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## JUDICIAL OVERSIGHT OF NEGOTIATED SENTENCES IN A WORLD OF BARGAINED PUNISHMENT

Nancy J. King\*

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### INTRODUCTION

For over two hundred years our nation's legislatures have, for the most part, rejected mandatory penalties in favor of judicial discretion to sentence within a designated range. This policy has endured, despite shifts in punishment philosophy, for two reasons. First, any offense definition is necessarily inexact, sweeping in less culpable offenders who just barely violate its terms along with hardened criminals who cause far more harm than its drafters envisioned. A sentencing range allows the judge to adjust the sentence to address these individual cases. Second, as negotiation increasingly dominates criminal justice, judicial discretion in sentencing has helped to iron out the very different punishments that like offenders might have otherwise received as a result of bargains—bargains sometimes based on considerations that the legislature has not endorsed as valid reasons to reduce or increase punishment.<sup>1</sup> The judge's final authority to select an appropriate sentence from

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\* Lee S. and Charles A. Speir Professor of Law, Vanderbilt University Law School. My thanks to Jason Criddle for his helpful research assistance.

1. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of the Trial*, 117 HARV. L. REV. 2463, 2474-75 (2004) (explaining that bargaining in federal cases is

within a range of punishment is thus an essential part of any sentencing policy that simultaneously values both efficiency through negotiated dispositions and consistent application of systemwide sentencing norms.<sup>2</sup>

In the Sentencing Reform Act of 1984,<sup>3</sup> Congress recognized that bargaining threatened to undermine its new sentencing regulations. It also recognized that judicial oversight was the most potent remedy for this threat. Continuing the pre-Guidelines practice of real-offense sentencing, the new Federal Sentencing Guidelines preserved for judges the authority to set final sentences using offense and offender facts not established as part of the offense of conviction.<sup>4</sup> But the ability of real-offense sentencing to counter the sentencing effects of negotiation has proved far from perfect. Both in bargaining over statutory ranges and in bargaining over sentences *within* statutory ranges, parties have easily escaped from the constraints of the Guidelines.

Prosecutors control statutory ranges by selecting charges. In addition, prosecutors decide whether to use or forego special sentencing statutes that carry mandatory minimum penalties *higher* than the maximum Guidelines sentence that would otherwise apply to the defendant's conduct, as well as statutes that authorize a sentence *lower* than the minimum Guidelines sentence that would otherwise apply ("safety valve," "substantial assistance," and Rule 35 reductions).<sup>5</sup> By creating these additional provisions and then removing any effective judicial oversight of their application, Congress has expanded the

sometimes influenced by who wins the race to cooperate, personal attitudes of the prosecutor, lawyers' skill, friendships and relationships between repeat players, and workloads); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. (forthcoming 2005) (collecting reports that sentencing bargains vary depending upon the presence and breadth of appeal waivers, as well as attorney skill); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992).

2. 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 10 (2004) [hereinafter U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT], [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm) (last visited Aug. 10, 2005).

3. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

4. U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT, *supra* note 2, at 82-84. On real-offense sentencing generally, see *United States v. Booker*, 125 S. Ct. 738, 746 (2005) (Breyer, J.); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 (1997); David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267 (2005) (in this Issue).

5. U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT, *supra* note 2, at 91 (reporting that because of a trumping statutory minimum penalty, ten percent of the offenders in 2002 received sentences above the top of the Guidelines range that would otherwise have applied to their cases and another five percent received sentences in which the Guidelines range was narrowed).

opportunities for prosecutors to decide when to opt out of the national Guidelines and when to abide by them.<sup>6</sup>

Other authors in this Issue address whether lawmakers should modify some of these statutory mechanisms that expand the government's unilateral power to select very different punishment ranges for not-so-different cases.<sup>7</sup> This Article will focus instead on the parties' ability to circumvent consistency by bargaining around the rules that structure sentences *within* statutory ranges. Without careful control by judges, sentencing bargaining carries risks for structured-sentencing systems that may outweigh gains in efficiency. After a discussion of weaknesses in the ability of judges to oversee the factual accuracy of sentencing decisions, this Article advances several options that would strengthen that supervisory role, promoting greater accuracy, transparency, and consistency in federal sentencing.

### I. GETTING AROUND THE GUIDELINES

Parties have at least three mechanisms for evading rules intended to structure the judge's sentencing decision within a given statutory range, regardless of whether those rules are the complex Guidelines presently in place, or are more simplified rules, as several commentators have proposed. First, because judicial oversight of negotiated sentences depends upon access to independent offense and offender information in the presentence report, parties can handicap the judge's ability to detect how their recommended disposition deviates from the Guidelines by *managing the information that is revealed* during the presentence investigation. Second, parties can minimize the impact of the presentence report by *stipulating in their plea agreement to facts or to applications of factors*, hoping the judge will accept their stipulations rather than take the time to adjudicate the accuracy of those facts or issues. Third, parties have used plea agreements with binding sentence agreements under Federal Rule of Criminal Procedure 11(c)(1)(C) to bypass judicial oversight of sentencing entirely.<sup>8</sup>

Congress, the Department of Justice, and the Sentencing Commission recognize that these practices undercut sentencing consistency. The Attorney

6. As the Commission recently observed, when prosecutors use their authority to bypass sentencing regulations in these ways, "there is little a judge can do to compensate for the resulting sentencing disparity." *Id.* at 92.

