

THE SENTENCING COMMISSION AND PROSECUTORIAL DISCRETION: THE ROLE OF THE COURTS IN POLICING SENTENCE BARGAINS

*Honorable John Gleeson**

My topic is an important defect in the United States Sentencing Guidelines: their attempt to withhold from federal prosecutors the power to enter into sentence bargains pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure.¹ By “sentence bargain” I mean an agreement, subject to court approval, that the defendant will receive a specified sentence, or a sentence within a specified range, that is lower than the defendant’s actual Guidelines range.

I chose this topic because it is a window into several important issues. What is the mission of the United States Sentencing Commission? Is it to guide judicial discretion that affects sentencing outcomes, or does it also extend to prosecutorial discretion? The history of the issue also raises questions about the processes by which the Commission makes sentencing policy and shows what happens when it makes policy badly. Finally, of course, there is the question of whether sentence bargains are a good thing or a bad thing. I think they are a good thing, so I think the Commission should fix a mistake it has made.

I acknowledge at the outset the irony in criticizing the Guidelines (or the Sentencing Commission, which created them) for trying to deprive the government of anything. The Guidelines tipped the balance of sentencing power sharply away from the judge and toward the prosecutor.² Recent developments in the law, which have made the Guidelines advisory only, have rectified that somewhat, but it remains true, just to pick one of many examples, that an undercover agent can directly influence a drug dealer’s later sentence simply by persuading

* United States District Judge, Eastern District of New York. These remarks constituted the Howard and Iris Kaplan Memorial Lecture, delivered on February 13, 2008 at Hofstra University School of Law. I am deeply grateful to my law clerk, Paul Monteleoni, who helped me enormously in thinking through the issues addressed here and in expressing my views. Any remaining errors are, of course, my own.

1. FED. R. CRIM. P. 11(c)(1)(C).

2. See, e.g., Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 244 (2005) (“[T]he Guidelines . . . granted prosecutors an unprecedented measure of authority over particular sentences because the pre-*Booker* Guidelines were mandatory and fact-driven, and prosecutors are largely in control of sentencing facts.”).

him to cook powder cocaine into crack.³ One other example relates to cooperation: In tandem with the severe mandatory minimum drug sentences enacted just before the Guidelines came into effect, the Guidelines transformed the recruitment of accomplice witnesses from a painstaking art into a booming industry. I was investigating and prosecuting gangsters at the time, and it revolutionized the way we did business.⁴

Despite all this, the Commission has attempted to strip prosecutors of a power they have had for more than half a century: the power under Rule 11(c)(1)(C) to negotiate a sentence with the defendant.⁵ Prosecutors want to do this often, for lots of reasons. Sometimes they decide that agreeing to a shorter (but certain) prison term better serves the public than running the risk of acquittal at trial. Or they might prefer to devote the time and effort a trial demands to other investigations, so they agree to let the defendant off a little easier in exchange for a guilty plea. A victim's interest in avoiding the trauma of a trial might influence a prosecutor to negotiate a more lenient sentence if the defendant agrees to plead guilty. Sometimes, believe it or not, prosecutors simply reveal the milk of human kindness and negotiate a lesser sentence because it just seems fair in the circumstances.⁶

By way of context, I should say that a sentence bargain under Rule 11(c)(1)(C) is not the only way prosecutors can give defendants a break. They can give the ultimate break of not making them defendants at all—that is, they can choose not to prosecute the case, or to dismiss a case they have already brought. Another way of giving a defendant a break is a charge bargain: tinkering with the charge or charges the defendant will plead guilty to in order to establish a statutory maximum that is below the applicable Guidelines range. Charge bargains are also authorized by

3. See Jon O. Newman, *The New Commission's Opportunity*, 10 FED. SENT'G REP. 44, 44 (1997).

The Commission's decision to require incremental punishment for every measurable aspect of offense conduct has . . . had the unfortunate consequence of shifting significant sentencing authority not merely to prosecutors but to law enforcement agents. . . . [T]he guidelines permit undercover drug enforcement agents to determine the ultimate punishment by shaping the conversation with a suspect concerning the extent of future deliveries.

Id.

4. I have argued in the past that "if federal prosecutors had been asked to create the sentencing regime that would place the maximum permissible pressure on criminal defendants to cooperate with the government, they could hardly have done better than the Sentencing Commission." John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1119 (1995).

5. See *infra* notes 22-23 and accompanying text.

6. See *infra* note 10 and accompanying text.

Rule 11,⁷ but they are blunt instruments. In many contexts, especially narcotics and violent crime, there are not that many lesser counts to work with. Additionally, a charge bargain only *caps* the available sentence; it does not allow the parties to select a particular sentence or sentencing range.

So the best tool between the extremes of no prosecution at all and an effort to obtain the most severe sentence available under the law and the Guidelines is the sentence bargain authorized by Rule 11(c)(1)(C). The rule provides that the government and the defendant may agree, subject to court approval, “that a specific sentence or sentencing range is the appropriate disposition of the case.”⁸

Sentence bargaining has been around a lot longer than the Guidelines. Rule 11 was amended in 1974 to explicitly authorize these agreements and require their full disclosure at the time of the plea.⁹ By that time, prosecutors across the country had been negotiating sentences for all the reasons I mentioned earlier: to hedge against the risk of acquittal; to preserve scarce resources; to protect victims; and to show sympathy for the defendant.¹⁰ The Advisory Committee proposing the

7. See FED. R. CRIM. P. 11(c)(1)(A).

8. Rule 11(c)(1)(C) provides in full:

(c) PLEA AGREEMENT PROCEDURE.

(1) *In General.* An attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

.....

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

FED. R. CRIM. P. 11(c)(1)(C).

9. PROPOSED AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS R. 11 advisory committee note (1974), *reprinted in* 62 F.R.D. 271, 275-77 (1974) [hereinafter 1974 AMENDMENTS].

10. This discussion borrows from John Gleeson, *Sentence Bargaining Under the Guidelines*, 8 FED. SENT’G REP. 314, 315 (1996).

A 1964 article cited with approval in the Advisory Committee Notes to the 1974 amendments reported that 85% of the prosecutors surveyed, representing 31 states, were influenced by weaknesses in the government’s case; 60% were influenced by the victims’ preferences; 36.7% by their office’s heavy workload; 31.7% by the fact that the penalties the defendant faced were too harsh; and 26.7% by sympathy for the defendant. See Dominick R. Vetri, Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 896, 901 (1964); see also 1974 AMENDMENTS, *supra* note 9, at 281 (citing Vetri, *supra*). Absent “flagrant abuses of discretion by prosecutors,” plea bargains based on such factors have historically been accepted and enforced by courts. Vetri, *supra*, at 893. Indeed, they are recognized as “an essential component of the administration of justice.” *Santobello v. New York*, 404 U.S. 257, 260 (1971).

