or cases of extremely unusual punishment. He summarized his opinion as follows:

- (i) the penalty for a noncapital offense may be unconstitutionally disproportionate, (ii) the possibility of parole should not be considered in assessing the nature of the punishment, (iii) a mandatory life sentence is grossly disproportionate as applied to [the] petitioner, and (iv) the conclusion that this petitioner has suffered a violation of his Eighth Amendment rights is compatible with principles of judicial restraint and federalism.⁹²

Justice Powell found nothing in *Coker* which limited proportionality reviews only to capital punishment cases. He then went through the three objective factors with a broad analysis and found that the objective criteria established disproportionality.⁹³ Because the crime did not involve violence or large sums of money, he found that the nature and gravity of the offense, the first objective factor, worked in *Rummel's* favor. He then reasoned that since no other state imposed a mandatory life sentence upon the third nonviolent property-related offense, the Texas statute was unconstitutionally disproportionate. Finally, upon a comparison of how other criminals were punished in Texas, Justice Powell concluded that *Rummel's* punishment was grossly disproportionate to his crime. He reached this conclu-

88. *Id.* at 280-281.

89. *Id.* at 284.

90. *Id.* The majority included Justice Rehnquist, Burger, Stewart, White and Blackmun. A concurring opinion was written by Justice Stewart. The dissenting opinion was written by Justice Powell who was joined by Justice Brennan, Marshall and Stevens.

91. *Id.* at 285-307 (Powell, J., dissenting).

92. *Id.* at 286-287 (Powell, J., dissenting).

93. *See supra* note 83 (setting forth the three objective factors).

sion because all three-time felons receive the same sentence under the statute, regardless of the nature of the underlying offense. Powell concluded that to punish Rummel as severely as someone who had committed three successive violent offenses was not only disproportionate but unjust.

2. The *Hutto* and *Solem* Cases

Two years after *Rummel*, the Court again was confronted with the appropriateness of conducting a proportionality review of prison sentences under the Eighth Amendment. In *Hutto v. Davis*,⁹⁴ Huey Davis had been convicted in a Virginia state court of possessing with intent to distribute and distribution of nine ounces of marihuana. For this offense, Davis was sentenced to forty years in prison pursuant to the provisions of the Virginia code of criminal law.⁹⁵ Davis challenged the sentence, arguing that the sentence was so grossly disproportionate to his offense that it constituted cruel and unusual punishment in violation of the Eighth Amendment to the Constitution. The district court and court of appeals in Virginia held in Davis' favor and granted him *habeas corpus* relief, but the Supreme Court reversed the lower courts' judgment. The Court held that it was error to review legislatively mandated prison terms for proportionality except in rare cases, and that by analyzing Davis' case in light of the objective factors expressly rejected in *Rummel*,⁹⁶ the lower courts "ignored . . . the hierarchy of the federal court system created by the Constitution and Congress."⁹⁷

Just one year later, the issue of proportionality for terms of imprisonment again came before the Supreme Court. In *Solem v. Helm*,⁹⁸ Jerry Helm was convicted under a recidivist statute and sentenced to life imprisonment. He was convicted of issuing a "no account" check for \$100, and he had six prior felony convictions.⁹⁹ Helm applied to a federal district court for *habeas corpus*

94. 454 U.S. 370 (1982).

95. VA. CODE ANN. § 19.2-295 (Michie 1988).

96. In *Hutto*, the Court rejected the four part test that the District Court had used to assess the proportionality of Davis' sentence. The District Court had used four objective factors taken from the case of *Hart v. Cooner*, 483 F.2d 136 (Ca 1973). (Three of these four objective factors had been rejected by the *Rummel* court, though taken from different case law). The four *Hart* factors included the three used in *Coker*, and in addition, required the reviewing court to examine the purposes behind the statute and the existence of less restrictive means of effectuating those purposes. See *Hutto*, 454 U.S. at 373-74 n.2.

97. *Hutto*, 454 U.S. at 374-75.

98. 463 U.S. 277 (1983).

99. *Id.* at 281. The usual maximum penalty for this offense, by itself, is five years and a \$5000 fine. *Id.* He had previously been convicted three times

relief challenging the constitutionality of his sentence under the Cruel and Unusual Punishments Clause of the Eighth Amendment.¹⁰⁰ The district court, noting *Rummel v. Estelle*,¹⁰¹ denied relief, but the court of appeals reversed, finding Helm's case distinguishable from that of Rummel's.¹⁰² Solem then brought his case before the Supreme Court.

The Court held that the Eighth Amendment prohibited sentences that are disproportionate to the crime committed, and that prison sentences are also subject to a proportionality review, guided by objective criteria.¹⁰³ The Court then went through the three objective criteria from *Coker* and found that because Helm's crime was among those considered less serious, did not involve violence or large amounts of money, and because none were against a person (as opposed to property), a sentence of life imprisonment was disproportionate to his crime.¹⁰⁴ Justice Powell, now writing for the 5-4 majority, stated that *Solem* was distinguishable from *Rummel* because Rummel was sentenced to life with the possibility of parole after 12 years.¹⁰⁵ In South Dakota, where Helm was convicted, there was no such possibility and therefore, the Court concluded that Helm's sentence was far

for third degree burglary, once for obtaining money under false pretenses, once for grand larceny, and once for third-offense driving while intoxicated. *Id.* at 279-80.

100. *Id.* at 283.

101. *Rummel*, 445 U.S. at 263.

102. *Id.* at 283-284. See *supra* notes 76-93 and accompanying text for a discussion of *Rummel*.

103. *Id.* at 303. The Court, however, noted in its opinion that substantial deference should be granted to the legislature and trial courts in determining the types and limits of punishments for crimes, as well as to the sentencer. The Court went on to say, though, that despite this deference, "... no penalty is *per se* constitutional." *Id.* at 290 (emphasis added).

104. Justice Powell wrote that:

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State.

Id. at 30.

105. *Id.* at 297. The majority in this case now included Justice Powell, Blackmun, Brennan, Marshall and Stevens. *Id.* at 279. It is important to note that the reason for the switch in the Court's position is largely the result of Justice Blackmun's vote. In *Rummel*, (also a 5-4 decision), he had voted against conducting proportionality reviews of prison sentences. Here, in *Solem*, he cast his vote in favor of such review. In neither case did he give any reasons for his vote.

more severe than the life sentence in *Rummel*. Moreover, Powell considered that in forty-eight of the fifty states, Helm would not have received such a harsh sentence. This analysis had been expressly rejected by the majority in *Rummel*, which stated that it was the province of the state legislators to assess and arrive at an appropriate sentence length.¹⁰⁶

Again as in *Rummel*, there was a highly critical dissenting opinion, this time authored by Chief Justice Burger.¹⁰⁷ He discussed the subjective nature of the factors used in *Coker* and *Rummel*, and rejected the use of those factors to determine the proportionality of sentences other than those involving capital punishment. Burger also wrote that the Eighth Amendment did not authorize federal courts to review state sentences of imprisonment to determine whether or not they were disproportionate to the crime.¹⁰⁸ He stated that "[d]rawing lines between different sentences of imprisonment would thrust the Court inevitably 'into the basic line-drawing process that is pre-eminently the province of the legislature' and produce judgments that were no more than the visceral reactions of individual justices."¹⁰⁹

3. The *Harmelin* Case

Indicating the lack of consensus among the Justices, the Court again reversed its position on proportionality reviews in *Harmelin v. Michigan*.¹¹⁰ *Harmelin* did not involve a recidivist statute — the defendant was sentenced under a mandatory minimum drug statute. Nevertheless, the principles of proportionality review have equal force in the case of mandatory minimums. Recidivist statutes are little more than a subset of mandatory minimums, and the arguments set forth in *Solem* and *Rummel* have direct bearing on proportionality challenges to mandatory minimums. In *Harmelin*, the defendant, Ronald Harmelin, was convicted under Michigan law of possessing more than 650 grams of cocaine, and was sentenced to a mandatory life prison term without possibility of parole.¹¹¹ His conviction was affirmed by the Michigan Court of Appeals, which held that his sentence was not cruel and unusual within the meaning of

106. See *supra* text accompanying note 80.

107. *Solem*, 463 U.S. at 304. Chief Justice Burger authored the dissent, and was joined by Justices White, Rehnquist, and O'Connor.

108. *Id.* (Burger, C.J., dissenting).

109. *Id.* at 308 (quoting *Rummel*, 445 U.S. 263, 275 (1980)) (Burger, C.J., dissenting).

110. 501 U.S. 957 (1991).

111. *Id.* at 961.

the Eighth Amendment.¹¹² The Michigan Supreme Court denied his leave to appeal, and the United States Supreme Court granted certiorari. Harmelin asserted that his sentence was unconstitutionally cruel and unusual, and therefore unconstitutional, because: (1) it was significantly disproportionate to his crime; and (2) because the sentencing judge was statutorily required to impose it, without taking into account the circumstances surrounding his particular crime and background.¹¹³

The Supreme Court issued an extremely divided opinion in *Harmelin*. The opinion contained four parts, only one of which was a majority opinion,¹¹⁴ and the majority opinion only addressed whether the sentencing judge was required to take into account the circumstances surrounding his particular crime and background before imposing a mandatory sentence. In support of his arguments, Harmelin cited *Woodson v. North Carolina*,¹¹⁵ in which the Court held that the character of the offender and circumstances of the offense were a "constitutionally indispensable part" of the process of sentencing someone to death.¹¹⁶ Harmelin asked the Court to extend that holding to an "individualized mandatory-life-in-prison-without-parole sentencing doctrine" and to require a sentencing court to consider mitigating factors before imposing a mandatory sentence.¹¹⁷ The

112. *Id.*

113. *Id.* at 961-962.

114. *Id.* at 960. Justice Scalia wrote the opinion of the Court in Part IV, and was joined by Justices Rehnquist, O'Connor, Kennedy, and Souter. He authored an opinion for Parts I, II, and III and was joined by Justice Rehnquist. Justice White wrote for the dissent, and was joined by Justices Blackmun and Stevens. Justice Marshall also wrote a dissenting opinion, as did Justice Stevens, who was joined by Justice Blackmun.

115. 428 U.S. 280 (1976).

116. *Id.* at 281. Later cases have clarified and limited this holding, and have held that there is no comparative proportionality review required by an appellate court in every capital case. *Pulley v. Harris*, 465 U.S. 37 (1984). The Court in *Pulley* further held that although some schemes for proportionality review are constitutional, that review was not necessarily indispensable. *Id.* Additionally, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court stated that:

The concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition, these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of all the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id. at 195. No requirement of comparative review was mentioned in the opinion.

117. *Harmelin*, 501 U.S. at 995.

Court refused to require an individualized proportionality requirement for mandatory prison sentences, and affirmed Harmelin's conviction.¹¹⁸ The Court stated that mandatory penalties and severe prison sentences may be cruel, but they were not unusual in the Constitutional sense, based on their frequent and extensive use throughout history.¹¹⁹ Therefore, Rummel's argument that it would be cruel and unusual to impose a mandatory life sentence without any consideration of "mitigating" factors, such as the absence of a prior conviction, failed to convince the Court to require such a consideration.

Elsewhere in his plurality opinion, Justice Scalia addressed the more general issue of whether sentences of imprisonment were subject to a proportionality review under the Eighth Amendment. Part I of Justice Scalia's opinion was a lengthy historical analysis of the "usualness" of imprisonment and its use throughout the centuries, and he stated that proportionality reviews of prison sentences were an "... invitation to an imposition of subjective values."¹²⁰ Justice Scalia stated that based on a historical analysis of the Eighth Amendment, the cruel and unusual clause contained no proportionality guarantee, and that therefore the defendant's sentence could not be considered unconstitutionally disproportionate.¹²¹ Scalia's opinion was directly contrary to *Solem* — in fact he stated that *Solem's* decision was "simply wrong,"¹²² and he opined that the cruel and unusual clause was intended as a check only on the various modes of punishment.¹²³ In Part III, Scalia wrote that the Eighth Amendment does not require strict proportionality between the crime and the sentence, but instead forbids only very extreme sentences which were grossly disproportionate to the crime committed.¹²⁴ He stated that "[t]he Eighth Amendment is not a ratchet, whereby a

118. "We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further." *Id.* at 996.

119. *Id.* at 994-995.

120. *Id.* at 986 (Scalia, J., plurality opinion).

121. *Id.* at 962-994 (Scalia, J., plurality opinion).

122. *Id.* at 965 (Scalia, J., plurality opinion).

123. *Id.* at 985 (Scalia, J., plurality opinion). Justice Scalia stated in Part II of his plurality opinion that while the decision on whether or not a particular mode of punishment was cruel or unusual is relatively clear, proportionality was not such an easy call to make. "This is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept. But for the same reason these examples are easy to decide, they are certain never to occur." *Harmelin*, 501 U.S. at 985-986. See also *id.* at 981-982.

124. *Id.* at 990-994 (Scalia, J., plurality opinion). Scalia wrote that it would not be fair to say that there was no proportionality requirement in the Eighth Amendment; rather he stated that this review was limited to cases

temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions."¹²⁵ Thus, although the majority of Justices did not agree on whether or not proportionality reviews were required by the Eighth Amendment, Justice Scalia, joined by Chief Justice Rehnquist, laid the groundwork for the argument that proportionality reviews are *not* required, except in capital cases or cases of extremely unusual punishment.

Justice Kennedy authored an opinion, joined by Justices O'Connor and Souter, concurring in part and concurring in the judgment.¹²⁶ He supported adherence to a very narrow proportionality principle that also had application in cases of noncapital punishments.¹²⁷ He acknowledged that the determination of prison terms was primarily a function of the legislature, and that the individual state legislatures could differ in the penalties imposed for the same offense.¹²⁸ Justice Kennedy also agreed with the statement that proportionality reviews should be guided by objective criteria to the maximum extent possible.¹²⁹ However, he ultimately concludes that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."¹³⁰ Justice Kennedy then examined Harmelin's sentence in light of those principles and concluded that his sentence was not grossly disproportionate to his crime. He reasoned that intrajurisdictional and interjurisdictional comparisons between sentences (two of the three objective factors) were "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality,"¹³¹

involving capital punishment or the extreme cases like *Weems v. United States*. *Id.* (emphasis added).

125. *Id.* at 990 (Scalia, J., plurality opinion).

126. *Id.* at 996-1008.

127. *Id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment).

128. *Id.* at 997-998 (Kennedy, J., concurring in part and concurring in the judgment).

129. *Id.* at 1000 (Kennedy, J., concurring in part and concurring in the judgment) (Justice Kennedy analyzed Harmelin using the factors set forth in *Rummel and Coker*).

130. *Harmelin*, 501 U.S. at 1001 (quoting *Solem v. Helm*, 463 U.S. 277, 288, 303 (1983)) (Kennedy, J., concurring in part and concurring in the judgment).

131. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

and that an analysis of the gravity and nature of Harmelin's offense compared to his sentence was sufficient to refute a claim of disproportionality.¹³²

The dissent was led this time by Justice White, who interpreted the Eighth Amendment to include a proportionality review in mandatory minimum cases, as well as death penalty cases.¹³³ What is perhaps best exemplified by the trio of *Rummel*, *Solem*, and *Harmelin* is that no strong consensus exists as to the appropriateness of a proportionality review, or what factors, if any, should be considered when conducting such a review. Some judges openly refuse to sentence under "three-strikes" statutes or mandatory minimums, and put offenders who are not targeted by the statutes in prison.¹³⁴ To these judges, three strikes legislation represents a further impingement upon the remaining areas of their discretion, already restricted by mandatory minimums and sentencing guidelines. These statutes, they argue, sacrifice fairness and proportionality to convey a politically charged message — that Americans will not tolerate being the victims of violent crime. If the actual number of crimes committed were to decrease as a result of mandatory minimums or "three-strikes" laws, this message might carry some weight behind it. Unfortunately, the crime rate has remained about the same since 1970, one indication that deterrent effects of mandatory minimums have not been as widespread as Congress and state legislators had hoped.¹³⁵ Additionally, in its Special Report to the Congress, the U.S. Sentencing Commission determined that in approximately 35% of all cases in which a mandatory minimum statute could have been supported by the evidence, the defendants pled guilty to charges carrying non-mandatory sentences or a reduced

132. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

133. *Id.* at 1009-1027 (White, J., dissenting).

