

McSENTENCING:  
MASS FEDERAL SENTENCING AND THE LAW OF  
UNINTENDED CONSEQUENCES

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**Contents**

I. Introduction .....	1
II. The Principal Attributes of McDonaldization.....	4
III. The McSentencing of Federal Punishments .....	7
A. Predictability .....	10
B. Calculability .....	13
C. Efficiency .....	18
D. Control .....	23
IV. Federal Sentencing and the Law of Unintended Consequences.....	25
A. Insufficient Knowledge.....	31
B. Error .....	34
1. Prosecutorial Discretion .....	35
2. Probation Officers' Influence.....	41
3. Law Enforcement Interests.....	42
4. Differences in Defense Counsel Abilities .....	44
5. Racial Disparities .....	45
C. Short-Term Focus.....	46
1. Prison Costs.....	46
2. Increases in Adjudication Costs .....	51
D. Competing Basic Values.....	52
E. Self-Fulfilling Prophecies.....	56
1. Disparities .....	56
2. Proportionality.....	62
V. Conclusions.....	63

I. INTRODUCTION

American law represents, in the lexicon of prominent sociologist and lawyer Max Weber, a bureaucratization of formal rationality in modern society.<sup>1</sup> Legal decisions are driven by reliance upon abstract, universal, and systematized rules and laws.<sup>2</sup> Yet while Weber contemplated that this

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<sup>1</sup> MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 220 (Hans H. Gertgh & C. Wright Mills eds., 1946).

<sup>2</sup> MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 63-64 (Max Rheinstein ed., 1964).

type of bureaucratization of formal rationality in the law engendered certain benefits, such as precision, efficiency, consistency, and continuity, it is also deeply depersonalizing.<sup>3</sup> The ideology of the “McDonaldization of society” borrows from Weber’s thesis. The McDonaldization of society is a popular sociological construct coined two decades ago.<sup>4</sup> Instead of focusing broadly on bureaucracy, McDonaldization draws upon the emergent model of fast food consumerism as representing the dominating force of formal rationality in American society today.<sup>5</sup> The icon of the McDonald’s restaurant chain is useful in offering a well-known social artifact to illustrate and exemplify a macro ideology of structural processes in a postmodern world. The famous food chain, recognized worldwide, is the epitome of structured and refined assembly-line procedures to serve multitudes of customers quickly and with consistent product. The four main advantages of McDonaldization are predictability, efficiency, calculability, and control. Yet the McDonaldization model leads to irrationalities in that the same four tenets, while affording obvious advantages, inexorably invite unforeseen repercussions, including depersonalization. This recognition is reminiscent of a sociological paradigm known as the law of unintended consequences. The concept envisages that any purposive human action yields unanticipated consequences because a complex social world can never be completely controlled.

Together, the theoretical principals underlying McDonaldization and the law of unintended consequences offer interdisciplinary methods to study the formally rational system of the law. Legislation can properly be analyzed as collective purposive action meant to achieve expected outcomes. Notwithstanding such intent, as the prominent legal scholar Cass Sunstein submits, “government regulation that may be amply justified in principle may go terribly wrong in practice.”<sup>6</sup>

This Article is essentially a case study in which the doctrines of McDonaldization and the law of unintended consequences provide a salutary framework for analyzing a particular area of law. The legal subject of this study is federal sentencing reforms. In the federal criminal justice system, district judges are the terminal deciders of the definitive sentences issued in individual cases. As thousands of district judges around the country determine sentences, however, consistency is uncertain. In the

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<sup>3</sup> *Id.* at 350-51.

<sup>4</sup> See generally GEORGE P. RITZER, *THE MCDONALDIZATION OF SOCIETY* (1993).

<sup>5</sup> George Ritzer, *The Weberian Theory of Rationalization and the McDonaldization of Contemporary Society*, in ILLUMINATING SOCIAL LIFE: CLASSICAL AND CONTEMPORARY THEORY REVISITED 41, 45 (Peter Kivisto ed., 2005) [hereinafter *Weberian Theory*].

<sup>6</sup> Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1390 (1994).

1980s, critics charged that the judiciary retained too much discretion and that the result was unwarranted disparities in sentencing, even potential racial discrimination. Convinced that changes were warranted, Congress enacted certain legal reforms with the intent of achieving greater uniformity. These reforms principally operate by limiting judicial discretion in meting out punishments to convicted offenders. In place of discretion is a systemized process of specific and uniform guidelines that direct sentencing outcomes through a series of computations based on discrete quantifications of harm. We now have almost thirty years of experience with these sentencing reforms. The principles of McDonaldization and its corollary of the law of unintended consequences appear well suited to examine and explain the reforms' impact on federal sentencing.

This Article argues that the plethora of controls instituted to closely direct sentencing processes and restrain judicial discretion represents a commodification of punishments in which the products—*i.e.*, sentences—are meticulously constructed through a sort of assembly-line justice. The products are sequentially created by Congress, a sentencing commission, prosecutors, probation officers, and then handed to judges for the final touches. Hence, I use the rhetorical moniker of *McSentencing* to represent the mechanized system that federal sentencing reforms appear designed to achieve. As this Article will outline, *McSentencing* most assuredly will confront the law of unintended consequences. Founded upon expectations that an automated style of sentencing outcomes would lead to an idealized uniformity, the reforms have unfortunately led to a sentencing system recently described by a Department of Justice official as “continu[ing] to fragment” and besought with “visible, widespread, and unwarranted sentencing disparities.”<sup>7</sup> The federal sentencing system is in crisis.

In sum, this work represents an interdisciplinary study of federal sentencing law and policy. The results are a reminder that the law is not an isolated entity; it operates within a social world that reacts to, and may fundamentally affect, any statute's expected goals. The analysis will proceed as follows. Section I briefly outlines the core principles of the concept of McDonaldization. Section II applies the McDonaldization attributes to the federal sentencing system as envisioned by legislative reforms to justify the label *McSentencing*. Section III proceeds to elaborate upon the unintended consequences resulting from the *McSentencing* reforms and discusses how well the expected goals of uniformity and proportionality have been achieved. The theme therein advances that the

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<sup>7</sup> *Federal Sentencing Options after Booker*, Hearing Before the U.S. Sent'g Comm'n 6-7 (2012) (statement of Matthew Axelrod, Ass't Deputy Att'y Gen.), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/2012\\_0215-16/Agenda\\_16.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/2012_0215-16/Agenda_16.htm).

system has gone awry, that despite whatever good intentions the reformers embraced, unexpected aftereffects have biased the results. Throughout the Article, statistical measures derived from various government datasets supplement the analysis with relevant empirical perspectives.

## II. THE PRINCIPAL ATTRIBUTES OF McDONALDIZATION

The McDonaldization of society is a phenomenon involving rationalization, commodification, homogenization, and domination.<sup>8</sup> It is essentially a creature of modern society in which the personal and individual have been overtaken by the political and collective. Based on the principles of mass production and mass consumption, McDonaldization has far reaching application in offering a unique theoretical approach to studying a business, institution, process, or policy. Four core dimensions of the McDonaldization model, and what makes it so intellectually and practically appealing, are its predictability, efficiency, calculability, and controllability.<sup>9</sup>

The tenet of predictability mandates that products and services are the same over time and in different places.<sup>10</sup> Customers expect that Egg McMuffins, for instance, will look identical and taste the same from year-to-year, no matter the locale.<sup>11</sup> Customers rely on McDonald's employees to interact in predictable ways, and vice versa.<sup>12</sup> Predictability can be comforting and its homogenizing effect also fits well with the second tenet of McDonaldization which highlights efficient processes. Efficiency concerns the optimum means to an end.<sup>13</sup> McDonald's employees learn efficacious methods for producing prodigious amounts of food through very refined, assembly-line procedures.<sup>14</sup> In the world of fast food, customers are processed quickly and effectively through methods designed to prey on impulses to expediently assuage hunger. Food ordering and delivery are optimized to move as many customers through the stores as quickly as possible. In time, McDonald's officials exploited another avenue to further improve efficiency. The chain promoted the drive-thru, convincing customers that they could obtain their food more quickly while simultaneously minimizing physical effort.<sup>15</sup> In some sense, the

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<sup>8</sup> See generally GEORGE P. RITZER, *THE McDONALDIZATION OF SOCIETY* (1993).

<sup>9</sup> GEORGE RITZER, *THE McDONALDIZATION OF SOCIETY* 6 14-16 (2011) [hereinafter *McDonaldization 6*].

<sup>10</sup> Ritzer, *Weberian Theory*, *supra* note 5, at 50.

<sup>11</sup> Ritzer, *McDonaldization 6*, *supra* note 9, at 15.

<sup>12</sup> Ritzer, *McDonaldization 6*, *supra* note 9, at 15-16.

<sup>13</sup> Ritzer, *Weberian Theory*, *supra* note 5, at 47.

<sup>14</sup> Ritzer, *McDonaldization 6*, *supra* note 9, at 14.

<sup>15</sup> Ritzer, *McDonaldization 6*, *supra* note 9, at 14. The food chain also benefited as a drive-thru saves it time, energy, and space from not having to handle those customers

McDonald's accelerated "experience" itself is commodified.

Both predictability and efficiency interrelate smartly with the fast food model of mass consumption. The dimension of calculability means that quantity is exalted over quality, though in some sense quality is presumed by mass quantities.<sup>16</sup> As a prime example, for many years McDonald's restaurants would boldly advertise on large signs posted outside the legion of customers served.<sup>17</sup> The company clearly invoked quantification as a value in this, with the numbers over time rising from the thousands, to millions, and eventually to billions (e.g., "over 99 billion sold"). Calculability matters, as well, to employee performance metrics. Because products and services are expected to be predictable and efficiently delivered, workers are discouraged from creativity and judged primarily on quantitative measures.<sup>18</sup>

The fourth element to the McDonaldization model is control. The goal of the fast food model is to process numerous customers quickly. The model's main method for achieving this goal is to precisely control people, processes, and goods.<sup>19</sup> The idea is to compel everyone to follow the same precise rules and procedures. But in McDonaldization, humans, with all their faults and creative impulses which may impede predictability, efficiency, and calculability, become expendable.<sup>20</sup> Eventually, the preferred way of wresting control is to remove people from the production equation by using non-human devices and technologies.<sup>21</sup>

These four dimensions may appear simply to comprise basic building blocks of automation. Still, they also provide a philosophical perspective for conceptualizing a theoretically rational system in contemporary Westernized culture.<sup>22</sup> The academic who envisioned the McDonaldization of society concept, George Ritzer, borrowed here from Max Weber's theory of rationality. Weber had expressed the idea that modern Western society was prone to rationalization through domination by bureaucratic processes.<sup>23</sup> Importantly, both Weber and Ritzer recognized significant flaws with modern rational structures. Weber called it the iron cage of

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indoors. *Id.* at 16.

<sup>16</sup> Ritzer, *Weberian Theory*, *supra* note 5, at 49.

<sup>17</sup> *McDonald's*, LOGOPEDIA, <http://logos.wikia.com/wiki/McDonald's> (last visited July 30, 2013).

<sup>18</sup> Ritzer, *McDonaldization 6*, *supra* note 9, at 15.

<sup>19</sup> *Id.* at 16.

<sup>20</sup> *Id.* at 118.

<sup>21</sup> Ritzer, *Weberian Theory*, *supra* note 5, at 52.

<sup>22</sup> George Ritzer, *Introduction*, in *MCDONALDIZATION: THE READER* 4, 18 (George Ritzer ed., 2010).

<sup>23</sup> Ritzer, *McDonaldization 6*, *supra* note 9, at 24-25.

rationality, while Ritzer termed it the irrationality of rationality.<sup>24</sup> For our purposes here, consider them analogous doctrines. This represents the fifth dimension of McDonaldization, though it is a consequence of and in opposition to the first four.<sup>25</sup> At its core, the doctrine involves a realization that “rational systems inevitably spawn a series of irrationalities that serve to limit, ultimately compromise, and perhaps even defeat, their rationality.”<sup>26</sup> In simple terms, otherwise rational systems become unreasonable.<sup>27</sup> The same core principles that represent positive attributes of bureaucratization in the McDonaldization model—predictability, efficiency, calculability, and control—are also oppressive. “[T]hey serve to deny the basic humanity, the human reason, of the people who work within or are served by them. Rational systems are dehumanizing systems. Although in other contexts rationality and reason are often used interchangeably, here they are employed to mean antithetical phenomena.”<sup>28</sup> In other words, the model is paradoxical in that its benefits beget undesired outcomes.

Ritzer first applied this theory to the McDonald’s brand as representative of a globalized and well-recognized fast food model of consumerism. The McDonald’s chain was merely a signifier, or—again to borrow from Max Weber, an ideal type—of institutionalization and bureaucratization in modern society. Ritzer observed that similar processes of formal rationality were represented in a host of other modern businesses, such as furniture sales, oil changes, tax preparation, and weight loss centers with exemplary companies such as Ikea, Jiffy Lube, H&R Block, and Nutrisystem, respectively.<sup>29</sup> Much of what McDonaldization has to offer for academic studies is appealing in realms outside of consumerism, including the law. Researchers have applied the concepts to legal institutions such as the British police service<sup>30</sup> and to procedural mechanisms in the law such as plea bargaining,<sup>31</sup> probation services,<sup>32</sup> and asylum hearings.<sup>33</sup> The

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<sup>24</sup> *Id.* at 16-17.

<sup>25</sup> George Ritzer, *Introduction*, in *MCDONALDIZATION: THE READER* 4, 18 (George Ritzer ed., 2010).

<sup>26</sup> Ritzer, *Weberian Theory*, *supra* note 5, at 55.

<sup>27</sup> *Id.* at 55.

<sup>28</sup> *Id.* at 56.

<sup>29</sup> *Id.* at 47.

<sup>30</sup> Richard Heslop, *The British Police Service: Professionalisation or ‘McDonaldization’?*, 13 *INT’L J. POLICE SCI. & MGMT.* 312 (2011) (suggesting McPolicing).

<sup>31</sup> Deirdre M. Bowen, *Calling your Bluff: How Prosecutors and Defense Attorneys Adapt Plea Bargaining Strategies to Increased Formalization*, 26 *JUST. Q.* 2, 5 (2009).

<sup>32</sup> Mark Oldfield, *Talking Quality, Meaning McDonalds, the Market and the Probation Service*, 41 *PROBATION J.* 186, 187 (1994).

<sup>33</sup> Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line*

McDonaldization concept has also been useful in studying legal policies, such as drug policy<sup>34</sup> and the new penology of three-strikes laws.<sup>35</sup> In sum, the ideology underlying McDonaldization has proven constructive as an alternative theoretical approach to critical analysis of a variety of social and legal bureaucracies, processes, policies, and laws. It offers an appealing perspective for a system of standardized and routinized outcomes in the law, hence explaining the study of the McDonaldization of federal sentencing that follows. The next section addresses the question whether McSentencing is an appropriate nickname for the federal sentencing system today.

### III. THE MCSENTENCING OF FEDERAL PUNISHMENTS

The federal system of punishment traditionally represented an indeterminate system in which federal judges were the principal agents of social control with broad discretion to determine sentences in individual cases.<sup>36</sup> Federal judges were, as a general rule, merely constrained by statutory maximum penalties. A collateral authority was introduced in 1910 when an independent parole agency was first introduced in the federal system.<sup>37</sup> While judges still maintained dominion over the type and length of the sentence issued, parole officials controlled if and when prisoners would be released early (subject to certain legislative restrictions).<sup>38</sup>

The indeterminate system was justified at the time considering the correctional philosophy for the federal prison system then relied upon rehabilitation.<sup>39</sup> A rehabilitative model befittingly necessitates an assessment of the individual offender, his experiences, capabilities, and

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*Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L. J. 259 (2008); see also Mark Umbreit, *Avoiding the Marginalization and McDonaldization of Victim Offender Mediation: A Case Study in Moving Toward the Mainstream*, in RESTORATIVE JUVENILE JUSTICE 213 (Gordon Bazemore & Lode Walgrave eds., 1999) (applying McDonaldization to victim-offender mediation).

<sup>34</sup> Uwe E. Kemmesies, *What do Hamburgers and Drug Care Have in Common: Some Unorthodox Remarks on the McDonaldization and Rationality of Drug Care*, 33 J. DRUG ISSUES 689, 694 (2002).

<sup>35</sup> David Shichor, *Three Strikes as a Public Policy: The Convergence of the New Penology and the McDonaldization of Punishment*, 43 CRIME & DELINQ. 470, 476 (1997).

<sup>36</sup> Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

<sup>37</sup> Act of June 25, 1910, ch. 387, 2, 36 Stat. 819, 819.

<sup>38</sup> Stith & Koh, *supra* note 36, at 226.

<sup>39</sup> Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS L.J. 299, 304 (2000) (“the system assumed that judges, expert in law and the social sciences and seasoned by the experience of sentencing defendants, would choose penalties that maximized the rehabilitative chances of offenders”); Stith & Koh, *supra* note 36, at 227.

recidivism risk.<sup>40</sup> By the 1970s, however, critics were crying foul. Complainants alleged that the indeterminate structure led to unappealing results, such as too lenient sentences for certain offenses, disparities in sentences among similarly-situated offenders, discrimination against minority defendants, and uncertainty in parole decisions.<sup>41</sup> One of the primary instigators of reform condemned the federal system as constituting lawlessness in sentencing.<sup>42</sup> These complaints eventually resonated with Congressmen, and legislative sentencing reforms were born. Three types of reform legislation passed. Congress heavily delved into the practice of assigning mandatory minimum sentences to certain offenses.<sup>43</sup> The more dramatic reform specified a mandatory system of guidelines that were meant to systematize sentencing outcomes principally by restraining judicial discretion. Qualifying as a cardinal piece of legislation and aptly titled, the Sentencing Reform Act of 1984 created a guidelines system to be engineered under the auspices of a newly created United States Sentencing Commission (the “Commission” or “Sentencing Commission”).<sup>44</sup> At the same time, Congress passed a truth-in-sentencing statute to prospectively abolish parole.<sup>45</sup> In effect, while the correctional model of rehabilitation as a principal purpose of sentencing has never been entirely abdicated (at least officially) in the federal system, the mood of Congress and the country to discount the rehabilitative model took hold. The transition has been described as a seismic shift away from individualized justice toward aggregated sentencing.<sup>46</sup>

Despite the guidelines initially being essentially mandatory, the United States Supreme Court rendered them advisory in nature in the seminal case of *United States v. Booker* in 2005.<sup>47</sup> The Court ruled in *Booker* that the federal determinative sentencing system operated in an unconstitutional manner. The mandatory guidelines system violated defendants’ Sixth Amendment rights to a jury trial by requiring judges, rather than juries, to make determinations of fact that would enhance the possible punishment for

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<sup>40</sup> Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 LAW & CONTEMP. PROB. 161, 165 (2013).

<sup>41</sup> Stith & Koh, *supra* note 36, at 227.

<sup>42</sup> MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1972).

<sup>43</sup> Stith & Koh, *supra* note 36, at 259.

<sup>44</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-300, 98 Stat. 1837, 1987-2040.

<sup>45</sup> 18 U.S.C. § 3624.

<sup>46</sup> Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991).