The same factors cause prosecutors to want to sentence bargain today, as recounted by

amendment recognized that sentence bargaining is “an ineradicable fact” of our system, and that “[f]ailure to recognize it tends not to destroy it but to drive it underground.”¹¹

At the same time Rule 11 was being amended, the sentencing reform movement was gathering steam. That movement was a reaction to the results of indeterminate sentencing regimes that vested great discretion in sentencing judges. Widely disparate sentences were imposed without any explanation of the reasons and without any meaningful appellate review of the results. In the words of Judge Marvin Frankel, sentencing was a “wasteland in the law.”¹²

In the federal arena, the movement culminated in the Sentencing Reform Act of 1984 (“SRA”), which created the Sentencing Commission and told it to establish a sentencing system that would “avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct”¹³ The result was the Guidelines system, which dramatically narrowed judges’ sentencing power. Before the Guidelines, a judge chose a sentence between probation and the aggregated statutory maximum sentences available for the offenses of conviction. Under the Guidelines, the judge is directed to 1 of 258 boxes on a sentencing grid, each containing a much narrower range of available sentences.¹⁴ Pre-

two high-ranking Assistant United States Attorneys in the District of Columbia:

When the [11(c)(1)](C) plea contains a stipulation to a sentence outside the Guidelines range, it may, in effect, be a stipulation to a downward departure under the Guidelines. A (C) plea may also be based on other considerations that are outside the rubric of the Guidelines, such as proof problems, uncertain legal issues, competing demands for prosecutorial resources, victim preference, and a need for the defendant’s cooperation in other cases.

Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1071 (2006) (citation omitted). As the authors note, they are permitted an expansive view of Rule 11(c)(1)(C) because the D.C. Circuit held in *United States v. Goodall*, 236 F.3d 700, 705-06 (D.C. Cir. 2001), that Rule 11(c)(1)(C) trumps the Sentencing Commission’s effort to curtail sentence bargains. See Brown & Bunnell, *supra*, at 1071 (noting the effect of *Goodall*). As discussed *infra*, at notes 31-34 and accompanying text, other courts of appeals have held otherwise.

11. 1974 AMENDMENTS, *supra* note 9, at 282. The Advisory Committee recognized not only the ubiquity of sentence bargaining, but also its value, noting that sentence bargains ensure “swift and certain punishment,” avoid the expense of a public trial, and can spare victims the “trauma of direct and cross-examination.” *Id.* at 281-82.

12. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 54 (1972).

13. 28 U.S.C. § 991(b)(1)(B) (2000).

14. See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2007) [hereinafter U.S.S.G.]. The SRA prescribed a 25% rule limiting the breadth of each range; that is, the upper end of each range cannot exceed the lower end by more than 25% (or six months, whichever is greater). 28 U.S.C. § 994(b)(2) (2000).

Guidelines, a loan shark who threatened to kill someone so that he would make a payment on a \$2000 loan faced anywhere from probation to twenty years in jail; under the Guidelines, his range is twenty-seven to thirty-three months.¹⁵ The Guidelines allow for departures from the applicable range only in cases outside the Guidelines “heartland”¹⁶—that is, only in the rare case involving circumstances not adequately considered by the Commission in formulating the Guidelines.¹⁷

At the same time that it restricted judicial discretion at sentencing, the Commission took pains to assure judges, prosecutors, and defense attorneys that it was not touching plea bargaining practices, at least not yet.¹⁸ Rather, the Guidelines would establish a clear and definite sentence expectation so the plea bargaining prosecutor and defense counsel would “no longer work in the dark.”¹⁹ In policy statement § 6B1.2 and its commentary the Commission said that sentence bargains could be accepted as long as the specified sentence departed from the applicable Guidelines range for “justifiable reasons”²⁰ and did “not

15. Compare Hobbs Act, 18 U.S.C. § 1951 (2000) (setting the statutory maximum) with U.S.S.G., *supra* note 14, § 2B3.2 & ch. 5, pt. A (setting the Guidelines range assuming a defendant with no prior convictions who is convicted at trial).

16. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, 4(b) (1987) [hereinafter U.S.S.G. 1987].

17. 18 U.S.C. § 3553(b)(1) (2000 & Supp. V 2007); U.S.S.G., *supra* note 14, § 5K2.0; see also *United States v. Booker*, 543 U.S. 220, 245 (2005) (severing and excising § 3553(b)(1) to avoid unconstitutional application of the Sentencing Guidelines). Another basis for departure from the Guidelines range is a government motion based on a defendant’s cooperation with the government. For the most part, such departures serve the government’s interest in crime control, and have little bearing on the issues raised here, that is, how prosecutors choose to give defendants a break from Guidelines sentences for reasons other than cooperation. But the history of practice under the Guidelines has shown that even these “substantial assistance” motions have been used to give non-cooperating defendants relief from the rigors of the Guidelines:

One study revealed that nearly one-half of the U.S. Attorneys around the country consider it “substantial assistance” to the government when the only crimes the cooperating defendant discloses are his own. And the [U.S. Attorney’s Office for the] Eastern District of Pennsylvania, a perennial league leader in substantial assistance motions, acknowledges that it uses the motions—which spare the defendants the rigors of a Guidelines sentence—as an alternative to charge bargaining.

John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1708-09 (2003) (citations omitted).

18. “The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices.” U.S.S.G. 1987, *supra* note 16, ch. 1, pt. A, 4(c).

19. *Id.*

20. Specifically, § 6B1.2(c) stated as follows:

In the case of a plea agreement that includes a specific sentence [Rule 11(c)(1)(C)], the court may accept the agreement if the court is satisfied either that:

- (1) the agreed sentence is within the applicable guideline range; or
- (2) the agreed sentence departs from the applicable guideline range for justifiable

undermine the basic purposes of sentencing.”²¹

Those are standards a district judge can work with. The phrase “justifiable reasons” can easily accommodate all of the real-world factors that cause prosecutors and defense counsel to strike sentence bargains. And since those concerns had long been considered legitimate reasons for courts to accept sentence bargains, it was easy to conclude that accepting these agreements did not “undermine” *any* purposes of sentencing, let alone the “basic” ones. So the initial Guidelines left plea bargaining in general—and sentence bargaining in particular—as the Commission had found it.

Then, in 1989, just two years into the Guidelines era, the Sentencing Commission produced Amendment 295 to the Guidelines, which in turn has produced the topic here. The amendment is easily described. The Commission did not touch the text of § 6B1.2, which still authorizes judges to accept sentence bargains so long as there are “justifiable reasons” for doing so.²² But it slipped into the commentary language that defined that phrase. The definition limited “justifiable reasons” to those extraordinary circumstances that would support a departure under the Guidelines’ narrow departure authority.²³

Though the Commission billed the 1989 amendment as a mere “clarification” of the existing commentary,²⁴ nothing could have been further from the truth. By prohibiting judges from accepting a bargain for a sentence that could not be reached through the departure power, the

reasons.

U.S.S.G. 1987, *supra* note 16, § 6B1.2(c). The provision respecting recommended sentences was identical.

21. The commentary read as follows:

Similarly, the court will accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that the contemplated sentence is within the guidelines or, if not, that the recommended sentence or agreement departs from the applicable guideline range for justifiable reasons and does not undermine the basic purposes of sentencing.

U.S.S.G. 1987, *supra* note 16, § 6B1.2(c) cmt.