7. See Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277 (2005) (in this Issue); Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339 (2005) (in this Issue); Yellen, *supra* note 4 (in this Issue).

8. See FED. R. CRIM. P. 11(c)(1)(C) (providing that an attorney for the government may "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").

General has advised prosecutors to provide probation officers and judges with all “readily provable” sentencing facts.<sup>9</sup> The presentence report form itself was modified to include a section, titled “Impact of the Plea Agreement,” to report the plea’s effect on the sentence.<sup>10</sup> Congress directed the Commission to issue guidance for judicial policing of plea agreements through Rule 11, hoping that “judicial review of plea bargaining under such policy statements should alleviate any potential problem in this area.”<sup>11</sup> In turn, the Commission promulgated a policy statement that courts “shall” defer deciding whether to approve charge bargains or plea agreements with binding sentence stipulations “until there has been an opportunity to consider the [presentence] report.”<sup>12</sup>

These rules have yet to produce a unified approach to judicial oversight of the negotiation of sentences by the parties. Some prosecutors, judges, attorneys, and probation officers believe justice is served whenever parties choose in their plea agreements sentences that make sense to them, even if they do not make sense under the Guidelines, while others disagree. The remainder of this Article addresses this debate and proposes some modest modifications of present rules.

## II. THE EXTENT OF EVASION

There is little research available examining how often information known to the prosecution or the defense is not included in the presentence report or investigation or how often parties submit plea agreements that understate offense or offender information, or how often plea agreements stipulate to sentences or sentence calculations outside the Guidelines.<sup>13</sup> It is probably safe to say that stipulations, even when they conflict with factual allegations in the presentence report, usually reflect appropriate compromise and professional judgment, not outright manipulation. For example, probation officers (who are

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9. See Memorandum from John Ashcroft, Attorney General, Department of Justice, to All Federal Prosecutors, Regarding Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003) [hereinafter Ashcroft Memo], [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm) (last visited Aug. 26, 2005) (“[I]f readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. Likewise, federal prosecutors may not ‘fact bargain,’ or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing.”).

10. See U.S. SENTENCING COMM’N, FIFTEEN-YEAR REPORT, *supra* note 2, at 31 (citing ADMIN. OFFICE, PUBLICATION No. 107, II-79).

11. S. REP. NO. 98-225, at 63 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3246.

12. U.S. SENTENCING GUIDELINES MANUAL § 6B1.4 & cmt. (2003). This policy statement was softened in 2004 to provide that “the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.” See U.S. SENTENCING GUIDELINES MANUAL § 6B1.4 & cmt. (2004).

13. See, e.g., U.S. SENTENCING COMM’N, FIFTEEN-YEAR REPORT, *supra* note 2, at 82 (“The data available to assess these effects are not as detailed and complete as data on the sentencing decision itself.”).

not lawyers) may not fully understand why the evidence supporting particular sentencing facts is unreliable or why a judge might accept an argument for applying a Guidelines factor differently.<sup>14</sup>

Still, reports of fact and factor management by parties are too frequent to be ignored. In one survey, more than twenty-five percent of responding judges reported that stipulations in plea agreements understated the offense conduct somewhat frequently or very frequently, and another twelve percent said it was understated about half the time.<sup>15</sup> Another survey revealed that probation officers in forty-three percent of the districts reported that more often than not, the calculations in plea agreements were not supported by accurate and complete offense facts.<sup>16</sup> Other studies, too, have identified fact bargaining.<sup>17</sup> One of the few points on which all nine Justices in *Booker* could agree was the persistence of fact bargaining under the Guidelines.<sup>18</sup>

Evasion may persist in part because existing controls are not effective. Rules of professional responsibility prohibit misrepresentations by lawyers, but they do not bar prosecutors from skipping over information when discussing a case with the probation officer or from closing investigations as soon as a deal is imminent. Nor do they limit defense attorneys from counseling their clients not to discuss offense conduct or criminal history with the probation officer, a common (and understandable) practice in some districts to avoid disclosure of facts that may lead to an aggravated sentence.<sup>19</sup> Not every prosecutor complies in every case with the Attorney General's warning to disclose to probation officers and base plea agreements upon *all* readily provable facts. And the primary control—the judge's ability to sort accurate allegations from questionable ones—is constrained by lack of information and resource pressures that make testing the reliability of stipulations difficult and costly.

Judges rely on presentence reports for information about the case, but there

14. See, e.g., Felicia Sarner, "Fact Bargaining" Under the Sentencing Guidelines: The Role of the Probation Department, 8 FED. SENT'G REP. 328 (1996).

15. MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 9-10 & tbl.8 (1997) [hereinafter FJC REPORT], [http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/\\$File/gssurvey.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$File/gssurvey.pdf) (last visited Aug. 28, 2005).

16. *Probation Officers' Survey*, 8 FED. SENT'G REP. 303 (1996).

17. U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT, *supra* note 2, at 86-88 (collecting authority); see also KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 139 (1998); Joseph S. Hall, *Rule 11(e)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?*, 87 IOWA L. REV. 587, 588, 613 (2002).

