

## PROSECUTORS AS PUNISHMENT THEORISTS: SEEKING SENTENCING JUSTICE

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### INTRODUCTION

It is a truism that prosecutors are called not just to win, not just to zealously represent their clients, but rather to “seek justice.”<sup>1</sup> What this admonition means in practice, however, is notoriously slippery. Most obviously, it means that prosecutors should not convict (or charge) the innocent. It is also quite commonly understood to mean that prosecutors should “play by the rules” and should ensure that defendants are afforded a fair process. More fundamentally, it means that prosecutors should ensure that the power of the state is wielded judiciously.<sup>2</sup> In other words, the prosecutor has an obligation not just to ensure procedural fairness, but also to ensure substantive justice.

These three special prosecutorial obligations are, in many ways, quite different from each other. The obligation to avoid prosecuting the innocent

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<sup>1</sup> An oft-quoted inscription on the walls of the Department of Justice states: “The United States wins its point whenever justice is done its citizens in the courts.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Various ethics codes contain similar admonitions. *See, e.g.*, MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1983) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”). *See generally* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 n.2 (1991) (noting that various professional rules treat prosecutors as having a duty to seek justice in the context of an adversarial trial).

<sup>2</sup> *See* Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 634 (1999). Green argues that the sovereign’s interests extend beyond ensuring that only the guilty are prosecuted and that defendants are given fair process:

Additionally, most would agree, the sovereign has at least two other aims. One is to treat individuals with proportionality; that is, to ensure that individuals are not be [sic] punished more harshly than deserved. The other is to treat lawbreakers with rough equality; that is, similarly situated individuals should generally be treated in roughly the same way. Sometimes these various objectives are in tension. It is the prosecutor’s task, in carrying out the sovereign’s objectives, to resolve whatever tension exists among them in the context of individual cases.

*Id.*

is straightforward and rather easy for prosecutors to understand (if not always easy to apply in practice). It is also regulated, albeit indirectly, by jury verdicts and judicial acquittals.<sup>3</sup> Similarly, the obligation to ensure a fair process is based on generally accepted principles—largely embodied in the Constitution—and is heavily regulated by judicial oversight. The obligation to seek substantive justice, however, is not closely regulated. Indeed, it is hardly regulated at all.<sup>4</sup> We call it prosecutorial discretion, and it is the core of the prosecution function, the most important thing prosecutors do.

Notwithstanding the universal acceptance of prosecutors' obligation to "seek justice," relatively little attention has been paid to federal prosecutors' role in ensuring justice at sentencing.<sup>5</sup> To the extent that commentators have examined the relationship between substantive justice and prosecutorial discretion, the focus has usually been on prosecutorial charging discretion: the power that prosecutors have to decide whether a defendant should be charged, which charges should be brought, and whether the defendant should be allowed to plead guilty to lesser charges.<sup>6</sup> On one level, this inattention to sentencing justice is surprising, for what matters most in our criminal justice system—what defendants and victims and society care about—is not the charge, but the sentence. On another level, however, this neglect of the prosecutorial role in sentencing justice is not at all surprising. For most of the past one hundred years, federal prosecutors have exercised very little formal discretion at sentencing. Indeed, for the most part, federal

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<sup>3</sup> FED. R. CRIM. P. 29.

<sup>4</sup> See *infra* notes 19-35 and accompanying text.

<sup>5</sup> See David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 533-34 (1999) (arguing that while the academy has paid lavish attention to prosecutors' new powers as a result of recent changes to sentencing law, it has largely "ignored" addressing how these powers should be properly used to achieve sentencing justice). One area that has received academic attention is prosecutorial decision-making about sentencing discounts for cooperating defendants. Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 924 (2002); R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635, 653-67 (2006). To the extent that scholars have addressed prosecutorial discretion to control sentencing, it has usually been in the context of evaluating judicial or legislative responses to that discretion. See, e.g., Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 302 (2005) (calling for judicial oversight of sentence bargaining); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1265 (2004) (calling for legislative elimination of mandatory sentences).

<sup>6</sup> Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) [hereinafter Davis, *American Prosecutor*] ("Prosecutors decide whether and how to charge an individual. They decide whether to offer a plea to a lesser charge, set the terms of the plea, and assess whether the conditions have been met."). For general discussions of prosecutorial discretion, see James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981); KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 176-80, 231-32 (Greenwood Press 1980) (1969) [hereinafter DAVIS, *DISCRETIONARY JUSTICE*]; Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

prosecutors—and the academy as well—have viewed sentencing justice as the responsibility of the judicial and legislative branches.<sup>7</sup>

This view of federal prosecutors' role at sentencing has prevailed under two very different sentencing systems. For most of the twentieth century, federal prosecutors operated under an indeterminate sentencing system in which judges had almost unfettered discretion to individualize sentences for particular defendants. Because prosecutors had relatively little authority to affect the sentence, they typically saw their role as simply securing the conviction. Although prosecutors no doubt cared about the sentences that resulted, they were not required to take a position on the justice of the sentence, and they had almost no power to contest a sentence on appeal. Questions of sentencing justice could be left to the judge (and to the parole board).<sup>8</sup>

In 1987, the federal sentencing system changed completely. The indeterminate system that had prevailed for decades was replaced with a determinate system in which judges were constrained by a complex set of Sentencing Guidelines designed to eliminate unwarranted sentencing disparity.<sup>9</sup> Under the Guidelines system, prosecutors played a much more active role at sentencing, proving sentencing facts and arguing Guidelines law.<sup>10</sup> But prosecutors still were not required to concern themselves with the justice of the ultimate sentence. Questions of sentencing justice were left to the Sentencing Commission (and, to a lesser extent, to the judge).<sup>11</sup>

Superficially, this limiting of the prosecutor's involvement at sentencing made sense and was consistent with traditional institutional roles: the prosecutor decided the charge, the jury decided guilt or innocence, and the judge decided the sentence. This division of roles, however, had one major exception: mandatory sentences. At the same time it created the Sentencing Guidelines, Congress also began creating a variety of crimes that carried mandatory minimum sentences, typically for offenses involving drugs and

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<sup>7</sup> The Department of Justice's official manual for prosecutors states: "Sentencing in Federal criminal cases is primarily the function and responsibility of the court." U.S. ATTORNEYS' MANUAL § 9-27.710 (1997). Admittedly, my focus on federal prosecutors excludes a wide variety of practices in the states—some of which is consistent with federal practice, some of which is not. Other scholars, most notably Marc Miller and Ronald Wright, have done important recent work on sentencing in the states. For other examples, see several recent issues of the Federal Sentencing Reporter devoted to state sentencing: *Information-based Sentencing Analysis*, 19 FED. SENT'G REP. (2007); *The State of Blakely in the States*, 18 FED. SENT'G REP. (2005); *Recent State Reforms II: The Impact of New Fiscal and Political Realities*, 15 FED. SENT'G REP. (2002); *Recent State Reforms I: Developments in Sentencing Drug Offenders*, 14 FED. SENT'G REP. (2001).

<sup>8</sup> See *infra* Part I.B.

<sup>9</sup> See Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994) ("The federal sentencing guidelines, which have been in effect since November 1987, were designed to promote certainty, uniformity, and proportionality in sentencing.").

<sup>10</sup> See *infra* notes 112-19 and accompanying text.

<sup>11</sup> See *infra* Part I.C.

guns.<sup>12</sup> Because these mandatory sentences “trump” the Sentencing Guidelines, the charge often determined the sentence.<sup>13</sup> In other words, by charging (or not charging) an offense with a mandatory minimum sentence, the prosecutor effectively became the sentencer. In a system in which sentencing is viewed as a judicial function and in which prosecutors are typically not asked to engage with questions of sentencing justice, this “sentencing by charge” increases the risk of unjust sentences.

In January 2005, the Supreme Court created a third federal sentencing system, one that combines elements of the first two. In *United States v. Booker*,<sup>14</sup> the Court declared that the Sentencing Guidelines are merely advisory.<sup>15</sup> The Court also declared that sentences should be based not only on the Guidelines but also on the traditional purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation.<sup>16</sup> Finally, the Court established a new appellate review procedure whereby federal appellate courts would determine whether the sentence was “reasonable” given the Guidelines and the principles of punishment. Under this system of advisory guidelines, prosecutors still play the role to which they had become accustomed—proving sentencing facts and arguing Guidelines law to establish the appropriate Guidelines range. But prosecutors now also find themselves in the unfamiliar role of arguing—both at sentencing and on appeal—that a particular sentence is or is not reasonable. In other words, prosecutors must justify the sentences they seek by reference to the traditional purposes of punishment. Indirectly, *Booker* has caused prosecutors to engage at last with questions of justice at sentencing.

This engagement with sentencing justice can also provide a vehicle to address the worst aspects of mandatory minimum sentences. As prosecutors grow more accustomed to their role as punishment theorists with responsibility for justice at sentencing, they can also begin to play that role more actively when making charging decisions. In other words, prosecutors can—and should—use the same principles of punishment that determine sentencing “reasonableness” under *Booker* to determine the “reasonableness” of a charge that carries a mandatory sentence.<sup>17</sup>

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<sup>12</sup> See Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 88 (2003) (“The profusion of new narcotics and gun proscriptions, almost all of which carry mandatory minimum prison sentences, transformed the traditional prosecutorial power to charge into the contemporary prosecutorial power to determine the length of the sentence the defendant will serve.”).

<sup>13</sup> *Id.*

<sup>14</sup> 543 U.S. 220 (2005).

<sup>15</sup> *Id.* at 245.

<sup>16</sup> *Id.* at 260 (citing 18 U.S.C. § 3553(a)(2) (2000)).

<sup>17</sup> There are, of course, more straightforward legislative ways to fix the problem with mandatory sentences, as judges and commentators of all stripes have been arguing for years. See, e.g., Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1044-46 (2004); John S. Martin, Jr., *Why Mandatory Mini-*

Part I of this Article explores the roots of prosecutorial detachment from sentencing justice, as prosecutors first served as passive bystanders under the pre-Guidelines system of individualized judicial sentencing, and then served as sentencing technicians under the pre-*Booker* mandatory Guidelines. Part I also explains why this detachment was sensible, at least in theory, because both systems were designed so that responsibility for sentencing justice resided elsewhere—either with the judiciary or with the Sentencing Commission. Part II, however, examines a situation in which prosecutorial detachment from sentencing justice is not sensible: when prosecutors act as de facto sentencing judges by charging crimes with mandatory sentences.

In Part III, this Article examines the changes wrought by *Booker*'s unintended, but potentially important, shift in prosecutorial engagement with sentencing justice. In particular, the Article examines whether the principles of sentencing justice being developed by federal courts in the wake of *Booker* can inform not just prosecutorial sentencing arguments, but also prosecutorial charging decisions—particularly charging decisions that directly affect the required sentence. In the end, the Article argues that prosecutors should use *Booker*'s “reasonableness” standard in determining whether to file charges that will result in a sentence above the advisory guidelines range. By directly incorporating an explicit consideration of the principles of punishment into their charging decisions, prosecutors can take an active role in ensuring sentencing justice.

## I. THE ROOTS OF PROSECUTORIAL DETACHMENT FROM SENTENCING JUSTICE

### A. *Prosecutorial Discretion, Charging Decisions, and Sentencing Justice*

The two main theories that underlie criminal law and criminal punishment—utilitarianism and retributivism—have been debated by philosophers and theorists for centuries. Nevertheless, in practice, there is widespread agreement about the animating principles of criminal punishment, at least in their most general form. Wrongdoers should be punished: (1) because they have culpably inflicted a harm (retribution); (2) so that others will be discouraged from committing future crimes (general deterrence); (3) so that the individual wrongdoer will be discouraged from committing future crimes (specific deterrence); (4) so that the individual wrongdoer will be physically prevented from committing future crimes (incapacitation);

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*mums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 311, 312 (2004); Weinstein, *supra* note 12, at 131. Congress, however, has repeatedly shown itself unwilling to engage in any sentencing reforms that could be viewed as “soft on crime.” Weinstein, *supra* note 12, at 131.

and (5) so that the individual wrongdoer can be changed in ways that will reduce future criminal activity (rehabilitation).<sup>18</sup>

Complementing these general theories are three additional principles. First, sentences should be uniform, so that similar conduct by similarly situated wrongdoers receives similar punishment. Second, sentences should be proportional, so that more serious wrongdoing is punished more seriously than less serious wrongdoing. Third, sentences should be parsimonious, so that wrongdoers are not punished any more than is necessary or deserved based on the other principles of punishment.

Until recently, federal prosecutors' engagement with these principles at sentencing was indirect at best. This disengagement with sentencing justice was not an accident. By legislative design, the power to determine the sentence has traditionally resided elsewhere: first with the judge, then with the Sentencing Commission. To understand why, it is necessary to consider the scope of prosecutorial discretion.

Unbridled prosecutorial discretion is one of the defining characteristics of the American criminal justice system,<sup>19</sup> and the core of the prosecutor's power is the charging decision.<sup>20</sup> The prosecutorial charging decision can be summed up in two questions: "Who?" (as in, "Who should be charged?") and "What?" (as in, "What charges should be brought?" or "What charges should the defendant be allowed to plead guilty to?").<sup>21</sup> Formally, these decisions are almost entirely immune from judicial review.<sup>22</sup> They are, however, informally constrained by various institutional forces.

On the question of "who" should be charged, prosecutors are typically limited in two ways. First, they must rely on law enforcement to identify

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<sup>18</sup> See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03 (4th ed. 2006) (discussing utilitarian and retributive justifications for punishment).

<sup>19</sup> DAVIS, DISCRETIONARY JUSTICE, *supra* note 6, at 188 ("Viewed in broad perspective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute or not to prosecute.").

<sup>20</sup> Davis, *American Prosecutor*, *supra* note 6, at 408 ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion."). For a full (and critical) examination of prosecutorial power and discretion, see ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) [hereinafter DAVIS, ARBITRARY JUSTICE] ("Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official.").

<sup>21</sup> Davis, *American Prosecutor*, *supra* note 6.

<sup>22</sup> See DAVIS, ARBITRARY JUSTICE, *supra* note 20 ("The most remarkable feature of [prosecutors'] important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable. Prosecutors make the most important of these discretionary decisions behind closed doors and answer only to other prosecutors."). While it is technically possible for judges to review prosecutorial charging decisions pursuant to a claim of selective or vindictive prosecution, such claims are notoriously difficult to prove. See Melissa L. Jampol, *Goodbye To the Defense of Selective Prosecution*, 87 J. CRIM. L. & CRIMINOLOGY 932, 932 (1997) (discussing the difficulties faced by defendants seeking to prove selective prosecution).

targets and to gather evidence. Second, they must ultimately answer to the electorate about their decisions to bring (or not to bring) cases. Nevertheless, these constraints generally operate with much less force against federal prosecutors. For one, federal prosecutors are typically less dependent upon law enforcement and can exercise greater control over the allocation of investigative resources.<sup>23</sup> Indeed, federal prosecutors are often directly involved in the investigative stage of a case and can make decisions about who should be targeted very early in the process.<sup>24</sup> State prosecutions, on the other hand, are more often responsive, with the prosecutor making decisions only after the police have made an arrest.<sup>25</sup> Moreover, because federal prosecutors' political accountability runs through the President, they are less directly accountable than their locally elected state counterparts.<sup>26</sup>

"What" to charge is a different decision, but also one left almost entirely to the prosecutor's discretion.<sup>27</sup> Here again, federal-state differences are important. Most state criminal laws are part of an organized coherent code and the "right" crime for a particular wrongdoer's conduct is often readily apparent. Federal criminal law, on the other hand, is anything but organized.<sup>28</sup> Indeed, there are thousands of different federal crimes, many of which apply to the same conduct.<sup>29</sup> Thus, a federal prosecutor will typi-

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<sup>23</sup> See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 778 (2003) (discussing prosecutorial control over investigatory tactics in the federal system).

<sup>24</sup> *Id.* at 780.

<sup>25</sup> Of course, some state prosecutions involve proactive investigations by prosecutors and some federal prosecutions involve reactive prosecutions following arrests; but, in general, the institutional differences in approach between federal and state prosecutors are pervasive. See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 862-63 (2001) (noting that federal prosecutors, unlike state prosecutors, largely have the ability to choose which crimes they will prosecute).

<sup>26</sup> See generally JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 198-206 (1978) (discussing the ways in which political pressures affect U.S. Attorneys' behavior).

<sup>27</sup> Felony charges, of course, require a grand jury finding of probable cause. Davis, *American Prosecutor*, *supra* note 6, at 423. The grand jury requirement, however, provides few limits on the prosecutor's charging discretion. See *id.* ("Though the use of ordinary citizens as grand jurors should serve as protection for the accused and as a check on the prosecutor's charging power, this goal is rarely fulfilled because of the prosecutor's control over the process.").

<sup>28</sup> Kathleen F. Brickey, *Federal Criminal Code Reform: Hidden Costs, Illusory Benefits*, 2 BUFF. CRIM. L. REV. 161, 189 n.1 (1998) ("[F]ederal criminal law . . . is organized alphabetically rather than topically, is replete with overlapping provisions that proscribe substantially the same conduct, and does not contain general principles of criminal liability that are applicable throughout the code."); Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 195 (1997) ("[Federal criminal law] is duplicative, ambiguous, incomplete, and organizationally nonsensical.").

<sup>29</sup> See Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 897 (2000) (discussing the frequently cited statistic that there are over 3,000 federal crimes); Joost, *supra* note 28, at 197-98 ("[I]n the mid-1970s there were approximately 159 sections in the United States Code pertaining to offenses involving false statements

cally have an array of possible crimes to choose from in bringing charges against a particular defendant. For example, a defendant who submits a fraudulent claim to the United States might be charged with mail fraud,<sup>30</sup> wire fraud,<sup>31</sup> theft of public money,<sup>32</sup> false claims,<sup>33</sup> false statement,<sup>34</sup> conspiracy,<sup>35</sup> or any combination of the above.