22. *Id.*

23. The commentary as amended by Amendment 295 read as follows:

Similarly, the court will accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that the contemplated sentence is within the guidelines or, if not, that the recommended sentence or agreement departs from the applicable guideline range for justifiable reasons (*i.e., that such departure is authorized by 18 U.S.C. § 3553(b)*). *See generally Chapter 1, Part A (4)(b)(Departures)*.

U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(c) cmt. (1989) [hereinafter U.S.S.G. 1989] (emphasis added). *Cf. supra* note 21 (reproducing pre-amendment commentary).

24. *See* 1 U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL 144 (2003) [hereinafter GUIDELINE AMENDMENTS] (listing Amendment 295 and stating “[t]he purpose of this amendment is to clarify the commentary”).

Commission actually made a very important normative decision: It subjected disparities produced by prosecutors through sentence bargains to the same tight regulation the Guidelines had imposed upon disparities produced by judges. A prosecutor's concern about losing at trial is not an authorized departure ground. Neither is concern for the victim, sympathy for a defendant, or a desire to free up resources for another investigation. As discussed above, these and other reasons had always been considered legitimate bases for a prosecutor, subject to court approval that was almost always given, to negotiate a sentence bargain.²⁵ For reasons sufficient to the Commission but expressed nowhere, the 1989 amendment tried to outlaw these agreements by requiring judges to reject them. To be fair, judges could accept them, but only when they were not necessary to begin with because a departure was available anyway. The intent to snuff out sentence bargains in almost all circumstances was clear. Indeed, a law review article authored by the Commission's Chair and General Counsel shortly after the 1989 amendment suggested that the real reason for the "clarification" was to do just that.²⁶

The first point I want to make is the most obvious one: This is not the way sentencing policy should be made. The 1989 amendment implicated an extremely important issue—the extent to which the Guidelines, which were created to restrict *judicial* discretion, should become a mechanism to try to restrict prosecutorial discretion as well. And even if the Commission was justified in attempting to curtail sentence bargains, there are natural institutional problems in using judges to police a rule that neither the prosecutor nor defense counsel wants enforced. But these and all the other facets of the issue cannot be considered where important policy changes are made by stealth, disguised as "clarifications."²⁷ I hasten to add that the current

25. See *supra* note 10 and accompanying text.

26. The article suggests that the purpose behind the amendment was to place greater responsibility on judges to reject efforts by prosecutors and defense lawyers to affect sentences through unspecified plea bargaining "abuses." William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 500 (1990).

27. Unfortunately, Amendment 295 was not an isolated instance of the initial Commission's dysfunctional approach to sentencing policy. At precisely the same time, the Commission made a similarly fundamental shift in policy concerning "substantial assistance" motions in an equally disingenuous manner. As originally promulgated, § 5K1.1 of the Guidelines permitted departures based on a government motion stating that the defendant had made a "good faith effort to provide substantial assistance" in another investigation or prosecution. U.S.S.G. 1987, *supra* note 16, § 5K1.1. Amendment 290 restricted such departures to cases in which the government motion states that substantial assistance was actually provided. See GUIDELINE AMENDMENTS, *supra* note 24, at 143 (describing Amendment 290). Again, the amendment addressed a core issue of sentencing policy: Is rewarding cooperation a matter of crime control only, or is the effort to cooperate a

Commission does not work this way. It lacks the balance of an *ex officio* position to represent the views of the defender community,²⁸ but the Commission is more transparent and receptive than it has ever been. The results it reaches are often controversial, but the processes it uses are difficult to quarrel with. It is past time for it to use those processes to consider and clarify the role of sentence bargains in federal courts.

As for the results of the amended § 6B1.2, which contains the narrow limits on sentence bargains, the policy statement has not exactly been effective.²⁹ In the Commission's zeal to conscript judges to help stamp out disparities produced by sentence bargains, it overlooked some important real-world facts. Ours is, after all, an adversarial system. It asks a lot of a judge to reject an outcome that both sides think is just. It asks even more when the negotiated sentence results in a break that everyone, including the judge, feels is needed from a sentencing regime that many believe is too severe. So even though more than ninety percent of federal cases are resolved by guilty pleas, and sentence bargains are common in many places, there are not many cases that even address § 6B1.2.³⁰ But it has not been ignored entirely. Some courts have tried gamely to figure out what the Commission expects of judges to whom sentence bargains are submitted by the parties. Those cases show that when § 6B1.2 is not disregarded, all it produces is confusion.

The First Circuit has stated that the provision means what it says, and thus sentence bargains calling for below-range sentences may be

cognizable offender characteristic as well? Yet once again the Commission masked its action as a "clarification." See *id.* at 143. ("The purpose of this amendment [Amendment 290] is to clarify the Commission's intent that departures under this policy statement be based upon the provision of substantial assistance.") It asserted that the original § 5K1.1 "could be interpreted as requiring only a willingness to provide" substantial assistance, so the clarification was needed. *Id.* But the original provision stated that only a willingness was needed—that is what "good faith effort" means. At bottom, the Commission in Amendment 290 "clarified" its intent by reversing its decision to permit cooperation to be rewarded even if no law enforcement results were achieved.

28. The Judicial Conference of the United States has asked Congress to amend the SRA to establish such a position to allow for input by the defender community on par with the input provided by the Attorney General's designee, who enjoys *ex officio* status according to 28 U.S.C. § 991(a) (2000 & Supp. V 2007). See Jon M. Sands, *Roberts' Sentencing Rules of Order*, 18 FED. SENT'G REP. 250 (2006).

29. See 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, 1303-04 (1997) ("Our findings suggest that, contrary to these expectations, the Chapter 6 [charge bargaining] mechanism is not working as intended. In the identifiable minority of all cases where judicial oversight is critical, judges rarely invoke their Chapter 6 authority.").

30. See BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 59 (2006), available at http://fjsrc.urban.org/fjs.cfm?p=pubs_ann_rpt&t=h&a=ALL (providing statistics on federal criminal cases terminated by plea agreement from Oct. 2003 through Sept. 2004).

accepted only if a departure is authorized by the Guidelines.³¹ The Sixth Circuit has come out the same way.³² The District of Columbia Circuit and the Seventh Circuit have held otherwise, and those courts permit sentence bargains even when § 6B1.2 does not authorize their acceptance.³³ Although the Commission frequently amends the Guidelines to resolve circuit splits, it has ignored the split on this important issue for more than a decade.³⁴

The Commission's policy on sentence bargains has not exactly won over the Judiciary, but it has fared better with the Department of Justice ("DOJ"), at least with Main Justice. The DOJ has a formal policy regarding sentence bargains. The most recent formulation was announced by Attorney General John Ashcroft in 2003 as part of the DOJ's response to the PROTECT Act.³⁵ In a memorandum to all federal prosecutors, the Attorney General stated that a sentence bargain below the applicable range is permissible only if that sentence can be reached through the departure authority.³⁶ If that sounds familiar, it should—the DOJ's policy for sentence bargains mirrors the Sentencing Commission's policy in § 6B1.2.

