

TOO SEVERE?: A DEFENSE OF THE FEDERAL SENTENCING GUIDELINES (AND A CRITIQUE OF FEDERAL MANDATORY MINIMUMS)

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INTRODUCTION

Are the federal sentencing practices too tough? This Article reviews the severity of the federal sentencing guidelines and related mandatory minimum sentences. In brief, I do not believe that a case has been made that the Guidelines are too severe. The statutes establishing mandatory minimum

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sentences, however, are redundant to the Guidelines and their usefulness should be reconsidered.

With respect to the severity of the Guidelines, we need to consider the purposes of criminal sentencing. Federal sentencing has two primary aims: just punishment and crime control. The Guidelines appear to satisfy both of these goals. On the dimension of just punishment, the Guidelines generally track social norms (for example, public opinion) by providing prison sentences that are consistent with the public's view of appropriate punishment. On the dimension of crime control, the Guidelines create significant incapacitative and deterrence benefits by prescribing substantial penalties for serious federal crimes with high costs to victims. The Guidelines thus have strong potential for being cost-effective crime control measures. Accordingly, assessed against either purpose of criminal sentencing, it is hard to understand how the Guidelines can be deemed too severe.

The situation is somewhat more complex with respect to the federal statutes prescribing mandatory minimum sentences. In light of the Guidelines, the mandatory minimum sentences are largely redundant. Their only effect is to prevent downward departures from the Guidelines in unusual cases. This "no escape" feature of the mandatory minimums can lead to possible injustices in particular cases. These apparent injustices may undercut support for the entire federal guidelines structure. The mandatory minimums should be reconsidered.

I. THE ATTACK ON THE GUIDELINES AS "TOO SEVERE"

On August 9, 2003, Justice Anthony Kennedy spoke at the American Bar Association's annual meeting. In his widely-noted address, Justice Kennedy called for a general, across-the-board reduction in the sentences dictated by federal sentencing guidelines, arguing:

It requires one with more expertise in the area than I possess to offer a complete analysis, but it does seem justified to say this: Our resources are misspent, *our punishments too severe*, our sentences too long.

In the federal system the sentencing guidelines are responsible in part for the increase in prison terms. In my view the guidelines were, and are, necessary. Before they were in place, a wide disparity existed among the sentences given by different judges, and even among sentences given by a single judge. . . . [H]owever, the compromise that led to the guidelines led also to an increase in the length of prison terms. We should revisit this compromise. *The Federal Sentencing Guidelines should be revised downward.*¹

Justice Kennedy's thoughtful remarks have prompted a nationwide discussion on the severity of the federal sentencing guidelines. Such a review is

1. Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting, at 4 (Aug. 9, 2003), available at http://www.supremecourtus.gov/public/info/speeches/sp_08-09-03.html (last visited Mar. 11, 2004) [hereinafter Justice Kennedy Speech] (emphasis added).

appropriate. The imposition of criminal sentences must never be taken lightly. Prison sentences remove an offender from society. They deprive the prisoner of freedom to pursue his² livelihood and to interact with his family and friends. The conditions in prison can be harsh. For all these reasons, the men and women who serve on the federal bench imprison offenders with no sense of joy.

In federal courts today, the Guidelines prescribe with some precision the sentences for most criminal cases. The aim of this Article is to assess the global question of whether the Guidelines *generally* impose sentences that are too harsh. This is a broad-gauge review that will not inquire into specific guidelines. This disclaimer is important because particular sentencing ranges are, no doubt, out of kilter. For example, my own view is that the guidelines for immigration offenses are quite often too high. No doubt, too, there are various cases in which the Guideline sentence turns out to be inappropriate. Of course, the Guidelines may permit departures for such unusual situations.³ But the focus here is the forest, not the trees. In my view, the sweeping claim that the Guidelines need an across-the-board reduction remains to be proven.

One clarification may be helpful at the outset. Because the focus of this Article is average guidelines sentences, it does not fully analyze the separate issue of sentencing discretion. It may be the case that judges need more discretion at sentencing, as some thoughtful commentators have argued.⁴ This Article takes no position on such issues (other than to suggest that the mandatory minimums conflict with the Guidelines). But it does seem fair to say that some calls for more “discretion” are, in truth, calls for lower sentences. Whether such arguments are sound is the larger issue that this Article considers.⁵

2. Most criminal offenders are male. For simplicity in this Article, I will use masculine pronouns.

3. See, e.g., *United States v. Vanleer*, 270 F. Supp. 2d 1318 (D. Utah 2003).

4. See, e.g., KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

5. Marc Miller’s intriguing contribution to this Symposium attempts to evaluate whether the Guidelines are “working” by asking whether actors in the criminal justice system (specifically judges, prosecutors, and Congress) believe the Guidelines are working. See Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 *STAN. L. REV.* 1211 (2004). While his paper offers a number of valuable insights, it seems more straightforward to me to evaluate the *Sentencing Guidelines* directly—by evaluating the *sentences* they produce on the critical dimension of severity. One could also attempt to evaluate the Guidelines by their success in reducing sentencing disparity between judges. See, e.g., Paul J. Hofer, Kevin Blackwell & R. Barry Rubick, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 *J. CRIM. L. & CRIMINOLOGY* 239 (1999). This, too, seems like an important but nevertheless subsidiary question to whether the Guidelines sentences are themselves appropriate.

II. THE GUIDELINES HAVE NOT BEEN PROVEN TO BE TOO SEVERE

To conclude that the Guidelines are too harsh requires some metric for assessment. The severity of sentences should be considered in relation to the goals criminal sentences are to achieve. In the Guidelines themselves, the Sentencing Commission articulates two primary purposes of sentencing: (1) "just deserts," in other words, scaling punishment according to the offender's culpability and resulting harms, and (2) "crime control," in other words, preventing future crime, either by incapacitating the defendant or deterring others.⁶ In considering these purposes, the Sentencing Commission concluded that it was unnecessary to determine which of these two purposes should have primacy "because in most sentencing decisions, the application of either philosophy will produce the same or similar results."⁷ The failure of the Commission to pick between deserts and crime control has been critiqued by judges⁸ and commentators.⁹ But, at the risk of some over-simplification,¹⁰ it is enough to note for present purposes that these two sentencing goals appear to cover the relevant universe of standards by which to assess the Guidelines. The one other possible candidate—rehabilitation of offenders—is surely an additional aim of criminal sentencing. But the determinate sentencing structure of the federal system implicitly rejects the idea that rehabilitation should determine the length of sentences. In view of this fact, rehabilitation need not be extensively considered here.

Before turning to the specifics of the argument, a brief overview of my conclusions may be helpful. First, assessed against the standard of just deserts, the Guidelines have not been proven to be too harsh. The most straightforward way to determine the just deserts for a particular crime is to determine the public views about the subject. A comprehensive comparison of the Guidelines to such social norms found little variance. While the Guidelines may be tough, they merely impose the kind of punishment that society expects for serious federal offenses.

Second, assessed against the standard of crime control, the Guidelines have not been proven to be inappropriate. Federal criminal sentences appear to have significant deterrent and incapacitative effects. While federal prison space is expensive, the costs of crime are high as well. So far as can be determined from the available literature on the subject, the Guidelines seem to generate positive benefit-to-cost ratios. In short, the Guidelines "pay" by creating the significant

6. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 3 (2003).

7. *Id.* at 4.

8. *See, e.g.,* United States v. Blarek, 7 F. Supp. 2d 192, 203 (E.D.N.Y. 1998) (Weinstein, J.) ("In practice, results may vary widely depending upon theory.")

9. *See, e.g.,* Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

10. *See generally* Miller, *supra* note 9, for an excellent discussion of complex issues raised by potentially conflicting sentencing purposes.

social benefit of reducing dangerous crimes.

A. *Just Deserts*

Just deserts is the first purpose of punishment that should be considered. Sometimes labeled “retribution” (or, less charitably, “revenge”), this theory of punishment contends that criminal sentences are imposed to give an offender his just deserts. In short, “[t]he offender may justly be subjected to certain deprivations because he deserves it; and he deserves it because he has engaged in wrongful conduct—conduct that does or threatens injury and that is prohibited by law.”¹¹ Just punishment is a justification that is anchored in the past. As articulated by two leading proponents, a just punishment “gives an offender what he or she deserves for a past crimes [as] a valuable end in itself and needs no further justification.”¹² Congress has specifically articulated just punishment as a legitimate purpose of a federal criminal sentence.¹³

Against the backdrop of a just punishment rationale, we can consider the claim that the Guideline sentences are too severe. In his speech to the ABA, Justice Kennedy provided one specific illustration of the way in which federal sentences were too harsh:

Consider this case: A young man with no previous serious offense is stopped on the George Washington Memorial Parkway near Washington, D.C., by United States Park Police. . . . A search of the car follows and leads to the discovery of just over 5 grams of crack cocaine in the trunk. The young man is indicted in federal court. He faces a mandatory minimum sentence of five years. If he had taken an exit and left the federal road, his sentence likely would have been measured in terms of months, not years.¹⁴

Let us set aside the fact that this illustration seems directed at federal mandatory minimum sentences, rather than the Guidelines themselves. (Mandatory minimum sentences are discussed at greater length below.) The example Justice Kennedy picked is certainly anomalous. It is a stand-alone provision that singles out possession of crack cocaine—and only crack cocaine—for a tough penalty.¹⁵ It does seem odd to single out possession of one single drug for such harsh consequences. The oddity only increases when we recognize that the statutes spell out the same five-year minimum for both simple possession of crack and the possession with the intent to distribute.¹⁶ For that reason, Congress should consider repealing the five-year minimum for

11. ANDREW VON HIRSH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 51 (1976).

12. Robinson & Darley, *supra* note 9, at 454.

13. See 18 U.S.C. § 3553(a)(2)(A) (2003) (noting that in imposing sentence, a court should consider the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”).