134. Mandatory minimums were designed to severely punish mid-to high-level participants in a crime. See MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 9-10. For examples of judges who have refused to sentence under both state and federal three-strikes laws, see Anne Krueger, *S.D. Judge Criticized for Ignoring Three-Strikes Law*, The San Diego Union-Tribune, June 30, 1995 at B1; Harriet Chiang, *Judges Can't Defy 'Three-Strikes' Law: Ruling Restricts Sentencing Options*, The San Francisco Chronicle, Sept. 30, 1995 at A19; Bill Kisliuk, *DA's 'Three-Strikes' Appeal Takes the Cake*, The Recorder, July 20, 1995 at 3. See also, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, HIGHLIGHTS FROM TWENTY YEARS OF SURVEYING CRIME VICTIMS, THE NATIONAL CRIME VICTIMIZATION SURVEY, 1973-92 7 (1993).

135. Heglin, *supra* note 71. See also, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, HIGHLIGHTS FROM 20 YEARS OF SURVEYING CRIME VICTIMS, THE NATIONAL CRIME VICTIMIZATION SURVEY, 1973-92 7 (1993).

mandatory penalty.¹³⁶ That the mandatory statutes are not being charged in cases where they are applicable suggests that "tough on crime" politics, though appealing in theory, have a significantly diluted effect in practice.

In an effort to avoid the problem of disproportionate sentences, the federal sentencing guidelines impose severe penalties on habitual offenders only when the underlying offense involves violence or controlled substances.¹³⁷ Under the guidelines, a defendant convicted of kidnapping with two prior convictions for violent felonies or drug offenses receives approximately thirty years of imprisonment. A defendant convicted of assault with two prior convictions receives, on the average, about six years. The guidelines provide for distinctions in the severity of the offense, whereas "three-strikes" statutes would place both these defendants in prison for life.¹³⁸

Some critics have protested recidivist statutes on grounds of fairness, explaining that "three-strikes" laws could often be over-inclusive.¹³⁹ This situation arises in cases where a defendant may have numerous non-violent felonies such as a stolen credit card or forging a check. Prosecutors have also criticized recidivist statutes, stating that there was "no reliable way to identify violent criminal predators from their official records, which is what 'three-strikes' proposals would automatically do."¹⁴⁰ When Congress and state legislators enacted recidivist statutes and mandatory minimums, defendants like Rummel were not among those meant to be targeted. Mandatory minimums, especially for drug crimes, were meant to target mid- to high-level participants in a drug operation.¹⁴¹ Similarly, recidivist statutes were

136. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, summary.

137. Allyn G. Heald, *U.S. v. Gonzalez: In Search of a Meaningful Proportionality Principle*, 58 BROOKLYN L. REV. 455, 465 n.35 (1992). See also, UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 4B1 (1994-1995) [hereinafter U.S.S.G.].

138. Taifa, *supra* note 71, at 721.

139. Heglin, *supra* note 71, at 225-26. For example, Heglin notes that under traditional three-strikes legislation, a three-time petty thief could be sentenced to life in prison. Considering that three-strikes laws were meant target those who repeatedly committed violent crimes or drug offenses, the three-strikes laws are inappropriately used when applied to this three-time petty thief. Other statutes may carry penalties more commensurate with the offense committed. Additionally, a three-time offender who committed two crimes early in his life and then committed a third, unrelated offense thirty years later would also be sentenced to life in prison under three-strikes laws. It would be inaccurate to label this person a "career offender" and punish him as such. *Id.*

140. Taifa, *supra* note 71 at 723.

141. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 29.

designed to combat the most serious of crimes, and imprison those who repeatedly preyed upon innocent citizens.

It is this aspect of these harsh, mandatory statutes that has led prosecutors to avoid charging defendants like Rummel for being repeat offenders, and instead engage in "charge-shopping" until a more appropriate charge can be found. For example, under discretionary repeat offender laws in Illinois, prosecutors charged only eighty-eight people in fifteen years,¹⁴² indicating a reluctance to eliminate discretionary sentencing and impose overly severe punishments. These practices of "charge-shopping" by prosecutors creates the potential for defendants to plead guilty to lesser, "non-violent" offenses in order to avoid the application of three-strikes or mandatory minimum legislation. Prosecutors who are unwilling to impose what they believe are overly harsh sentences may accept plea bargains and manipulate facts to avoid the statutes.¹⁴³

Recidivist statutes are closely linked, both in theory and in practice, to mandatory minimums. The complaints against recidivist statutes echo those made against mandatory minimums and cause many of the same problems of disparity, manipulation and disproportionality in sentencing. Though recidivist statutes pose difficult problems for sentencers, as evidenced by the lack of consensus among the Supreme Court Justices, they are not the focus of this inquiry. Instead, they remain useful illustrations of some of the issues and problems surrounding proportionality review and the difficulties associated with finding an acceptable way to link culpability with time served. Congress tried to solve these same problems by enacting mandatory minimums, which were originally thought to provide such a link. The Supreme Court cases have shown that not only is such a link impossible to attain, but if some rough commensurability between blameworthiness and punishment were possible, mandatory minimum statutes would not be the ideal connection between the two.

IV. THE FAILURE OF MANDATORY MINIMUMS TO IMPROVE THE SYSTEM

Mandatory minimums simply have not met the goals envisioned by Congress and the public.¹⁴⁴ Criticisms have focused on

142. Taifa, *supra* note 71, at 723.

143. *Id.*

144. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 14-16. These goals included: (1) retribution or ensuring the offender has received his or her just deserts; (2) deterrence and certainty in the punishment to be imposed; (3) incapacitation — removing dangerous individuals from society at

several main points: (1) mandatory minimums still do not fit the punishment to the crime and the offender's culpability;¹⁴⁵ (2) they result in prison overcrowding;¹⁴⁶ (3) they transfer sentencing discretion from the court to the prosecutor;¹⁴⁷ (4) they motivate judges to find loopholes in mandatory sentencing;¹⁴⁸ and (5) mandatory minimums are inconsistent with Congress' decision to delegate sentencing authority to a sentencing commission of experts.

A. *Mandatory minimums do not relate the punishment to the culpability of the offender*

Mandatory minimums have drawn heavily from a retributive philosophy of punishment that seeks to punish an offender only because he or she has committed an offense. There need not be, and should not be, any justification for the punishment other than the conduct of the offender.¹⁴⁹ Herbert Packer, who may properly be called a "limiting retributivist,"¹⁵⁰ writes that punishment should be imposed upon those who deserve it by reason of their criminal conduct, but that their culpability should serve as the upper limit on that punishment.¹⁵¹ Traditionally, retribution has been included as one of the main purposes of punishment,¹⁵² yet mandatory minimums commonly do not connect culpability with time served. To the extent that defendants are

large; (4) removing disparity from sentencing so that similarly situated offenders would receive similar sentences; (5) inducement of cooperation with authorities; and (6) inducement of guilty pleas.

145. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 27, 34.

146. Lowenthal, *supra* note 22, at 71 n.49.

147. Freed, *supra* note 43, at 1686-1687.

148. See MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 102, 103, 107.

149. HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 9-10 (1968). "[M]an is a responsible moral agent to whom rewards are due when he makes right moral choices and to whom punishment is due when he makes wrong ones . . . [T]hese imperatives flow from the nature of man and do not require — indeed do not permit — any pragmatic justification." *Id.* at 9.

150. See *infra* notes 369-372 and accompanying text.

151. PACKER, *supra* note 149, at 65-70. Packer writes,

I see an important limiting principle in the criminal law's traditional emphasis on blameworthiness as a prerequisite to the imposition of punishment. But it is a *limiting* principle, not a justification for action. It is wrong to say that we should punish persons simply because they commit offenses under circumstances that we call blameworthy. It is right to say that we should not punish those who commit offenses unless we can say that their conduct is blameworthy.

Id. at 66.

152. Kenneth Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing*, 3 FED. SENTENCING REP. 326 (1991).

grouped together under broad classes of offenses, mandatory minimums fail to ensure that the punishment fits the crime. When less restrictive punishment would be more appropriate for a particular offender, deviations or reductions in sentence terms are often impermissible when mandatory minimums are in place.¹⁵³ Sentencing under mandatory minimum statutes is based the elements of the offense charged, and only in extremely limited situations can an offense or offender characteristic alter the sentence length dictated by the statute. The statutes do not permit a judge to consider a defendant's background or whether or not the crime involved violence, unless it is an element of the offense. Instead, the judge is permitted to depart from the required sentence only if the offender assists the authorities in some way. This policy works against some individuals, who may be penalized by not having any assistance to offer.

While a precise equation linking culpability to sentence length is impossible to derive, an attempt should be made to create a system that roughly measures the severity of the punishment by the gravity of the offense (actual or intended). Because mandatory minimums fail to do this, meaning is removed from the sentencing process. By shifting the focus of sentencing almost completely away from the offender, not only does the criminal justice system fail to consider the culpability of the individual, but the interests of society as well.¹⁵⁴

B. *Mandatory minimums and prison overcrowding*

A problem inextricably intertwined with automatic incapacitation is prison overcrowding. Mandatory minimums leave the judge with virtually no option but to imprison an offender. And with Congress having simultaneously abolished parole,¹⁵⁵ the multitude of federal offenders sentenced under mandatory mini-

153. Unfettered discretionary sentencing in this sense had been superior to determinate sentencing, insofar as it had provided alternate methods of punishment, such as supervised release and probation. The limiting retributivist would have culpability serve as a cap on the upper limits of punishment imposed, yet capped (capped by the level of the offender's culpability) discretionary sentencing might require the release or a substantial reduction in sentence length if the offender was not as culpable as the mandatory minimum statute presumes. Mandatory minimums simply do not permit such a consideration or limiting use of culpability.

154. These interests include safety from harm and loss of life or property, the interests of society in rehabilitating an offender and the interests of society in deterring other potential offenders, or that particular offender, from committing further crimes.

155. See 28 U.S.C. § 991-998 (1988). The 1984 Sentencing Reform Act abolished parole in all federal cases.

mums has significantly increased prison overcrowding.¹⁵⁶ The most recent statistics indicate that at the end of 1994, a record 1.5 million inmates were in federal and state prisons and local jails.¹⁵⁷ This amount is triple that of 1980 statistics and is expected to increase to 7.3 million in a decade.¹⁵⁸ Since 1984, the mean sentence expected to be served by federal offenders for all offenses has increased from 24 months to 46 months.¹⁵⁹ The states have also experienced serious shortages in prison space.¹⁶⁰ The difference between the states and the federal sentencing commission is that many of the states have used guidelines to their advantage.¹⁶¹ Minnesota, Oregon and Washington

156. Lowenthal, *supra* note 22, at 71 n.49. Before the mid-70s, state and federal prison populations fluctuated at around 200,000 inmates. Since 1974, however, there has been a continual rise in prison populations. See NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 47 (1990). From 1980-1985, the prison population increased by approximately 189%. See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 CHIC. L. REV. 901, 929 (1991). And for the entire decade, 1980-1989, the population increased by 123%, with 1989 recording the largest annual growth (80,000) in 65 years. Benjamin J. Lambiotte, *Retribution or Rehabilitation?: The Addict Exception and Mandatory Sentencing After Grant v. United States and the District of Columbia Controlled Substances Amendment Act of 1986*, 37 CATH. U. L. REV. 733, 736 (1988). (Part of this substantial increase may be attributed to the Supreme Court's ruling in *United States v. Mistretta*, 488 U.S. 361 (1989), that the sentencing guidelines were constitutional. Many judges had refused to sentence under the guidelines until this case was decided, and others sentenced pending the outcome of this case). In 1990 alone, additional costs to the prison system, from the effects of mandatory minimum sentencing, were between \$79 and \$125 million. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 120.

157. Fox Butterfield, *More in U.S. Are in Prisons, Report Says*, N.Y. Times, Aug. 10, 1995, at A14 (summarizing the latest report by the Justice Department).

158. Butterfield, *supra* note 157.

159. Tonry, *supra* note 31, at 168.

160. In Alaska, between 1980 and 1990, the prison population had risen 230%. See Teresa White Carns, *Sentence Reform in Alaska*, 6 FED. SENTENCING REP. 134 (1993). The problem in Texas appears to be even more critical. Texas has traditionally attempted to combat increased needs for prison space by building more prisons. Nevertheless, a backlog exists and this backlog is projected to reach almost 59,000 prisoners by the year 2000 if reform is not initiated. Not only was it costly to build these facilities, but by 1991 fourteen counties had filed suit in both state and federal court to obtain funds for inmate care, further adding to the costs of overcrowding. See Michele Ceitch, *Giving Guidelines the Boot: The Texas Experience with Sentencing Reform*, 6 FED. SENTENCING REP. 138 (1993). Kansas also faced ever-increasing rates of prison overcrowding. From 1979 to 1989, the prison population tripled. See David J. Gottlieb, *Kansas Adopts Sentencing Guidelines*, 6 FED. SENTENCING REP. 158 (1993).

161. During 1984, the Justice Department reported that the number of inmates in Federal, state and local prisons increased by more than 1,600 per

have tied their available and foreseeable prison resources to sentencing policies.¹⁶² In fact, Minnesota and Washington successfully maintained prison populations within available prison capacity, and experienced lower than average incarceration rate increases, until legislative changes in the mid-80s toughened the guidelines.¹⁶³

The lack of available prison cells has plagued the penal system for decades and to fill available cells with first-time or non-violent offenders is too costly and burdensome, given the scarcity of space and funding.¹⁶⁴ The federal prison population is facing an estimated 119% increase between 1987 and 1997, ". . . as a result of the Federal Sentencing Guidelines and harsh mandatory punishments for drug offenses."¹⁶⁵ These statistics are not intended to suggest, however, that if capacity is reached, any new offenders should be released under judicial order. Instead, judges could oversee prison capacity much like a spicket does the flow of water—when capacity is reached, non-violent offenders or those nearing the end of their term (and determined safe for release) could be let out under a supervised release program. The decisions regarding whom to release could be a matter for the state or federal sentencing commission to decide and structure.

C. Sentencing discretion shifts to the prosecutor

Mandatory minimums failed to solve the problems of discretionary sentencing on another level as well. Instead of removing the adverse effects of discretion from the process, mandatory minimums only shift them from the judge to the prosecutor.¹⁶⁶ For mandatory minimums to have any useful effects on eliminating disparity, a prosecutor must first be willing to pursue the proper charge. Unfortunately, this is frequently not the case.¹⁶⁷ Prosecutors have stated often that the severity of mandatory sen-

week and there were 958, 704 inmates in state prisons at the end of 1994. Butterfield, *supra* note 154.

162. Tonry, *supra* note 31, at 183.

163. *Id.* at 176.

164. Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 103-104 (1988). See also, MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 115-120 (discussing the impact of mandatory minimums on the federal prison population and a comparison of sentences under the guidelines with mandatory minimums).

165. Butterfield, *supra* note 154.

166. Freed, *supra* note 43, at 1686-1687.

167. *Id.* at n.11.

tencing motivated them to accept pleas to lesser offenses or charge an offense carrying a shorter prison term.¹⁶⁸

The disparate charging practices of prosecutors raises an issue beyond the resulting uncertainty in the system and manipulation of the guidelines. These potentially discriminating policies may violate the equal protection clause of a state or the federal constitution. In *Stephens v. State*,¹⁶⁹ a defendant with a second conviction for the sale or possession with intent to distribute a controlled substance was sentenced to life imprisonment under a recidivist statute. The defendant challenged this statute on the grounds that state prosecutors had applied the statute discriminatorily based on race, and he proffered evidence to demonstrate a consistent policy of discrimination by the prosecutors. Stephens claimed that the statute as applied violated the equal protection clauses of both the United States and the Georgia constitutions. The court found that the evidence was insufficient to establish a policy of prosecutorial discrimination, and stated that "[b]ecause the district attorney in each judicial circuit exercises discretion in determining when to seek a sentence of life imprisonment, a defendant must present some evidence addressing whether the prosecutor handling a particular case engaged in selective prosecution to prove a state equal protection violation."¹⁷⁰

Though the court in this case found no evidence of a policy to discriminate, the foundation was laid for future challenges to mandatory minimums, based on selective or discriminatory application of the statutes. However, advancing a successful equal protection claim based on discriminatory application of mandatory minimums may prove a difficult hurdle to overcome. As the court in *Stephens* was careful to stress, prosecutorial discretion must be preserved in areas such as the decisions surrounding whom to prosecute, what charges to bring and what sentences to seek.¹⁷¹ Nevertheless, should a defendant accumulate sufficient evidence to prove a "consistent policy of discrimination," the potential exists for sentences to be challenged as violating the equal protection clause.