In the absence of the usual institutional, political, and legal forces that constrain charging decisions, the federal criminal justice system has taken a different approach. But instead of constraining the prosecutor's charging decision, federal law has constrained the *effect* of the prosecutor's charging decision by making the ultimate sentence not dependent upon the charge selected by the prosecutor. The effect, both in the pre-Guidelines era and in the Guidelines era, was to remove prosecutors from questions of sentencing justice.

#### B. *The Pre-Guidelines Era: Sentencing by the Judiciary*

The defining characteristic of sentencing in the pre-Guidelines era was unfettered judicial discretion.<sup>36</sup> In the indeterminate system that prevailed for most of the twentieth century, the prosecutorial charging decision set only the broadest parameters for the sentence. Prosecutors had the power to decide which charges to bring, but the charging decision had little direct affect on the ultimate sentence.<sup>37</sup> The sentence was determined by the judge, and the actual amount of time the defendant spent in prison was determined by the parole board.<sup>38</sup>

Most federal crimes—then and now—carry extremely broad sentencing ranges. For example, the statutorily permissible sentence for bribing a

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to government officials, 134 pertaining to theft and fraud, 89 pertaining to forgery and counterfeiting, and 84 pertaining to arson and property destruction.”).

<sup>30</sup> 18 U.S.C. § 1341 (2000).

<sup>31</sup> *Id.* § 1343.

<sup>32</sup> *Id.* § 641.

<sup>33</sup> *Id.* § 287.

<sup>34</sup> *Id.* § 1001.

<sup>35</sup> *Id.* § 371.

<sup>36</sup> By “pre-Guidelines era,” I am referring to the roughly fifty years before the Guidelines took effect in 1987. Although federal prosecutions (and thus federal sentencings), have existed since the 1790s, the robust federal law enforcement to which we are accustomed did not begin until the Prohibition era. For a short history of federal prosecutions, see Simons, *supra* note 29, at 902-07. For a more detailed treatment, see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 71-73, 134-39, 261-76, 339-41 (1993).

<sup>37</sup> See Lee, *supra* note 9, at 113-14 (“Congress set statutory minimums and maximums, within which sentencing judges had wide discretion to sentence offenders. The sentence given by the judge was indeterminate because the length of the sentence could change depending on whether the Parole Commission felt the defendant had rehabilitated enough to be released early.”).

<sup>38</sup> *Id.*

public official is imprisonment for “not more than fifteen years”;<sup>39</sup> the statutory sentencing range for armed bank robbery is imprisonment for “not more than twenty-five years”;<sup>40</sup> and the range for kidnapping is imprisonment for “any term of years or for life.”<sup>41</sup> None of those federal crimes carry a minimum sentence.<sup>42</sup> Thus, in the indeterminate sentencing system used in federal courts before 1987, the prosecutor’s charging decision usually determined only the maximum possible sentence.<sup>43</sup> The actual sentence imposed was solely within the judge’s discretion,<sup>44</sup> and appellate review was practically nonexistent.<sup>45</sup> Moreover, because most defendants were eligible for parole, the amount of time served on any sentence was actually determined by the Parole Board.

At the heart of this system was the belief that the purpose of criminal punishment was to rehabilitate the defendant. Writing in 1949, the Supreme Court extolled the enlightened philosophy underlying individualized sentences and judicial discretion:

The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial. Today’s philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences, the ultimate termination of which are sometimes decided by nonjudicial agencies[,] have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board. Retribution is no longer the dominant ob-

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<sup>39</sup> 18 U.S.C. § 201 (2000).

<sup>40</sup> *Id.* § 2113(d).

<sup>41</sup> *Id.* § 1201(a).

<sup>42</sup> Similarly, while the maximum sentences for mail fraud, wire fraud, theft of public money, false statement, false claims, and conspiracy range from twenty years to five years, none of the crimes carry a minimum sentence. *Id.* §§ 287, 371, 641, 1001(a), 1341, 1343.

<sup>43</sup> Although a few federal criminal statutes provide minimum as well as maximum sentences, few of those statutes predate the Guidelines era. In any event, the resulting range is typically extremely broad. For example, the authorized prison sentence for distributing five hundred grams of cocaine ranges from a minimum of five years to a maximum of forty years. 21 U.S.C. § 841(b)(1)(B) (2000).

<sup>44</sup> STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* 16 (1989) (“In a system that has no statutory sentencing mandates other than the requirement of setting a term or fine within the ranges defined, . . . the judge is free not to mete out a prison term or not to set a fine if he or she so chooses, [because] the legislative framework establishes only weakly felt constraints and gives little direction in determining how to set sentences in specific cases.”). See generally MARVIN FRANKEL, *CRIMINAL SENTENCE: LAW WITHOUT ORDER* 5-7 (1973) (criticizing the broad discretion given to sentencing judges).

<sup>45</sup> See, e.g., *United States v. Brennehan*, 918 F.2d 745, 746 (8th Cir. 1990) (“Appellate review of pre-Guidelines sentences is very limited. If the sentence imposed is within the applicable statutory limits, the sentence is generally not subject to review on appeal. We review only for manifest or gross abuse of discretion such that the severity of the sentence ‘shocks the judicial conscience.’” (quoting *Castaldi v. United States*, 783 F.2d 119, 123 (8th Cir. 1986))).

jective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.<sup>46</sup>

As a result, prosecutors had little legal authority to affect the ultimate sentence.<sup>47</sup> Of course, prosecutors could still use their persuasive authority to argue for particular sentences, which they no doubt did on occasion.<sup>48</sup>

But, in many cases, prosecutors took a passive approach to sentencing. Indeed, prosecutors often explicitly bargained away their ability to even try to influence the judge's sentencing decision.<sup>49</sup> In some cases, the prosecution would agree to limit its role at sentencing to presenting its view of the facts, rather than recommending a specific sentence (or a specific application of the principles of punishment).<sup>50</sup> In other cases, the prosecution would specifically agree to remain silent, explicitly abdicating any responsibility for the sentence imposed.<sup>51</sup>

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<sup>46</sup> *Williams v. New York*, 337 U.S. 241, 247-48 (1949) (footnote omitted). *See also* FRANKEL, *supra* note 44, at 7 (“[I]t is fashionable nowadays to say . . . that only rehabilitation of the offender can justify confinement.”).

<sup>47</sup> In their influential study of pre-Guidelines sentencing, Wheeler, Mann, and Sarat concluded that, in most cases, neither the choice of charges nor the number of charges greatly affected the sentencing decision. WHEELER, MANN & SARAT, *supra* note 44, at 17 (“One must ‘look behind the charging instrument’ to avoid the uneven impact of prosecutorial discretion.”). [It’s important to note that this quote comes from a federal judge, not from Wheeler, Mann, and Sarat.]

<sup>48</sup> For an interesting discussion of prosecutorial sentencing advocacy in a high-profile pre-Guidelines case, see Stanton Wheeler, *Adversarial Biography: Reflections on the Sentencing of Michael Milken*, 3 FED. SENT’G REP. 167, 167-68 (1990) (describing the government’s lengthy sentencing memorandum in “the last of the great pre-guidelines sentences”). *See also* *United States v. Hawthorne*, 806 F.2d 493, 495 (3d Cir. 1986) (noting district court’s “apparent reliance on the Government’s Sentencing Memorandum,” which recommended a four-year sentence). In other pre-Guidelines cases, even without lengthy sentencing memoranda, the prosecution would sometimes recommend a specific sentence, often as part of a negotiated bargain. *See, e.g.*, *United States v. Januszewski*, 777 F.2d 108, 109 (2d Cir. 1985) (describing a plea agreement in which the prosecution agreed “to make a non-binding sentence recommendation for a sentence ‘not to exceed six years’”). Even when made, it is not clear that prosecutorial recommendations had an important effect. In their seminal study of white collar sentencing before the Guidelines, Wheeler, Mann, and Sarat describe almost no role for prosecutorial recommendations in affecting judicial sentencing determinations. *See* WHEELER, MANN & SARAT, *supra* note 44, at 27-53 (describing the sources of information used by judges in sentencing white-collar criminals).

<sup>49</sup> *See, e.g.*, *United States v. Picone*, 773 F.2d 224, 225 (8th Cir. 1985) (describing the prosecution’s agreement “not to make any recommendations as to sentencing”); *United States v. Corsentino*, 685 F.2d 48, 49 (2d Cir. 1982) (prosecution promised to “take no position at sentencing”).

<sup>50</sup> *See, e.g.*, *United States v. Harvey*, 784 F.2d 330, 331 (8th Cir. 1986) (describing a plea agreement in which the government agreed that it “would not make a recommendation as to sentencing” but “reserved the right to present its version of the facts to the district court”); *United States v. Carbone*, 739 F.2d 45, 45 (2d Cir. 1984) (“The government promised that it would ‘make no recommendation to the sentencing judge . . . ,’ but reserved the right to bring out the facts of the case at the sentencing hearing and to correct any factual misstatements by defense counsel.”).

<sup>51</sup> *See, e.g.*, *United States v. Oldham*, 787 F.2d 454, 456 (8th Cir. 1986) (noting that the prosecution “promised to stand mute at sentencing”); *United States v. Baylin*, 696 F.2d 1030, 1033 (3d Cir. 1982) (observing that a plea agreement required the prosecution “to remain silent and to make no

This willingness to bargain away a role at sentencing is not surprising because Department of Justice policies affirmatively discouraged prosecutors from endeavoring to influence judicial sentencing decisions. For many years, official Department of Justice policy has been that “[s]entencing in Federal criminal cases is primarily the function and responsibility of the court.”<sup>52</sup> Although this policy permits prosecutors to make sentencing recommendations when “warranted by the public interest,”<sup>53</sup> the clear preference is for no recommendation at all.<sup>54</sup>

Without consistent input from prosecutors, judges were left on their own to fashion whatever sentence they thought fit the offense and the offender. In doing so, and consistent with the then-dominant purpose of rehabilitation, judges often focused on those characteristics that made the defendant an individual: criminal history, age, education, employment, family background, family responsibilities, charitable works, health, history of substance abuse, behavior at trial, assistance to the authorities, remorse, and any other factor that the judge considered relevant.<sup>55</sup>

By the 1970s, this system of individualized sentencing had come under increasing attack.<sup>56</sup> Sentencing reformers argued that judges, in exercising their unfettered discretion, were imposing indefensibly inconsistent sentences.<sup>57</sup> One of the most forceful critics of pre-Guidelines sentencing was federal Judge Marvin Frankel, whose influential book *Law Without Order* lamented the lack of guidance given to judges and the widely disparate sentences that sometimes resulted:

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recommendation . . . as to the nature and length of sentence, if any, to be imposed by the Court upon the Defendant, and . . . not to oppose, or to take any position with respect to, any request which the Defendant may make for a particular sentence”); *United States v. Avery*, 621 F.2d 214, 216 (5th Cir. 1980) (noting that the prosecution promised “to make no recommendation and stand mute at the time of sentencing”).

<sup>52</sup> U.S. ATTORNEYS’ MANUAL § 9-27.710 (1997).

<sup>53</sup> *Id.* § 9-27.730.

<sup>54</sup> *Id.* (“The prosecutor should bear in mind the attitude of the court toward sentencing recommendations by the government, and should weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the likely consequences of making no recommendation.”).

<sup>55</sup> See *Williams v. New York*, 337 U.S. 241, 247 (1949) (noting that the sentencing judge could consider “the fullest information possible about the defendant’s life and characteristics”); WHEELER, MANN & SARAT, *supra* note 44, at 88-92, 102-05 (discussing various factors considered by judges in setting sentences for white-collar offenders); FRANKEL, *supra* note 44, at 7-8, 18-25 (discussing factors considered by judges in setting sentences). Such cases abound. See, e.g., *United States v. Hernandez*, 617 F. Supp. 83, 85 (S.D.N.Y. 1985) (noting that a co-defendant was given leniency because of his age (twenty-five), remorse, and drug addiction); *United States v. Bergman*, 416 F. Supp. 496, 501 (S.D.N.Y. 1976) (considering, among other things, the defendant’s lack of criminal history, age, health, employment, and charitable works).

<sup>56</sup> See generally FRANKEL, *supra* note 44, at 5-7 (criticizing pre-Guidelines sentencing).

<sup>57</sup> *Id.* at 6-7.

[O]ur legislators have not done the most rudimentary job of enacting meaningful sentencing “laws” when they have neglected even to sketch democratically determined statements of basic purpose. Left at large, wandering in deserts of uncharted discretion, the judges suit their own value systems insofar as they think about the problem at all.<sup>58</sup>

Interestingly, prosecutors appeared to make little effort to prevent sentencing disparity in the pre-Guidelines era. Even though prosecutors would have been well positioned to inform judges about comparable sentences received by similarly situated defendants (at least within the same district), there is little evidence that prosecutors did so with any regularity.<sup>59</sup>

### C. *The Mandatory Guidelines Era: Sentencing by Commission*

A number of forces combined to spell the end of the pre-Guidelines era: Judge Frankel’s criticism of sentencing disparity, the demise of rehabilitation as a widely accepted basis for punishment, and a fear of rising crime that was blamed on “soft” judges and individualized sentences.<sup>60</sup> As a result, in 1984, after a decade of effort by sentencing reformers, Congress enacted the Sentencing Reform Act,<sup>61</sup> which fundamentally restructured sentencing by eliminating parole, creating the Sentencing Commission, and leading directly to the creation of the Sentencing Guidelines.<sup>62</sup>

The centerpiece of the Sentencing Reform Act appears in 18 U.S.C. § 3553. In its first section, titled “Factors to be considered in imposing a sentence,” the statute articulates the principles of punishment underlying the Sentencing Reform Act.<sup>63</sup> It is worth reproducing the entire list:

- (a) The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
  - (2) the need for the sentence imposed—

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<sup>58</sup> *Id.* at 7-8.

<sup>59</sup> See WHEELER, MANN & SARAT, *supra* note 44, at 29-53 (describing the sources and types of information that judges regularly received in making sentencing decisions, which did not include reports from the prosecutor detailing sentences received by defendants in similar situations).

<sup>60</sup> The story of the Sentencing Guidelines’ creation is a well-told tale. For the most comprehensive description of the legislative history of the Sentencing Reform Act of 1984 and the Sentencing Guidelines, see generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 *passim* (1993); see also KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 38-77 (1998); Simons, *supra* note 5, at 925-36.

<sup>61</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

<sup>62</sup> STITH & CABRANES, *supra* note 60, at 40.

<sup>63</sup> 18 U.S.C. § 3553(a) (2000).

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
  - (4) the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission . . . ;
  - (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . ;
  - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
  - (7) the need to provide restitution to any victims of the offense.<sup>64</sup>

Thus, the Sentencing Reform Act's first principle is parsimony—the sentence shall be “sufficient, *but not greater than necessary*,” to comply with the purposes of punishment.<sup>65</sup> The Act then instructs the sentencing judge to consider the basic principles of punishment: retributive desert (a determination of “just punishment” based on an evaluation of the “nature and circumstances of the offense”—including the “seriousness of the offense—and the “history and characteristics of the defendant”),<sup>66</sup> and utilitarian crime prevention (including deterrence, incapacitation, and rehabilitation).<sup>67</sup> The Act further instructs the sentencing judge to consider sentencing alternatives,<sup>68</sup> the Guidelines,<sup>69</sup> the need for uniformity,<sup>70</sup> and the need for restitution.<sup>71</sup>

Although these instructions to sentencing judges reflect Congress's articulation of the core principles of sentencing, § 3553(a) received scant attention from sentencing judges, because the very next subsection mandated that judges impose sentences within the narrow ranges set by the Sentencing Commission:

(b) Application of guidelines in imposing a sentence.—

- (1) In general. . . [T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into considera-

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> *Id.* §§ 3553(a)(1), (2)(A).

<sup>67</sup> *Id.* §§ 3553(a)(2)(B), (C), (D).

<sup>68</sup> *Id.* § 3553(a)(3).

<sup>69</sup> 18 U.S.C. §§ 3553(a)(4), (5) (2000).

<sup>70</sup> *Id.* § 3553(a)(6).

<sup>71</sup> *Id.* § 3553(a)(7).

tion by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.<sup>72</sup>

Thus, while § 3553(a) instructed judges to consider the broad purposes of sentencing, § 3553(b) mandated that judges follow the Guidelines. The discretion left to sentencing judges—choosing a sentence within the mandatory Guidelines range or choosing to depart from the Guidelines range when the Commission failed to adequately consider a particular sentencing factor—was minimal.<sup>73</sup> In essence, the responsibility to consider the principles of punishment was delegated to the Sentencing Commission.<sup>74</sup> The goal, then, of the sentencing process engaged in by the prosecutor, defense lawyer, and judge was not to arrive at the “just” sentence, but rather to arrive at the correct Guidelines calculation.

The dawning of the mandatory Guidelines era drastically changed prosecutors’ role at sentencing. No longer were prosecutors passive bystanders who stood mute while the sentencing judges exercised their discretion. Instead, prosecutors were active participants. But the sentencing reforms neither required nor encouraged prosecutors to address the purposes of punishment or the fundamental justice of the sentence. Indeed, both the Sentencing Commission and the Department of Justice discouraged prosecutors from being anything more than sentencing technicians.

Under the mandatory Sentencing Guidelines, which went into effect in 1987, sentences were determined by reference to the infamous “sentencing grid,” which established over 250 separate sentencing ranges.<sup>75</sup> No longer were sentences individualized. Instead, a defendant’s sentencing range was determined by combining a mathematical score for the seriousness of the offense with a mathematical score for the defendant’s criminal history.<sup>76</sup>

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<sup>72</sup> *Id.* § 3553(b).

<sup>73</sup> The Sentencing Reform Act required that the ranges established by the Commission be narrow. *See* 28 U.S.C. § 994(b)(2) (2000) (“If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months.”).

<sup>74</sup> Interestingly, the Commission, after much debate, largely avoided considering the basic principles of punishment, and instead chose to base the Guidelines ranges on a detailed study of average sentences in the pre-Guidelines era:

Faced, on the one hand, with those who advocated ‘just deserts’ but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other hand, with those who advocated ‘deterrence’ but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the Guidelines primarily upon typical, or average, actual past practice.