14. Justice Kennedy Speech, *supra* note 1, at 4.

15. See 18 U.S.C. § 844(a) (2004).

16. See *id.* § 841(a) (2004).

simple possession of crack. But any general assessment of the Guidelines should look at typical sentences, not outliers. More relevant to this discussion is the general statute prohibiting distribution of illegal drugs—covering not only crack cocaine, but also heroin, cocaine powder, PCP, LSD, marijuana, and methamphetamine.¹⁷ This statute provides mandatory minimum sentences for defendants possessing drugs “with the intent to distribute,” including (as just noted) a five-year minimum for possession of five grams of crack with the intent to distribute. To convert Justice Kennedy’s illustration into a more typical case, we can ask what the appropriate sanction for the young man in his illustration would be if he were convicted of possessing five grams of crack with the intent to distribute. This situation is still something of a worst case scenario: The five gram “trigger” for crack is lower than the trigger for any other drug. Still, looking at this example, it is hard to discern any clear variance from just punishment principles.

What is the just desert for an offender involved in potentially distributing a small amount of crack cocaine? The federal sentencing guidelines recognize that the just punishment for such an offender is less severe than that for those more extensively involved with drugs. Indeed, the five year “mandatory” minimum in the illustration is seemingly covered by the “safety valve” provision in the Guidelines, which allows a sentence below the mandatory minimum sentence for nonviolent, first-time drug offenders who are truthful with prosecutors.¹⁸ Under this safety valve provision, the defendant in the hypothetical might receive a sentence as low as thirty months.¹⁹ Even this figure is probably too high, because he will likely be eligible for good time credit (fifty-four days a year). Indeed, the offender might even qualify for a federal boot camp as a youthful drug offender with only minor prior offenses. If so, and if he successfully completes the program, he could be released to a half-way house as early as six months after entering the program. Alternatively, he might be eligible for the in-patient intensive drug treatment program. After successful completion of 500 hours of the program, he would be eligible for a one-year reduction in his sentence.²⁰

In short, the offender might never serve anything close to a thirty-month

17. *See id.*

18. *See* U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2003), *based on* 18 U.S.C. § 3553(f) (2004).

19. Assuming a sentence at the low end of the Guideline range for a Base Offense Level of 26 for the 5+ grams of crack cocaine, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2003), reduced by 2 for the safety valve adjustment, *id.* at § 2D1.1(b)(6), reduced by 3 for accepting responsibility, *id.* at § 3E1.1, and reduced by 2 for a minor role in the offense, *id.* at § 3B1.2(b); all combined with a Criminal History Category of I, for an offense level of 19.

20. FED. BUREAU OF PRISONS, CATEGORIZATION OF OFFENSES, PROGRAM STATEMENT 5162.04 (1997) (discussing early release programs); FED. BUREAU OF PRISONS, INTENSIVE CONFINEMENT CENTER PROGRAM, PROGRAM STATEMENT 5390.08 (1999) (discussing boot camp programs).

sentence, let alone the five-year “mandatory” minimum. But even assuming that he did, is such a sentence too harsh? Justice Kennedy points out that such a defendant would likely face lesser punishment in a state court and implies that the state sentence would be closer to the just deserts for such an offense. Proceeding on the assumption that a state sentence would be lower, the fundamental question would remain regarding which sentence gave the offender his just deserts: the shorter state sentence or the longer federal one? There is considerable reason to suspect that the state sentence might in fact be too lenient. It is well known that state criminal justice systems are chronically underfunded, and, accordingly, offenders may often receive lesser sentences because of fiscal exigencies rather than principles of justice.²¹ Given this possibility, it is not enough to simply resort to the claim that state sentences impose just deserts. Instead, we must compare state sentences and social norms.

1. *Social norms as a measure of just deserts.*

Perhaps the most straightforward way of determining desert is to determine what society believes is the appropriate penalty for a particular crime. If this approach is used, then it becomes even more questionable whether state practices impose just deserts. A recent public opinion poll asked respondents whether, in general, they thought “the courts in this area deal too harshly or not harshly enough with criminals.” The results for 2002 showed that the public thought criminal sentences were too short, not too long. The public responded:

Too harshly: 9.8%

Not harshly enough: 71.5%

About right: 18.7%²²

Of course, such a statistic can be criticized in various ways. The public may be uninformed about the sentencing practices in their area, unaware of the effectiveness of alternatives to imprisonment, or unfamiliar with other criminal offenders. But this nationwide figure at least raises questions about using state sentences as the benchmark for assessing just punishment.

A similar conclusion is suggested by experiences with jury-imposed sentences. If prison sentences in this country are generally too severe, we would expect to find citizen jurors imposing shorter sentences when given the

21. See, e.g., Dan Wihlema, VERA Inst. of Justice, Testimony before the ABA Kennedy Commission (Nov. 13, 2003) (noting that the primary impetus for lower sentences in recent years is cost).

22. NAT'L OPINION RESEARCH CTR., GENERAL SOCIAL SURVEY (2002). As this Article was going to print, I learned of another national public opinion poll finding that “[t]he public’s preferred incarceration rate for most street crimes appeared to be largely consistent with—but slightly less harsh than current practice.” MARK A. COHEN, MEASURING PUBLIC PERCEPTION OF APPROPRIATE PRISON SENTENCES 109 (2001). How to compare this poll to the poll discussed in the text is not immediately clear.

opportunity. The recent evidence shows no such pattern.²³ While some “mock” jury studies suggest juries may choose leniency,²⁴ when faced with real world criminals juries are extremely tough. In Virginia, for example, a convicted offender can elect to have his sentence imposed by a jury, rather than by a judge following sentencing guidelines. Fewer than four percent of offenders make such an election.²⁵ The reason is clear: When juries follow their own instincts and impose a sentence, the offender often spends more time in prison.²⁶

The nationwide polling data and Virginia experience suggest that the public supports tough sentences. This information, however, provides no particular insight into the *federal* sentencing guidelines. Here too, however, the evidence generally suggests public concern about leniency, not severity. For example, the Sentencing Commission most frequently hears public complaints that the Guidelines are not too high, but too low—especially for crimes of violence and white collar offenses.²⁷ We have more than anecdotal evidence on this issue. In their informative book *Just Punishments: Federal Guidelines and Public Views Compared*, Professors Peter Rossi and Richard Berk undertake a systematic comparison of sentences called for by the Guidelines and sentences

23. Some historical evidence suggests ambiguity about whether juries were as lenient as judges several decades ago. See Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775 (1999) (summarizing data from (1) Alabama during 1957-1982; (2) Georgia during 1974; and (3) Texas during 1973-1977). The best study from several decades ago, however, is unambiguous, finding that “[t]he sentences desired by the public are . . . consistently more severe than sentences actually imposed . . .” Alfred Blumstein & Jacqueline Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public’s View*, 14 LAW & SOC’Y REV. 223, 223 (1980). Because the public’s attitudes about criminals appear to have hardened considerably in recent years, see Michelle D. St. Amand & Edward Zamble, *Impact of Information About Sentencing Decisions on Public Attitudes Toward the Criminal Justice System*, 25 LAW & HUM. BEHAV. 515 (2001), the relevance of this older data to current sentencing issues is not immediately clear.

24. See, e.g., Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing*, 14 LAW & HUM. BEHAV. 199, 211-13 (1990); cf. Paul G. Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL’Y 523, 600 n.454 (1999) (collecting sources cautioning against reliance on mock juror studies).

25. VA. STATE SENTENCING COMM’N, 2003 ANNUAL REPORT 32 (2004).

26. *Id.* at 34 (showing that (1) jury sentences were above the Guidelines 42% of the time and below only 21% of the time; (2) sentences above the Guidelines were on average 30 months higher; and (3) sentences below the guidelines were on average 15 months lower). If Virginia’s experience is representative, the public’s punitiveness may pose difficulties for Professor Chemerinsky’s innovative proposal in this Symposium that juries should play a larger role in criminal sentencing as a way of ameliorating harsh penalties. See Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1079 (2004).

27. MICHAEL GOLDSMITH & JAMES GIBSON, THE U.S. SENTENCING GUIDELINES: A SURPRISING SUCCESS? 13 (NYU Law Sch. Ctr. for Research in Crime & Justice 1999). For drug sentences, though, the Commission more frequently hears complaints about undue severity. *Id.*

that the public would impose. By means of a national public opinion survey, they studied eighty-nine separate crimes, ranging in seriousness from illegal drug possession to kidnapping, including many of the crimes most frequently prosecuted in federal court. For example, approximately one-fifth of the crimes in the survey involved drug trafficking.