18. See *United States v. Booker*, 125 S. Ct. 738, 762 (2005) (Breyer, J.) (noting that the "system has not worked perfectly; judges have often simply accepted an agreed-upon account of the conduct at issue"); *id.* at 782 (Stevens, J., dissenting, joined by Scalia, Thomas, and Souter, JJ.) (noting that fact bargaining is "quite common under the current system").

19. See, e.g., Christopher P. Yates & Louise E. Herrick, *The Perils of Discussing Criminal History During the Presentence Interview*, 13 FED. SENT'G REP. 330 (2001).

are presently few mechanisms in place to ensure that probation officers conduct thorough investigations. Rather, funding for investigations has not kept pace with caseloads, and some probation officers reportedly have had to cut corners. Lacking the time it would take to contact referring state agents, witnesses, and other sources who could give a more complete picture of the offense, some officers make do with the prosecution's description.<sup>20</sup> Investigations of the defendant and his circumstances are also abbreviated compared to those of the past. Some officers reportedly avoid investigating facts once they learn there is a stipulation, particularly if there is an appeal waiver.<sup>21</sup>

Delayed consideration of presentence reports can cripple oversight as well. Judges often accept plea agreements including stipulations as to sentencing facts and factors *before* reviewing the presentence report.<sup>22</sup> If later a conflict arises between the stipulated recommendations and the presentence report, theoretically the judge can reject the stipulations and impose a sentence based on the facts as established at the hearing, but reportedly judges infrequently choose to do so.<sup>23</sup> One probation officer said in responding to an informal

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20. STITH & CABRANES, *supra* note 17, at 129; U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT, *supra* note 2, at 84; *see also Probation Officers' Survey*, *supra* note 16 (reporting that the offense conduct section of the presentence report is prepared either by the prosecutor or by the probation officer based almost entirely on government submissions); Marcia G. Shein & Cloud H. Miller, III, A "Knowing, Intelligent and Voluntary" Plea: The Justice Department's Latest Oxymoron, 19 CHAMPION 10, 13 (1995) (noting that resource constraints force probation officers to limit their investigation to the prosecutor's version).

21. King & O'Neill, *supra* note 1, at n.85. Quoting a defender:

About the same time appeal waivers came in, that's when probation said we're accepting the stipulations. Except really obvious stuff, like if my guy shot somebody, he can't claim he didn't have a gun. So this is important in considering appeal waivers, because we're going into it knowing that the Probation Office will not upset stipulations.

*Id.*

22. *See In re Ellis*, 356 F.3d 1198 (9th Cir. 2004) (collecting authority).

23. FJC REPORT, *supra* note 15, at 9-10 (noting that judges infrequently examined underlying conduct behind agreements); U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT, *supra* note 2, at 86 (collecting research that found that in "a significant number of districts, probation officers reported that the court would usually or nearly always defer to the plea agreement when it conflicted with information in the presentence report" and that revealed that a significant percentage of judges and probation officers reported that stipulations as to sentencing in plea agreements understated offense conduct); Leslie A. Cory, *Looking at the Federal Sentencing Process One Judge at a Time, One Probation Officer at a Time*, 51 EMORY L.J. 379, 396-97 (2002) ("A presentence report that conflicts with the representations of a plea agreement may be welcomed by a judge who wants to maintain control of the process, but considered a nuisance by a judge who prefers to rely on the prosecution and defense to work out the sentence."); Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1262 (1997) (reporting that "federal judges increasingly reject the probation officer's Guidelines calculations in favor of a sentence or sentencing range that the parties jointly recommend as part of a plea bargain," that "some judges have directed probation officers to limit their investigations to the facts as stipulated by the parties," and that "others have viewed a sentencing agreement between the parties as a legitimate alternative to the sentencing outcome that would likely be calculated under the Guidelines in the absence of the agreement"); *see also United States v. Granik*, 386 F.3d 404, 413 (2d Cir. 2004) ("[F]acts admitted in a plea agreement can, and usually

survey on post-*Booker* practice: “There is disparity, especially when there is a stipulated sentence and the courts know there will not be an appeal. It’s disconcerting because it is as varied as the tenacity of the advocate.”<sup>24</sup>

Binding sentence agreements are even more impervious to contradiction later at sentencing by a presentence report. Binding sentence agreements are sometimes referred to as “C” pleas—plea agreements authorized under subsection (C) of Rule 11(c)(1). A plea agreement under subsection (B) involves mere recommendations as to sentence, so that the defendant enters a guilty plea risking that the judge may impose a sentence higher than the sentence recommended in the agreement. Agreements under subsection (C) provide more certainty to the parties regarding the sentence once the plea is accepted. If later at sentencing the judge decides based on the presentence report that the sentencing stipulations in an agreement under subsection (C) are inappropriate, the judge cannot impose a higher sentence but must allow the defendant to withdraw the plea. Before *Booker*, some courts had interpreted subsection (C) to authorize judges to accept sentences *outside* the Guidelines when the parties so stipulated.<sup>25</sup> Now that *Booker* has loosened the grip of the Guidelines, it is even less likely that a judge confronted with a contradiction

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will, be accepted by the sentencing court as true.”).