<sup>47</sup> 543 U.S. 220, 245 (2005).



defendants' crimes.<sup>48</sup> For example, the guidelines increased the potential sentence if the judge determined that the defendant committed the offense with a hate crime motive.<sup>49</sup> Bestowing advisory status was the Supreme Court's remedial fix for the constitutional violation.<sup>50</sup> Yet the *Booker* fix did not return to the judiciary the ample flexibility that existed pre-guidelines. In a series of cases since then, the Supreme Court has reaffirmed that federal judges in deciding fair sentences are significantly circumscribed by the Commission's guidelines and policies, albeit guided by certain other statutory sentencing factors.<sup>51</sup> These factors include the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed considering the seriousness of the offense, retribution, deterrence, and protecting the public; the range set by the sentencing guidelines and Commission policy statements; and the need to avoid unwarranted sentencing disparities among similarly-situated offenders.<sup>52</sup> The Court has reiterated, therefore, that because of the Sixth Amendment issue, the guidelines remain important; they just do not constitute the only factor in considering just punishment.<sup>53</sup>

Based on *Booker* and its progeny, the current process of selecting a particular punishment generally involves a series of steps. The first few involve the calculation of what the guidelines refer to as levels, which are essentially points. Higher levels correspond to longer sentences. The sentencing judge starts with the base offense level from the applicable offense guideline.<sup>54</sup> She then makes appropriate adjustments provided by relevant guidelines to reach a final offense level. These adjustments generally constitute facts related to the offense (which are called specific offense characteristics), the victim, or the offender that the Commission perceives as aggravating or mitigating culpability.<sup>55</sup> The total number of levels, together with a criminal history score, is translated through a solitary guidelines grid into a sentencing range (such as 24-30 months). This constitutes the recommended range. Still, the guidelines provide justifiable reasons to depart from the recommendation. The judge is to consider if any of the general departure standards apply, such as substantial assistance to

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<sup>48</sup> *Id.*

<sup>49</sup> U.S. SENTENCING GUIDELINES MANUAL § 3K1.1 (2012).

<sup>50</sup> 543 U.S. at 268.

<sup>51</sup> *Peugh v. United States*, 186 L. Ed. 2d 84, 95 (2013).

<sup>52</sup> 18 U.S.C. § 3553(a).

<sup>53</sup> *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

<sup>54</sup> *Gall v. United States*, 552 U.S. 38, 49 (2007).

<sup>55</sup> Specific offense characteristics for the child pornography guideline, for example, include the number of images possessed, the nature of the content of the images, the young age of the children depicted, and distribution activity. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2012).

authorities<sup>56</sup> or diminished capacity,<sup>57</sup> for which the judge may deviate from the recommended range, upward or downward, respectively. Thus, the guidelines provide a definitive framework for any sentencing decision.<sup>58</sup> Still, the *Booker* decision permits sentencing judges to vary from the guidelines recommendations, subject to statutory minimum and maximums, after considering the statutory sentencing factors mentioned earlier.

This Article envisions that the federal criminal justice model as framed by the reform legislation is akin to McSentencing. This title entails mass sentencing on a scale that aggrandizes mass sentencing procedures while downgrading the values of individuality, creativity, and even humanization. To justify this moniker, it is necessary to discuss each of the four tenets of McDonaldization and apply them to federal sentencing reforms.

### A. Predictability

The federal sentencing reforms were manifestly architected to promote the predictability of punishments.<sup>59</sup> As a general rule, determinate sentencing is certainly an inherently more prophetic type of sentencing structure.<sup>60</sup> Mandatory minimums, for instance, represent a predictable component of federal sentencing reforms, at least with respect to dictating sentencing floors for offenders. Congress has conspicuously embraced the practice of mandatory minimum laws since the 1980s; a recent count of mandatory minimum penalty provisions in federal criminal law totaled almost 200.<sup>61</sup> The Commission generally has built considerations of mandatory minimums into the sentencing guidelines, thereby magnifying the combination in terms of achieving standardization and increasing the expected severity of sentences, which it argues is consistent with Congressional intent in enacting requisite minimums.<sup>62</sup>

The reform's truth-in-sentencing measure to abrogate parole works on another aspect of prediction: the certainty of the length of the sentence

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<sup>56</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2012).

<sup>57</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2012).

<sup>58</sup> Gall, 552 U.S. at 49.

<sup>59</sup> 28 U.S.C. § 994(f) (commanding Commission to formulate guidelines that promote certainty in sentencing).

<sup>60</sup> Robert M. Bohm, "*McJustice*": *On the McDonaldization of Criminal Justice*, 23 JUST. Q. 127, 137 (2006).

<sup>61</sup> U.S. SENT'G COMM'N, REPORT ON MANDATORY MINIMUM PENALTIES IN FEDERAL SENTENCING App. A (2011), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm) [hereinafter *Mandatory Minimum Report*].

<sup>62</sup> Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1616 (2012). The institution reports that its general, though not universal, method of incorporation is to set guidelines ranges "slightly above" applicable mandatory minimums. *Mandatory Minimum Report*, *supra* note 61, at 53.

actually served. Before the guidelines, prisoners customarily served between forty to seventy percent of their prison sentences before being paroled.<sup>63</sup> The variability—*i.e.*, the unpredictability—of how long the offender could be expected to be imprisoned was due to the dynamic aspect of assessments of recidivism risk and the subjectivity of individual parole decisions.<sup>64</sup> After statutory reforms, a federal defendant must generally serve the length of the prison sentence issued less a maximum fifteen percent reduction for good time.<sup>65</sup> Hence, the time actually served is far more objectively derived and foreseeable post-reform from the perspective of those within the criminal justice system (Congress, judges, prosecutors, defense counsel, prison officials, and defendants themselves), as well as to external factions (victims and the public in general).

Despite *Booker*, the guidelines, and the predictability they envision, remain the ballast of sentencing decisions. As the Supreme Court recently postulated, the federal sentencing guidelines constitute “a system under which a set of inputs specific to a given case (the particular characteristics of the offense and offender) yield[s] a predetermined output (a range of months within which the defendant could be sentenced).”<sup>66</sup> The guidelines, therefore, provide an estimable anchor for sentencing decisions.<sup>67</sup> The Supreme Court continues to underscore this point, variously referring to the guidelines as the starting point and initial benchmark,<sup>68</sup> remaining a meaningful benchmark through appellate review, and, in an eccentric gesture, recently characterized the guidelines as the “lodestone” of federal sentencing.<sup>69</sup>

Predictability in McDonaldization also signals uniformity. A main purpose of the guidelines system is uniformity, which, as posited by Congress and the Commission is in direct contrast to both disparity and judiciary discretion.<sup>70</sup> Thus, with the reforms, reducing judicial discretion is

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<sup>63</sup> Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 FED. SENT'G REP. 12, 13 (1999).

<sup>64</sup> Peter B. Hoffman & Patricia L. Hardyman, *Crime Seriousness Scales: Public Perception and Feedback to Criminal Justice Policymakers*, 14 J. CRIM. JUST. 413, 414 (1986) (indicating parole decisions were based on a grid with inputs representing expected length of sentence served considering the severity of the offense and recidivism risk, which could be disregarded for “good cause”).

<sup>65</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2012).

<sup>66</sup> Peugh, 133 S. Ct. at 2079.

<sup>67</sup> Peugh, 133 S. Ct. at 2083.

<sup>68</sup> Gall 552 U.S. at 49.

<sup>69</sup> Peugh, 133 S. Ct. at 2084. A lodestone represents a “magnetite possessing polarity” or, more simply, “something that strongly attracts.” WEBSTER’S NEW COLLEGIATE DICTIONARY 670 (1981).

<sup>70</sup> 28 U.S.C. § 991(b)(1)(B) (“The purposes of the United States Sentencing Commission are to . . . provide certainty and fairness in meeting the purposes of

the primary means to achieve the expected ends—*i.e.*, uniformity and proportionality in sentencing practices.<sup>71</sup>

Foreseeability is likewise applicable to the expectations of customers. This term (customers) is used very loosely here in *McSentencing* to encompass the individual defendants themselves as the most direct recipients of sentencing outputs.<sup>72</sup> Importantly, this tenet nicely invokes the values of deterrence theory. Deterrence is a major penological policy that promotes a punishment sufficient to deter a rational individual from committing the crime. Before committing an offense, the guidelines on their face provide individuals the ability to calculate their likely punishments. Plus the truth-in-sentencing law provides more certainty in the expectation that they will be required to serve virtually all of it. From a pure rational thinking perspective, the guidelines theoretically operate as a deterrent at least to the extent the recommended punishment actually is adequate to inhibit the potential offender from undertaking the offending behavior. Thus, the foreseeability of the constricted sentencing range and certainty of serving much of it seem to suitably fit deterrence theory.<sup>73</sup>

Another relevant characteristic of predictability presented by the reforms collectively is the expected impact on the federal prison population. Prisons require fixed infrastructures, sufficient bed spaces, proportional numbers of trained staff, and commensurate other resources to effectively

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sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices[.]”); Mark Osler, *The Promise of Trailing-Edge Sentencing Guidelines To Resolve the Conflict Between Uniformity and Judicial Discretion*, 14 N.C.J.L. & TECH. 203, 205 (2012).

<sup>71</sup> Osler, *supra* note 70, at 205.

<sup>72</sup> Wes R. Porter, *The Pendulum in Federal Sentencing can also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post-Booker*, 37 WM. MITCHELL L. REV. 469, 482 (2011).

<sup>73</sup> While the guidelines in operation are consistent with the goal of deterrence, it must be mentioned here that this is merely a theoretical exercise. Experience has proven that it is impractical for fledgling deviants to navigate the complex guidelines in order to correctly derive potential punishments. Alschuler, *supra* note 46, at 915 (“No one expects potential offenders to study the grid.”). Moreover, there is scant evidence that the vast majority of offenders actually engage in the rational thinking process that deterrence theory inherently assumes, which is to engage in a pre-conduct cognitive exercise of weighing potential costs and benefits of engaging in crime. Willem De Haan & Jaco Vos, *A Crying Shame*, 7 THEORETICAL CRIMINOLOGY 29, 50-51 (2003). Further, to the extent that many believe that the guidelines are actually based on a retributive philosophy—despite the Commission having never clearly enunciated which sentencing policy drives the guidelines generally—then deterrence is irrelevant. Retribution as a theory is uninterested in such utilitarian concerns.

punish, protect the public, and fulfill prisoners' basic human needs. Imprisonment is an enormously costly exercise and a notable burden on government coffers. Thus, criminal justice officials are often cognizant of capacity issues when crafting their sentencing policies.<sup>74</sup> It was not surprising, then, that Congress contemplated that the Commission should consider repercussions to federal prisons when promulgating guidelines and policies. The legislature directed the Commission to "minimize the likelihood" that the federal prison population would exceed capacity.<sup>75</sup> Presumably, the standardization the guidelines provide and the Commission's ongoing study of sentencing practices and prison capacity issues permits the agency to make appropriate modifications to fulfill this mandate.<sup>76</sup>

### B. Calculability

The premise of calculability is about the value of quantification.<sup>77</sup> The guidelines certainly qualify as they are inherently number-laden. The end result of guidelines calculations in any case is a numeric range, which is tightly ascribed with a legislative limitation that the top and bottom of any guideline range not exceed a twenty-five percent differential.<sup>78</sup> The output—*i.e.*, the range—is obtained from a single numerical grid. The description that follows replicates the summary series of steps in determining a sentence that was previously mentioned, yet here it fleshes out these steps to better emphasize the aspect of calculability in McSentencing.

The horizontal axis of the grid addresses criminal history. The criminal history score itself is computed through an aggregation of points assigned to the defendant's prior sentencing experiences.<sup>79</sup> The guidelines assign one of six ordinal categories to exemplify the defendant's criminal history score.<sup>80</sup> The vertical axis of the sentencing grid represents the final offense level. It is a number between one and forty-three that is a terminal count from a series of sub-calculations. The maximum of forty-three is a residual category inclusive of totals of forty-three and above. The grid, therefore, has 258 cells.<sup>81</sup> The aim of the machinations that are described next is to

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<sup>74</sup> Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 700 (1995).

<sup>75</sup> 28 U.S.C. § 994(g).

<sup>76</sup> *But see infra* Section IV.C.1. (contending the Commission generally declines to alter the guidelines to manage prison growth).

<sup>77</sup> Ritzer, *Weberian Theory*, *supra* note 5, at 49.

<sup>78</sup> 28 U.S.C. § 994(b)(2).

<sup>79</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 4 (2012).

<sup>80</sup> *Id.*

<sup>81</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2012).

ascertain which cell, and thereby the tight numeric range within that cell, controls the case at hand.

Placement of the defendant on the vertical axis requires an initial decision on which offense guideline to apply,<sup>82</sup> such as the one for robbery, drug trafficking, or money laundering. This in itself can often be a challenging exercise because in many cases various offense guidelines appear relevant, particularly if there were multiple counts of conviction. The general rule is that the highest offense level prevails, although the fact that other guidelines are relevant may, pursuant to the guideline manual, result in a longer recommended sentence.<sup>83</sup> In any event, each offense guideline specifies an initial base offense level with which to begin. Theoretically, at least, the spread permits a ranking of severity of crimes such that murder, for instance, should likely be assigned a higher number than a minor assault.

Significantly, the base offense level is merely the starting point. Not every crime is alike in terms of intentionality, cruelty, and harm. As the Supreme Court has posited, “every element of every statute can be imaginatively transformed [] so that every crime is seen as containing an infinite number of sub-crimes corresponding to ‘all the possible ways an individual can commit’ it.”<sup>84</sup> The Court further fancifully illustrates the importance of context, drawing on the popular board game Clue: “Think: Professor Plum, in the ballroom, with the candlestick?; Colonel Mustard, in the conservatory, with the rope, on a snowy day, to cover up his affair with Mrs. Peacock?”<sup>85</sup> Hence, the vast majority of offense guidelines provide for additional levels to be added to, or on fewer occasions subtracted from, the base offense number for facts or circumstances that are believed to be aggravating or mitigating, respectively. These are called specific offense characteristics.

Once the base offense level plus the specific offense characteristics are summed, the court next considers other arithmetic adjustments, whether upward or downward, that are generic to the offense involved. These are additional facts or circumstances relative to the crime committed, victims, or the offender that are considered to impact culpability measures. Examples include using a minor to commit a crime<sup>86</sup> and preying on an especially vulnerable victim as upward modifications,<sup>87</sup> while acceptance of

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<sup>82</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2012).

<sup>83</sup> U.S. SENTENCING GUIDELINES MANUAL § 3D1.3 (2012).

<sup>84</sup> *Descamps v. United States*, 133 S. Ct. 2276, 2290-91 (2013) (citing *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 927 (2011)).

<sup>85</sup> *Descamps v. United States*, 133 S. Ct. 2276, 2291 (2013).

<sup>86</sup> U.S. SENTENCING GUIDELINES MANUAL § 3B1.4 (2012).

<sup>87</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (2012).

responsibility triggers a reduction.<sup>88</sup> In the end, a final offense level is calculated. The court then finds the sentencing range by locating the relevant cell in the sentencing grid by matching the defendant's criminal history score on the horizontal axis with the final offense level on the vertical axis. The result is a range of months within which the guidelines provide the actual sentence should be situated. The court next considers whether guidelines departure standards are applicable or whether the statutory sentencing factors are convincing enough to vary from the range so provided.

Noticeably, the Commission specifically developed the guidelines themselves to permit a plethora of things to be counted. Since the levels are essentially points, these calculations represent minute quantifications of harm. Perhaps a simple example will help explain the system. Suggest that Zigfried is convicted of robbery. The case facts indicate Zigfried, while in possession of a knife, threatened the victim and stole from him cash amounting to \$11,000. Upon arrest, Zigfried expresses remorse and quickly pleads guilty. Zigfried is now to be sentenced. The most applicable guideline is for robbery, and it is designated § 2B3.1. The base offense level is 20. Of the seven types of specific offense characteristics within that guideline, two are germane. The use of the knife likely qualifies for a 3 level enhancement for possessing a weapon during the offense and the amount of loss situated between \$10,000 and \$50,000 earns a one level increase. The sum is now 24. The court would likely adjust the total based on a guideline that permits a two level decrease for the acceptance of responsibility. Assume no other guideline adjustment or departure provision applies. The final offense level is 22. Zigfried's criminal history score, determined through another series of calculations is in the third ordinal category. The sentencing grid yields a range of 51-63 months. In the end, this type of incremental quantification of harm is akin to actuarial sentencing. And if reformers are believed, these quantities are preferable over the quality of judicial reasoning.

The federal sentencing scheme is calculable in several other important ways. Mandatory minimums are easily quantified, at least in terms of lower thresholds of punishment. The truth-in-sentencing aspect of the parole abolition reform rendered more assessable the duration of the sentence prisoners would serve. Finally, the tenet of calculability is fulfilled in the Commission's perennial production of sentencing statistics to represent actual sentencing practices. These measures offer the Commission's activities a guise of empiricism. Every year, the Commission produces a Sourcebook of Federal Sentencing Statistics in which it calibrates a host of

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<sup>88</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2012).

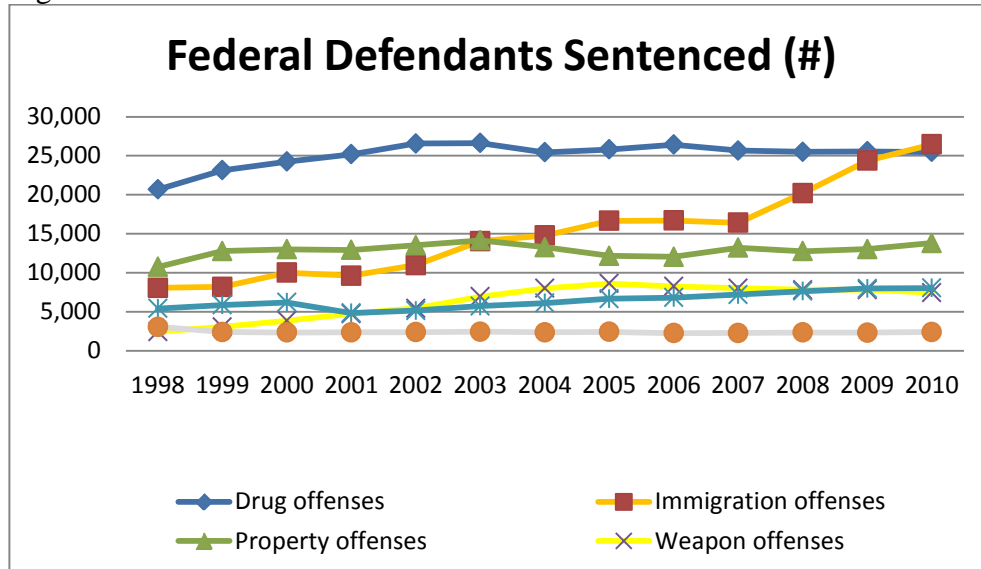
sentencing measures for the prior fiscal year. The sourcebooks, for example, contain mean and median sentences for all offenses and then in finer increments such as general categories of crimes and then specific offense guidelines. The sourcebooks parse numbers regarding the application of specific offense characteristics, departures, and reported reasons for sentences issued. With an eye toward Congress' sensibilities, the sourcebooks provide overall statistical measures on judicial compliance with guidelines as a whole, as well as appraised by district and offense, which can be taken as indicators of disparity (or uniformity) in sentencing practices. The sourcebooks offer empirical data on demographic characteristics of offenders, as well, and plot those against the foregoing measures.