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

<sup>75</sup> *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2007).

<sup>76</sup> For a good introduction to how the Guidelines work, see Frank O. Bowman III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 690-704; *see also* Breyer, *supra* note 74, at 6-31.

The resulting process, as intended, significantly restricted judicial discretion.<sup>77</sup> Most obviously, the factors that determined the seriousness of the offense (such as the amount of money stolen, the extent of the physical injury inflicted, or the quantity of drugs distributed) and the factors that determined the blameworthiness of the offender (such as the defendant's role in the offense or abuse of a position of trust) were spelled out by the Sentencing Commission in minute detail.<sup>78</sup> Notably, many of the individual offender characteristics that often played a central role in pre-Guidelines sentencing were given no effect in the mathematical calculation.<sup>79</sup> Moreover, to the extent that judges retained discretion to decide where within a particular guideline range the defendant should be sentenced,<sup>80</sup> the ranges in the Guidelines grid were exceedingly narrow—at least when compared to pre-Guidelines law.<sup>81</sup>

It has often been argued that the Sentencing Guidelines, in restricting judicial discretion, simply shifted that discretion to prosecutors. The Sentencing Guidelines, however, were carefully structured to restrict prosecutorial discretion.<sup>82</sup> In creating the Guidelines, the Sentencing Commission had

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<sup>77</sup> Frank O. Bowman III, *Places in the Heartland: Departure Jurisprudence After Koon*, 9 FED. SENT'G REP. 19, 19 (1996) ("The whole point of the guidelines was to hem in district courts with a set of rules created by the Commission and enforced by courts of appeals."). See also STITH & CABRANES, *supra* note 60, at 78-103 (criticizing the Guidelines for restricting judicial discretion).

<sup>78</sup> STITH & CABRANES, *supra* note 60, at 68-69.

<sup>79</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H (2007) (describing age, education and vocational skills, mental and emotional conditions, physical condition, employment record, family ties and responsibilities, military, civic, charitable, and public service, and prior good works as "not ordinarily relevant").

<sup>80</sup> Judges were still free to consider most individual sentencing factors in deciding what sentence to impose within the relatively narrow Guidelines sentencing range. See U.S. SENTENCING GUIDELINES MANUAL § 5C1.1(a) (2000) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").

<sup>81</sup> Most federal criminal statutes provide only a maximum sentence, so the statutory range is almost always a term of many years. See, e.g., 18 U.S.C. § 2113(d) (2000) (sentence for armed bank robbery is "not more than twenty-five years"); *id.* § 201(b) (sentence for bribing a public official is "not more than fifteen years"). The Sentencing Reform Act of 1984, by contrast, mandated that the maximum of any Guidelines sentencing range not exceed the minimum by more than 25 percent. 28 U.S.C. § 994(b)(2) (2000); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(h), introductory cmt. (2007). Thus, the armed bank robber who faced a pre-Guidelines sentence of between 0 and 300 months would face a Guidelines sentence of between 70 and 87 months. *Id.* § 2B3.1. Similarly, the defendant who paid a \$10,000 bribe to a judge and faced a pre-Guidelines sentence between 0 and 180 months would now face a Guidelines sentencing of between 27 and 33 months. *Id.* § 2C3.1.

<sup>82</sup> See Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 *passim* (1997) (summarizing the ways in which the Guidelines "real-offense" system minimizes the effect of prosecutorial charging decisions). Of course, the Guidelines did greatly reduce judicial discretion, but most of that power was shifted to the Sentencing Commission. James B. Burns, Barry Rand Elden & Brian W. Blanchard, *We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)*, 91 NW. U. L. REV. 1317, 1317-18 (1997). To the extent that prosecutorial power over sentencing increased in

to make a fundamental structural choice. It could adopt a “charge-offense” system, in which a defendant’s sentence was determined by the charge. Or, it could adopt a “real-offense” system, in which the defendant’s sentence was determined by the underlying conduct, without regard for the particular charge.<sup>83</sup>

Each system has its strengths and drawbacks. In a pure “real-offense” system, no fact is irrelevant to the sentence. The sentencing court may consider (or must consider) all facts about the offense and all facts about the offender that could affect an evaluation of the defendant’s culpability, the defendant’s dangerousness, the defendant’s potential for rehabilitation, and the need for deterrence.<sup>84</sup> This kind of system allows the maximum individualization of sentence. The pre-Guidelines sentencing system was, at least potentially, a pure real-offense system because judges were allowed (though not required) to consider almost anything in imposing a sentence.<sup>85</sup> Under the pre-Guidelines system, however, judges enjoyed unfettered discretion in deciding which “real-offense” facts to consider and what weight to give those facts.<sup>86</sup> The inevitable sentencing disparities that resulted from this system were the main impetus for the Sentencing Guidelines.<sup>87</sup> Additionally, because the Guidelines were created to ensure uniformity and proportionality in sentencing,<sup>88</sup> any real-offense fact to be considered at sentencing needed to be catalogued and quantified so that it would be applied

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the Guidelines era, that power mostly resulted from mandatory statutory sentences, not from the Guidelines themselves. *See infra* Parts II.A-C.

<sup>83</sup> For a full explanation of the differences between real-offense and charge offense systems, see generally David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 406-12 (1993); O’Sullivan, *supra* note 82, at 1343-49. *See also* Breyer, *supra* note 74, at 8-12 (discussing rationales behind the Guidelines’ compromise between real-offense and charge offense systems).

<sup>84</sup> *See* Yellen, *supra* note 83, at 408, 412 (noting that a pure real-offense sentencing system would take into consideration “the entirety of the defendant’s life, an almost limitless undertaking”).

<sup>85</sup> *See id.* at 418 (discussing the bounds and limits of judicial discretion over real-offense sentencing prior to the enactment of the Guidelines); Stephen J. Schulhofer, *Due Process at Sentencing*, 128 U. PA. L. REV. 733, 765-68 (1980). In the seminal pre-Guidelines sentencing case of *Williams v. New York*, the Supreme Court noted that “possession of the fullest information possible concerning the defendant’s life and characteristics” is “highly relevant—if not essential” to a sentencing judge’s “selection of an appropriate sentence.” 337 U.S. 241, 247 (1949).

<sup>86</sup> *See* Yellen, *supra* note 83, at 418.

<sup>87</sup> *See* Stith & Koh, *supra* note 60, at 290 n.96.

<sup>88</sup> *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) (2003). In addition to achieving “honesty in sentencing,” when it created the Guidelines, Congress sought “uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders” and “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.” *Id.*

consistently to different defendants. Such a complete catalogue of real-offense facts would be impossible to create and unwieldy to apply.<sup>89</sup>

In a pure charge-offense system, on the other hand, the only relevant fact is the offense of conviction, and all defendants who are convicted of a particular offense receive the same sentence. Although such a system is easy to create and simple to apply, it has two problems: (1) it creates a false uniformity (where differently situated defendants are treated the same) that offends basic principles of proportionality;<sup>90</sup> and (2) it creates the potential for wide disparities because prosecutors have the power to choose among different charges with different potential sentences. With prosecutorial discretion unbounded by judicial review or enforceable guidelines, idiosyncratic prosecutorial charging decisions would inevitably produce unwarranted disparities.<sup>91</sup>

In the pre-Guidelines sentencing system, the charge determined the sentencing range.<sup>92</sup> But because most federal crimes carried only maximum sentences, the statutory sentencing range rarely affected the sentence. By manipulating the charges, the prosecutor could cap the defendant's sentence at a particular maximum, but the judge still had discretion to sentence the defendant to something far less than the maximum.<sup>93</sup>

In navigating between the “Scylla and Charybdis” of real-offense and charge offense sentencing,<sup>94</sup> the Sentencing Commission chose a middle course, but one that drifts much closer to a real-offense system. The “modified real-offense”<sup>95</sup> system chosen by the Commission starts with a charge-offense foundation: the offense of conviction determines the base offense level. After that, however, the system incorporates many real-offense facts. First, the base offense level is modified by “specific offense characteristics” contained in each guideline. Second, the offense level is adjusted based

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<sup>89</sup> As the original Commission noted: “[A] sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect.” *Id.*

<sup>90</sup> By way of example, imagine two defendants who each commit a mail fraud. The first defendant obtains millions of dollars by engaging in a complex Ponzi scheme involving numerous underlings that defrauds hundreds of vulnerable senior citizens of their life saving (and this defendant has done it before). The second defendant submits one fraudulent insurance claim and obtains a few thousand dollars. Under a pure charge-offense system, both defendants would be convicted of mail fraud and would receive the case sentence, even though the first defendant is far more culpable and his offense is far more serious. See O’Sullivan, *supra* note 82, at 1345-46. A charge-offense system could reduce this disproportionality by creating different degrees of crimes (as most state codes do). But until the federal criminal law is completely revised into a coherent code, Joost, *supra* note 28, that particular kind of charge-based system will remain impossible for federal sentencing.

<sup>91</sup> See O’Sullivan, *supra* note 66, at 1346.

<sup>92</sup> See Yellen, *supra* note 83, at 418.

<sup>93</sup> See Frank O. Bowman III, Symposium, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1336 (2005); Yellen, *supra* note 83, at 421-22.

<sup>94</sup> See Yellen, *supra* note 83, at 405.

<sup>95</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(a) (2003).

upon general factors such as the defendant's role in the offense. Third, the sentencing range is determined by combining the offense level with a detailed calculation of the defendant's criminal history. And finally, the Guidelines authorize departures for the sentencing range when the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."<sup>96</sup>

Thus, at least in theory, the prosecutor's charging decision determines the starting point for the Guidelines calculation, while the real-offense facts determine the rest of the calculation. Nevertheless, even the prosecutor's power to control the starting point for the Guidelines calculation is severely constrained by two important structural aspects of the Guidelines. First, the Guidelines do not contain a separate base offense level for every offense. Instead, similar offenses (or offenses that may be based upon similar conduct) are given the same base offense level. For example, federal criminal law contains dozens, if not hundreds, of different fraud, theft, and embezzlement offenses. Yet almost all of them are sentenced based upon the same guideline. Thus, although a defendant who submits a fraudulent claim to the government may be charged with mail fraud, wire fraud, theft of public money, false claims, false statement, conspiracy, or any combination of the above,<sup>97</sup> it matters little for his Guidelines calculation which charge the prosecutor chooses. Regardless of the crime (or crimes) charged, the defendant's Guidelines range will be determined under section 2B1.1 of the Sentencing Guidelines.<sup>98</sup> Similarly with drug offenses, a defendant who produces methamphetamine in Canada and then flies to the United States where he delivers it to a confederate could be charged with manufacturing, distributing, or possessing with intent to distribute narcotics,<sup>99</sup> importing narcotics,<sup>100</sup> possessing narcotics on an aircraft arriving in the United States,<sup>101</sup> manufacturing narcotics with an intent to import,<sup>102</sup> or conspiracy to commit any of those offenses.<sup>103</sup> If he did it on multiple occasions, he could be charged with multiple counts for each occasion. Nevertheless, regardless of the charge or charges chosen by the prosecutor, the defen-

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<sup>96</sup> *Id.* ch.1, pt. A(4)(b). *See generally id.* § 1B1.1 (describing the steps involved in computing a Guidelines sentence).

<sup>97</sup> *See supra* notes 28-35 and accompanying text.

<sup>98</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2007). For example, a defendant who steals \$2 million and pleads guilty will likely be facing a guidelines sentence of either 30 to 37 months (if he pleads guilty to theft of public funds, false statement, false claims, or conspiracy) or 33-41 months (if he pleads guilty to mail fraud or wire fraud). *See id.*

<sup>99</sup> 21 U.S.C. § 841(a) (2000).

<sup>100</sup> *Id.* § 952(a).

<sup>101</sup> *Id.* § 955.

<sup>102</sup> *Id.* § 959(a).

<sup>103</sup> *Id.* §§ 846, 963.

dant's Guidelines range will be determined under section 2D1.1 of the Guidelines.<sup>104</sup>

The second structural way in which the Guidelines reduce the impact of prosecutorial charging decisions is through the concept of "relevant conduct." Under this controversial (and much criticized) aspect of the Guidelines, a defendant's Guidelines calculation may include conduct for which he was not convicted if that conduct was "part of the same course of conduct or common scheme or plan as the offense of conviction."<sup>105</sup> Thus, a prosecutor often cannot control a defendant's offense level by declining to charge particular conduct, because that conduct will be included in the sentencing calculation anyway as relevant conduct.<sup>106</sup>

This real-offense system is quite specifically designed to alleviate some of the perceived problems with prosecutorial charging discretion. As Kenneth Davis recognized some thirty-five years ago, the perniciousness of unfettered discretion most often manifests itself in unwarranted leniency.<sup>107</sup> The Guidelines themselves were motivated in large part because lawmakers perceived that judges were doling out discretionary leniency in a way that favored "white, middle-class offenders."<sup>108</sup> Similarly, prosecutorial discretion most often appears in grants of leniency—whether in the decision not to charge at all or in the decision to allow a defendant to plead to reduced charges.<sup>109</sup> While leniency—particularly in today's world of harsh sen-

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<sup>104</sup> U.S. SENTENCING GUIDELINES § 2D1.1 (2007). For example, a first offender who imported one gram of pure methamphetamine on three occasions (for a total of three grams) and pleaded guilty would likely be facing a guidelines sentence of 30-37 months regardless of the charge or combination of charges.

<sup>105</sup> *Id.* § 1B1.3(a)(2). See generally Yellen, *supra* note 83; O'Sullivan, *supra* note 82, at 343-49; Breyer, *supra* note 74, at 8-12.

<sup>106</sup> Despite this structural limitation on prosecutors' ability to affect the offense level, prosecutors can nevertheless use a variety of informal mechanisms to manipulate the Guidelines' calculation. The most common is fact bargaining, where the prosecutor and defense attorney stipulate to a version of the facts less serious than supported by the evidence. See King, *supra* note 5, at 294 (suggesting greater judicial oversight as a way to combat fact bargaining); see also United States v. Booker, 543 U.S. 220, 289-91 (2005) (Stevens, J., dissenting) (noting that fact bargaining is "quite common under the current system"). While fact bargaining is no doubt prevalent (despite the constant efforts of Justice Department policymakers to eliminate it, see *infra* notes 119-23 and accompanying text, it cannot be done without the active participation of the defense attorney and the acquiescence of the judge. Thus, while it enables a prosecutor to negotiate a particular sentence, it does not allow the prosecutor to control the sentence.

<sup>107</sup> See DAVIS, DISCRETIONARY JUSTICE, *supra* note 6, at 176-80, 231-32 ("The inescapable reality, insufficiently appreciated, is that the discretionary power of public officers . . . to be lenient is always intrinsically a discretionary power . . . not to be lenient and is susceptible to many kinds of abuse, including the worst sort of discrimination, favoritism, or caprice . . .").

<sup>108</sup> See Stith & Koh, *supra* note 60, at 231.

<sup>109</sup> See DAVIS, DISCRETIONARY JUSTICE, *supra* note 6, at 188-91 ("The affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected against abuse."); Vorenberg, *supra* note 6, at 1527 ("Lenient treatment . . . is most likely to be available to well-to-do offenders since their prior records will look better and they will have easier access to psychiatric or other help.").

tences—might not seem like much of a problem, the obvious danger is that it will be distributed inequitably. And though the Guidelines' modified real-offense system is not perfect,<sup>110</sup> by and large it has worked to minimize the potentially disparate effects of prosecutorial charging decisions.<sup>111</sup>

In the quest to eliminate disparity, however, the Guidelines discouraged prosecutorial engagement with sentencing justice. When the Guidelines were mandatory, the calculation determined the sentence.<sup>112</sup> Thus, for prosecutors, the key role to play at sentencing—indeed, the only role—was as a sentencing technician. The prosecutor's job was simply to present sentencing facts and to advocate for particular calculations as a result of those facts. Inevitably, the factual questions raised by Guidelines calculations touch on the principles of punishment. For example, a calculation of the "loss" caused by an offense is relevant to a determination of the harm, which affects both the wrongdoer's desert and the need for deterrence.<sup>113</sup> Or, a determination of whether a crime involved "sophisticated means" is some measure of the wrongdoer's culpability and of the extent to which the crime is deterrable.<sup>114</sup> Similarly, a determination of whether a criminal activity involved four participants or five participants has some relevance to the activities' dangerousness.<sup>115</sup> But, all of these measures are inexact, at best, in identifying those defendants most deserving of punishment or those crimes most requiring deterrence. More importantly, what mattered in sentencing under the mandatory Guidelines was the individual determinations that went into the calculation, not the underlying principles of punishment.

Department of Justice policies encouraged—indeed, required—prosecutors to view the goal of Guidelines sentencing as a uniform application of technical rules rather than as a just application of the principles of

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<sup>110</sup> There are still three ways in which prosecutors can manipulate the Guidelines to grant leniency to particular defendants. First, prosecutors can charge an offense with a statutory maximum penalty below the Guidelines sentencing range. For example, a defendant arrested for distributing a large quantity of narcotics might be facing a Guidelines sentencing range of 121-151 months. A lenient-minded prosecutor, however, might nevertheless charge the defendant with an offense that carries a maximum sentence of five years (conspiracy, 18 U.S.C. § 371 (2000)), four years (use of communications facility to commit a drug offense, 21 U.S.C. § 843(b) (2000)), or three years (misprision of felony, 18 U.S.C. § 4 (2000)). See Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 345 (2000). A second way in which prosecutors can manipulate the Guidelines' system is to engage in "fact bargaining"—something necessarily done with the encouragement of the defense attorney and often done with the acquiescence of the judge. See *id.* at 347 (describing fact bargaining as "[t]he most direct, if disingenuous, method of evading a fact-driven real-offense sentencing system"). Prosecutors can also use cooperation departures to avoid sentences determined by the facts of the defendant's offense. See Simons, *supra* note 5, at 944-45.

<sup>111</sup> See O'Sullivan, *supra* note 82.

<sup>112</sup> Judges did retain the discretion to choose a sentence within the range set by the Guidelines. Those ranges, however, are so narrow that little turns on the decision.