24. E-mail from Colleen Rahill-Beuler to Author (May 23, 2005) (on file with author) (summarizing survey responses to be reported as part of panel discussion at the National Sentencing Institute on May 26, 2005); *see also* David N. Adair, Jr. & Toby D. Slawsky, *Looking at the Law, Fact-finding in Sentencing*, FED. PROBATION, Dec. 1991, at 67 (“The practice of permitting the parties to stipulate to facts, without close review by the court to determine the accuracy of the stipulation, undermines the purposes of sentencing reform. Inaccurate facts, no matter how they are determined, lead to inaccurate guideline ranges and inappropriate sentences.”).

25. In 1999, Rule 11 was amended to expand “C” plea agreements to allow not only designated specific sentences, but also specified sentencing factors, ranges, or offense levels. A split of authority developed over whether this change authorized judges to endorse a sentence outside the Guidelines whenever the parties agreed. *See* Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power To Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004) (collecting authority); *see also* United States v. Heard, 359 F.3d 544 (D.C. Cir. 2004) (holding that a “C” plea capped what would have been a 188-month sentence at 48 months); John M. Dick, *Allowing Sentence Bargains To Fall Outside of the Guidelines Without Valid Departures: It Is Time for the Commission To Act*, 48 HASTINGS L.J. 1017, 1049 (1997). My own view is that the amendment was not intended to license Guidelines-free sentencing. The text of the Rule allows stipulations as to whether a “provision, policy statement or . . . factor is or is not applicable.” FED. R. CRIM. P. 11(c)(1)(C). It does not allow the parties to edit or discard the Guidelines at their convenience. Instead, the amendment does two things. First, it permits the parties to agree on the specific sentence or scoring that a *lawful* interpretation of the Guidelines would produce. Second, it clarifies that a defendant can withdraw a plea entered under subsection (C) if the agreement is rejected at sentencing, but that a defendant cannot withdraw a plea entered under subsections (A) or (B) of the Rule if the sentence differs from the agreement. The Advisory Committee specifically declined to address the issue whether, in a case where the parties agreed in a “C” plea to a sentence unauthorized by the Guidelines, a judge has the authority to impose the sentence as well as the authority to reject the plea. *See* FED. R. CRIM. P. 11 (advisory committee’s notes on 1999 amendments).



between the parties' stipulated sentence and a Guidelines-compliant sentence that is higher will force the defendant to either accept the higher sentence or withdraw the guilty plea.<sup>26</sup> And "C" pleas, which used to be quite unusual, seem to be growing in popularity.<sup>27</sup>

### III. THE COSTS OF FACILITATING EVASION BY AGREEMENT

Assuming that Guidelines evasion goes undiscovered (or uncorrected) by judges in some segment of cases, the question for policymakers is whether it is worth the effort to try to limit it further. On balance, I believe that some additional incremental controls are warranted. At the very least, lawmakers should consider these issues carefully before encouraging even greater judicial deference to sentence bargaining.<sup>28</sup>

*A non-Guidelines sentence is not "reasonable" just because the parties agree to it.* After *Booker*, supporters of negotiated sentences might claim that any stipulated sentence within the statutory range is "reasonable." Neither the text of the Sentencing Reform Act nor the Court's decision in *Booker* supports this claim. *Booker* requires that judges impose sentences that are "reasonable," but only after consideration of the Guidelines. A judge is not free to ignore the Guidelines just because the parties decide that they would like her to do so, and sentencing policy should be structured accordingly.

*Transparency makes sentencing policy better, not worse.* A few judges and

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26. U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT, *supra* note 2, at 144 ("Rejection of plea agreements that undermine the guidelines, though not unknown, appears to have been relatively rare . . .") (citing Adair & Slawsky, *supra* note 24); *see also* Caryl A. Ricca, *Simplification of Chapter Four: Comments from the Probation Officers Advisory Group to the U.S. Sentencing Commission*, 9 FED. SENT'G REP. 209, 211 (1997) ("Whatever the reason, probation officers frequently come up with a different criminal history category than the parties. Theoretically, this should undermine a Rule 11(e)(1)(C) plea agreement or a plea agreement stipulating to a § 5K1.1 departure for substantial assistance to the government. However, all too often, the stipulated sentence is not adjusted to take into consideration the probation officer's more accurate summary of the criminal history. . . . [I]n too many cases, if the government does not like the result, the numbers are fudged to match the recommended sentence in the plea agreement.").

27. Possibly judges are willing to provide more certainty to defendants who are waiving their rights to appeal sentencing error. *See* King & O'Neill, *supra* note 1 (noting a substantial proportion of plea agreements involved binding sentence agreements); *see also* Rahill-Bueler E-mail, *supra* note 24 (noting report from at least one district of "more use of stipulations that are binding, in which case we do the guidelines calculations based on that and if we find a difference, note it in the Impact of Plea Agreement").