I mentioned earlier that when Rule 11 was amended to authorize sentence bargains and make them transparent, the Advisory Committee predicted that any attempt to put an end to them would simply drive them underground.³⁷ The Commission's policy regarding sentence bargains, and the DOJ policy that mimics it, help to prove the truth of that observation, and I see evidence of that all the time in my courtroom.

Willie Mayo was a forty-eight-year-old man with a long, nonviolent criminal history. He pled guilty to conspiracy to distribute crack and powder cocaine. Mayo pled guilty pursuant to a plea agreement, but it

31. *United States v. Carrozza*, 4 F.3d 70, 87 (1st Cir. 1993).

32. *Fields v. United States*, 963 F.2d 105, 108 (6th Cir. 1992).

33. *See United States v. Goodall*, 236 F.3d 700, 703-06 (D.C. Cir. 2001) (§ 6B1.2 does not restrict a judge's broad discretion to accept sentence bargains even where departure ground is unavailable; "proof problems" constitute a "justifiable reason" for acceptance); *United States v. Barnes*, 83 F.3d 934, 936, 941 (7th Cir. 1996) (an agreed-upon sentence that is higher than the Guidelines range may be accepted even if it "depart[s] from the prescriptions of the [G]uidelines").

34. *See, e.g., Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (discussing the Commission's expansive role in making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest" and choosing not to address a circuit split because the Commission had already undertaken a proceeding to resolve it).

35. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 § 401 (2003) (codified in scattered sections of 18, 28 & 42 U.S.C.).

36. Memorandum from Att'y Gen. John Ashcroft to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

37. *See* 1974 AMENDMENTS, *supra* note 9, at 282.

was not a sentence bargain. Rather, he bargained for and got a plea agreement stating that the government's "estimate" of his applicable range under the Guidelines was eighty-four to one hundred and five months, roughly seven to nine years. The probation officer came to a different conclusion. Taking into account all the drugs Mayo was accountable for, and giving him the career offender status he deserved, the range set forth in the presentence report was not seven to nine years, it was thirty years to life.³⁸

Mayo's personal history showed a long struggle with drug addiction, and Mayo himself was a victim of the violence so often associated with drugs. Eighteen years earlier a friend he was smoking crack with had smashed him in the head with a pipe; he had been stabbed multiple times in the chest in another such incident, shot in the thigh in a third, and he had incurred serious injuries jumping off the roof of a three-story building while high on crack because he thought, wrongly, that the police were chasing him. During the period of Mayo's most significant prior criminal activity, he was suffering from chronic schizophrenia, which was aggravated by his crack use.³⁹

When the parties appeared for sentencing, both sides said the probation officer's calculation of the range was correct,⁴⁰ but both sides asked for a sentence within their estimated range of seven to nine years, which the government claimed would be "fair under all the circumstances."⁴¹ Because the undisputed Guidelines range was thirty years to life but both sides agreed that a fair sentence would be within the seven to nine year range, I asked why I should not consider their agreement a sentence bargain under Rule 11(c)(1)(C). The prosecutor responded that his office, consistent with the DOJ policy described above, does not enter into such agreements for sentences outside the guidelines range,⁴² but he still requested that I consider seven to nine years to be the advisory range. Though the prosecutor was not permitted to acknowledge that this was a *de facto* sentence bargain, I accepted the

38. The statutory maximum sentence of forty years, however, produced an effective range of 360-480 months. See 21 U.S.C. §§ 841(b)(1)(B), 846 (2000).

39. Transcript of Sentencing Record at 4-5, *United States v. Mayo*, No. 05-CR-43 (JG) (E.D.N.Y. Feb. 24, 2006).

40. *Id.* at 3-4, 12. Mayo filed pro se an objection to the presentence report's conclusion that he employed a firearm in committing these offenses, claiming he had "never owned or used a gun." Assuming the truth of that assertion, and accordingly removing the upward adjustment for the gun from the presentence report's calculation, the resulting offense level would have been 35 instead of 37, decreasing the applicable range from 360-480 months to 292-365 months. See *id.* at 6.

41. *Id.* at 3.

42. Transcript of Sentencing at 4, *United States v. Mayo*, No. 05-CR-00043 (E.D.N.Y. Apr. 4, 2006).

parties' agreement and sentenced Mayo to seven years and eight months in prison.⁴³

I could give you countless other examples, from my courtroom and others, of how a policy that forbids sentence bargains simply drives them underground. These *de facto* sentence bargains come in different forms. Sometimes, when the defendant challenges an upward sentence adjustment on the ground that the facts do not support it, the government will tell me I do not need to decide the facts because the government agrees that the defendant can be sentenced without the adjustment. Recently I was told by a prosecutor that the defendant before me was an organizer or leader of a narcotics ring, an aggravated role that would double his Guidelines range, but as an incentive to get him to plead guilty the government had offered an agreement that would say he did not deserve any role adjustment. Obviously, a defendant's role in the offense does not really depend on whether he pleads guilty pursuant to an agreement. In a regime that prides itself on transparency, these machinations alone are a reason to revisit the Commission's policy.⁴⁴

So the Commission has created a messy situation when it comes to sentence bargains authorized by Rule 11(c)(1)(C). What should be done about it? I have some thoughts on that question, but first let me suggest that unless they produce obviously irrational results, sentence bargains are not really the Commission's business. Those who think otherwise see sentence bargains as a giant loophole in the quest for uniformity, undermining the very purpose of the Sentencing Reform Act and the Guidelines. They are not.

43. *Id.* at 10.

44. A judge who refuses to abide by such a sentence bargain is more likely to make a record of it that is accessible to researching lawyers. A recent example is *United States v. Mercer*, 472 F. Supp. 2d 1319 (D. Utah 2007). Mercer was a tax preparer who pled guilty to tax fraud. In the plea agreement, the government promised to oppose a two-level upward adjustment for use of a special skill pursuant to § 3B1.3, even though in the circumstances of Mercer's case the adjustment was "obviously proper." *Id.* at 1322. The sentencing judge concluded that "the reason the government agreed the enhancement did not apply had nothing to do with the actual facts of the case, but rather with the government's desire to avoid the sentence called for by the Guidelines." *Id.* at 1321. Indeed, the government admitted that the facts warranted the adjustment, but opposed it anyway. *Id.* In rejecting the agreement and sentencing within the enhanced range, the court appropriately criticized the "disingenuous position[]" taken by the government. *Id.* at 1323. If the government wanted to sentence bargain, the court pointed out, "there are legitimate vehicles for doing so." *Id.*

I agree with the court in *Mercer* that Rule 11(c)(1)(C) is the proper vehicle for the sentencing break the prosecution wanted to confer in that case. But the court might have criticized the Sentencing Commission instead, for § 6B1.2 would have required the court in *Mercer* to reject that 11(c)(1)(C) agreement. Additionally, the prosecutor, by declining to use the "legitimate vehicle" of Rule 11(c)(1)(C), was likely following the DOJ policy that mirrors § 6B1.2, and thus forbids such agreements where the narrow departure authority does not render the sentence bargain "justifiable."