<sup>113</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2007).

<sup>114</sup> See *id.* § 2B1.1(b)(9).

<sup>115</sup> See *id.* § 3B1.1(a).

punishment.<sup>116</sup> In July 2003, then Attorney General John Ashcroft issued a memorandum to all federal prosecutors instructing them on Department of Justice policies regarding sentencing recommendations and sentencing appeals.<sup>117</sup> This Ashcroft Sentencing Memo makes clear that a prosecutor's role at sentencing is to ensure consistent application of the mandatory Guidelines, not to decide questions of sentencing justice:

[F]undamental policy choices as to the range of permissible sentences are ultimately for the Congress to make. . . . Department attorneys must ensure that the Sentencing Guidelines are applied as Congress and the Sentencing Commission intended them to be applied, regardless of whether an individual prosecutor agrees with the policy decision.<sup>118</sup>

The prosecutor's objective, in this model, is simple: consistency, predictability, and uniformity. Questions of "justice" are left to others.

Of course, prosecutors are not automatons, and it is inevitable that they will consider the justice of their sentencing calculations. And, while the Guidelines are structured to make those sorts of considerations irrelevant, prosecutors still found ways under mandatory Guidelines to influence sentencing outcomes. For example, prosecutors could engage in "fact bargaining," either by controlling the information that is disclosed to the court or by stipulating to certain facts in the hope that the court will simply accept the stipulation.<sup>119</sup> Prosecutors could also agree to (or not oppose) requests for departures, even if those requests are not fully supported by the facts of the case.<sup>120</sup> The very purpose of the Ashcroft Sentencing Memo, though, is to stamp out this kind of thinking and these kinds of practices: the memorandum explicitly prohibits fact bargaining,<sup>121</sup> requires prosecutors to disclose all relevant sentencing facts to the court,<sup>122</sup> and requires prosecutors

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<sup>116</sup> Memorandum from John Ashcroft, Attorney Gen., U.S. Dep't of Justice, to All Federal Prosecutors on Department Policies and Procedures Regarding Sentencing Recommendations and Sentencing Appeals (July 23, 2003) [hereinafter Ashcroft Sentencing Memo].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1-2.

<sup>119</sup> For a detailed discussion of these practices, see King, *supra* note 5, at 294 (suggesting greater judicial oversight as a way to combat fact bargaining).

<sup>120</sup> See David M. Zlotnick, *The War Within the War on Crime: The Congressional Sentencing Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 225-26 (2004) (noting that prosecutors have sanctioned downward departures in illegal immigration and drug cases in order to alleviate congestion in the courts).

<sup>121</sup> Ashcroft Sentencing Memo, *supra* note 116, at 3 ("Federal prosecutors may not 'fact bargain,' or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing. Nor may prosecutors reach agreements about Sentencing Guidelines factors that are not fully consistent with the readily provable facts.").

<sup>122</sup> *Id.* at 2 ("[I]f readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. . . . [A] prosecutor may not fail to bring readily provable facts about relevant conduct to a court's attention (e.g. additional drug amounts or fraud losses).").

“to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law.”<sup>123</sup>

On one level, this official prosecutorial disengagement from the principles of punishment is not particularly troubling. In theory, at least, sentencing justice will be achieved by combining the policy decisions of the Sentencing Commission with the factual determinations of the sentencing judge. One problem with this view is that it ignores the reality of plea bargaining. In the course of negotiating plea agreements, it is inevitable that prosecutors will consider the justice of their sentencing calculations. By officially forbidding such considerations of sentencing justice, Department of Justice policies simply hide the practice from public view and from internal oversight. To the extent that prosecutors considered the justice of their mandatory sentencing calculations, they did so in secret, without articulating their reasons to the court or to the public, and without justifying their results by reference to any accepted principles.

This vision of prosecutorial disengagement from sentencing justice is even more troubling when considered in light of prosecutors' power to affect the sentence through charging decisions. As noted above, the Guidelines' real-offense system is designed to minimize the effect of charging decisions. The system largely works, but with one major exception: mandatory sentences.

## II. MANDATORY SENTENCES: SENTENCING BY PROSECUTORS

At the same time that Congress enacted the mandatory Guidelines, it also began creating crimes that carried statutory minimum sentences.<sup>124</sup> While there may still be debate about the extent to which the Sentencing Guidelines shifted sentencing power to prosecutors,<sup>125</sup> there is no question that mandatory sentences shifted enormous sentencing authority to prosecutors.<sup>126</sup> And this shift is significant, given that nearly half of all federal criminal prosecutions involve narcotics or firearms charges, the main areas

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<sup>123</sup> *Id.* at 3 (emphasis in original).

<sup>124</sup> U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8-11 (1991) [hereinafter REPORT ON MANDATORY MINIMUM PENALTIES], available at [http://www.ussc.gov/r\\_congress/manmin.pdf](http://www.ussc.gov/r_congress/manmin.pdf).

<sup>125</sup> Compare Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 459 (1988) (“[A]lthough sentencing discretion would not be greatly restricted [under the Guidelines], it would reside primarily in the United States Attorney’s office, not the courts”), with Burns, Elden & Blanchard, *supra* note 82, at 1318 (“The Guidelines did effect a shift in sentencing power. But we submit that the shift was not from the judiciary to the prosecution, but from the judiciary to Congress and in turn to the United States Sentencing Commission.”).

<sup>126</sup> Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Address at the University of Nebraska College of Law: Federal Sentencing Guidelines Revisited (Nov. 18, 1998), in 11 FED. SENT'G REP. 180, 6 (1999).

in which mandatory sentences apply.<sup>127</sup> This shift in sentencing authority has also been much criticized—largely because it is fundamentally inconsistent with the division of discretion and responsibility established by the Guidelines.<sup>128</sup>

But before examining the ways in which mandatory sentences distort the Guidelines, it is necessary to distinguish between different types of mandatory sentences. They come in two types: mandatory minimums and sentencing enhancements. Mandatory minimum sentences establish a minimum sentence of imprisonment for particular criminal conduct. By far the most important mandatory minimum sentences are those that apply to narcotics offenses.<sup>129</sup> Sentencing enhancements, on the other hand, are mechanisms that increase an otherwise applicable sentence, usually because the defendant has a prior record<sup>130</sup> or used a firearm in committing the underlying offense.<sup>131</sup> By definition, sentencing enhancements are *not* incorporated into the Sentencing Guidelines.

#### A. *Mandatory Minimum Sentences and the Guidelines*

During the 1970s and much of the 1980s, few federal crimes carried mandatory penalties.<sup>132</sup> By the mid-1980s, however, public fear of drugs

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<sup>127</sup> In 2006, 35.5 percent of the federal criminal docket were narcotics cases and 11.7 percent were firearms cases. U.S. SENTENCING COMM’N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.A (2006), available at <http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm>. Approximately two-thirds of the drug cases involved a statutory mandatory minimum sentence. *Id.* at tbl.43.

<sup>128</sup> See *supra* notes 94-111 and accompanying text. Of course, much of the criticism directed at mandatory sentences is concerned primarily with the length of those sentences, not prosecutorial decisions to charge mandatory sentencing statutes. See, e.g., Bowman, *supra* note 110, at 308; Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1060-62 (2001).

<sup>129</sup> While there are a limited number of mandatory minimum sentences that apply to non-narcotics offenses, those offenses are rarely prosecuted. See REPORT ON MANDATORY MINIMUM PENALTIES, *supra* note 124, at 37 (“In the Federal Criminal Code today, over sixty criminal statutes contain mandatory minimum sentencing provisions. However, only a small number of statutes, those regulating drug and weapons offenses, account for most of the convictions. For most statutes carrying mandatory minimum sentence provisions, convictions are quite rare.”). The only non-narcotics minimum sentence used with any regularity is 18 U.S.C. § 924(c), which, as explained below, is more properly understood as a sentencing enhancement.

<sup>130</sup> See, e.g., 21 U.S.C. § 841(b) (2000) (doubling the otherwise applicable mandatory minimum sentence if the defendant has a prior felony drug conviction).

<sup>131</sup> See 18 U.S.C. § 924(c) (2000) (providing various minimum penalties if a defendant “uses or carries a firearm” in connection with “a crime of violence or drug trafficking crime”).

<sup>132</sup> In 1970, led by the now-surprising political line-up of President Nixon, Senator Strom Thurmond, and Representative George H.W. Bush, Congress “abolished all but one federal mandatory penalty, including mandatory penalties applicable in drug and firearm cases.” Miller, *supra* note 5, at 1267-68 (discussing the legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970).

and drug-related crime had reached new heights.<sup>133</sup> In 1986, Congress responded with the Anti-Drug Abuse Act of 1986, which fundamentally changed federal drug sentences by establishing mandatory minimum penalties for offenses involving certain quantities of drugs.<sup>134</sup> In 1988, Congress stiffened those minimum penalties to levels where they remain today.<sup>135</sup> Thus, a defendant convicted of a crime involving one kilogram of heroin, five kilograms of cocaine, or fifty grams of crack now faces a mandatory minimum sentence of ten years' imprisonment.<sup>136</sup> A defendant convicted of a crime involving one hundred grams of heroin, five hundred grams of cocaine, or five grams of crack now faces a mandatory minimum sentence of five years' imprisonment.<sup>137</sup>

At least in theory, these mandatory minimums give prosecutors significantly more control over a defendant's sentence. Because the mandatory minimum is triggered by the charge, the minimum sentence applies only if the prosecutor includes the relevant charge. So for example, if a defendant is arrested after distributing ten kilograms of cocaine, the prosecutor could elect to file a narcotics distribution charge with a statutory sentencing range of zero to twenty years,<sup>138</sup> a charge with a statutory sentencing range of five to forty years,<sup>139</sup> or a charge with a statutory sentencing range of ten years to life.<sup>140</sup>

In practice, however, the effect of the charging decision was significantly constrained by the mandatory Guidelines. While the statutory charge set the outer parameters of the sentence, the sentence itself was determined

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<sup>133</sup> David Sklansky has convincingly argued that the fear of rising drug crime—especially crime related to crack cocaine—was essentially race-based. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1302 (1995). Crack was seen as “a black drug, sold by black men” and “much of the public anxiety about the feared narcotic stemmed from a concern that use of the drug was spreading beyond the confines of the minority group with which it traditionally had been associated.” *Id.* at 1292-94. See also Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition, Politics and Reform*, 40 VILL. L. REV. 383, 391-95 (1995) (discussing how the “cynical exploitation of racial fear and hatred became a central legislative strategy in the enactment of narcotics prohibition” throughout the 1900s).

<sup>134</sup> Pub. L. No. 99-570, 110 Stat. 3207 (codified as amended at 21 U.S.C. § 841(b)(1) (2000)). Like most “comprehensive” crime bills, the 1986 Act was passed in October of a national election year. See Simons, *supra* note 29, at 902-07 (summarizing the history of federal criminal law and noting that since 1984, every national election year has seen significant federal criminal legislation); REPORT ON MANDATORY MINIMUM PENALTIES, *supra* note 124, at 9 (“Beginning in 1984, and every two years thereafter, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime.”).

<sup>135</sup> See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended at 21 U.S.C. §§ 841-969 (2000)).

<sup>136</sup> 21 U.S.C. § 841(b)(1)(A) (2000).

<sup>137</sup> *Id.* § 841(b)(1)(B).

<sup>138</sup> *Id.* § 841(b)(1)(C).

<sup>139</sup> *Id.* § 841(b)(1)(B).

<sup>140</sup> *Id.* § 841(b)(1)(A).

by the Sentencing Guidelines, and the mandatory minimum sentences have been incorporated into the Guidelines sentencing ranges.<sup>141</sup> As a result, Guidelines ranges for drug offenses are determined largely by the quantity of the drug involved, and those sentences are directly proportional to the mandatory minimum sentences established by Congress.<sup>142</sup> Thus, regardless of the charge filed by the prosecutor, if a defendant is convicted at trial of narcotics distribution, the court will make an independent finding of the quantity of narcotics involved in the offense. If the court finds that the defendant distributed ten kilograms of cocaine, the defendant's base offense level under the Guidelines will be level 32, which yields a sentencing range of 121-151 months.<sup>143</sup>

That is not to say that the prosecutor's charging decision is not without any effect. Because statutory minimum sentences trump the Guidelines, the prosecutor can file a sentence that establishes a statutory floor below which the sentencing judge may not go. And even though the mandatory minimum sentences are incorporated into the Guidelines, such floors still matter because the base offense level is only the starting point for the Guidelines calculation. For example, if the defendant who distributed ten kilograms of cocaine decided to plead guilty, he would qualify for "acceptance of responsibility," which would reduce his offense level by three points to level 29.<sup>144</sup> And even though level 29 carries a sentencing range of 87-108 months, the statutory minimum would prevent the judge from imposing any sentence less than 120 months.<sup>145</sup> This "floor effect" would be even greater if the defendant were a "minor participant" in the offense entitled to a re-

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<sup>141</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) (2000) (noting that "increased and mandatory minimum sentences" of the Anti-Drug Abuse Act of 1986 required the Commission to depart from its normal practice of drafting the Guidelines to reflect pre-Guidelines practice); STITH & CABRANES, *supra* note 60, at 60 n.155; REPORT ON MANDATORY MINIMUM PENALTIES, *supra* note 129, at 8-9.

<sup>142</sup> U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) cmt. background (2007) ("The base offense levels [for drug trafficking] are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute."). *See also* Bowman & Heise, *supra* note 128, at 1060-62 (describing the impact of the Anti-Drug Abuse Act of 1986 on the Sentencing Guidelines). In 2007, in an effort to reduce crack cocaine sentences, the U.S. Sentencing Commission lowered the offense levels for most crack offenses by two points. These "crack amendments," however, did nothing to change the statutory minimum sentences, which are set by Congress and cannot be changed by the Commission. *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9-10 (2007) (describing the limited nature of the 2007 amendments to the crack offense levels and urging "prompt congressional action" to reduce the corresponding statutory minimum sentences for crack offenses).

<sup>143</sup> U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(4) (2007); *id.* ch. 5, pt. A. If the defendant has a criminal history, the sentencing range for level 32 would be higher. *Id.* ch. 5, pt. A.

<sup>144</sup> *Id.* § 3E1.1.

<sup>145</sup> *Id.* § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

duction of up to four levels.<sup>146</sup> If this minor participant's offense level were reduced to level 25, the statutorily required minimum sentence of 120 months would be approximately double the otherwise applicable Guidelines sentence.<sup>147</sup>

In 1994, however, Congress acted to ameliorate the harshest effects of the mandatory minimums for the least culpable defendants.<sup>148</sup> Under a provision known as the "safety valve," non-violent narcotics defendants with little or no criminal history are exempt from the mandatory minimums.<sup>149</sup> Because those are the defendants most likely to end up with a Guidelines' sentencing range below the mandatory minimum, the "safety valve" has substantially reduced the situations in which the charge rather than the underlying facts determines the sentence.<sup>150</sup>

Of course, there are still some narcotics defendants for whom the mandatory minimum charge (as opposed to the Guidelines calculation) determines the ultimate sentence—most notably defendants who are minor participants in a drug conspiracy but are ineligible for the safety valve because of a modest criminal history.<sup>151</sup> In ways that are fundamentally inconsistent with the Guidelines' real-offense foundations, these defendants are still subject to the charging whims of individual prosecutors. Nevertheless, the incorporation of the mandatory minimums into the Guidelines sentencing ranges and use of the safety valve have combined to minimize the number of such cases. As a result, even though mandatory minimum sentences "trump" the Sentencing Guidelines, a prosecutor's decision to charge a mandatory minimum usually will not markedly change the defendant's sentence. So there is usually little reason for prosecutors to ponder whether their charge is consistent with the principles of punishment—unless the prosecutor is considering charging a sentencing enhancement.

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<sup>146</sup> *Id.* § 3B1.2.

<sup>147</sup> At offense level 25, a defendant with no significant criminal history would be facing a Guidelines range of 57 to 71 months. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2007).

<sup>148</sup> Bowman & Heise, *supra* note 128, at 1069-74 (explaining the "safety valve" exception to mandatory minimum drug sentences).

<sup>149</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 U.S.C. § 3553(f) (2000)). To be eligible for the "safety valve," a defendant must not have more than one criminal history point, must not have possessed a gun, must not have caused serious bodily injury, must not have had a supervisory role, and must truthfully disclose to the Government all information regarding the offense. *Id.*

<sup>150</sup> See Bowman & Heise, *supra* note 128, at 1071 ("In 1996, the percentage of drug cases receiving either a statutory or Guidelines safety valve reduction totaled 19.2 percent.").

<sup>151</sup> For example, a defendant with a criminal history category of II would be ineligible for the safety valve. If that defendant were a minimal participant in a ten-kilogram cocaine conspiracy, his Guidelines sentencing range after a guilty plea would be 63 to 71 months. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(4), 3B1.2(a), 3E1.1 (2007); *id.* ch. 5, pt. A. His statutory minimum sentence, however, would be 120 months. 21 U.S.C. § 841(b)(1)(A) (2000).

## B. *Sentencing Enhancements*

The term “sentencing enhancement” is not subject to precise usage, particularly as distinguished from “mandatory minimum.” As I use the term, however, a sentencing enhancement differs from a mandatory minimum in three important ways: (1) the sentencing enhancement applies only if the defendant has already committed some other underlying crime; (2) the sentencing enhancement applies only if the prosecutor elects to charge it; and (3) the sentencing enhancement has not been incorporated into the Guidelines calculation for the underlying crime.<sup>152</sup>

While dozens of sentencing enhancements are scattered throughout the federal criminal law, two are particularly important. The first is the “prior felony” enhancement for drug offenses, which doubles the otherwise applicable mandatory minimum sentence if the defendant has a prior conviction for a felony drug offense.<sup>153</sup> It is, of course, not uncommon for a defendant’s sentence to be affected by prior convictions.<sup>154</sup> What is unusual about this enhancement, however, is that it is not automatic. Unlike other enhancements for criminal history, the prior felony enhancement for drug offenses applies only if the prosecutor “charges” the enhancement by filing what is called a “prior felony information.”<sup>155</sup>

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<sup>152</sup> Others have used slightly different terminology. *See, e.g.*, Memorandum from John Ashcroft, Attorney Gen., U.S. Dep’t of Justice, to All Federal Prosecutors on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003) [hereinafter Ashcroft Charging Memo] (referring to “statutory enhancements”).