The Commission has even outsourced calculability in the sense of permitting external parties to run data analyses by making certain datafiles available in a form that is functional with standard statistical software.<sup>89</sup> In addition, other federal government sites helpfully offer datasets for external researchers. This study utilizes some of these compilations of data in its analysis in various places herein to support certain assertions. The first is to emphasize the mass sentencing theory. The following is a visual to represent the sheer numbers of defendants sentenced in recent years, categorized by type of offense (excluding a residual group of unknown offense) (see Figure 1).

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<sup>89</sup> I used either Excel or SPSS, depending on the sophistication of the data analysis.



Figure 1<sup>90</sup>

As the foregoing suggests, all of this data-crunching is similar to McDonald's tracking over time the various food items purchased, costs, customer demographics, and, in the end, profitability. As a more specific analogy, recall McDonald's practice of highlighting the numbers served. In McSentencing, this is similar to the numbers of defendants sentenced in the scheme of mass sentencing. Figure 1 is used here as an exemplar for quantifying numbers of defendants served. It shows that numbers increased since 1998 in every category of crime shown except violent offenses, with immigration crimes particularly experiencing inflated numbers. Overall, the number of defendants sentenced during the period represented increased from 50,764 in 1998 to 83,946 in 2010.

In sum (so to speak), the calculability portion of McSentencing is represented through numerous counts, which are in essence additive quantifications of discrete harms. As in McDonaldization, the drive toward objective quantifications overshadows human subjectivities. While sentencing judges must articulate reasons for their final sentences, they do so only after exercises of completing Commission-issued worksheets containing numerous pages of numeric data processing. According to the reforms, federal punishment at its foundation is sentencing by numbers.

<sup>90</sup> Data compiled from U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Criminal Case Processing Statistics, Offenders Sentenced: Trends, <http://www.bjs.gov/fjsrc/> (last visited June 26, 2013).

*C. Efficiency*

The federal sentencing reforms conceivably offer efficient means to their expected ends. In McSentencing, the ends comprise terminal sentencing outcomes. The guidelines calculations just mentioned are designed, in part, to streamline the process of federal sentencing.<sup>91</sup> In the previous indeterminate system, the sentencing judge had no real orienting guideposts, other than vague philosophical notions of deterrence, retribution, and rehabilitation. The guidelines sort of automate the process of determining punishments. They provide the starting point, and through a sequential series of specific calculations, offer end results. As with McDonald's corporate headquarters, the Commission maintains detailed training and operations manuals containing usually explicit instructions to guide and structure sentence calculations, with the purpose of achieving practiced and uniform results.<sup>92</sup>

Still, sentencing reforms have yielded efficiencies beyond just the routinized exercise of quantifying harms. Actually, the whole system is a sort of assembly-line justice requiring different players to fulfill their assignments.<sup>93</sup> Investigators basically are the initial instigators by referring individuals suspected of crime to United States attorneys. Prosecutors generally pursue plea negotiations, potentially also including direct sentencing negotiations, or brings cases to trial. Upon conviction, whether by plea or trial, cases are handled by federal probation officers, who conduct presentence investigations and then execute initial guidelines calculations. Probation officers eventually present the reports and provide sentencing recommendations to the assigned district judges. The resulting commodities in this assembly-line are final sentences. At the end of this process, sentencing hearings in front of district courts may simply be ceremonial proceedings,<sup>94</sup> particularly if the judge accepts a plea deal or the parties have few issues with the probation officer's report. This has the added efficiency of not burdening the court's docket. Nevertheless, this represents a sort of mechanized system of justice<sup>95</sup> in which each actor

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<sup>91</sup> Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 44 (2005).

<sup>92</sup> See generally U.S. SENT'G COMM'N, <http://www.ussc.gov/> (last visited July 23, 2013).

<sup>93</sup> Matthew R. Robinson, *McDonaldization of America's Courts, Police, and Corrections*, in MCDONALDIZATION: THE READER 85, 87 (George P. Ritzer ed., 2006).

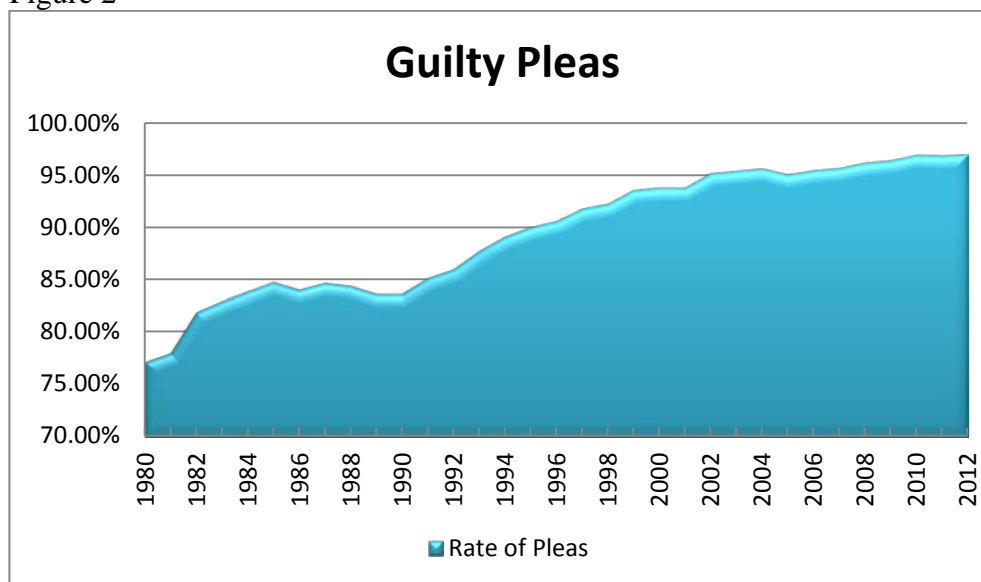
<sup>94</sup> Porter, *supra* note 72, at 487; Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992) (lamenting judges focus on checking the probation officer's math rather than studying presentence reports).

<sup>95</sup> FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *THE SCALE OF IMPRISONMENT* 161 (1991) (referring to grid-type sentencing guidelines as providing a "mechanical approach")

completes specific tasks and passes the results along to the next worker, though there are obvious overlapping responsibilities.

The guidelines system recognizes this assembly-line of justice and expressly exploits it to accelerate criminal adjudication. In the federal system, plea bargaining has become the focal point of efficiency. Undoubtedly, the system has become increasingly reliant upon avoiding the time and expense of formal trials by incentivizing informal plea arrangements.<sup>96</sup> Figure 2 shows that the rate of pleas has increased over time during the last few decades.

Figure 2<sup>97</sup>



The likelihood of a plea is now near perfect. In fiscal year 2012, ninety-seven percent of cases were resolved on pleas.<sup>98</sup> Notably, the progressively extreme rates of pleas are significantly promoted by the guidelines system. Four key provisions in the guidelines equip prosecutors with the tools to force, or encourage, depending on one's predilection, guilty pleas. Further, prosecutors and judges use these provisions to incent pleas even earlier in

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to determining punishment).

<sup>96</sup> Robert M. Bohm, "McJustice": *On the McDonaldization of Criminal Justice*, 23 JUST. Q. 127, 129 (2006).

<sup>97</sup> Data aggregated from U.S. Dep't of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics, Criminal Defendants Disposed in U.S. District Courts, by Type of Disposition, 1945-2010, [http://www.albany.edu/sourcebook/tost\\_5.html#5\\_w](http://www.albany.edu/sourcebook/tost_5.html#5_w); and U.S. SENT'G COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Fig. C (2013), [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm) [hereinafter 2012 Sourcebook].

<sup>98</sup> U.S. SENT'G COMM'N, 2012 ANNUAL REPORT 42 (2013).

the proceedings.

First, perhaps the most powerful carrot for attracting guilty pleas and speedy resolutions is the availability of the acceptance of responsibility reduction. Guideline section 3E1.1 permits a court to grant a reduction if the defendant “clearly demonstrates acceptance of responsibility for his crimes.”<sup>99</sup> The commentary provides some examples of what actions might suffice, such as truthfully admitting the conduct that comprised the offense and any relevant conduct, promptly surrendering, and entering a guilty plea before the commencement of trial.<sup>100</sup> Section notes signal a type of trial penalty: “This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial...,” though the commentary also indicates that conviction by trial is not an automatic bar to receiving the downward departure.<sup>101</sup> It is expressly acknowledged that this reward is designed to foster efficiency by allowing prosecutors to cease preparing for trial and direct their resources elsewhere.<sup>102</sup>

The assembly-line of justice strategically uses the acceptance of responsibility provision to expedite adjudication and to get to the end product—a sentence—in a punctual manner.<sup>103</sup> Importantly, the commentary specifically states that the timeliness of accepting responsibility is relevant to qualifying for the reduction.<sup>104</sup> Practitioners report that some judges encourage pleas earlier in the process by setting deadlines by which defendants must plead in order to be eligible for acceptance of responsibility benefits.<sup>105</sup> Defense counsel report, too, that prosecutors use the lure of acceptance of responsibility to encourage quicker pleas while simultaneously threatening to withhold them if defense counsel wishes to file any motions or challenge any guideline issue.<sup>106</sup> Thus, the provision operates in practice to streamline the adjudication process. The use of the acceptance of responsibility reduction is widespread. The

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<sup>99</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2012).

<sup>100</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n. 1(A), (D) & n. 3 (2012).

<sup>101</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n. 2 (2012). The commentary provides a defendant may still earn this credit despite not pleading if the defendant goes to trial for reasons other than denying factual guilt, such as to challenge the constitutionality of a statute or the applicability of the statute to his conduct. *Id.*

<sup>102</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2012).

<sup>103</sup> Jeffrey T. Ulmer et al., *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560, 582 (2010) (surveying federal judges and finding one-third reported acceptance of responsibility served organizational efficiency purposes).

<sup>104</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n. 1(H) (2012).

<sup>105</sup> Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 448-50 (2004).

<sup>106</sup> *Id.*

Commission reports that in fiscal 2012, ninety-five percent of defendants sentenced received an acceptance of responsibility reduction.<sup>107</sup> Using Commission datafiles and standard statistical software, a few other measures are relevant. A statistical crosstabulation using Commission data shows that in fiscal 2012, very close to one hundred percent of defendants who received any acceptance of responsibility reduction were those who pled, meaning that very few defendants who went to trial were granted it. And agreeing to plea almost guaranteed this reduction. Of those defendants who pled, ninety-eight percent received acceptance of responsibility bonuses.

The second guideline provision that operates as an incentive to advance the progression of cases is befittingly referred to officially as early disposition programs, or more colloquially, fast-track sentencing. On its face, Section 5K3.1 permits a downward variance in jurisdictions in which the district's United States Attorney has formally established such a program.<sup>108</sup> The express purpose of the deduction is to permit districts with large numbers of particular offenses to efficiently process them by rewarding defendants for speed.<sup>109</sup> While fast-track program policies vary, these programs typically ask defendants to waive indictment, discovery, and presentence reports; plead guilty at the initial appearance; and consent to immediate sentencing. In return, prosecutors agree to recommend downward departures or let defendants plead to lesser charges. Because these cases move much more quickly, prosecutors can process many more of them.<sup>110</sup>

The fast-track provision has evolved from the perspective of the Attorney General's office. In 2003, the then Attorney General issued a memorandum stating that fast-track programs should be "properly reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases."<sup>111</sup> At that time, fast-track programs for illegal entry were instituted in those southwestern jurisdictions that faced large

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<sup>107</sup> 2012 *Sourcebook*, *supra* note 97, at tbl. 19.

<sup>108</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2012) (requiring, too, approval by the Attorney General). Congress approved this type of departure in the PROTECT Act of 2003. Pub. L. No. 108-21, 117 Stat. 650 (2003).

<sup>109</sup> *United States v. Anaya-Aguirre*, 704 F.3d 514, 517 (7th Cir. 2013).

<sup>110</sup> Stephanos Bibas, *Federalism: Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 146 (2005).

<sup>111</sup> U.S. SENT'G COMM'N, DEPARTURE AND VARIANCE PRIMER 27 (2013), [http://www.ussc.gov/Education\\_and\\_Training/Guidelines\\_Educational\\_Materials/index.cfm](http://www.ussc.gov/Education_and_Training/Guidelines_Educational_Materials/index.cfm).

immigration caseloads.<sup>112</sup> However, this situation caused controversy because of the presence of an early disposition program for illegal entry in some districts but not others, meaning that similarly-situated offenders were differentially treated based on their sentencing districts.<sup>113</sup> As a result, in early 2012, the then current Deputy Attorney General officially authorized a fast-track program for all districts for illegal entry cases.<sup>114</sup> The Commission reports that in fiscal 2012, about eleven percent of all defendants sentenced received fast-track reductions, with the vast majority in cases of immigration offenses and drug trafficking.<sup>115</sup> A crosstabulation using Commission datafiles shows that, consistent with the provision's design, all of them involved guilty pleas.

Third, the substantial assistance guideline offers another option to enhance expediency. Under Section 5K1.1, upon the motion of the government, a court may grant a reduction when "the defendant has provided substantial assistance in the investigation and prosecution of another person who has committed an offense." This provision appears mainly to concern improving the government's productivity in terms of prosecuting others, but it also fosters efficiency concerns with respect to the assisting defendant. One of the factors listed to consider for granting the substantial assistance reduction is the timeliness of the defendant's assistance.<sup>116</sup> And prosecutors are known to threaten the loss of this reduction if, despite being of service, the defendant refuses to plea.<sup>117</sup> The substantial assistance benefit can be particularly alluring for defendants facing charges carrying mandatory minimums as it rather uniquely can serve, with Congress' official support, to vitiate statutory minimums.<sup>118</sup> Almost twelve percent of defendants sentenced in fiscal year 2012 received substantial assistance departures.<sup>119</sup> A crosstabulation showed that almost all substantial assistance awards were issued to defendants who pled.

The fourth guideline provision that promotes pleas works in the opposite direction than the prior three, but is still used in operation to accelerate adjudication. The obstruction of justice adjustment adds levels. Section 3C1.1 provides an enhancement if the defendant obstructed the

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<sup>112</sup> *United States v. Reyes-Hernandez*, 624 F.3d 405, 409 (7th Cir. 2010).

<sup>113</sup> U.S. SENT'G COMM'N, DEPARTURE AND VARIANCE PRIMER 27 (2013), [http://www.ussc.gov/Education\\_and\\_Training/Guidelines\\_Educational\\_Materials/index.cfm](http://www.ussc.gov/Education_and_Training/Guidelines_Educational_Materials/index.cfm).

<sup>114</sup> *Id.*

<sup>115</sup> *2012 Sourcebook*, *supra* note 97, at tbl. 30A.

<sup>116</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a)(5) (2012).

<sup>117</sup> *Ulmer et al.*, *supra* note 103, at 583.

<sup>118</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 cmt. n. 1 (2012) (citing 18 U.S.C. § 3553(3) and 28 U.S.C. § 994(n)).

<sup>119</sup> *2012 Sourcebook*, *supra* note 97, at tbl. 30.

administration of justice “with respect to the investigation, prosecution, or sentencing of the instant offense of conviction.” This adjustment is not used often, representing just two percent of cases in fiscal 2012.<sup>120</sup> Again running analyses on fiscal 2012 datafiles, results indicate that in those cases in which this enhancement was given, thirty-one percent were for defendants whose cases went to trial.

On a completely different front, though still belonging within the rubric of efficiencies, past criminal history can significantly increase punishment. In the context of penal policy, cliffs for repeat offenders are efficient in the sense of achieving the greatest incapacitation effect for the most dangerous criminals.<sup>121</sup> The maximum incapacitation effect is consistent with a goal of efficiency since as it provides an expedient and direct means for protecting the public.<sup>122</sup> Considered next is the final of the four main beneficial tenets of McDonaldization as applied to the McSentencing ideology.

#### D. Control

This aspect of McDonaldization is clearly represented by federal sentencing reforms. Mandatory minimums, statutory maximums, and presumptive guidelines are quintessential tools for dictating specific punishments for offenders. Definitive numbers are themselves dominating entities. Studies in social psychology show that recommended sentence lengths have a strong anchoring effect on judicial outcomes.<sup>123</sup> By now, it should be clear that the four tenets of McDonaldization serve each other. Predictive measures offered by guidelines, standardized guideline calculations, and efficient systems inducing quick pleas all serve as control functions, too.

The guidelines system itself, enacted expressly to reduce judicial discretion and to promote uniformity, is evidently designed to reduce the hundreds of district judges to relative automatons in the operation of federal sentencing.<sup>124</sup> The system is designed to render the judge merely the last worker in the sentencing assembly-line. Congress pushes for this result

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<sup>120</sup> 2012 Sourcebook, *supra* note 97, at tbl. 18.

<sup>121</sup> David Shichor, *Three Strikes as a Public Policy: The Convergence of the New Penology and the McDonaldization of Punishment*, 43 CRIME & DELINQ. 470, 476 (1997).

<sup>122</sup> In criminology, the term is “selective incapacitation”. *See generally* Stephen D. Gottfredson & Don M. Gottfredson, *Selective Incapacitation?*, 478 ANNALS AM. ACAD. POL. & SOC. SCI. 135 (1985).

<sup>123</sup> *See e.g.*, Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535 (2001).

<sup>124</sup> *But see* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 3, 42 (1991) (contending that the guidelines do not reduce judges to mere functionaries as judges normally have to follow rules and the guidelines still provide them some discretion considering their decisions cannot be overruled by the Commission itself).

through mandatory minimums and enacting a presumptive guideline system. Thus, Congress seeks to retain much control though also subjects the judiciary to follow the bidding of the Commission as Congress' designee. The Commission, variously responding to legislative fiat and on its own initiative, also strives to commandeer federal sentencing away from judicial discretion. The relationship is not too symbiotic. The agency has been described as hegemonic and dogmatically prone to issuing diktats with little explanation.<sup>125</sup> The institution acts as sort of an agency manager, continuously vying to corral federal judges into strict adherence to its rules and procedures manual—*i.e.*, the guidelines.<sup>126</sup>

The Commission seeks to manage through quite detailed rules. Each primary guideline contains commentary and notes, some rather lengthy. The Commission appears to try to address every minute circumstance for each type of offender and each crime. To achieve control and gain adherence, the Commission publishes countless publications and offers compliance trainings throughout the country multiple times a year.<sup>127</sup> Not only does the Commission attempt to dictate what federal judges must do in the sentencing process, it also instructs them as to what they shall not do. For instance, the Commission has asserted that in sentencing decisions judges cannot consider sex, religion, and socio-economic status.<sup>128</sup> In other words, the Commission pontificates upon which considerations constitute extralegal factors that are not appropriate in assessment of punishment for criminal activity.