Professors Rossi and Berk found considerable agreement between the Guideline sentences for particular crimes and the public's view of appropriate sentences. To provide a few illustrations:

The Guidelines call for 39.2 years in prison for kidnapping when a victim is killed; the public believes 39.2 years is appropriate.

The Guidelines call for 9.1 years in prison for trafficking in cocaine; the public believes 10 years is appropriate.

The Guidelines call for 4.8 years in prison for bank robbery without a weapon; the public believes 4 years is appropriate.

The Guidelines call for 2.5 years for a firearms dealer keeping poor sales records; the public believes 3 years is appropriate.²⁸

Interestingly, in assessing the harshness of the five-year sentences for a defendant trafficking illegal drugs, the sample believed that the generic offense of trafficking cocaine or heroin should be punished by a ten-year sentence. As Professors Rossi and Berk conclude, the public "apparently desire[s] relatively harsh penalties for trafficking in illegal drugs . . ."²⁹ Table 1 reflects their complete results.

28. PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 92-93 tbl.5.5 (comparing Guidelines sentences with median sentences from the sample).

29. *Id.* at 67.

TABLE 1³⁰

Guidelines and Sample Sentences Compared for 73 Crime Examples. (Crimes ranked in descending order by median Guideline Sentences.)

Crime Type	Median (Years)		Means (Years)		N
	Guidelines	Sample	Guidelines	Sample	
Kidnapping: Victim Killed	39.2	39.2	39.2	33.9	724
Drug Trafficking: Crack	22	10	21.8	16.0	3,281
Bank Robbery: Teller seriously wounded	17.6	15	17.5	19.9	635
Bank Robbery: Teller had minor gunshot injury	14.1	10	14.1	15.4	616
Kidnapping: Victim unhurt	11.3	6	11.5	12.5	672
Street Robbery: Carjacking	11.3	5	11.3	10.4	732
Bank Robbery: Weapon Fired at ceiling	11.3	5	11.3	8.2	2,240
Food & Drug Poisoning OTC drugs	9.4	15	10.5	21.8	681
Drug Trafficking: Cocaine	9.1	10	12.1	15.9	3,387
Drug Trafficking: Heroin	9.1	10	11.8	15.8	3,359
Bank Robbery: Weapon used but not fired	8.1	5	9.2	8.2	681
Environment: Discharging toxic wastes	8.1	2	8.6	4.2	664
Money: Coin dealer laundering criminal funds	7.3	4	7.3	6.8	669
Street Robbery: Convenience store	6.5	5	7.6	8.5	596
Bank Robbery: Bomb threatened but not used	6.5	5	6.9	8.9	666
Bank Robbery: No weapon used	4.8	4	5.6	5.8	661
Fraud: Bank officer causing S&L failure	4.8	3	5.4	6.1	660
Civil Rights: Police brutality of motorist	4.3	2	4.3	4.4	675
Civil Rights: Police brutality of a minority motorist	4.3	2	4.3	3.8	709
Civil Rights: Police brutality resisting motorist	4.3	0.5	4.3	2.1	636
Forgery: Counterfeiting U.S. currency	3.8	5	4.7	7.6	704
Fraud: Selling defective helicopter parts	3.8	10	3.7	11.9	672
Extortion/Blackmail	3.1	5	3.8	9.1	683
Bribery: Bribing county commissioner	3.1	2	3.4	3.5	686
Firearms: Owning sawed-off shotgun	3.1	2	3.4	4.5	670
Fraud: False mortgage: Intent to repay	3.1	0.5	3.0	2.1	678
Fraud: Doctor filing false Medicare claims	3.1	5	2.9	6.9	684

30. *Id.* at 92-93 tbl.5.5.

Fraud: Selling worthless stocks and bonds	3.1	5	2.9	7.5	680
Fraud: Company officer; insider trading	3.1	2	2.9	4.4	661
Firearms: Dealer selling guns to felons	2.8	5	3.0	7.5	657
Drug Trafficking: Marijuana	2.5	8	4.4	13.1	3,386
Environment: Discharging hot water into stream	2.5	0.7	2.8	2.2	658
Firearms: Dealer keeping poor sales records	2.5	3	2.6	6.1	725
Tax: Failure to file returns	2.5	2	2.5	4.4	1,341
Tax: Failure to report income	2.5	2	2.5	4.4	1,340
Bribery: County Commissioner accepting bribe	2.5	1	2.5	2.6	615
Money: Coin dealer not reporting big purchases	2.2	2	2.4	3.8	660
Firearms: Felon owning handgun	2	2	2.5	3.7	691
Antitrust: Bid rigging	2	4	2.3	6.0	642
Antitrust: Price fixing	2	1	2.3	3.7	711
Larceny: Buying and selling stolen goods	2	2	2.3	4.5	619
Fraud: Soliciting for fake charity	2	3	2.2	4.9	661
Environment: Factory polluting air	2	1	2.2	3.8	674
Food & Drug: Marketing drug with side effects	1.8	5	5.9	11.7	631
Food & Drug: Marketing drug false testing	1.8	5	5.4	8.6	677
Tax: Promoting illegal tax shelter	1.8	2	2.3	4.3	1,333
Fraud: False mortgage no intent to repay	1.8	2	1.8	3.8	628
Money: Bank official laundering criminal funds	1.8	2	1.7	4.5	666
Embezzlement: Postal worker	1.8	3	1.7	5.6	672
Fraud: Using stolen credit card	1.5	2	1.7	4.2	701
Fraud: Writing bad checks	1.5	2	1.6	4.6	719
Forgery: Writing bad checks on false account	1.3	3	1.2	5.0	681
Larceny: Stealing U.S. mail	1.2	3	1.7	5.5	636
Civil Rights: Harassment of minority neighbor	1.1	1	1.3	3.4	650
Civil Rights: Vandalism of house of worship	1.1	1	1.3	2.6	673
Bribery: Bribing company purchase agent	1.1	2	1.2	3.3	657

From their data, Professors Rossi and Berk reached the conclusion that the Guidelines generally track public opinion. As they explained:

[T]here is a fair amount of agreement between sentences prescribed in the guidelines and those desired by the members of the sample. The agreement is quite close between the means and the medians of respondents' sentences and the guidelines prescribed sentences. There is also quite close agreement between how individual respondents rank crimes and the way in which the guidelines rank the same crimes. . . .

We interpret this major finding to mean that the ideas about sentencing in the guidelines and the interviews with respondents reflect societal norms concerning punishment for those who violate the criminal laws. Both the [sentencing] commission and the public converge on roughly the same sentences, because the commission sought to write guidelines that would be acceptable to major constituencies. . . . [T]he commission relied heavily on the central tendencies in past sentencing practices in federal courts as a kind of template for its sentencing rules, a strategy that used those practices as a proxy for public preferences. Using this template, the commission avoided both overly lenient and overly harsh sentences and wrote sentencing rules that came close to the mainstream consensus.³¹

If anything, Professors Rossi and Berk may have understated the extent to which the public supports the severity of sentences under the Guidelines. Their research compared public opinion with what they deem to be the "Guidelines sentence." Yet real world Guideline sentences would probably be considerably lower than that used in their research for several reasons. First, Professors Rossi and Berk used the midpoint of the applicable Guideline range.³² In actual practice, the vast bulk of judges sentence toward the very bottom of any applicable Guideline range.³³ Second, their Guidelines sentence does not consider the possibility of a downward departure. But judges often depart downward. According to the recent General Accounting Office study of downward departures, 36% of all federal sentences involved a downward departure, including 44% of all drug sentences.³⁴ While most of these departures are apparently for "substantial assistance" to government prosecutors or for the "fast tracking" of immigration offenses in border districts with a high volume of cases, these departures still ameliorate the harshness of the Guidelines as written. Finally, the great bulk of federal cases (more than 95%) are resolved by a plea arrangement. In such circumstances, the defendant

31. *Id.* at 207-08.

32. *Id.* at 77.

33. See Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 338 (2000) (noting that about 80% of all drug offenders are sentenced at or below the guideline minimum, while about an additional 10% are sentenced in the lower half of the range).

34. U.S. GEN. ACCOUNTING OFFICE, FEDERAL DRUG OFFENSES: DEPARTURES FROM SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES, FISCAL YEAR 1999-2001, at 3 (2003).

almost always qualifies for a two-level or three-level reduction from the otherwise applicable Guideline range for “accepting responsibility.”³⁵ For all these reasons, Rossi and Berk’s findings might well be read as suggesting that the Guidelines sentences are actually *lower* than what the public supports.

Before leaving Professor Rossi and Berk’s path-breaking research, it is important to note some specific areas of disagreement between the public’s views and Guidelines sentences, areas that might warrant adjustment by the Sentencing Commission.³⁶ In particular, the public did not support the Guidelines’ focus on drug quantities and differentially harsh treatment of crack cocaine (as compared to powder cocaine); nor did it support the tough sentences for environmental crimes, violations of civil rights, and certain bribery and extortion crimes.³⁷ On the other hand, the public supported somewhat longer sentences for trafficking in marijuana and for crimes that endanger the physical safety of victims and bystanders (for example, adding poison to over-the-counter drugs).³⁸ But these disagreements were the exceptions; the rule was public opinion tracking Guideline sentences.