<sup>153</sup> *See* 21 U.S.C. § 851 (providing that the mandatory minimum sentences of five and ten years in 21 U.S.C. § 841(b) are increased to ten and twenty years respectively if the prosecutor files an “information” with the court charging that the defendant has a prior felony drug offense).

<sup>154</sup> Every Guidelines sentencing range is determined in part by the defendant’s criminal history score. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2007).

<sup>155</sup> 21 U.S.C. § 851. First enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, section 851 replaced a prior recidivist provision that did not give the prosecutor any discretion over the sentencing enhancement. *United States v. Noland*, 495 F.2d 529, 530-32 (5th Cir. 1974). This infusion of prosecutorial discretion was intentional:

The legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 reveals that one major goal of the Act was to make more flexible the penalty structure for drug offenses. The purpose was to eliminate “the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.” Mandatory minimum sentencing was abolished to permit greater prosecutorial and judicial flexibility. In keeping with this purpose, the new statutory scheme contemplates prosecutorial discretion to seek enhancement.

*Id.* at 532-33 (quoting H.R. Rep. No. 91-1444 (1970)). *See also* *United States v. Severino*, 268 F.3d 850, 863 (9th Cir. 2001) (“The theory of the Act was to eliminate mandatory sentences and to invest prosecutors with discretion as to whether to seek enhanced sentences and which prior convictions to invoke. Thus, the statutory scheme was completely everted: rather than requiring courts to impose mandatory minimums regardless of prosecutorial desire, courts were prohibited from enhancing sentences unless the government had timely filed an information stating that it intended to seek an enhanced sentence based on specific prior convictions.”). In contrast, other statutory enhancements based on criminal history apply without any prosecutorial action. *See, e.g.*, 18 U.S.C. § 924(e) (2000) (providing a manda-

The other major sentencing enhancement is the enhancement for any person who “uses or carries” a firearm “during and in relation to a crime of violence or drug trafficking crime.”<sup>156</sup> This enhancement—known as § 924(c)—is unusual for two reasons: first, the mandatory sentences of five, seven, or ten years (depending on whether the gun was possessed, brandished, or discharged) must be served consecutively with any sentence imposed for the underlying drug crime or crime of violence;<sup>157</sup> second, the mandatory sentence for any second or subsequent offense is an additional twenty-five-year consecutive sentence.<sup>158</sup> Again, this enhancement applies only if the prosecutor includes the § 924(c) violation as a separate charge.

The important practical difference between mandatory minimums and sentencing enhancements is the extent to which they “trump” the Guidelines. Because mandatory minimums have been incorporated into the Guidelines’ offense levels, the effect of the prosecutor’s decision to charge a mandatory minimum is usually minimal. Sentencing enhancements, on the other hand, have not been incorporated into the Guidelines’ offense levels and therefore quite often generate sentences far different from the otherwise applicable Guidelines sentences.<sup>159</sup> In other words, sentencing enhancements create a largely charge-based system in which prosecutorial decisions determine the sentence. The very real danger from such a system is that prosecutorial charging decisions will result in both unwarranted disparity (where similarly situated defendants receive vastly different sen-

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tory fifteen-year sentence if a person convicted of violating 18 U.S.C. 922(g) “has three previous convictions . . . for a violent felony or a serious drug offense”). Similarly, the Sentencing Guidelines enhance sentences based on the defendant’s criminal history without regard to whether the prosecutor “charges” the criminal history.

<sup>156</sup> 18 U.S.C. § 924(c). First enacted in 1968 (after the King and Kennedy assassinations), § 924 originally applied only to crimes of violence. It was extended to include drug crimes in 1986. For the full legislative history of the provision, see Pragati Bhatt Patrick & Thomas Bak, *Firearms Prosecutions in the Federal Courts: Trends in the Use of 18 U.S.C. § 924(c)*, 6 BUFF. CRIM. L. REV. 1189, 1190-93 (2003).

<sup>157</sup> 18 U.S.C. §§ 924(c)(1)(A), (D). In addition, if the firearm possessed is a “short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon,” the mandatory minimum sentence is ten years. *Id.* § 924(c)(1)(B). If the gun possessed is a “machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler,” the mandatory minimum sentence is thirty years. *Id.* § 924(c)(1)(C).

<sup>158</sup> *Id.* §§ 924(c)(1)(C), (D). If the firearm involved in the second or subsequent offense is “a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler,” the mandatory sentence is life without parole. *Id.*

<sup>159</sup> As a technical matter, the Guidelines themselves require that the sentence imposed comport with any mandatory statutory sentence. U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(b) (2007) (“Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.”). Thus, even though the sentence that results from a sentence enhancement can be significantly greater than the sentence that would otherwise result from an application of the Guidelines, the enhanced sentences will technically be the “Guidelines” sentence.

tences) and unwarranted uniformity (where defendants with widely varying degrees of culpability receive similar sentences).

### C. *Case Studies in Mandatory Sentencing*

A series of case studies will help illustrate how sentencing enhancements can lead both to unwarranted disparity and to unwarranted uniformity.<sup>160</sup>

#### 1. Case Study #1: The Kingpin and the Courier

Imagine a typical street-level narcotics distribution organization. At the top of the organization is the Kingpin, who supervises the operation, “owns” the drugs, and keeps most of the profits. In the middle are the Workers, who are paid a fixed amount for selling drugs on a daily basis. At the bottom is the Courier, who occasionally carries drugs for the Kingpin and is often paid in small quantities of drugs for his personal use.<sup>161</sup> Now imagine that the members of this organization are arrested and that the prosecution can prove that the organization distributed at least ten kilograms of cocaine. Also imagine that Kingpin has a lengthy prior record, with convictions for misdemeanor assault, misdemeanor drug possession, and felony drug distribution. Courier has only a minimal criminal history. A rational sentencing system would distinguish between Kingpin and Courier, and the Guidelines do. Sentencing enhancements, however, do not.

Under the Guidelines, Kingpin and Courier would receive appropriately different sentences. Kingpin would start with a base offense level of 32 (for the ten kilograms of cocaine),<sup>162</sup> which would then be increased to level 36 for his role as the leader of the organization.<sup>163</sup> His prior convictions would give him a criminal history category of III,<sup>164</sup> and the resulting sentencing range would yield a minimum sentence of 235 months.<sup>165</sup> Cou-

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<sup>160</sup> These case studies will also illustrate the extreme (and often unwarranted) severity of sentencing enhancements. Severity, however, is not the point of this critique. Whether one believes that our current *average* sentence length is too high, too low, or just right, the disproportionate distribution of those sentences among different defendants is an evil to be avoided nonetheless.

<sup>161</sup> See, e.g., *United States v. Ortiz-Martinez*, 1 F.3d 662, 666 (8th Cir. 1993) (describing a drug organization that fits this typical model).

<sup>162</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(4) (2007).

<sup>163</sup> See *id.* § 3B1.1(a) (“If the defendant was an organizer or leader of a criminal activity that involved five or more participants . . . increase by 4 levels.”).

<sup>164</sup> If Kingpin’s prior felony distribution conviction resulted in a sentence of at least sixty days’ imprisonment, he would have at least four criminal history points, which would place him in criminal history category III. See *id.* § 4A1.1; *id.* ch. 5, pt. A.

<sup>165</sup> See *id.* § 4A1.1; *id.* ch. 5, pt. A.

rier would start with the same base offense level of 32, but his minimal role in the offense would decrease the offense level to 28. If Courier were eligible for the safety valve, his offense level would be decreased by an additional two levels.<sup>166</sup> At offense level 26, Courier's minimum Guidelines sentence would be 63 months. Thus, under the Guidelines' view of the defendants' relative culpability, based upon their differing roles in the offense and their differing criminal histories, Kingpin's minimum Guidelines sentence is almost four times higher than Courier's.

The charges that would be brought against Kingpin and Courier would likely carry mandatory minimum sentences. Those mandatory minimums, however, would have absolutely no effect on the Guidelines sentencing ranges or the statutorily available sentences. At a quantity of ten kilograms of cocaine, both defendants would be facing a mandatory minimum sentence of ten years' imprisonment.<sup>167</sup> Kingpin, however, would face a Guidelines minimum sentence far in excess of ten years, and Courier would be exempt from the mandatory minimum under the safety valve. Thus, the prosecutor's decision to charge or not to charge the mandatory minimum would make no difference to the available sentences.

The situation would be somewhat different if Courier had a prior conviction that made him ineligible for the safety valve. Assume that Courier had one prior felony drug conviction that gave him a criminal history category of II. His offense level would be 28, which would yield a minimum Guidelines sentence of 87 months. The ten-year mandatory minimum, however, would trump the Guidelines sentence and raise the minimum to 120 months. Thus, the prosecutor's charging decision would require a sentence 33 months (or almost 40 percent) above the Guidelines' minimum. But even then, Courier's sentence would still be approximately half of Kingpin's.

If, however, the prosecutor elected to file prior felony information, the situation, at least for Courier, would be *very* different. The filing of the prior felony information would raise the statutory minimum sentence for each defendant to 240 months.<sup>168</sup> Thus, Kingpin's minimum sentence would be 240 months, just 2 percent higher than the Guidelines' minimum of 235 months. For Courier, however, the statutory minimum sentence of 240 months would add twelve years to the Guidelines' minimum of 87 months. Thus the prosecutor's decision to file the sentencing enhancement would almost triple Courier's sentence and would leave Courier with the same sentence as Kingpin.

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<sup>166</sup> See *supra* notes 149-51 and accompanying text. To be eligible for the safety valve, Courier could have no more than one prior conviction that resulted in a sentence of less than sixty days. See 18 U.S.C. § 3553(f) (2000); U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2007).

<sup>167</sup> See 21 U.S.C. § 841(b)(1)(A) (2000).

<sup>168</sup> See *id.* §§ 841(b)(1)(A), 851.

## 2. Case Study #2: Worker A and Worker B

Now imagine that two of the workers in Kingpin's organization are charged not only with narcotics conspiracy, but also with two counts of narcotics distribution because on two occasions they each sold a small quantity of cocaine to an undercover FBI agent.<sup>169</sup> Assume also that each Worker carried a gun during those transactions.

For Guidelines purposes, the additional distribution charges would make no difference in the calculation. Both Workers will have a base offense level of 32, plus an additional two levels for possessing a gun.<sup>170</sup> Assuming no prior criminal history, both defendants' minimum Guidelines sentence would be 151 months. Again, whether the prosecutor elects to charge the ten-year mandatory minimum is irrelevant because the Guidelines' minimum exceeds the statutory minimum.

But if the prosecutor elects to charge one of the defendants with the sentencing enhancement known as a "924(c) violation," everything changes. While a § 924(c) violation is technically a separate crime—the crime of using or carrying a firearm during a crime of violence or a drug crime—it functions like a sentencing enhancement.<sup>171</sup> The defendant can only be charged with a § 924(c) violation if he also committed the underlying crime, and all the § 924(c) charge does is increase the defendant's sentence for that underlying crime.<sup>172</sup>

Thus, if the prosecutor charges Worker A with one § 924(c) violation, Worker A's minimum sentence will be 181 months—two-and-a-half years more than Worker B's Guidelines' minimum of 151 months.<sup>173</sup> If the prosecutor elects to charge Worker A with two § 924(c) violations, Worker A's minimum sentence will increase to 481 months—twenty-seven-and-a-half years more than Worker B's Guidelines' minimum. Thus, the prosecutor's decision to file the § 924(c) charge will leave Worker A with a minimum sentence more than four times as long as Worker B's and more than twice as long as Kingpin's.<sup>174</sup>

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<sup>169</sup> See *id.* §§ 841(a), 846.

<sup>170</sup> See U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(4), (b)(1) (2007).

<sup>171</sup> Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1384-85 (2002).

<sup>172</sup> *Id.* It is possible for a defendant to be charged with a § 924(c) violation without also being charged with the underlying crime. But he must have in fact committed the underlying crime to be guilty of the § 924(c) violation. *Id.* at 1429-30.

<sup>173</sup> Worker's offense level for the narcotics conspiracy and distribution would actually decrease to level 32, because the two-level enhancement for possessing a dangerous weapon, see U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2007), would not apply (to avoid double counting), see *id.* § 2K2.4, cmt. n.4. Level 32 yields a minimum sentence of 121 months, see *id.* ch. 5, pt. A, and the § 924(c) violation adds an additional 60 months to that minimum, see *id.* § 2K2.4.

<sup>174</sup> Of course, the prosecutor might also be able to charge Kingpin with § 924(c) violations, on a theory of vicarious liability for the crimes of a coconspirator. See *Pinkerton v. United States*, 328 U.S.

### 3. Case Study #3: Robber and Driver

Imagine a bank robber (Robber) and his accomplice (Driver) who are arrested after committing two bank robberies. Robber was the moving force behind the robberies: he selected the banks, he obtained the needed materials, and he told Driver what to do. In each robbery, Robber went into the bank, brandished a gun, demanded money from the teller, received approximately \$2,000, and then ran outside to where Driver was waiting with the getaway car. Robber has a significant criminal history, with one prior conviction for robbery and four prior convictions for misdemeanor drug offenses. Driver has no prior offenses.

Under the Guidelines, both defendants would start with a base offense level of 20,<sup>175</sup> which then would be enhanced by two levels because they robbed a bank,<sup>176</sup> by five levels because a gun was brandished,<sup>177</sup> and by two levels because they committed two robberies.<sup>178</sup> In addition, Robber would receive an additional two-level enhancement because he was the leader of the duo.<sup>179</sup> Given his criminal history,<sup>180</sup> Robber's minimum Guidelines sentence would be 151 months. Driver, on the other hand, would receive a two-level reduction for his minor role in the robberies, leaving him with a minimum Guidelines sentence of 70 months.

Thus, Robber's minimum Guidelines sentence is 115 percent higher than Driver's minimum Guidelines sentence. But if the prosecutor elects to charge both men with one § 924(c) violation, Robber's minimum sentence increases to 176 months, while Driver's increases to 125 months—leaving Robber's sentence only 40 percent higher than Driver's. And if the prosecutor elects to charge both men with two § 924(c) violations, Robber's minimum sentence increases to 476 months, while Driver's increases to 425 months—leaving Robber's sentence only 12 percent higher than Driver's. Moreover, the prosecutor's decision to include two § 924(c) charges has the effect of increasing the defendant's sentence by almost thirty years over the sentence otherwise recommended by the Guidelines.

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640, 646-47 (1946) (holding that conspirators are liable for substantive crimes committed by co-conspirators in furtherance of the conspiracy, even if the conspirators did not specifically agree to commission of those additional crimes). *See also* United States v. Floyd, Nos. 93-5077, 93-5078, 1994 WL 18009, at \*6 (6th Cir. Jan. 21, 1994) (holding that the defendants aided and abetted the possession of a firearm in relation to a drug trafficking offense because the use and possession of the firearm was reasonably foreseeable to the defendants).

<sup>175</sup> *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(a) (2007).

<sup>176</sup> *See id.* § 2B3.1(b)(1).

<sup>177</sup> *See id.* § 2B3.1(b)(2)(C).

<sup>178</sup> *See id.* § 3D1.4.

<sup>179</sup> *See id.* § 3B1.1(c).

<sup>180</sup> I am assuming that Robber's five prior convictions yield at least seven criminal history points, which would leave him with a criminal history category of IV. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2007); *id.* ch. 5, pt. A.

The power wielded by prosecutors to charge sentencing enhancements creates obvious occasions for prosecutors to consider the principles of punishment—to consider whether a particular narcotics defendant deserves to have his sentence doubled or whether a particular robbery defendant deserves to have thirty years added to his sentence. In practice, however, prosecutors seem little concerned with the “justice” of such sentencing enhancements. Indeed, Department of Justice policies seem designed to affirmatively discourage prosecutorial engagement with the justice of sentencing enhancements.

D. *Prosecutorial Discretion, Department of Justice Policy, and the Charging of Sentencing Enhancements*

Sentencing enhancements create a system where prosecutors effectively choose the sentence. Neither the detailed system of uniformity and proportionality created by the Sentencing Commission nor the exercise of judicial discretion has much effect on the sentence. All that matters is whether the prosecutor elects to charge the sentencing enhancement, either by filing the “prior felony information” under 21 U.S.C. § 851 or by adding a charge under 18 U.S.C. § 924(c). Moreover, because sentencing enhancements increase sentences so dramatically, they create a real risk that sentences will be unfairly disparate or unjustly severe.

Having been given this sentencing power, prosecutors have three options: (1) charge sentencing enhancements in all possible cases; (2) refuse to charge sentencing enhancements; or (3) charge sentencing enhancements only in selected cases. The first two options—never charging or always charging—have the significant benefit of ensuring uniformity. Nevertheless, either approach seems inconsistent with Congress’s intent in enacting the sentencing enhancement statutes. On the one hand, when Congress enacted these enhanced penalties for offenses involving guns and for repeat drug offenders, it undoubtedly expected that they would be used by prosecutors.<sup>181</sup> On the other hand, Congress specifically created these sentencing enhancements as separate offenses that must be charged by prosecutors to be triggered.<sup>182</sup> Instead of creating sentencing enhancements, Congress could have simply increased the penalties for the underlying crimes. In other words, Congress could have incorporated the increased sentence—including an increased mandatory minimum sentence—directly into the statute, without requiring any additional action by the prosecutor.<sup>183</sup> That

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<sup>181</sup> See *supra* notes 155-56 (summarizing legislative history).

<sup>182</sup> See *supra* notes 155-56.

<sup>183</sup> For example, the basic drug offense statute, 21 U.S.C. § 841, provides for enhanced mandatory minimum penalties “if death or serious bodily injury results from the use of such substance.” 21 U.S.C.