Thus far it has hopefully been established the relevance and salience of the four core tenets of McDonaldization in conceptualizing the federal sentencing scheme per the legislative reforms. On their face, the existence of them is often perceived as advantageous to a system or process. To more fully justify the sobriquet of McSentencing, the accompanying paradox of the fulfillment of the McDonaldized form of scientific management must be supported. The fifth tenet of McDonaldization is the aftermath, which Ritzer called the irrationality of rationality. In other words, despite the combination of predictability, efficiency, calculability and control representing patterns of rational thought, this philosophy holds that unreasonable consequences are inevitable. Ritzer has left the irrationality of rationality dimension a rather broad and unmoored concept for a rigorous

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<sup>125</sup> KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 95, 99 (1998).

<sup>126</sup> See generally U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING pt. A (2012), [www.usc.gov](http://www.usc.gov) [hereinafter *Booker Report*].

<sup>127</sup> See generally U.S. SENT'G COMM'N, <http://www.usc.gov/> (last visited July 23, 2013).

<sup>128</sup> U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2012).



academic study. Yet its ethos is analogous to another ideology—one developed by Robert Merton—and generally known as the law of unintended consequences.<sup>129</sup> Notably, Merton outlined specific standards that permit a better frame of reference for an analysis of the detrimental flaws resulting from whatever formal rational system or policy the researcher is studying. The following Section of this Article, therefore, explores the irrationality of rationality in the form of the law of unintended consequences and applies it to federal sentencing and the ramifications of reform.

#### IV. FEDERAL SENTENCING AND THE LAW OF UNINTENDED CONSEQUENCES

Sentencing reformers presumably had good intentions if we generally consider the ideals of uniformity and proportionality. Nonetheless, federal sentencing law has been unstable ever since the reform legislation.<sup>130</sup> As the Attorney General's office recently recognized,

for many years, the federal sentencing system has been a target of criticism for Members of Congress, judges, academics, and practitioners. These criticisms range from concerns about statutory mandatory minimum penalties and undue leniency or severity for certain offenses to unwarranted racial and ethnic disparities in sentencing decisions and the scope of conduct considered at sentencing.<sup>131</sup>

Today, the federal sentencing system is in crisis.<sup>132</sup> Compliance rates have plunged, particularly following *Booker*. For fiscal 2012, half of sentences were within guidelines ranges.<sup>133</sup> Plus there is substantive evidence that

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<sup>129</sup> Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (1936) [hereinafter *Unanticipated Consequences*]. Merton later described the law of unintended consequences as similar to the Thomas Theorem, which is the thesis from another prior, eminent sociology W.I. Thomas, that “If men define situations as real, they are real in their consequences.” Robert K. Merton, *The Self-Fulfilling Prophecy*, 8 ANTIOCH REV. 193, 193 (1948). Max Weber wrote that “It is undeniably true, indeed a fundamental truth of all history that the final result of political activity often, nay, regularly, bears very little relation to the original intention: often, indeed it is quite the opposite of what was intended.” Max Weber, *Politics as a Vocation*, in *Princeton Readings*, in POLITICAL THOUGHT: ESSENTIAL TEXTS SINCE PLATO 499 (M. Cohen & N. Fermon eds., 1996).

<sup>130</sup> Symposium, *Judicial Discretion: A Look Forward and a Look Back Five Years After Booker*, 22 FED. SENT'G REP. 297 (2010) (statement of Douglas Berman).

<sup>131</sup> Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 FED. SENT'G REP. 110, 110 (2010).

<sup>132</sup> Amy Baron-Evans & Thomas W. Hillier, II, *The Commission's Legislative Agenda to Restore Mandatory Guidelines*, FED. SENT'G REP. (forthcoming 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2252105](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252105); Luna, *supra* note, at 54.

<sup>133</sup> 2012 *Sourcebook*, *supra* note 97, at tbl. N.

mandatory minimum laws are being circumvented.<sup>134</sup> The obvious question then is how were the objectives of uniformity and proportionality sidetracked and what other unforeseen results have occurred? This Section provides some answers by applying the law of unintended circumstances to the McSentencing regime just outlined.

This Article submits that the law of unintended consequences offers an appropriate alternative to examining troublesome issues with rational thought as theorized within the McDonaldization of society dogma.<sup>135</sup> Of course, this use of the term “law” is meant colloquially, and not to signify formal legislative activity. Popularized by the prominent sociologist Robert K. Merton, the law of unintended consequences involves purposive social action.<sup>136</sup> Merton observed that motivated human conduct, whether accomplished by individuals or formal organizations, at times represents rational action; but at other times it becomes irrational in the sense of not actually constituting the best means to attain the actor’s desired ends.<sup>137</sup> Like Ritzer, Merton was rather fatalistic about the consequences of rationalization. While Merton noted that not all unforeseen results would necessarily be embraced as negative when considered retrospectively by the actor, he also hypothesized that undesirable consequences were virtually inevitable from purposive human action.<sup>138</sup> It is suggested here that McSentencing is a form of institutionalized purposive action in that the reforms pressed by Congress and the presumptive guidelines urged by the Commission represent a rationalization of thought designed to effectuate proper and consistent punishments. The reason Merton’s conceptualization is more useful for an academic study than Ritzer’s irrationality of rationality idea is that Merton outlined five causes of unintended consequences, thus offering a convenient structure for analysis. These include ignorance, error, short-term focus, competing values, and self-fulfilling prophecy. Brief descriptions of the five follow.

The first cause of unanticipated results is ignorance. Merton clarified that this does not necessarily entail engaging in social action with no information.<sup>139</sup> Unintended consequences can result from a lack of sufficient knowledge to properly plan and frame our actions to beget

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<sup>134</sup> See *infra* notes 198-201 and accompanying text.

<sup>135</sup> Merton’s original formulation used the term “unanticipated consequences.” Merton, *Unanticipated Consequences*, *supra* note 129, at 896. Still, the analogous phrasing of “unintended consequences” for his theorem has prevailed in academic and popular literature.

<sup>136</sup> *Id.* at 896.

<sup>137</sup> *Id.* at 896.

<sup>138</sup> *Id.* at 896. In contrast, Merton noted that purposive action could beget beneficial results that were unintended as well, such as through chance. *Id.* at 897 n.9.

<sup>139</sup> *Id.* at 900.

successful results.<sup>140</sup> When we engage in purposive social action, we are necessarily making predictions about how best to achieve our desired goal. Humans often make these predictions based on past experiences. But we are often deceived into falsely believing that observed associations between events are causally related, when they are merely stochastic associations.<sup>141</sup>

Nonetheless, the actor may actually be cognizant of his lapses in full knowledge and predictive abilities, yet risk unintended consequences because he is forced to act anyway. One may have an immediate need, whether in actuality or simply by belief, to initiate a course of action, despite insufficient time to deliberate and prepare.<sup>142</sup> Another reason to act, even when one is aware of his imperfect knowledge, is due to the limited availability of resources to more fully explore past experiences or consider alternative options.<sup>143</sup>

Error is the second cause of unintended consequences. Potential errors can occur in such areas as appraising the present situation, making inferences therefrom, selecting the course of action, or executing the plan.<sup>144</sup> Error may arise when the actor fails to systematically and thoroughly evaluate, or pathologically follows, a certain course. For instance, humans often favor routine. However, reliance on habitual action can generate undesirable outcomes. Even though a prior conduct led to a desirable result, automatic and undeliberative actions may ignore that circumstances have changed or that the same causal result may not apply in all conditions.<sup>145</sup> Thus, what may appear to have been rational and reasonable predictions based on actual past experiences become, in retrospect, unreasonable in practice. Negative consequences may be exacerbated by ignoring troubling or conflicting evidence.<sup>146</sup>

The third factor in creating unintended consequences is an undue focus on short-term goals. Merton referred to this as an “imperious immediacy of interest,” whereby the actor is intent on foreseeable immediate goals, to the exclusion of considering additional and future consequences.<sup>147</sup> The attainment of a short-term goal may actually preclude us from realizing other, perhaps equally important, objectives.<sup>148</sup> A focus on the near-term

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<sup>140</sup> *Id.* at 898.

<sup>141</sup> *Id.* at 898.

<sup>142</sup> *Id.* at 900.

<sup>143</sup> *Id.* at 900.

<sup>144</sup> *Id.* at 901.

<sup>145</sup> *Id.* at 901.

<sup>146</sup> *Id.* at 901.

<sup>147</sup> *Id.* at 901. Merton provides as an example cavemen who carried their mates to their caves to satisfy their immediate sexual desires unintentionally led over time to the development of the family unit. *Id.* at 902.

<sup>148</sup> *Id.* at 902.

may preclude us from envisioning the bigger picture.

Closely related is the fourth factor involving basic values. A core set of fundamental values may necessitate purposive social action that blinds us from considering possible interactions. In the social world, actions do not operate in a vacuum. Merton offered examples:

The empirical observation is incontestable: activities oriented toward certain values release processes which so react as to change the very scale of values which precipitated them. This process may in part be due to the fact that when a system of basic values enjoins certain *specific* actions, adherents are not concerned with the objective consequences of these actions but only with the subjective satisfaction of duty well performed.”<sup>149</sup>

Dominant values may also render us so focused on them that we discount the fact that our actions may impact related fields in negative ways, and that because those related fields are so connected, they may be reactive and alter the course of planned events.<sup>150</sup>

The final circumstance leading to unintended consequences basically implies the social construct of the self-fulfilling prophecy. “Public predictions of future social developments are frequently not sustained precisely because the prediction has become a new element in the concrete situation, thus tending to change the initial course of developments.”<sup>151</sup> Predictions made on assumptions of “all other things being equal” are necessarily counter-productive since in human interactions not all things will be equal.<sup>152</sup> The concept resonates with purposive social action since the very purpose becomes an interfering artifact. Designated purposes can fundamentally alter the course of social processes and prejudice the results.<sup>153</sup> In this sense, the situation becomes a self-defeating prophecy in that the prediction prevents what is predicted from happening.<sup>154</sup> In sum, the inevitability of unintended consequences reminds us that it is hubris to believe we can entirely control a complex social world.

This Article uses the foregoing five causes of unintended consequences as an appropriate analytical tool to study a specific area of law. In other words, Merton’s law of unintended consequences offers a lens with which to observe a particular law’s creation, its operation, and its results. But first it should be established whether this is a proper theoretical marriage. Certainly, legislation is quintessentially a collective form of purposive

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<sup>149</sup> *Id.* at 903 (emphasis in original).

<sup>150</sup> *Id.* at 903.

<sup>151</sup> *Id.* at 903-04.

<sup>152</sup> *Id.* at 904.

<sup>153</sup> *Id.* at 904.

<sup>154</sup> *Id.* at 903.

social action, and humans have always exhibited a social tendency to use the law as a tool to achieve social goods or avoid perceived cultural ills.<sup>155</sup> We use legislation to redress wrongs, to maintain the status quo, to alter social structures, and to shape power relations. Our immanent penchant for legislation exists even though socio-legal scholars insist it is a rare occurrence that the desired results of laws are fully effectuated.<sup>156</sup> As Merton himself recognized, man continues to legislate with the goal of achieving objectives despite all available information providing clear evidence “cannot thus be achieved.”<sup>157</sup>

But why do laws generally fail to procure their intended objectives? Legislation very clearly embeds its intended goals into the process and results are naturally biased thereby. Laws are extraordinarily powerful social acts as in our social world the *law* connotes officialdom, gravity, and expertise. Consequently, they naturally elicit strong reactions. “Laws [] shift incentives, realign individual interests, alter human motivations, and disrupt social equilibrium, thereby arousing corrective counterweights among even the most obedient.”<sup>158</sup> It has been observed that the current legal environment in the United States is particularly perverse. The American legal system

has devolved into absurdities that mock the pretensions of modern law, such as secret government memoranda justifying torture; federal agencies that insulate the very institutions they are supposed to regulate; an incarceration rate unparalleled in any “free” society; a Supreme Court that refuses to give its own decision the status of precedent [referring to the case decision in *Bush v. Gore* regarding the winner of their presidential election]; and a chief executive who instructs the executive branch *not* to enforce the legislation that he signs into law [referring to President George W. Bush’s prolific use of limiting signing statements].<sup>159</sup>

All of this segues nicely with the law of unintended consequences. Merton’s central idea was based on the notion that purposive human action appears rational at the outset yet yields irrational returns. Interestingly, we continue believe in the social construct of the law’s unique power to

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<sup>155</sup> Frederick W. Preston & Roger I. Roots, *Law and its Unintended Consequences*, 47 AM. BEHAV. SCIENTIST 1371, 1371-72 (2004).

<sup>156</sup> J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 814 (2003).

<sup>157</sup> Robert K. Merton, *Manifest and Latent Functions*, in SOCIAL THEORY: THE MULTICULTURAL AND CLASSIC READINGS 304, 307 (C. Lemert ed., 1999).

<sup>158</sup> Roger I. Roots, *When Laws Backfire: Unintended Consequences of Public Policy*, 47 AM. BEHAV. SCIENTIST 1376, 1386 (2004).

<sup>159</sup> Douglas Litowitz, *Max Weber and Franz Kafka: A Shared Vision of Modern Law*, 7 LAW, CULTURE & HUMAN. 48, 49-50 (2011).

achieve its intended goals despite our experiences that results are often paradoxical. Society's continued conviction that laws have the ability to right wrongs and provide social benefits veers toward the religious in that it is, in reality, based merely on faith.<sup>160</sup> The fact that legislation bears unanticipated results appears, therefore, axiomatic.

In sum, Merton's law of unintended circumstances is an appropriate heuristic device to analyze legal actions. The analysis that follows, correspondingly, applies the ideology of the law of unintended consequences to federal sentencing reforms. The most important reforms are the federal guidelines system, reliance upon mandatory minimum statutes, and, to a lesser degree, truth-in-sentencing laws. Before addressing each of the five causes of unintended consequences, it is necessary to identify the laws' intended goals. It is widely recognized that Congress' intent was to create a more scientific system to achieve uniformity in sentencing and to reduce unnecessary disparities, the two generally being corresponding articulations of the same point, and to foster proportionality in punishments.<sup>161</sup>

In general, this Article contends that the reforms have not adequately achieved their intended goals. Indeed, the current state of federal sentencing is in disarray as a result. Table 1 is a summary of the major arguments that will follow for how the law of unintended consequences recognizes the impediments that have prevented the reforms from achieving the reformers' idealistic objectives.

Table 1

<i>Cause of Unintended Consequences</i>	<i>Application to Federal Sentencing Reforms</i>
Insufficient Knowledge	The inaugural Commission failed to settle on a primary sentencing philosophy, conduct a holistic ranking of federal crimes for proportionality purposes, or sufficiently engage empirical study.
Error	The reforms did not sufficiently cabin other avenues for discretion in sentencing, such as those arising from decisions by prosecutors, probation officers, and investigatory agents.

<sup>160</sup> Frederick W. Preston & Roger I. Roots, *Law and its Unintended Consequences*, 47 AM. BEHAV. SCIENTIST 1371, 1373 (2004).

<sup>161</sup> Stith & Cabranes, *supra* note 125, at 13, 40.

Short-Term Focus	<p>The Commission's decisions to focus on short-term goals of achieving high conformance statistics by judges and appeasing Congress' desire for longer punishments disregarded the long-term effect of a burgeoning federal prison system.</p> <p>The goal of standardization resulted in an complicated guidelines system that spawned conflicts in interpretation, causing increased adjudication costs and burdened judicial caseloads.</p>
Competing Basic Values	<p>The policy of real-offense sentencing promotes proportionality over the values of efficiency and fairness to defendants.</p> <p>Emphasis on creating metrics trumped providing coherent sentencing policies to guide judicial decisionmaking.</p>
Self-Fulfilling Prophecy	<p>The prophecy that mechanized justice would yield uniformity fostered nonconformance.</p> <p>The goal of a proportional system became self-defeating when the actors' whose decisions were required to achieve that objective rebelled.</p>

#### A. *Insufficient Knowledge*

Substantial evidence demonstrates that the creation of the guidelines system suffered multiple knowledge and planning gaps. Numerous reports indicate that the inaugural Commission was disorganized as an organization and that the initial commissioners were unfortunately prone to conflicts and infighting.<sup>162</sup> Shortly after the initial guidelines became law, a former commissioner publicly and vehemently criticized the Commission for failing to act like an “expert body,” instead “becoming a forum for expressing the members’ personal preferences.”<sup>163</sup> At about the same time, the General Accounting Office, the federal watchdog group at the time, audited the Commission and its activities, documenting a host of issues.<sup>164</sup>

<sup>162</sup> See generally Stith & Cabranes, *supra* note 125, at 51-58.

<sup>163</sup> Lowell Dodge et al., *Congressional Oversight*, 2 FED. SENT’G REP. 210, 222 (1990). Apparently, one of the divisive issues that sidetracked the commissioners was an attempt to “resurrect through administrative action some long-dormant federal death penalty statutes. This bizarre proposal failed by one vote.” Alschuler, *supra* note 46, at 926.

<sup>164</sup> Dodge et al., *supra* note 163, at 210.

The watchdog asserted that the Commission had failed to comply with statutory requirements to develop a monitoring system, the project was beset by delays, the development of an evaluation program experienced cutbacks, the institution had weak internal controls, and conflicting projects existed among commissioners and staff.<sup>165</sup> The report further faulted the Commission for doubling, even quintupling, sentences for repeat offenders without also studying the cost of lengthening prison terms.<sup>166</sup>

Supreme Court Justice Stephen R. Breyer was one of the initial commissioners, at the time serving as a circuit level judge.<sup>167</sup> Justice Breyer has essentially admitted that the major policies underlying the guidelines were not founded upon consensus, expert judgments, or even best practices. Instead, these policies represented compromises that the Commission determined were necessary for various ideological, administrative, institutional, and political reasons.<sup>168</sup> For example, a holistic, comparative ranking of the severity of federal criminal laws was a necessary exercise to ensuring the system as a whole achieved the goal of proportionality. It was attempted but then abandoned.<sup>169</sup> Justice Breyer explained that one reason the commissioners were unable to agree on a rank ordering was political divisiveness in identifying the leading sentencing philosophy for the new system. Commissioners variously promoted retribution and deterrence, reaching no consensus on which one should prevail.<sup>170</sup> Further, the ranking process was handicapped by instances in which individual commissioners would proffer their subjective views about the seriousness of their “pet” crimes, which would have resulted in increases in each area.<sup>171</sup> Justice Breyer also admitted that the Commission lacked sufficient knowledge to create a system other than one in which sentence length was based primarily

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<sup>165</sup> *Id.* at 210-11 (1990). In response to such criticisms, the then Chair of the Commission, Judge William W. Wilkins, complained that the “Commission’s statutory mandate was demanding,” it had no blueprint to follow, and Congress had given it too little time. *Id.* at 215.

<sup>166</sup> *Id.* at 222-23.

<sup>167</sup> Stith & Cabranes, *supra* note 125, at 49.

<sup>168</sup> See generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon which they Rest*, 17 HOFSTRA L. REV. 1 (1988).

<sup>169</sup> *Id.* at 17.