The higher standard of proof necessary to convict under mandatory minimums may constitute yet another reason for prosecutors to circumvent application of the statutes. In addition to a desire to pursue a mandatory minimum charge, the

168. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 101-103.

169. 456 S.E.2d 560 (Ga. 1995).

170. *Id.* at 562.

171. *Id.*

prosecutor must have the ability to meet the standard of proof required for conviction in criminal cases — guilt beyond a reasonable doubt.¹⁷² Under discretionary sentencing, sentencing factors only had to be established by a preponderance of the evidence, because a sentencing hearing is not an adjudicatory stage.¹⁷³ With mandatory minimums, those factors constitute the actual elements of the offense, which must be proved beyond a reasonable doubt. Moreover, prosecutions of offenses carrying mandatory minimum sentences often result in complex evidentiary hearings and are more susceptible to appeal.¹⁷⁴

D. *Judicial circumvention of mandatory minimums*

The case for mandatory minimums is weakened further in the courtroom. Studies have shown that judges, believing mandatory minimum sentences to be too harsh, often circumvent the statutes.¹⁷⁵ The judiciary has resented the encroachment on their powers of discretion and interpretation of the law.¹⁷⁶ Sentencers are hesitant to impose sentences which they believe to be unjust, and

[a] sense of justice is essential to one's participation in a system for allocating criminal penalties. When the penalty structure offends those charged with the daily administration of the criminal law, tension arises between the judge's duty to follow the written law and the judge's oath to administer justice.¹⁷⁷

When judges are faced with a choice between adhering to the law by imposing what they believe to be an unjust sentence, and circumventing mandatory minimums by imposing a lesser sentence,

172. In *Re Winship*, 397 U.S. 358, 359 (1970).

173. See *Kinder v. United States*, 504 U.S. 946 (1992) (in which the Supreme Court denied cert., but in the dissenting opinion, Justice White set forth the almost universally accepted principle that the proper standard of proof for sentencing hearings is a preponderance of the evidence). See also, In *Re Winship*, 397 U.S. 358, 359 (1970) (drawing a distinction between adjudicatory and nonadjudicatory stages in the criminal process.) By the time a defendant is given a sentencing hearing, guilt is already established, and the process is no longer adjudicatory. Therefore, the requisite standard of proof for factors relevant in a sentencing hearing is proof by a preponderance of the evidence.

174. Weigel, *supra* note 164.

175. See MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 102, 103, 107, Appendix G (containing resolutions from all circuit courts seeking repeal of mandatory minimums and voicing dissatisfaction and disfavor with mandatory minimums).

176. Freed, *supra* note 43, at 1722.

177. *Id.* at 1686.

the tendency to follow their conscience is strong.¹⁷⁸ As no one can ever be excused from doing what he or she believes to be just, the strength of this tendency must be maintained. But, the hidden manipulation that occurs behind sentencing thwarts the purposes of mandatory minimums — to eliminate uncertainty and unwarranted disparity and to bring about “truth in sentencing.”¹⁷⁹ All twelve circuit courts of appeals have issued resolutions urging Congress to “ . . . reconsider the wisdom of all mandatory minimum sentencing statutes, and to establish such alternate policy as the Congress deems appropriate in order to retain some degree of flexibility in the criminal sentencing process.”¹⁸⁰

Perhaps one of the strongest arguments against mandatory minimums is that the majority of the statutes are simply not used. By 1991, approximately 100 federal mandatory minimum provisions within 60 different criminal statutes existed.¹⁸¹ Only four statutes involving drug and weapons violations accounted for approximately 94% of the cases.¹⁸² Mandatory sentences cannot have a deterrent effect or incapacitate offenders if they represent only empty threats.

The experience in some states with mandatory minimums has not differed greatly from the circumvention and manipulation present in the federal system. For example, back in the 1970s, the police in Boston avoided the usage of a statute calling for mandatory one-year sentences for offenders convicted of carrying a gun.¹⁸³ Instead of arresting offenders for this offense, the police instead increased the number of weapon seizures without arrests by 120% between 1974 and 1976.¹⁸⁴ In New York, both police and prosecutors avoided application of the Rockefeller Drug Laws by charging offenders with other statutes carrying lesser penalties.¹⁸⁵ A study found that drug felony arrests, indictment rates and conviction rates all declined after the law was

178. *Id.*

179. U.S.S.G., *supra* note 137, Ch.1, pt. 3 (policy statement); MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 18. “Truth in sentencing” means that sentences imposed are those that are actually served. The elimination of parole from the federal system was an attempt to remove the need for judges to guess what the Parole Commission would do, i.e. release a defendant early, etc.

180. MANDATORY MINIMUM PENALTIES REPORT, Appendix G, *supra* note 7, at G-4.

181. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 9.

182. *Id.* at 10.

183. Michael Tonry, *Mandatory Penalties*, 16 CRIME AND JUSTICE 243, 252 (1992).

184. *Id.*

185. *Id.* at 257.

effectuated.¹⁸⁶ Despite the fact that many state sentencers and police forces avoid the application of mandatory minimums, other states regularly employ those statutes to combat crime, and have increased the number of mandatory minimum statutes in their criminal codes.¹⁸⁷ Some states, California, Illinois and Indiana for example, continue to employ broad determinate sentencing schemes, but this group of states is continually decreasing in number.¹⁸⁸

States that have chosen to implement guideline sentencing systems have almost uniformly moved away from determinate sentencing and mandatory minimums, in favor of more discretionary systems.¹⁸⁹ When faced with decisions on sentencing reform back in 1981, Washington opted for a guideline system, and used three mandatory minimum statutes only as starting points for proportionately scaling the remaining offenses.¹⁹⁰ Pennsylvania also decided against mandatory minimums, and during a statewide sentencing conference in 1977 concluded that mandatory sentencing was a poor choice to reform sentencing because: "(1) it created blatant unfairness by treating diverse offenders equally; (2) its provisions would be circumvented by plea bargaining and therefore make sentencing decisions less vis-

186. *Id.* This effect was canceled out, however, because those convicted were more likely to be imprisoned, and the average length of the term imprisonment increased. *Id.* Judges in Detroit, Michigan also avoided applying a statute that sentenced persons convicted of possessing a firearm to two years in prison. The judges either acquitted the offenders of the gun charge or by decreasing the sentence they would otherwise impose by two years to offset the mandatory term. *Id.* at 253.

187. *Id.* at 251. Florida and Arizona are two such states.

188. See Pub. Act. No. 80-1099, 1977 Ill. Laws 3264-3318 (codified throughout Uniform Code of Corrections ILL. REV. STAT. ch. 38, §§ 1001-1008)(1983)); and Uniform Determinate Sentencing Act, CAL. PENAL CODE § 1170 (a)(1) (West 1985). The number of states switching to a guideline system has continually increased since 1979.

189. These "guideline" states have established sentencing commissions, a body of experts, to promulgate a structured and guided process for sentencing, which are mandatory in the sense that a sentencer must consult the guidelines when sentencing. These systems preserve some discretion to the sentencer to adjust a sentence, either upwards or downwards, if the circumstances of the case merit such an adjustment. See *infra* notes 198-224 and accompanying text for a more thorough discussion of the development of sentencing guidelines.

190. David L. Fallen, *The Evolution of Good Intentions: A Summary of Washington State's Sentencing Reform*, 6 FED. SENTENCING REP. 147 (1993). Washington established mandatory terms as follows: twenty years for first degree murder, five years for first degree assault, and three years for first degree rape. The punishments for the remaining offenses were then ranked according to their seriousness and sentence lengths for those offenses were scaled around the mandatory minimums.

ible; and (3) they would increase prison populations."¹⁹¹ For these reasons, Pennsylvania rejected mandatory minimum sentencing.

Prison overcrowding was the impetus behind Kansas' rejection of mandatory minimums and "get-tough-on-crime" sentencing.¹⁹² In the early to mid 1980s, bills introducing a series of mandatory minimums failed to get past even the proposal stage in the legislature. Wisconsin also flirted with the notion of implementing determinate, mandatory sentencing during the late 1970s, based to some extent on California's system.¹⁹³ By the early 80s, however, the Special Committee on Determinate Sentencing, which had been established to study California's system, had instead begun the process for drafting guidelines based on the Minnesota model.¹⁹⁴ Mandatory minimums also fell into disfavor in Ohio and the legislature repealed most of the statutes prescribing a mandatory sentence.¹⁹⁵ In the mandatory minimums retained, the legislature gave the judges discretion to choose the appropriate sentence within the sentencing ranges.¹⁹⁶ In this way, the mandatory terms required by the statutes were made to fit within the guideline structure. Despite the limited use of mandatory minimums retained by the guideline states, and the states such as California which use determinate sentencing throughout the system, mandatory minimums have been phased out in many areas in which they previously were the most important sentencing tool.

E. *Mandatory minimums are inconsistent with guideline sentencing*

Perhaps the most confusing aspect surrounding the proliferation of mandatory minimums is the inherent inconsistency between the sentencing schemes which Congress has chosen to co-exist. On the one hand, Congress has sought to eliminate unwarranted disparity in sentencing by creating a commission of experts to solicit information on all aspects of sentencing, from a wide variety of sources, and to create a system of sentencing

191. John H. Kramer and Cynthia Kempinen, *History of Pennsylvania Sentencing Reform*, 6 FED. SENTENCING REP. 152 (1993).

192. Gottlieb, *supra* note 157, at 158.

193. Sandra Shane-DuBow, *Hybrid Guidelines: The Wisconsin Experience*, 6 FED. SENTENCING REP. 162, 164 (1993).

194. *Id.*

195. Fritz Rauschenberg, *Sentencing Reform Proposals in Ohio*, 6 FED. SENTENCING REP. 166, 167 (1993).

196. *Id.*

guidelines.¹⁹⁷ Congress entrusted this Commission to promulgate the guidelines, and gave them the authority to refine and revise those guidelines when necessary. Yet, despite this apparent commitment to transfer sentencing decisions to this body of experts, and the desire to preserve some discretion and flexibility for the sentencer, Congress enacted, and is still enacting, mandatory minimums. Mandatory minimums are directly at odds, both in practice as well as ideologically, with sentencing guidelines. It is difficult, if not impossible, to reconcile these two very different and contradictory approaches to sentencing.

V. SENTENCING GUIDELINES: AN ALTERNATE APPROACH TO SENTENCING REFORM

To temper the deficiencies in mandatory minimum statutes and to impose some constraints on fluctuations in discretionary sentencing, Congress enacted the Sentencing Reform Act of 1984.¹⁹⁸ This legislation created a Sentencing Commission, which had as its task the establishment of guidelines to assist judges in a modified and limited exercise of discretionary sentencing.¹⁹⁹ The Commission was organized as an independent, non-partisan body consisting of seven voting members, appointed by the President and confirmed by the Senate, and two non-voting ex-officio members.²⁰⁰

The Commission had three primary objectives: (1) to create certainty and honesty in sentencing; (2) to provide uniformity in sentencing for similarly situated defendants; and (3) to link punishment with culpability.²⁰¹ It began the task of promulgating sentencing guidelines with an analysis of past cases, specifically focusing on which offense and offender characteristics judges had used to determine a sentence.²⁰² The proposals went to Congress in early 1987, and following the statutorily mandated six month period of review, they became effective on November 1, 1987.²⁰³

197. This commission was established via the Sentencing Reform Act of 1984, which established the United States Sentencing Commission, a body of seven members made up of both judges, prosecutors, and others involved in sentencing. See *infra* notes 198-205 and accompanying text.

198. See generally, 28 U.S.C. §§ 991-998 (1988).

199. *Id.*

200. Weigel, *supra* note 164, at 85; see also MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 19.

201. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 18.

202. *Id.* at 19.

203. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6 (1988).

Sentencing guidelines and mandatory minimum statutes were meant to address many of the same problems, but the guidelines employed a different approach. The guidelines were designed to structure the sentencing process to avoid a complete abdication of judicial discretion and to enable consideration of the circumstances particular to an individual case. Congress believed that the guideline system could structure the decision making process and could clearly outline the relevant factors to be considered, thereby reducing disparity and uncertainty.²⁰⁴ The result theoretically would be the most just and proportionate sentence possible.²⁰⁵

The guidelines provided judges with substantially limited discretion in determining a sentence.²⁰⁶ The sentence still could be adjusted when unusual circumstances existed,²⁰⁷ but all departures were then subject to appellate review.²⁰⁸ This was a compromise between a "real offense" system and a "charge offense" system. Real offense sentencing is a method by which the length of a sentence is based not only on the crime or crimes for which a defendant has been convicted, but also for alleged crimes which relate to the offense of conviction. Essentially all available information about a defendant is properly considerable by a sentencer. Charge offense systems permit the sentencer to consider only evidence relating to the offense of conviction. Virtually no aggravating or mitigating factors are considered. The federal guidelines are a hybrid between these two systems.²⁰⁹ By structuring sentencing this way, the unique characteristics of an offender are highlighted and treated accordingly.

In practice, the federal guideline system is much more "mandatory" than a general set of suggestions. It represents a detailed and specific seven step process.

204. *Id.* at 5. See also, U.S.S.G., *supra* note 137, Ch.1, Pt.A, intro. comment, at 1.2.

205. Bruce M. Selya and Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 5 (1991). Apparently, the states also acknowledge the merits of sentencing guidelines, as evidenced by the 17 states which currently have operative guidelines, and by the five other states which have established sentencing commissions. See Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 174 (1995).

206. Breyer, *supra* note 203, at 8-9.

207. See, e.g., U.S.S.G., *supra* note 137, at §§ 5H1.1-5H1.10 (lists factors not ordinarily relevant in departure decisions). See also *id.* at §§ 5K2.1-5K2.15 (for a non-exhaustive list of factors that provide a proper basis for departure).

208. Weigel, *supra* note 164, at 102. See also Selya and Kipp, *supra* note 205, at 2.

209. Selya and Kipp, *supra* note 205, at 9-10.

1. Look up the statute of conviction in the statutory index.²¹⁰
2. Find the "base offense level" for the offense.²¹¹
3. Add "specific offense characteristics" for value of goods taken, weapons used, incidental crimes committed and the like.²¹²
4. Determine if any "adjustments" to the sentence are to be made. Among others, these include harming victims of the crime, the offender's role in the offense, and efforts to obstruct justice.²¹³
5. Calculate a criminal history score based on past convictions, if any.²¹⁴
6. Refer to a sentencing table in the guidelines and, using the offense level score and the criminal history score, arrive at the appropriate sentencing range.²¹⁵
7. Impose the Guideline sentence or in the presence of unusual factors, depart from the guideline range and impose a non-Guideline sentence.

210. The statutory index contains a list of all federal criminal statutes by their federal citation. A corresponding guideline section is listed for each offense. U.S.S.G., *supra* note 137, at Appendix A.

211. The "base offense level" is the sentencing commission's numerical assessment of the seriousness of the offense of conviction. For example the base offense level of first degree murder is 43. This number is then to be used within the grid system. *Id.* at § 2A1.1.

212. Specific Offense Characteristics vary from offense to offense and include those factors which are common attributes of that offense. These factors, when present, establish the seriousness of the offense and either increase or decrease the base offense level. *See generally id.*

213. Adjustments are found in a separate chapter of the guidelines and differ from specific offense characteristics in that they are applicable to all offenses. There are victim-related adjustments and adjustments for the role the offender played in the offense, any obstruction of justice, increases for multiple count convictions, and decreases for acceptance of responsibility. *Id.* at Chapter Three.

214. A criminal history score is to be calculated by totaling prior convictions. Different convictions are assigned different scores. For example, a prior sentence of imprisonment exceeding one year and one month increases the criminal history score by three points, whereas a prior sentence of at least sixty days but less than one year and one month requires two points to be added. The result of this process is a score that is used in the grid system to determine the applicable sentencing range. *Id.* at Chapter Four.

215. The criminal history categories are arranged horizontally across the top of the sentencing grid, and the offense levels run vertically down the side of the grid. U.S.S.G., *supra* note 137, Chapter Five. The range itself is the product of substantial and extensive research of past cases and sentence patterns. The amounts were carefully considered and structured for maximum effectiveness, and sought to create just and proportionate sentences which met the needs of both the individual and society. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, chapter 3.