Congress chose instead to require separate prosecutorial action to trigger the enhancements indicates that Congress expected prosecutors to *decide* when the enhancements were appropriate. And, indeed, that is what happens. But *how* do prosecutors decide when to file sentencing enhancements? Part of the answer may be found in Department of Justice charging policies.

The Department of Justice first promulgated rules for charging decisions in 1980.<sup>184</sup> These “Principles of Federal Prosecution”<sup>185</sup> contain general instructions for prosecutors making charging decisions. First, with respect to the initial decision about whether an offense should be charged, the Principles direct that prosecutors should consider the following:

- (a) federal law enforcement priorities;
- (b) the nature and seriousness of the offense;
- (c) the deterrent effect of prosecution;
- (d) the person’s culpability in connection with the offense;
- (e) the person’s history with respect to criminal activity;
- (f) the person’s willingness to cooperate in the investigation or prosecution of others; and
- (g) the probable sentence or other consequences if the person is convicted.<sup>186</sup>

Significantly, prosecutors are specifically directed to consider the traditional purposes of punishment: retributive desert (as determined by both harm—“nature and seriousness of the offense”—and by “culpability”) and deterrence. The commentary included in the Principles of Federal Prosecution provides further guidance on how prosecutors should evaluate harm, culpability, and the need for deterrence.<sup>187</sup>

Once the decision to prosecute is made, however, the Principles of Federal Prosecution do not instruct prosecutors to consider the principles of punishment in deciding *which* charges to bring. Instead, prosecutors are instructed to charge “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.”<sup>188</sup> As originally promulgated, the Principles of Federal Prosecution noted that the “most serious offense” will “ordinarily” be the offense

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§ 841(b)(1)(A) (2000). Not coincidentally, this enhanced penalty is incorporated directly into the Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a) (2007).

<sup>184</sup> U.S. DEP’T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (1980), *reprinted in* 6 FED. SENT’G REP. 317, 319 (1994). These principles are also incorporated in the United States Attorneys’ Manual. U.S. ATTORNEYS’ MANUAL § 9-27.230 (2007).

<sup>185</sup> U.S. ATTORNEYS’ MANUAL § 9-27.230 (2007).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* §§ 9-27.230(B)(2), (3), (4).

<sup>188</sup> *Id.* § 9-27.300(A).

with the “most severe penalty.”<sup>189</sup> With respect to mandatory sentences, however, the original Principles recognized that a mandatory minimum penalty set by Congress might not be appropriate in all cases in which it could be charged.<sup>190</sup>

During the Guidelines era, the Principles of Federal Prosecution were amended by a series of directives from three different Attorneys General. First, in 1989, shortly after the Sentencing Guidelines passed constitutional muster in the Supreme Court, Attorney General Richard Thornburgh issued a memorandum instructing prosecutors to charge “the most serious, readily provable offense.”<sup>191</sup> Like the original Principles of Federal Prosecution, however, the Thornburgh Memo did not discuss sentencing enhancements. Four years later, Attorney General Janet Reno issued a memorandum clarifying the factors that prosecutors should consider in making charging decisions.<sup>192</sup> Although the Reno Memo maintained the general policy of charging “the most serious offense that is consistent with the nature of the defendant’s conduct,” it also instructed prosecutors to ensure that the charge chosen would result in a sentence that was consistent with the principles of punishment.<sup>193</sup> Specifically, the Reno Memo instructed prosecutors to make an “individualized assessment” of each case, which includes considering

the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.<sup>194</sup>

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<sup>189</sup> U.S. DEP’T OF JUSTICE, *supra* note 184, at 323.

<sup>190</sup> *Id.* Apparently, however, the concern was a practical one. The mandatory sentence might be so grossly out of proportion to the defendant’s offense that nullification by the judge or jury might lead to an acquittal:

In many instances, the term the legislature has specified certainly would not be viewed as inappropriate. In other instances, however, unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of defendant’s conduct that the jury or judge in assessing guilt, or the judge in ruling on the admissibility of evidence, may be influenced by the inevitable consequence of conviction. In such cases, the attorney for the government should consider whether charging a different offense that reaches the same conduct, but that does not carry a mandatory penalty, might not be more appropriate under the circumstances.

*Id.* at 323.

<sup>191</sup> Memorandum from Richard Thornburgh, Attorney Gen., U.S. Dep’t of Justice, on Plea Bargaining Under the Sentencing Reform Act (Mar. 13, 1989), *reprinted in* 1 FED. SENT’G REP. 421, 421 (1989) [hereinafter Thornburgh Memo]. The Guidelines were originally declared constitutional in *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

<sup>192</sup> Memorandum from Janet Reno, Attorney Gen., U.S. Dep’t of Justice, on Charging and Plea Decisions (Oct. 12, 1993), *reprinted in* 6 FED. SENT’G REP. 352, 352 (1993) [hereinafter Reno Memo].

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* Like the Thornburgh Memo, the Reno Memo did not mention sentencing enhancements, although the version of the United States Attorneys’ Manual in effect at the time instructed prosecutors

If the Reno Memo suggested that prosecutors should consider sentencing justice when deciding whether to file sentencing enhancements, its successor—a memorandum issued by Attorney General John Ashcroft in September 2003—suggests that prosecutors should simply seek to maximize sentences, including by filing sentencing enhancements.<sup>195</sup> Not hiding its disapproval of the “individualized assessment” promoted by the Reno Memo, the Ashcroft Charging Memo’s stated purpose is “to re-examine the subject thoroughly and to state with greater clarity Department policy with respect to charging, disposition of charges, and sentencing.”<sup>196</sup> The Ashcroft Charging Memo also makes clear that the overriding policy governing charging decisions is to ensure “consistency” and to “eliminate unwarranted disparity.”<sup>197</sup>

The Ashcroft Charging Memo then reiterates the policy of charging the most serious offense, but in more forceful terms:

It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney in the limited circumstances described below.<sup>198</sup>

In contrast to the original policy set forth in the Thornburgh Memo, the Ashcroft Charging Memo states the policy as an imperative (“must” rather than “should”) and limits exceptions to the policy to specifically enumerated situations. In addition, the Ashcroft Charging Memo defines the “most serious” offense as the one that yields the most punishment: “The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.”<sup>199</sup> Gone is the notion reflected in the original Principles of Federal Prosecution that a mandatory minimum sentence might be “out of proportion to the seriousness of the defendant’s conduct.”<sup>200</sup>

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to file a prior felony information under 21 U.S.C § 851 for readily provable charges unless a high-level supervisor authorized otherwise in the context of a negotiated plea. See Richard F. Albert et al., Department of Justice Charging, Plea Bargaining and Sentencing Policies Under Attorneys General Thornburgh, Reno, and Ashcroft 18 (July 2004) (a report of the Federal Bar Council’s Committee on Second Circuit Courts, on file with the author).

<sup>195</sup> Ashcroft Charging Memo, *supra* note 152.

<sup>196</sup> *Id.* The Ashcroft Charging Memo also states that it “supersedes all previous guidance on this subject.” *Id.*

<sup>197</sup> *Id.* (“Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.”).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> U.S. DEP’T OF JUSTICE, *supra* note 184, at 323.

The Ashcroft Charging Memo lists six specific exceptions to the requirement that prosecutors always charge the “most serious” offense, but none of those exceptions relates to the justice of the resulting sentence. Instead, the exceptions are justified solely by the efficient use of prosecutorial resources.<sup>201</sup>

The Ashcroft Charging Memo also specifically addresses sentencing enhancements, noting that they are “strongly encouraged” and that “federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as the filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases.”<sup>202</sup> The Memo stops short of requiring sentencing enhancements to be charged in *all* cases; but, to the extent that prosecutors are permitted to refrain from filing sentencing enhancements, the rationale is not based on any notions of proportionality, parsimony, or any due consideration for the principles of punishment. Instead, prosecutors are permitted to forgo sentencing enhancements only for reasons of prosecutorial efficiency:

In many cases . . . the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty. Requiring the pursuit of such enhancements to trial in every case could therefore have a significant effect on the allocation of prosecutorial resources within a given district.<sup>203</sup>

Having identified the “allocation of prosecutorial resources” as the only reason for forgoing sentencing enhancements, the Ashcroft Charging Memo provides little guidance on how prosecutors should decide which defendants should have their sentences increased and which should not. Instead, prosecutors are referred to the general policies governing plea agreements.<sup>204</sup> In addition, the Ashcroft Charging Memo also contains spe-

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<sup>201</sup> See Ashcroft Charging Memo, *supra* note 152. For example, prosecutors may decline to file the “most serious” charge as part of a “fast-track program,” which is designed to encourage “early disposition” of large numbers of cases, usually involving immigration-related cases in border districts. Or, prosecutors may decline to file the “most serious” charge where necessary to secure the cooperation of a defendant in an important case. A “catch-all” exception for “exceptional circumstances” is based on “practical limitations,” such as when “the United States Attorney’s Office is particularly over-burdened, the duration of the trial would be exceptionally long, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.” *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* Specifically with respect to the statutory enhancement under 18 U.S.C. § 924(c), the Memo also instructs that “the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued” in “all but exceptional cases” and that the second such violation shall be charged and pursued in any cases involving “three or more readily provable violations . . . in which the predicate offenses are crimes of violence.” *Id.*

<sup>204</sup> *Id.* The Memo notes that the authorization to forgo the filing of a sentencing enhancement “must be written or otherwise documented and may be granted only after careful consideration of the

cific instructions on how to implement this policy with respect to the two main sentencing enhancements. With respect to repeat drug offenders, prosecutors are instructed to give “particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity.”<sup>205</sup> With respect to the sentencing enhancements for the use of a gun, prosecutors’ ability to forgo the charge is even further constrained, as they are instructed that they must bring the charge, if “readily provable,” in “all but extraordinary cases.”<sup>206</sup>

Thus, although the Ashcroft Charging Memo does not require sentencing enhancements in all possible cases, the clear Department of Justice policy is that the enhancements are “strongly encouraged” and should be sought whenever practical limitations allow. And, even if prosecutors have limited discretion to choose whether to charge sentencing enhancements—albeit for reasons of efficiency not justice—they are (or were) exercising that discretion within a system that regularly discouraged them from thinking about sentencing justice.

Moreover, to the extent that prosecutors do exercise discretion to forgo sentencing enhancements, it is likely that they do so primarily as a way to manage their dockets.<sup>207</sup> Indeed, there is good reason to believe that prosecutors in the field may be significantly more parsimonious with sentencing enhancements than the Ashcroft Charging Memo would suggest, but not for any principled reasons of sentencing justice. Instead, prosecutors may use the threat of a sentencing enhancement to induce an early plea. One former federal prosecutor has described his experience with an “unwritten policy” that repeat drug offender enhancements should “never” be filed against defendants who timely pleaded guilty but that they should “always” be filed

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factors set forth in Section 9-27.420 of the United States Attorneys’ Manual.” Ashcroft Charging Memo, *supra* note 152. That section of the Manual instructs prosecutors to consider:

All relevant considerations, including: (1) The defendant’s willingness to cooperate in the investigation or prosecution of others; (2) The defendant’s history with respect to criminal activity; (3) The nature and seriousness of the offense or offenses charged; (4) The defendant’s remorse or contrition and his/her willingness to assume responsibility for his/her conduct; (5) The desirability of prompt and certain disposition of the case; (6) The likelihood of obtaining a conviction at trial; (7) The probable effect on witnesses; (8) The probable sentence or other consequences if the defendant is convicted; (9) The public interest in having the case tried rather than disposed of by a guilty plea; (10) The expense of trial and appeal; (11) The need to avoid delay in the disposition of other pending cases; and (12) The effect upon the victim’s right to restitution.

U.S. ATTORNEYS’ MANUAL § 9-27.420(A) (2007).

<sup>205</sup> Ashcroft Charging Memo, *supra* note 152.

<sup>206</sup> *Id.* Specifically, prosecutors are instructed that “the first readily provable violation of 18 U.S.C. § 924(c) [which will add between five and ten years to the sentence] shall be charged and pursued” in “all but extraordinary cases.” *Id.* In addition, prosecutors are instructed that they must, “in all but exceptional cases,” charge a second § 924(c) count [which will add an additional twenty-five years to the sentence] “[i]n cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are crimes of violence.” *Id.*

<sup>207</sup> See, e.g., JOHN SCALIA, U.S. DEP’T OF JUSTICE, FEDERAL FIREARMS OFFENDERS, 1992-1998, at 3, 6-7 (“[P]rosecutors often dismiss the § 924(c) charge in exchange for a guilty plea.”).

against defendants who went to trial.<sup>208</sup> Other studies have shown that § 924(c) charges are filed far less often than official Department of Justice policy would suggest.<sup>209</sup>

Whether sentencing enhancements are used as leverage to extract pleas or used routinely in an effort to obtain the “most serious” sentence, the result can distort any notion of sentencing justice.<sup>210</sup> Defendants with vastly different levels of culpability can receive essentially identical sentences. Defendants with essentially identical levels of culpability can receive vastly different sentences. And, even putting questions of uniformity and disparity aside, the indiscriminate use of sentencing enhancements can lead to extraordinarily harsh sentences that are grossly out of proportion to the defendant’s conduct and difficult to justify under any principled theory of punishment.

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<sup>208</sup> Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1184 n.342 (2001). Having served as an Assistant United States Attorney in the same office as Bibas (the Southern District of New York) during some of the same time period, I can attest to the accuracy of his description. Although both Bibas and I served as federal prosecutors before the Ashcroft Charging Memo was issued, there is good reason to think that the memo did little to change office practice. Shortly after the Ashcroft Charging Memo was issued, Southern District of New York U.S. Attorney David Kelley remarked that the memo was “a continuation of what was already in place in the D.O.J. and what was already in place in the S.D.N.Y.,” and thus “the defense bar should not expect that the memo will lead to any changes in practices in the S.D.N.Y.” Albert, *supra* note 194, at 23. Even before the Ashcroft Charging Memo was issued, the use of sentencing enhancements as leverage in plea discussions was forbidden by Department of Justice policy going back at least to the Thornburgh Memo in 1989. See Thornburgh Memo, *supra* note 191 (“Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant’s conduct.”). That prosecutors in the field might not comply with Department of Justice policy directives is hardly surprising. See Miller, *supra* note 5, at 1212 (discussing the “ongoing and visible tension between official policy at the Department of Justice and the activities of line prosecutors in the field”). Indeed, the very tone of the Ashcroft Charging Memo can be said to betray a sense of frustration that prosecutors in the field do not always follow the rules laid down by policymakers in Washington. See *id.* at 1256 (“It is striking that in 2003, after fifteen years of directing line prosecutors to make consistent, fully revealed and tough judgments, the Attorney General would think it necessary to again forbid concealment of facts, fact bargains, and agreements ‘not fully consistent with the readily provable facts.’”).

<sup>209</sup> See FIREARMS POLICY TEAM, U.S. SENTENCING COMM’N, SENTENCING FOR THE POSSESSION OR USE OF FIREARMS DURING A CRIME 16 (2000) (“There is considerable evidence, spanning almost ten years and using different research methods, that section 924(c) violations are not charged and pressed in a significant number of cases that appear to legally qualify for them.”).

<sup>210</sup> Michael O’Hear has recently questioned the constitutionality of using the threat of additional charges as plea bargaining leverage. See Michael M. O’Hear, *The End of Bordenkircher: Extending the Logic of Apprendi to Plea Bargaining*, 84 WASH. U. L. REV. 835, 884-85 (2007) (arguing that the practice, approved by the Supreme Court in *Bordenkircher* three decades ago, offends the vision of the Due Process Clause that underlies recent Supreme Court sentencing jurisprudence).

### III. THE ADVISORY GUIDELINES ERA: PROSECUTORS AS PUNISHMENT THEORISTS

As Parts I and II of this Article have demonstrated, prosecutors in both the pre-Guidelines era and mandatory Guidelines era were able to approach sentencing without much regard for the purposes of punishment. In the pre-Guidelines era, prosecutors had little power to affect the sentence and therefore bore little responsibility. In the Guidelines era, prosecutors many times found themselves in a similar situation with little power to affect the “real-offense” sentence. When prosecutors did address sentencing, it was usually as technocrats, arguing over the minutia of Guidelines calculations, not the broad questions of harm, blame, deterrence, and justice. And even when prosecutors did wield significant sentencing power, as when deciding whether to charge sentencing enhancements, there is little evidence that either official policy or actual practice gave much attention to the principles of punishment. In the current *Booker* era, however, this prosecutorial indifference to punishment theory is, by necessity, changing.

#### A. *The Booker Rollback*

For over a decade after the Supreme Court first gave its blessing to the Sentencing Commission,<sup>211</sup> the constitutionality of the mandatory Guidelines was largely unquestioned.<sup>212</sup> Then, in 2000, the Supreme Court unexpectedly began constitutionalizing sentencing procedures—a process that eventually led it, five years later, to reject the basic structure of the mandatory Guidelines in *United States v. Booker*.<sup>213</sup>

The road to *Booker* began in 2000 with *Apprendi v. New Jersey*,<sup>214</sup> in which the Court struck down a New Jersey hate crimes statute that permitted a court to increase a defendant’s sentence above the otherwise applicable statutory maximum if the sentencing judge found, based on a prepon-

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<sup>211</sup> See *Mistretta v. United States*, 488 U.S. 361, 412 (1989). The primary constitutional challenge in *Mistretta* was to the creation and composition of the Commission and to the congressional delegation of authority to it. See *id.* at 412 (“We conclude that in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches.”).

<sup>212</sup> In the decade after *Mistretta*, the Court did address various equal protection and due process challenges to particular aspects of the Guidelines. See, e.g., *United States v. Watts*, 519 U.S. 148, 153-54 (1991) (rejecting a Due Process challenge to the consideration of acquitted conduct but not to the Guidelines as a whole).

<sup>213</sup> 543 U.S. 220 (2005). For a concise description of the jurisprudential developments leading up to *Booker* by perhaps the most thorough and insightful observer of recent sentencing jurisprudence, see Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 654-76 (2005).