The unwarranted disparities in sentencing that led to the Sentencing Reform Act were the product of discretion exercised by *judges*, not prosecutors. It was the judges who were perceived, correctly, to be exercising unbounded sentencing discretion and achieving wildly disparate results.⁴⁵ The reform movement was silent about sentence bargains, but not because the disparities they produce did not exist. As discussed above, they were common in the pre-Guidelines era, and the purpose of the 1975 Amendments to Rule 11 was to legitimize them and make their results transparent. There is simply no support for the notion that the disparities they produced were among the “unwarranted sentencing disparities among defendants with similar records” that Congress tasked the Commission with eliminating.⁴⁶ And that is why it was uncontroversial when the initial Sentencing Commission did nothing to change existing plea bargaining practices.

There is more to be said about the structure and history of the Sentencing Reform Act on this subject, but my punchline is clear: The statute cannot reasonably be viewed as a mandate to the Commission to rein in prosecutorial discretion along with judicial discretion.⁴⁷

45. As one conspicuous example, the Senate Report accompanying the SRA sounded this theme, harshly criticizing the pre-Guidelines regime in which “each judge is left to apply his own notions of the purposes of sentencing.” S. REP. NO. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.A.N. 3182, 3221 [hereinafter SRA SENATE REPORT]. “As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders,” the report stated, creating unwarranted disparities that “can be traced directly to the unfettered discretion the law confers on those judges” and on the parole authorities who determined when offenders would be released from prison. *Id.* There is not a single mention in the 153 pages of the report devoted to sentencing reform that sentencing disparities produced by plea bargains were among the disparities targeted by the law.

46. 28 U.S.C. § 991(b)(1)(B) (2000).

47. The SRA itself reflects the distinction between curbing judicial discretion at sentencing and the far more ambitious endeavor of restricting prosecutorial discretion as well. The comprehensive statute meticulously cabins the power of judges, requiring them to sentence within narrow bands to be prescribed by the Sentencing Commission unless extraordinary circumstances not adequately considered by the Commission warrant a departure. It directed the Sentencing Commission to consider scores of sentencing-related factors in fashioning the Guidelines and to incorporate the ones the Commission deemed appropriate into its sentencing grid.

By contrast, the SRA contains but a single mention of plea bargaining. Among the various “general policy statements regarding the application of the guidelines” the Commission was directed to promulgate was one concerning “the appropriate use of . . . the authority granted under rule 11(e)(2) . . . to accept or reject a plea agreement entered into pursuant to Rule 11(e)(1).” 28 U.S.C. § 994(a)(2)(E) (2000). The provision reflected a concern that the SRA’s restriction of judges’ sentencing discretion would, in effect, empower prosecutors. Specifically, Professor Stephen Schulhofer had raised the question whether the Guidelines “would shift too much discretion to prosecutors,” and § 994(a)(2)(E) was included in the statute to assure that judges received guidance in examining plea agreements. SRA SENATE REPORT, *supra* note 45, at 63. Significantly, the section-by-section analysis of the bill explicitly stated that the Commission’s plea bargaining policy statement would provide meaningful judicial review of plea bargains “while at the same time [guarding] against improper judicial intrusion upon the responsibilities of the Executive Branch.”

Putting that aside, and assuming for argument's sake that sentence bargains are the Commission's business, should it prohibit them? There are two principal arguments against sentence bargaining. One exists almost exclusively in the academy. The other finds its supporters in the general public. Though both camps would outlaw sentence bargaining, and plea bargaining generally, they would do so for opposite reasons: The academics do not care for it because it treats defendants unfairly; the public does not care for it because it treats them too well. I think both are wrong.

There is no way to do complete justice to the academics' argument within this piece, but let me try to summarize it as best I can. Sentence bargaining, like all forms of plea bargaining, should be abolished, the argument goes, because it induces too many innocent people to plead guilty rather than take their chances at trial.⁴⁸ We owe it to those people, and to our society as a whole, which has an independent interest in ensuring that innocents are not convicted of crimes, to forbid a practice that coerces the innocent to accept favorable sentence bargains.⁴⁹

Some proponents of this view have a very dim view of prosecutors. Professor Albert Alschuler has asserted that there is a "remarkable disregard" on the part of prosecutors for the danger of false convictions,⁵⁰ that "a significant number of prosecutors" do not "entertain a personal belief in the guilt of the men they prosecute."⁵¹ He says that prosecutors routinely lie about the evidence available to them in order to coerce people, including significant numbers of innocent people, to plead guilty to reduced sentences.⁵² In my view, if Professor

Id. at 167.

In sum, the simple directive of § 994(a)(2)(E), both in the context of the legislation as a whole and of the sentencing reform movement that produced it, was not a mandate to the Commission to rein in prosecutorial discretion along with judicial discretion. If Congress meant to drastically curtail well-accepted forms of plea bargaining, and to effectuate such a change through sentencing judges' rejections of plea bargains explicitly authorized by Rule 11, it would have said as much. Instead, both § 994(a)(2)(E) and the original version of § 6B1.2 promulgated in response to it are consistent with the accepted pre-Guidelines understanding that sentencing judges have broad discretion in determining whether to accept or reject plea bargains. The effort in Amendment 295 to convert judges into something entirely different—the Commission's police in a bold new regime of curbing executive branch discretion—was not within the scope of the mission established by the SRA.

48. See, e.g., Albert W. Alschuler, *The Changing Plea-Bargaining Debate*, 69 CAL. L. REV. 652, 713-16 (1981); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 70-74 (1988).

49. See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1985-86 (1992) (noting the social costs of convicting the innocent even through a voluntary transaction).

50. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 62 (1968).

51. *Id.* at 63.

52. *Id.* at 65-69.

Alschuler meant those observations to apply to federal prosecutors, and it is not clear to me that he did, he got it wrong.

The more troublesome strand of this argument, advanced both by Alschuler and by Professor Stephen Schulhofer, is based on structural flaws in the criminal justice system that stack the deck against an innocent accused.⁵³ Prosecutors, especially those who are elected, care more about conviction rates than they do about getting appropriate sentences.⁵⁴ They have personal incentives to offer unduly lenient sentence bargains that risk-averse innocent people are very tempted to accept.⁵⁵ And on the defense side, there are powerful economic incentives for counsel to advise their clients to accept those bargains. Most defendants are indigent.⁵⁶ Their appointed counsel, who are frequently conscripted into service, receive below-market hourly rates, but even more important than that, they are subject to extremely stingy case maximums—limits on the total amount that the attorney can be paid for a case.⁵⁷ In Virginia, for example, even if her client is facing up to twenty years in jail, state law caps the total amount an appointed attorney can be paid at \$445 for the entire case.⁵⁸ Of course she will pressure her client to plead guilty, and do a bad job at trial if he refuses. In Schulhofer's view, even institutional defenders have organizational pressures and personal incentives to plead their clients guilty.⁵⁹ These structural features combine to inflict grievous damage, not only on innocent defendants but on society generally, which has an interest in guilty defendants receiving proper punishment.