<sup>170</sup> *Id.* at 16. A document issued by the Commission itself in 1987 defended its demurral, arguing that any choice between retribution and deterrence merely constituted an academic exercise and that sentencing outcomes would likely be the same under either philosophy. U.S. SENT’G COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 16 (1987). The report also indicated that such a choice was compliant with Congress’ instruction that no single sentencing purpose should prevail. *Id.* This is a curious stance considering the Commission almost completely ignored the other sentencing purpose addressed by Congress involving rehabilitation.

<sup>171</sup> Breyer, *supra* note 168, at 15-16.



on past sentencing practices, although noting that sentence recommendations for certain crimes were intentionally lengthened.<sup>172</sup> He ceded the anomaly: “It reflects a lack of adequate, detailed deterrence data, and it reflects the irrational results of any effort to apply ‘just deserts’ principles to detailed behavior through a group process. The result of this compromise is that the Commission’s results will reflect irrationality in past practice . . . .”<sup>173</sup> On this front, the situation is reminiscent of Merton’s discussion of the force of habit and the causal link to unintended consequences by incautiously relying upon past experience.

Paul H. Robinson, another of the initial commissioners and a prominent criminal law professor, went further in expressing his displeasure. He publicly “dissented” from the inaugural guidelines, citing insufficient planning, study, organization, and forecasting.<sup>174</sup> He specifically noted that the initial Commission undertook no analysis of empirical studies on deterrence or on public views about relevant sentencing factors and their proportional weights.<sup>175</sup> Further, he lamented that the staff had conducted no impact assessments regarding potential rates of departure, regularity of sentences across judges, administrative burdens on sentencing processes, potential changes in the rates of pleas or trials, prison capacity and probation service issues, or community perspectives on reasonableness of the punishments.<sup>176</sup>

One of the likely reasons that the Commission released its initial guideline system, even in the face of a knowing lack of sufficient information, was a Congressionally-imposed deadline.<sup>177</sup> Thus, even though the commissioners likely were aware of significant knowledge gaps, the

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<sup>172</sup> *Id.* at 17.

<sup>173</sup> *Id.* at 18.

<sup>174</sup> Paul H. Robinson, Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission 22 (May 1, 1987), [www.law.upenn.edu/fac/phrobins/usscDISSENT.pdf](http://www.law.upenn.edu/fac/phrobins/usscDISSENT.pdf). (“A process of informed policy-making and thoughtful drafting might have taken the following course: isolation of the significant issues, staff preparation of background research papers on each of the issues, discussion and debate of each background paper to identify the most likely resolutions of each issue, staff preparation of option papers on the advantages and disadvantages of each possible resolution, discussion and debate of each option, a vote and tentative resolution of each issue, drafting a guideline system that embodies each of the options tentatively selected, re-evaluation of the tentative resolutions after their integration into a single guideline system, clinical testing of the revised document, revision in light of the clinical testing, limited field-testing of the revised document, revision in light of the limited field-testing, full field-testing during a period when the guidelines would be only advisory (including orientation and training programs for judges, probation officers, prosecutors, and defense counsel), and final revision in light of the full field-testing.”).

<sup>175</sup> *Id.* at 3.

<sup>176</sup> *Id.* at 20.

<sup>177</sup> Breyer, *supra* note 168, at 5.

statutory mandate required action. Still, the use of the guidelines system so developed, created in such an information vacuum, as a means to achieve the desired goals was extremely risky. Without considering the public's views on the reasonableness of punishments and without re-ranking federal crimes on a severity scale, the Commission undermined the goal of proportionality in sentencing. To the extent that the guidelines system was intended as a means to overcome what was already perceived as unfairness and lack of uniformity in past sentencing practices, basing the system largely on those same past practices appear to represent a failure in planning and, thereby, likely an ineffective method to achieve those goals.

The foregoing has addressed the initial guidelines and the Commission's initial policy choices. But the analyses resonate still today as many of the same knowledge failures continue to exist. The Commission has never completed a holistic ranking of offenses for proportionality and fairness purposes. Instead, it tends to conduct piecemeal work on specific guidelines that are the then current subject of debate.<sup>178</sup> The Commission has neglected to adopt a principal theory of punishment for the system as a whole, and the guidelines tend to vicariously reflect retributive and deterrence purposes.<sup>179</sup> Further, some of the most important policy decisions continue into the present time. Certain controversial policies, such as real-offense sentencing, consistent increases in the length of sentence recommendations, substantial reliance upon quantification methods, and failure to use the guidelines to help manage the prison population, will be developed further below.

### *B. Error*

The Commission appears to have adopted a liberalist perspective that consistency could be achieved primarily through the use of normative constraints to circumscribe the discretionary power of the judiciary. Such a myopic concentration on the judiciary was manifestly misguided from the very beginning. The Commission has strategically downplayed the existence, and the critical importance to the goal of uniformity, of other relevant and powerful players in the federal criminal justice system.<sup>180</sup> In

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<sup>178</sup> See, e.g., U.S. SENT'G COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES (2012), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Sex\\_Offense\\_Topics/201212\\_Federal\\_Child\\_Pornography\\_Offenses/index.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/index.cfm); U.S. SENT'G COMM'N, COCAINE AND FEDERAL SENTENCING POLICY (2007), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/index.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/index.cfm).

<sup>179</sup> Rehabilitation is another permitted goal of sentencing practices yet the Commission has never seemed inclined to adopt it and it is generally not reflected in the guidelines.

<sup>180</sup> Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 573 (1998) ("largely ignored by the [g]uidelines is discretion exercised outside of the judicial branch"). The Commission does

the assembly-line vision of the proposed McSentencing scheme, a relevant observation is that there are necessarily multiple players, each of whom can shape and manipulate the expected final product.

### 1. Prosecutorial Discretion

In addition to the judiciary, the other group that is perhaps most often discussed in terms of influencing sentencing is prosecutors.<sup>181</sup> Many federal criminal law experts have observed that the implementation of determinate sentencing immanently fails to achieve its ambitions of uniformity and proportionality as it merely transferred discretion from judges to United States Attorneys.<sup>182</sup> Thus, disparities will continue to exist but more directly operating at the level of prosecutorial decisions and in pre-trial stages, rather than primarily at the late phase of sentencing with judicial choices.<sup>183</sup> But this view might be interpreted as suggesting that prosecutors held little discretionary command—or at least less than the judiciary—preceding sentencing reforms, an assumption that is not evident. Prosecutors, as a

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not entirely deny that prosecutorial decisions foster disparities. In its 2012 report to Congress, the Commission acknowledges that differences in prosecutorial practices have contributed to disparities. *Booker Report*, *supra* note 126, app. A, at 97. Nonetheless, the report expresses that the Commission has insufficient information to enable it to study the extent of such disparities other than what it has observed with respect to prosecutorial charge bargaining with mandatory minimum offenses. *Id.* None of its recommendations implicates prosecutors' practices.

<sup>181</sup> Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency Within the Judicial Branch*, 58 STAN. L. REV. 217, 221 (2005) (“The reality is that over the past two decades, sentencing authority has been transferred from judges through a politically weak Commission to Congress and, in the end, to prosecutors.”).

<sup>182</sup> John Wooldredge et al., *(Un)Anticipated Effects of Sentencing Reform on the Disparate Treatment of Defendants*, 39 LAW & SOC'Y REV. 835, 840 (2005); Alschuler, *supra* note 46, at 926 (“[T]he guidelines are bargaining weapons-armaments that enable prosecutors, not the sentencing commission, to determine sentences in most cases. In operation, the guidelines do not set sentences; they simply augment the power of prosecutors to do so”); Federal Courts Study Committee, *Report of the Federal Courts Study Committee*, 2 FED. SENT'G REP. 232, 234 (1990); *but see* Ricardo J. Bascuas, *American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 4 n.20 (2010) (contending guidelines reduced prosecutors' discretion in plea bargaining as probation officers can independently interject factual conclusions); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U.L. REV. 1284, 1285 (1997) (qualitative study concluding discretion not transferred to prosecutors based on finding that in plea negotiations prosecutors attempted to circumvent the guidelines in 20-35% of cases).

<sup>183</sup> Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 395 (2010).

group, possess perhaps the single greatest power in controlling outcomes in the criminal justice system.<sup>184</sup> The prosecutor's ultimate weapon in this system of dueling command centers may be the charging decision.<sup>185</sup> This exemplifies a crucial stage as the formal commencement of prosecution determines if the person will even be subjected to punishment. And if the prosecutor decides to file, the decision on exactly which crime(s) to charge sets the stage for bargaining, the potential applicability of a mandatory minimum, and, ultimately, the length of the sentence.<sup>186</sup> Significantly, the prosecutor's controlling role is amplified in that her case decisions are almost completely discretionary and virtually unreviewable.<sup>187</sup>

Thus, it is probably more accurate to conclude that prosecutors have always possessed significant influence in terms of the sentencing system. While the Sentencing Reform Act incorporated a much stronger appellate review of district judges' sentencing decisions, it did little with respect to implementing checks on prosecutors' choices.<sup>188</sup> To the contrary, the guidelines actually have operated to further embolden prosecutors' influence in several important areas. First, the guidelines equip prosecutors with greater ability to manipulate sentences through charge bargaining. Admittedly, before the guideline system and its intended determinative sentencing structure, prosecutors were incited to engage in charge bargaining. The practice allows prosecutors to galvanize plea deals and shape their desired sentencing outcomes. Yet charge bargaining was not as dispositive to actual sentence outcomes prior to the guidelines. In the pre-guidelines era, agreeing to a lesser included offense might have resulted in a reduction in sentence, but that was not at all an assured prospect. The reason is that statutory penalty ranges for many offenses were quite widespread. For example, before the guidelines were effective, the statutory penalties for Class D, C, B, and A felonies were up to 6, 12, 25 years, and life, respectively.<sup>189</sup> These allowed judges a wide leeway for where to locate a sentence therein. Because the numbers overlapped, the prosecutor could

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<sup>184</sup> ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007).

<sup>185</sup> Richard S. Frase, *Is Guided Discretion Sufficient? Overview of the State Sentencing Guidelines*, 44 ST. LOUIS U. L. REV. 425, 440 (2000).

<sup>186</sup> Barkow, *supra* note 62, at 1624; Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1569-70 (2010).

<sup>187</sup> ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007). Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1585 (2010) (contending federal system "can become the subject of political whims of a prosecutor" since it currently "imposes few boundaries, fails to allow enforcement of internal guidelines, and has no legal oversight").

<sup>188</sup> Barkow, *supra* note 62, at 1601.

<sup>189</sup> Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1998.

directly constrain the absolutely maximum sentence possible, but otherwise could not count on whether a charge bargain would convince a judge to invoke a lesser sentence. A plea deal would not have been dispositive of a lesser sentence either as in the federal system, agreed sentence provisions in plea agreements are not binding on judges who reject them.<sup>190</sup> The guidelines system actually altered the field of charge bargaining. The guidelines situate the sentencing recommendation within a far more discrete range, in which the calculation begins with the relevant offense(s) of conviction.<sup>191</sup> Thus, a prosecutor can more fruitfully attempt to manage sentencing results in a guidelines system by bargaining for a crime that invokes a different starting guideline.

Second, the guidelines produced a new species of fact bargaining. Previously this took the form of statutory offense enhancements,<sup>192</sup> such as a fixed increase in punishment if the offense was also determined to constitute a hate crime.<sup>193</sup> The guidelines spawned a whole different breed of fact bargaining, by virtue of the implementation of non-statutory specific offense characteristics, adjustments, and departure provisions. These are aggravating or mitigating circumstances—*i.e.*, facts—that prosecutors can trade in the plea bargaining process. With the guidelines, a plethora of facts are specifically relevant to increase and decrease sentencing recommendations. And these fact-based modifications reach much farther than statutory offense enhancements. In essence, fact bargaining here represents more a form of sentence bargaining than plea bargaining because the relevant facts are generally external to the elements of the offense. Admittedly, fact bargaining is not dispositive since sentencing judges are not bound by stipulated facts or absence thereof.<sup>194</sup>

Third, local variations in prosecutors' offices policies yield disparities, and the guidelines further fuel them. A prime example includes fast-track departures which are, pursuant to the guidelines, permitted only in districts in which the U.S. Attorney has adopted them for specific offenses. By definition defendants in those districts are advantaged as compared to offenders who committed the same offense in districts without them. Mere discrepancies in workload also differentially incentivize offices to more aggressively pursue plea deals, such as greater leniency on offering acceptance of responsibility and substantial assistance departures, to

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<sup>190</sup> FED. R. CRIM. P. 11(c).

<sup>191</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2012).

<sup>192</sup> Frank O. Bowman, III, *Debacle: How the Supreme Court has Mangled American Sentencing Law and how it Might yet be Mended*, 77 U. CHI. L. REV. 367, 377 (2010) [hereinafter *Debacle*].

<sup>193</sup> 28 U.S.C. § 994.

<sup>194</sup> See *infra* Section IV.B.2.

manage cases.<sup>195</sup> Hence, inconsistencies may result merely to service prosecutors' administrative interests. Accommodations for specific district problems are relevant, too. Individual offices may, from time to time, target specified offenses that are perceived as being of particular concern in their area. While U.S. attorneys may be reined in somewhat by national policy choices, they may appropriately be responsive to local conditions.<sup>196</sup> Since the idea often is about crime control, these operations tend to rely upon heavy enforcement as well as attaining noticeably lengthy sentences for the crime *du jure*.<sup>197</sup> Research has highlighted, too, that offices may have disparate policies in their interpretations of major guidelines and departure provisions.<sup>198</sup>

Fourth, the guidelines offer opportunities for prosecutors to effectively circumvent mandatory minimums. This issue comprises both intended and unintended consequences. Two guidelines' departure mechanisms formally endorse sentence bargaining for mandatory minimum offenses. One is the substantial assistance departure that permits a sentence below an otherwise statutorily-required minimum.<sup>199</sup> The other is the safe-valve adjustment that allows in limited circumstances for a prosecutor to recommend a below-mandatory minimum sentence for low-level drug trafficking offenders.<sup>200</sup> Unintended avoidance of mandatory minimums occurs as well. The extent of this is unknown, but some evidence exists.<sup>201</sup> The Commission, for instance, has conducted special empirical studies in which it found evidence that charges and enhancements were manipulated in ways that essentially permitted the parties to bypass mandatory minimums for offenses involving drug trafficking and child pornography.<sup>202</sup>

Fifth, the guidelines afford the prosecution virtually unilateral power over two additional, and important, downward departures: substantial

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<sup>195</sup> Bibas, *supra* note 110, at 140.

<sup>196</sup> Andrew B. Whitford, *Bureaucratic Discretion, Agency Structure, and Democratic Responsiveness: The Case of the United States Attorneys*, 12 J. PUB. ADMIN. RES. & THEORY 3, 22 (2002).

<sup>197</sup> See e.g., David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1447-48 (2011) (discussing United States Attorney's Office in Richmond, Virginia running Project Exile in the late 1990s using federal felon-in-possession laws to combat high murder rate in the local area).

<sup>198</sup> See e.g., Bibas, *supra* note 110, at 148.

<sup>199</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2012); Pub. L. No. 99-570, 100 Stat. 3207 (1986).

<sup>200</sup> U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2012); Violent Crime Control and Law Enforcement Act of 1994, § 80001, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 U.S.C. § 3553(f)).

<sup>201</sup> Ulmer et al., *supra* note 103, at 582 (survey respondents estimating twenty percent of plea deals are intended to avoid otherwise applicable mandatory minimums).

<sup>202</sup> *Booker Report*, *supra* note 126, app. A, at 97.

assistance and fast-track departures. These two are widely known to be highly influential in influencing guilty pleas as they operate to reduce guidelines sentences.<sup>203</sup> Both require government motions, and determinations by the prosecution not to move for them are discretionary. One researcher, for example, found variations in policies about how liberally to grant substantial assistance designations among the U.S. Attorneys' offices studied.<sup>204</sup> A statistical analysis of the Commission's fiscal 2012 datafiles shows potentially improper usage of the fast-track guideline in two particular districts. These two districts use the fast-track guideline for a variety of offenses, clearly beyond those high caseload volume crimes the policy was designed to address.<sup>205</sup>

Sixth, the abolition of parole permits prosecutors to control the length of sentences actually served through the foregoing plea, fact, and sentence bargaining practices. The replacement of good time credits is far more exacting and predictable than the prior parole system. Presumably prosecuting attorneys are cognizant that offenders, as a general rule, will legally be required to serve at least 85% of their prison sentences. This eventuality is likely factored into bargaining by both sides.

Importantly, prior to the Sentencing Reform Act, the judiciary was considered a check on these discretionary, pre-sentence practices of prosecutors.<sup>206</sup> The guidelines generally removed that counterbalance. Thus, federal defendants may be charged with different offenses and sentenced under different guidelines for similar behaviors, while others may be charged with the same offenses and subjected to the same guidelines as defendants who engaged in dissimilar behaviors.<sup>207</sup> This can occur across jurisdictions based on differential prosecutor office policies or amongst defendants within the same district for variations in individual prosecutorial

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<sup>203</sup> Barkow *supra* note 62, at 1624.

<sup>204</sup> Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255, 263-65 (2005).

<sup>205</sup> The data indicate that outside of immigration and drugs, early disposition departures were granted in a handful of cases for such crimes as sexual abuse, robbery, embezzlement, forgery, national defense, and child pornography. Two districts were mainly responsible. Arizona and the Southern District of California accounted for almost all of the fast-track departures for offenses other than drugs and immigration. Notably, these two districts account together for the vast majority of fast-track departures for drugs and a majority of those for immigration crimes. It is possible that the use of fast-track procedures generically became ingrained in their cultural psyches.

<sup>206</sup> Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1474 (1993).

<sup>207</sup> Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 398 (2010).

decisions.

Perhaps a supervisory authority could replace the prior judicial check on prosecutorial discretion. The Department of Justice's overarching policies on the discretionary authority of prosecutors has changed over time in this regard. In 1993, then Attorney General Janet Reno issued a statement that indicated prosecutors ought to base charging and plea decisions on an individualized assessment of cases, including the proportionality of a guidelines sentence to the seriousness of the offender's behavior.<sup>208</sup> A decade later, then Attorney General John Ashcroft superseded this degree of discretion with instructions mandating that prosecutors charge the "most serious, readily provable" crimes in almost all cases.<sup>209</sup> Some level of discretion was returned, though, in 2010 when Attorney General Eric Holder clarified that his office's position was that the most serious offense remains the assumption, but that prosecutors in making sentencing recommendations should also consider whether a non-guidelines sentence better meets the statutory sentencing factors.<sup>210</sup> Thus, the current policy appears to continue to permit some variations in judgment on the part of individual prosecutors, therefore inspiring inconsistencies.

Despite sentencing reforms' purpose of reducing disparity, Congress in enacting the reform legislation failed to circumscribe or to channel these discretionary prosecutorial practices.<sup>211</sup> Nor has Congress acted on this issue since then. The Supreme Court, in reviewing sentencing cases post-reform, has made no significant changes to prosecutorial powers in these regards. While the *Booker* decision theoretically could have substantially reduced prosecutorial discretion by vesting judges with greater authority to police prosecutorial disparities, it is not entirely clear that this has occurred to any great extent. Plea deals—a practice in which judges are not permitted to participate in the federal system<sup>212</sup>—only increased since then and the various rewards and threats offered by guideline departure standards appear to persevere as effective plea negotiation tools.<sup>213</sup> Empirical research

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<sup>208</sup> Memorandum from Janet Reno, Att'y Gen. of the U.S. to Holders of U.S. Attorney's Manual, Title 9, Principles of Federal Prosecution (Oct. 12, 1993).