<sup>214</sup> 530 U.S. 466 (2000).

derance of the evidence, that the offense involved racial animus.<sup>215</sup> The court's holding was based on its view that any fact (other than the fact of a prior conviction) that permits the imposition of a sentence above the otherwise applicable statutory maximum "must be submitted to a jury, and proved beyond a reasonable doubt."<sup>216</sup> Although constitutional concerns about judicial fact finding at sentencing had been expressed by the Court in two cases decided in the late 1990s,<sup>217</sup> most of the criminal justice world was surprised by *Apprendi's* "watershed" ruling.<sup>218</sup> Read broadly, *Apprendi's* holding could call into question two decades of sentencing reform.<sup>219</sup>

Immediately following *Apprendi*, however, it was not clear that the decision imperiled the mandatory Guidelines. *Apprendi*, after all, concerned only judicial fact finding that increased sentences beyond statutory maxima, and the sentencing ranges established by the Guidelines all include sentences below the statutory maxima.<sup>220</sup> Indeed, for four years, most lower courts interpreted *Apprendi* in a narrow way that preserved the mandatory Guidelines system.<sup>221</sup> Then, in 2004, the Supreme Court followed the *Apprendi* "watershed" with the "earthquake" of *Blakely v. Washington*.<sup>222</sup>

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<sup>215</sup> *Id.* at 497.

<sup>216</sup> *Id.* at 490.

<sup>217</sup> The concern about judicial fact finding at sentencing reflected in *Apprendi* first appeared in *Almendarez-Torres v. United States*, 523 U.S. 224, 246-48 (1998) (holding five to four over a strong dissent that a statutory maximum sentence could be increased based on a judicial finding of prior criminal history), and in *Jones v. United States*, 526 U.S. 227, 248-49 (1999) (suggesting that *Almendarez-Torres* created only a limited exception for prior convictions).

<sup>218</sup> Writing in dissent, Justice O'Connor noted that *Apprendi's* holding "will surely be remembered as a watershed change in constitutional law." *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting). See Berman, *supra* note 213, at 670 ("But then, all of a sudden, almost as if a mysterious *fin-de-siecle* doctrinal light-switch was flipped, the Supreme Court's sentencing jurisprudence took a remarkable turn and the Court started to express considerable concerns with traditionally lax sentencing procedures.").

<sup>219</sup> See Berman, *supra* note 213, at 672 (describing *Apprendi* as a "shocking decision" because it "cast constitutional doubt on many sentencing statutes and guidelines enacted during the modern sentencing reform movement").

<sup>220</sup> Moreover, *Apprendi* did not call into question either of the two main sentencing enhancements. Enhancements for prior felony drug offense fell within the *Almendarez-Torres* exception for prior convictions, and enhancements for the use of a gun under 18 U.S.C. § 924(c) were charged as separate crimes and so subjected to jury fact finding. See *id.*

<sup>221</sup> See generally Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1, 1 (2003) ("State courts have by and large interpreted *Apprendi* very cautiously and narrowly."); Berman, *supra* note 213, at 673 ("Lower federal and state courts typically interpreted *Apprendi* narrowly in order to preserve, as much as possible, existing sentencing structures that relied on judicial fact-finding, and legislatures did not feel compelled to alter existing sentencing systems or criminal codes in light of *Apprendi*.").

<sup>222</sup> 542 U.S. 296 (2004). Speaking at the Ninth Circuit Judicial Conference one month after *Blakely* was decided, Justice O'Connor noted that the case "looks like a No. 10 earthquake." *Senate, Judges Urge 'Blakely' Redux*, N.Y. L.J., July 26, 2004, at 2.

In *Blakely*, the Court held that *Apprendi*'s requirement of jury fact finding extended to "all facts legally essential to the punishment."<sup>223</sup> *Blakely*'s sentence for kidnapping under the Washington State sentencing guidelines had been enhanced based on the sentencing judge's finding that the offense had involved "deliberate cruelty."<sup>224</sup> Because the Washington Sentencing Guidelines were mandatory, this finding was "legally essential" to the sentence, which rendered the process unconstitutional.<sup>225</sup>

*Blakely*'s application to the federal Sentencing Guidelines was immediately apparent. Under the mandatory federal guidelines, most of the facts that went into a guidelines calculation were "legally essential" to the sentence. To comply with *Blakely*, those facts would have to be found by a jury beyond a reasonable doubt—a task that is practically impossible given the detail and complexity in the federal guidelines. Thus, when the Supreme Court agreed to review the constitutionality of federal sentencing in *United States v. Booker*,<sup>226</sup> most participants in the sentencing system expected the Court to declare the federal Sentencing Guidelines unconstitutional, sending Congress back to the sentencing reform drawing board for the first time in twenty years.<sup>227</sup> Indeed, the attention of many commentators had already turned to a variety of possible "*Blakely* fixes."<sup>228</sup>

When *Booker* was decided in January 2005, the result surprised the experts. As expected, the Court ruled that the federal Sentencing Guidelines were unconstitutional under *Blakely*.<sup>229</sup> Writing for a five-justice majority that included Justices Scalia, Souter, Thomas, and Ginsburg, Justice Stevens affirmed the Court's holding in *Apprendi*: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."<sup>230</sup> Dissenting from this "constitutional opinion," Justice Breyer, joined by Chief Justice Rehnquist and Justices Kennedy and O'Connor, argued both that *Blakely* was wrongly decided and that it need not apply to the Sentencing Guidelines.<sup>231</sup> This much of *Booker* was predictable.

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<sup>223</sup> *Blakely*, 542 U.S. at 313.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 301.

<sup>226</sup> Petition for Writ of Certiorari, *United States v. Booker*, 542 U.S. 956 (2004) (No. 04-104).

<sup>227</sup> See Berman, *supra* note 213, at 675 ("[N]early all observers were prepared for the Court to declare *Blakely* applicable to the federal system and thereby find unconstitutional the federal sentencing guidelines' reliance on judicial fact-finding at sentencing.").

<sup>228</sup> See, e.g., Frank O. Bowman III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 259-64 (2004).

<sup>229</sup> See *United States v. Booker*, 543 U.S. 220, 226 (2005).

<sup>230</sup> *Id.* at 244 (Stevens, J., delivering the opinion of the court in part).

<sup>231</sup> *Id.* at 326-27 (Breyer, J., dissenting).

But then, a different group of five Justices—the four dissenters from the merits opinion plus Justice Ginsburg—announced the remedy.<sup>232</sup> Writing for this group, Justice Breyer, against all odds, managed to preserve the Guidelines in the face of *Apprendi* and *Blakely*.<sup>233</sup> He did so by excising two sections of the Sentencing Reform Act: (1) the provision that required judges to impose a sentence within the Guidelines range, unless the court found grounds for a departure;<sup>234</sup> and (2) the provision that established standards of review on appeal, including de novo review of departures from the otherwise mandatory Guidelines range.<sup>235</sup> With this minor surgery, Justice Breyer preserved the vast body of Guidelines law and Guidelines-era practice. The Guidelines themselves are left intact; so too is the procedure for judicial determination of Guidelines facts and Guidelines sentencing ranges. The major difference is that the Guidelines sentencing range is now “advisory” rather than mandatory, as originally required by 18 U.S.C. § 3553(b).

The elimination of § 3553(b) has given new life to § 3553(a). With the Guidelines no longer mandatory, judges are now free—indeed, required—to sentence pursuant to the principles set forth in § 3553(a).<sup>236</sup> Thus, judges must follow the basic principle of parsimony,<sup>237</sup> and then must consider the traditional purposes of punishment (retribution,<sup>238</sup> deterrence,<sup>239</sup> incapacitation,<sup>240</sup> and rehabilitation<sup>241</sup>), along with the need for uniformity<sup>242</sup> and restitution.<sup>243</sup> Even with this new-found freedom for sentencing judges, the

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<sup>232</sup> *Id.* at 244-68 (Breyer, J., delivering the opinion of the court in part).

<sup>233</sup> Justice Breyer’s role in preserving the Guidelines came as no surprise, as he was both an important Senate aide during the drafting of the Sentencing Reform Act and a Commissioner during the drafting of the Guidelines. *See* STITH & CABRANES, *supra* note 60, at 48-51.

<sup>234</sup> *Booker*, 543 U.S. at 259; *supra* notes 72-73 and accompanying text.

<sup>235</sup> *Booker*, 543 U.S. at 259.

<sup>236</sup> *See id.* at 233-34 (“The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.”).

<sup>237</sup> *See* 18 U.S.C. § 3553(a) (2000) (“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.”).

<sup>238</sup> *See id.* § 3553(a)(2)(A) (requiring sentencing judges to consider the need “to provide just punishment for the offense”).

<sup>239</sup> *See id.* § 3553(a)(2)(B) (requiring sentencing judges to consider the need “to afford adequate deterrence to criminal conduct”).

<sup>240</sup> *See id.* § 3553(a)(2)(C) (requiring sentencing judges to consider the need “to protect the public from further crimes of the defendant”).

<sup>241</sup> *See id.* § 3553(a)(2)(D) (requiring sentencing judges to consider the need “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

<sup>242</sup> *See id.* § 3553(a)(6) (requiring sentencing judges to consider the need “to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”).

<sup>243</sup> *See* 18 U.S.C. § 3553(a)(2)(7) (2000) (requiring sentencing judges to consider the need “to provide restitution to any victims of the offense”).

Guidelines remain alive and well because § 3553(a) also requires judges to consider the sentencing range established by the Guidelines and the policy statements issued by the Sentencing Commission.<sup>244</sup>

The Guidelines' continuing vitality was ensured by the second part of the *Booker* remedy—a new appellate standard of review for sentences.<sup>245</sup> Before *Booker*, appellate courts reviewed sentences only to determine whether they complied with the Guidelines.<sup>246</sup> With the Guidelines no longer mandatory, this appellate standard no longer made sense. So, Justice Breyer replaced it with a “reasonableness” standard, which he found implicit in the language, structure, and policy of the Sentencing Reform Act.<sup>247</sup> This appellate review, while deferential, ensures that the Guidelines remain the starting point<sup>248</sup> for most sentencing determinations, because sentences within the now-advisory Guidelines range will almost always survive reasonableness review.<sup>249</sup>

Thus, the end result of *Booker*—advisory Guidelines and reasonableness review—is a far cry from the “revolution” that many commentators saw presaged in *Blakely*.<sup>250</sup> Instead of a revolution, *Booker* represents a modest rollback of the sentencing reforms of the past twenty years. The now-advisory Guidelines are still central to sentencing determinations and,

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<sup>244</sup> See *id.* §§ 3553(a)(4), (5).

<sup>245</sup> See *United States v. Booker*, 543 U.S. 220, 260-61 (2005).

<sup>246</sup> Sentences were reviewed for errors in the Guidelines calculation or for unauthorized departures from the Guidelines range. See 18 U.S.C. § 3742(e).

<sup>247</sup> See *Booker*, 543 U.S. at 260-61 (“We infer appropriate review standards from related statutory language, the structure of the statute, and the ‘sound administration of justice.’ And in this instance those factors . . . imply a practical standard of review already familiar to appellate courts: review for ‘unreasonable[ness].’” (quoting *Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988))).

<sup>248</sup> See *United States v. Terrell*, 445 F.3d 1261, 1264 (10th Cir. 2006). When imposing terms of imprisonment, “[t]he Guidelines continue to be the ‘starting point’ for district courts.” *Id.*

<sup>249</sup> The clearest evidence of the Guidelines' continued vitality is in *Rita v. United States*, where the Court held that a circuit could adopt a “presumption of reasonableness” for sentences within the advisory Guidelines range. 127 S. Ct. 2456, 2462 (2007). Even in the Second Circuit, which has not adopted a “presumption of reasonableness,” the court has recognized that “in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (citing *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005)); see also *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) (“While we fully expect that it will be a rare Guidelines sentence that is unreasonable, the [Supreme] Court’s charge that we measure each defendant’s sentence against the factors set forth in § 3553(a) requires the door to be left open for this possibility.”).

<sup>250</sup> See, e.g., *Blakely v. Washington*, 542 U.S. 296, 326 (2004) (O’Connor, J., dissenting) (“What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.”); Jack Nordby, *Windfall Justice: Sentences at the Mercy of Hypertechnicality*, 31 WM. MITCHELL L. REV. 407, 409 (2004) (“Blakely presages a revolution in sentencing; it is the epitaph to the guidelines system as we know it.”); Bowman, *supra* note 228, at 219, 259 (decrying “the shambles *Blakely* has created” and expressing fear that the Court will “complete the *Blakely* revolution by making structured sentencing constitutionally impossible”).

indeed, most sentences remain within the advisory range.<sup>251</sup> Nevertheless, the essence of the *Booker* remedy remains: judges are now required to consider not just the Sentencing Guidelines, but also the traditional purposes of punishment. In other words, judges are now required to consider the ultimate justice of the sentence.

This change in the judicial role at sentencing has important implications for prosecutorial engagement with sentencing justice.

### B. Seeking “Reasonableness” at Sentencing

Once *Booker* freed judges to shape sentences in light of the principles of punishment, prosecutors had two options. First, they could continue their practice of not taking a position at sentencing, other than to argue for a correct calculation of the Guidelines range. In other words, prosecutors could advocate for a particular Guidelines calculation, but then could stand mute as the judge considered the other purposes of punishment: retribution, deterrence, incapacitation, rehabilitation, uniformity, and restitution.

Not surprisingly, prosecutors have not chosen this option. During the past two decades, prosecutors have grown accustomed to the certainty—and the severity—of the sentencing Guidelines. They have also grown accustomed to the power that the mandatory Guidelines gave them. Whether by proving a loss amount, or proving a drug quantity, or presenting evidence about a wide variety of Guidelines factors, prosecutors played a large role in determining the sentence. Moreover, at the institutional level, Department of Justice policymakers in Washington have become devoted to the ideal of “uniformity”—no doubt in part as a way to ensure consistent severity.<sup>252</sup> The other option—and the one chosen by the Department of Justice—is for prosecutors to become sentencing activists, abandoning their

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<sup>251</sup> The latest statistics from the Sentencing Commission indicate that only approximately 10 percent of all sentences vary from the advisory Guidelines range as a result of *Booker*. See U.S. SENTENCING COMM’N, PRELIMINARY QUARTERLY DATA REPORT 1, tbl.1 (2007) (noting that 61 percent of all sentences fall within the advisory Guidelines range, while an additional 28 percent fall within departures—most initiated by the Government—that pre-date *Booker*), available at [http://www.ussc.gov/sc\\_cases/Quarter\\_Report\\_3rd\\_07.pdf](http://www.ussc.gov/sc_cases/Quarter_Report_3rd_07.pdf). In its brief in *Rita*, the Department of Justice cited figures suggesting that *Booker* has led to a 4 percent increase in sentences outside the Guidelines range. See Brief for the United States, *Rita v. United States*, 127 S. Ct. 2456 (2007) (No. 06-5754) [hereinafter Brief for the United States, *Rita v. United States*].

<sup>252</sup> See Miller, *supra* note 5, at 1241-52 (describing the legislative history of the Feeney Amendment, which was created and promoted by the Department of Justice as a way to reduce downward departures); Letter from Jamie E. Brown, Assistant Attorney Gen., U.S. Dep’t of Justice, to Orrin G. Hatch, Chairman, U.S. Senate Committee on the Judiciary (Apr. 4, 2003), reprinted in 15 FED. SENT’G REP. 355, 356 (2003) (noting that the DOJ sought to restore “consistency, predictability, and toughness” through the Feeney Amendment) (emphasis added); Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 75 U. CIN. L. REV. 749, 786 (2006) (“Proponents of the Feeney Amendment made no secret of their single, overriding objective: a reduction in rates of downward departure.”).

traditional reluctance to advocate for particular sentences and instead arguing the principles of punishment as set forth in § 3553(a).

Just days after *Booker* was decided, Deputy Attorney General James Comey issued a memo to all federal prosecutors outlining official policy for sentencing under the advisory Guidelines. The memo began with a nod to the principles of punishment:

First, we must do everything in our power to ensure that sentences carry out the fundamental purposes of sentencing. Those purposes, as articulated by Congress in the Sentencing Reform Act, are to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford deterrence, to protect the public, and to offer opportunities for rehabilitation to the defendant.<sup>253</sup>

But then, the memo quickly turned to the main principles—uniformity and proportionality—that underlie the Guidelines:

Second, we must take all steps necessary to ensure adherence to the Sentencing Guidelines. One of the fundamental imperatives of the federal sentencing system is to avoid unwarranted disparity among similarly situated defendants. The Guidelines have helped to ensure consistent, fair, determinate and proportional punishment. They have also contributed to historic declines in crime. We must do our part to ensure that the Guidelines continue to set the standard for federal sentencing.<sup>254</sup>

To implement these principles, the Comey Memo instructed federal prosecutors that, in all but extraordinary cases, they must actively seek sentences within the advisory Guidelines range and must oppose defense requests for sentences outside that range:

Federal prosecutors must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases. Under the Guidelines, departures are reserved for rare cases involving circumstances that were not contemplated by the Sentencing Commission. Accordingly, federal prosecutors must obtain supervisory authorization to recommend or stipulate to a sentence outside the appropriate Guidelines range or to refrain from objecting to a defendant's request for such a sentence.<sup>255</sup>

At first blush, this insistence on adherence to non-binding Guidelines seems the exact opposite of prosecutorial engagement with sentencing justice. By insisting on adherence to Guidelines sentences, the Comey Memo seems to suggest that prosecutors should ignore the other principles set forth in § 3553(a).

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<sup>253</sup> Memorandum from James B. Comey, Deputy Attorney Gen., U.S. Dep't of Justice, to All Federal Prosecutors on Department Policies and Procedures Concerning Sentencing 1 (Jan. 28, 2005) [hereinafter Comey Memo].

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 2.

