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Does Economic Crime Pay in Pennsylvania - The Perception of Leniency in Pennsylvania Economic Offender Sentencing

Peter Fridirici

Comment

DOES ECONOMIC CRIME PAY IN PENNSYLVANIA? THE PERCEPTION OF LENIENCY IN PENNSYLVANIA ECONOMIC OFFENDER SENTENCING

I. INTRODUCTION

Crime pays—at least for Debra King it did.[1] She worked as an accounts payable clerk for Lansdale Manufacturing Company, and over a two-month period she embezzled over $280,000 from her employer.[2] Her punishment: a night in jail, intermediate punishment for twenty-three months, the first nine of which she was to spend under house arrest, then five years of probation.[3] Her sentence also requires that she pay restitu-

1. *See* Notes of Testimony at 7, Commonwealth v. King, No. 5379-98 (Pa. Ct. Common Pleas 1999) (July 13, 1999) (imposing intermediate punishment, house arrest, five years probation and court costs for misappropriation of over $280,000 from Lansdale Manufacturing Co.); *see also* Interview with Laurel F. Grass, Chief, Economic Crimes Unit, Montgomery County District Attorney's Office, in Norristown, Pa. (June 7, 1999) (commenting generally on leniency of economic crime offender sentencing, and that all things considered, for these defendants "crime pays").

2. *See* Affidavit of Probable Cause at 1-3, Commonwealth v. King, No. 5379-98 (Pa. Ct. Common Pleas 1999) (statement of Det. Sgt. Steven Ford, Upper Gwynedd Township Police Department detailing nature of employment and offenses attributed to Debra King). Debra King worked as an accounts payable clerk for Lansdale Manufacturing Company in Montgomeryville, Pennsylvania. *See id.* at 1 (noting King's employment). She worked initially as a temporary employee, starting on March 17, 1997, and then was hired permanently on May 5, 1997. *See id.* Between July 9, 1997 and September 4, 1997, someone other than the intended payee endorsed and transacted a total of 19 checks made payable to various vendors. *See id.* The various vendors never received the checks, totaling $282,691.33. Instead, the checks were deposited in a Core States bank account held by Debra King. *See id.*

3. *See* Notes of Testimony at 7-8, *King*, No. 5379-98 (July 13, 1999) (imposing sentence). Judge Corso "sentenced" Debra King to one night in jail by simply adjourning the sentencing hearing until the next day, revoking bail and remanding her to the custody of the sheriff. *See* Notes of Testimony at 25, *King*, No. 5379-98 (July 12, 1999) (adjourning sentencing for one day). The purpose of the adjournment was to provide Debra King with a taste of what jail is like and to let her know that "if [she does not] make a one hundred percent turnaround in [her] conduct" she would be back. Notes of Testimony at 5, *King*, No. 5379-98 (July 13, 1999). "Intermediate punishment" is defined as "[a] sentencing alternative available to the court for eligible offenders who would otherwise be sentenced to partial or total confinement in a county correctional facility." PENNSYLVANIA SENTENCING GUIDELINES IMPLEMENTATION MANUAL 270 (1997) [hereinafter PA SENTENCING GUIDELINES] (defining intermediate punishment). For a further discussion of intermediate punishment, see *infra* notes 139-41 and accompanying text. Debra King was already receiving rehabilitative therapy from the Penn Foundation at the time of sentencing. *See* Notes of Testimony at 14-15, *King*, No. 5379-98 (July 12,

tion to her former employer; barring any unforeseen circumstances, however, the single mother will likely never repay the entire amount to Lansdale Manufacturing Company.[4] Typically, some payments are made at first, then they just stop.[5]

Another example is Linda DeSimone.[6] Ms. DeSimone owned and operated a bill collection service known as Quantum Recovery Organization ("Quantum").[7] Among DeSimone's clients was Volunteer Medical Services Corporation ("VMSC"), which contracted with Quantum for bill collection services.[8] VMSC billed over $21,000 for services rendered to

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1999) (noting that King was already receiving rehabilitative therapy). Judge Corso required as part of King's sentence that she continue this therapy. *See* Notes of Testimony at 8, *King*, No. 5379-98 (July 13, 1999) (mandating continuation of therapy as requirement of sentence). The sentence that Judge Corso imposed on Debra King—one night in jail, intermediate punishment for twenty-three months, the first nine of which were to be spent under house arrest, then five years of probation, and restitution—was considerably more lenient than the sentence recommended by the Pennsylvania Sentencing Guidelines ("Pennsylvania Guidelines") for Theft by Deception, which is nine to sixteen months confinement. *See* PA SENTENCING GUIDELINES, *supra* note 2, at 33 (providing grid for sentencing); 18 PA. CONS. STAT. § 3922 (1998) (describing crime of "theft by deception"). For a discussion on the use of the Pennsylvania Guidelines, see *infra* notes 130-46 and accompanying text.

4. *See* Notes of Testimony at 8, *King*, No. 5379-98 (July 13, 1999) (outlining restitution payment plan). Debra King's restitution plan required that she pay "fifteen thousand dollars . . . forthwith" and "one thousand dollars per month" from rental property directly to Lansdale Manufacturing Company. *See id.* Additionally, Judge Corso required King to pay "not less than three hundred dollars per month" restitution. *See id.* (outlining restitution payments to be made). Ms. King was also required to continue full-time employment. *See id.* (outlining special conditions of release). At the time of sentencing, Debra King was working as a receptionist through a temporary employment agency. *See* Notes of Testimony at 13, *King*, No. 5379-98 (July 12, 1999) (detailing current job status). Counsel for Lansdale Manufacturing Company testified at the sentencing hearing on behalf of Debra King that it would be in the best interest of the company that Debra King not be sentenced to incarceration, but rather be allowed to work full-time in order to pay restitution. *See id.* at 8 (suggesting beneficial remedy).

5. *See* Interview with Laurel F. Grass, *supra* note 1 (recalling from personal experience that most payments are simply discontinued).

6. *See* Affidavit of Probable Cause at 1-3, Commonwealth v. DeSimone, No. 1774-99 (Pa. Ct. Common Pleas 1999) (statement of Det. Steven G. Cassel, Lansdale Borough Police Department detailing nature of employment and offenses attributed to Linda DeSimone).

7. *See id.* at 1 (detailing bill collection service owned by DeSimone). DeSimone was the sole proprietor of Quantum. *See id.* (noting that DeSimone was sole proprietor). It is unclear whether she had any employees. When asked about missing funds and a suspicious address change, DeSimone blamed these on an employee, but when asked for a name, DeSimone claimed the employee had been hired and fired under an alias. *See* Incident Report, Commonwealth v. DeSimone, Incident No. 98-4756 (Pa. Ct. Common Pleas 1999) Jan. 25, 1999 (noting DeSimone's claim that this employee used an alias).

8. *See* Affidavit of Probable Cause at 1, *DeSimone* (detailing contract between Quantum (DeSimone) and VMSC). VMSC contracted for bill collection services in June 1996, and terminated Quantum's services on January 1, 1997. *See id.* (noting VMSC's termination of DeSimone's services).

various insurance companies and individuals, from whom DeSimone, acting as Quantum, collected check payments.[9] DeSimone, however, never paid VMSC.[10] Instead, she diverted the funds to a secret bank account that she controlled.[11] The judge imposed a sentence of five years probation and restitution.[12]

These are just two examples of what many would call lenient sentences for economic or white-collar offenses. But is this wrong? Many prosecutors think so.[13] In particular, one prosecutor from the Montgom-

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9. *See id.* at 2 (detailing collection of funds on behalf of VMSC). The arrangement was that Quantum was to receive payments from various insurance carriers and individuals who were billed for services rendered by VMSC and its two subsidiaries, North Penn Medical Transport ("NPMT") and Skippack Emergency Medical Services ("SEMS"). *See id.* DeSimone received these funds and deposited them in her First Service Bank account. *See id.* Then Quantum was to forward those collected funds to VMSC, in the form of a check drawn on her First Service Bank account, minus the agreed upon collection fee. *See id.* (detailing proposed payment arrangements). Detective Cassel detailed the operation:

> I asked DeSimone how her business (Quantum) had handled the funds received from various insurance carriers. DeSimone told me that the funds would be placed into her First Service Bank account. The funds would then be distributed to clients like the VMSC minus the collection fee due. I asked DeSimone if the redistribution of the funds entailed an electronic transfer and she stated that it did not and that a check would be issued from her bank account to pay the client.

Incident Report, Commonwealth v. DeSimone, Incident No. 98-4756 (Pa. Ct. Common Pleas 1999) (Jan. 25, 1999).

10. *See* Affidavit of Probable Cause at 1, *DeSimone* (revealing that payments received by Quantum were never distributed to VMSC).

11. *See id.* at 1-2 (detailing secret bank account and address change). In December 1996, Jack Metz, Administrator for VMSC, discovered that Quantum changed its mailing address for billing purposes to DeSimone's home address in Kulpsville, Pennsylvania, without notifying VMSC. *See id.* at 2 (noting change of Quantum's mailing address). Investigation also showed that as of October 31, 1996, DeSimone changed the VMSC, NPMT and SEMS mailing addresses with written notification to the insurance carriers, but without notice to or authorization from VMSC, and that numerous payments from insurance carriers had been sent to Quantum at the Kulpsville address. *See id.* (noting change of mailing addresses). The checks were deposited by DeSimone into two accounts at First Service Bank that were directly controlled by DeSimone, who was listed as the sole authorized designee account holder. *See id.* (noting that DeSimone was in control of bank accounts). Also, investigation revealed that Quantum received numerous checks from insurance carriers for VMSC services after the termination of Quantum's employment. *See id.* None of these funds, totaling $21,491.40, were distributed to VMSC as required. *See id.* (noting total amount owed to VMSC).

12. *See* Sentence Recommendation Report, Commonwealth v. DeSimone, No. 1774-99 (Pa. Ct. Common Pleas 1999) (Sept. 7, 1999) (imposing sentence of five years probation and requiring restitution payments amounting to $300). DeSimone was charged with "Theft by Failure to Make Required Disposition of Funds." *See* 18 PA. CONS. STAT. § 3927(a) (1998) (defining elements of crime). As a level 2 offense, theft by deception has a standard range of zero to thirty-six months incarceration under the Pennsylvania Guidelines. *See* PA SENTENCING GUIDELINES, *supra* note 2, at § 303.16 (providing sentencing matrix).