This general convergence between public opinion and Guideline sentences poses a considerable challenge to those arguing that the Guidelines are too harsh. At first blush, when proceeding under a theory of just deserts, one would think that criminal sentences ought to track societal norms. After all, criminal sentencing is the way in which society expresses its views on the seriousness of criminal conduct. Moreover, one of the core ideas behind just deserts sentencing is to “promote respect for the law.”³⁹ It is hard to understand how ignoring public views on sentencing is consistent with this aim. To be sure, it is possible that a case can be made for deviating downward (or conceivably upward) from public opinion. In the area of civil rights offenses, for example, the law might well seek to lead, rather than follow, public opinion. But critics of the harshness of the sentencing guidelines have yet to fully articulate the basis on which they would deviate from social norms.

2. *Foreign sentencing practices as a measure of just deserts.*

Perhaps sensing that American social norms support the Guidelines, critics of tough sentencing practices sometimes turn to international practices. Thus, the claim is occasionally made that compared to other countries (particularly

35. U.S. SENTENCING GUIDELINES MANUAL § 3E.1.1 (2003).

36. See Peter H. Rossi & Richard A. Berk, *The Non-Response of the U.S. Sentencing Commission to Our Study of Public Views on Just Punishments for Federal Felons*, 12 FED. SENTENCING REP. 29, 29 (1999).

37. ROSSI & BERK, *supra* note 28, at 99.

38. *Id.*

39. 18 U.S.C. § 3553(a)(1)(2) (2003).

European countries), our sentencing practices are too harsh.⁴⁰ This argument, too, is not enlightening. Of course, a variety of cultural and other differences may make direct comparison with foreign sentencing practices difficult.⁴¹ Moreover, it is uninformative to learn that we have higher incarceration rates without considering the fact that America has higher *crime* rates than many other countries.⁴² The evaluation becomes even more complex when deterrence is added into the picture: The gap between American and European crime rates may have narrowed in recent years precisely because European countries impose lower sentences and thus deter fewer crimes.⁴³

Still, the larger issue remains: Do our criminal sentences give criminals more than their just deserts? Or do the sentences in other countries give criminals less than they deserve? On this point, it is interesting to note that the criminal sentences in Europe may be less severe because European governments are less democratic than ours. For example, European courts have largely abolished the death penalty in the face of substantial public approval of capital punishment.⁴⁴

Perhaps the foreign practices could be woven into a complete argument for why “enlightened” views differ from those of the American public. But if so, the critics need to admit forthrightly that they are rejecting our social norms and explain their grounds for doing so. A full articulation of the critics’ position might reveal that they have simply failed to appreciate the full harm of criminal offenses. As Thomas Sowell has passionately argued:

If a day in prison can be pretty long, so can every day living in a high-crime neighborhood, where you have to wonder what is going to happen to your son or daughter on the way to or from school. The nights can get pretty long too, when you are afraid to go out on the streets and have to worry about how safe you are, even inside your apartment behind doors with multiple locks. Locks can’t stop stray bullets from warring drug gangs. [Elitist critics of tough sentences] may feel “secure” where [they] live and work. But the “equal protection of the laws” under the Fourteenth Amendment applies to those who

40. David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 458 (2001); Justice Kennedy Speech, *supra* note 1, at 3.

41. See, e.g., George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: a “Steady-State” Theory of Confessions*, 43 UCLA L. REV. 933, 942-43 (1996) (rejecting my effort to compare American confession rates under *Miranda* with higher rates in other countries because countries such as England and Canada do not “share a core of relevant characteristics”).

42. See Charles H. Logan & John J. DiIulio, Jr., *Ten Deadly Myths About Crime and Punishment in the U.S.*, in CRIMINAL JUSTICE? THE LEGAL SYSTEM VERSUS INDIVIDUAL RESPONSIBILITY 156, 172 (Robert James Bidinotto ed., 1994).

43. See discussion *infra* Part II.B.

44. See Josh Marquis, *Truth and Consequences: The Penalty of Death*, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 117, 124-27 (Hugo Bedau & Paul Cassell eds., 2004); Joshua Micah Marshall, *Death in Venice*, NEW REPUBLIC, July 31, 2000, at 14.

live or work in less elite circumstances.⁴⁵

In light of all these questions, I do not have a firm answer about whether the American public or the critics of harsh sentences might ultimately have the better argument. I simply offer my tentative conclusion that, when measured by a just deserts standard on the available evidence, the federal sentencing guidelines seem generally appropriate.

B. *Crime Control*

Apart from just deserts, the remaining metric for assessing the federal sentencing guidelines is crime control. Evaluated from this perspective, the question would be whether the Guidelines are a cost-effective means of preventing crime, either by deterring potential criminals (general deterrence) or incapacitating criminals who would otherwise have committed more crime (specific deterrence or incapacitation). This is a consequentialist argument—that is, punishment is justified because of its future benefits in terms of reducing crime.⁴⁶ This justification for punishment is also specifically recognized by Congress.⁴⁷

Of course, almost any prison sentence has some crime control benefit. After all, a prisoner behind bars cannot commit other crimes against the public, and his presence there might deter some potential criminal. The tricky issue is to measure whether those crime control benefits are purchased at too high a price, either in fiscal cost to the taxpayers or personal cost to the prisoners. In short, punishment should be “optimal” in the sense that its benefits outweigh its costs.⁴⁸

In his address to the ABA, Justice Kennedy argued that tough prison sentences (including the sentences under the federal guidelines) were not justified on cost-effectiveness grounds. Justice Kennedy noted the monetary expense of incarceration, explaining that in California the cost per prison inmate per year was about \$26,000.⁴⁹ Justice Kennedy also highlighted the human costs of incarceration: “[T]he prisoner is a person; . . . he or she is part of the family of humankind.”⁵⁰ Justice Kennedy acknowledged that deterrence

45. Thomas Sowell, *Justice Kennedy's New Move Left: Soft on Crime*, HUMAN EVENTS, Aug. 18, 2003.

46. See Robinson & Darley, *supra* note 9, at 454.

47. See 18 U.S.C. 3553(a)(2) (2003) (noting that federal sentences should “afford adequate deterrence to criminal conduct” and “protect the public from further crimes of the defendant”).

48. See Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395 (1991) (providing an excellent discussion of the general theory). See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

49. Justice Kennedy Speech, *supra* note 1, at 3.

50. *Id.*

and incapacitation are often legitimate goals of the criminal justice system. But he concluded with the following observation: "It requires one with more expertise in the area than I possess to offer a complete analysis, but it does seem justified to say this: Our resources are misspent, our punishments too severe, our sentences too long."⁵¹

Justice Kennedy has done a great service in reminding us of the human toll that prison sentences take. Clearly, no society should send any offender to prison without strong reasons for doing so. But at least with respect to the federal system, there is reason for skepticism about the conclusion that "our resources are misspent" and "our sentences too long." The costs of prison sentences are easy to identify and tabulate, as Justice Kennedy's \$26,000 per year figure demonstrates. It is precisely because prison entails significant financial (and human) costs that a principle of conservation of punishment exists under federal law.⁵² Sentence benefits are more indirect and diffuse. But without fully assessing these countervailing benefits, which way the balance tips cannot be determined.⁵³ Indeed, to reach a firm conclusion without complete analysis of the competing concerns brings to mind the *Alice in Wonderland* pronouncement: "Sentence first—verdict afterwards."⁵⁴

A full evaluation of the costs and benefits would present difficulties to a hasty conclusion that our resources are misspent on federal prison sentences. Money spent on imprisonment unquestionably buys a social benefit: a reduction in crime, either through incapacitation or general deterrence. Quantifying the value of that crime reduction requires assessing (1) how much a crime "costs"—in terms of human suffering and economic consequences—and (2) how many such crimes are prevented. Some research is available on both subjects, suggesting that tough sentences may well be cost effective.

1. *The costs of crime.*

While surprisingly little research has been done about how much suffering crimes cause,⁵⁵ the available data suggest that the costs are quite high and perhaps unappreciated by those arguing that long sentences are not cost-effective. Ted R. Miller and his colleagues for the National Institute of Justice

51. *Id.* at 4.

52. 18 U.S.C. § 3553(a) (2004) (providing that a court must impose a sentence "no[] greater than necessary"). See generally Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289, 297-98 (1989).

53. Cf. Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996) (calling for a full cost-benefit assessment of restrictions on police questioning).

54. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* (1865).

55. See generally Logan & DiIulio, *supra* note 42, at 168.

performed one of the most comprehensive analyses in 1996.⁵⁶ They evaluated only the costs of crime to crime victims, ignoring costs to the criminal justice system and other social costs associated with the fear of crime. They separated victims' costs into two parts: tangible and intangible losses. Tangible losses included property damage and loss, medical care, mental health care, police and fire services (initial response only), expenses for victim services, and lost productivity. Intangible losses included pain and suffering and reduced quality of life. The researchers conceded that such intangible harms do not have a direct market price. But they argued for inclusion of such losses because "[v]ictims would pay dearly to avoid [such costs],"⁵⁷ a conclusion that seems unassailable.