28. An additional argument raised in favor of encouraging negotiated sentences is that a settlement provides more finality for victims than the uncertainty of judicial determination that may differ from the preferences of the parties. Victims, however, would probably prefer that defendants be sentenced by a judge who is fully informed about mitigating and aggravating circumstances, even if it takes a bit longer to obtain a final sentence. Moreover, victim participation in sentencing is also much more likely when a sentence does not become a done deal at the plea stage.

commentators have argued that judges should tolerate, or even encourage, negotiated sentences outside the Guidelines as more appropriate (i.e., less severe) than the sentences called for by the application of the Guidelines to the facts as presented in the presentence report.<sup>29</sup> Accepting a stipulation is more efficient than the process of making accurate findings and then explaining why the defendant should receive a sentence outside the Guidelines. It is also less visible.<sup>30</sup> Unlike a departure, a stipulated sentence will not be appealed. Moreover, because legislative adjustments to federal sentencing policy have been a one-way ratchet for twenty years,<sup>31</sup> the prospect of provoking yet another round of even tougher sentencing rules makes the transparency of overt departures considerably less attractive to the judge or prosecutor who views a Guidelines sentence as too long already, and real-offense sentencing as already far too “real.”

As a reason to weaken or discourage judicial scrutiny of sentence agreements, however, this argument is not appealing to anyone who respects the conscientious efforts of the legislature and the judiciary to pursue the nation’s criminal justice goals. Sentencing law should be informed by the candid views of all judges and attorneys. Most judges and prosecutors after *Booker* are carefully applying the Guidelines and dutifully explaining the reasons why each sentence is appropriate. If there are some who are not, sentencing policy should not encourage their game of hide and seek.<sup>32</sup> Several authors in this Issue urge Congress to take more care in separating good disparities from bad ones.<sup>33</sup> The best hope for accomplishing this goal is not to make it even easier for judges to settle for whatever sentence the parties propose. Instead, sentencing policy should make it easier for judges to look behind stipulations so that every sentence is based on accurate information, and

29. See, e.g., Stith & Cabranes, *supra* note 23, at 1265.

30. See, e.g., Eugene D. Natali, *The Probation Officer, Bean Counting and Truth in Sentencing*, 4 FED. SENT’G REP. 102, 106 (1991) (noting that by stipulating to agree on the facts, parties can “sponsor de facto departures from the guidelines without uttering the dreaded ‘D’ word”).

31. U.S. SENTENCING COMM’N, FIFTEEN-YEAR REPORT, *supra* note 2, at 138 (noting the “steady accretion of guideline enhancements,” that “Congress frequently has directed the Commission to add aggravating adjustments to a wide variety of guidelines,” and that “[p]olitical pressure to respond to public concerns over high-publicity crimes could result in frequent revision of the guidelines without a sound policy basis”).

32. Professor Berman once said that fact bargaining “is less likely the consequence of miscreant prosecutors who seek to thwart a just sentencing system, and more likely the consequence of lawabiding attorneys seeking to achieve just results in a sentencing system that no longer allows them to accomplish those ends directly.” Douglas Berman, *Is Fact Bargaining Undermining the Sentencing Guidelines?*, 8 FED. SENT’G REP. 300, 305 (1996). After *Booker*, the system allows direct advocacy by all for non-Guidelines sentences, obviating the need for subterfuge through unexamined or questionable factual stipulations.

33. See Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005) (in this Issue); Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 STAN. L. REV. 309 (2005) (in this Issue).

it should encourage judges to explain fully their reasons for selecting the sentences that they do.

*The gains in efficiency are not worth the cost.* Judicial oversight of sentence bargaining is crucial to preserve national sentencing policy, even though deferring to parties would save time and money. The most efficient resolution is not necessarily the most fair. This principle was not lost on either Congress or the Commission, who provided in Rule 32 for a presentence investigation in every case (not just when the parties wanted one), and provided that factual ambiguities should be disclosed for judicial resolution (not bargained away).<sup>34</sup> In particular, a policy of encouraging non-Guidelines sentences when preferred by the parties while discouraging the same when selected by judges means that the Guidelines are applied only when the *prosecutor* chooses to apply them.<sup>35</sup> When negotiated sentencing replaces sentencing by judges, the reasons why some defendants and some crimes are exempted from Guidelines' applications can no longer be reviewed. Congress might approve some of the reasons prosecutors make sentence bargains (e.g., proof problems or victim preference), but it would probably reject others (e.g., a defendant's refusal to agree to an appeal waiver or an individual prosecutor's disagreement with a Guidelines' weighting).<sup>36</sup> As the former Attorney General has observed, a sentence should no more turn on which prosecutor the defendant draws than which judge the defendant draws.<sup>37</sup>

It is worth noting one specific risk of delegating sentencing to adversaries—unregulated bargaining can lead to deeper and deeper discounts for waiving process. Prosecutors can offer sentencing discounts only to defendants who stipulate to sentencing facts and can withhold them from defendants who insist on their rights under Rule 32. If settling rather than adjudicating sentencing facts becomes the norm, then the defendant who litigates will never get the "stipulating" discount. Punishment, which is supposed to be allocated depending upon the factors included in the Sentencing Reform Act and the Guidelines, will be allocated instead in accordance with the priorities of local prosecutors. Already, prison time is the currency used to

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34. See FED. R. CRIM. P. 32(c)(1)(A) (requiring investigation unless statute requires otherwise or court explains on the record why presentence report is not needed for it to "meaningfully exercise its sentencing authority under 18 U.S.C. § 3553"); U.S. SENTENCING GUIDELINES MANUAL § 6B1.4(b) & cmt. (2004) ("The stipulation should identify all areas of agreement, *disagreement* and *uncertainty* that may be relevant to the determination of sentence.") (emphasis added).