An example of the application of the federal guidelines is as follows. Consider an individual who has been convicted of burglarizing a private residence. The offender was employed by the household to take care of two small children. There was only one occupant in the residence at the time of the offense. The offender used her key to the house to get in, and physically restrained the one occupant by tying him to a chair. The offender brandished, but did not use, a firearm. The total amount of goods taken was \$8000, and this amount included a firearm which was owned by and registered to the occupants. The offender has two prior convictions for violations carrying penalties of at least 60 days in prison.

Burglary of a residence has a base offense level of 17.²¹⁶ Various specific offense characteristics are listed which can affect the base offense level. Here, the base offense level is increased by one level because the financial loss exceeded \$2500, but was less than \$10,000. There is a one level increase for the firearm taken, and a two level increase because a dangerous weapon was possessed by the offender. This brings the base offense level up to 21. The sentencer must then determine whether any adjustments are to be made to the sentence.

For the restraint of a victim, the base offense level is increased by two levels. Other increases for crimes involving a vulnerable or official victim are not applicable. The offender's role in the offense must also be considered, and the abuse of trust provision increases the base offense level by two more points.²¹⁷ The offender was employed by the household and entrusted with the care and safety of the occupant's children, and the offender abused her position of trust by gaining access to the house with the key she was given to help her perform her duties. The base offense level is now 25. With these adjustments made, the sentencer must determine the offender's criminal history.

The offender is assigned two criminal history points for every prior sentence of imprisonment of at least sixty days. In the above hypothetical, the offender has two such prior convictions, which puts her in the second criminal history category. With a base offense level of 25 and a criminal history score of 4, the applicable guideline range is between 84 and 105 months.

216. U.S.S.G., *supra* note 137, at § 2B2.1 This offense level is the starting point for determining the applicable guideline range. Adjustments for aggravating and mitigating factors either decrease or increase this base level.

217. *Id.* at § 3B1.3.

While this procedure does usurp much of the discretion judges previously had been free to exercise, the departure provisions allow for some consideration of other factors, (aside from specific offense characteristics and criminal history), when fashioning a sentence.²¹⁸ In doing so, the court must first decide whether or not the Commission, when promulgating the guidelines, adequately considered the kind or degree of circumstances in the case at hand.²¹⁹ This determination is required irrespective of whether those circumstances are aggravating or mitigating.²²⁰ The court, moreover, may make reference only to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.²²¹

The Commission recognized that it may not have created the perfect set of guidelines. It only attempted to "establish sentencing policies and practices for the Federal criminal justice system that ' . . . reflect, to the extent practicable, advancements in knowledge of human behavior as it relates to the criminal justice process.' "²²² A system was contemplated that would evolve and adapt to changes in the needs of the penal system.²²³ An amendment process therefore permits the addition, modification or removal of guidelines, helping to ensure that they remain current and to improve and refine the sentencing process.²²⁴

VI. A COMPARISON OF STATE AND FEDERAL GUIDELINES

It would be a mistake to assume that the federal sentencing guidelines were based on the state models which had been implemented almost five years earlier. Significant differences exist between the state and federal systems, and each have met with different degrees of success and failure. In general, however,

218. *Id.* There are, however, several factors which the commission has specified can not be considered as grounds for departure, even if in an atypical case. For example, the offender's economic status, race, sex or religion can never be considered. Nor can the offender's age, education or vocation, or mental and emotional conditions. *Id.* at § 5H1.4.

219. *Id.* at § 5K2.0.

220. The possibility for an "adequacy" determination is often ignored by the courts, which only serves to continue the application of guidelines that fail to meet the needs of sentencing. Freed, *supra* note 43, at 1695.

221. Selya and Kipp, *supra* note 205, at 11.

222. Freed, *supra* note 43, at 1690.

223. Breyer, *supra* note 203, at 7. Congress intended the Commission to continually revise and evaluate the guidelines as new data is obtained or sentencing policies change.

224. See generally, William W. Wilkins, Jr. and John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63 (1993).

most proponents of guideline systems concede that the state systems have met with far greater success, and have accomplished more of their initial goals, than the federal guidelines.²²⁵ In fact, Texas specifically decided *not* to develop guidelines that were modeled after the federal guidelines.²²⁶

The main differences between state and federal systems can be summarized as follows: (1) state guidelines employ more of a "real offense" sentencing approach, whereas the federal system is a hybrid between real and charge offense sentencing;²²⁷ (2) state guidelines permit sentencers to consider substantially more aggravating and mitigating factors when sentencing;²²⁸ (3) states often provide more opportunity and tolerance for departures than is present in the federal system;²²⁹ (4) the state sentencing commissions all serve as the state's principal forum for sentencing policy proposals;²³⁰ (5) many state systems tie sentencing policy to available and/or foreseeable prison capacity;²³¹ and (6) state frequently use intermediate sanctions as alternatives to incarceration.²³² The sentencing guidelines implemented in Minnesota, Washington, Pennsylvania, and Oregon have been considered among the most successful among the state models, and for this reason serve as useful examples of the differences between state and federal systems.

A. State guidelines and "real offense" sentencing

The federal guidelines are unique in that they are based on "actual offense behavior" and "relevant conduct," as opposed to the offense of conviction. This method of sentencing is a hybrid between "real offense sentencing," which sentences on the basis of all identifiable conduct (that the prosecutor can prove in court),²³³ and "charge offense sentencing," which overlooks that

225. See generally, Tonry, *supra* notes 31 and 183. See also, Frase, *supra* note 205 and *infra* note 227.

226. Kay A. Knapp and Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 680 n.2 (1992).

227. Breyer, *supra* note 203. See also, Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 6 FED. SENTENCING REP. 124-125 (1993).

228. *Id.*

229. Tonry, *supra* note 31, at 175.

230. *Id.* at 173.

231. *Id.* at 171.

232. Frase, *supra* note 227, at 126.

233. The standard of proof for the sentencing hearing is by a preponderance of the evidence. See Deborah Young, *Factfinding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 318-322 (1994).

conduct which does not constitute a statutory element of an offense. The first element of real offense sentencing, "actual offense behavior," requires a sentencer to consider alleged crimes of which the offender was acquitted or never charged. Thus, if a prosecutor charged a defendant with rape and kidnapping, but the rape charge was later dropped, the fact that the defendant was charged with rape would be a factor which the sentencer must consider.

The other component of real offense sentencing, "relevant conduct," is an extremely limited set of factors which may be considered by the judge when sentencing, and involve considerations of things like the amount of drugs in the offense or the use of a weapon — factors which often make up the elements of the offense.²³⁴ Real offense sentencing was specifically chosen by the Commission to prevent prosecutors from conducting a mini proportionality review — dismissing charges to offenses carried overly harsh penalties, (given their assessment of the crime and the offender), and instead charging offenses with a more "appropriate" sentence length. This goal has not been reached, however, insofar as prosecutors are able to "swallow the gun" and choose not to present evidence to support the presence of aggravating factors.²³⁵

The state guideline systems base sentences on the conviction offense and the defendant's conviction record.²³⁶ Non-convic-

234. For example, for the offense of aggravated assault, if a firearm was discharged, the base offense level is increased by five levels. U.S.S.G., *supra* note 137, at § 2A2.2(b)(2)(A). In *United States v. Galloway*, 976 F.2d. 414 (8th Cir. 1992), the court held that it was not unconstitutional to consider relevant conduct when sentencing. Relevant conduct is defined in the guidelines as:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charges as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense.

U.S.S.G., *supra* note 137, at § 1B1.3(a)(2). Additionally, offenses committed as part of the same course of conduct or common scheme or plan as the offense of the conviction, all harm that resulted from the acts mentioned above, and all harm that was the object of the acts or omissions is also "relevant conduct." *Id.* at § 1B1.3(a)(2)(3) and (4).

235. Knapp & Hauptly, *supra* note 226, at 686.

236. Frase, *supra* note 227, at 124-125.

tion offense characteristics do play some role, (i.e. weapon use, regardless of whether or not it was an element of the offense), but this role is significantly more narrow than with "real offense" sentencing. In this way, the prosecutor has less motivation to manipulate the facts and evidence of a case, as the charges brought were those specifically selected by or agreed to by the prosecutor. The prosecutor, in theory, brings the charge carrying a penalty that comports with the severity and nature of the offense committed.²³⁷ Thus, the prosecutor has less motivation to "swallow the gun" and is able to present all the evidence for the offense charged, while abiding by his or her ethical principles. State guidelines do not attempt to curb the discretion of prosecutors, with the exception of Washington, which has created voluntary, non-binding prosecutorial guidelines.²³⁸

Federal guidelines also differ from state systems in that they employ a "base case" approach. This system assigns a "base offense level," which is the minimum point score for a given offense. Additional points are then either added or subtracted to take aggravating or mitigating factors into account. On the other hand, state systems are based on the "usual case." The state commissions consider each crime in the context of relevant policy goals, the culpability of the offender, and the nature of the offense. The commissions then arrive at a "usual" or typical case for each crime by also considering such factors as offender characteristics, situational factors, relationship between the victim and the offender, victim characteristics, type of harm and level of harm in the typical case.²³⁹ The state "usual case" rejects the idea of a "base" or "minimum" score for a given offense, and already incorporates many aggravating and mitigating factors into the guideline range.

B. *Factors considered when sentencing*

Another important difference between the federal and state guidelines lies in what may be considered relevant conduct by the sentencer. The factors considered by the state when arriving at the "usual case" are substantially more broad than those considered by the federal commission when arriving at its "heart-land" cases.²⁴⁰ The result is that the "usual" case presents a much

237. In a perfect world, the crime that was actually committed would, if charged, result in exactly the proper punishment in terms of mode and length, in light of a proportionality review.

238. Frase, *supra* note 227, at 125.

239. Knapp & Hauptly, *supra* note 226, at 683.

240. *Id.* at 683-87.

more complete picture of the offender and the offense, and the individual judges have a great deal more flexibility in assessing the offender's culpability. Mandatory minimums and other determinate sentencing codes usually only include elements such as use of a weapon, serious physical injury, aid by an accomplice, or other similar factors.²⁴¹ The federal guidelines are not much broader. State guidelines, on the other hand, tend to permit the sentencer to consider more conceptual factors such as those mentioned above.²⁴² Not surprisingly, the federal commission has expressly forbidden judges from considering most of the more conceptual factors such as the effect of the sentence on the defendant or his family, the offender's mental health or chemical dependence, and the age of the offender or the offender's background, including any sexual or emotional abuse. In this way, judges have no discretion to consider factors that "many judges believe to be ethically relevant to sentencing."²⁴³ It must be said, to the Commission's credit, that many of the "forbidden" factors were already considered by the commission when reaching the guideline ranges or determined to be inappropriate for consideration.

C. *Tolerance of departures*

There is also a greater tolerance for departures in the states by the courts of appeals. In Minnesota, Oregon, Pennsylvania and Washington, departure rates are generally low.²⁴⁴ This can be partly explained by the fact that states are able to consider many more factors which are "not ordinarily relevant" in the federal guidelines. Additionally, the state guidelines already consider these factors in arriving at the appropriate guideline range. The states vary in their tolerance for departures, but on the whole, appellate courts are more hesitant to reverse trial court's sentences. For example, in Pennsylvania, departures on substantive grounds, (improper sentence), are rarely reversed, and the guideline ranges tend to be very broad, thereby enabling sentencers somewhat broad discretion when sentencing.²⁴⁵ In Minnesota and Washington, however, guideline ranges are noticeably more narrow. In those states, reversal on substantive grounds is more common, though a sentencer's refusal to depart

241. *Id.*

242. *Id.* at 683.

243. Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 171 (1995).

244. *Id.*

245. *Id.* at 175.

is almost never reversed.²⁴⁶ In *State v. Kindem*,²⁴⁷ the Supreme Court of Minnesota stated that "[although] we do not intend to entirely close the door . . . it would be a rare case which would warrant reversal of the refusal to depart."

The opportunity for and tolerance of departures in the federal system is much more limited, although guideline issues are raised in about one half of all federal appeals. During 1994, there were more than 8,000 appeals on guideline issues, where before the guidelines, federal sentencing appeals were very rare.²⁴⁸ Approximately 59.5% of all federal criminal appeals involved the guidelines, and of those, 33.6% only involved guideline issues.²⁴⁹ From 1989-1993, there has also been a marked decrease in departures based on the judge's exercise of discretion (from 12.2% to 7.5% of all cases), while departures based on prosecutorial substantial assistance motions have increased from 5.8% to 17% of all cases.²⁵⁰ This average differs greatly among the circuits and districts,²⁵¹ but indicates that judicial discretion in federal sentencing is limited further by reversals on appeal.

D. *State commissions and statewide sentencing policy*

Still another major difference between state and federal guidelines is that the state sentencing commissions all serve as the state's principal forum for sentencing policy proposals. The result is that comprehensive, long term sentencing policy and goals originate with one body, creating greater consistency throughout the system and a more coherent body of law insofar as it originates from one source — the state sentencing commission. The federal guidelines, though promulgated by the United States Sentencing Commission, must meet with Congressional approval. Because each member of Congress may have his or her own agenda, consistency throughout the guidelines is impossible. Additionally, when one crime becomes the target of "law and

246. *Id.*

247. 313 N.W.2d 6, 7 (Minn. 1981).

248. Steven L. Chanenson, *Consistently Inconsistent: Circuit Rulings on the Guidelines in 1994*, 7 FED. SENTENCING REP. 224, 225 (1995) (citing a telephone interview with the Administrative Office of the U.S. Courts).

249. *Id.* However, departures are more frequently reversed on procedural grounds, such as the failure to state reasons. Tonry, *supra* note 243, at 175.

250. Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 184 (1995).

251. *Id.* at 184-185.

order sloganeering," Congress is usually quick to enact legislation carrying severe penalties to combat that offense.²⁵²

Though no commission is completely immune from the influences of the legislature, the state sentencing commissions are more insulated from their legislatures than their federal counterpart.²⁵³ The state commissions are able to insulate sentencing policy from the short term emotionalism that a particular crime may be generating at that point in time. Nevertheless, in response to the tough on crime politics of the 1990s, Minnesota and Washington did make "public safety" the primary factor in determining guideline ranges, and implemented harsher sentences for those targeted offenses.²⁵⁴ The difference then, between the state and federal commissions, is that the states are able to act as a short term buffer between the demand for harsher penalties and overall sentencing policy. "Political pressures and emotions tend to support increased penalties for currently topical crimes and to provide little support for comprehensive unemotional approaches to crime control policies. Where the political will exists to try to buffer sentencing policy from short-term emotions, the experience in states shows that commissions can provide that buffer — so long as the supportive political will survives."²⁵⁵

E. *Prison resources and sentencing policy*

Another way in which state commissions promulgate overall sentencing policy is by linking prison resources to that policy. Minnesota, Washington and Oregon have all experienced very

252. Tonry, *supra* note 31, at 175.

253. There are a few ways in which this is accomplished. State commissions often employ a broader range of individuals to make up the commission. For example, Washington has a nineteen member commission; the federal has seven full time members and two ex-officio members. Three members are ex-officio: the secretary of corrections, chair of the parole board, and the director of the Governor's budget office. Twelve other voting members are appointed by the Governor. The initial commission was made up of four superior court judges, two prosecuting attorneys, two defense attorneys, one chief law enforcement officer, and three citizens. Four legislators were then designated as non-voting members. Fallen, *supra* note 190, at 147. This broad mix of individuals ensures that all those interested in sentencing (save for the offender) has a voice in sentencing policy.

Nevertheless, Congress has also taken some steps to preserve the neutrality of the commission. No more than four commissioners can be from any one political party and the terms of the commissioners have been staggered so that any one president, who nominates the commissioners, cannot fill the commission with those favorable to his or her agenda.

254. Tonry, *supra* note 31, at 175.

255. Tonry, *supra* note 31, at 175-76.

positive results when sentencing ranges and lengths were tied to prison capacity.²⁵⁶ Even when a particular crime or class of offenses became subject to the demand for harsher penalties, if the sentence length for these offenses increased, there was a similar decrease in length for other, less politically charged offenses.²⁵⁷ Alternatively, if a perceived increase in needed prison resources became imminent, these facilities could be constructed or prison resources expanded to meet those projected needs. Minnesota and Washington confined their prison population to available capacity and maintained lower than average incarceration rate increases until legislative changes in the 1990s lengthened sentencing ranges for many offenses.²⁵⁸ In Oregon, prison population controls continues to keep overcrowding under control.²⁵⁹ Pennsylvania, North Carolina, Kansas and Texas have all considered, and some have implemented, policies of tying sentencing policy to correctional resources.²⁶⁰ Despite the fact that state commissions succumbed to political pressure to increase those penalties, the state efforts illustrate sound comprehensive and long-term planning as an approach to policy making.