Using sophisticated methodology, Miller and his colleagues calculated a total loss per criminal victimization that ranged from \$2.9 million for various forms of murder to \$87,000 for rape and sexual assault to \$8000 for robbery to \$1400 for burglary to \$370 for larceny.⁵⁸ Table 2, reflecting all of their calculations, is found on the following page. They also computed the aggregate annual victim cost in the United States from crime—\$450 billion as of 1990, or more than \$1800 per U.S. resident.⁵⁹ Another more recent analysis using a different methodology reported an even higher aggregate burden from crime on the United States—in the neighborhood of \$1 trillion annually.⁶⁰

56. TED R. MILLER, MARC A. COHEN & BRIAN WIERSEMA, NAT'L INST. OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996) [hereinafter VICTIM COSTS AND CONSEQUENCES].

57. *Id.* at 14.

58. *Id.* at 9.

59. *Id.* at 17.

60. David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611 (1999).

TABLE 2⁶¹

Losses per Criminal Victimization (Including Attempts)

	Tangible Losses	Quality of Life	Total
Fatal Crime			
Rape, Assault, etc.	1,030,000	1,910,000	2,940,000
Arson Deaths	770,000	1,970,000	2,740,000
DWI	1,180,000	1,995,000	3,180,000
Child Abuse	7,931	52,371	60,000
Sexual Abuse (incl. rape)	9,500	89,800	99,000
Physical Abuse	9,000	57,500	67,000
Emotional Abuse	5,700	21,100	27,000
Rape & Sexual Assault (excluding Child Abuse)	5,100	81,400	87,000
Other Assault or Attempt	1,550	7,800	9,400
NCVS with injury	4,800	19,300	24,000
Age 0-11 with injury	4,600	28,100	33,000
Non-NCVS Domestic	1,200	10,000	11,000
No Injury	200	1,700	2,000
Robbery or Attempt	2,300	5,700	8,000
With Injury	5,200	13,800	19,000
No Injury	700	1,300	2,000
Drunk Driving	6,000	11,900	18,000
With Injury	22,300	48,400	71,000
No Injury	1,300	1,400	2,700
Arson	19,500	18,000	37,500
With Injury	49,000	153,000	202,000
No Injury	16,000	500	16,000
Larceny or Attempt	370	0	370
Burglary or Attempt	1,100	300	1,400
Motor Vehicle Theft or Attempt	3,500	300	3,700
* Child Neglect	1,800	7,900	9,700

To be sure, one can dispute these figures. For example, Miller and his colleagues used jury awards for pain and suffering to calculate the intangible losses to crime victims. Some academics have argued that jury views on such matters tend to be inflated. Yet some measure of intangible loss is clearly

61. VICTIM COSTS AND CONSEQUENCES, *supra* note 56, at 9 tbl.2 ("Notes: All estimates in 1993 dollars. Totals may not add due to rounding. Major categories are in bold, subcategories listed under bold headings. * Non-educational child neglect is not included in any of the total figures reported in the remaining tables.").

appropriate, and the figures recited above may at least provide a convenient starting point. Moreover, the pain and suffering figures are aggregate figures based on many jury verdicts, which should tend to level out excessive awards.

2. *Preventing crime through criminal punishment.*

It would be impossible to discuss criminal sentencing in this country without highlighting the fact that crime rates are now at their lowest levels in thirty years. Violent crime victimization rates have fallen from 47.7 per 1000 population in 1973 to 22.8 in 2002, an amazing 52% reduction.⁶² In other words, Americans today are only half as likely to fall victim to violent crime as they were in 1973. That drop in the crime rate has coincided with an increase in the number of prisoners behind bars. Statistics reveal that 2002 was not only the year of the lowest victimization rate in recent history, but also the year with the highest prison population. Is this purely a coincidence? Or, as seems more probable, a consequence?

An expanding body of literature suggests that the recent surge in imprisonment demonstrably reduced crime, through both incapacitative and deterrent effects. This Article will simply summarize some of the key studies, leaving it to others to fully canvass the relevant literature.⁶³

With respect to incapacitation, perhaps the most well known research is the Rand Corporation's study of California's "three strikes" law.⁶⁴ Rand researchers analyzed the number of "index" crimes committed per year by offenders. (Index crimes are tracked by the FBI, and include murder, robbery, rape, burglary, assault, larceny, arson, and vehicle theft). The researchers concluded that a low-rate offender would commit about one index crime per year and a high-rate offender about twenty index crimes per year. Applying these figures to the three strikes law at issue in California in 1994, they projected a reduction of 340,000 serious crimes per year in California.

The Rand assessment was based solely on the incapacitative effects of prison, excluding consideration of a general deterrent effect. Presumably, three strikes laws not only incapacitate the offenders who are directly subject to these penalties, but also deter others who are considering whether to commit crimes. While Rand researchers seemingly suggested no deterrent effect from

62. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY, VIOLENT CRIME TRENDS, 1973-2002, *available at* www.ojp.usdoj.gov/bjs (last visited Mar. 11, 2004).

63. *See, e.g.*, Paul G. Cassell, *In Defense of the Death Penalty*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT*, *supra* note 44, at 183, 189-97 (collecting death penalty deterrence studies).

64. P.W. GREENWOOD, C.P. RYDELL, A.F. ABRAHAMSE, J.P. CAULKINS, J. CHIESA, K.E. MODEL & S.P. KLEIN, RAND CORP., *THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY-SENTENCING LAW* (REPORT NO. MR-509-RC) (1994).

California's law,⁶⁵ the most recent and sophisticated research considering the full range of possible effects found deterrence.⁶⁶ This research concluded that the three strikes law, during its first two years of operation, prevented 8 murders, 4000 aggravated assaults, 10,000 robberies, and 400,000 burglaries.⁶⁷ More generally, estimates of both a deterrent and an incapacitative effect have suggested that each 1% increase in the prison population produces approximately 0.10% to 0.30% fewer index crimes.⁶⁸ For example, renowned criminologist James Q. Wilson has opined that the "elasticity" of crime with respect to incarceration is between 0.10% and 0.20%.⁶⁹ Thomas Marvell and Carlisle Moody examined crime statistics and prison populations for 49 states over the period of 1971-1989.⁷⁰ They found that a 1% increase in prison population results in approximately 0.16% fewer reported index crimes. Steven Levitt found a higher elasticity—about 0.30% or more—in a recent sophisticated, comparative analysis of 12 states that experienced system-wide restraints on prison populations imposed by federal courts.⁷¹

Of particular interest to federal practices may be a recent study assessing the deterrent effect of state truth-in-sentencing laws.⁷² Since 1994, Congress has provided some incentive grants to states who can demonstrate that violent offenders serve at least 85% of their sentences. These state truth-in-sentencing laws track the Guidelines, which generally demand that prisoners serve 85% of their sentences. A regression analysis comparing states with and without such truth-in-sentencing programs found that the laws decreased murders by 16%, aggravated assaults by 12%, robberies by 24%, rapes by 12%, and larcenies by 3%. While there was a "substitution" by offenders into less harmful property crimes (burglaries increased by 20% and auto thefts by 15%), the overall reduction in crime was substantial.

65. See Peter Greenwood, C. Peter Rydell, Allan F. Abrahamse, Jonathan P. Caulkins, James Chiesa, Karyn E. Model & Stephen P. Klein, *Estimated Benefits and Costs of California's New Mandatory-Sentencing Law*, in *THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY* 53 (David Shichor & Dale K. Sechrest eds., 1996).

66. Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 *J. LEGAL STUD.* 159, 185 (2002).

67. *Id.* at 191-92.

68. John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 *J. LEGAL STUD.* 1, 12-14 (1998).

69. James Q. Wilson, *Prisons in a Free Society*, 117 *PUB. INTEREST* 37, 38 (1994).

70. Thomas Marvell & Carlisle Moody, *Prison Population Growth and Crime Reduction*, 10 *J. QUANTITATIVE CRIMINOLOGY* 109 (1994).

71. Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 *Q.J. ECON.* 319 (1996).

72. Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 *J.L. & ECON.* 509 (2002).

3. *The experience in other countries.*

This may be a convenient place to discuss the evidence for deterrence that arises by comparing America's crime rates with those of other countries. It is true that America incarcerates at a higher rate than European countries. For example, in his speech to the ABA, Justice Kennedy noted that our incarceration rate is now about 1 in 143 persons, while in England it is about 1 in 1000. What has been the effect on crime rates? As one might expect, a good case can be made that fewer Americans are now being victimized. A recent report by the Department of Justice's Bureau of Justice Statistics (BJS) compared crime in the United States to crime in England from 1981 to 1996. The BJS found that during this period of time, the risk of criminal punishment generally rose in the United States, while it fell in England.⁷³ At the same time, generally speaking, English crime rates rose while American crime rates fell. As the BJS explained:

For most U.S. crimes (survey estimated assault, burglary, and motor-vehicle theft; police-recorded murder, robbery, and burglary), the latest crime rates (1996) are the lowest recorded in the 16-year period from 1981 to 1996. By comparison, English crime rates as measured in both victim surveys and police statistics have all risen since 1981.⁷⁴

The BJS attempted to determine whether these trends were linked. Its preliminary analysis was unable to reach a definitive general conclusion about whether either punishment risk or punishment severity affected crime rates.⁷⁵ Intriguingly, however, the BJS did detect consistent deterrence effects on burglary, both with respect to the risk that a burglar would be punished and the severity of the burglar's punishment.⁷⁶ The BJS also noted that, as compared to some of the crimes analyzed (for example, murder, rape, assault), burglary was particularly likely to be rationally motivated by considerations of gain and loss and, therefore, might be especially susceptible to deterrence. The BJS suggested that further research is needed on these questions, which certainly seems correct. But these figures should give one pause before too quickly concluding that European sentences are appropriate.