13. *See, e.g.*, Martin F. Murphy, *No Room at the Inn? Punishing White Collar Criminals*, BOSTON BAR J., May/June 1996, at 5, 14 (suggesting that white collar and

ery County (Pa.) District Attorney's Office, Laurel F. Grass, thinks so.[14] Her position, and apparently that of many other prosecutors, is that complicated and time-consuming investigations make for a relatively staggering caseload, allowing only limited prosecutorial attention for each economic crime offender.[15] Prosecution of violent crime offenders makes much more political sense because it answers public outcries to "get tough on violent crime."[16] As a result, prosecutors must mete out their budgets accordingly. This is simply part of the price society pays for protection from violent offenders.[17]

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economic offenders historically have been treated with leniency in sentencing). First Assistant D.A. Murphy, First Assistant District Attorney for Middlesex County, Massachusetts, suggests that there are two problems with the sentencing disparity between white collar/economic crimes and the more typical street crimes. *See id.* at 14 (identifying broad social impact of sentencing system). First, the disparity impacts more heavily on minorities. *See id.* (noting disparate impact for minorities). Second, white collar crime imposes considerable costs on society. *See id.* (noting relationship between economic impact and white collar crime). One commentator stated that "[t]he economic loss resulting from bank robberies pales in comparison to the $6 billion cost of criminal fraud in the savings and loan industry." *Id.* Another commentator stated that "[i]n 1989, bank robberies in the United States totaled $24.6 million in losses, with the average 'take' being $3,951." *Id.* (quoting TONY G. POVEDA, RETHINKING WHITE COLLAR CRIME 11 (1994)). First Assistant D.A. Murphy quotes former U.S. Attorney General Richard Thornburgh as saying that "[a] street criminal can steal only what he can carry. With the stroke of a pen, or the push of a computer key, white-collar criminals can, and do, steal billions." *Id.* (quoting Richard L. Thornburgh, *Forward to Sixth Survey of White Collar Crime*, 28 AM. CRIM. L. REV. 383-84 (1991)); *see* G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim: *Will Civil RICO Be Effective Only Against White Collar Crime*, 62 NOTRE DAME L. REV. 526, 568 n.191 (suggesting that leniency toward white collar offenders may "provide lower class and working class individuals with justifications for their own violation of the law"). Associate Attorney General Stephen S. Trott suggested that widespread fraud in legitimate business undermines this country's economic foundation:

> The example of criminal enterprises, and also supposedly legitimate enterprises, routinely operating by means of kickbacks, bribes, persistent frauds, and other kinds of illegal conduct, is infectious. The attitude develops that, since "everybody does it," it makes no sense for a small business or an individual to try to succeed solely by honest means. The result is widespread public cynicism, and an overall erosion of deterrence.

Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary, 99th Cong. 109-11 (1985) (statement of Associate Attorney General Stephen S. Trott).

14. *See* Interview with Laurel F. Grass, *supra* note 1 (commenting generally on leniency of economic offender sentencing).

15. *See id.* (noting that only limited resources are available for prosecuting economic crime offenders); *see also* Murphy, *supra* note 13, at 16 (noting local district attorneys' limited resources for investigating and prosecuting white collar crime).

16. *See* Murphy, *supra* note 13, at 16 (noting that "street crime is public's top priority"); Interview with Laurel F. Grass, *supra* note 1 (commenting on political nature of criminal prosecution).

17. *See* Interview with Laurel F. Grass, *supra* note 1 (suggesting that costs of economic crime are borne by general public in fear of violent crime).

That is, however, not the end of it. The relatively sparse prosecution of economic offenders is coupled with, and compounded by, relatively lenient sentencing by the judiciary.[18] There are several theories for this leniency, some seemingly valid, others somewhat specious.[19] The combination of sparse prosecution and lenient sentencing acts as a double incentive that practically promotes economic crime.[20]

This Comment discusses the perception of lenient economic crime offender sentencing in Pennsylvania. Part II summarizes the origin and history of sentencing guidelines.[21] This section examines various state sentencing guidelines as well as the Federal Sentencing Guidelines, with a focus on the treatment of economic or white collar offenders by the fed-

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18. *See, e.g.*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20 (1988) (noting that white collar offenders typically receive probation, and if sentenced to prison, less severe sentences); Ami L. Feinstein et al., *Eighth Survey of White Collar Crime, Procedural Issues, Federal Sentencing*, 30 AM. CRIM. L. REV. 1079, 1094 (1993) (noting perception of leniency in white collar offender sentencing); Murphy, *supra* note 13, at 14 (noting that white collar offenders "frequently do not receive sentences that reflect the seriousness of their offenses").

19. *See* Murphy, *supra* note 13, at 5 (noting theories for leniency toward white collar criminals). First Assistant D.A. Murphy suggests several theories for this historical leniency. *See id.* (outlining theories). First, he suggests that many judges have historically viewed direct and violent acts against individuals as more serious and deserving of more severe punishment. *See id.* (noting that common street crimes are distinguishable from purely economic crime because they often involve violence). Second, many judges believed that "for white collar criminals, who typically had no criminal record, the process of investigation, indictment and conviction was itself a form of punishment, and in some cases, punishment enough." *Id.* Finally, he quotes other scholars who emphasize that "there is one shadowy consideration that troubles many judges. That is the possibility that they will treat white-collar offenders differently because they can empathize with their plight. Being able more easily to identify with them, they may be prone to leniency." *Id.* at 5 (quoting STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 160 (1988)). This historical leniency, he adds, has a disproportionate impact on minority offenders, and turns lenient white collar sentencing into lenient *white* sentencing. *See id.* at 14 (emphasis added).

20. *See* Blakey & Cessar, *supra* note 13, at 568 n.191 (noting civil nature of white collar crime). Blakey and Cessar note several limitations placed upon prosecutors in litigating white-collar criminal cases:

> Resources available for investigation and prosecution are scarce. The common law criminal trial is ponderous. The cases are complex. Offenders will be most often treated as "first offenders" even if they had actually engaged in a pattern of behavior over a substantial period of time. Indeed, while the proceeding is in form criminal, it is in substance civil, for a fine, not imprisonment, is the norm for white-collar offenders.

Id. Further, they add, the government is "less than effective in its enforcement of fines," noting that "most of the 22,532 cases of unpaid federal fines totaling $185.6 million involved white collar crime." *Id.* (citing *Unpaid U.S. Fines Total $185 Million, Panel Told*, N.Y. TIMES, Aug. 4, 1983, at A3).

21. For a discussion of the origin and history of sentencing guidelines, see *infra* notes 26-46 and accompanying text.

eral guidelines.[22] Part II will conclude with a detailed examination of the treatment of economic crime offenders by the Pennsylvania Sentencing Guidelines.[23] Part III evaluates the current status of economic crime offender sentencing in Pennsylvania and the effect this sentencing posture has on society.[24] Part IV provides an outlook on, and suggestions for, future economic crime prosecutions.[25]

II. BACKGROUND

A. *The Origin and History of Sentencing Guidelines*

Prior to the arrival of sentencing guidelines, Pennsylvania used "indeterminate" or individualized sentencing.[26] This type of sentencing gave judges wide discretion and allowed them to consider the individual characteristics of the offender and the circumstances of the crime, with rehabilitation of the offender as the goal.[27] Also, judges sentenced defendants

22. For a discussion of other states' sentencing guidelines, see *infra* notes 47-86 and accompanying text. For a discussion of the Federal Sentencing Guidelines, see *infra* notes 87-124 and accompanying text. For a discussion of the treatment of white collar offenders by the federal guidelines, see *infra* notes 125-30 and accompanying text.

23. For a discussion of the Pennsylvania Guidelines and the treatment of white collar offenders under the Pennsylvania Guidelines, see *infra* notes 131-47 and accompanying text.

24. For a discussion of the current approach to sentencing white collar offenders under the Pennsylvania Guidelines, see *infra* notes 148-57 and accompanying text.

25. For outlook and suggestions regarding future economic crime prosecutions, see *infra* notes 158-68 and accompanying text.

26. *See* Ivan S. DeVoren, *Criminal Law—Judicial Discretion in Sentencing*—Commonwealth v. Devers, *Pennsylvania Supreme Court Review, 1988 Recent Decisions*, 62 TEMP. L. REV. 729-36 (1989) (noting history of sentencing practices); Donald W. Dowd, *What Frankel Hath Wrought*, 40 VILL. L. REV. 301 (1995) (same).

27. *See* Commonwealth v. Martin, 351 A.2d 650, 656-57 (Pa. 1976) (explaining indeterminate sentencing). At the time of *Martin*, Pennsylvania law, espousing indeterminate sentencing, provided that:

> Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a State penitentiary, shall be sentenced to imprisonment therefor . . . the court, instead of pronouncing . . . a definite or fixed term of imprisonment, shall pronounce . . . a sentence of imprisonment for an indefinite term: Stating in such sentence the minimum and maximum limits thereof; and the maximum limit shall never exceed the maximum time now or hereafter prescribed as a penalty for such offense; and the minimum shall never exceed one-half of the maximum sentence prescribed by any court.

Act of June 19, 1911, Pub. L. No. 1055, § 6 (codified as amended PA. STAT. ANN. tit. 19, § 1057 (West 1964)). Pennsylvania, as well as other states, encompassed a rehabilitative goal within its indeterminate sentencing laws. *See* FRANCES A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 6 (1981) (stating that indeterminate sentencing is reflection of rehabilitative ideal); NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 26-43 (1974) (outlining critiques of rehabilitative goal of indeterminate sentencing); DeVoren, *supra* note 26, at 730 (outlining history of sentencing practices); Dowd, *supra* note 26, at 301-05 (outlining critiques of rehabilitative goal of indeterminate sentencing); Ilene H. Nagel, *For-*

to "a range of incarceration rather than to a definite term."[28] The theory behind indeterminate sentencing is that every crime and every criminal are different.[29] Under this approach, the particular circumstances of the crime and the characteristics of the criminal are taken into account in order to rehabilitate the criminal more effectively.[30]

Indeterminate sentencing began to lose favor in Pennsylvania and other states in the 1970s.[31] First, courts abandoned rehabilitation as a purpose, with many jurisdictions instead espousing retribution as the primary goal of sentencing.[32] Second, indeterminate sentencing was seen as unfair, as the unbridled discretion of judges left a wake of disparate, inconsistent, disproportionate and seemingly arbitrary sentences.[33] States thereby

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ward to Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. CRIM. L. & CRIMINOLOGY 883, 893-99 (1990) (same).

28. DeVoren, *supra* note 26, at 730; *cf.* PA. STAT. ANN. tit. 19, § 1057 (West 1964) (stating that sentence must have minimum and maximum limits).

29. *See* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 3 (1985) (explaining that individualized sentencing allows for consideration of each crime in relation to each individual).

30. *See Martin*, 351 A.2d at 658 (setting forth guidelines for individualized approach to sentencing); *see also* ALLEN, *supra* note 27, at 6 (discussing rehabilitation as principal goal of sentencing); MORRIS, *supra* note 27, at 24-43 (same); DeVoren, *supra* note 26, at 730 (stating that indeterminate sentencing requires courts to consider circumstances of crime and characteristics of criminals in efforts to rehabilitate offender more effectively); Nagel, *supra* note 27, at 893-99 (stating that rehabilitation should be primary objective of sentencing).

The *Martin* court interpreted the intermediate sentencing legislation to require courts to impose "the minimum amount of confinement that is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant . . . . At least two factors are crucial to such determination—the particular circumstances of the offense and the character of the defendant."

31. *See* Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1078 (1992) (noting that support for indeterminate sentencing began to crumble in early 1970s); DeVoren, *supra* note 26, at 730 (noting that rehabilitative needs of defendant must be considered in sentencing decision); Dowd, *supra* note 26, at 302 (noting that "assumptions behind the consensus on individualized sentencing were under attack from all sides"); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 61-62 (1993) (noting that last 20 years have seen significant changes in sentencing law). *See generally* Jodeen M. Hobbs, Comment, *Structuring Sentencing Discretion in Pennsylvania: Are Guidelines Still a Viable Option in Light of* Commonwealth v. Devers*?*, 69 TEMP. L. REV. 941 (1996) (noting that Pennsylvania legislature sought to control sentencing discretion in 1970s).

32. *See* Barrett, *supra* note 31, at 1079 (noting that sentencing philosophy shifted from treatment to deserved punishment); Dowd, *supra* note 26, at 302 (noting that rehabilitative goal of sentencing had fallen out of favor); Lowenthal, *supra* note 31, at 63 (noting that most jurisdictions have abandoned rehabilitation as goal of sentencing).