Just as the scope of these remarks is insufficient to do this theory justice, it also precludes a full rebuttal. Professor Schulhofer's view has no subscribers, as far as I know, in the federal judiciary. I think that is because the structural flaws he sees in plea bargaining systems are mostly absent from the federal system. Federal prosecutors are of course politically accountable—and indeed that is why we worry less about the disparities they produce than the ones produced by judges, who, thank God, cannot be fired. But they are accountable in a way that is much less direct than elected District Attorneys, which leads them to have more

53. *Id.* at 106-111; Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975); Schulhofer, *supra* note 49, at 1987-91.

54. Alschuler, *supra* note 50, at 106; Schulhofer, *supra* note 49, at 1987-88.

55. Schulhofer, *supra* note 49, at 1988.

56. *Id.*

57. *Id.* at 1989, 1999.

58. VA. CODE ANN. § 19.2-163(2)(iii) (2004). This fee cap was recently amended to allow a court to waive the fee cap for an increase of \$155, if the work of the attorney or the facts of the case merit the waiver. 2007 Va. Legis. Serv. 946 (West).

59. Schulhofer, *supra* note 49, at 1989-90.

concern for the Justice Department's long-term reputation for fairness and less for the need to maximize conviction statistics. On the indigent defense side, the federal system is worlds apart from the state systems Professor Schulhofer condemns. Though our system is far from perfect—and as a member and as Chair of the Judicial Conference Committee on Defender Services, I have dedicated myself over the past decade to making it better—it suffers far less from the pathologies Schulhofer describes. In the overwhelming majority of districts, appointed counsel are not conscripted.⁶⁰ They face competition to get on Criminal Justice Act panels in order to receive appointments. The hourly rate for noncapital cases is now \$100 and hopefully on the rise.⁶¹ The felony case maximum of \$7,000 can be and often is waived when cases are sufficiently complex.⁶² On the institutional side, we have achieved shining success; the universal view is that our Federal Defenders provide

60. In June 2003, the Vera Institute reviewed the Criminal Justice Act (“CJA”) plans of all ninety-four judicial districts and reported, *inter alia*, that attorneys are conscripted into membership, that is, they become members of the CJA panel simply by becoming a member of the bar of the district court, in only a “very few districts.” JOHN WOOL ET AL., VERA INST. OF JUST., IMPROVING PUBLIC DEFENSE SYSTEMS 9 (2003), http://www.vera.org/publication_pdf/201_388.pdf. The report cited as examples the Middle District of Georgia, the Eastern District of Missouri, the District of North Dakota, the Northern District of Texas (in all divisions except Dallas) and the Western District of Texas (San Antonio Division). *Id.* at 9 n.28. The San Antonio Division of the Western District of Texas, however, in an order filed October 31, 2007, has established a “completely voluntary” plan, calling for appointments to the CJA panel by a CJA Panel Committee based on merit and experience. U.S. DIST. COURT FOR THE WESTERN DIST. OF TEXAS, ORDER ADOPTING CJA PLAN 2 (2007), http://www.txwd.uscourts.gov/cja/docs/sa_cja_plan.pdf. And though the Middle District of Georgia plan requires all members of the bar of the court to be on the CJA panel, when cases are assigned preference is given to “those attorneys who have expressed a willingness to represent indigent parties.” CRIMINAL JUSTICE ACT PLAN OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA 2 (2004), <http://www.gamd.uscourts.gov/forms/CJAPlan&Addendum.pdf>.

61. See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1900 (appropriating funds for panel attorneys); *Rate Increase for CJA Attorneys*, THE THIRD BRANCH (Administrative Office of the U.S. Courts Office of Public Affairs, Washington D.C.) Feb. 2008, available at http://www.uscourts.gov/tb/2008-02/cja_rate_increase.cfm (explaining increase in panel attorney hourly rate to \$100). In recent testimony before the Senate subcommittee responsible for appropriations including the judiciary, the chair of the Judicial Conference's budget committee testified that the recent change to \$100 was welcome but advocated in favor of further increases in upcoming years. *Financial Serv. and General Government Appropriations Bill, 2008: Hearing Before the Subcomm. on Financial Serv. and General Government of the S. Comm. on Appropriations*, 110th Cong. 15 (2008) (statement of Hon. Julia S. Gibbons, Chair, Comm. on the Budget of the Judicial Conference), available at http://www.uscourts.gov/Press_Releases/2008/Gibbons_2009_Senate_Final.pdf.

62. This amount, which is exclusive of expenses and reimbursements, may be exceeded in extended or complex cases in which the presiding judge certifies it is necessary to provide fair compensation and the circuit chief judge (or designee) approves the payment. 18 U.S.C. § 3006A(d)(2)-(3) (2000 & Supp. V 2006). The waivable attorney case compensation maximum for noncapital felony representations rose from \$5200 to \$7000, effective December 8, 2004. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2894 (2004).

well-funded, independent, and high quality representation. In many places, the only job in the criminal sphere that is harder to land than Assistant United States Attorney is Assistant Federal Defender.

Finally, the realities of case selection have a bearing on the risk that innocent people will become defendants. Federal prosecution remains a tiny fraction of criminal justice in our country, and a large portion of its limited resources are devoted to proactive, investigative efforts. In part because they do not face local elections, and are not so immediately answerable to their communities, United States Attorneys do not feel the pressure that District Attorneys feel to bring the kind of one-witness reactive case that poses the greatest risk of false accusation.

The last thing I want to suggest is that the federal system has no “innocence problem,” to use the academic phrase.⁶³ The combination of our system’s severity and the significant benefits we bestow on defendants for pleading guilty, and especially for pleading guilty and cooperating, exacerbate that problem and the problem of fabricated testimony as well. But the structure of our system, in my view, diminishes the problem enough that it is outweighed by the institutional and societal benefits of allowing parties to resolve cases in a swift, certain, and often merciful manner through sentence bargaining.

The popular argument against sentence bargaining comes, as mentioned above, from the opposite direction. It focuses on the guilty defendants, not the innocent ones, and says they are getting off too easily. As was mentioned before, a law review article authored by the Commission’s Chair and General Counsel at the time of the 1989 amendment suggests that this was the real reason for the change in § 6B1.2.⁶⁴ And to the extent courts have condemned sentence bargains, this has been their concern as well.⁶⁵ They are not worried about an innocence problem; they are concerned that prosecutors might give away the store to the guilty.

This too is not a legitimate concern, for two main reasons. First, it is their store. Unless invidious discrimination is the reason for the differential treatment, the government can prosecute the first of two identically situated offenders to the fullest extent of the law and not charge the second at all. Against that backdrop, it seems odd to prohibit the government from prosecuting the second offender less vigorously than the first by offering a sentence bargain.

63. See Schulhofer, *supra* note 49, at 1981-86 (arguing that rival conception of an “innocence problem” misstates the problems plea bargaining represents for innocent defendants).

64. See Wilkins & Steer, *supra* note 26, at 500-01.

65. In *United States v. Fine*, the Ninth Circuit observed that “[t]he purpose of the 6B1.2(a) plea bargaining standard is to avoid inappropriate lenience.” 975 F.2d 596, 601 (9th Cir. 1992).