<sup>209</sup> Memorandum from John Ashcroft, Att'y Gen. of the U.S. to All Federal Prosecutors, Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003).

<sup>210</sup> Memorandum from Eric H. Holder, Att'y Gen. of the U.S. to all Federal Prosecutors, Dep't Policy on Charging and Sentencing (May 19, 2010).

<sup>211</sup> Frank O. Bowman, III, *The Year of Jubilee... Or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279, 283 (2006).

<sup>212</sup> See FED. R. CRIM. PROC. 11.

<sup>213</sup> Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 354 (2006).



suggests that prosecutors have essentially countered the potential for *Booker*-led judicial oversight by more excessively using the foregoing guidelines-based prosecutorial bargaining measures as carrots and sticks.<sup>214</sup>

One might have expected, then, that the Commission in promulgating the guidelines system would have foreseen that leaving the prosecution's role largely unaltered, even, as indicated above, gifting prosecutors with even greater discretionary powers, would effectively undermine the goal of uniformity. However, the Commission itself has done little in this regard. Legally, the Commission has no direct ability to significantly control prosecutors in terms of charging decisions or plea bargaining.<sup>215</sup> Still, making little effort to ameliorate the opportunities prosecutors have to impact sentencing results in the implementation and maintenance of the guidelines system has been naïve. Overall, it seems a very odd system in which prosecutorial discretion is accepted while judicial discretion is challenged.<sup>216</sup> Pursuant to the guidelines, discretion is acceptable for the party litigant yet denied the independent arbiter. Nonetheless, several other sources of disparities exist, though they are less likely to be mentioned by sentencing practitioners and academics.

## 2. Probation Officers' Influence

The Sentencing Reform Act of 1984 operated to bequeath federal probation officers with a far greater participatory role in sentencing proceedings, and such role has transformed into a sort of supplementary adversarial position.<sup>217</sup> Probation officers possess broad discretion in terms of locating and documenting facts about the crime and relevant conduct, computing guidelines-based sentences, and in recommending (or not) departures.<sup>218</sup> Probation officers often make both factual and legal conclusions about the defendant, the crime, relevant conduct, statutory applications, and guidelines interpretations, even though they are not required to be experienced investigators or licensed attorneys.<sup>219</sup> Curiously, in writing presentence investigation reports, probation officers are not restricted to the facts or agreed sentencing elements set forth in any applicable plea agreement.<sup>220</sup> Indeed, probation officers may develop the report and its contents, which then form the basis of the computed

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<sup>214</sup> Ulmer et al., *supra* note 103, at 586.

<sup>215</sup> Stith & Dunn, *supra*, note 181, at 221.

<sup>216</sup> J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 725 (2011).

<sup>217</sup> Jerry D. Denzlinger & David E. Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, 55 FED. PROBATION 49, 51-52 (1991).

<sup>218</sup> Bibas, *supra* note 110, at 145.

<sup>219</sup> Bascuas, *supra* note 182, at 12.

<sup>220</sup> U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 (2012).

guidelines sentence, using sources and information outside of what is offered by, or even stipulated by, the prosecution and defense.<sup>221</sup> Given such prerogative, it should not be surprising that studies show significant variations in how probation officers perform in terms of investigatory efforts and in their judgments on assessing facts and offenders.<sup>222</sup>

Even at this stage, the guidelines subsidize the prosecution by placing defendants in a catch-22. Probation officers have been reported to compel defendants' cooperation in terms of submitting to intrusive interviews and providing inculpatory information through threats of withholding recommendations for the acceptance of responsibility reduction and/or suggesting an obstruction of justice increase; defendants are so pressured even though such cooperation can trigger relevant conduct or specific offense characteristic enhancements.<sup>223</sup> It has been suggested that the guidelines system has morphed the presentence investigation into an inquisitorial exercise that is distinctly inclined toward determining reasons to increase sentences or otherwise imposing negative consequences primarily on defendants.<sup>224</sup>

While the presentence report and initial sentencing calculations do not carry the force of law, judges often defer to the recommendations of probation officers.<sup>225</sup> In considering sentences, judges may prefer the presentence reports' factual assertions even if they conflict with those stipulated in an agreed plea deal.<sup>226</sup> Calculations from the Commission's fiscal year 2012 datafiles highlight the influence probation officers enjoy. Simple statistical computations indicate that sentencing judges in that year accepted the guideline factors applied in the presentence investigation reports eighty-two percent of the time while accepting them with changes an additional eighteen percent of the time. (Judges did not accept the probation officers' reports on guideline factors in less than two-tenths of one percent of cases.)

### 3. Law Enforcement Interests

Federal police forces retain substantial authority in choosing investigatory strategies that can fundamentally transform sentence

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<sup>221</sup> U.S. SENTENCING GUIDELINES MANUAL § 6B1.4 (2012).

<sup>222</sup> Douglas A. Berman, *From Lawlessness to too much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 452 (2002) (citing studies) [hereinafter *Lawlessness*].

<sup>223</sup> Bascuas, *supra* note 182, at 60-61.

<sup>224</sup> Bascuas, *supra* note 182, at 65.

<sup>225</sup> Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255, 266 (2005).

<sup>226</sup> *Id.*

outcomes. They can select whom to target and what crimes to investigate and, therefore, the makeup of the federal defendant population is largely dependent on law enforcement initiatives. Law enforcement can be politically motivated and responsive to the public's concerns which, depending on one's perspective, can be positive or negative. As a result, federal officials are prone to initiating, and decommissioning, local task forces that specialize on and target the crimes du jour.<sup>227</sup> For example, task forces set up in different time frames in pursuit of the drug war in the 1990s and those more recently developed to target child sexual exploitation offenses are significant contributing factors to the substantial increase in the number of drug offenders and child pornography defendants, respectively, sentenced and imprisoned in the federal system.<sup>228</sup> In recent years, federal authorities refocused from drug control to pursuing weapons offenses and immigration violations, leading to corresponding changes in the number of offenders in each category sentenced (see *supra* Figure 1) and in the makeup of the federal prison population (see *infra* Figure 3).<sup>229</sup> Investigators' discretion is also evident in the frequent tactic recently adopted of sting operations, which constitutes "the latest and perhaps clearest reflection of a broad shift by federal law enforcement away from solving crimes in favor of investigating people the government thinks are criminals."<sup>230</sup>

Law enforcement choices are not only critical to determining which offenders enter the system, the largely discretionary decisions federal agents make can directly impact sentencing. The guidelines system has probably only exacerbated their impact. It is quite possible that federal agents, understanding how the guidelines allow for a multitude of enhancements, can manipulate sentence outcomes prior to arrest. Thus, for example, the child pornography guidelines contain specific offense characteristics based on the number of images possessed, the sadistic content of the material, and trafficking material involving a pubescent child.<sup>231</sup> An undercover sting operation could easily trigger enhanced sentencing recommendations under

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<sup>227</sup> See Bibas, *supra* note 110, at 139 ("Agents and prosecutors must use their enforcement discretion to respond ad hoc to crises, and judges may cooperate by issuing stiffer sentences.").

<sup>228</sup> Brad W. Smith et al., *Multijurisdictional Drug Task Forces*, 28 J. CRIM. JUST. 543, 545 (2000); U.S. SENT'G COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 63 (2012).

<sup>229</sup> NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 9 (2013), [www.fas.org/sgp/crs/misc/R42937.pdf](http://www.fas.org/sgp/crs/misc/R42937.pdf).

<sup>230</sup> Brad Heath, *ATF Uses Fake Drugs, Big Bucks to Snare Suspects*, USA TODAY (June 28, 2013), <http://www.usatoday.com/story/news/nation/2013/06/27/atf-stash-houses-sting-usa-today-investigation/2457109/>.

<sup>231</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2012).

the guidelines by offering material that implicates any one or all three enhancements. For instance, the FBI in 2012 actually operated a child pornography website for two weeks,<sup>232</sup> and, therefore, presumably could control the distribution of content. Outside of concerns of entrapment, there is no legal or constitutional limitation that would prevent law enforcement from this type of discretionary action which, in essence, is a potential source of sentencing disparity that operates at a preliminary stage. A similar form of sentencing manipulation seems possible for other crimes with sentencing enhancements easily controllable by law enforcement, such as sting operations involving drugs (controlling quantity), fraud (varying monetary amount), and weapons offenses (manipulating type and quantity).<sup>233</sup>

Another source of disparity occurs as offense guidelines allegedly were developed with the heartland of offenders in mind. Yet, the “typical” offender in any crime category may change over time as Department of Justice priorities shift.<sup>234</sup> The problem is that a guideline created on the assumption of the heartland of offenders may offer punishment that in the end is disproportionate due to an evolving typical base of offenders as a consequence merely of investigators’ choices.<sup>235</sup>

#### 4. Differences in Defense Counsel Abilities

Variable abilities of defense counsel may implicate another reason for inconsistencies with guideline sentences.<sup>236</sup> Obviously, the idea that defense counsel competence matters is not unique to the federal system or to the sentencing reforms implicated herein, but the magnitude and complexity of the guidelines likely inordinately favors defense counsel with greater

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<sup>232</sup> Levi Pulkkinen, *FBI Shared Child Porn to Nab Pedophiles; Washington Home Raided*, SEATTLEPI.COM (May 28, 2012), <http://www.seattlepi.com/local/article/FBI-shared-child-porn-to-nab-pedophiles-4552044.php>.

<sup>233</sup> Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims Under the Federal Sentencing Guidelines*, 94 MICH. L. REV. 2385, 2396 (1996).

<sup>234</sup> Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 681 (2011).

<sup>235</sup> *Id.* (offering, as an example, Commission’s admitting the money laundering guideline was based on a presumed normal case involving organized crime yet the new offending group was not so involved).

<sup>236</sup> Bibas, *supra* note 110, at 144-45 (“Some districts have aggressive, knowledgeable federal defenders’ offices that exploit and stretch every possible loophole in the [g]uidelines for their clients. Other districts have overburdened, less-aggressive, or less-experienced defense lawyers who know less about how to exploit the [g]uidelines. Because repeat players who pool information are best able to exploit those complexities, federal public defenders probably achieve lower sentences than private lawyers who take occasional ad hoc court appointments.”).

experience with them.<sup>237</sup> Thus, it has been observed that veteran federal defenders routinely effectuate lower sentences compared to private defense counsel who usually have less familiarity with the system.<sup>238</sup>

Another unintended consequence on a different front has materialized. Arming prosecutors with multiple options to impel quick plea deals, as discussed earlier, has had the unfortunate repercussion that defense counsel feel challenged in providing effective assistance: if they seek to litigate issues, their clients may lose opportunities to earn acceptance of responsibility or substantial assistance reductions.<sup>239</sup> The guidelines system and its emphasis on pleas have unexpectedly shifted defense counsels' efforts and attention from trial preparation to bargaining at the very earliest stages of representation, which presents its own unique challenges in being adequately prepared with all case facts relevant to guidelines' computations.<sup>240</sup>

## 5. Racial Disparities

The foregoing addressed various sources of disparities in federal sentencing generally without regard to type. But just about any comprehensive discussion of the federal sentencing reforms cannot completely ignore the frequently expressed concern about demographic-based practices. When passing the sentencing guidelines reform legislation, Congress was also interested in combating racial discrimination. Yet again, the guidelines' singular focus on honing judicial discretion fails to account for potentially discriminatory practices and decisions by other parts of the criminal justice system and within society. It is argued that local variations in law enforcement actions "may stem from or create racial, ethnic, or class disparities, as inner-city minorities may suffer heavier penalties than suburban whites who commit identical crimes."<sup>241</sup> The guidelines foster discrimination emanating from prosecutorial decisions, as well, which may serve to "discriminate against particular defendants or subgroups of defendants by attempting to settle like cases differently depending on defendants' personal characteristics unrelated to culpability."<sup>242</sup>

The reforms actually may exacerbate inequalities among social groups. Mandatory minimums, particularly with drug offenses, disproportionately

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<sup>237</sup> Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 STAN. L. REV. 309, 320 (2005) [hereinafter *Adversariality*].

<sup>238</sup> Bibas, *supra* note 110, at 144-45.

<sup>239</sup> Berman, *supra* note 222, at 448.

<sup>240</sup> *Id.* at 450.

<sup>241</sup> Bibas, *supra* note 110, at 140.

<sup>242</sup> Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1473 (1993).

impact racial minorities and lower socioeconomic groups.<sup>243</sup> The guidelines system that was created embraces factors that serve to heighten the likelihood of discriminatory impact, albeit likely unintentionally. Using criminal history as a major factor can simply replicate and entrench race-based practices, such as police engaging in racial profiling by targeting minority citizens for pretextual stops and consent searches.<sup>244</sup> For example, a Commission study found that Black drug offenders were far less likely to receive the safety valve relief to mandatory minimums because their criminal history score precluded such relief.<sup>245</sup>

In sum, the guidelines system as developed was incapable of achieving the intended consequences of uniformity and nondiscrimination because of an erroneous disregard for the multiple and varied sources of sentencing disparities. The main thesis here is that the plan to achieve that goal was, therefore, defective as it was based on a flawed inference that disparities were mainly a product of judicial discretion. In carrying out the guidelines system, the Commission has not appeared to holistically reassess this heedless perspective.

### C. *Short-Term Focus*

The law of unintended consequences' causative factor of short-sightedness is evident, as well. Federal sentencing reformers have, pretty surprisingly, largely neglected to systemically address the laws' long-term costs. Curiously, the Commission's efforts have been founded upon the imperious immediacy of interest objectives of standardization, conformity, and appeasing Congress' desire for longer sentences, to the exclusion of future resource management. The costs that are the focus here include federal prison capacity and resource issues and adjudicatory expenses.

#### 1. Prison Costs

Congress originally expressed some concern about the price tag of federal sentencing reforms, at least in terms related to prison population metrics. The Sentencing Reform Act has a rather weak proscription, directing the Commission to seek to "minimize the likelihood" that the federal prison population would exceed capacity.<sup>246</sup> Of the major mandates the legislature enacted for the Commission, this one has ostensibly received the least attention in terms of any action to address the mandate. Nevertheless, such negligence does not signify that the Commission has not

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<sup>243</sup> *Mandatory Minimum Report*, *supra* note 61, at 101-02.

<sup>244</sup> Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1554, 1579 (2012).

<sup>245</sup> *Mandatory Minimum Report*, *supra* note 61, at 354.

<sup>246</sup> 28 U.S.C. § 994(g).

been aware that the system it created would overburden the federal prison system. An initial prison impact analysis released in 1987 demonstrates that the Commission was quite cognizant of the potential that the federal prison population was likely to rise dramatically after the implementation of the new guidelines system.<sup>247</sup> Substantial increases would necessarily result from the cumulative impact of the abolition of parole, newly enacted mandatory minimums for drug offenses and repeat offenders, new guidelines rules to significantly reduce the availability of probation-only sentences, and new guidelines provisions that would lengthen sentences for violent offenses, burglary, and tax evasion.<sup>248</sup> The report mentions that these projections indicate that “future demands on the federal prisons will greatly exceed prison capacity.”<sup>249</sup> Despite this, in the end quite astute, prognostication, there is little evidence that the Commission has ever sought to ameliorate these consequences through the strategic use of guidelines.

This represents a crucial observation. While some states have set up their sentencing commissions to energetically utilize their guideline structures to continuously manage their states’ prison populations,<sup>250</sup> the federal Commission has decidedly declined to accept that role. To the contrary, major choices adopted at the very beginning jumpstarted the federal prison population boom. Commission-instituted policies discouraged probation sentences, leading to a dramatically decreased rate of probation sentences from over fifty percent to around fifteen percent.<sup>251</sup> The Commission systematically increased presumptive sentence lengths, despite the truth-in-sentencing reform requiring prisoners to serve a greater percentage of their sentences. In combination, this meant that many more defendants would be imprisoned and for significantly longer periods of time. From the Commission’s perspective, steady increases in sentence recommendations likely appeases Congress’ desire for a tough on crime stance. Statistical measures show the dramatic numerical results. A study by the Urban Institute compared sentencing data in 1986, the year before the guidelines took effect, with 1997, noting that

imposed prison terms increased from [thirty-nine] months to [fifty-four] months. Further, during this period, the proportion of the imposed prison term that offenders could expect to serve increased from [fifty-nine percent] to [eighty-seven percent]. The time offenders entering [f]ederal prison could expect to serve increased

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<sup>247</sup> U.S. SENT’G COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 53-67 (1987).

<sup>248</sup> *Id.* at 53.

<sup>249</sup> *Id.* at 64.

<sup>250</sup> Barkow, *supra* note 62, at 1603.

<sup>251</sup> Nancy J. Gertner, *Federal Sentencing Guidelines*, 29(2) HUM. RIGHTS 6, 7 (2002).

from about [twenty-one] months, on average, during 1986 to about [forty-seven] months during 1997.<sup>252</sup>

The Commission also seemingly neglected the fact that at the time of sentencing reforms, the Federal Bureau of Prisons already operated over capacity, and it has ever since.<sup>253</sup> In recent years, overcrowding in all facilities has ranged from twenty-two percent in fiscal year 1997 to an overall high of forty-one percent in 2004.<sup>254</sup> Capacity issues, though, vary by type of facility. The most current estimate in 2013 is that Federal Bureau of Prison is operating at thirty-seven to fifty-four percent over capacity, depending on the security level.<sup>255</sup> The situation would be worse if the Bureau was not outsourcing almost twenty percent of its population.<sup>256</sup>

As a consequence of these policies, the federal prison population has exploded. Using Bureau of Justice Statistics data, Figure 3 shows the trend in the federal prison population for sentenced offenders over time and by major offense type.