35. See, e.g., Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 287 (1989).

36. U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT, *supra* note 2, at 137; see also Schulhofer & Nagel, *supra* note 35, at 263 (arguing that factor bargaining "thwart[s] the underlying logic of the Guidelines and their goals of proportionality, uniformity and reduced disparity").

37. Ashcroft Memo, *supra* note 9, at 2.

purchase a defendant's agreement to waive sentencing hearings and the right to appeal sentencing error, functioning as a discount for waiving sentencing regulation itself.<sup>38</sup> Without judicial oversight, not only is the discount for waiving sentencing regulation likely to get deeper, it is also likely to vary significantly from district to district and from case to case.

In a time when the judiciary is experiencing acute financial crisis,<sup>39</sup> it is understandable that policy might flow in the direction of reducing costs. But policymakers should keep in mind that encouraging sentence negotiation is not a costless strategy for any structured sentencing system such as the Guidelines. The less scrutiny judges give to criminal settlements, the less overall compliance there will be with national sentencing regulation.

*Regulating bargained sentences is not a futile enterprise.* The final justification for encouraging a hands-off approach to negotiated sentences is the practical objection that regulating sentencing bargaining is a wasted effort. Some judges have pointed out that even if probation officers consistently present the full story at sentencing, the evidence available at the sentencing hearing may be insufficient to prove the allegations in the report that conflict with the stipulations of the parties. Establishing facts in an adversarial system without the assistance of adversaries is an awkward business.<sup>40</sup> The judge cannot force a prosecutor or a defendant to present evidence that she chooses not to advance. Probation officers may fail to marshal the evidence needed for the hearing if the burden of establishing facts falls upon them.<sup>41</sup>

This argument raises a fascinating feature of sentencing law in a world of

38. See, e.g., King & O'Neill, *supra* note 1 (reporting the practice of exchanging enhancements and discounts for waivers of appeal).

39. See WILLIAM REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY, <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf> (last visited Aug. 26, 2005) (referring to the "funding crisis currently affecting the federal Judiciary").

40. John Gleeson, *Sentence Bargaining Under the Guidelines*, 8 FED. SENT'G REP. 314, 317 (1996) ("The court may be pursuing the 'true' facts, but neither side really wants it to succeed. This is not the sort of inquiry for which courts are well-equipped, and should only be conducted if the court concludes that the adversarial process has gone seriously awry. A compromise of a few levels on the guidelines chart is not such a situation.").

41. Judge Saris relates two examples:

I recently had a bank fraud case where the parties agreed that the dollar loss figure was one level lower than the amount the victim bank had informed the probation officer. The probation officer merely had the figures provided by the bank, without self-explanatory back up documentation, and had not subpoenaed the bank employee to the hearing. I accepted the plea agreement because I did not find the record supported the higher level by a preponderance of the evidence. . . . In another sentencing hearing on the amount of economic loss from a mail fraud scheme, several victims of the scheme claimed they should be considered for purposes of reluctant conduct and restitution. Although the government agreed not to assert their claims in the plea agreement, the probation officer concluded their claims were credible in the PSR [presentence report]. For want of a better procedure, I ended up conducting the direct examination with the defense counsel doing the cross. This approach was equally awkward.

Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1060 (1997).

negotiated punishment—that is, its curious balance of adversarial and inquisitorial procedure. Judges are responsible for resolving disputes not only between the two parties but also between the parties and the probation officer, who is a judicial officer. Judges must police settlements, not simply facilitate them, but must do so without participating directly in negotiations. The proper response to these unusual demands is not for judges to throw up their hands and let the parties have their way. Instead, sentencing policy should encourage judges to fulfill their unique responsibilities in overseeing agreements in criminal cases and to provide them with alternatives and options. For example, if the probation officer alleges facts in the presentence report that conflict with the representations in the plea agreement, the judge could require that the officer include with his report any supporting evidence he has for those facts in order to assist the judge in determining whether each fact has been established by at least a preponderance of the evidence.

Finally, in response to the argument that prosecutors will always have access to other forms of subterfuge to reach the same results no matter what the judge does,<sup>42</sup> I agree with Professor O’Sullivan, “To acknowledge that not all disparities flowing from executive decisionmaking can effectively be controlled does not . . . compel the conclusion that no effort should be made to eliminate some of those disparities.”<sup>43</sup>

#### IV. SOME OPTIONS FOR IMPROVING JUDICIAL OVERSIGHT OF NEGOTIATED SENTENCES

The most important step in improving judicial oversight of negotiated sentences is to increase the utility of presentence reports. Three concrete changes would help make presentence reports more accurate and useful.