4. *Benefit-cost analysis of prison sentences.*

In light of this research on crime's costs and its response to criminal penalties, it should in theory be possible to begin making an assessment of the cost effectiveness of prison sentences. With respect to state sentences, only a few preliminary calculations have been made. With respect to the federal

73. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME AND JUSTICE IN THE UNITED STATES AND IN ENGLAND AND WALES, 1981-1996, at 37 (1998).

74. *Id.* at iii.

75. *Id.* at 38.

76. *Id.* at 40.

sentencing guidelines, to my knowledge no calculations have been undertaken. In the absence of firm data, it is hard to reach firm conclusions. Yet the available evidence does not support the claim that we are mispending our resources on long federal prison sentences.

A brief discussion of a few of the studies regarding state sentencing practices may helpfully frame the issue.⁷⁷ One early effort to determine whether money spent on prisons was worth it was made by National Institute of Justice Economist Edwin Zedlewski.⁷⁸ For the cost of prisons, he used the figure of \$25,000 per prisoner per year. For the benefit of prisons, he estimated an average cost of a crime at \$2300 (including both tangible and intangible losses). He then estimated that the average prisoner committed 187 crimes per year, based on self-report data from the Rand Corporation,⁷⁹ producing a social cost per prisoner on the streets of \$430,000. Dividing the cost of prisons by the apparently substantial benefits obtained, he concluded that prison has a benefit-cost ratio of just over 17.

Other researchers criticized his conclusions in general and his use of the figure of 187 crimes per prisoner in particular. The Rand survey on which the estimate was based found that half of the prisoners committed fewer than 15 crimes per year, so that the median number of crimes committed was 15. Substituting that far more cautious number produced a benefit-cost ratio of 1.38, still greater than one.

A similar positive assessment was reached by John DiIulio. He conducted a sophisticated self-report study of crimes committed by prisoners in the Wisconsin prison system. He found that prisoners committed an average of 141 crimes per year, exclusive of drug deals. The median number of crimes was 12. Using the very conservative median as a basis for calculation, his study concluded that the benefit-cost ratio of prisons in Wisconsin was 1.97.⁸⁰ Later analysis of the same data to reconsider various assumptions that might reduce the benefits of prison still produced a substantially positive benefit-cost ratio of 1.84.⁸¹

Perhaps the most sophisticated benefit-cost study was recently published by Steven Leavitt. Using regression analysis, he concluded that 15 crimes per year are prevented by each additional year of imprisonment of offenders prosecuted in state courts. This reduction in crime created a social benefit of

77. This analysis draws on Logan & DiIulio, *supra* note 42.

78. EDWIN W. ZEDLEWSKI, MAKING CONFINEMENT DECISIONS (Nat'l Inst. of Justice 1987).

79. "Self-report data" is information from the prisoner himself about how many crimes he committed before being incarcerated.

80. John J. DiIulio, Jr., *Crime and Punishment in Wisconsin: A Survey of Prisoners and an Analysis of the Net Benefits of Imprisonment*, WIS. POL'Y RES. INST., Dec. 1990.

81. John J. DiIulio, Jr. & Anne Morrison Piehl, *Does Prison Pay?: The Stormy National Debate over the Cost-Effectiveness of Imprisonment*, 9 BROOKINGS REV., Fall 1991, at 28.

\$53,000 compared to a social cost of incarceration of about \$35,000, a benefit-cost ratio of 1.5.⁸²

While the studies generally suggest positive benefit-cost ratios, one contrasting study deserves brief mention. Professors John J. Donohue and Peter Siegelman have criticized California's three strike's law on the grounds that the same crime reduction benefits could perhaps have been achieved less expensively through investments in social programs.⁸³ As a "thought experiment,"⁸⁴ they took several successful programs (such as pilot programs in family-based therapy and treatment programs for juvenile delinquents) and extrapolated the possible crime reduction effects. Their tentative conclusion was that the money might have been better spent in social programs. But they were quick to emphasize that the social programs they studied (some of which were thirty years old) might not be expandable across the country. Most important for present purposes, they seemingly recognized that past increases in incarceration in this country were cost beneficial and focused their concern only on future increases.⁸⁵ In sum, the available literature generally shows positive benefit-cost ratios for prisons.

5. *Benefit-cost analysis of federal sentences.*

All of the preceding studies focused on the benefit-cost ratio of *state* sentencing practices. To my knowledge, no comprehensive assessment of federal sentences has been performed. Perhaps the best that can be said at this time is that further research is appropriate. I add my voice to those of others who have called for further exploration of the cost-effectiveness of federal sentencing practices.⁸⁶

Pending further analysis, the lack of data suggests caution before firmly pronouncing that the resources devoted to federal prison sentences are misspent. But there are good reasons for thinking that the sentences are fully cost-effective. I take the liberty of sketching out my speculative observations here.

Targeting of High Rate Offenders. Federal sentences may be cost-effective because they appear to focus on high rate offenders. The benefit-cost analysis of state sentences explored above often revolved critically around the number of crimes committed by each offender. It is well known that a small number of

82. Levitt, *supra* note 71, at 346-47. *But see* Donohue & Siegelman, *supra* note 68, at 13-14 (suggesting Levitt's methodology may be flawed).

83. Donohue & Siegelman, *supra* note 68.

84. *Id.* at 43.

85. *Id.* at 2.

86. *See, e.g.,* Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001 (2001); *cf.* Miller, *supra* note 5, at 1263-65 (raising useful suggestions for expanding our knowledge of how the Guidelines operate in practice).

offenders commit a huge number of crimes. If it were possible to target criminal sanctions against these high-rate offenders, positive benefit-cost ratios would be easy to demonstrate.

Federal sentences may be directed towards these high-rate offenders. For starters, it is important to understand how cases end up in the federal criminal justice system. Unlike the state systems, which essentially prosecute all arrested persons, the federal system frequently relies on prearrest investigation. For example, rather than policing a particular area for drug crimes, Drug Enforcement Agency agents frequently attempt to dismantle entire drug trafficking organizations. Similarly, rather than pursuing every isolated bank robbery, FBI agents often focus on career criminals who have committed a string of robberies. If these examples reflect general federal investigative practices, then the resulting federal criminal prosecutions may almost by definition involve those who are at a particular risk to reoffend.⁸⁷

In making this argument, I am aware of the increasing trend by federal prosecutors to “adopt” what is essentially a state investigation for federal prosecution. Such adopted prosecutions may not fit the model of careful, proactive investigation described above. But even for adopted prosecutions, screening by the United States Attorney’s Office before a case “goes federal” may weed out inferior cases where there is likely to be little “bang for the buck.”

The Guidelines themselves also target high-rate offenders for more severe penalties. An obvious example is the Guidelines criminal history category, which aggravates sentences for offenders with lengthy criminal records. The criminal history category may well successfully differentiate those offenders likely to recidivate from those who are not. (The Sentencing Commission is apparently pursuing research on precisely this question.) Some evidence along these lines comes from a study of federal drug offenders with a range of criminal histories. Offenders with 0 criminal history points were still successful 3 years after release 92% of the time. Those with over 10 points succeeded only 23% of the time.⁸⁸ There are other places in the Guidelines where potential recidivists may be successfully identified, including enhancements for “career” offenders, armed career criminals, and those earning a criminal livelihood,⁸⁹ as well as for those organizing a criminal enterprise.⁹⁰

As result of these twin factors—investigation before prosecution and enhancements for career criminals—federal prosecutions may more successfully sort the wolves from the sheep and produce highly cost-effective

87. Goldsmith & Gibson, *supra* note 27, at 11.

88. See U.S. DEP’T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES tbl.2, pt.1 (1994) (reporting results of a follow-up study of a cohort of drug offenders with a range of criminal histories).

89. U.S. SENTENCING GUIDELINES MANUAL §§ 4B1.1, 4B1.3, 4B1.4 (2003).

90. *Id.* at § 3B1.1(a).

prison terms.