33. *See* Barrett, *supra* note 31, at 1078-79 (noting concerns of disparity in length of sentences for defendants who committed similar crimes); DeVoren, *supra* note 26, at 731 (noting "perceived problems of unwarranted disparity and undue leniency" in sentencing); Dowd, *supra* note 26, at 302 (noting critics' concerns of

began instituting determinate sentencing schemes, typically in the form of various types of sentencing guidelines.[34]

States have adopted one of two types of determinate sentencing schemes.[35] Some state legislatures have prescribed a statutory presumptive sentence for each crime, with permissible deviations in the form of aggravating and mitigating circumstances.[36] Other states, as well as Con-

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irrational disparity in sentencing, resulting in unequal justice and oppression of poor and minorities); Lowenthal, *supra* note 31, at 63 (noting concerns of unwarranted disparity, disproportionate punishment and inconsistent punishment for similar crimes).

34. *See* Barrett, *supra* note 31, at 1078 ("Since 1970, many states and the federal government have shifted to determinate sentencing."); Lowenthal, *supra* note 31, at 61 (noting that "in the last twenty years . . . most jurisdictions have adopted determinate sentencing schemes that narrow the range of sanctions available to trial courts and reduce or eliminate the broad discretion previously exercised by corrections administrators and parole boards"); Hobbs, *supra* note 31, at 941 (noting that Pennsylvania sought to control sentencing discretion by creating standards or guidelines for trial courts to consider when sentencing offenders for felonies or misdemeanors).

Determinate sentencing is defined as a system of standards or guidelines that constrain judicial discretion in sentencing and create uniformity and proportionality therein. *See* Barrett, *supra* note 31, at 1078 (defining determinate sentencing). One commentator states that "[s]entencing guidelines are a popular manifestation of determinate sentencing." *Id.*

35. *See* Lowenthal, *supra* note 31, at 63 (noting two general types of determinate sentencing). Determinate sentencing schemes generally narrow the wide range of sanctions available to sentencing courts, and reduce or eliminate the formerly broad discretion afforded parole boards and corrections administrators. *See id.* at 61 (discussing how set sentencing schemes narrow judicial sanctioning ability). Prior to the current practice, judges typically set the maximum terms of an individual sentence, and parole boards set the actual confinement period within that judicially determined maximum. *See* Mistretta v. United States, 488 U.S. 361, 364-65 (1989) (describing allocation of discretion between Congress, which defined maximum sentence, judiciary, which imposed sentences within statutory range, and parole board, which determined actual duration of sentence, in federal sentencing).

36. *See, e.g.*, CAL. PENAL CODE §§ 1170, 3000, 3040 (West Supp. 2000) (enacting California's determinate sentencing system). The California legislature found that "the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion." § 1170(a)(1). California was the first state to pass this type of sentencing legislation. *See* Lowenthal, *supra* note 31, at 63 (noting that California was first state to pass presumptive sentence law). Other states followed California's lead in passing presumptive sentence legislation. *See, e.g.*, ALASKA STAT. §§ 12.55.125 to 12.55.145, 12.55.155 to 12.55.165 (Michie 1998) (enacting presumptive sentence legislation); ARIZ. REV. STAT. ANN. §§ 13-701 to 13-702 (West 1989 & Supp. 1999) (same); COLO. REV. STAT. § 18-1-105 (1999) (same); IND. CODE ANN. §§ 35-50-2-1 to 35-50-2-10 (West 1998) (same); N.C. GEN. STAT. § 15A-1340 (1999) (same).

gress, have required judges to follow sentencing guidelines promulgated by a statutorily created state sentencing commission.[37]

Some states have also enacted "mandatory minimum" laws along with their determinate sentencing schemes.[38] Mandatory minimum laws impose a mandatory sentence, or an enhancement to an existing sentence, when a specified circumstance exists in connection with the commission of a certain crime.[39] Two theories support mandatory minimum sentencing laws.[40] First, deterrence results from increased certainty and severity of incarceration.[41] Second, the incapacitation of criminals results in their separation from the law-abiding general public.[42] Although politically popular, mandatory minimum sentencing laws have created more than

37. *See, e.g.*, MINN. STAT. ANN. § 244.09 (West 1992 & Supp. 2000) (providing for mandatory minimum sentences); 204 PA. CODE § 303.1 (1997) (same); WASH. REV. CODE ANN. § 9.94A.310 (West Supp. 2000) (same).

38. *See* Lowenthal, *supra* note 31, at 64 (noting that states have increasingly enacted mandatory minimum sentencing laws). These mandatory minimum sentencing laws usually have severe penalty provisions. *See id.* (noting severity of penalty provisions). By 1992, 46 states had at least some mandatory minimum sentence enhancement laws, and by 1993, over 100 separate federal provisions required mandatory minimum sentences. *See id.* at 64-65 (describing shift in criminal justice policies); *see also* Marc Mauer, *Americans Behind Bars*, CRIM. JUST., Winter 1992, at 16 (same).

39. *See* Lowenthal, *supra* note 31, at 69 (describing operation of mandatory sentence enhancement provisions). Mandatory minimum laws can take on several different forms: (1) an offender serving a mandatory minimum term that otherwise would not be applicable to the offense; (2) an increase in both the statutory minimum and maximum sentences that may be imposed; (3) consecutive sentences for the underlying offense and the enhancement-triggering offense; (4) an increase in sentence severity by restricting administrative discretion with regard to parole eligibility or prohibiting "good behavior" prison term reductions; (5) any combination of these elements, requiring certain and lengthy incarceration. *See id.* at 67-68 (describing various mandatory minimum laws).

40. *See id.* at 67 (noting theories that support mandatory minimum sentencing laws).

41. *See id.* (noting purposes of mandatory sentence enhancement provisions). Prohibiting courts from suspending sentences increases the likelihood of incarceration, while statutory devices increase the severity of sentences. *See id.* (describing impact of mandatory minimum sentencing schemes).

42. *See id.* (noting purposes of mandatory sentence enhancement provisions). The goal of incapacitation has been met for the most part, as prison populations have increased dramatically since the inception of determinate and fixed sentencing laws. *See* Andrew H. Malcolm, *More Cells for More Prisoners, But to What End?*, N.Y. TIMES, Jan. 18, 1991, at B16 (noting skyrocketing prison populations). Between 1980 and 1991, the overall crime rate in the United States decreased by 3.5%. *See* Mauer, *supra* note 38, at 16 (describing drop in crime rate and growth of prison population). Despite the decreased crime rate, the number of people behind bars in that same time period doubled. *See id.* at 16 (citing statistics); *see also* Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 696 (1995) (noting that between 1968 and 1993, United States prison populations have increased nearly 400%).

their share of debate, especially when used in conjunction with some form of determinate sentencing scheme.[43]

Some commentators have claimed that although the initial goal of the sentencing guidelines was to remedy sentencing disparity, this goal has been partially supplanted by concerns of an exploding prison population.[44] Some state legislatures have specifically charged guideline commissions with tailoring sentences according to prison capacity.[45] This shift in goals is a reflection of the realization that finite prison resources need to

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43. *See* Lowenthal, *supra* note 31, at 64, 106 (noting that "[u]nlike comprehensive determinate sentencing reforms, the single-factor sentence enhancement laws have been enacted piecemeal, usually during election years" and noting cross purposes of mandatory sentence enhancement provisions and determinate sentencing schemes). Professor Lowenthal claims that "[t]he mandatory sentence enhancement laws enacted during the past two decades have undermined the goals of the contemporaneous sentencing reform movement." *Id.* at 105-06. The reason, according to Professor Lowenthal, is because mandatory sentence enhancements have become an appealing tool for prosecutors, "used primarily as prosecutorial bargaining chips and . . . only infrequently enforced in actual sentences." *Id.* at 107. By offering the dismissal of mandatory sentence enhancements in exchange for guilty pleas, prosecutors can concentrate on other matters. *See id.* (noting that because "prosecutors must balance the needs of disposing of their case load and maintaining conviction rates with the competing and sometimes conflicting goal of ensuring consistent punishment . . . [p]lea bargaining thus becomes an appealing tool"). The disparity arises between those who plea bargain and those who do not. Professor Lowenthal notes that "[m]any of the offenders who received sentences without the mandatory enhancements for which they were eligible had committed offenses as serious as those of the offenders who did receive enhanced sentences." *Id.* at 107-08.

44. *See* Marvell, *supra* note 42, at 697 (noting that purpose of guidelines has evolved over time). Professor Marvell notes that:

> although their original purpose was to reduce sentencing disparity, the guidelines have acquired a second function in several states: to limit prison population growth by tailoring sentences to prison capacity. Legislators who either worried about prison costs, or were not persuaded that more imprisonment effectively reduced crime, required the guideline authors to consider prison capacity.

Id. (citations omitted).

45. *See, e.g.*, Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL'Y 279, 329 (1993) (noting that "[a]lthough the 1978 enabling statute only required the [Minnesota Sentencing] Commission to take existing correctional resources into 'substantial consideration,' the Commission chose to treat prison capacity as a controlling factor in drafting and implementing the Guidelines"); Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U.C. DAVIS L. REV. 695, 697 (1992) (noting that one impetus behind Oregon's adoption of sentencing guidelines was prison overcrowding); Lowenthal, *supra* note 31, at 72 n.50 (noting that guidelines commissions take availability of correctional resources into account when establishing sentencing ranges); Murphy, *supra* note 13, at 15 (noting that Massachusetts Sentencing Commission is charged with recommending sentencing policies that ration prison capacity so as to "afford sufficient capacity to incarcerate violent offenders").

be balanced with society's desire to be protected from the most dangerous offenders.[46]

B. *Examples of State Sentencing Guidelines*

1. *The Minnesota Experience: The Pioneer State in the Sentencing Guidelines Effort*

Minnesota was the first state to use an independent commission to enact a comprehensive system of sentencing reforms in the form of guidelines.[47] The Minnesota legislature created a Guidelines Commission ("Minnesota Commission") to promulgate guidelines regulating both the decision to impose imprisonment and the duration of the imprisonment.[48] In creating these guidelines, the Minnesota Commission was to sentence offenders based on "reasonable offense and offender characteristics," taking into substantial consideration "current sentencing and release practices [and] correctional resources."[49] The Minnesota Commission promulgated the Minnesota Guidelines in the form of a matrix, with offense severity on the vertical axis, the defendant's criminal history on the horizontal axis, and each block representing a narrow, specified range of incarceration time.[50]

The Minnesota Guidelines have evolved over the years. The most important changes involved reducing prison term durations at low severity levels in order to stay within prison capacity limits, while increasing durations at high severity levels.[51] In addition, courts have defined acceptable

46. *See* Murphy, *supra* note 13, at 15 (noting higher priority placed on incarcerating violent offenders when prison capacity must be rationed).

47. *See* Frase, *supra* note 45, at 279 (noting that Minnesota was first state to enact sentencing guidelines). Minnesota's Sentencing Guidelines have been in effect since 1980, the result of a 1978 enabling statute. *See* Act of Apr. 5, 1978, ch. 723, 1978 Minn. Laws 761, 765 (codified as amended at MINN. STAT. ANN. §§ 244.09-244.11 (West 1992 & Supp. 2000)) (creating sentencing commission for purpose of promulgating sentencing guidelines).

48. *See* Frase, *supra* note 45, at 281-82 (outlining goals of Minnesota's Guidelines Commission). The three explicit goals of the Minnesota Sentencing Guidelines are: (1) to create more uniformity in sentencing procedures in an attempt to prevent racial, gender and social class disparities; (2) to promote proportionality of prison commitment rates and duration to offense seriousness, and; (3) to avoid prison over-crowding. *See* MINN. R. OF CT. § 1 (stating purpose and principles of guidelines); *see also* Frase, *supra* note 45, at 281 (describing goals).

49. MINN. STAT. ANN. § 244.09(5)(2).

50. *See* § 244 app. at 545 (providing matrix).