First, ensuring adequate funding for thorough presentence investigations is essential. Burdensome caseloads can lead probation officers to become too dependent upon what prosecutors tell them, foregoing the effort to obtain additional information from victims, witnesses, agents, or defense counsel, or even to inspect the prosecution’s file. Judges are powerless to monitor the accuracy of factual allegations by the parties if probation officers receive only the information that the prosecution chooses to reveal.<sup>44</sup> Routing more

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42. Cf. Gleeson, *supra* note 40, at 315 (“If a prosecutor can compromise the remorselessly rigid guidelines in exchange for cooperation, why can’t she do so in exchange for the certainty of conviction in a shaky case, or as part of a policy designed to loosen a logjam of cases?”); Hall, *supra* note 17, at 614 (“[S]trict rules requiring slavish adherence to the Guidelines would most likely have the effect of forcing prosecutors and defendants to disguise Guideline manipulation . . .”).

43. O’Sullivan, *supra* note 4, at 1407.

44. As Professor Richman recently stated, judges should encourage probation officers to talk to case agents directly. If higher sentences are the result, “the solution here ought to be rules ensuring that [a defendant] can withdraw his plea” and that judges can adjust the sentence, “not [rules] that silence agencies.” Daniel Richman, *Prosecutors and Their Agents*,

resources into presentence investigations is difficult to manage in a period of fiscal crisis.<sup>45</sup> Yet, as difficult as funding decisions are, those who make them should not overlook the relationship between presentence reports and sentencing consistency. The more difficult it becomes for probation officers to seek independent sources of information, the less tenable it becomes for judges to oversee sentencing decisions made by the parties.

Second, minimum standards for presentence investigations would also help to preserve consistency in sentencing. Particularly now, after *Booker*, when the probation officer's job arguably has shifted to a more exploratory investigation for factors relevant to section 3553(a),<sup>46</sup> judges together with the Commission should continue to monitor current presentence investigation practices and consider minimum standards for not only the form these reports take but also for the investigation itself.<sup>47</sup> Sentencing policy that relies so heavily on presentence investigations should include nationwide norms for those investigations.

Third, preplea review of sentencing information should be routine when plea agreements contain sentencing stipulations. Presently, judges need not review presentence reports before accepting or rejecting plea agreements that contain stipulations as to the sentence.<sup>48</sup> Allowing parties to have the last say over sentences and Guidelines calculations without judicial review of the presentence report is bad policy. If parties seek acceptance of a plea agreement that contains stipulations that affect sentencing, they should not also have the option of delaying the presentence investigation until after those stipulations are accepted.<sup>49</sup> This "hide the ball" technique does not advance the goals of the

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*Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 829 (2003).

45. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, 2004 ANNUAL REPORT OF THE DIRECTOR ("The challenge is to provide high quality investigative and supervision services to the Judiciary despite projected increases in workload and the likelihood that the workforce will not grow to keep up."), [http://www.uscourts.gov/library/annual\\_probation.html](http://www.uscourts.gov/library/annual_probation.html) (last visited Aug. 26, 2005); U.S. JUDICIAL CONFERENCE, REPORT OF THE MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14 (2004) ("[r]ecognizing the seriousness of the judiciary's financial situation" and recommending "revisions to certain practices with respect to . . . presentence investigation reports . . . to reduce specific categories of work currently being performed but not absolutely critical to public safety and the mission of probation and pretrial services"), <http://www.uscourts.gov/judconf/sep04proc.pdf> (last visited Aug. 10, 2005).

46. 18 U.S.C. § 3553(a) (2005) (outlining the factors to consider when sentencing).

47. Guidelines for ensuring that victim information about restitution reaches the judge have already been prepared for internal use by the Department of Justice. See OFFICE FOR VICTIMS OF CRIMES, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2005), <http://www.usdoj.gov/olp/final.pdf> (last visited Aug. 26, 2005).

48. See U.S. SENTENCING GUIDELINES MANUAL § 6B1.1(c) (2004) ("To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.").

49. Adair & Slawsky, *supra* note 24, at 67 ("Courts can aid in the sentencing process by . . . not accepting pleas until the presentence report is reviewed and the court is assured

Sentencing Reform Act.<sup>50</sup>

One possible improvement would be to amend Rule 11 to *require* the judge to review the presentence report before accepting any “C” plea agreement, making the parties’ access to a “C” plea contingent upon judicial review of the presentence report.<sup>51</sup> Alternatively, an abbreviated investigation could be required for those specific aspects of the sentence that the parties would like to tie down. For example, often the information available at the time of the plea to the parties about a defendant’s criminal history is sketchy or incomplete. Before the judge is asked to accept a plea agreement that contains a stipulation about criminal history, the probation officer could prepare the criminal history section of the presentence report for the judge (and the parties) to review.<sup>52</sup>

Two additional changes would assist in promoting informed oversight of negotiated sentences in the long term. One positive step would be for the Commission to improve its data collection concerning the effects of negotiation on sentencing.<sup>53</sup> In order to anticipate when negotiated sentences may be crowding out adjudicated sentences and to promote more informed sentencing policy, the Commission should add two items to the data collected from each case: first, whether the case involved a “C” plea, and second, whether the presentence report was reviewed by the judge before accepting the plea agreement. Despite the promise of the Commission to collect data on plea practices and to determine whether those practices are undermining the intent of the Sentencing Reform Act,<sup>54</sup> the Commission has never collected this basic information. As a result, although some report more stipulations and “C” pleas since *Booker*, no one really knows how often these sorts of agreements are used today.<sup>55</sup>

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that the plea will not undermine the guidelines.”).