Whether or not prison capacity should be tied to sentencing decisions begs the question: if prisons are full and none are to be built, should an egregious criminal be let go? This is, of course, not what Minnesota, Oregon and Washington have done. Instead, when capacity is reached, either more prisons are built or some non-violent offenders, or some of those non-violent offenders nearing the end of their sentences and suitable for release, are let go. Ultimately, it is a political question how Congress or the states should spend their tax dollars, but it is, at the very least, irresponsible for Congress to increase sentence lengths or mandatory minimum statutes without a thorough analysis of the financial effects of the prison population. Too often, there is simply no accountability with "tough on crime" politics. Unless the budget is correspondingly increased with those tough on

256. *Id.* at 176.

257. *Id.*

258. *Id.* at 175; Frase, *supra* note 227, at 227. For example, while the federal average in all districts was 17%, in the third circuit the average was 35%, the Eastern district of PA was 51%, while the tenth circuit was 10%. Miller, *supra* note 247, at 185.

259. Tonry, *supra* note 31, at 176.

260. Robin L. Lubitz, *Recent History of Sentencing Reform in North Carolina*, 6 FED. SENTENCING REP. 129 (1993); Kramer & Kempinen, *supra* note 191, at 155; Gottlieb, *supra* note 160, at 158.

crime measures, Congress will continue to make irresponsible decisions.

F. *Alternate sentences to incarceration*

In addition to connecting prison resources to guideline length, the states have instituted other methods of controlling the prison population, which the federal guidelines have virtually ignored. State guidelines often provide for sentences other than incarceration.²⁶¹ Not only does this afford a sentencer the flexibility to sentence an offender to a lighter sentence in an appropriate case, but it controls prison overcrowding by providing meaningful alternatives to incarceration. Oregon has implemented a system of punishment units.²⁶² If 120 units is the presumptive sentence, the judge has discretion to impose any sentence which constitutes 120 units.²⁶³ If 2 months imprisonment is equal to 120 units, and 1,000 hours community service is also equivalent to 120 units, the judge would be free to consider the nature of the offense and the offender, and any potential future threat to society when sentencing.

One problem, however, with this approach is that it is very difficult for commissions or sentencers to reach a conclusion about exchange rates, i.e. what amount of community service is really equal to X days in prison. Washington specifics equivalent custodial and noncustodial penalties and authorizes judges to impose them in the alternative.²⁶⁴ In this respect, Washington has met with a problem similar to Oregon's when implementing these noncustodial penalties, specifically the difficulty of formulating a precise exchange rate.²⁶⁵ Moreover, because of the difficulty in making "equivalent" punishments as subjectively burdensome as incarceration, the use of these exchange rates is limited to minor offenses and offenders.²⁶⁶ Though states have met with various hurdles in implementing these noncustodial penalties, they go much farther than the federal guidelines in

261. For example, Wisconsin, in its objectives for its sentencing guidelines, states that probation and non-incarcerative sentences are to be preferred to imprisonment in an appropriate case. See Shane-DuBow, *supra* note 193, at 163.

262. Tonry, *supra* note 31, at 181.

263. *Id.*

264. Tonry, *supra* note 240, at 182.

265. *Id.*

266. *Id.* at 183. It is impossible to say, for example, that any amount of community service hours would be the equivalent of life imprisonment. It is simply less burdensome than many of the lengthier terms of imprisonment.

three respects: (1) they attempt to control prison populations;²⁶⁷ (2) they recognize that certain minor offenses and offenders cannot truly receive a proportionate punishment if it involves imprisonment for any length of time; and (3) they recognize that viable alternatives to incarceration exist and that attempts should be made to explore those options.

Although the federal guidelines were created long after the first state guidelines appeared, very little of the state systems and methods entered into the final draft of the federal guidelines. The merits of the decision not to base the federal guidelines on the state models continue to dissipate as state guidelines and commissions enjoy a stability and acceptance that the federal guidelines have yet to experience. There is considerable internal dissension within the United States Sentencing Commission, with a great deal of political infighting and conflict.²⁶⁸ State commissions, on the other hand, tend towards stability. The director of the Pennsylvania commission was appointed in 1978 and remained in that position until early 1993.²⁶⁹ Other state commissions have promoted their directors from within, and some started as initial research directors when the guidelines were still in their initiatory, unimplemented stage.²⁷⁰ Perhaps more importantly, "[i]n no state is there heated debate about the guidelines' desirability and legitimacy and in no state is there organized opposition to them."²⁷¹ This experience is markedly different than with the federal guidelines, and illustrates that the differences that exist between the state and federal guidelines are more than trivial or inconsequential. Those distinctions have made the difference between guidelines that are respected and followed by sentencers, and those that are highly criticized and often circumvented.

Indeed a final lesson to be learned from the states is the decrease in use of mandatory minimum statutes to combat crime. As the state guidelines become more successful, the need and the desirability of mandatory sentencing decreases. When a workable and logical guideline system is in place, the harsh sentences which are meted out by mandatory minimums are no longer necessary. The guidelines will adequately reflect the seri-

267. Minnesota policy dictated that prison capacity not exceed 95%. Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. OF L. & PUB. POL. 279, 330 (Spring, 1993).

268. Tonry, *supra* note 31, at 177.

269. *Id.* at 177.

270. *Id.*

271. *Id.* at 175-176.

ousness of the offense, and if not, the judge will have sufficient discretion to depart. Though the federal guidelines have their faults, and the U.S. Sentencing Commission could learn a great deal from state efforts, critics have voiced approval for the federal guidelines given the alternative — mandatory minimums.

VII. THE "RELATIVE" SUCCESS OF THE FEDERAL GUIDELINES

Though sentencing guidelines and mandatory minimums share similar goals, the federal guidelines have been better able to meet the objectives of Congress. The guidelines have succeeded in important ways: (1) they represent current notions of what constitutes appropriate punishment; (2) they preserve a limited power of discretion for judges; (3) they provide for greater individualization of sentences; and (4) they avoid many of the pitfalls of prosecutorial discretion.

Given the frequency with which penal policies and political agendas change, mandatory minimums often have embodied outdated concepts of punishment as well as the extreme impulses of society. By 1988, Congress had established mandatory minimum penalties for most drug offenses. The sentencing guidelines were not yet fully implemented, and as a result, when these mandatory minimums were enacted they were the only statutes which ensured that certain offenses received certain penalties. Additionally, in the latter half of the 80s, crack cocaine was a relatively new drug, thought to pose serious threats to society, and therefore there was strong political and societal pressure to enact severe penalties to deter possible offenders.

In recent years, the Sentencing Commission has criticized these outdated, "get tough on crime" policies and has recently suggested, in light of new information and studies on crack cocaine, that "... the most efficient and effective way for Congress to direct cocaine sentencing policy is through the established process of sentencing guidelines, rather than relying solely on a statutory distinction between the two forms of the same drug."²⁷² In April of 1995, the Sentencing Commission recommended that Congress reevaluate the penalty structures for offenses involving crack cocaine, in an effort to harmonize the mandatory statutes with the guidelines.²⁷³ The Commission,

272. 56 CRIM. L. REP. 2162 (1995).

273. *The Crack/Cocaine Penalty Ratio: Recommendations to Congress*, 7 FED. SENTENCING REP. 312 (1995). Currently, the statutes create a 100-1 quantity ration between the two forms of cocaine - crack and powder. A defendant receives a five year mandatory sentence for trafficking in 5 grams of crack or 500 grams of powder cocaine. *Id.*

finding the ratio between the two forms both arbitrary and unjustified, recommended that crack cocaine be treated the same way as other forms of cocaine, i.e. 500 grams of either crack or powder would result in five years mandatory imprisonment.²⁷⁴ On November 1, 1995, Congress, for the first time since the Commission's inception, expressly rejected the Commission's proposal to lower penalties for crack.²⁷⁵

Guidelines, as opposed to mandatory minimums, have been designed by the Commission to avoid becoming outdated in two ways. First, the amendment process affords the Commission the opportunity to modify existing guidelines or to enact new guidelines when their intended purposes are no longer being served.²⁷⁶ This element of flexibility is crucial to a system that has as its goal evolution and refinement of the process. The other way in which guidelines remain true to the system is the process of research and analysis used to create the sentencing grids. Congress alone defined the facets of mandatory minimums, whereas the Commission employed the aid of judges, prosecutors, defense attorneys and probation officers to create

274. Proposed Cocaine Penalty Adjustment Act of 1995, 7 FED. SENTENCING REP. 312 (1995).

275. *Cocaine Sentencing, Still Unjust*, N.Y. Times, Nov. 5, 1995 § 4, at 14. Congress had until November 1, 1995 to reject the proposal or it would become law. The proposal was rejected by both houses of Congress. Senator Orrin Hatch gave a statement before the U.S. Senate in which he outlined the reasoning behind the vote to reject the Commission's proposal. See *Cocaine Sentencing Policy*, Statement of Senator Orrin Hatch before the United States Senate (Nov. 2, 1995). At least one judge has felt the sting of his conscience when forced to imposed lengthier sentences in crack cocaine cases. *Judge is Forced to Lengthen Sentences for Crack*, N.Y. Times, Nov. 27, 1995, at B5. Judge Lyle Strom, an Eighth Circuit federal district court judge, was forced by the court of appeals to lengthen sentences imposed under the guidelines by 10 years, based solely on the fact that crack cocaine, as opposed to powder, was involved in the offense. *Id.* Strom stated that he had delayed resentencing the defendants in the hopes that Congress would adopt the Sentencing Commission's recommendation to abolish the 500-1 distinction between crack and powder cocaine. When sentencing, Strom apologized to the defendants, expressing his regret that the guidelines did not provide him with sufficient discretion to depart downwards. *Id.*

276. For another good example of mandatory minimums embodying outdated notions of appropriate punishment, and how sentencing commissions can provide a "buffer" see Parent, *supra* note 43, at 1786. An increase in the price of silver in Minnesota in 1979 had resulted in a rise in burglaries and theft of silver items. The public advocated harsh penalties for offenders, but the commission resisted enacted these penalties. If those mandatory penalties had been enacted, however, they would still be in the statutes, even though the price of silver has since stabilized. Thus, the penalties would no longer reflect the seriousness of the offense as measured by public perception.

sentencing parameters.²⁷⁷ Federal judges, in particular, appointed for life and immune to the pitfalls of answering to their constituencies, have been better able to make tough or unpopular choices without fear of election-dependent positions, like those of Congress.²⁷⁸ Additionally, judges possess what a majority of Congress does not — experience in sentencing. This experience enables judges to draw on the cases that have come before them to create appropriate sentencing policies. As the Commission itself enjoys an objectivity and a range of experience similar to the federal judiciary, the guidelines respond well to the actual needs of the system.

In addition, the guidelines are superior to mandatory minimums because they protect the interests of both the individual and society by preserving a limited version of judicial discretion. The Commission not only has developed relatively narrow ranges within which a judge is to sentence an offender, but it has also provided a limited opportunity for departure.²⁷⁹ The sentence inevitably is more equitable and fair, protecting the fundamental need of a criminal justice system to exact proportionate punishments.

Furthermore, guideline sentencing reduces disparity where mandatory minimums failed to. Instead of grouping defendants under a broad umbrella, the guidelines define offenses with greater specificity.²⁸⁰ This creates an element of protection for both the offender and the penal system. Additionally, should a particular statute fail to consider every possible exception or extenuating circumstance, the flexibility and malleability of the sentencing guidelines will permit a reasoned departure from the specified range, subject always to appellate review.²⁸¹

The guidelines achieve greater certainty insofar as the sentence received does not depend heavily on the prosecutor's charge.²⁸² With mandatory minimums, the sentence length depends solely on the charge pursued by the prosecutor. Since some prosecutors view these statutes as overly harsh, offenders were often charged with less serious crimes. Sentencing guidelines, on the other hand, apply a range to offenses, providing room for departure should the sentence still be too severe. The certainty of the guidelines, then, lies in the application of this

277. See MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 17.

278. Freed, *supra* note 43, at 1698.

279. Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines,"* 4 FED. SENTENCING REP. 129, 131 (1991).

280. Weigel, *supra* note 164, at 89-90.

281. Breyer, *supra* note 203, at 5-6.

282. Tonry, *supra* note 279, at 130.

definite range, as opposed to a specific sentence length. The end result is a sentence closely grounded in the defendant's actual conduct as opposed to the offense charged.

Proponents of the sentencing guidelines would argue that the success of the guidelines should not be qualified by the term "relative." The primary advocate of the sentencing guidelines is, not surprisingly, the Sentencing Commission, which in its report to the Congress on mandatory minimums, praised the success of the guidelines and their superiority to mandatory minimums.²⁸³ The Commission reported that the guidelines are more likely to achieve the goals most commonly cited in support of mandatory minimums and do so without bringing unwanted disparity and uncertainty to the system.²⁸⁴

A substantial body of case law also surrounds the sentencing guidelines, most notably *United States v. Mistretta*.²⁸⁵ In this case, the Supreme Court held that the sentencing guidelines were a valid and constitutional delegation of legislative power to the Sentencing Commission. The Court held that Congress had provided the Commission with a sufficiently specific and detailed process for promulgating the guidelines, and that there was no separation of powers violation because the whole power of one department was not exercised by the same hands which possess the whole power of another department.²⁸⁶ Far from endorsing the Guidelines, the *Mistretta* Court was asked only to rule on their Constitutional validity.

Lower Federal courts have sometimes been more supportive of the sentencing guidelines. In *United States v. Rivera*,²⁸⁷ for example, the court discussed the scope of the guidelines, and the appropriateness of the discretion reserved for judges under the guidelines. The court stated that:

Ultimately . . . the Guidelines cannot dictate how courts should sentence in . . . special, unusual, or other-than-ordinary circumstances. And that is how it should be . . . the very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in such cases, decided to depart, they will explain their departures. The courts of appeals, and the Sentencing Commission,

283. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at 27-35.

284. *Id.* at 14-16. These six goals are (1) to exact retribution/just deserts; (2) to deter and to promote certainty; (3) to incapacitate serious offenders; (4) to reduce disparity; (5) to induce co-operation from offenders; and (6) to induce guilty pleas.

285. 488 U.S. 361 (1989).

286. *Id.* at 374, 381.

287. 994 F.2d 942 (1st Cir. 1993).

will examine, and learn from those reasons. And, the resulting knowledge will help the Commission to change, to refine, and to improve the Guidelines themselves. That is the theory of partnership that the Guidelines embody.²⁸⁸

Though the guidelines often come under attack for violating the constitutional guarantee against cruel and unusual punishment, or as a breach of the Equal Protection or Due Process Clause, guidelines have just as frequently withstood these challenges.²⁸⁹

VIII. DEPARTURES AND APPELLATE REVIEW UNDER THE GUIDELINES

According to the guidelines, there are essentially four situations in which an appeal may properly be brought: (1) if the sentence was imposed in violation of a law;²⁹⁰ (2) if the sentence was based on an incorrect application of the guidelines;²⁹¹ (3) if the sentence was plainly unreasonable; and (4) if the sentencer authorized an upward departure,²⁹² or if the sentencer authorized a downward departure.²⁹³ If a departure has been made, the sentencer must state his or her reasons for that departure, and generally, that departure will be upheld if it was "reasonable."²⁹⁴ Both upward and downward departures fall into one of two categories: (1) guided or motion-dependent departures (for substantial assistance) or (2) spontaneous departures pursuant to § 5K2 (for aggravating or mitigating factors not adequately considered by the Commission when creating the guidelines).²⁹⁵

Certain restrictions apply both on the judge's ability to depart, and a parties' ability to bring an appeal. A discretionary decision not to depart is never appealable. Once a departure has been granted, however, a defendant cannot appeal a favorable departure. For example, a defendant who has received a downward departure cannot ask the sentencer for a reduction greater than that which he has received. Moreover, a judge may not

288. *Id.* at 949-950.

289. See *supra* notes 76-141 for *Solem*, *Rummel*, *Harmelin* and *Stephens*. See also *United States v. Williams*, 746 F. Supp. 1076 (Utah 1990) (in which the defendants challenged the sentencing guidelines as violating the Due Process Clause of the Fourteenth Amendment to the Constitution).