51. *See* Frase, *supra* note 45, at 285-87 (noting that durations at severity levels one to three, with medium to high criminal history, were lowered due to prison capacity concerns, though some durations at higher severity levels were increased). Several changes occurred between 1980 and 1988. First, mandatory minimum prison terms increased for the use of a dangerous weapon, as well as the number of offenses applicable to such mandatory minimums. *See id.* at 287. Second, a 1981 provision allowed a court to stay a conviction for intrafamily sexual abuse if the court found that it was in the best interest of the complainant or family unit and the offender was amenable to treatment. *See id.* Third, a 1987 provision ad-

departures from the Minnesota Guidelines on a case by case basis.[52] The Minnesota Supreme Court has held that certain factors could not be taken into account to justify departures when the same factors had already been considered in drafting the guidelines.[53] The court additionally ruled that downward departures were largely immune to review, as the court did not wish to substitute its judgment for that of the sentencing court.[54] In a separate line of cases, the Minnesota Supreme Court has favored the dispositional departures (as opposed to durational departures) based on individualized assessments of the defendants' amenability to probation or prison.[55] Further fine-tuning of the guidelines produced mandatory minimums for drug crimes, and a higher maximum sentences for certain violent crimes and sex crimes.[56] Importantly, these "get tough" measures coincided with a change of heart regarding the primary consideration in setting the Minnesota Guidelines: the main focus would now be public safety and not the availability of correctional resources.[57] Although prison space availability remains a factor, it is no longer a substantial factor to be taken into account.[58]

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ding "amenable to treatment" language to mandatory minimum repeat sex offender statute. *See id.* at 287.

52. *See id.* at 288-90 (summarizing Minnesota cases allowing departures for variety of reasons).

53. *See* State v. Schmit, 329 N.W.2d 56, 58 (Minn. 1983) (noting that departures cannot be based on special needs for deterrence); State v. Hagen, 317 N.W.2d 701, 703 (Minn. 1982) (holding that departures cannot be based on danger imposed by any individual defendant); State v. Evans, 311 N.W.2d 481, 483 (Minn. 1981) (holding that upward durational departures should not normally exceed twice presumptive sentence lengths).

54. *See* State v. Kindem, 313 N.W.2d 6, 7 (Minn. 1981) (stating that "[although] we do not intend entirely to close the door . . . it would be a rare case which would warrant reversal of the refusal to depart"). State trial decisions choosing not to depart were largely insulated from review after *Kindem*. *See* Frase, *supra* note 45, at 289 (noting insulation from appellate review after *Kindem*).

55. *See, e.g.*, State v. Trog, 323 N.W.2d 28, 31 (Minn. 1982) (upholding downward dispositional departure based on defendant's unamenability to probation, noting aberrational and uncharacteristic nature of crime, rather than treatment needs); State v. Randolph, 316 N.W.2d 508, 510 (Minn. 1982) (holding that courts must grant defendant's request for execution of presumptive stayed prison term when trial court's proposed conditions would be more severe than actual prison term); State v. Hernandez, 311 N.W.2d 478, 481 (Minn. 1981) (holding criminal history points may accrue on single day when defendant is sentenced concurrently for more than one offense); State v. Wright, 310 N.W.2d 461, 462-63 (Minn. 1981) (upholding downward dispositional departure based on findings that defendant was unusually vulnerable and thus unamenable to prison); State v. Park, 305 N.W.2d 775, 776 (Minn. 1981) (upholding upward dispositional departure of commitment to prison rather than presumptive stayed term based on defendant's unamenability to probation).

56. *See* Act of June 1, 1989, ch. 290, 1989 Minn. Laws 1581 (codified as amended in scattered sections of Minn. Statutes) (adopting "get tough" measures).

57. *See* Frase, *supra* note 45, at 292 (noting that primary goal of Guidelines was public safety and not prison space availability).

58. *See id.* (identifying public safety as primary goal of Guidelines).

Minnesota's experience with sentencing guidelines has generally been positive.[59] Sentences have been more uniform, and racial disparity has been greatly reduced.[60] Furthermore, despite "get tough" measures and a seventy percent increase in the state's felony caseload, Minnesota has managed to control prison overcrowding.[61] Finally, the Minnesota Guidelines control discretion but still give judges and prosecutors enough flexibility to tailor sentencing to individual offenders.[62] The Minnesota sentencing structure has shown relative success and a long-term fulfillment of its goals; as a result Minnesota is seen as a model for other jurisdictions.[63]

2. *The Oregon Experience: Gearing a Sentencing System Toward Prison Capacity*

Oregon's approach to sentencing guidelines originated as a public backlash against its parole board's early release practices.[64] Oregon

59. *See id.* at 333-36 (noting successes of Minnesota Guidelines, and that "viewed in proper perspective, the Minnesota Guidelines remain an impressive and achievable model"). Despite its successes, however, the Minnesota Guidelines have not completely eradicated racial disparity, as blacks have had consistently lower rates of downward mitigated dispositional departures than whites. *See id.* at 335 (noting persistent racial sentencing disparity). Also, Minnesota's Sentencing Commission, although conceived as an independent, non-political body, was not completely immune to the 1980s media-fanned political pressure to "get tough" on crime. *See id.* at 334 (noting that Minnesota was not "immune from popular pressures to escalate prison rates and durations in response to short-term public hysteria").

60. *See id.* at 335 (stating that guidelines helped Minnesota make its sentences more uniform and avoid racial disparity in sentencing and prison use).

61. *See id.* at 334 (noting success in stemming prison overcrowding). Although this achievement of controlling prison overpopulation has nothing to do with the original goals of the Minnesota Guidelines, that is, truth-in-sentencing and reducing disparity, controlling prison overcrowding is "perhaps the Minnesota Guidelines' greatest 'success story.'" *Id.*

62. *See id.* at 336 (noting that Minnesota Guidelines control discretion but remain flexible).

63. *See id.* (noting that Minnesota Guidelines serve as valuable model for other states' sentencing control efforts). Professor Frase notes that:

> [M]innesota's experience remains important because its Guidelines have been in effect the longest and have been extensively studied and evaluated . . . . This rich source of data and commentary, the extensive appellate case law interpreting the Guidelines, and a decade of legislative and Commission-initiated amendments contain essential lessons for reformers in other jurisdictions.

Id. at 279-80.

64. *See* Kirkpatrick, *supra* note 45, at 697 (noting image of state corrections system as "revolving door"). Oregon has used a guidelines approach to controlling sentencing since 1977, when it adopted parole guidelines that transferred sentencing control from trial courts to parole boards. *See id.* at 696 (noting sentencing control transfer). Because the parole guidelines only affected those who actually went to prison, however, disparities persisted as to which offenders received prison sentences—these disparities led Oregon to adopt sentencing guidelines. *See id.* (noting factors leading Oregon to pursue creation of sentencing guidelines).

adopted early release practices in an attempt to eliminate sentencing disparities between counties.[65] However, the public began to perceive a "revolving door" justice system, and the backlash ensued.[66] The Oregon state legislature responded by charging the state's Criminal Justice Council with developing a comprehensive scheme of sentencing guidelines ("Oregon Guidelines").[67] The Criminal Justice Council enacted the Oregon Guidelines to restore the public's confidence in the state's criminal justice system, addressing sentencing disparity as a collateral result.[68]

Between 1977 and 1987, Oregon's prison population more than doubled, nearly outgrowing the state's prison capacity.[69] As a result, the

65. *See id.* at 697 (noting inter-county sentencing disparities). There was a significant amount of inter-county disparity in each counties' usage of state prison resources. *See id.* (noting that "some county's sentenced similarly situated offenders to prison at a much higher rate than other counties"). The parole board attempted to remedy this disparity with early release programs for some offenders who were at the low end of the parole matrix. *See id.* (describing parole board's early release program).

66. *See id.* (noting public backlash). This situation created a public backlash when many offenders soon reappeared on the streets after serving only a fraction of their sentences. *See id.* Another goal of Oregon was the control of prison populations, because Oregon's prison population doubled between 1977 and 1987. *See id.* (noting doubling of prison population with no proportionate increase in prison capacity).

67. *See* 1985 Or. Laws 558, § 3 (directing Oregon's Criminal Justice Council to reform sentencing). The statute directed the Oregon Criminal Justice Council to:

> (1) Study and make recommendations concerning the functioning of the various parts of the criminal justice system, including study and recommendations concerning implementation of community corrections programs;
> (2) Study and make recommendations concerning the coordination of the various parts of the criminal justice system;
> (3) Conduct research and evaluation of programs, methods and techniques employed by the several components of the criminal justice system;
> (4) Study and make recommendations concerning the capacity, utilization and type of state and local prison and jail facilities; and alternatives to the same including the appropriate use of existing facilities and programs, and the desirability of additional or different facilities and programs;
> (5) Study and make recommendations concerning methods of reducing risk of future criminal conduct by offenders;
> (6) Collect, evaluate and coordinate information and data related to or produced by all parts of the criminal justice system . . . .

Id.

68. *See* Kirkpatrick, *supra* note 45, at 698 (noting public's loss of confidence). The prison overcrowding and resultant "revolving door" problem caused the public to lose confidence in the criminal justice system. *See id.* (noting loss of confidence). The state legislature looked to sentencing guidelines to help the corrections system restore its credibility by providing "truth-in-sentencing"; that is, time actually served being closely in line with the actual sentence that was imposed. *See id.* (defining "truth-in-sentencing").

69. *See id.* at 697. The Oregon legislature recognized that sentencing guidelines could be an effective management tool for the state's corrections system. Guidelines would allow the state to assess its current needs for additional prison

Oregon Guidelines were seen as a tool to alleviate this problem and were keyed to available institutional capacity.[70] Oregon was one of the first states to promulgate such a capacity-based sentencing scheme.[71]

The operation of the Oregon Guidelines is the familiar matrix, with offense seriousness on one axis and any prior criminal history of the offender on the other.[72] Each cell of the matrix contains a relatively narrow sentencing range, granting the judge some limited discretion to sentence anywhere within that range.[73] The final sentencing grid was weighted heavily toward personal safety, with violent crimes receiving the most serious sanctions.[74]

The Oregon Guidelines are mandatory, and trial judges must impose sentences within the specified range unless there are "substantial and compelling reasons" for departure.[75] The Oregon Guidelines set forth a list of aggravating and mitigating factors to support such departures.[76] Judges cannot use aggravating factors that have already been considered in the guidelines.[77] Although sentences within the standard range are not reviewable, both the state and the defendant can appeal a standard range departure that is allegedly not supported by substantial and compelling reasons.[78]

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capacity, forecast future demand for prison capacity and generally regulate the utilization of all aspects of the system. *See id.* (noting benefits of sentencing guidelines).

70. *See id.* (noting Oregon legislature's recognition of lack of public confidence in state criminal justice system).

71. *See id.* at 695; *see also* Kathleen M. Bogan, *Constructing Felony Sentencing Guidelines in an Already Crowded State: Oregon Breaks New Ground,* 36 CRIME & DELINQ. 467, 468 (1990) (addressing Oregon's prison overcrowding solution).

72. *See* Kirkpatrick, *supra* note 45, at 701 (describing grid system that determines sentence length).

73. *See id.* (describing judge's discretion). The sentencing judge "should select the center of the range in the usual case and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure." OR. ADMIN. R. 253-05-001 (1993).

74. *See* Kirkpatrick, *supra* note 45, at 703 (noting priority of protection); *see also* Bogan, *supra* note 71, at 472 (same). The ranking of societal interests includes personal safety at the top, followed by property rights, with the integrity of government institutions coming in third. *See id.* (summarizing Oregon's offense ranking system).