50. See also Shein & Miller, *supra* note 20, at 10-11 (arguing that preparation of the presentence report during plea negotiations and prior to the formal acceptance of the plea would give notice to a defendant about sentencing before entering a plea agreement—an understanding that defendants too often lack).

51. See Bibas, *supra* note 25, at 306 n.63.

52. See Daniel W. Stiller, *Chapter Four Surprises and a Defender’s Longest Drive*, 13 FED. SENT’G REP. 323 (2001).

53. The need for better collection and dissemination of sentencing information generally is discussed elsewhere in this Issue. See Marc L. Miller & Ronald F. Wright, “*The Wisdom We Have Lost*”: *Sentencing Information and Its Uses*, 58 STAN. L. REV. 361 (2005) (in this Issue).

54. U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. (2004).

55. There are good reasons to anticipate that stipulations and “C” pleas have increased in popularity and will continue to do so, even under an advisory Guidelines system. The historical objection to binding sentence agreements was that they usurped judicial power, but newer judges accustomed to much more limited sentencing authority under the Guidelines system may feel less keenly the loss of sentencing authority that a “C” plea may carry. Alternatively, the reluctance of government attorneys to provide “C” pleas in the pre-*Booker* environment may have been related to the assurance that should the judge decide based on the presentence report to impose a sentence different from the negotiated sentence, the change would have been in the government’s favor. After *Booker*, that prediction is no

Finally, courts and probation officers should work toward ways to standardize the collection and use of information from victims. Victims provide another independent source of sentencing information in some cases. Presently, Federal Rule of Criminal Procedure 32 provides that victim-impact statements must be included in presentence reports, and victims of certain crimes must be given the opportunity to speak if present at sentencing.<sup>56</sup> The Department of Justice has encouraged individual victim-witness coordinators to improve victim participation through victim-impact statements.<sup>57</sup> But judges will often accept plea agreements, even those that include provisions that affect sentencing (including restitution), without any input from the victim, well *before* the victim-impact statement has been prepared. The new Justice for All Act grants victims the “right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing, . . . [t]he reasonable right to confer with the attorney for the Government in the case, . . . [and the] right to full and timely restitution as provided in law.”<sup>58</sup> In the next several years the courts will determine what this statutory language requires in practice, but it undoubtedly means more victim participation in sentencing than is provided under the current version of Rule 32.<sup>59</sup> The Act presents an unprecedented opportunity to establish nationwide norms for incorporating victim information into the sentencing process.

A victim’s participation in sentencing can be particularly useful during the presentence investigation and in the adjudication of sentencing facts, as an independent source of information about the offense or offender that may counter the script the parties have negotiated in the plea agreement. The influence of sentencing *recommendations* by victims, however, should be carefully limited so as not to undermine the goal of consistency that was, and

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longer as reliable, at least for some judges. Stipulations and “C” pleas will help to increase predictability as judges’ sentencing practices under an advisory Guidelines regime remain unknown. Also, judges may be sympathetic to the risks facing defendants whenever appeal waivers are included in the plea agreement. Rather than reject appeal waivers, judges may prefer to provide the defendant the certainty that a “C” plea can offer. Finally, although the scope of the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), remains a moving target, it is highly unlikely to be extended by the Court in a manner that threatens the finality of facts expressly admitted in a written plea agreement.

56. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248, 1249 (amending FED. R. CRIM. P. 32). For an early description of victim participation in federal sentencing, see Robert C. Wells, *Considering Victim Impact—The Role of Probation*, FED. PROBATION, Sept. 1990, at 26-29.

57. See OFFICE FOR VICTIMS OF CRIMES, *supra* note 47, at 32-33.

58. 18 U.S.C. § 3771(a)(4) (2005).

59. Judge Paul Cassell has already argued that in order to accommodate the new Justice for All Act, the Federal Rules of Criminal Procedure should be amended to require the prosecutor to confer with the victim about the plea, inform the court if the victim objects, and disclose at least portions of the presentence report to the victim. See Judge Paul G. Cassell, Proposed Amendments to the Federal Rules of Criminal Procedure in Light of the Crime Victims Rights Act (Mar. 2, 2005) (draft on file with author).



still is, at the heart of the Sentencing Reform Act.<sup>60</sup>

#### CONCLUSION

Those who craft sentencing policy should continue to be concerned about how bargains affect sentencing for one simple reason: parties do not strike deals that maximize sentencing consistency. They have entirely different goals. Every settlement is a complex accommodation of cooperation opportunities, strength of evidence, available litigation resources, witness credibility, the going price for appeal waivers, attorney skill and tenacity, local custom, and countless other factors, some of which have never been approved as legitimate reasons to allocate punishment, either by Congress or by the Commission. Oversight of negotiated sentences by judges provides some assurance that bargains do not deviate too far, or too often, from legislated limits on punishment.

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60. A useful collection of materials on victim participation appears in 1999 UTAH L. REV. 331-552. See also Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .*, 3 INT'L REV. VICTIMOLOGY 17 (1994); Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 241-46 (1991).