Nevertheless, to comply with this directive, prosecutors *must* engage with the traditional purposes of sentencing—if only to oppose defense requests for sentences below the advisory Guidelines range. Defendants now routinely seek sentences below the advisory Guidelines range.<sup>256</sup> To oppose those requests—to “actively seek the sentence within the Guidelines range”—prosecutors must argue that the Guidelines sentence is consistent with the purposes of punishment and the below-Guidelines sentence is not. In other words, prosecutors cannot simply argue the correctness of the Guidelines calculation; they must also argue the justness of the Guidelines sentence.<sup>257</sup> And, they must do so not only at sentencing, but also on appeal when the appellate court will review the “reasonableness” of the sentence.<sup>258</sup>

Engaging with sentencing justice—or, to use the post-*Booker* term, “substantive reasonableness”—is not a comfortable or familiar role for prosecutors. Arguing for a particular Guidelines calculation is much easier: it involves proving facts and arguing law. But now, prosecutors cannot simply argue facts and law; they must also defend the substantive justice of the result. And it will not do to argue that the below-Guidelines sentence is unjust simply because it is below the Guidelines. The essential holding of *Booker* is that the Guidelines are not mandatory. So, while the Guidelines can be the start of the sentencing analysis, they cannot be the end. The ultimate question for the judge, and by extension for the prosecutor-as-advocate, is whether the sentence comports with the principles of punishment.

As a matter of sentencing policy, the system of advisory Guidelines established by *Booker* has its obvious appeal. On the most superficial level, if a Guidelines sentence does not comport with the principles of punishment, it should not be imposed; if it is imposed, it should be reversed on appeal as “substantively unreasonable.” Of course, increased judicial dis-

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<sup>256</sup> See, e.g., *United States v. Gall*, 374 F. Supp. 2d 758, 760 (S.D. Iowa 2005), *rev'd* 446 F.3d 884 (8th Cir. 2006), *rev'd* 128 S. Ct. 586 (2007) (“The Defendant made several motions for downward departures from the Guidelines calculation . . . based on the Defendant’s age, cooperation with the government, remorse, and post-offense rehabilitation.”).

<sup>257</sup> See, e.g., Brief for the United States at 44-50, *Gall v. United States*, 128 S. Ct. 586 (2007) (arguing that a probationary sentence received by narcotics offender was unreasonable).

<sup>258</sup> In reviewing for reasonableness, many courts have distinguished between “procedural reasonableness” and “substantive reasonableness.” For example, in the Second Circuit, reasonableness review involves a “two-pronged analytical process”:

(1) procedural reasonableness, in which the court will look to see if the district court identified the appropriate Guidelines range, treated the Guidelines as advisory, and considered the Guidelines alongside the other § 3553(a) factors; and (2) substantive reasonableness, in which the court will consider the length of the sentence imposed in light of the statutory factors.

Kevin J. Doyle, *Criminal Sentencing in the Second Circuit after Booker: Theoretical and Practical Considerations*, 21 ST. JOHN’S J. LEGAL COMMENT 653, 666 (2007). My concern is with substantive reasonableness.

cretion creates a risk of increased unwarranted disparity. Nevertheless, given the powerful anchor provided by the Guidelines, it is unlikely that such disparities will become a serious problem.

My interest, however, is not in defending *Booker* or the advisory Guidelines. Instead, my interest is in *Booker*'s potential to change the way federal prosecutors think about sentencing justice. Prosecutors' new role as advocates for sentencing justice is, in my view, enormously positive—even if it will have little practical effect on actual sentences. I do not expect that federal prosecutors will suddenly become more lenient simply because they must justify Guidelines sentences. Department of Justice policy requires them to advocate for sentences within the Guidelines<sup>259</sup> and most prosecutors are quite comfortable doing so. Nevertheless, it is possible that over time prosecutors will grow accustomed to their new role as punishment theorists, will grow accustomed to thinking about the purposes of punishment, will grow accustomed to talking about and advocating for the purposes of punishment, and will grow accustomed to being responsible for the righteousness of the sentences that they cause to be imposed.

### C. Seeking “Reasonableness” in Charging

So what? Why should it matter that prosecutors couch their arguments not just in the language of offense levels and criminal history categories, but also in the language of deterrence and retribution, harm and blame? Or, to put it differently, why *not* leave sentencing justice to the judge and the defense attorney?

In a true real-offense system, prosecutorial passivity about the “substantive reasonableness” of sentences might make sense. In a true real-offense system, decisions about the purposes of punishment could be left to the sentencing judge, as guided by the policy determinations of the Sentencing Commission. In a true real-offense system, it might make sense to say, as the Department of Justice does, that “[s]entencing in Federal criminal cases is primarily the function and responsibility of the court.”<sup>260</sup>

But we don't have a true real-offense system. Instead, for many crimes, mandatory minimums and sentencing enhancements create a “charge offense” system in which prosecutorial decisions effectively determine the sentence. The promises of the Sentencing Guidelines—uniformity, proportionality, and consistency—are rendered false when a prosecutor can double or triple already lengthy sentences simply by filing additional charges.<sup>261</sup> And the goal of sentencing justice becomes more elusive when a sentence is determined not through the expert analysis of the Sentencing

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<sup>259</sup> See *supra* notes 253-55 and accompanying text.

<sup>260</sup> U.S. ATTORNEYS' MANUAL § 9-27.710 (2007).

<sup>261</sup> See *supra* notes 160-80 and accompanying text.

Commission and the disinterested discretion of the sentencing judge, but rather through the decisions of a prosecutor who is neither encouraged nor equipped to consider questions of sentencing justice.

The engagement with sentencing justice thrust on prosecutors by *Booker* is helpful at the sentencing stage, but not essential. At sentencing, the judge is both required and perfectly able to consider the principles of punishment and to sentence accordingly. But, in a limited number of cases—typically those involving guns or those involving serious drug offenses where the defendant has a prior drug conviction—the prosecutor serves as the sentencer. In those cases, it is their *charging* decisions—particularly their use of sentencing enhancements—that determine the sentence. Thus, in these cases, it is at charging that prosecutorial engagement with the purposes of punishment is so important. And it is here that prosecutors' new role as punishment theorists can make the most difference.

As the system stands now, prosecutors effectively impose the sentence by choosing to file (or choosing not to file) sentencing enhancements. Yet, those prosecutors are neither required nor encouraged to consider explicitly the justice of the resulting sentence. Under official Department of Justice policy, sentencing enhancements are “strongly encouraged” and may be foregone only for reasons of efficiency.<sup>262</sup> Thus, while prosecutors undoubtedly exercise their discretion in deciding whether to file sentencing enhancements, the main consideration is likely to be docket management. In other words, sentencing enhancements are likely to be used as a “trial penalty” to induce defendants to plead guilty. Indeed, given the long-standing prosecutorial disengagement from sentencing justice, prosecutors may find themselves ill equipped to consider sentencing justice even if they wanted to.

As a result, a defendant who is convicted of a drug offense could have his sentence doubled from ten years to twenty years without anyone explicitly considering the justice of that sentence. A defendant who commits two armed robberies without inflicting any injuries could receive a sentence in excess of thirty-five years without anyone explicitly considering the justice of that sentence.

It is not my position that sentencing enhancements should never be used. Congress undoubtedly intended and expected them to be used.<sup>263</sup> The question is *how* prosecutors should decide *which* defendants should have their sentences enhanced. *Booker*, by forcing prosecutors to engage with the basic principles of punishment, now provides a framework for prosecutors to think about the justice of sentencing enhancements. More particularly,

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<sup>262</sup> See U.S. ATTORNEYS' MANUAL § 9-27.300 (1997) (“Such a reason [for not filing an enhancement] might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.”).

<sup>263</sup> See *supra* notes 181-83 and accompanying text.

appellate review of sentences for reasonableness will, over time, add substance to that framework. And, this framework can lead to a simple rule: prosecutors should file charges that trump the Guidelines sentence only when the sentence determined under the Guidelines would be “unreasonable” under *Booker*. In other words, prosecutors should file a sentencing enhancement only when the particular circumstances of the case make an unenhanced sentence inconsistent with the principles of punishment as set forth in § 3553(a).<sup>264</sup>

To be sure, my suggested approach—tying sentencing enhancements to “reasonableness” under *Booker*—is flatly inconsistent with current Department of Justice policy as outlined in the Ashcroft Charging Memo.<sup>265</sup> My suggested approach, however, is consistent with the Department’s repeated defense of the Sentencing Guidelines in the face of increased judicial discretion to impose non-Guidelines sentences. For example, in the more recent Comey Memo, the Department announced that prosecutors must “do everything in [their] power to ensure that sentences carry out the fundamental purposes of sentencing” as articulated in § 3553(a), but must do so by “actively seek[ing] sentences within the range established by the Sentencing Guidelines in all but extraordinary cases.”<sup>266</sup> The clear implication from these dual directives is that the Guidelines sentence, absent extraordinary circumstances, is the sentence that comports with the principles of punishment.

The Department of Justice has since made this argument more explicit. In its brief in *Rita v. United States*, the first significant post-*Booker* sentencing case to be decided by the Supreme Court, the Department argued that Guidelines sentences could be considered “presumptively reasonable” because the Guidelines were designed to—and generally do—effectuate the principles of punishment in § 3553(a).<sup>267</sup> In particular, the Department argued that “a sentence within the Guidelines range” “best satisfies the considerations in 18 U.S.C. 3553(a)” in “all but the most unusual cases” for “four related reasons”:

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<sup>264</sup> In proposing a “rule,” I am suggesting a non-binding prosecutorial policy. While such policies do not create enforceable rights, they can still carry numerous salutary benefits, both internally and externally. See generally Simons, *supra* note 29, at 956-63 (summarizing the benefits from non-binding charging guidelines).

<sup>265</sup> See Ashcroft Sentencing Memo, *supra* note 116, at 2 (“Department attorneys must ensure that the Sentencing Guidelines are applied as Congress and the Sentencing Commission intended them to be applied, regardless of whether an individual prosecutor agrees with that policy decision.”).

<sup>266</sup> Comey Memo, *supra* note 253, at 1. Paraphrasing § 3553(a), the Comey Memo noted that the fundamental purposes of sentencing, “as articulated by Congress in the Sentencing Reform Act, are to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford deterrence, to protect the public, and to offer opportunities for rehabilitation to the defendant.” *Id.*

<sup>267</sup> See Brief for the United States, *Rita v. United States*, *supra* note 251, at 14-16.

the Guidelines integrate the factors in Section 3553(a); they reflect the Sentencing Commission's extensive consideration of past practice and sound policy, including Congress's directions regarding appropriate sentences for certain crimes; they are a critical tool for achieving Congress's goal of sentencing uniformity; and, finally, a Guidelines sentence reflects a joint determination by the sentencing judge and the Sentencing Commission that a sentence within the Guidelines range complies with the factors in Section 3553(a).<sup>268</sup>

In other words, the Department of Justice maintains that, in all but the most unusual cases, the Guidelines sentence will comport with the principles of punishment. Sentences imposed as a result of sentencing enhancements, however, are usually significantly higher than Guidelines sentences. If the Guidelines sentence is reasonable and satisfies the principles of punishment in all but the most "unusual" or "extraordinary" cases, then the Guidelines sentence should be doubled or tripled through the use of sentencing enhancements only in the "unusual" or "extraordinary" case where the Guidelines sentence is "unreasonable" under *Booker*.<sup>269</sup>

Determining "reasonableness" under § 3553(a) obviously involves some level of subjectivity. And, in the two-decades-old quest for sentencing uniformity, prosecutors have been discouraged from making subjective determinations that can introduce disparity into the system. But, when prosecutors are effectively imposing sentences through their charging decisions, it is irresponsible not to consider the justice of the resulting sentence. Moreover, by adopting the *Booker* standard, prosecutors can make use of a rapidly developing body of practice and a wealth of judicial authority to guide their decisions.

*Booker* not only established a standard ("reasonableness"), but it also established a procedure ("appellate review for reasonableness") that is now regularly invoked.<sup>270</sup> Thus, prosecutors must routinely decide whether to appeal a sentence as unreasonable.<sup>271</sup> Even more frequently, prosecutors must defend a sentence as reasonable in the face of a defense appeal. And, as appellate courts decide more reasonableness cases, those opinions will give more content to the *Booker* standard. In other words, in the post-*Booker* era, prosecutors will have both extensive practice and appellate guidance in determining whether sentences are reasonable. It will be both

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<sup>268</sup> *Id.* at 16. The Department's position was eventually adopted by the Supreme Court. *See Rita v. United States*, 127 S. Ct. 2456, 2458 (2007) (holding that the Guidelines "seek to embody the § 3553(a) considerations, both in principle and in practice" and "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives").

<sup>269</sup> Of course, simply because a Guidelines sentence is "reasonable" in a particular case, it does not automatically follow that a non-Guidelines sentence in that case necessarily will be "unreasonable." *See Rita*, 127 S. Ct. at 2467 (stating that appellate courts may not presume that any variance from the Guidelines is unreasonable). Nevertheless, given that sentencing enhancements increase sentences so dramatically—both in absolute terms and relative terms—it will be the rare case in which both the Guidelines sentence and the enhanced sentence can be considered equally reasonable.

<sup>270</sup> *See supra* notes 245, 247 and accompanying text.

<sup>271</sup> *Comey Memo, supra* note 253, at 2.

straightforward and familiar for them to apply the same process in determining whether a sentencing enhancement results in a reasonable sentence.

I do not mean to suggest that determining sentencing reasonableness is easy, but the difficulty of the determination does not make it any less essential to sentencing justice. Moreover, in a case involving a sentencing enhancement, only the prosecutor is in a position to make the determination. In most cases, once the sentencing enhancement is imposed, neither the sentencing judge nor the appellate court has any authority to pass on the reasonableness of the sentence, no matter how high it is. In other words, if the prosecutor does not ask the question—“Is this sentence just?”—no one will. By applying the *Booker* “reasonableness” standard to sentencing enhancements, prosecutors can ensure that charging decisions are based not only on considerations of prosecutorial efficiency, but also on considerations of sentencing justice. To make that determination, prosecutors will have to become punishment theorists of a sort. They will have to engage with the difficult question of whether the basic principles of punishment—retribution, deterrence, incapacitation, and rehabilitation—require that a defendant receive a sentence above the normal Guidelines range.

#### CONCLUSION

Although it was not designed by Congress, the system of guided discretion that now governs federal sentencing is quite consistent with punishment theory. The Sentencing Guidelines establish an anchor that ensures general consistency and widespread uniformity, while judicial discretion allows individualization of sentences by a neutral decision maker pursuant to the generally accepted principles of punishment. Sentencing enhancements—and mandatory minimum sentences in general—are fundamentally inconsistent with this system. Why not, then, forgo sentencing enhancement altogether? In other words, should prosecutors simply refuse to charge sentencing enhancements, and instead argue for upward variances? That way, prosecutors could still advocate for the enhanced sentence, but the ultimate decision could be made by a neutral arbiter. While such prosecutorial forbearance has some undeniable appeal, expecting it is unrealistic. Sentencing enhancements and mandatory minimum sentences give prosecutors undeniable power. It is simply too much to expect that prosecutors will voluntarily forgo the exercise of this significant power. More importantly, if prosecutors categorically refuse to exercise their discretion to charge mandatory minimums and sentencing enhancement, they would be frustrating congressional intent.<sup>272</sup> By enacting mandatory minimums and sentencing enhancements, Congress expressed its distrust of judicial discretion. In other words, Congress specifically chose to empower prosecutors to trump judi-

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<sup>272</sup> See *supra* notes 132-42, 181-83 and accompanying text.

cial sentencing determinations. Presumably, Congress expected that prosecutors would exercise this discretion responsibly. My proposal—for prosecutors to voluntarily limit their sentencing discretion pursuant to the principles of punishment set forth by Congress—is both politically feasible and consistent with the division of sentencing responsibility intended by Congress.

Moreover, our current system of advisory guidelines has made the responsible exercise of prosecutorial sentencing discretion all the more important. Because judges now have discretion to impose sentences below the Guidelines range, prosecutors will be under increasing pressure to use their charging power to prevent below-Guidelines sentences in high-profile cases. Indeed, in its most recent pronouncements regarding post-*Booker* sentencing, the Supreme Court has made clear that judges have broad discretion to impose below-Guidelines sentences.<sup>273</sup> As more sentencing judges come to understand—and appreciate—the breadth of the discretion granted to them by *Booker*, pressure will only increase on prosecutors to bring more charges that carry minimum penalties, as a way to counteract “unwarranted” judicial leniency. Moreover, and notwithstanding the steady drumbeat of opposition to mandatory sentences, they are only likely to proliferate in the post-*Booker* world. When the Sentencing Guidelines were mandatory, Congress could “get tough” on a particular crime simply by mandating changes to the guidelines.<sup>274</sup> Now that the Guidelines are advisory, Congress will be increasingly tempted to respond to perceived crime threats (or perceived judicial leniency) with additional mandatory sentences. In a world where mandatory sentences will occupy an increasing role, prosecutorial charging discretion becomes all the more important. It is thus crucial for sentencing justice that prosecutors develop *charging* policies that are fair, rational, and consistently based on the principles of punishment.

Their new role as punishment theorists may not be a comfortable one for prosecutors, especially after years of prosecutorial disengagement from sentencing justice. Nevertheless, it is a role that has been thrust on them by *Booker*. It is also a role they should embrace in their quest to “seek justice.”

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<sup>273</sup> In *Kimbrough v. United States*, the Court approved a below-Guidelines sentence for a defendant convicted of a crack offense, based on the sentencing judge’s disagreement with the ratio between crack sentences and cocaine sentences under the advisory guidelines, even though that ratio was explicitly set by Congress. 128 S. Ct. 558, 576 (2007). Similarly, in *Gall v. United States*, the Court approved a below-Guidelines sentence based on the judge’s evaluation of a variety of individual characteristics—including the defendant’s age, immaturity, education, and post-offense conduct—that are typically irrelevant under the Sentencing Guidelines. 128 S. Ct. 586 (2007).

<sup>274</sup> See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (known as the “PROTECT Act”), Pub. L. No. 108-21, § 401(m) (Apr. 30, 2003) (mandating that the Sentencing Commission make “appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced”).