75. *See* OR. ADMIN. R. 253-08-001 (1993) (providing justification to depart from standard range).

76. *See* OR. ADMIN. R. 253-08-002(1)(a) (1993) (providing mitigating factors that would justify downward departure from standard range); OR. ADMIN. R. 253-08-002(1)(b) (1993) (providing aggravating factors that would justify upward departure from standard range).

77. *See* OR. ADMIN. R. 253-08-002(2) (1993) (prohibiting upward departure if aggravating factor was already taken into account in guidelines).

78. *See* OR. REV. STAT. § 138.222(2)(a) (1999) (prohibiting review of sentences falling within already promulgated standard ranges). An honest error in computing the seriousness of the crime or the criminal history of the defendant is reviewable. *See* OR. ADMIN. R. 138-08-002(2) (1993) (noting that honest errors are reviewable). Both the state and the defendant may appeal a departure not sup-

One difficulty that arose was the issue of consecutive sentences and the possibility that these sentences would provide an end-run around the Oregon Guidelines which would result in the same sorts of disparities that the guidelines were enacted to resolve.[79] The Criminal Justice Council responded with a system that used a combination of the sentence for the most serious offense, with first-time-offense sentences for the rest of the offenses.[80] Each criminal who is sentenced to prison is also sentenced to a term of post-prison supervision.[81] Violations of the conditions of this supervision can result in a return to prison for up to six months.[82]

The Oregon sentencing system has resulted in a substantial increase in incarceration time for offenders convicted of forcible sex and person crimes, a modest increase for drug crimes, and a decrease in time served for property crimes and driving offenses.[83] Judges have departed from the Oregon Guidelines in only six percent of cases, and the guidelines have had little, if any, effect on the felony plea bargain rate.[84] Perhaps most important, prison population control-the original impetus for the Oregon Guidelines-has been achieved.[85] Whether the Oregon Guidelines have been successful or not depends on the commentator: many minorities feel the system is still biased, and that "if you're a black man, you're going to prison."[86]

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ported by substantial and compelling reasons. *See* OR. REV. STAT. § 138.222(3) (1993) (allowing limited review of sentences departing from presumptive sentence range to determine whether departure was supported by ample evidence and whether court had substantial and compelling reasons to depart).

79. *See* Kirkpatrick, *supra* note 45, at 709 (noting concern over disparities caused by consecutive sentences). This could happen through multiple victims of the same crime or multiple instances of crime to the same victim. *See id.* (discussing consecutive sentences). If there were no limit, the total of the consecutive sentences imposed could far exceed a sentence for a much more serious crime. *See id.* (discussing consecutive sentences).

80. *See* OR. ADMIN. R. 253-12-020(2)(a) (1993) (providing that presumptive term for consecutive sentences equals presumptive term for most serious offense, plus possible maximum terms for each additional offense with first-time offenders).

81. *See* OR. ADMIN. R. 253-05-002(2) (1993) (mandating one year post-prison supervision for crime categories one to three, two years for categories four to six, and three years for categories seven to eleven).

82. *See id.* (providing sanctions for violation of post-prison supervision).

83. *See* Kirkpatrick, *supra* note 45, at 713 n.56 (noting findings).

84. *See id.* (noting that Oregon Guidelines have not affected rate of plea bargains). Ninety-two percent of felony cases plead out—the same rate as before the Oregon Guidelines. *See id.*

85. *See* Marvell, *supra* note 42, at 703-04 (demonstrating regression results for Oregon's prison population growth since enacting Oregon Guidelines).

86. *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 OR. L. REV. 823, 863 (1994) (quoting minority witness).

3. *The Federal Sentencing Guidelines*

Congress enacted the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984[87] to "enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system."[88] The Sentencing Reform Act created the United States Sentencing Commission (the "Commission"), a bipartisan, seven member commission, to establish "sentencing policies and practices" in the form of guidelines that would provide certainty and fairness in sentencing and avoid sentencing disparities among defendants with similar histories and similar offenses.[89] The guidelines would address the length of sentences, types of sentences imposed and whether multiple sentences should run concurrently or consecutively under given circumstances.[90] Three fundamental policies guided the Commission in its task.[91] First, the Commission wanted to promote honesty in sentencing through determinate sentences, irreducible by parole or good behavior credits.[92] Second, the Commission wanted to achieve uniformity in sentencing across all federal jurisdictions.[93] Third, the Commission wanted to achieve proportionality between sentences of offenders convicted of crimes with varying severity levels.[94]

The Commission faced a difficult obstacle, because conflicting theories regarding the purposes of punishment and sentencing, such as retribution, deterrence, incapacitation and rehabilitation, proved difficult to reconcile within one sentencing system with little guidance from Congress.[95] The Commission felt it unnecessary to choose between sentencing philosophies, however, and chose instead to structure the guidelines based on the historical sentencing practices of the federal courts, resulting in a guideline system that represents an "amalgam of views."[96] The Federal Sentencing Guidelines ("Federal Guidelines") became effective on November 1, 1987.[97]

A federal sentencing court sentences a defendant under the Federal Guidelines according to information gathered by a United States proba-

87. 28 U.S.C. §§ 992-998 (1994).

88. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. cmt. 3 (1998).

89. *See* Feinstein et al., *supra* note 18, at 1080 (providing background of federal sentencing guidelines).

90. *See id.* at 1080-81 (detailing purpose of Sentencing Commission).

91. *See id.* at 1081 (detailing three guiding policies).

92. *See id.* (discussing policy of honesty).

93. *See id.* (discussing policy of uniformity).

94. *See id.* (discussing policy of proportionality).

95. *See, e.g., id.* at 1082 (detailing various theories of punishment and sentencing).

96. *See id.* at 1082-83 (detailing approach Commission settled on in structuring guidelines).

97. *See id.* at 1083 (noting effective date of Federal Guidelines). The Commission submitted the guidelines for congressional approval on April 13, 1987. *See id.*

tion officer, submitted to the court in a pre-sentence report.[98] The court first determines the base offense level, which is a numerical severity factor based on the particular type of crime.[99] The court may then make adjustments based on criteria such as victim characteristics, participation level of the defendant in the crime, whether or not the defendant obstructed justice and whether the defendant has accepted responsibility for the crime.[100] The court then considers the criminal history of the defendant, under the theory that a repeat offender is more culpable than a first-time offender.[101] After the court determines the offense level and criminal history points, the court applies the numbers to a grid, with criminal history comprising the horizontal axis and offense level comprising the vertical axis.[102] At the intersection of these two values is the range in which the judge must impose a sentence, and thus the limit of the sentencing judge's discretion.[103]

The sentencing judge has one other remnant of discretion—a judge may depart from the prescribed range, downward or upward, if he or she feels there is an aggravating or mitigating circumstance present in the defendant's case that was not taken into account in the formulation of the Federal Guidelines.[104] The Federal Guidelines explicitly permit depar-

98. *See id.* at 1084 (describing pre-sentencing reporting process). The sentencing court has the duty to ensure that the defendant and his or her counsel has had the opportunity to examine and discuss the report, which must contain the factors the court considered in its sentencing recommendation. *See id.* (noting court's duty to inform defendant). The court must allow the defendant to address the court before sentencing. *See id.* (noting court's duty to allow defendant to be heard).

99. *See id.* at 1084-85 (describing application of guidelines). Each federal offense has a corresponding base offense level. *See id.* at 1085 (describing offense level). When determining the base offense, the court must consider acts or omissions that are part of the charged offense. *See id.* The court must apply the Federal Guidelines to the offense actually charged to the defendant, rather than the actual conduct in which the defendant engaged. *See id.*

100. *See id.* at 1085-86 (describing adjustments). Chapter three of the Federal Guidelines details the adjustment process, with Part A providing for victim-related adjustments, Part B providing for adjustments based on the role the defendant played in the crime, Part C providing for adjustments based on whether the defendant intentionally obstructed justice, Part D providing for adjustments for multiple convictions and/or closely related counts and Part E providing for adjustments based on the defendant's acceptance of responsibility for the crime or crimes committed. *See id.* at 1085-86 (illustrating how adjustments combine with base offense level to create total offense level); *see also* Jim McHugh, *The United States Sentencing Guidelines: Justice for All or Justice for a Few?*, 36 VILL. L. REV. 877, 903 n.33 (1991) (detailing chronological application of Federal Guidelines).

101. *See* Feinstein et al., *supra* note 18, at 1086-87 (detailing application of criminal history to sentencing procedure).

102. *See id.* at 1087 (describing sentencing grid that court must use to determine sentence).

103. *See id.* (describing range of sentencing at intersection of offense level and criminal history on sentencing grid).

104. *See id.* at 1088 (describing departures from sentencing guidelines); McHugh, *supra* note 100, at 903 (same).

tures for two reasons.[105] First, the Commission realized that it would be impossible to account for every possible situation.[106] Second, the Commission believed judges would depart only rarely, as the Federal Guidelines reflected current sentencing practices.[107] To determine whether a departure is warranted, the court may examine the text, policy statements and commentary of the Federal Guidelines.[108] When a case falls outside this "heartland" of typical cases, the court should consider a departure.[109] Departures are generally not warranted when the factor used in justifying the departure is already taken account of in the Federal Guidelines.[110] It is possible, however, for the court to find that a departure is warranted when a factor, already taken account of in the formulation of the Federal Guidelines, is present in a "degree substantially in excess of that which ordinarily is involved in the offense."[111]

A defendant has a statutory right to appeal his or her sentence.[112] The circuits have developed various tests to review departures, which generally follow a three-step approach.[113] First, the circuit courts consider

105. *See* Feinstein et al., *supra* note 18, at 1088 (elaborating on nature and purpose of sentencing departures).

106. *See id.* (noting impossibility of creating complete sentencing guidelines).

107. *See id.* (noting that judges already use aggravating and mitigating factors in handing down criminal sentences).

108. *See* United States v. Aguilar-Pena, 887 F.2d 347, 349 (1st Cir. 1989) (holding that departure is permitted when "idiosyncratic circumstances warrant individualization of sentence beyond that which is possible within the comparatively close-hewn parameters constructed by the guidelines").

109. *See id.* at 350 (noting that when any "court finds an atypical case . . . it may consider whether departure is warranted").

110. *See* United States v. Carey, 895 F.2d 318, 323 (7th Cir. 1990) (holding that downward departure based on defendant's restitution is improper because acceptance of responsibility is already incorporated in Federal Guidelines).

111. U.S. Sentencing Guidelines Manual § 5K2.0 (1998).

112. *See* 18 U.S.C. § 3742 (1994) (defining bases on which defendant may file appeal). The statute states that a defendant may appeal an otherwise final sentence if the sentence:

> (1) was imposed in violation of law;
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

Id.