And the very same reasons that we grant them the power to decline to prosecute—their expertise in assessing the strength of a case, their interest in best allocating their resources, and their superior ability to weigh the crime control implications of their actions—counsel in favor of allowing prosecutors to bargain for lesser sentences. Here’s an example from my own experience as a prosecutor: A decision to strike a seven-year sentence bargain with a seventy-year old mobster charged with murder. That bargain reflected a considered judgment about the risk that defendant posed to the community at the time, the risk he would pose when released after such a sentence, and the likelihood that a jury would convict based on the evidence I knew would be presented. Similarly, a sentence bargain that would fend off a long money laundering trial could easily reflect a decision to staff a wiretap with agents who otherwise would be tied up in that trial. These are important crime control and resource allocation decisions, and they are exactly the kinds of decisions we *want* our prosecutors to make. And we already let them do this some of the time: “Fast-track” dispositions of immigration cases at the border produce clear disparities that Congress and the Commission *encourage* in the name of resource allocation;⁶⁶ and

66. U.S.S.G., *supra* note 14, § 5K3.1 (providing a downward adjustment for participation in early disposition program). See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (directing the Sentencing Commission to provide a downward adjustment for participation in an early disposition program). While some judges may think they can reach sounder judgments than the Attorney General about where executive branch resources are “truly needed,” see *United States v. Perez-Chavez*, 422 F. Supp. 2d 1255, 1267 (D. Utah 2005), judges are not (and should not be) privy to all the information on which such decisions are based. Cf. *Vasquez-Ramirez v. U.S. Dis. Ct.*, 443 F.3d 692, 697 (9th Cir. 2006) (“Should the government indeed decide to drop the section 1326 indictment, it will be exercising classic prosecutorial discretion. It may have any number of reasons for doing so, such as wise allocation of scarce resources, none of which are the district court’s business.”). Besides, those decisions, whether they are right or wrong, belong in the hands of the political branches, which can be held accountable for them.

Some have criticized regional differences in sentencing outcomes caused by plea bargaining practices. See, e.g., *Perez-Chavez*, 422 F. Supp. 2d at 1266 (“[T]he court wishes to note its concern about fast-track disparities and urge action to reduce the geographical differences.”). The criticism boils down to decrying a system in which how much prison time an offender gets depends “on the happenstance of the district in which he is arrested.” *Id.* at 1267. But that superficially appealing criticism is not well-grounded in law or in the real world of crime and punishment in the United States.

As for law, the SRA explicitly acknowledges the appropriateness of allowing different local conditions to influence sentencing outcomes. It directed the Commission to consider “the community view of the gravity of the offense,” “the public concern generated by the offense,” and “the current incidence of the offense in the community and in the Nation as a whole.” 28 U.S.C. § 994(c)(4), (5), (7) (2000). As the last of those considerations makes clear, the “communities” contemplated by the statute are localities, not “the Nation as a whole.” Thus, it cannot reasonably be argued that the SRA placed out of bounds the consideration of differing community views of how crime should be punished.

reduced sentences for cooperating witnesses are encouraged in the name of crime control.⁶⁷ Sentence bargains that further these same interests, or that protect victims from having to endure a trial, should be encouraged as well, not prohibited. Just like the decision whether or not to charge, the decision what sentence to pursue in plea negotiations is a crime control judgment that prosecutors are best situated to make.⁶⁸

Second, if there were ever an era in which prosecutors giving away the store was not a legitimate concern, it would be the Guidelines era. Despite the Sentencing Reform Act's admonition to the Commission to consider prison capacity,⁶⁹ the federal prison population has exploded under the Guidelines, and the average sentence lengths have increased dramatically.⁷⁰

And why should those differences be ignored? We live in a big, diverse country, and there are countless regional differences in how crimes, and appropriate punishments for them, are perceived. As I have observed elsewhere, the same drug case that would make headlines in one federal district might be regarded as too trivial even to warrant prosecution in another. *See* Gleeson, *supra* note 17, at 1703-04. One or two small narcotics cases that would scarcely be noticed in a large city may cause a heightened public concern in a small, drug-free community. By the same token, an illegal reentry case may be considered more serious, and deserving of more severe punishment, in a large city than in one of our five districts on the Mexican border, where "the current incidence of the offense in the community" can scarcely be tracked because the number of illegal immigrants crossing the border is so high. 28 U.S.C. § 994(c)(7).

These differences matter, not just to the residents of our nation's communities, but to the jurors, lawyers, and judges in them. They are acted upon in numerous ways, including in plea bargaining decisions, to produce results that prosecutors and judges believe are just. To be sure, those results are not uniform. Some drug couriers get a four-level downward role adjustment based on the happenstance of being arrested in New York rather than in Miami, *see* Gleeson, *supra* note 17, at 1705-06, just as some illegal immigrants gets a three-level fast-track adjustment based on the happenstance of being arrested in Arizona rather than in Utah. *Perez-Chavez*, 422 F. Supp. 2d at 1259. But those differences are inherent in the plea bargaining process that has long been "a hallmark of the federal criminal justice system." KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 140 (1998).

67. *See* 18 U.S.C. § 3553(e) (2000) (authorizing a court to sentence a cooperating witness below the statutory mandatory minimum on the motion of the government); U.S.S.G., *supra* note 14, § 5K1.1 (authorizing a court to sentence a cooperating witness below the Guidelines range on the motion of the government).

68. The Supreme Court has recognized that a prosecutor's broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. *Wayte v. United States*, 470 U.S. 598, 607 (1985). Although the Supreme Court used that language in addressing the decision whether to prosecute, it is equally applicable to the decision of how aggressively to prosecute, and specifically to whether an arguably reasonable sentence bargain is appropriate.

69. 28 U.S.C. § 994(g) (2000).

70. On December 31, 1986, the federal criminal population was 39,781. JOHN SCALIA,

Indeed, one of the most important benefits of sentence bargains today is that they help to leaven a sentencing regime that is too harsh. Guidelines sentences have always been too severe, especially for the non-violent drug trafficking offenders that account for a large segment of the federal criminal docket. The original Sentencing Commission was faced with a critical decision in this regard. It could have provided Guidelines ranges based on the averages of the 10,000 sentences it had collected, but those averages were substantially below the mandatory minimum sentences enacted the year before.⁷¹ Or it could do what it did—create Guidelines ranges that were artificially inflated so as to dovetail with those onerous minimum sentences.⁷² The original Commission never explained that momentous decision, a failure that was openly lamented by the authors of the Commission’s own fifteen-year report in 2004.⁷³ And we should never lose sight of the consequence of

PRISONER PETITIONS IN THE FEDERAL COURTS, 1980-96, at 5 (1997), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfc96.pdf>. On December 31, 1987, it was 42,478. *Id.* As of March 18, 2008, 200,663 people were in the Bureau of Prisons’ total population, over five times the 1986 figure and well over four times the 1987 figure. QUICK FACTS ABOUT THE BUREAU OF PRISONS (Feb. 23, 2008), <http://www.bop.gov/news/quick.jsp>; *see also* WILLIAM J. SABOL & JOHN MCGREADY, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 171682, TIME SERVED IN PRISON BY FEDERAL OFFENDERS, 1986-97, at 1 (1999) (“Between 1986 and 1997 prison sentences for federal offenses increased from 39 months, on average, to 54 months.”). *See generally* U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 38-78 (2004) [hereinafter 15-YEAR REPORT], *available at* www.ussc.gov/15_year/15year.htm (assessing the impact of the Sentencing Reform Act on certainty and severity of punishment).