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<sup>252</sup> WILLIAM J. SABOL, TIME SERVED IN PRISONS BY FEDERAL OFFENDERS, 1986-97 (1999), <http://www.bjs.gov/content/pub/ascii/tspfo97.txt>. "About 60% of this increase can be attributed to the increase in time to be served by new court commitments; 25%, to the increase in the number of suspects investigated by U.S. attorneys; and 15%, to the increase in the proportion of offenders sentenced to prison. Decreases in the prosecution rate and in time served by supervision violators curtailed the growth of the prison population." *Id.*

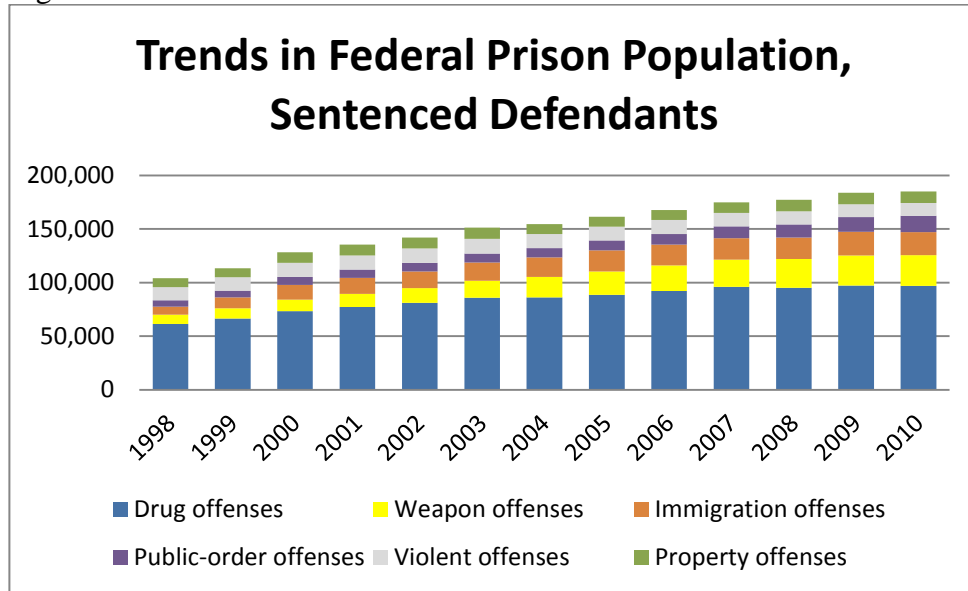
<sup>253</sup> NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS, 21 fig. 10 (2013), [www.fas.org/sgp/crs/misc/R42937.pdf](http://www.fas.org/sgp/crs/misc/R42937.pdf).

<sup>254</sup> *Id.* at 22 tbl. 2.

<sup>255</sup> U.S. Dep't of Just., FY2014 Congressional Budget 1 (2013), [www.justice.gov/jmd/2014justification/pdf/bop-bf-justification.pdf](http://www.justice.gov/jmd/2014justification/pdf/bop-bf-justification.pdf).

<sup>256</sup> *Id.* at 5 (involving privately operated facilities, state and locally managed facilities, residential reentry centers, and home-based confinement).

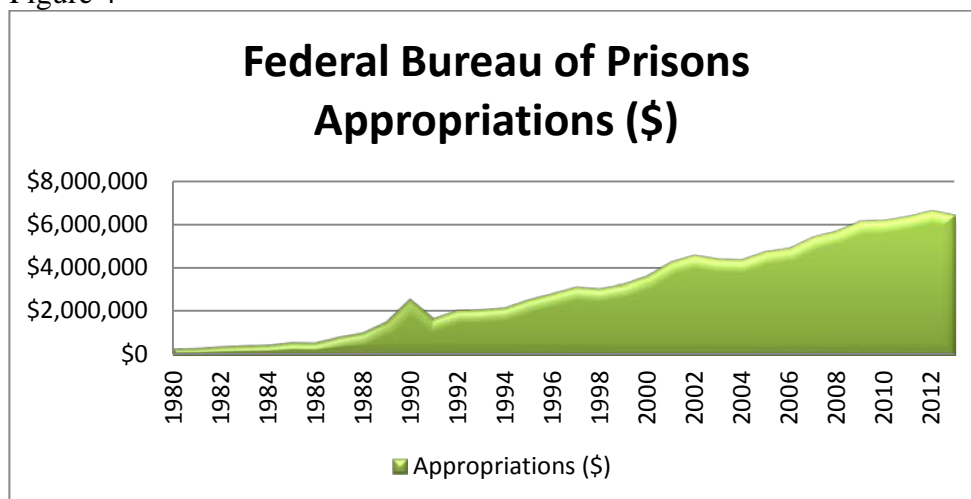


Figure 3<sup>257</sup>

Together with non-sentenced inmates (such as pre-trial detainees, civil committees, and District of Columbia prisoners), the total federal prison population in both public and private facilities numbered about 220,000 in July 2013.<sup>258</sup> As a result of growth, as well as inflation, appropriations to the Federal Bureau of Prisons has also grown exponentially since the pre-reform era, as shown in Figure 4.

<sup>257</sup> Data compiled from Dep't of Just., Bureau of Justice Statistics, Federal Criminal Case Processing Statistics, Prisoners in Federal Prison at Year-end: Trends, <http://www.bjs.gov/fjsrc/> (last visited June 26, 2013).

<sup>258</sup> FEDERAL BUREAU OF PRISONS, WEEKLY POPULATION REPORT (last visited June 21, 2013), [http://www.bop.gov/news/weekly\\_report.jsp](http://www.bop.gov/news/weekly_report.jsp).

Figure 4<sup>259</sup>

The Commission's entrenchment, with its laser focus on guidelines compliance, has yielded further unintended consequences for the prison system. A 2012 report by the General Accountability Office reports the results of its study: "[T]he growth of the federal inmate population and related crowding have negatively affected inmates housed in federal prison institutions, institutional staff, infrastructure, and have contributed to inmate misconduct, which affects staff and inmate security and safety."<sup>260</sup> The report designates the length of prison sentences as "one of the single most important factors in prison population growth."<sup>261</sup> The situation is expected to worsen. The Bureau of Prisons estimates an additional fifteen percent population increase by the year 2020.<sup>262</sup>

Oddly, the Commission, then and now, seems intent on sentencing inflation. The agency is consistently intent on increasing sentencing ranges.<sup>263</sup> To its merit, the Commission admits this reality, yet remains unapologetic. Instead, agency officials in 2004 rationalized that "Congress has proven willing to appropriate the funds needed to expand the capacity of the federal prisons to the levels needed to accommodate expanded federal prosecution and increased sentence severity."<sup>264</sup> Then in 2012, in response

<sup>259</sup> Data compiled from NATHAN JAMES, CONG. RESEARCH SERV., R42486, THE BUREAU OF PRISONS (BOP): OPERATIONS AND BUDGET 11-12 (20113).

<sup>260</sup> U.S. GOV'T ACCOUNTABILITY OFF., BUREAU OF PRISONS, GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 18 (2012), <http://www.gao.gov/products/GAO-12-743>.

<sup>261</sup> *Id.* at 48.

<sup>262</sup> *Id.* at 12.

<sup>263</sup> Oleson, *supra* note 216, at 712.

<sup>264</sup> U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 77 (2004),

to a Congressional hearing expressly enquiring about the rising costs of federal imprisonment, the Chair of the Commission appears to assume little blame. She principally explains overcrowding by pointing to mandatory minimums and the size and composition of the federal criminal docket.<sup>265</sup> While she asks Congress to consider enacting specific statutes that would offer some sentencing relief, no corresponding changes to the guidelines are offered.<sup>266</sup>

## 2. Increases in Adjudication Costs

The guidelines system actually has become quite inefficient in its tremendous consumption of resources. Some costs are unquantifiable, but there is substantial evidence that the guidelines system has caused interruptions and alterations in criminal adjudication. Mastering the guideline manual itself must be an intensive exercise for anyone. Coupled with annual guideline modifications and keeping track of various judicial interpretations of guidelines operations, expertise in guidelines compliance likely is time consuming. Probation officers spend more time than in the indeterminate system on sentencing matters.<sup>267</sup> The guideline system still requires lengthy presentence investigation reports,<sup>268</sup> but attention to detail is greater considering specific facts can trigger various specific offense characteristics and other adjustments. Practitioners note that guidelines' compliance is resource intensive.<sup>269</sup> Judges seem to agree. A survey of federal judges shortly after the implementation of the guidelines showed that ninety percent of respondents opined that sentencing procedures had become more time consuming.<sup>270</sup> One reason is that judges must spend more time finding facts to support the complex guidelines calculations.<sup>271</sup>

Experience has also proven that the guidelines are not easily interpretable and battles over them have left district courts litigating a wide variety of issues.<sup>272</sup> Guidelines complexity, interpretive issues, and

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[http://www.ussc.gov/Research/Research\\_Projects/Miscellaneous/15\\_Year\\_Study/index.cfm](http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/index.cfm).

<sup>265</sup> Letter from Patti Saris, Chair of the U.S. Sent'g Comm'n, to Patrick J. Leahy, Chairman of the House Judiciary Committee, and Charles Grassley, Member of the House Judiciary Committee (Aug. 7, 2012), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/index.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/index.cfm).

<sup>266</sup> *Id.*

<sup>267</sup> Denzlinger & Miller, *supra* note 217, at 51.

<sup>268</sup> FED. R. CRIM. PROC. 32(c).

<sup>269</sup> Etienne, *Adversariality*, *supra* note 237, at 320-21.

<sup>270</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 137 (Apr. 2, 1990), [www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/\\$file/repfsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/$file/repfsc.pdf).

<sup>271</sup> Susan N. Herman, *Federal Criminal Litigation in 20/20 Vision*, 13 LEWIS & CLARK L. REV. 461, 470 (2009) [hereinafter *Vision*].

<sup>272</sup> Berman, *supra* note 222, at 443.

constitutional questions have burdened the federal judicial system.<sup>273</sup> There has also been an impact on the federal appellate docket.<sup>274</sup> The fact that the United States Supreme Court has had to weigh in on issues with the guidelines in dozens of cases attests to the capital outlays the system has wrought.<sup>275</sup> Litigation over sentencing has burdened the caseloads of the federal circuit courts of appeal. Prior to the institution of the guidelines system in 1987, sentences were virtually unappealable.<sup>276</sup> The Sentencing Reform Act opened the door, permitting either party to appeal the sentence issued. The parties have realized this opportunity. The number of appeals has skyrocketed, with the majority filed by defendants. The number of appeals with sentencing issues has evolved from a rarity pre-reform, to approximately 4,000 sentencing appeals in fiscal 1996 (seventeen percent of which were reversed or remanded)<sup>277</sup> and increasing another fifty percent further to almost 6,000 in fiscal 2012 (of which twenty-seven percent were reversed or remanded).<sup>278</sup>

While not directly a cost of adjudication, the increased costs for the operation of the Commission, an agency situated in the judicial branch, is still relevant. The budget for the Commission's own tasks in promulgating, continually monitoring, and amending the guidelines has doubled over a fifteen-year period, rising from \$8.5 million for fiscal year 1997 to \$16.5 million in fiscal 2012.

#### *D. Competing Basic Values*

This Section on several occasions has highlighted the unanticipated consequence of sentencing reforms in the federal system of likely furthering disparities in sentencing nationwide. An additional source of this unintended consequence is partly the fault of an initial—and controversial—policy decision that the Commission made. The relevant policy here relates to what is generally referred to as real-offense sentencing.<sup>279</sup> The Commission's basic choice was whether to embrace a

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<sup>273</sup> William K. Sessions III, *Federal Sentencing Policy: Changes Since the Sentencing Reform Act of 1984 and the Evolving Role of the United States Sentencing Commission*, 12 *WIS. L. REV.* 85, 107 (2012).

<sup>274</sup> Herman, *Vision*, *supra* note 271, at 470.

<sup>275</sup> See U.S. SENT'G COMM'N, *SELECTED SUPREME COURT CASES ON SENTENCING ISSUES* (2013) (collecting cases), [www.ussc.gov/Legal/Court\\_Decisions/Supreme\\_Court\\_Cases.pdf](http://www.ussc.gov/Legal/Court_Decisions/Supreme_Court_Cases.pdf).

<sup>276</sup> *Koon v. United States*, 518 U.S. 81, 96 (1996) (noting the exception of sentences violating statutory limits).

<sup>277</sup> U.S. SENT'G COMM'N, 1996 ANNUAL REPORT 2 (1997), [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/1996/sbtoc96.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/1996/sbtoc96.htm).

<sup>278</sup> U.S. SENT'G COMM'N, 2012 ANNUAL REPORT 5 (2013), [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm).

<sup>279</sup> David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach*

charge system, one in which the sentence was proportional to the offense(s) of conviction, or a real-offense system, one in which the sentence also takes into consideration the defendant's actual conduct. The latter system prevailed.<sup>280</sup> The real-offense system the Commission employs permits the sentencer to consider facts outside the four corners of the charge sheet for which the defendant is sentenced. Thus, the sentencer can consider other relevant characteristics of the offense, offender, or victim and can evaluate the defendant's alleged other crimes.<sup>281</sup> These have been, appropriately, referred to as extraverdict facts which are still factored into the sentence outcome.<sup>282</sup> The Commission authorizes the consideration of additional offenses even if the prosecutor never brought charges for such conduct, the charges were dismissed, or the defendant was acquitted of them.<sup>283</sup> The scheme countenances such consideration even if the relevant conduct was bargained out of the plea deal.<sup>284</sup> In essence, at the sentencing hearing the parties may be litigating the existence of facts that were not necessary elements of the crime(s) for which the defendant was convicted.<sup>285</sup>

A hypothetical may help illustrate the gravity of a real-offense system. Suggest the defendant is tried for four bank robberies. The defendant goes to trial and the jury convicts on a single bank robbery though acquits on the others. At sentencing, though, the district judge can consider evidence of the three acquitted bank robberies and of additional facts not charged or found to be true by the jury, such as the use of a deadly weapon and the defendant's aggravating role in all four crimes.

The real-offense system was an accommodation to gaps in federal criminal law.<sup>286</sup> Supporters argue that real-offense sentencing is appropriate considering the failure of the federal criminal code itself to differentiate between culpable offenses in many statutes.<sup>287</sup> For instance, envisage the

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to *Real-Offense Sentencing*, 58 STAN. L. REV. 267, 268 (2005) (contending a "drastic" policy).

<sup>280</sup> Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 926 (1990).

<sup>281</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2012).

<sup>282</sup> Benjamin J. Priester, *Apprendi Land Becomes Bizarro World: "Policy Nullification" and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 SANTA CLARA L.J. 1, 8 (2011).

<sup>283</sup> David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 403 (1993).

<sup>284</sup> Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 925 n. 228 (1990).

<sup>285</sup> Bowman, *Debacle*, *supra* note 192, at 379.

<sup>286</sup> Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 HOFSTRA L. REV. 1, 8-9 (1988).

<sup>287</sup> Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U.L. REV. 1342, 1345 (1997).

federal crime of wire fraud. It is generically defined to include:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice.<sup>288</sup>

The penalty for wire fraud is up to 20 years.<sup>289</sup> On its own, there is no distinguishing the culpability between the worst and least offenders of the crime of wire fraud. There is no statutory distinction between the nature of the fraud, type of victim, extent of fear instilled, amount of loss, or duration of the crime, all of which are likely relevant considerations for assessments of culpability. Yet the fact that the potential range of punishment is so broad suggests even Congress expected there would be various degrees of seriousness in committing the offense of wire fraud.

Thus, supporters claim that in order to comply with the goal of punishment proportionate to the behavior, real-offense sentencing offers a method for gradating levels of moral responsibility and harm.<sup>290</sup> A real-offense system allows the sentencing authority to systematically incorporate offense characteristics as discrete quantifiable units of culpability to distinguish dissimilar crimes. Critics, on the other hand, claim that real-offense sentencing is fundamentally unfair for reaching conduct external to the offense(s) of conviction.<sup>291</sup> Real-offense sentencing occurs in proceedings without the normal procedural safeguards afforded during the guilt phase, such as a jury determination of the facts, the right to confront witnesses, and the requisite standard of proof beyond a reasonable doubt.<sup>292</sup> Objectors contend that the real-offense sentencing merely subsidizes the prosecution's case,<sup>293</sup> while contrastingly disadvantaging the defendant's position.

Real-offense sentencing has led to additional unintended consequences in further handicapping defendants. Defendants may be discouraged from even challenging real-offense evidence upon threat of losing an opportunity

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<sup>288</sup> 18 U.S.C. § 1343.

<sup>289</sup> *Id.*

<sup>290</sup> Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U.L. REV. 1342, 1345 (1997).

<sup>291</sup> Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 524 (1993).

<sup>292</sup> Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 290-91 (1992).

<sup>293</sup> Etienne, *Adversariality*, *supra* note 237, at 316.

to receive reductions for acceptance of responsibility. They also face aggravating obstruction of justice points if denying relevant conduct is determined to be thwarting the investigation.<sup>294</sup>

In sum, real-offense sentencing represents a tradeoff between competing values. The real-offense system just discussed represents an elevation of the goal of proportionality (for this purpose at the individual level measured by real-offense behavior) over traditional procedural interests. Efficiency is sacrificed to calculability, as well. Previously addressed was the idea that sentencing reform has led to the unintended consequence of substantially increasing adjudication costs. The minutiae of quantifications of harm represented by the system undermine efficiency, too. The guidelines system is widely criticized as being extremely complicated.<sup>295</sup> The most recent guidelines manual is over 500 pages long, excluding most appendices. It contains thousands of rules. A perusal of guidelines makes evident that there are numerous exceptions to rules, exceptions to exceptions, and sheer anomalies. A commentator has remarked that the guidelines comprise the most complicated mathematical word problem known in criminal law.<sup>296</sup> Compliance often requires numerous calculations and the guidelines' frequent use of cross-references may require a journey through many different guidelines even when there is a single count of conviction.<sup>297</sup>

Another fundamental value has been forfeited which deserves at least brief mention. The guidelines favored metrics over providing guiding principles that would prove useful for judicial decisionmaking. While it certainly has authored a plethora of complex rules under the guise of providing systematic structure, the high variance rate alone indicates the Commission is often not providing normative guidelines.<sup>298</sup> By emphasizing the value of reducing disparity, the Commission has resorted to quantification rather than employing its expertise. As one commentator has suggested, the Commission gave judges “words on a page, categories, grids, numbers” but no coherent sentencing policies to guide uniform and just decisions.<sup>299</sup> This reality, though, is certainly consistent with characteristics of McSentencing.

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<sup>294</sup> Etienne, *Adversariality*, *supra* note 237, at 320.

<sup>295</sup> David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 272 (2005).

<sup>296</sup> Porter, *supra* note 72, at 479.

<sup>297</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.5 (2012).

<sup>298</sup> Stith & Dunn, *supra* note 62, at 218.

<sup>299</sup> Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 535 (2007) [hereinafter *Impotence*].

### *E. Self-Fulfilling Prophecies*

As has been addressed, sentencing reforms were based on assumptions of disparities in sentencing and disproportionate punishments.<sup>300</sup> But these goals can properly be perceived as self-fulfilling prophecies. According to Merton's theory here, these presumptions may have been initially fallacious anxieties which have transformed into their actual existence. Let us start with the self-fulfilling prophecy of disparities.

#### 1. Disparities

Whether disparities in sentencing truly existed at the time of the sentencing reform legislation is uncertain. By characterizing judicial sentencing discretion as necessarily causing disparities, sentencing reformers certainly signaled their strong desire to find evidence thereof. Legal practitioners, academics, and empirical researchers have attempted to answer the question about whether disparity has increased or decreased over time, or at least whether there is disparity at all since the guidelines reform. But despite much research there is no definitive answer.<sup>301</sup> Research results point in many different directions and provide disparate findings. Likely this is due to inconsistent methodologies,<sup>302</sup> variables,<sup>303</sup> sources of data,<sup>304</sup> jurisdictions,<sup>305</sup> time frames,<sup>306</sup> offenses,<sup>307</sup> and focal point of attention

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<sup>300</sup> U.S. SENT'G COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1, [http://www.ussc.gov/About\\_the\\_Commission/index.cfm](http://www.ussc.gov/About_the_Commission/index.cfm) (last visited July 22, 2013).