113. *See* United States v. Diaz-Villafane, 874 F.2d 43, 49 (1st Cir. 1989) (using three-part test to review Guideline departure). The *Diaz-Villafane* court adopted the three-part test and the Sixth, Eighth, Tenth and Eleventh Circuits followed suit by expressly adopting this test. *See, e.g.*, United States v. Weaver, 920 F.2d 1570, 1573 (11th Cir. 1991) (adopting three-part test formulated in *Diaz-Villafane*);

whether the circumstances upon which the sentencing judge relied are unusual enough to merit departure.[114] Second, the courts consider whether those circumstances actually existed.[115] Third, the courts consider whether the direction and degree of departure were reasonable.[116]

Any meaningful understanding of the Federal Guidelines depends upon a firm grasp of the compromises that led to their creation.[117] The practical needs of administration, institutional considerations and the competing goals of the criminal justice system all contributed to an end result far different than originally envisioned.[118] One of the fundamental

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United States v. White, 893 F.2d 276, 277 (10th Cir. 1990) (same); United States v. Lang, 898 F.2d 1378, 1379 (8th Cir. 1990) (same); United States v. Rodriguez, 882 F.2d 1059, 1067 (6th Cir. 1989) (same). The Second, Third, Seventh, Ninth and District of Columbia Circuits have adopted substantially similar tests. *See, e.g.*, United States v. Lira-Barraza, 941 F.2d 745, 746-47 (9th Cir. 1991) (en banc) (holding that test is: (1) whether court had legal authority under guidelines to depart; (2) whether factual findings prompting departure are clearly erroneous; and, (3) whether departure was reasonable in light of Federal Guidelines); United States v. Kikumura, 918 F.2d 1084, 1098 (3d Cir. 1990) (holding that findings of fact should be left undisturbed unless clearly erroneous and that sentence departure must be reasonable); United States v. Lara, 905 F.2d 599, 603 (2d Cir. 1990) (holding that district court "has 'sensible flexibility' to depart under circumstances where such action is not unreasonable"); United States v. Schmude, 901 F.2d 555, 560 (7th Cir. 1990) (holding that question of degree of departure is reasonableness, and that standard of review is deferential, "recognizing that sentencing judges should be given considerable leeway in determining degree of departure"); United States v. Burke, 888 F.2d 862, 869 (D.C. Cir. 1989) (giving deference to sentencing court upon finding of reasonableness). The Fourth and Fifth Circuits employ similar standards. *See, e.g.*, United States v. Chester, 919 F.2d 896, 900 (4th Cir. 1990) (applying clearly erroneous standard to review factual support of departure and abuse of discretion standard to determine if departure factors are "of sufficient importance . . . that a sentence outside the Guidelines should result . . . [and] if the extent of the departure was reasonable"); United States v. Velasquez-Mercado, 872 F.2d 632, 637 (5th Cir. 1989) (holding that departure will be affirmed if reasonable).

114. *See Diaz-Villafane*, 874 F.2d at 49 ("First, we assay the circumstances relied on by the district court in determining that the case is sufficiently 'unusual' to warrant departure.").

115. *See id.* ("Second, we consider whether the circumstances, if conceptually proper, actually existed in the particular case.").

116. *See id.* ("Third . . . the direction and degree of departure must, on appeal, be measured by a standard of reasonableness.").

117. *See* Breyer, *supra* note 18, at 2 (noting that compromises permeate Federal Guidelines).

118. *See id.* at 2-3 (describing competing elements involved in formulation of Federal Guidelines). The United States Sentencing Commission had to overcome two differences between the federal government and the states with regard to sentencing. *See id.* (comparing state and federal guidelines). First, the federal criminal code had 688 statutes to deal with, compared to a much smaller number of crimes the typical state guidelines had to deal with. *See id.* at 3. For example, at the time the United States Sentencing Commission began to write the Guidelines in 1985, Minnesota, which already had its sentencing guideline system in place, only had to cover 251 statutory crimes. *See id.* The United States Sentencing Commission, on the other hand, had to deal with complex crimes included in statutes such as the Hobbs Act, 18 U.S.C. § 1951 (1982), the Travel Act, 18 U.S.C. § 1952

compromises of the Federal Guidelines was between creating a "real-offense" system versus a "charge-offense" system.[119] A charge-offense system would tie punishments directly to the offense for which the defendant was convicted, with deviations depending upon the presence of aggravating or mitigating circumstances.[120] A real-offense system, on the other hand, would tie punishments to the elements of the actual circumstances of the case.[121] The methods of proof of additional harms, the procedural fair-

(1982 & Supp. IV 1986) and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1963 (1982 & Supp. IV 1986). *See id.* (demonstrating complex task of federal sentencing commission). Second, political homogeneity in the states made it easier to achieve a consensus on such issues such as the goals of sentencing guidelines, as opposed to the nation as a whole, where there is no such consensus. *See id.* at 3-4 (distinguishing state and federal guidelines).

119. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. cmt. 4(a) (1998) (stating that real-offense versus charge-offense sentencing was "[o]ne of the most important questions for the Commission to decide"); Breyer, *supra* note 18, at 8-9 (noting that competition between real-offense and charge-offense sentencing rationales was "[t]he first inevitable compromise which faced the Commission").

120. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. cmt. 4 (1998) (stating that pure charge-offense system would only sentence defendants for crimes with which they are charged, overlooking behavior that is harmful); *see also* Breyer, *supra* note 18, at 8-9 (noting that charge-offense sentencing would tie punishment directly to offense for which defendant is convicted, and that "[t]he basic premise underlying a 'charge offense' system is that the guideline punishment is presumed to reflect the severity of the corresponding statutory crime").

121. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. cmt. 4 (1998) (stating that real-offense sentencing bases sentences "upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted"); Breyer, *supra* note 18, at 10 (noting that real-offense sentencing "bases punishment on the elements of the specific circumstances of the case"). The Federal Guidelines Manual provides the following example to contrast the two approaches:

> A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. cmt. 4 (1998). The Commission initially set out to develop a pure real offense system, noting that the pre-guidelines system was, in a sense, this type of system. *See id.* (stating that sentencing court and parole commission examined defendants' conduct prior to guidelines). The sentencing court and the Commission took account of a defendant's actions as described in a pre-sentence report. *See id.* (noting that defendant's conduct was determined by sentencing hearing or parole commission officer). The Commission, however, found no practical way to provide for the myriad types of diverse harms arising in different circumstances. *See id.* (noting that such system risked return to wide sentencing disparities). The Commission also could not devise a practical way to "reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases." *Id.* The Commission eventually moved toward a charge system that takes into account "a significant number of real offense elements . . . such as role in the offense, the presence of a gun, or the

ness and the administrative workability of such methods became one of the key compromises of the Federal Guidelines.[122]

The end result is a guideline system that accomplishes a compromise between pure charge-offense and pure real-offense ideologies—that is, a

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amount of money taken, through alternative base offense levels, specific offense characteristics, cross references and adjustments." *Id.*

122. *See* FED. R. CRIM. P. 32(c) (governing sentencing hearing). Rule 32(c)(1) provides the defendant an opportunity to examine and comment on the probation officer's findings:

> (1) Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

Id. Rule 32 allows a defendant access to a procedure to contest the findings upon which his or her sentence will be determined. *See id.* (allowing procedure); *see also* United States v. O'Neill, 767 F.2d 780, 787 (11th Cir. 1985) (vacating sentence and remanding for resentencing for failure of court to make findings pursuant to Rule 32 as to each controverted pre-sentence report item or to determine that no such finding was necessary); United States v. Pettito, 767 F.2d 607, 609 (9th Cir. 1985) (stating that purpose of Rule 32 is to ensure that record is made of "exactly what resolution occurred as to the controverted matter," ensuring accuracy of record to be used for sentencing).

Some commentators claim, however, that the federal sentencing process allows offenders to be sentenced to untried and unproven crimes through this process. *See, e.g.*, Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 420 (1992) (noting lesser procedural safeguards and evidentiary standards of sentencing hearings). The lesser procedural protections and lower evidentiary standards of sentencing hearings provide a temptation for prosecutors to withhold proof of some crimes until sentencing, thereby gaining a harsher sentence via evidence that probably would not have proven at trial. *See id.* (noting temptation of prosecutors to withhold introduction of certain crimes until sentencing hearings). For example, the prosecutor in *United States v. Kikumura* withheld evidence until the time of sentencing. *See* United States v. Kikumura, 918 F.2d 1084, 1089 (3d Cir. 1990) (stating that prosecutor withheld evidence of other crimes until time of sentencing). The defendant was convicted of several passport and weapons offenses for which the Federal Guidelines prescribe a sentencing range of 27 to 33 months. *See id.* at 1089. The prosecutor introduced proof at the sentencing hearing that the defendant manufactured lethal home-made firebombs in preparation for a major terrorist bombing. *See id.* (noting that prosecutor did not introduce bomb evidence until time of sentencing). Based on this bomb manufacturing charge, for which the defendant was neither tried nor convicted, the district court judge imposed a sentence of 30 years imprisonment. *See id.* In a concurring opinion, Judge Rosenn expressed his concern that "the Government's manipulation of Kikumura's charge and sentencing illustrates the problem reported by many courts that the sentencing guidelines have replaced judicial discretion over sentencing with prosecutorial discretion. In so doing, it may have violated Kikumura's right to due process." *Id.* at 1119 (Rosenn, J., concurring).

charge-offense system with some real elements, but not too many as to make it unwieldy or procedurally unfair.[123]

123. *See* Breyer, *supra* note 18, at 12 (describing Commission's final creation as compromise between charge-offense and real-offense ideologies). The system starts out like a charge-offense system, with the sentencing court looking to the offense charged to secure a base offense. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (1998) (providing application instructions). The U.S. Sentencing Guidelines Manual instructs the sentencing court first to "[d]etermine the base offense level." *Id.* The Guidelines then modify that charge-offense level in light of several real-offense aggravating or mitigating circumstances for each specific crime. *See id.* (directing court, after determining base offense level, to "apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two . . . "). The federal guidelines make reference to aggravating and mitigating circumstances throughout. *See, e.g., id.* § 2B3.1(b)(1)-(7) (providing aggravating and mitigating factors for offense of robbery). For example, to adjust upward for the presence of a firearm in the commission of robbery, section 2B3.1(b)(2) provides:

> (A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished, displayed, or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished, displayed, or possessed, increase by 3 levels; or (F) if a threat of death was made, increase by 2 levels.

Id. § 2B3.1(b)(2). General adjustments are then made according to such circumstances as victim characteristics and the defendant's role in the offense. *See id.* § 3A-B (discussing victim characteristics and defendant's role in crime). For example, section 3A1.1(a) provides an adjustment for hate crime motivation:

> If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels.

Id. § 3A1.1(a). Finally, characteristics of the offender are taken into account in section 4, with section 4A accounting for criminal history of the offender, and section 4B accounting for special "career offender" circumstances. *See id.* § 4A-B (proving for offender characteristics). For example, section 4A1.1 provides for a general criminal history calculation:

> The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.
>
> (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
>
> (b) Add 2 points for each prior sentence of imprisonment or at least sixty days not counted in (a).
>
> (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.
>
> (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
>
> (e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.
>
> (f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b) or (c)

The Commission recognized and allowed for the fact that prosecutors could manipulate a charge-offense system by increasing or decreasing the number of counts in an indictment by structuring the Federal Guidelines accordingly.[124]

4. *The Federal Sentencing Guidelines and White Collar Crime*

In the mid- to late 1980s, the public began to perceive a leniency in sentencing toward white collar offenders, and courts began to reflect this sentiment in their sentencing practices.[125] In its study of sentencing prac-

> above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided,* that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

Id. § 4A1.1. Finally, the federal guidelines provide for "departures," which allow the sentencing court to depart from a guideline sentence when, and only 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." *Id.* at 6 (citing 18 U.S.C. § 3553(B) (1984)).

Of course, there are those who believe the Federal Guidelines contain too many real-offense adjustments. *See, e.g.,* Breyer, *supra* note 18, at 12 (quoting Associate Attorney General Stephen S. Trott as saying that "the definition of conduct that is relevant to sentencing . . . [should be] enlarged to include *any conduct that is related to the offense of conviction,* even if it is not . . . in furtherance of that offense and any harms resulting from that conduct . . . ." (emphasis added)). Other commentators believe that the Federal Guidelines contain too few real-offense adjustments. *See id.* at 50 n.75 (noting that testimony of Dr. Edward J. Burger, Jr., Council of Court Excellence, suggests that elements such as offender characteristics promote unnecessary sentencing disparity).