290. 18 U.S.C. § 3742(e)(1)&(2) (Supp. 1994).

291. 18 U.S.C. § 3742(e)(3) or (4) (Supp. 1994).

292. 18 U.S.C. § 3742(a)(3) (Supp. 1994) (upward departures are appealable by the defendant).

293. 18 U.S.C. § 3742(b)(3) (Supp. 1994) (downward departures are appealable by the government).

294. 18 U.S.C. § 3553(c) (1988).

295. 18 U.S.C. § 3553(b) (1988).

depart both upwards and downwards and net the result. A departure can only go one way.

When reviewing a departure, appellate courts focus on the reasonableness of the departure, whether the basis for the departure was a factor that was not adequately considered by the Commission, and whether a departure for that reason should result, given the facts of a case. The First Circuit has developed a tripartite test for reviewing departures, taken from *United States v. Diaz-Villafane*.²⁹⁶ Under this test, the court's inquiry is (1) whether the circumstances in the instant case are sufficiently unusual to warrant a departure (i.e. of a kind or to a degree); (2) whether the circumstances, if a proper basis for departure, actually exist in the case; and (3) whether the direction and degree of the departure were reasonable. In general, the circuits employ some variation of this test — some making it more restrictive and some more broad.²⁹⁷

In practice, finding a circumstance that the Commission has completely failed to consider, either in kind or degree, has proven to be a difficult hurdle to overcome. There exists a substantial body of commentary and policy statements issued by the Commission in which almost every conceivable aggravating or mitigating circumstance has at least been discussed. In addition, the Commission has expressly forbidden the consideration of certain factors such as chemical use, race, sex, national origin, creed, religion, socio-economic status, community ties, age, and familial responsibilities.²⁹⁸ And among the grounds listed as proper circumstances to consider, none involve the personal characteristics or circumstances of the defendant, which severely restricts both the discretion of the sentencer and the review undertaken by the appellate courts. It also places the focus of the departure inquiry on the offense, as opposed to the offender, as most of the grounds for departure which are condoned by the Commission involve facts related to the offense and its commission. Thus, though the Commission states that the guidelines

296. 874 F.2d 43 (1st Cir. 1989).

297. *Id.* at 49. *E.g.*, the Fourth Circuit adds an abuse of discretion standard to the analysis. Selya & Kipp, *supra* note 205, at 20. The Ninth Circuit previously employed a five step test, which required a de novo inquiry by the court as to whether the district court adequately identified the aggravating or mitigating circumstances in the case. *Id.* at 21. This five step test was later rejected in *United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991) (en banc), which reduced the analysis to three steps similar to those articulated in *Diaz-Villafane*. *Id.*

298. U.S.S.G., *supra* note 137, at § 5H1.1- 5H1.12.

permit opportunity for departure and review, in reality this opportunity is quite restricted.

Though generally more prone to uphold departures upon appellate review, the states fall within a broad spectrum of viewpoints regarding departures. Most state courts of appeals are more tolerant of departures; however differences do exist among the circuits, and some substantially limit the ability of a district court to depart.

In the First Circuit, between 1987 and 1992, appellate courts reversed downward departures in nine cases and affirmed none.²⁹⁹ The court, however, in *United States v. Rivera*,³⁰⁰ held that appellate courts should review a district court's determination of unusualness with full awareness of and respect for the trier's superior feel for the case.³⁰¹ Then-Chief-Judge Stephen Breyer's analysis of the case suggested that district courts had greater discretion to depart, but *Rivera's* deference to district courts was limited to cases where a defendant's, (1) personal characteristics, (2) life circumstances, or (3) criminal conduct were never considered by the U.S. Sentencing Commission when creating the guidelines.³⁰² As it is very difficult to find such unusual circumstances, *Rivera* has not led to more departures, but rather a stricter reading of the guidelines. Additionally, there are several other cases which limit both downward and upward departures, indicating that in the First Circuit, the opportunity to depart is quite restricted.

The Second Circuit, on the other hand, is typically deferential on appeal. The court has upheld the guideline policy of using acquitted conduct to increase the guideline range, though some judges have voiced disapproval of this requirement.³⁰³ Deciding another important issue, the court in *United States v. Gigante*,³⁰⁴ overturned a conviction which based a substantial sen-

299. Michael J. Malinowski, *The First Circuit: District Courts May Decide What is "Unusual" But Will They Take the Hint?*, 6 FED. SENTENCING REP. 279, 281 (1994).

300. 994 F.2d 942, 952 (1st Cir. 1993).

301. *Id.* at 950 (quoting *United States v. Diaz-Villafane*, 874 F.2d 50 (1989)).

302. Breyer's comments in the case seem to suggest that the district courts have a measurable degree of autonomy when deciding whether or not to depart, but he then limits that discretion to cases where "the question on review is simply whether or not the allegedly special circumstances are of the 'kind' that the Guidelines, *in principle*, permit the sentencing court to consider at all." *Id.* at 950-51. This is a significant restriction on the ability of a district court to depart.

303. *United States v. Frias*, 39 F.3d 391 (2d Cir. 1994).

304. 39 F.3d 42 (2d Cir. 1994).

tencing enhancement for relevant conduct on a preponderance of the evidence. The court held that the correct standard of proof was applied, but that there was a constitutional requirement of "... rough proportionality between the weight of the evidence of the uncharged conduct and the degree of adjustment or departure."³⁰⁵ The Second Circuit, though for the most part deferential to the trial court, has also limited relevant conduct to acts that were part of the "... same course of common scheme or plan as the offense of conviction."³⁰⁶ This implies that some connection, and more than just a tenuous one, must exist between the conduct and the offense of conviction in order for that conduct to form the basis of a departure. Overall, however, reversals based on a mis-assessment of relevant conduct are rare.

The Third Circuit strictly limits downward departures but recent decisions have created new rules permitting discretionary departures in selected cases. The appellate courts engage in a very fact specific review of downward departures, and the question on appeal has become whether the facts of a case merit departure, and whether a district court chose the correct rule under which to depart.³⁰⁷ Noteworthy, however, is the decision in *United States v. Shoupe*,³⁰⁸ in which the court allowed a downward departure in the base offense level where the career offender (or three-strikes) provision overrepresented the seriousness of the defendant's criminal history.³⁰⁹

The Fourth Circuit tends to permit departures on grounds that are specifically identified by Congress, but it is unlikely to affirm a departure on grounds that a factor was not adequately considered by the Sentencing Commission.³¹⁰ The Fifth Circuit takes a very permissive view of departures and allows a district court to consider a wide variety of information when departing. In *United States v. Ashburn*,³¹¹ the court held that the district court had adequately justified its departure, even though it did not spe-

305. *Id.* at 47.

306. See Andrew H. Shapiro, *Guideline Development in the Second Circuit: A Willingness to Make Law*, 7 FED. SENTENCING REP. 230 (1995) (discussing *United States v. Fermin*, 32 F.3d 674 (2d Cir. 1994) and *United States v. Tapia-Ortiz*, 23 F.3d 738, (2d Cir. 1994)).

307. Quincy M. Crawford, *The Third Circuit: Rules Versus Discretion*, 7 FED. SENTENCING REP. 234 (1995).

308. 35 F.3d 835 (3d Cir. 1994).

309. *Id.* at 840. The dissent pointed out that the language of § 4A1.3 only discussed departures in the criminal history categories and not the base offense level.

310. Mary M. French, *The Forth Circuit: Adding to Inter-Circuit Conflicts*, 7 FED. SENTENCING REP. 237 (1995).

311. 38 F.3d 803 (5th Cir. 1994).

cifically state reasons for each increase in criminal history category. The general statement of departure was held sufficient to allow the court to increase Ashburn's criminal history category several levels.

The Seventh Circuit held that when the government moves for a downward departure based on substantial assistance, judges could depart below the mandatory minimum sentences.³¹² This was consistent with the Second, Fifth and Ninth Circuits.³¹³ In another important case, the court upheld a downward departure where the defendant's family ties and responsibilities or community ties ". . . are so unusual that they may be characterized as extraordinary."³¹⁴ Though these factors are "not ordinarily relevant" according to the sentencing Commission, this case provides defendants with room to secure a downward departure in unusual cases.

The Eighth Circuit has held in *United States v. Hammer*,³¹⁵ that if the defendant challenges any facts in the presentence report, the sentencing court must provide the defendant with an evidentiary hearing, or specifically state that the court is not relying on such facts in sentencing.³¹⁶ The Ninth Circuit court of appeals reversed the downward departures in *United States v. Koon*,³¹⁷ which involved the officers who were charged with beating Rodney King. Taking a rigid and mechanistic approach to the guidelines, the court upheld the validity of combining factors to arrive at a mitigating circumstance, but also held that the court could not consider (alone or in combination) factors that should not be part of the consideration according to the guidelines.³¹⁸ The court of appeals therefore ordered a new sentencing hearing for the officers.³¹⁹ Upon review by the Supreme

312. *United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994).

313. *Id.* See also Matthew C. Crowl and Barry Rand Elder, *The Seventh Circuit: Innovative Interpretations Enhance the Discretion of the District Court*, 7 FED. SENTENCING REP. 246, 249 (1995).

314. *United States v. Canoy*, 38 F.3d 893, 906 (7th Cir. 1994).

315. 3 F.3d 266 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1121 (1994).

316. *Id.* at 272-3.

317. 34 F.3d 1416 (9th Cir. 1993).

318. *Id.* at 1452. The dissenting opinion for the court of appeals stated that "The principle underlying our combination departure cases is rooted in the common sense maxim that the whole is greater than the sum of its parts." The dissent, in rejecting the majority's method of examining each factor individually, went on to say that "[n]o combination departure could survive this divide and conquer method of review." *United States v. Koon*, 45 F.2d 1301, 1305 (1995).

319. *Koon*, 34 F.3d at 1462. The Supreme Court has recently agreed to hear this issue and will decide whether the court of appeals correctly applied the guidelines in overturning the downward departures. See Linda Greenhouse,

Court, this case may prove to be still another important restriction on the ability of a trial court to depart and for an offender to bring an appeal.³²⁰

The ability of a district court to depart differs greatly among the circuits, as does the deference granted to district courts by the various courts of appeals. The differences among the circuits highlight the fact that many judges are uncertain as to the extent of their authority to depart and are concerned about overstepping those carefully drawn bounds. As more and more cases are brought before the Supreme Court on departure related issues, many of these issues will be decided for the lower courts. Until then, the circuits will continue to interpret and apply the guidelines, and test the limits of the discretion which the guidelines has preserved. Historically, the federal courts have been much less willing to do so than the state systems, but this may change as judges become more aware of their role under the guidelines.

IX. WEAKNESSES OF THE FEDERAL SENTENCING GUIDELINES

Although the guidelines have been more successful than mandatory minimums in realizing the goals of sentencing reform, ample room for improvement exists. The criticisms of the guidelines center around five points of contention: (1) the guidelines are confusing and complex; (2) they are too mechanical; (3) they are time-consuming to apply; (4) they do not permit sufficient individualization; and (5) they, like mandatory minimums, shift discretion to the prosecutor.

Guideline sentencing has been attacked by critics as too complex and confusing to apply.³²¹ The sentencing grid contains 258 boxes — 43 rows of "Offense Levels" and 6 columns of "Criminal History Categories," with further adjustments for various offense and offender characteristics. This complexity all but invites errors in calculation.³²² Additionally, since the guidelines

Supreme Court Agrees to Hear Case on Government's Refusal to Adjust 1990 Census, N.Y. TIMES, Sept. 28, 1995, at A18. The officers also raised a double jeopardy challenge to their subsequent federal prosecution, but the Court refused to hear that issue.

320. The deadline for briefs to be filed in the Supreme Court was November 9, 1995. The case is scheduled for argument in January. See *Koon v. United States*, 116 S. Ct. 39 (1995) (granting *certiorari* and scheduling briefs).

321. See generally, Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587 (1992).

322. *Id.* at 587. The Commission expressly rejected a broad-category approach used by some states because "relatively few, simple categories and narrow imprisonment ranges" are "ill suited to the breadth and diversity of federal crimes."

establish ranges of punishment without stating a midpoint, and because the grid contains so many boxes, comparisons between sentences and policy choices for various offenses become difficult, if not impossible, unless all the factors taken into consideration in the sentence are made known.³²³ This difficulty is compounded by the fact that many ranges overlap, a result desired by the Sentencing Commission.³²⁴

Consider an offender who is convicted of fraud to obtain goods in the amount of \$200,000 and who has no criminal history. Additionally, no weapons or victims were involved. Under the guidelines, fraud has a base offense level of 6, with an increase of 8 points for the amount taken; therefore the offense level for this offender is 14. This offense level would give the sentencer a range of 15-21 months in which to punish.³²⁵

Now consider a second offender, convicted of fraud in the amount of \$5000, with one prior conviction. Presume also that the offense involved a substantial risk of bodily harm. The base offense level is still 6, with an increase to level 13 because of the risk of harm. Given the prior conviction, the applicable sentencing range is 15-21 months.

Essentially, the crime and the requisite intent are substantially similar in each situation, but it is arguable that because the second offender had a conscious or reckless disregard for the safety of others and a prior conviction, that offender is more culpable. Even though the first offender took a substantially larger amount of money, he or she is less morally culpable, as a higher premium is generally (and appropriately) placed on human life. Regardless, both offenders are eligible for the same sentencing range. Adequate judicial discretion may have prevented this failure to individualize sentences based on relevant circumstances of both the offender and the offense.

The federal sentencing guidelines were originally designed to structure a process riddled with disparity and uncertainty, but without going as far as mandatory sentencing in removing all elements of discretion and flexibility. The complexity of a grid system, however, focuses the attention of the sentencer not upon any policy involved or the offender's need for punishment but upon mechanical calculations. Any system that attempts to reduce sentencing to a rote application of rules and calculations

323. *Id.* at 604-605.

324. *Id.* at 600-603. It was thought that the overlaps in ranges would eliminate the possibility for appeals by limiting the importance of disputed sentencing factors. See also U.S.S.G., *supra* note 137, at §§ 5H1.1-5H1.6.

325. Miller, *supra* note 321, at 611 (referring to a reprinted copy of the Federal Sentencing Guideline grid).

risks doling out punishments the way a computer would — mechanically and without individualization. Crimes do not follow rules that lend themselves to easy categorization. When the balance is not struck exactly, predictability and ease of application can be substituted for culpability and proportionality. As Judge Weinstein said, “[t]here are occasions where the law’s implacability must bend and give homage through compassion to humanity’s frailties and nature’s cruelties.”³²⁶

A good example of the need for sentence individualization is taken from *United States v. Rodriguez*.³²⁷ Defendant “A” had 15 years of diligent employment at a bank and was generally known as honest and trustworthy, yet when her husband died, her financial security was threatened. One of her four children became very ill, so to buy the medicine needed for her child, she embezzled \$10,000 from the bank. The child died anyway, so she confessed her crime and returned the unused portion of the money to the bank. Had she not done this, she would not have been caught.

Defendant “B”, on the other hand, has cheated and deceived others throughout his life. He left his first wife and children after spending all of his wife’s money, remarried bigamously without revealing the fact that he was already married, and obtained a job at the bank using forged references. He then embezzled money and was caught. Under the guidelines, these two defendants would be subject to the same sentencing range, unless the judge decided to use his or her departure powers. The court in the *Rodriguez* case argued that “[d]istinguishing between A and B is not the ‘unwarranted sentencing disparity’ the Act sought to terminate . . . [A] substantial distinction is fully warranted and required if the system is to do justice.”³²⁸ Unfortunately, judges are not always willing to use their powers to depart as they are unsure of the scope of that power, and appellate courts are often very critical of those departures that are appealed to them.³²⁹

326. *United States v. Perez*, 756 F.Supp. 698 (E.D.N.Y. 1991).

327. 724 F.Supp. 1118, 1122 (S.D.N.Y. 1989).

328. *Id.* at 1122.

329. See, e.g., Susan E. Ellingstad, *The Sentencing Guidelines: Downward Departures Based on a Defendant’s Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 977 (1992) (discussing the misperceptions of courts as to their authority to depart). See also Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: Empirical and Case Law Analysis*, 40 EMORY L. J. 393, 424, 431, 433-434 (1991) (discussing the differences in the circuits surrounding their perceived authority to depart and the differences in the appellate courts regarding their tolerance for those departures).