<sup>301</sup> Leslie Sebba, *Is Sentencing Reform a Lost Cause? A Historical Perspective on Conceptual Problems in Sentencing Research*, 76 LAW & CONTEMP. PROB. 237, 257-58 (2013).

<sup>302</sup> Caleb Mason & David Bjerk, *Inter-Judge Sentencing Disparity on the Federal Bench: An Examination of Drug Smuggling Cases in the Southern District of California*, 25 FED. SENT'G REP. 190, 195 (2013) (reviewing PACER information, comparing sentences 2007-2010 for drug smuggling cases issued in a single district, finding "a good deal of uniformity").

<sup>303</sup> Joel Waldfogel, *Aggregate Inter-Judge Disparity in Federal Sentencing: Evidence from Three Districts (D.Ct., S.D.N.Y., N.D. Cal.)*, 4 FED. SENT'G REP. 151, 152 (1991) (examining three districts and finding greater aggregate disparity in the transitional period after the guidelines than before in two of the three).

<sup>304</sup> Susan B. Long & David Burnham, *Examining Current Federal Sentencing Practices: A National Study of Differences Among Judges*, 25 FED. SENT'G REP. 6, 15 (2012) (analyzing Transactional Records Access Clearinghouse data for 2007-2011, finding "statistically significant, unexplained differences in the typical sentences of judges in around [sixty] percent of [federal courthouses], while the remaining [forty] percent showed no significant differences").

<sup>305</sup> Ann Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 BERKELEY J. CRIM. L. 43 (2006) (analyzing file data in three federal courts 1998-2000, finding preferential treatment of female drug defendants).



(race,<sup>308</sup> gender,<sup>309</sup> or sentence length<sup>310</sup>).

It is as if there is some metaphysical disparity that is at the heart of the debate, amorphous as it is. Nonetheless, whether the “truth” of disparity at sentencing reform was accurate or not is not dispositive of the self-fulfilling prophecy at issue. We can simply concede that disparities existed at the time of reforms while also recognizing that the sentencing reformers’ labeling of judicial discretion in sentencing as incapable of achieving uniformity may have inadvertently caused further inconsistencies in judicial decisions and fostered additional sources of disparity. A jurist has observed, for example, that the automated guidelines exercise left colleagues in his district less likely than before reforms to confer with each other to achieve uniformity.<sup>311</sup> Alternative sources of disparities include guideline policies discussed earlier which arm prosecutors with greater discretionary judgment, provide probation officers with authoritative influence, enable police forces to manipulate sentencing factors through investigative strategies, and favor defense counsel having familiarity with the complex guidelines.<sup>312</sup> By demanding uniformity and highlighting disparity, the former may have been unwittingly disparaged while the latter exacerbated.

Concentration of reforms on restricting judicial flexibility in

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<sup>306</sup> DOUGLAS C. McDONALD & KENNETH E. CARLSON, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 1-2 (1993), <https://www.ncjrs.gov/App/abstractdb/AbstractDBDetails.aspx?id=145332> (finding racial differences in drug offending after reforms but not before, citing impact of guidelines and mandatory minimums).

<sup>307</sup> Celesta A. Albonetti, *Sentencing under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentencing Outcomes for Drug Offenses, 1991-1992*, 31 LAW & SOC’Y REV. 789, 817 (1997) (examining drug offenses, finding sentences based on offense-related variables, as well as on ethnicity, gender, education, and citizenship).

<sup>308</sup> Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729 (2012) (using Commission data from 1992-2009, concluding judicial discretion can reduce racial disparities and any residual differences in sentence length and departures based on race were largely the result of mandatory minimums).

<sup>309</sup> David R. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 308 (2001) (finding blacks, males, and offenders of lower socioeconomic class on average receive longer sentences in fiscal years 1991-1994, controlling for relevant factors, due mostly to departure decisions).

<sup>310</sup> Celesta A. Albonetti, *The Joint Conditioning Effect of Defendant’s Gender and Ethnicity on Length of Imprisonment Under the Federal Sentencing Guidelines for Drug Trafficking/Manufacturing Offenders*, 6 J. GENDER RACE & JUST. 39, 55 (2002) (reporting univariate statistics for drug trafficking: black males received the longest mean sentence length while white and Hispanic females received the shortest).

<sup>311</sup> Jack B. Weinstein, *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 363-64 (1992).

<sup>312</sup> See *supra* Section IV.B.

decisionmaking is particularly relevant here, eliciting felicitous reflections upon the salience of cultural values. Neither Congress nor the Commission adequately considered the strong cultural traditions of judicial discretion, independence, and prerogative.<sup>313</sup> These traditions are especially robust in the area of sentencing. American judges, consistent with common law conventions, believe in their primordial abilities to adjudge proper punishments.<sup>314</sup> In contrast, Congress and the Commission seemed to genuinely trust that a mass overhaul of judicial sentimentalities, imaginations, and capacities could instantly occur through legislative and administrative fiat. Social forces dictated otherwise. Prophecies that judicial discretion was the source of disparities fostered institutional distrust.<sup>315</sup> Congress and the Commission, on the one hand, made different ideological assumptions than the federal judiciary, on the other, about how best to achieve sentencing uniformity and proportionality. For Congress and the Commission, these goals could be achieved through standardized mass sentencing rules and strict limits on judicial discretion.<sup>316</sup> For the judiciary, individualized justice remains the preferred method, and these values are best achieved with reliance upon judges' intelligence, experience, and good judgment.<sup>317</sup>

Attempts to restrict judicial discretion become a self-fulfilling prophecy considering the nature of judging in that it is figuratively an invitation for insurrection.<sup>318</sup> As a federal judge opines: "[T]he [g]uidelines . . . have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring the law in an effort to achieve a just result. All under the banner of 'truth in sentencing!'"<sup>319</sup> The

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<sup>313</sup> See Michael Edmund O'Neill & Linda Drazga Maxfield, *Judicial Perspectives on the Federal Sentencing Guidelines and the Goals of Sentencing: Debunking the Myths*, 56 ALA. L. REV. 85, 85 (2004).

<sup>314</sup> Gertner, *Impotence*, *supra* note 299, at 524.

<sup>315</sup> Osler, *supra* note 70, at 217 ("[A] sad result has been the continuing and destabilizing struggle between judges, the Sentencing Commission, and Congress, which has been fought like a tug of war with the rope being dragged first towards uniformity, then towards judicial discretion, and then back again in a pit of mud.").

<sup>316</sup> Paul J. Hofer, *Beyond the "Heartland": Sentencing under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 681 (2011).

<sup>317</sup> See Bowman, *Debate*, *supra* note 192, at 373-74 ("Some conceived of sentencing judges as performing a quasi-medical evaluation and treatment function. Others maintained that sentencing judges were performing a sui generis form of "moral reasoning" that could not be cabined within the fact-and-rule-bound strictures of adversarial due process. After all, one would scarcely insist on due process in the doctor's examining room or the tower of the philosopher-king."); Gertner, *Impotence*, *supra* note 299, at 527 (referring to sentencing judges' role as "therapeutic, much like a physician" such that limiting access to information on which to build a sentence becomes unreasonable).

<sup>318</sup> Osler, *supra* note 70, at 218.

<sup>319</sup> Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing*

institutions, operating on a fundamental level of distrust, have become alienated within McSentencing.<sup>320</sup> These institutions are so entrenched in such mistrust of each other on sentencing issues that a power struggle has ensued, which inherently undermines the goals of reforms. The judiciary's position is evident by the high variance rate. For fiscal 2012, only fifty-two percent of sentences were within guidelines ranges.<sup>321</sup> The level of dissension reverberated at a Congressional hearing held in 2011 specifically called to address the current state of affairs with federal sentencing. Pointedly titled "Uncertain Justice," the hearing appeared to have been intended to provide a public forum to chastise the judiciary for its high rates of variances and the Commission for not reining them in. On behalf of the House Judiciary Committee, the then Chair acerbically claimed that the federal judiciary had since *Booker* "wrested back most if not all of the old discretion [f]ederal judges used to have—a discretion that Congress found was abused in 1984 when it passed the sentencing guidelines law."<sup>322</sup> He further rhetorically surmised that the Commission appears "satisfied that the regulations they promulgate can be routinely ignored."<sup>323</sup>

For its part, the Commission struggles with its attempt at oversight since the agency does not enjoy direct managerial control of the federal judiciary. Therefore, it has petitioned for backup from two other institutions that wield some authority over decisions at the district court level: Congress and the federal appellate courts. In a lengthy report to Congress in 2012, the Commission beseeches Congress to assist it in wresting back significant control after the *Booker* decision. The administrative agency makes specific entreaties. The Commission recommends that Congress require that federal judges give the guidelines "substantial weight,"<sup>324</sup> thereby putting a thumb

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*Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992) (quoting survey respondent).

<sup>320</sup> Stith & Dunn, *supra* note 62, at 221 ("[T]he current Commission bears the taint of longstanding and widespread disrespect for its own [g]uidelines. This lack of respect is especially evident in Congress itself, which increasingly has rejected a role for the Sentencing Commission in formulating federal sentencing policy."); Ronald F. Wright, *The Power of Bureaucracy in the Response to Blakely and Booker*, 43 HOUS. L. REV. 389, 391 (2006) ("Congress's view of the Commission falls somewhere between indifference and hostility.").

<sup>321</sup> *2012 Sourcebook*, *supra* note 97, at tbl. N. Twenty-eight percent were government-sponsored below range, eighteen percent represented judicial downward departures, while a final two percent were above range. *Id.*

<sup>322</sup> *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker*: Hearing Before the H. Comm. on the Judiciary, 112th Cong. 2 (2011) (statement of F. James Sensenbrenner, Chair), [http://judiciary.house.gov/hearings/printers/112th/112-142\\_70669.pdf](http://judiciary.house.gov/hearings/printers/112th/112-142_70669.pdf).

<sup>323</sup> *Id.*

<sup>324</sup> *Booker Report*, *supra* note 126, pt. A, at 114 (suggesting alternatives of "due regard" and "respectful consideration").

on the scale favoring guidelines-computed numbers. It asks that Congress require district judges to give even more justification than normally required when issuing a sentence outside the applicable guideline range,<sup>325</sup> suggesting any variance should be deemed inherently suspect. In another clear bid for making the guidelines more salient and to encourage compliance, the Commission seeks the assistance of the federal appellate courts, asking for a “more robust” appellate review standard.<sup>326</sup> At present, these entreaties remain outstanding, with no public response yet by the legislature or the federal courts of appeal. Nonetheless, they are signifiers of the disconnect between institutions and that the judiciary’s strong reactions to the reform legislation undermines its success.

A potential reason for the high judicial variance rate regards the dehumanization aspect of McSentencing. Scoring systems that mechanize decisionmaking, while restricting freedom of thought, are inherently demoralizing to professionals. While guidelines calculations have not (yet) replaced human labor with technology driven devices,<sup>327</sup> the vast array of guidelines and required computations still undermine human ingenuity and solicitude in the sentencing equation. The sentencing reforms intend to exchange the intellectual and emotional largely with number crunching. The system is uniquely dehumanizing to judges, who naturally want to feel that have made a proper effort and given thoughtful consideration before substantially infringing upon a person’s liberty interest.<sup>328</sup> According to the estimable Judge Jack Weinstein: “Whereas sentencing once called for hours spent reflecting on the offense and the person, we judges are becoming rubber-stamp bureaucrats. When we come to see ourselves as judicial accountants, freed from the awful responsibility of imposing a sentence, we will have abdicated our judicial role entirely.”<sup>329</sup> McSentencing is dehumanizing to defendants as well. In the course of the intended mass sentencing system, offenders are seen as a belonging to a type and not as individuals.

In the end, the thesis presented here is that the prophecy of mechanized sentencing achieving uniformity virtually created a culture of nonconformance with the guidelines. The Commission seems to regard uniformity as meaning sameness in punishment for similar conduct. This

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<sup>325</sup> *Id.* at 112.

<sup>326</sup> *Id.* at 111-12.

<sup>327</sup> *But see* Osler, *supra* note 70, at 232-33 (suggesting a computer program with databases of federal sentencing practices could assist judicial decisions).

<sup>328</sup> Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1581 (2012); Jack B. Weinstein, *Does Religion Have a Role in Criminal Sentencing?*, 23 TOURO L. REV. 539, 539 (2007).

<sup>329</sup> Jack B. Weinstein, *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992).

ignores another cultural reality leading to irrationality. In the last century or so we as a society, when faced with concrete examples, have tended to balk at assuming a one-size-fits-all philosophy, even for offenses causing the same harm.<sup>330</sup> A few examples may suffice. Many states have codified degrees of murder mostly to be able to gradate punishments, even though an identical harm results—*i.e.*, death of a person. The death penalty has been, albeit led by Supreme Court doctrine, limited to the worst of the worst murderers,<sup>331</sup> and defining such is left to human judgment in individual cases. Our system of criminal law has developed a range of defenses, whether full or partial, because of the presence of certain personal attributes (e.g., infancy, insanity, diminished capacity) or situational circumstances (e.g., self-defense, necessity, duress) that alter our social perspective on culpability and/or desire for public condemnation. In other words, strict uniformity disregards our natural tendency to make value-laden judgments that are context dependent. To cite a challenging contemporary example, the distribution of child pornography has in recent years been decried as an extremely heinous offense with offenders being morally condemned and, at least in the federal system, subject to increasingly lengthy sentences.<sup>332</sup> But with the recent occurrences of teenagers sexting, the public's moral compass has been severely tested. Indeed, the commonality of such behavior<sup>333</sup> and with the general view that it may represent relatively innocent social escapades among immature youngsters (or at least not rising to the level of horror evoked by adult men with sexually explicit photos of young children) has caused state and local officials in various parts of the country to create specialized laws to exempt or reduce punishment for young offenders.<sup>334</sup>

The final result is that sentencing reforms, by declaring that judicial discretion caused disparities is a quintessential self-fulfilling prophecy in which reactive forces ensured that near uniformity would not be achieved. Judges are by nature resistant to cooptation of their professional and ethical

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<sup>330</sup> Gertner, *Impotence*, *supra* note 299, at 538.

<sup>331</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 440 (2008).

<sup>332</sup> See generally Melissa Hamilton, *The Child Pornography Crusade and its Net Widening Effect*, 33 CARDOZO L. REV. 1679 (2012); Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545 (2011).

<sup>333</sup> NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008) (estimating 22% of teenage girls and 18% of teenage boys in America had self-produced and distributed pornographic material by using technology to post nude or semi-nude photos of themselves).

<sup>334</sup> See generally Jordan J. Szymialis, *Sexting: A Response to Prosecuting Those Growing up with a Growing Trend*, 44 IND. L. REV. 302 (2010).

duties. The actions of Congress and the Commission unintentionally reinforced judicial discretion, both birthed and augmented discretionary abilities in other sectors, and precipitated social reactions in the form of end-runs around the system.

## 2. Proportionality

The extreme focus in the last thirty years on uniformity has left proportionality a definitively subordinated goal. Yet its importance in any system of punishment should not be underestimated. A simple rule requiring life sentences for all offenders would be uniform but would be disproportionate for the vast majority of offenders, and therefore would be unreasonable in many cases. Achieving proportionality was a self-defeating prophecy with the reform legislation and choices by the Commission. Here, we are concerned with systemic proportionality. With the refusal by Congress and the Commission to recalibrate the ranking of federal crimes and reimagine relative sentences, it is no wonder that the ideal of a proportional system could not be achieved. Indeed, the inaugural Commission rebelled at the instruction. A goal necessarily becomes self-defeating when the people required to act refuse to do so.

Again, there exists a disconnect amongst the institutions about whether the guidelines offer sentences that are too severe or too lenient. At the time of the sentencing reforms, there was not consistent agreement among the Congressmen who pushed for guidelines, there was a strong contingency of legislatures who believed sentences were too lenient.<sup>335</sup> Since then, the guidelines have taken on a consistent tone, in what a sentencing expert has described as a “one-way upward ratchet” in increasing sentencing recommendations.<sup>336</sup> In contrast, the judiciary tends, though this is not universal, to consider the guidelines as offering unreasonably harsh punishments.<sup>337</sup> Thus, in fiscal 2012, district judges issued below guidelines sentences in forty-six percent of cases.<sup>338</sup> This situation is reminiscent of one of the major enlightenments underlying the law of unintended consequences: purposive action, particularly that in the form of exceptional form of legislation, exists in a social world and will likely confront obstinance, obstacles, and reprisal.

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<sup>335</sup> Stith & Cabranes, *supra* note 125, at 38-48.

<sup>336</sup> Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319 (2005).

<sup>337</sup> Sessions, *supra* note 273, at 92.

<sup>338</sup> 2012 *Sourcebook*, *supra* note 97, at tbl. N.

## V. CONCLUSIONS

Congress embraced the potential to achieve lofty goals when it enacted federal sentencing reforms in the 1980s. Uniformity in sentencing practices and proportionality were main attractions of the reform legislation. What resulted was the creation of a federal punishment system reliant upon a mechanized system of assembly-line justice. But the reforms confronted the social world of the federal judiciary in which sentencing is not accepted as a mere numbers game and the concept of McSentencing is a horrifying prospect to many. McSentencing offers the benefits of predictability, calculability, efficiency, and control. On the other hand, it is also depersonalizing. The reforms begot unintended consequences as a result of insufficient planning, failure to develop a coherent sentencing philosophy, and erroneously fostering discretionary capabilities in multiple arenas. Federal criminal justice post-reform suffers from prison overcapacity and substantially increased adjudication costs as a consequence of Commission decisions to increase punishments across the board and limit the availability of probation, while creating an extremely complex set of guidelines. While likely there are fans of the reform measures, negative reactive forces have been obstacles to achieving the reforms' goals. Conformance measures have suffered and various actors in the sentencing game have found ways to circumvent the reforms. Notably, the federal sentencing system is the subject of institutional dispute and its viability is in jeopardy.

Perhaps we have come full circle. The Department of Justice recently called for another round of reforms.<sup>339</sup> Congressional committees are considering an overhaul.<sup>340</sup> One can only hope that lessons have been learned, and that perhaps the controversies and consequences explored in this Article may inform future reformers. Nonetheless, even if Congress or the Sentencing Commission do engage in legal and policy changes, properly heeding lessons dispensed by the experience with prior reforms, success is not guaranteed. The law of unintended consequences assures events will not transpire exactly as planned. A perfect sentencing system is unattainable in a complex social world. Improvement, though, is imaginable.

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<sup>339</sup> Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y & Legis., to Patti J. Saris, Chair, U.S. Sent'g Comm'n 9 (July 11, 2013), [www.justice.gov/criminal/foia/docs/2013annual-letter-final-071113.pdf](http://www.justice.gov/criminal/foia/docs/2013annual-letter-final-071113.pdf) ("The approach to reform we suggest is . . . to keep focus on all the various purposes of sentencing, to understand the full costs and benefits of various policy options, and to recognize the benefits of a more understandable and simpler framework for the federal sentencing guidelines.").

<sup>340</sup> David Keene, *Prison-Sentence Reform*, NATIONAL REVIEW (May 23, 2013), <http://www.nationalreview.com/article/349118/prison-sentence-reform-david-keene>.