124. *See* U.S. SENTENCING GUIDELINES MANUAL 5-6 (1998) (noting that Commission took into account possibility of prosecutors influencing sentences by increasing or decreasing counts). Generally, the Federal Guidelines provide that when conduct involves fungible items, like separate drug transactions or thefts of money, the amounts are added and the Guidelines apply to the total amount. *See id.* at 8 (discussing application of Federal Guidelines). When conduct involves nonfungible harms, "the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction." *Id.* at 9. For example, the Federal Guidelines would treat a three-count indictment, each count being 100 grams of heroin or theft of $10,000, the same as one count of 300 grams of heroin or theft of $30,000. *See id.* at 6 (providing example). Also, the court can control inappropriate manipulation with its departure power. *See id.* (noting departure power of court). For a discussion of a federal sentencing court's departure power, see *supra* notes 104-11 and accompanying text.

125. *See* Feinstein et al., *supra* note 18, at 1094-95 (noting public perception of leniency toward white collar offenders). In the mid-1980s, courts began to address this public sentiment by imposing increasingly harsh sentences on white collar offenders. *See id.* (discussing increasingly harsh sentencing of white collar offenders); *see also* United States v. Marquardt, 786 F.2d 771, 774 (7th Cir. 1986) (holding that seven concurrent three-year terms of imprisonment for embezzlement from savings and loan was not abuse of discretion); United States v. Morse, 785 F.2d 771, 774 (9th Cir. 1986) (imposing sentences of four and seven years imprisonment, respectively, on two defendants for mail fraud and securities fraud resulting from

tices prior to the passage of the Federal Guidelines, the Commission found that there were significant discrepancies between punishment of white collar crimes, such as fraud and embezzlement, and similar but more "common" theft crimes such as larceny.[126] As a result, rectifying the perceived leniency toward white collar offenders became a policy objective, and the Commission crafted the Federal Guidelines accordingly.[127]

The Commission rectified the situation by providing for short but certain terms of confinement for many types of economic crimes that, prior to the Federal Guidelines, likely would have resulted in only probation.[128]

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tax shelter/investment scheme); United States v. Lamp, 779 F.2d 1088, 1098 (5th Cir. 1986) (holding that twelve year sentence for tax evasion, conspiracy to defraud IRS and aiding and abetting perjury was not excessive). The sentencing judge in *Marquardt* noted that although this was not a crime of violence, he was concerned by "the calculated nature of [the] offense," and with promoting general deterrence because "[t]his [was] not the only savings and loan embezzlement that's been through court lately." *Marquardt*, 786 F.2d at 781-82.

126. *See* Breyer, *supra* note 18, at 20 (noting disparity between white collar crime sentencing and non-white collar crime sentencing). The Commission found that courts granted probation more frequently to white collar offenders than offenders convicted of other crimes, and that white collar offenders received less severe prison terms when sentenced to incarceration. *See id.* (discussing differences between sentences courts typically impose on white collar offenders and those convicted of other crimes).

127. *See* Feinstein et al., *supra* note 18, at 1095 (noting that severity of white collar crime became policy issue, "and that such offenses were specifically singled out by the Commission as targets for stiffer and more uniform sentences"). The Commission noted that "[u]nder pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement . . . ." U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (1998). These crimes, in the Commission's view, are "serious." *See id.* (noting that certain economic crimes are serious); *see also* Feinstein et al., *supra* note 18, at 1095 n.118 (noting Commission's findings regarding pre-guidelines sentencing practice). Commission member Judge Breyer noted that "white collar criminals, who now tend always to receive probation, [should] receive some short prison term—antitrust, insider trading, embezzlement, fraud—those people, in fairness, ought to be treated the same way as other people who are engaged in theft or crimes that are really functionally similar." *Id.* (citations omitted).

128. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (1998) (noting that Commission's solution was to "write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases"); Breyer, *supra* note 18, at 20-21 (noting decision of Commission to require short but certain terms of confinement for many white collar offenders). Before the Federal Guidelines, a federal sentencing judge could sentence all offenders convicted of embezzlement, tax evasion or antitrust violations to probation with no confinement whatsoever. *See Breyer*, supra note 18, at 22 (stating that "deterrence approach is heavy factor in sentencing white collar or economic offenders"). The Commission, however, fashioned the Federal Guidelines to prescribe imprisonment for all but the most minor of white collar offenses. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (1998) (providing sentencing grid which prescribes imprisonment for offenders convicted of crimes of offense level one or higher). For example, the base offense level for fraud, $2,000 or less, is six. *See id.* § 2F1.1(b)(1)(A) (providing base offense levels for offenses involving fraud or deceit). Applying this base offense level of six to

The Commission's goal in crafting the Federal Guidelines for white collar sentencing was not only to remedy pre-guideline sentencing disparities, but also to "serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm."[129] As a result, the Federal Guidelines now take a relatively harsh stance toward white collar and economic crime.[130]

5. *The Pennsylvania Sentencing Guidelines*

In 1978, the Pennsylvania General Assembly passed legislation that created the Pennsylvania Sentencing Commission ("Pennsylvania Commis-

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the grid in chapter five yields imprisonment of zero to six months. *See id.* at ch. 5, pt. A (stating that applying base offense level of six to grid results in zero to six months imprisonment). For a first-time offender, offense levels through eight comprise Zone A, the only zone which has zero as its minimum confinement time. *See id.* (discussing composition of Zone A). Fraud of more than $10,000 results in an offense level of nine, which, when applied to the sentencing grid, results in four to ten months imprisonment. *See id.* § 2F1.1(b)(1)(D). Probation may be prescribed for the entire Zone A range (offense levels one through eight for first-time offender) of the sentencing grid. *See id.* (discussing probation for first-time offenders). For Zone B offenses, probation may be prescribed only if the court imposes "a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of § 5C1.1." *Id.* § 5B1.1. Subsection (c) of the Guidelines Manual provides:

> (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by—
>
> (1) a sentence of imprisonment; or
>
> (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or
>
> (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).

Id. § 5C1.1(c). Part (f) provides that "[i]f the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment." *Id.* § 5C1.1(f). Thus, for fraud of over $120,000, which calculates to offense level 13, the term of imprisonment is 12-18 months. *See id.* § 2F1.1(b)(1)(H).

129. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(d) (1998). The Commission solved the "philosophical problem" by using an empirical/historical approach. *See id.* at cmt. 3(d) (outlining differing philosophical approaches to sentencing, and empirical/historical compromise). The "deterrence approach," however, weighs more heavily in the sentencing of white collar or economic offenders who, in the Commission's view, were penalized too lightly before the Federal Guidelines. *See id.* at cmt. 4(d) (noting that "the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice").

130. *See* Breyer, *supra* note 18, at 21-23 (discussing stance of Federal Guidelines towards white collar crime); Feinstein et al., *supra* note 18, at 1095 (same); Murphy, *supra* note 13, at 14 (noting that in light of direction from Congress to stiffen sentences for white collar crime, Sentencing Commission "took this ball and ran with it").

sion") to address disparity and leniency in sentencing.[131] In this legislation, the Pennsylvania General Assembly charged the Pennsylvania Commission with developing sentencing guidelines that would promote fairness and reduce disparity by giving judges a common reference point from which to sentence offenders who had similar backgrounds and had committed similar crimes.[132] The Pennsylvania Commission is composed of two members of the Pennsylvania House of Representatives, two members of the Pennsylvania Senate, four judges and three Governor appointees.[133] To promulgate guidelines, the Commission publishes its proposed guidelines in the Pennsylvania Bulletin, holds hearings between thirty and sixty days after publication, then evaluates public comment, revises and publishes the revised version.[134] If the Pennsylvania General Assembly does not reject the published revised guideline proposals by concurrent resolution ninety days after publication, the guidelines become effective immediately thereafter.[135]

The Pennsylvania Guidelines are composed of the standard matrix, with gravity of offense ("offense gravity score") comprising the vertical axis, and offender history ("prior record score") comprising the horizontal axis.[136] Once a defendant's offense gravity score and prior record score are determined, the intersection of these two values on the matrix provides the judge with a standard range, given in months, in which to sentence the defendant.[137] Any range that has a first value of "RS," such as RS-3, means that the court has the option of imposing Restorative Sanctions (restitution) with no confinement; RS-3 denotes a range of confinement of zero to three months combined with the payment of restitution.[138] If the pinpointed cell is in a shaded portion of the matrix, the court has the option of imposing "Restrictive Intermediate Punishment" ("RIP").[139] RIP is defined as a "program that provide[s] for strict supervision of the offender" by housing the offender full time or part time, significantly monitoring and restricting the offender's movement

131. *See* 1978 Pa. Laws 319 (creating Pennsylvania Sentencing Commission).

132. *See id.* § 1384 (requiring Commission to adopt sentencing guidelines to effect purposes of statute).

133. *See* 42 PA. CONS. STAT. § 2152(a) (1998) (setting forth composition of Commission).

134. *See* 42 PA. CONS. STAT. § 2155 (setting forth promulgation process).

135. *See* § 2155(b)-(c) (providing for automatic effectiveness in 90 days if not rejected in entirety by concurrent resolution).

136. *See* 204 PA. CODE § 303.16 (1994) (providing basic sentencing matrix).

137. *See* § 303.2 (providing procedure for determining guideline sentence).

138. *See* § 303.12(a)(5) (defining restorative sanctions). The Pennsylvania Code elaborates on restorative sanctions by stating that they are the least restrictive in terms of constraining the offender's liberties because the sanctions do not involve the housing of the offender (either full or part time) and focus on restoring the victim to pre-offense status. *See id.* (discussing restrictiveness of restorative sanctions).

139. *See* § 303.12(a)(1)(ii) (denoting shaded areas on sentencing matrix as areas where Restrictive Intermediate Punishment ("RIP") may be imposed).

and compliance with the program, or a combination of these methods of supervision.[140]

The standard range can deviate via a deadly weapon enhancement, a youth/school enhancement, or an aggravator or mitigator, with the deviations spelled out in months, plus or minus, for various groupings of offense gravity scores.[141] As a result, each cell of the matrix has a standard range, a mitigated range and an aggravated range.[142] Deadly weapon enhancements have their own matrices: one matrix for "deadly weapon possessed" and one matrix for "deadly weapon used."[143] When a court departs from the Pennsylvania Guidelines such that a sentence is either longer than provided for in the aggravated range, or shorter than provided for in the mitigated range, the court must state on the record that the sentence is a departure.[144]

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140. *See* § 303.12(a)(4)(i) (describing RIP). The Pennsylvania Code elaborates on the types of sanctions that can be imposed as intermediate punishment:

> (a) A program may be either residential or nonresidential and either custodial or noncustodial, or a combination thereof, and may include the following:
>
> (1) House arrest.
> (2) Electronic monitoring.
> (3) House arrest combined with electronic monitoring.
> (4) Probation with daily reporting.
> (5) Intensive supervision.
> (6) Full-time participation in a community public works project.
> (7) Full- or part-time participation in a public or private community service project.
> (8) Housing in a community residential treatment or residential rehabilitative center . . . .
>
> (c) In addition to the elements set forth in subsections (a) and (b), a Program may be comprised of:
>
> (1) An inpatient drug and alcohol program based on objective assessment that an offender is dependent on alcohol or drugs.
> (2) Residential rehabilitative center services.
> (3) Individualized treatment services.