In addition to criticizing the guidelines for not drawing sufficient distinctions between defendants, many judges and commentators have said that the guidelines are too time-consuming to apply.³³⁰ Although this is due in part to the requisite mathematical calculations, the amount of time needed to sentence is enhanced by factual disputes relating to the offense or the offender.³³¹ The judge provides a pre-sentence report to both the prosecution and the defendant, and both may file objections. A conference between all involved then must be held to resolve the issues, with the government and defendant having to file final sentencing statements with the court. If an agreement as to the facts still cannot be reached, an evidentiary hearing becomes necessary.³³² Witnesses and experts are questioned and evidence produced, all of which drain the scarce resources of the court.

A further weakness rests in the Commission's allowance for "relevant" characteristics to be considered. Characteristics that judges and prosecutors had been using actively in the past to distinguish cases have been specifically prohibited.³³³ Age, family relationships, work commitments, education, mental and emotional conditions, and drug or alcohol abuse have been labeled "not ordinarily relevant" and may justify a departure only if they are extraordinary in the context of the case.³³⁴ Factors which do not meet that high standard, yet have great bearing on the case, then become lost in the mathematical shuffle of the sentencing grid. Additionally, the vagueness of the term "extraordinary" subjects the process to the differing methodologies of individual judges. When a judge refuses to sentence under the guidelines because of an appeal to her sense of equity and fairness, this resistance calls into question the very ability of the guidelines to meet the needs of the penal system.

A final weakness in the Sentencing Guidelines is a shifting of discretion to the parties. If an indictment contains multiple counts, control over the applicable sentencing range rests in the

330. Miller, *supra* note 321 (discussing the complexity of the federal sentencing grid, some of the justifications offered for that complexity, and comparing the federal grid to the simpler state models). See also, Weigel, *supra* note 164, at 99; Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 25 ALB. L. REV. 1 (1987); U.S. Sentencing Commission, *THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING* 108 (1991).

331. Weigel, *supra* note 164, at 91-92.

332. *Id.*

333. Miller, *supra* note 321, at 608.

334. *Id.*

hands of the parties, who may agree as to what charge or charges the defendant will plead guilty.³³⁵ To their credit, both Congress and the Commission recognized this difficulty and concluded that "the court may accept a charge agreement if it determines . . . that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing . . ."³³⁶ Though the guidelines shift a great deal of discretion to the prosecutor, the ability of the court to accept or reject a charge agreement still preserves an element of discretion for judges.

In an effort to avoid some of the adverse effects of plea bargaining and to bring some structure to the process, then-Attorney General Richard Thornburgh issued an executive order in March of 1989, stating that plea bargaining must not undermine the Federal Sentencing Guidelines.³³⁷ Thornburgh's memo contained several principles that prosecutors should follow when considering a plea bargain. He stated that charges should not be dropped or bargained away unless the prosecutor had a ". . . good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons."³³⁸ More importantly, he wrote that charges should reflect the seriousness of the defendant's conduct, and that most plea agreements should be in writing or at least stated on the record.³³⁹ This guidance provides

335. Weigel, *supra* note 164, at 93.

336. U.S.S.G., *supra* note 137, at § 6B1.2(a) & commentary.

337. See Attorney General Richard Thornburgh, Memorandum to Federal Prosecutors: Plea Bargaining Under the Sentencing Reform Act, Mar. 13, 1989, reprinted in 6 FED. SENTENCING REP. 347 (1994) [hereinafter Thornburgh].

338. An overloaded docket was the only exception to this requirement. Thornburgh, *supra* note 328, at 348. Thornburgh's memorandum to prosecutors is not the only effort to structure prosecutorial discretion under the Federal Sentencing Guidelines. In 1987 when the guidelines took effect, the U.S. Department of Justice issued a manual for prosecutors. U.S. Dept. of Justice, Prosecutor's Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984 (Nov. 1, 1987). In 1992, then acting Deputy Attorney General George Terwilliger issued a memorandum to prosecutors in an effort to clarify the Thornburgh memo. Acting Deputy Attorney General George J. Terwilliger, III, Memorandum to Federal Prosecutors: Indictment and Plea Procedures Under Guideline Sentencing, Feb. 7, 1992, reprinted in 6 FED. SENTENCING REP. 350 (1994). Additionally, Attorney General Janet Reno has also issued a "clarification" memo. See Attorney General Janet Reno, Memo to Holders of the United States Attorney's Manual, Title 9: Principles of Federal Prosecution, Oct. 12, 1993, reprinted in 6 FED. SENTENCING REP. 352 (1994).

339. Thornburgh wrote: "[I]t would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a

prosecutors with very limited discretion in deciding which pleas to accept, and helps eliminate some of the adverse effects of unfettered prosecutorial discretion. Thornburgh's order does not always require the prosecutor to charge the maximum offense, and in this way, preserves the discretion crucial to enable the prosecution to perform its duties.³⁴⁰

Although judges still have some discretion when deciding whether or not to accept a plea bargain,³⁴¹ this practice subjects the defendant to the risks of appellate review. If a defendant pleads guilty to a certain charge, which is only one of many which could be brought, or is a charge carrying a lesser penalty than others for which he could be convicted, that lesser charge or sentence is put at risk if the defendant or the prosecution appeals that sentence. The judge could choose to depart from the guideline range, even in the case of a plea bargain, and must therefore state the reasons for this departure. If an offender brings an appeal³⁴² and this appeal fails, the appellate court could find the lower court's departure was unjustified, and the defendant may receive a higher sentence when his case is remanded for sentencing.³⁴³ A defendant, therefore, may prefer to plead not guilty and risk a trial than to lock himself into a guilty plea that may later subject him to a lengthier sentence. Additionally, a judge must limit plea benefits to a two-level adjustment to the offense level, or approximately a 20% sentence reduction,³⁴⁴ another disincentive to pleading guilty.

record of nor judicial review of the departure." Thornburgh, *supra* note 337, at 347.

340. The ability to make "deals" with offenders in return for assistance, as well as the ability of prosecutors to forego criminal prosecution for other strategic reasons is essential to the efficient and necessary operation of the criminal justice system. For example, some prosecutors often hold off on prosecuting one individual for a less serious offense in the hopes that a more serious offense will be supported by additional evidence. Other attempts have been made to curtail prosecutorial discretion. In Washington, for example, the State Sentencing Commission attempted to create a set of voluntary prosecutorial guidelines. Not surprisingly, these guidelines met with many of the same problems as the initial state guidelines — they are completely advisory and noncompliance does not constitute a basis for appeal. See Fallen, *supra* note 190, at 148-149.

341. Under the guidelines, judges may not accept pleas which do not adequately reflect the seriousness of the offense. U.S.S.G., *supra* note 137, at § 6B1.2(a).

342. See *supra* notes 290-295 (listing proper grounds for the appeal of a sentence).

343. 18 U.S.C. § 3742 (Supp. 1994). See also, Weigel, *supra* note 164, at 96-97.

344. *Id.* See also, Dolinko, *supra* note 8, at 93.

Several studies have been conducted, comparing the number of guilty pleas entered both before and after the guidelines were implemented.³⁴⁵ One such study used data collected by the Federal Probation Sentencing and Supervision Information System ("FPSSIS"), and reported that under the pre-guideline system approximately 85% of federal defendants in the fifth circuit entered guilty pleas.³⁴⁶ Since the guidelines, this rate has decreased to 66.12%. In a comparison of the number of pre- and post-guideline guilty pleas for thirteen different offenses, the number of guilty pleas decreased for every offense save for three, two of which saw only minimal increases.³⁴⁷ This decrease in the number of guilty pleas translates directly into an increased case load for trial courts and a further drain on the resources of the criminal justice system.³⁴⁸

X. MANDATORY MINIMUMS, SENTENCING GUIDELINES AND THE PROPORTIONALITY PRINCIPLE

To understand why mandatory minimums have failed to achieve proportionate and uniform sentences, and why the guidelines have met with only limited success, it is necessary to discuss exactly why the goal of proportionate sentencing is so difficult, yet so necessary, to attain. The "proportionality principle" provides that punishment should comport with the degree of harm caused and the culpability of the offender.³⁴⁹ To use an example from Judge Powell's dissenting opinion in *Rummel v. Estelle*, if New York City were to enact a law requiring a life sentence on third-offense illegal parking to deter this conduct, the prohibition on cruel and unusual punishment would clearly be

345. Karle & Sager, *supra* note 329, at 393.

346. *Id.* at 403.

347. A "minimal increase" is defined as less than 1% change. *Id.* at 405.

348. Of course, guilty pleas in and of themselves, do not necessarily indicate that some greater good has resulted. It certainly would not mean, in every case, that justice has been done or that an offender has received a proportionate sentence. In fact, a drop in the number of guilty pleas may have very positive implications. If, instead of pleading guilty, each offender goes to trial, is given a fair trial, convicted of the proper offense given the crime committed, and is sentenced according to the guidelines, it could very well be that the most just and proportionate result has been achieved.

349. Heald, *supra* note 137, at 455. The "proportionality principle" dictates that a punishment should not be "cruel and unusual" in relation to the offense committed. Many offenders have asserted that the Eighth Amendment to the U.S. Constitution contains a proportionality requirement in that if a punishment is grossly disproportionate to the crime committed, the ban on cruel and unusual punishment is violated. See *supra* notes 76-141 and accompanying text (discussing *Rummel*, *Hutto*, *Solem*, and *Harmelin* in the context of a proportionality requirement under the Eighth Amendment).

violated.³⁵⁰ This is because the harm caused would be grossly disproportionate to the punishment imposed. The proportionality principle serves as a limitation on the power of legislators to define crimes and fix sentences without including moral and constitutional principles.

While theoretically the principle of proportionality is very sound, difficulties arise in its implementation. Primarily, it is impossible to set forth objective criteria for making punishments fit crimes perfectly.³⁵¹ The majority in *Rummel* refused to require proportionality reviews for sentences other than capital punishment or, in extreme cases, life sentences.³⁵² One of the reasons for this decision is that the Court recognized that it was much easier to determine the proportionality of a sentence of capital punishment for a particular offender than it was to draw that line between different sentences of imprisonment.³⁵³ The Court expressed concern that the individual, subjective notions of the judges would inevitably enter the analysis, rendering an objective determination of proportionality almost impossible.³⁵⁴

The Court in *Solem v. Helm* attempted to reduce the proportionality principle into objective standards.³⁵⁵ The Court established a tripartite test requiring a sentencer to (1) assess the gravity of the offense and the harshness of the punishment; (2) compare the challenged sentence to sentences imposed on other criminals in the same jurisdiction; and (3) compare the challenged sentence to those imposed for the same offense in other

350. *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J., dissenting). "In this respect, proportionate sentencing insures that a defendant is treated as an individual and thus limits the pursuit of utilitarian goals by legislatures. This is in accord with the Eighth Amendment's concern with the dignity of the individual." See Heald, *supra* note 137, at 456.

See also H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 230-237 (1968) (in which Hart discusses the necessity of connecting the severity of punishment with the gravity of the offense; "Murder is to be punished more severely than theft; intentional killing more severely than unintentionally causing death through carelessness." The problem with ending the analysis here, however, is that saying that murder is to be punished more severely than theft is the easy part of proportionality. The real issue is what the proper term of imprisonment (or other punishment) for murder, or for theft should be. That murder is a greater offense than theft does not lead to the equation linking crime and punishment which is necessary to determine a proper punishment. Hart also leaves this important question unanswered).

351. See *supra* Section I, discussing the impossibility of this kind of equation.

352. Heald, *supra* note 137, at 457.

353. *Rummel v. Estelle*, 445 U.S. 263, 275 (1980).

354. *Id.*

355. *Solem v. Helm*, 463 U.S. 277, 288 (1983).

jurisdictions.³⁵⁶ Critics of this approach contend that these criteria still afford judges too much subjective discretion and undermine the constitutionally mandated powers of the legislature, giving rise to separation of powers concerns.³⁵⁷ Permitting courts to legislate through their sentences, on a piecemeal basis, and use subjective notions of proportionality, would thwart the purpose of a separation of powers between the legislative and judicial branches.³⁵⁸ The courts would become legislators insofar as they would essentially be defining and interpreting a non-existent requirement of proportionality, which is not codified in any statute. Additionally, piecemeal legislation by courts would create uncertainty in the application of the relevant law, as a defendant could not accurately gauge what a court might do when faced with certain circumstances.

Though attempts at relative proportionality have been made, strict proportionality is an impossible goal, given the difficulties in equating incomparable factors such as, for example, theft and time served. "Requiring strict proportionality would presume that precise correlations between criminal offenses and deserved punishments were discernible and acknowledged by policymakers throughout the nation."³⁵⁹ A requirement of strict proportionality raises three issues: (1) local problems may call for penal policies that differ from those of the nation as a whole; (2) varying perceptions of the gravity of a given offense further contribute to a lack of uniformity and proportionality throughout all the jurisdictions; and (3) strict proportionality is conceptually impossible in every case. Strict proportionality requirements would not permit a city such as Washington, D.C. to enforce harsher penalties for crimes that are particularly rampant in that community, when a city in the midwest does not face that kind of crime on a regular basis, and is therefore less concerned with severe penalties for its commission. Some offenses appear graver in one jurisdiction because of the frequency with which they are committed. It is therefore natural for citizens and politicians in that community to respond more severely to those offenders. For this reason, it would be impossible, and not only undesirable, to require strict proportionality among the jurisdictions.

To deal with these problems, courts have held that a range of sentences for a given offense would comport with constitu-

356. *Id.* at 290-91.

357. Heald, *supra* note 137, at 457.

358. *Id.*

359. *Id.* at n.5.

tional requirements as long as the sentences were not grossly disproportionate.³⁶⁰ These interpretations by various courts imply that uniformity in the sense of precise sentence correlation's between or within jurisdictions is not the end to be achieved. On the contrary, serious concerns about the sovereignty of the state over its penal laws would arise if Congress or the federal courts required nationwide uniformity of sentences.³⁶¹ Instead, consistency among the several jurisdictions must involve a range of permissible sentences which accounts for local responses to crime, which may not match those on the federal level.³⁶²

Mandatory minimums attempt to achieve uniformity without adequately considering exactly what type of uniformity is desirable — broad uniformity, uniformity for like offenses, like offenders, or within each jurisdiction. If broad uniformity is the goal, mandatory minimums are destined for failure, as evidenced by the sentencers who have openly dissented from applying mechanical and harsh rules of sentencing.³⁶³ And though the guidelines permit some room for subjective determinations of proportionality, they fail too, as judges and prosecutors have admitted manipulating the guidelines to find an opportunity to exercise almost unfettered discretion.³⁶⁴ Reducing disparity does not necessarily result in proportionality unless defendants are so carefully grouped together as to account for subtle differences in both the offense and the offender.

Sentencers have understood this distinction, however, and are in the unfortunate position of having to adhere to the guidelines and mandatory minimums that the legislature has promulgated, yet must also do justice in the system in which they work. Because of the perceived harshness of the sentencing guidelines, one judge has gone so far as to resign, stating that he could no longer serve a system that required him to impose sentences that he believed were disproportionate and unjust.³⁶⁵ Many judges

360. *Terrebonne v. Butler*, 848 F.2d 500 (1988). See also, *Mistretta v. United States*, 488 U.S. 361 (1989) (in which the Supreme Court held that the Sentencing Guidelines were constitutional as a means of sentencing).

361. Heald, *supra* note 137, at 492.

362. *Id.*

363. See *infra* note 366 and accompanying text.

364. See Hanchette, *infra* note 365. Guidelines are successful when they appropriately guide discretion. The manipulation around that guidance evidences the failure of the guidelines to limit the discretion exercised.

365. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea For Less Aggregation*, 58 U. CHI. L. REV. 901, 925 (1991). See also MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, Appendix G. See also *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. Times, Sept. 30, 1990, at A22 (reporting that Federal District Judge J. Lawrence Irving resigned because he believed that the

have stressed the need for proportionate sentences and have been active critics of the guideline system.³⁶⁶

The proportionality principle is a foundation of the justice system and in its absence, sentences are mechanistically applied, justice is distorted, and the culpability of the offender becomes irrelevant. Proportionality is

. . . a precept of fairness and justice that greater crimes should merit harsher penalties than lesser crimes. The notion that punishment should be proportional to the seriousness of the offense is fundamental to maintaining an identity between the criminal law and the public's general sense of morality. In this way, proportionate sentencing serves the purpose of instilling respect for penal law. A penal system that imposes severe punishments for minor crimes runs the risk of being discredited and ridiculed.³⁶⁷

A system that fails to connect punishments with culpability creates widespread dissatisfaction among judges, prosecutors, and legislators and increases overall uncertainty and disparity as sentencers attempt to manipulate the guidelines to their satisfaction. Mandatory minimums go one step further away from proportionality by eliminating almost every method by which a judge can exercise discretion and factor culpability into a sentence, leaving a judge with little alternative but to impose what he or she may believe to be an unjust punishment. Society also begins to lose respect for a system that offends common notions of justice and proportionality.

sentencing guidelines were too harsh, and that he could not, in good conscience, apply the guidelines). In a Gallup Poll of (Federal) Judges commissioned by the American Bar Association, the results indicated that 56% of all the judges surveyed said the guidelines worked poorly; 76% thought that the guidelines gave prosecutors too much power in plea bargaining; and 94% believed that the guidelines have created dissatisfaction in the judiciary. See John Hanchette, *Federal Judges Dislike Mandatory Minimum Sentences*, Gannett News Service, Oct. 2, 1993, available in Lexis, Nexis Library, GNS File.

366. See generally Jose Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y.L.J., Feb. 11, 1992 (In 1992, Cabranes was a federal district court judge. He is currently serving on the Second Circuit) and Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S.CAL. L. REV. 357 (1992).

367. Heald, *supra* note 137, at 472 (footnotes omitted). Almost everyone would agree that greater crimes like murder should result in a more severe punishment than a crime like shoplifting. The second statement, however, poses the greatest challenge for those attempting to establish proportionality in sentencing. Nothing can lead us to the conclusion that one year is the optimal, and more importantly, the proportionate punishment for the crime of shoplifting.

Not everyone is so offended, however, and this explains both the substantial number of mandatory minimums that exist today and the harshness of the sentencing guidelines. While proportionality is a desirable goal, those who adhere to a purely retributive or just deserts theory of punishment want to see a defendant receive a punishment based solely on the fact that a crime was committed and the nature of that offense.³⁶⁸ No other purpose of punishment, for example, to rehabilitate or deter, can justify or limit the imposition of that punishment; punishment is justified solely by the criminal conduct of the offender.³⁶⁹ The fact that the conduct may have been negligent or reckless does not serve to limit the sentence imposed. For some retributivists, the primary goal of punishment is not to rehabilitate or to deter the offender, but to achieve public vindication for that crime and to punish solely for the reason that a crime was committed.³⁷⁰ Retributive theories of justice were often used throughout the 1980s to win the support of voting constituencies and advance a strong anti-crime platform.³⁷¹

On the other hand, limiting retributivists recognize other purposes of punishment, such as deterrence or rehabilitation, and the role these purposes play in sentencing.³⁷² What lies at the heart of a limiting retributivist philosophy, however, is the need to justify the imposition of that punishment based upon the fact that the offender *deserves* it, and not some other goal such as crime prevention.³⁷³ Limiting retributivists would use desert to limit the amount and kind of punishment imposed on an offender.³⁷⁴ If an overly severe punishment is imposed, either because of some need for deterrence or because of some perceived ability to rehabilitate if the offender is confined in prison for a very long time, limiting retributivists would use desert as a ceiling on that punishment.³⁷⁵ This theory is closely linked to, and comports well with, the proportionality principle, which

368. See PRIMORATZ, *supra* note 4, at 151-52.

369. *Id.*

370. HART, *supra* note 350, at 235.

371. Taifa, *supra* note 71.

372. MORRIS, *supra* note 15.

373. PACKER, *supra* note 150, at 67.

374. *Id.* at 65-70. This is contrasted with a pure retributivist theory, which would justify a harsher punishment than may be deserved, based upon a need for public vindication and revenge.

375. *Id.* He writes that "[p]unishments must be individualized but within limits, limits having to do both with the need for deterrence and with judgments about comparative morality, as well with the relative difficulties of predicting future behavior." *Id.* at 140.

seeks to limit the punishment imposed on an individual based on what is deserved.

Still another problem arises in the search for proportionality and the use of mandatory minimums or strict sentencing guidelines to achieve that goal. When two similarly situated offenders with identical criminal histories are given two different sentences, a question arises as to the culpability of the offenders and the proportionality of their sentences. Does the offender who received a harsher sentence understand the subtle differences in their relative culpabilities or does he or she feel unfairly treated because of the disparities in the two sentences?

The answer does not have to be a resounding "yes." Proportionality is not necessarily achieved by imposing equivalent sentences on like offenders, because there are two aspects to equivalency: equivalency from the offenders' perspective and equivalency from the perspective of the criminal justice system.³⁷⁶ Two virtually identical offenders who committed identical offenses are less concerned with the sameness of their sentences than they are with the equivalency in the subjective burden of punishment that each must endure — the hardship of their respective punishments. One offender does not want to feel that another, similarly situated offender, has "gotten off easy." Should the subjective burdens of a sentence be equivalent between the offenders, it may matter little that one is imprisoned and the other punished in some other way. What is important, then, is equivalency in the burden, by which I mean the form and length of sentence imposed on the offenders.

From the perspective of society and the criminal justice system, equivalence in the function of the sentence is more important than equivalencies in terms of punishment.³⁷⁷ Again, if society believes that deterrence, rehabilitation or even the receipt of just deserts can be achieved either by one year in prison or 1000 hours of community service, society may be indifferent to the punishment chosen by the sentencer. The sentencing guidelines require that the purpose(s) to be served in punishing must be considered when reaching a sentence for a given offender.³⁷⁸ If one of the purposes of sentencing is to rehabilitate, one sentence could require a shorter prison term and mandatory drug rehabilitation programs, whereas another could impose only a prison sentence, where, for example, the offender is no longer drug-dependent. The purposes served by

376. MORRIS & TONRY, *supra* note 156, at 100-04.

377. *Id.*

378. *Id.*

the "disparate" and unequal sentences are, for society, more important than identical sentences.

While this distinction is well noted in theory, in practice a system of sentencing must make apparent, both to society and to an individual offender, that equivalency in the punishment imposed, by itself, is not a desirable goal. If this cannot be done, the system will lose credibility. Therefore, it is necessary to have, both in appearance and in fact, alternative punishments that exact roughly the same subjective burden from the offenders. This is the principle reason why mandatory minimums fail to offer sentencers a viable alternative to sentencing guidelines.

Mandatory minimums impose the same sentence on offenders, regardless of the purposes to be served in punishing, or the true deserts of the offender. Mandatory minimums also leave a sentencer with no alternative to incarceration and forbid any consideration of alternative punishments, even if they impose the same subjective burden on the offenders. Moreover, although the same punishment is imposed on two apparently similar offenders, just because equivalency in punishment has been achieved does not mean that justice has been served. Mandatory minimums are completely divorced from any proportionality review, whereas alternative punishments, which are equivalent in the burdens they impose, internalize proportionality review at every stage of sentencing. Finally, imposing mandatory sentences is the "easy way out," whereas finding these equivalent burdens can be a very onerous task. Morris and Tonry support a system of interchangeable punishments:³⁷⁹

The path of wisdom, in terms of justice and political acceptability, requires the enunciation of some rough interchangeabilities between different types of punishments. The aim must be to identify punishments with roughly equal punitive properties that are suited to the variety of social threats and personal conditions that characterize offenders, a diversity of punishments suited to social needs, that do not result in unwarranted sentencing disparities.³⁸⁰

The authors recognize however, that exact equivalencies are always impossible to achieve. This is because prison in rural Connecticut may be vastly different from a hard labor penitentiary in Arizona.³⁸¹ Additionally, one year of prison may mean much less

379. *Id.* at 10-11.

380. *Id.* at 90. Washington has also implemented a system of equivalencies. See Fallen, *supra* note 190, at 147-148.

381. MORRIS & TONRY, *supra* note 156, at 95.

in terms of impact on lifestyle to a middle class, educated teenager than it would to an urban youth who earns the only source of income to his or her family.³⁸² Is it therefore proper to impose two different punishments on two similarly situated defendants without offending traditional notions of justice? The answer is clearly yes, if these "rough equivalencies" can be found.

An interchangeability concept could work as follows:

One month of imprisonment = 30 days intermittent confinement
 = one month's community service
 = two month's home detention
 = 100 hours community service.³⁸³

If these equations were made known to the public, not only would there be certainty in the sentence received,³⁸⁴ but offenders sentenced differently would be aware that the other was serving an equivalent sentence, though expressed in different terms. That the public believes in the "fairness" of the process is crucial to the acceptance of such a system, for if the varying sentences are not perceived as roughly equivalent punishments, offenders will object and society might sympathize with offenders who are considered victims of an unjust and severe system. If, however, a rough system of interchangeable sentences could be established, which (1) relates culpability to time served; (2) incorporates notions of just deserts; and (3) integrates multiple forms of punishment, then credibility and fairness would return to sentencing. A side-effect of this system would be to relieve some of the burden off of existing penal facilities and free up some of the already exceeded capacity of prisons.³⁸⁵

XI. RECOMMENDATIONS TO THE COMMISSION

Despite any faults in the sentencing guidelines, the Commission has laid the groundwork for an equitable and workable system. With respect to recommendations for the future, the Commission first should recalculate the sentencing guideline

382. *Id.* at 95.

383. *Id.* at 74-75.

384. This certainty would arise from the fact that a sentence would either be within at least the specified guideline range, or if the equivalency method was used, that the sentence would be readily determinable (within limits) based on the applicable guideline range and equivalency "equation." For example, if an offender is convicted of theft, under a guideline system it is at least certain that the offender will be sentenced within the guideline range (subject to departure). If the sentencer instead chooses to impose an equivalent punishment, using the guideline range it will be certain that the guideline range will serve as the upper and lower limits on the equivalent punishment imposed.

385. *Id.*

ranges. In doing so, mandatory minimums should be repealed and transformed into "target sentences" within the guideline system.³⁸⁶ To arrive at the proper target, the Commission should consider penal policies, the needs of the offender and community, and available data on crime prevention techniques. Past sentencing practices based upon virtually unlimited discretion, while useful to analyze what judges considered appropriate in the past, should be relevant only to the extent that the policies behind them match current knowledge about crime.³⁸⁷

In addition, sentences other than incarceration should be established to ease the tension involved with prison overcrowding and to sentence minor or first time offenders according to what they truly deserve. These alternative methods of punishment could include early supervised release, probationary periods, extensive rehabilitation programs, and community service. Michael Tonry and Norval Morris articulate three conditions that should be fulfilled before incarceration is appropriate: (1) any lesser punishment would depreciate the seriousness of the crime or crimes committed; (2) imprisonment is necessary for deterrence, general or special; and (3) other less restrictive sanctions have been frequently or recently applied to this offender.³⁸⁸ The goal must be to connect, as far as possible, the nature and severity of the sentence with the offense committed.³⁸⁹ Because no equation exists that would tell us how to do this with any precision, the goal should be to relate (as thoroughly as humanly possible) punishments to the comparative seriousness of the offense and culpability of the offender.

The Commission, as well as the States, should also consider modifying prosecutorial, as opposed to judicial, discretion within the sentencing process. Charging guidelines are not the answer, but the federal and state commissions could require that the charging process be done "on the record" instead of secretly. This would then subject the prosecutor's actions to appellate review, and help insure that a charge brought closely matches the offense committed. Of course, this does not entail the elimination of plea bargaining, as it is often a necessary means to reduce ever-increasing caseloads. Instead, pleas must be to "rea-

386. The Commission itself has suggested that Congress repeal mandatory minimums. See MANDATORY MINIMUM PENALTIES REPORT, *supra* note 7, at introduction and Chapter 7.

387. Judge George E. Mackinnon, *What Two Steps Do You Recommend Congress Take to Improve the Sentencing Guideline System?*, 1 FED. SENTENCING REP. 359, 378 (1989) (compilation of survey results and text).

388. MORRIS & TONRY, *supra* note 156, at 90.

389. *Id.*

sonable" charges, those that do not minimize the crime committed or provide too light a sentence for the offender.

Perhaps the most important and necessary method of improving the guidelines is also the most obvious — return enough discretion to judges so they may consider all relevant offender and offense characteristics. This does not mean a return to unconstrained discretionary sentencing, where every factor that the defendant wishes to assert in his favor must be considered. Rather, it contemplates the consideration of factors "not ordinarily relevant," such as age, family responsibilities, work experience or drug and alcohol abuse. The purpose of sentencing is to match the appropriate punishment to the individual defendant. It is for this reason that the sentencer should have greater discretion in the factors that may be considered when sentencing. These factors are not permissible as mitigating or aggravating factors in a determination of guilt or innocence, and this serves as an additional safeguard to the integrity of the trial court's findings.

To alleviate prison overcrowding and capacity constraints, the individual states should enact legislation which requires legislators to tailor sentences to current prison capacities.³⁹⁰ Not only would this encourage the use of alternative methods of punishment, but it would relieve some of the tension of prison overcrowding and free up funds that would have gone to building new institutions. This money could then be channeled into rehabilitation programs, a restitutionary fund for victims of crime, or a tax cut for constituents. To ensure the success of this legislation, both federal and state legislatures would have to implement some variation on the interchangeability concept discussed previously.³⁹¹ The legislature could work with both judges and prosecutors to determine the mechanics of the formula, which should link, as closely as possible, culpability to the offense committed.

Finally, the Commission should require all those involved in the sentencing process to attend continuing education sessions on the guidelines and their policy objectives.³⁹² It is in this type of forum that judges and prosecutors are best able to raise questions of interpretation without testing them on convicted defendants. The Commission then is afforded the opportunity to clarify

390. Again, the states have done well in this area - staving off more substantial increases in prison overcrowding and drains on penal resources by tying sentencing policy to those resources. See *supra* notes 256-260 and accompanying text.

391. See *supra* notes 376-382 and accompanying text.

392. MORRIS & TONRY, *supra* note 156, at 11.

ambiguous points in the guidelines, obtain valuable input from the participants, and use that information to amend, create, or repeal guidelines as needed. This is consistent with the evolutionary nature of the guidelines and their need to reflect current notions of fairness and justice. The Commission could then publish periodic policy statements and commentary for the legal community, or request their opinions on proposed amendments.

The ability of a sentencer to depart is one of the most important areas in which the Commission needs to concentrate its educational efforts. Judges, concerned that their sentencing decisions will be overturned on appeal, are hesitant to explore the limits of their discretion. The Commission should take special care to instruct both district and appellate courts about their respective roles regarding departures under the guidelines.

XII. CONCLUSION

The federal guidelines seem to be driven by a quest for the unattainable — the ideal sentencing system. The U.S. Sentencing Commission has attempted to account for every possible combination of offense and offender within a 258-box grid, and to properly reflect the seriousness of the offense and culpability of each offender using a mechanical, mathematical approach to sentencing. However, any system that purports to equate a crime with a certain punishment is not only misguided, but conceptually flawed; such an equation is humanly impossible. It may at first seem logical, and indeed readily apparent that murder is to be punished more severely than theft — but this intuition, though grounded in notions of “justice” cannot lead a sentencer to the conclusion that 20 years in prison is definitively the right sentence for murder.

Nevertheless, even if a sentencer is unable to equate the incommensurables of culpability and the offense committed, this should not leave the determination of sentences wholly at the mercy of the legislature. The role of the judiciary must be exercised with the necessary discretion to consider *who* is being sentenced, and to tailor punishments to the unique circumstances of every case. Though the U.S. Sentencing Guidelines still fall short of this ideal, they far surpass mandatory minimums in their ability to respond to the special circumstances of each case.

Because mandatory minimums have failed in their essential purposes and conflict with sentencing policy and with concepts of just and fair punishment, they should be repealed and replaced by a sentencing guideline system that incorporates discretion and proportionality with structure and some degree of

certainty. Such a system is possible through the existing guidelines, although some modifications are necessary. These modifications must have, as their guiding principle, a commitment to the creation of a sentencing system that considers the culpability of an offender, the nature of the offense committed, and the purposes to be served by the imposition of punishment. Sentencing cannot be reduced to a rigid, mechanical process unless a sentencer may depart from that process, when appropriate, without fear of appellate review. Anything less sacrifices the identity and uniqueness of those being sentenced, all of whom may not be equally morally culpable.