71. *See, e.g.*, William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a “War on Drugs” Era*, 28 WAKE FOREST L. REV. 305, 319 (1993) (noting that mandatory minimum sentences “substantially exceed[ed] those previously meted out”); *see also* 15-YEAR REPORT, *supra* note 70, at 48-49 (describing formulation of drug quantity tables in initial guidelines).

72. *See, e.g.*, Wilkins et al., *supra* note 71, at 319-20.

[B]ecause the Anti-Drug Abuse Act of 1986 took effect prior to the issuance of the initial guidelines and generally required penalties substantially exceeding those previously meted out, the Commission determined that past practice would be of little use in determining appropriate guideline sentences for drug offenses. Instead, the drug guidelines were based principally upon the mandatory penalty structures provided by the 1986 Act.

Id. The effect of scaling drug penalties around the mandatory minimums was to lift *all* federal drug sentences, like a lattice, so “long minimum sentences” would “poke through the lattice” at the right places. Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT’G REP. 355, 358 (1992).

73. *See* 15-YEAR REPORT, *supra* note 70, at 49.

The *Guidelines Manual*, *Supplementary Report* (USSC, 1987) and other documents published at the time of guideline promulgation do not discuss why the Commission extended the [Anti-Drug Abuse Act]’s quantity-based approach in this way. This is unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population.

Id.

the decision: *All* of the Guidelines' drug sentences are proportionate to mandatory minimum sentences that are now widely regarded as excessive. Average sentences were not used in the white collar sphere either, though for a different reason,⁷⁴ and the resulting sentences for those offenses also exceeded the pre-Guidelines norms.

As a result of these choices, the Guidelines have never achieved their goal of carving out "heartland" sentences, at least not if twenty years of judicial application of them is the measure. If they had, that is, if the Guidelines range were truly the heartland in each case, you would expect over the years there would have been a roughly equal number of departures upward as there were downward. Aggravating circumstances appear just as frequently as mitigating ones. But in the history of the Guidelines, downward departures have consistently dwarfed upward ones. By 2003, when Congress enacted the PROTECT Act, downward departures (for reasons other than cooperation) were up to eighteen percent, yet upward departures before that time never even reached one percent.⁷⁵ Why? Because the ranges have always been too high—severe enough to accommodate virtually all aggravated sentences, but too severe to accommodate large numbers of mitigated ones. In short, the Commission may consider the Guidelines to stake out "heartland" sentences, but the judiciary, which uses them, never has. So when prosecutors use sentence bargains to confer a break on a defendant, for whatever reason, it is hardly cause for alarm.

In short, there is no need to worry about too much leniency in this regime, and of all the people in a position to grant leniency in sentencing, prosecutors—who are already empowered to grant absolute leniency by not charging—are the least likely to go overboard.

So the academic case and the popular case against sentence bargains both fail. If federal judges were allowed to accept sentence bargains, our justice system would not collapse in a tidal wave of leniency. And to the extent that sentence bargains may coerce the innocent even in the federal system, the current system of under-the-table sentence bargaining is likely at least as bad. Indeed, a principal vice of the current system is that the steps taken to hide the existence of a bargain impede any honest assessment of its value. The Commission's

74. The SRA had instructed the Commission to ensure that the Guidelines reflected the "general appropriateness" of probation where first-time offenders have not been convicted of "a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j) (2000). But the Commission declared that "certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement," are "serious," warranting jail time. U.S.S.G. 1987, *supra* note 16, ch. 1, at pt. A, 4(d). In that one stroke, the Commission raised the prior average sentences for all white collar offenses.

75. 15-YEAR REPORT, *supra* note 70, at 103.

misguided attempt to bind prosecutors to the Guidelines has left prosecutors and courts in a dilemma. Those who faithfully abide by the prohibition on sentence bargaining deprive defendants and society of efficient and merciful sentence bargains; and those who yield to the natural temptation to sentence bargain are forced to obfuscate, depriving us of the opportunity to assess whether they are bargaining wisely.

Where the Commission has failed, *Booker*,⁷⁶ and the recent cases of *Kimbrough*⁷⁷ and *Gall*,⁷⁸ have succeeded, at least in part. The Guidelines are now advisory—they are finally just guidelines. Judges, that is, now have the power to accept bargained-for sentences outside the Guidelines range. But these cases do not fix the Commission's mistake entirely. Even after *Booker*, most courts have followed the Guidelines anyway, and imposed Guidelines sentences.⁷⁹ Since judges appear to be following the Guidelines generally, it is reasonable to conclude that they will generally follow § 6B1.2 as well. And even where their newfound authority is put to use, the ability of courts to accept sentence bargains is of little use if the DOJ continues to follow the Commission's policy by refusing to authorize them. True, it is up to the DOJ to set its own plea bargaining policies, and if it decides to outlaw sentence bargains on its own, that is its business. But there is every reason to believe its current policy has simply followed the lead of the Commission. Not only is the language of the DOJ's policy virtually identical to that of the commentary to § 6B1.2, but the DOJ has strong incentives not to disagree with the Commission on sentence bargains if it wants to convince judges to trust the Commission on other aspects of the Guidelines. As the DOJ's policy has simply driven sentencing bargaining underground, the Commission should lead in the opposite direction, by making it clear that sentence bargaining is permissible.

While not every sentence bargain is necessarily a wise decision, and while there are reasons to be cautious about the practice of bargaining in systems with poor institutional checks on abuse, in the federal system there is no reason to accept a practice of underground bargaining which relies on factual manipulations that are opaque to everyone but the participants in the case. To bring this process back out of the shadows, the Sentencing Commission should revoke the 1989

76. See *United States v. Booker*, 543 U.S. 220, 245 (2005).

77. See *Kimbrough v. United States*, 128 S. Ct. 558, 572 (2007).

78. See *Gall v. United States*, 128 S. Ct. 586, 600 (2007).

79. Early returns show that *Kimbrough* and *Gall* have not altered that practice. See U.S. SENTENCING COMM'N, PRELIMINARY POST-KIMBROUGH/GALL DATA REPORT tbl.1 (Feb. 2008) (noting that the sentences below the Guidelines range that were not government sponsored increased from only 12.3% of all federal sentences during the post-*Booker* period to only 13.3% in the wake of *Kimbrough* and *Gall*).

amendment to § 6B1.2 and make it clear in a revised policy statement that prosecutors, subject to review by the sentencing court, have the power to engage in sentence bargaining. The rule should further make it clear that court approval should be freely given, authorizing prosecutors to hedge against the risk of acquittal, to allocate their resources wisely, to be compassionate in their treatment of victims and offenders as well, and in numerous other respects to do justice.