Targeting High Cost Crimes. The federal sentencing guidelines may also be cost-effective because they successfully target high cost crimes. The Guidelines are particularly tough on violent crimes. Starting with what is essentially a mandatory life sentence for first-degree murder,⁹¹ through repeated enhancements for offenses that injure victims,⁹² violent offenders in the federal system are particularly likely to face long prison terms. Along the same lines, the Guidelines impose harsh penalties for firearms offenses⁹³ and on those who victimize vulnerable victims, including children.⁹⁴

These crimes—involving violence, firearms, or harms to children—are likely to be the most costly to victims and, therefore, their corresponding Guidelines sentences are potentially the most cost-effective kinds of criminal penalties. For example, the table on losses per crime victimization reprinted previously shows losses escalating based on injury and violence: \$370 for a typical larceny, \$8000 for a robbery, \$19,000 for a robbery with injury, \$60,000 for child abuse, \$87,000 for a sexual assault, and \$2,940,000 for a murder.⁹⁵

Crimes Particularly Susceptible to Deterrence. The Guidelines may also be cost-effective in increasing penalties for offenses that are particularly susceptible to deterrence. One well-known effect of the Guidelines was to punish white collar offenses more harshly, particularly by requiring that white collar offenders received more than simply a probationary sentence. Data show that the use of simple probation for such offenders fell dramatically after implementation of the Guidelines in 1988.⁹⁶ This was no accident. The Sentencing Commission specifically articulates in the introductory section of the Guidelines that: “Under 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, that in the Commission’s view are serious.”⁹⁷

These kinds of “crimes in the suites” may be most subject to a deterrent effect. White collar offenders may be particularly loathe to face prison terms. Moreover, economically-motivated crimes may be the quintessential example of reflective crimes for which criminal sanctions may have their greatest effect.

91. *Id.* at § 2A2.1.

92. *See, e.g., id.* at § 2A2.2(b)(3) (listing specific offense characteristics for assault enhancing penalties based on victim injury); *id.* at § 2B3.2(4) (providing the same for robbery).

93. *Id.* at § 2K2.1.

94. *Id.* at § 3A1.1.

95. *See* VICTIM COSTS AND CONSEQUENCES, *supra* note 56, at 9 tbl.2.

96. Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 FED. SENTENCING REP. 12, 15 (1999).

97. U.S. SENTENCING GUIDELINES MANUAL 1.A(d) (2003).

For all these reasons, the deterrent effects shown in research involving street crimes (particularly assault) may understate the true deterrent values.

6. *The special problem of drug trafficking crimes.*

It would be impossible to fairly assay the effectiveness of federal sentencing practices without some special discussion of drug offenses. Drug trafficking represents the largest single category of the crimes prosecuted in federal courts.⁹⁸ About 40% of the federal docket in recent years has been drug prosecutions.⁹⁹ An even larger portion of the increase in the federal prison population is attributable to the lengthening of drug sentences. The BJS calculated that, of the roughly 60,000-prisoner increase in prison population between 1986 and 1997, about 42,000 (70%) could be attributed to drug crimes.¹⁰⁰

Because drug trafficking crimes loom so large in the federal system, it would be nice to be able to make a clear benefit-cost assessment about drug sentences. Yet evaluating drug sentencing policy remains quite tricky. Some critics of stiff drug sentences have argued that imprisoning drug traffickers is less effective than imprisoning other criminals because traffickers are more readily replaceable. As Professor Alfred Blumstein has written, "Lock up a rapist, and there is one less rapist on the street. Lock up a drug dealer, and you've created an employment opportunity for someone else."¹⁰¹ There also is some evidence that drug traffickers are less likely to recidivate than the average federal offender.¹⁰² Finally, it is possible to simply question the relative harm of drug trafficking offenses.

On the other hand, good arguments can be made in favor of tough drug trafficking sentences. For starters, the toll exacted by drug trafficking is clearly substantial. There is no need to recount here the abundant evidence of destroyed lives and blighted neighborhoods that ultimately result from the illegal distribution of heroin, cocaine, methamphetamine, and other dangerous drugs. Moreover, the Guidelines attempt to target the most serious traffickers for the most serious penalties, avoiding at least to some extent the substitution problem for street dealers identified by Professor Blumstein. Indeed, it may be the case that tough penalties are needed precisely to permit effective pursuit of

98. See generally Erik Luna, *New Voices on the War on Drugs: Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002).

99. Hofer & Semisch, *supra* note 96, at 18.

100. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING, WITH TRENDS 1982-1988 (1999); see also Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 FED. SENTENCING REP. 29 (1993) (finding drug sentencing accounts for the majority of the growth in federal prison populations).

101. Hofer & Semisch, *supra* note 96, at 19 n.20 (quoting Alfred Blumstein).

102. U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, RECIDIVISM AMONG FEDERAL PRISON RELEASEES IN 1987: A PRELIMINARY REPORT (1994).

the leaders of drug organizations. Prosecutors often need cooperation from low-level drug dealers in order to convict those higher up in the organization.¹⁰³ Without stiff sentences, it may be difficult to “flip” these low-level players and obtain convictions of drug kingpins. With stiff sentences in place today, prosecutors are able to frequently secure “substantial assistance” in drug prosecutions. According to recent data, 28% of all federal drug offenders receive a “substantial assistance” downward departure.¹⁰⁴ Finally, at least some anecdotal evidence suggests that drug violence has diminished in the wake of tough federal drug sentences. The wars between rival distribution organizations, particularly for crack cocaine, seem to have ameliorated somewhat recently. While some have suggested that this reduction in violence is due to a settling out in distribution patterns, my impression is that tough sentences had at least some role in this positive development. After all, drug trafficking is primarily an economically motivated crime, and deterrence typically works well to counteract such motivations.

To be sure, the success with which the Guidelines target the most serious, violent drug offenders is open to debate. The Guidelines are driven primarily by drug quantities, rather than other factors that might be more appropriate indicators of criminal risk.¹⁰⁵ This is apparently a result of congressionally mandated mandatory minimum sentences, which likewise are based almost exclusively on drug quantities.¹⁰⁶ Without the need to track the mandatory minimum sentencing structure, the Guidelines likely could be recrafted to focus even more directly on dangerous drug offenders.¹⁰⁷ But even as they exist today, I am not ready to conclude (as some thoughtful commentators have) that federal drug sentences are “too dang high.”¹⁰⁸ We simply need more analysis of the tradeoffs.

* * * * *

In sum, tough federal criminal sentences purchase significant crime control benefits. When measured against this standard, it would be impossible to say based on the information we have that our resources are misspent. To the contrary, the best guess today appears to be that the Guidelines “pay” by preventing particularly serious and costly crimes.

103. See Michael M. Baylson, *Mandatory Minimum Sentences: A Federal Prosecutor's Viewpoint*, 40 FED. B. NEWS & J. 167 (1993).

104. U.S. GEN. ACCOUNTING OFFICE, *supra* note 34, at 12.

105. See Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENTENCING REP. 121 (1994).

106. See generally U.S. SENTENCING COMM'N, COCAINE & FEDERAL SENTENCING POLICY (1995).

107. *Id.* at xv.

108. Frank O. Bowman, III, *Sentencing Guidelines: Where We Are and How We Got Here*, 44 ST. LOUIS U. L.J. 405, 406 (2000).

III. TOUGH GUIDELINES MAKE MANDATORY MINIMUM SENTENCES SUPERFLUOUS

The previous section argued that the federal sentencing guidelines, while tough, are not “too” tough. The fact that tough strict sentencing guidelines are in place, however, may suggest that Congress should repeal a number of the statutes creating mandatory minimum sentences.¹⁰⁹ With tough guidelines in place, mandatory minimum sentences become largely redundant at best and harmful at worst.

Justice Kennedy reached a similar conclusion, though for very different reasons. In his address to the ABA, Justice Kennedy acknowledged the underlying wisdom of some kind of guidelines system to avoid unwarranted sentencing disparity between different judges. But, he continued, “By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”¹¹⁰

Justice Kennedy’s concerns about mandatory minimum sentences are widely shared. For example, a comprehensive report from the Sentencing Commission to Congress concluded that mandatory minimums ought to be reconsidered.¹¹¹ Similar criticisms have been advanced by academic commentators,¹¹² judges,¹¹³ and the United States Judicial Conference.¹¹⁴

Senator Orrin Hatch has leveled one of the most thoughtful critiques. As he explained, Congress began adopting mandatory minimum sentences when the Guidelines were not yet in place. With the Guidelines now regulating sentences, the need for minimum sentences is substantially reduced.¹¹⁵ Perhaps

109. Mandatory minimum sentences are sentences that are prescribed by statute and from which judges cannot generally depart. For example, possession of more than five grams of crack cocaine is punished by a mandatory term of five years in prison. See 21 U.S.C. § 841 (2003). This Article focuses on mandatory minimum sentences for drug offenses and does not purport to comprehensively review such sentences in more unusual contexts, such as the mandatory life sentence for first degree murder, 18 U.S.C. § 111(b), the mandatory 15-year sentence for violent armed felons, 18 U.S.C. § 924(e), or various mandatory minimum sentences for sexual exploitation of children, 18 U.S.C. § 2251(d).

110. Justice Kennedy Speech, *supra* note 1, at 4.

111. U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

112. See, e.g., Miller, *supra* note 5; Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).

113. See, e.g., *Harris v. United States*, 536 U.S. 545 (2002) (Breyer, J., concurring).

114. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (Mar. 1993).

115. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993).

more important, mandatory minimum sentences sharply conflict with the basic idea behind sentencing guidelines. As Senator Hatch observed:

The compatibility of the guidelines system and mandatory minimums is also in question. While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent. Whereas the guidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the guidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a “real offense” approach to sentencing, mandatory minimums are basically a “charge-specific” approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.¹¹⁶

In light of these concerns, it is unsurprising that a large proportion of the examples cited of flawed federal sentences appear to stem from the mandatory minimums, not the federal sentencing guidelines. For example, Justice Kennedy discussed the situation of a young man caught with crack cocaine subject to a mandatory minimum.¹¹⁷ As another example, my colleague, Professor Erik Luna, has collected several illustrations of what he identifies as miscarriages of justice in federal sentencing, all of which appear to involve mandatory minimums for drug offenses.¹¹⁸ These examples could be multiplied. But without agreeing or disagreeing about particular cases, it is striking how many of these “horror stories” stem from mandatory minimums in general and from narcotics mandatory minimums in particular.

Such inappropriate sentences may undermine the entire Guidelines system. Professor Frank Bowman has cogently argued that unduly harsh drug sentences create a culture where both judges and prosecutors begin to wink at legal requirements.¹¹⁹ While his comments focused on drug sentences generally, much of his concern appears to stem from the mandatory minimum sentences. It is one thing to require judges and prosecutors to hew to presumptive sentences for drug offenders; it is quite another to mandate “no escape” even in unusual cases. To be sure, these problems might be solved short of repealing the mandatory minimums. Attorney General Ashcroft, for example, has recently promulgated internal Justice Department policies designed to restrict

116. *Id.* at 194.

117. *See supra* Part I.A.

118. Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 POL’Y ANALYSIS, Nov. 1, 2002, at 1, 17, at <http://www.cato.org/pubs/pas/pa458.pdf> (last visited Mar. 11, 2004).

119. Bowman, *supra* note 33, at 338-40.

some of the prosecutorial deviations from the Guidelines and mandatory minimums.¹²⁰ But the success of such efforts remains unproven.

Those supporting tough federal sentences may find it worthwhile to consider repealing some of the mandatory minimum sentences, particularly those tied solely to drug quantities. To be sure, the case for repeal made here rests on political calculations that may be better assessed by those in the political arena. But sound reasoning would underlie such an approach

Such repeals would give up little in overall sentencing severity. Not all sentences are subject to mandatory minimums. About 40% of drug cases (and 73% of all cases) are already entirely outside mandatory minimums.¹²¹ Even with respect to the 60% of drug cases ostensibly subject to them, about 26% already fall below the mandatory minimum because of the “safety valve” provision and a further 26% because of departures for “substantial assistance” to prosecutors.¹²² Moreover, the Guidelines themselves often reflect the mandatory minimum sentences. The Guidelines for drug trafficking, for example, are pegged to the mandatory minimum drug quantities. Repealing these mandatory minimums statutes would thus leave in place guidelines presumptively calling for the same sentences. The net effect of such a repeal, then, would be to change sentences only in those rare cases where a judge determined to depart downward from the otherwise applicable Guideline range.

Any proposal to change the mandatory minimums must confront two competing concerns. The first is the need to give prosecutors the tools they need to secure cooperation from low-level players. Then-Assistant U.S. Attorney Jay Apperson nicely articulated the case for mandatory minimums on these grounds:

Those arrested in federal drug cases are told immediately that they face tough mandatory minimums and that their only way out is to cooperate with the government, identify their sources, work in conjunction with undercover agents and testify in court. . . . Faced with the certainty of a 10-year mandatory with no parole, it's amazing how a defendant's fear or “loyalty” [to higher ups] is suddenly put into perspective. They suddenly realize they will be giving up a huge chunk of their lives for someone else, who walks away scot free.¹²³

Critics of mandatory minimum sentences have tended to unfairly minimize this serious issue. Without cooperation from the “little fish,” federal drug

120. See, e.g., Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003) (on file with the author).

121. U.S. SENTENCING COMM'N, FINAL REPORT: SURVEY ON ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES ES-4 (2003); see also U.S. GEN. ACCOUNTING OFFICE, *supra* note 34, at 12, 14 (reporting that 42,861/72,283 (56%) of the federal drug sentences in the study were subject to mandatory minimums).

122. U.S. GEN. ACCOUNTING OFFICE, *supra* note 34, at 15.

123. Jay Apperson, *The Lock-'em-Up Debate: What Prosecutors Know: Mandatory Minimums Work*, WASH. POST, Feb. 27, 1994, at C1 (sentences reordered).

prosecutions against the “big fish” could be severely hampered. But I suspect that prosecutors could secure almost the same degree of cooperation by telling defendants what their likely sentence is under the tough Guidelines. On this point, it is interesting to note that federal prosecutors apparently obtain significant cooperation from lesser players when prosecuting many other serious crimes for which no mandatory minimum sentences exist.

My view that cooperation could be secured through threats of stiff Guidelines sentences, however, rests on an assumption that may be disputed: that judges will generally follow the Guidelines if the restraints of mandatory minimums have been removed. This is a contentious issue that cannot fully be resolved here. Congress may have particular concern about judicial subversion of the Guidelines. Congress recently enacted the “Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003” or “PROTECT Act,” which contained provisions to reduce downward departures.¹²⁴ As Congressman Feeney justified these provisions: “Unfortunately, judges in our country all too often are arbitrarily deviating from the sentencing guidelines enacted by the U.S. Congress based on their personal biases and prejudices, resulting in wide disparity in sentencing.”¹²⁵

Recent statistical analysis suggests that these concerns are overstated. A comprehensive review of downward departures by the United States Sentencing Commission found that of all sentences in fiscal year 2001, 63.9% were within the Guidelines and another 24.6% were below the Guidelines only because of a “substantial assistance” or other government-initiated departure; only 10.9% were below the Guidelines due to a downward departure.¹²⁶ In other words, 89% of all cases fell within the sentencing guidelines or the prosecutor’s suggestions. Even this high figure may understate the extent to which courts are staying within the Guidelines and prosecutors’ positions, as the government may have formally or informally acquiesced in many of the additional downward departures.¹²⁷

But even assuming (purely for the sake of argument) that some significant number of district judges would be willing to violate their sworn obligation to follow the Guidelines, the mandatory minimums would be overkill in response. Ordinarily, the way in which the federal system responds to erroneous decisions by trial court judges is through review by appellate courts. The courts of appeals can deal with aberrant Guidelines decisions. Indeed, just this year in

124. Pub. L. No. 108-21, 117 Stat. 650 (2003); *cf.* CHIEF JUSTICE WILLIAM H. REHNQUIST, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2003) (criticizing Congress’ failure to consult with the judiciary before passing the Act). *See generally* United States v. Vanleer, 270 F. Supp. 2d 1318 (D. Utah 2003) (reviewing legislative history of the Act).

125. 149 CONG. REC. H2423 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney).

126. U.S. SENTENCING COMM’N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 60 (2003).

127. *Id.*

the PROTECT Act, Congress acted to invigorate appellate review of Guidelines decisions. The PROTECT Act requires *de novo* appellate review of trial courts' sentencing decisions. Courts of appeals have begun to proceed under this new standard and appear to be more frequently reversing downward departure decisions.¹²⁸ The Act further directs the Justice Department to develop policies to effectively appeal erroneous applications of the Guidelines. The law also required the Sentencing Commission to reduce the incidence of downward departures from the Guidelines, a mandate that has now been implemented.¹²⁹ As a result of these changes, it seems more likely than ever that, in the absence of mandatory minimum sentences, downward departures would be restricted to a tiny percentage of cases in which unusual factors truly justified a more lenient sentence.

If my assumptions are correct—and more research would clearly be helpful here—repealing the mandatory minimums would lead to neither difficulties for prosecutors nor disregard of the Guidelines by judges. The repeal would, however, allow downward departures in a small percentage of cases where a federal district court judge identifies the presence of some significant unusual factor. Because only a small fraction of cases would be involved, some may argue this is much ado about nothing. But these downward departures would be in precisely those cases that would otherwise lead to criticism of the entire federal sentencing structure. Admittedly, my conclusions in this area have to be quite preliminary. And if federal prosecutors could demonstrate a clear need for tough mandated sentences rather than tough Guidelines sentences, the mandatory minimums should be retained. But my tentative view is that repeal of the mandatory minimums would have the positive effect of bolstering support for the tough current federal sentencing structure without harming legitimate law enforcement interests.

CONCLUSION

Federal sentences today are tough by any measure. But whether they are “too” tough requires some judgment about the purposes that they are designed to achieve. Assayed against either the goal of just deserts or of crime control, the case has yet to be made that federal criminal sentences should be generally reduced.

At the same time, however, it may be desirable to repeal the federal mandatory minimum sentences, particularly those tied solely to drug quantities. The statutes requiring these minimums appear to generate a disproportionate share of the criticism of tough federal sentences, while seemingly purchasing little in return.

128. See, e.g., *United States v. Andrews*, 353 F.3d 1154 (10th Cir. 2003).

129. See U.S. SENTENCING COMM'N, COMMISSION EMERGENCY AMENDMENT EFFECTIVE (2003), reprinted in UNITED STATES SENTENCING COMM'N, *supra* note 126, at app.A.