37 PA. CODE § 451.51 (1991).

141. *See* 204 PA. CODE § 303.10(a) (1994) (providing sentence enhancement if defendant used deadly weapon); § 303.10(b) (providing sentence enhancement if defendant either distributed controlled substance to person under 18 or manufactured, delivered or possessed with intent to deliver controlled substance within 1,000 feet of school); § 303.13 (providing enhancement if aggravating or mitigating circumstance is present). When a judge imposes an aggravated or mitigated sentence, he or she must state the reasons on the record. *See* § 303.13(c) (requiring that record reflects reasons for aggravated or mitigated sentence).

142. *See* § 303.13(a)(1)-(4) (describing ranges for different offense gravity levels).

143. *See* § 303.17 (providing matrix if deadly weapon possessed in crime); § 303.18 (providing matrix if deadly weapon used in crime).

144. *See* PA SENTENCING GUIDELINES, *supra* note 2, at 53 (providing description of 204 PA. CODE § 303.1(d)). The manual states that "[i]n every case where the court imposes a sentence outside the sentencing guidelines, the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines." *Id.* (citing 204 PA. CODE § 303.1(d)).

Notwithstanding the statutory requirement that sentencing judges must state on the record the reason or reasons for departure, the actual binding force of the Pennsylvania Guidelines is unclear because the statute requires only that courts "consider" the guidelines when sentencing a defendant.[145] The advisory nature of the Pennsylvania statute was confirmed by *Commonwealth v. Sessoms*,[146] which held that "the legislature has done no more than direct that the courts take notice of the Commission's work," because the Pennsylvania Guidelines "cannot, without more, be given the effect of law, either as legislation or regulation, so as to by themselves alter the legal rights and duties of the defendant, the prosecutor, and the sentencing court."[147]

III. ANALYSIS

A. *Comparing Sentencing Guidelines: Pennsylvania and Federal Sentencing Guidelines' Treatment of White Collar Crime*

Unlike the Federal Guidelines, the Pennsylvania Guidelines were not formulated with an emphasis on being stern towards white collar and economic crime.[148] The Pennsylvania Guidelines, by contrast, were formulated in the 1970s when proportionality to crime seriousness and offender history were the primary concerns of the legislature, and white collar crime had not yet reached its media-fueled notoriety.[149]

Comparisons between federal and Pennsylvania sentencing demonstrates the different stances each system takes towards white collar offenders. For example, under the Federal Guidelines, a federal first-time offender convicted of theft or embezzlement of $15,000 would have zero criminal history points and an offense level of nine.[150] Barring any adjustments, applying this factor to the sentencing matrix results in four to ten months confinement.[151] Performing the same exercise under the Pennsylvania Guidelines yields a somewhat different result. A comparable

145. *See* 42 PA. CONS. STAT. ANN. § 9721(b) (West 1998) (mandating trial court to "*consider* any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing"(emphasis added)).

146. 532 A.2d 775 (Pa. 1987).

147. *Id.* at 780-81. The *Sessoms* court relegated the statute to advisory status on constitutional separation of powers grounds, as the statute contained no presentment provision that mandated that a rejection resolution be presented to the Governor before taking effect. *See id.* at 783 (relegating statute to advisory status on separation of power grounds).

148. *See, e.g.*, Feinstein et al., *supra* note 18, at 1094-95 (noting particularly harsh stance of Federal Guidelines towards white collar crime, with purpose being deterrence and retribution).

149. *See* 1978 Pa. Laws 319 (creating Pennsylvania Sentencing Commission with purpose of proportionality and retribution).

150. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(F) (1998) (providing offense level for "Larceny, Embezzlement, and Other Forms of Theft: Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property").

151. *See id.* at ch. 5, pt. A (providing sentencing matrix).

Pennsylvania crime entitled "Theft by Deception" yields the following sentence for a similar offender: again, the prior record score is zero because the offender is a first-time offender; the offense gravity score for theft by deception of an amount between $2,000 to $25,000, is five.[152] Applying this value to the sentencing matrix yields a standard range of "RS-9," which requires restitution or zero to nine months confinement.[153] Assuming a similar white collar crime and similar offender, involving no aggravating or mitigating circumstances, the Federal Guidelines mandate four to ten months of confinement, while the Pennsylvania Guidelines only "suggest" zero to nine of months confinement.[154]

A more striking example is a comparison between the Federal Guidelines and the Pennsylvania Guidelines for the offense of fraud, arguably a more "white-collar" crime than theft by deception, because the perpetrator is typically an individual in a position of trust.[155] Under the Federal Guidelines, a first-time offender who defrauded a victim out of $250,000 would have an offense level of fourteen, landing him or her in the fifteen to twenty-one months incarceration cell.[156] In a Pennsylvania state court, however, this same person, sentenced for "Deceptive or Fraudulent Business Practices over $2,000," would have an offense gravity score of only five, again landing the offender in the standard range of "RS-9" or zero to nine months confinement.[157] It is here that a glaring difference between the Pennsylvania and Federal Sentencing Guidelines becomes apparent—

152. *See* 18 PA. CONS. STAT. § 3922 (1998) (describing crime of theft by deception); 204 PA. CODE § 303.15 (1994) (listing offense gravity score by offense).

153. *See* 204 PA. CODE § 303.16 (1994) (providing basic sentencing matrix).

154. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (1998) (providing that offender would fall in range of four to ten months confinement); 204 PA. CODE § 303.16 (suggesting that offender receive zero to nine months confinement). For a discussion of the differences between the Federal and Pennsylvania Sentencing Guidelines regarding white collar offenders, see *infra* notes 150-64 and accompanying text.

155. *See* M.I. Dixon, *The Re-Defining of White Collar Crime,* 13 DICK. J. INT'L L. 561, 561 (1995) (suggesting white collar crime includes all financial crime, such as theft by deception and tax evasion, rather than just "occupational" crime). The traditional definition of white collar crime, as E.H. Sutherland coined the term in 1940, is a "'crime committed by a person of respectability and high social status in the course of his occupation.'" *Id.* at 562 (quoting E.H. Sutherland, *White Collar Criminality,* 5 AM. SOC. REV. 1 (1940)).

In general, the Federal Guidelines differentiate between fraud and theft in that the two have different offense level schedules. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (1998) (providing sentencing schedule for "Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States"), *with* § 2B1.1 (providing offense level for "Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property").

156. *See* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (1998) (providing sentencing schedule for "Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States").

157. *See* 18 PA. CONS. STAT. § 4107(a.1)(1)(I) (2000) (indicating that felony of $2,000 or more is considered "third degree" or "F3"); 204 PA. CODE § 303.15

the federal offender will face a minimum fifteen months confinement, while the Pennsylvania offender may face no confinement at all.

B. *Rationales*

Why the difference? The most obvious difference between the two guideline systems is that the Federal Guidelines are mandatory, and the Pennsylvania Guidelines are "mere suggestions."[158] But even if the Pennsylvania Guidelines imposed a mandatory sentence, the differences in the range of incarceration time between the two—the difference between going to jail and not going to jail—is monumental in the eyes of the offender.[159] Because certain imprisonment is seen as a strong deterrent against white collar crime, and Pennsylvania generally does not impose mandatory imprisonment for typical white collar offenses, one may surmise that potential white collar offenders are not significantly deterred in Pennsylvania.

Another difference is that the Federal Guidelines were proposed and enacted in the late 1980s, a time when white collar crime—big money white collar crime—gained significant notoriety in the media.[160] The Federal Guidelines, at their inception, took a harsh stance toward white collar offenders because they were a product of their era.[161] The Pennsylvania Guidelines, by contrast, were conceived in the 1970s, before white collar crime gained significant notoriety.[162] Consequently, no explicit anti-white collar crime measures found their way into the Pennsylvania enabling statute.[163]

Finally, there is the issue of limited prison capacity. The federal government, many would argue, has much more money to spend on prisons than the states. The states, which have to carefully divide space between

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(listing offense gravity score by offense); 204 PA. CODE § 303.16 (displaying sentencing range).

158. *See* 18 U.S.C. § 3553(b) (1994) (mandating use of guidelines in federal sentencing); Commonwealth v. Sessoms, 532 A.2d 775, 781 (Pa. 1987) (noting that Pennsylvania Guidelines need only be considered).

159. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (noting deterrent effect of certain imprisonment). The Commission found that pre-guideline sentencing of economic crime offenders resulted in a disproportionate amount of probation, and that "the definite prospect of prison, even though the term may be short, will serve as a significant deterrent" to economic crime offenders. *Id.*

160. *See* Elkan Abramowitz, *From Wrist Slaps to Hard Time*, N.Y.L.J., Jan. 8, 1991, at 3 (discussing Michael Milken's sentence of 10 years imprisonment and $600 million in fines and restitution for fraud and general stiffening of sentences of white collar offenders).

161. *See* Feinstein et. al, *supra* note 18, at 1095 (noting view in 1987 that white collar crime was "serious").

162. *See* 1978 Pa. Laws 319 (creating Pennsylvania Commission on Sentencing in 1978).

163. *See generally id.* (providing no measures to combat white collar crime).

violent and nonviolent offenders, understandably make the sacrifice in favor of housing violent offenders.[164]

IV. CONCLUSION

For white collar offenders, crime pays in Pennsylvania. For example, Debra King, introduced in Part I of this Comment, would have received a much harsher sentence under the Federal Guidelines, one that would have included at least ten months imprisonment.[165] But this outcome turns out to be a judgment made by state citizens through the political process, that limited prison space is better allocated to violent offenders than to non-violent offenders.

An argument one might make in opposition to harsh sentencing of white collar offenders is that, compared to the federal government, which has a virtually unlimited budget for prison building, Pennsylvania has much more limited resources from which to build prisons. This argument presupposes that prison resources are a finite "pie"; that is, in order to house more white collar offenders, the state would have to house fewer violent offenders. This argument has questionable merit, however, because prison population was not even considered in the formulation of the Pennsylvania Guidelines.[166]

What remains is an attitude among the judiciary, and perhaps some elected district attorneys, that white collar offenders are not as "dangerous" as violent offenders.[167] "Dangerous" can be defined as immediate physical danger, but it can also be defined in the aggregate sense, such as the dramatic economic impact of the savings and loan scandal of the late 1980s and early 1990s.[168] Until the judiciary realizes that economic and white collar crime imposes a huge and far reaching cost on society, potential offenders will not be significantly deterred. Perpetrators of economic

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164. *See, e.g.*, Bogan, *supra* note 71, at 469 (noting Oregon's sentencing commission enabling statute included control of prison overpopulation as consideration in constructing guidelines).

165. *See* U.S. SENTENCING GUILDLINES MANUAL § 2B1.1(b)(1)(K) (1998) (assigning offense level of 14 for theft of more than $200,000); *see also id.* at ch. 5, pt. A (imposing sentence of 15-21 months for offense level 14). Even with a two point downward adjustment for "Acceptance of Responsibility," Debra King still would have received 10-16 months imprisonment. *See id.* § 3E1.1(a) (imposing sentence of 10-16 months for offense level 12).

166. *See* Marvell, *supra* note 42, at 699 (noting that Pennsylvania legislature did not include prison capacity among criteria to be considered in formulation of guidelines). Dr. Marvell stated that "[t]he Pennsylvania legislature considered such a provision, but decided not to include it, and the sentencing commission did not factor in prison capacity." *Id.*

167. *See* Murphy, *supra* note 13, at 5 (noting that interviewed judges considered violent crimes to be "more serious, and more deserving of severe punishment").

168. *See id.* at 14 (noting costs to society of savings and loan scandal).

and white collar crimes will conduct business as usual because they will likely not be caught, not be prosecuted if caught, and leniently sentenced if caught, prosecuted and found guilty.

Peter Fridirici