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## Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences

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2002]

DEPARTING WAYS: UNIFORMITY, DISPARITY AND COOPERATION  
IN FEDERAL DRUG SENTENCES

MICHAEL A. SIMONS\*

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I. INTRODUCTION

IN 1995, this law review sponsored a symposium entitled *The Sentencing Controversy: Punishment and Policy in the War Against Drugs*.<sup>1</sup> That symposium’s focus on sentencing was appropriate because, as one of the participants noted, “[s]entencing is the bottom line of the criminal justice system.”<sup>2</sup> Six years later, as this current symposium makes clear, we are still waging “war” on drugs. And although this symposium is not devoted exclusively to punishment, sentencing is still a central—and vexing—battlefield in that war.

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\* Associate Professor, St. John’s University School of Law; Fellow, Vincentian Center for Church and Society. I owe thanks to the participants in the faculty writing workshop at St. John’s University School of Law for helpful comments on an earlier version of this Article, and to Eon Smith and Brian Tretter for research assistance. My views about cooperators and the drug war are no doubt affected by my experiences as a soldier in that war. From 1995 through 1998, I was an Assistant United States Attorney in the Southern District of New York, where, among other things, I prosecuted narcotics cases.

1. Symposium, *The Sentencing Controversy: Punishment and Policy in the War Against Drugs*, 40 VILL. L. REV. 301 (1995).

2. Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition, Politics and Reform*, 40 VILL. L. REV. 383, 383 (1995).

The war on drugs is fought on multiple fronts: education, treatment, interdiction, diplomacy and law enforcement.<sup>3</sup> Law enforcement, however, remains the most visible front in the war—and the one with the most significant practical impact. Each year, over 1.5 million people are arrested for drug offenses.<sup>4</sup> The challenge for drug war policy-makers is what to do with those offenders. In other words, how should they be sentenced? Sentencing is the “bottom-line” in the war on drugs, and for hundreds of thousands of defendants each year, that bottom-line means prison.<sup>5</sup>

Our enthusiasm for incarceration as a weapon in the war on drugs is, by now, an old story. At the federal level, stiff prison sentences for participants in the drug trade have been the norm for twenty-five years. Federal drug sentences are determined by the federal Sentencing Guidelines (a rigid set of sentencing rules designed to ensure that sentences are uniform)<sup>6</sup> and by statutory minimum penalties (an even more rigid set of sentencing rules designed to ensure that drug sentences are severe).<sup>7</sup> And despite frequent criticism of these drug sentences,<sup>8</sup> drug war policy-mak-

3. See OFFICE OF NATIONAL DRUG CONTROL POLICY, THE NATIONAL DRUG CONTROL STRATEGY: 2001 ANNUAL REPORT 6-7 (2001) (listing five “goals” of National Drug Control Strategy as: (1) “[e]ducate and enable America’s youth to reject illegal drugs as well as alcohol and tobacco;” (2) “[i]ncrease the safety of America’s citizens by substantially reducing drug-related crime and violence;” (3) “[r]educe health and social costs to the public of illegal drug use by reducing the treatment gap;” (4) “[s]hield America’s air, land, and sea frontiers from the drug threat;” and (5) “[b]reak foreign and domestic drug sources of supply”).

4. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000 352 tbl. 4.1 (1,532,200 persons arrested nationwide for drug abuse violations in 1999).

5. See *id.* at 456 tbl. 5.40, 458 tbl. 5.43 (in 1996, 347,774 persons were convicted of drug felonies in state courts and 72% of those convicted were incarcerated).

6. See U.S. SENTENCING GUIDELINES MANUAL [hereinafter U.S.S.G.] (2000). The federal Sentencing Guidelines were born in 1984 and took effect in 1987. See *infra* notes 39-46 and accompanying text (discussing Congress’ mandatory minimum drug sentences as incorporated into Guidelines).

7. See 21 U.S.C. § 841 (2001). The federal mandatory minimum prison sentences were enacted in 1986. See *infra* notes 41-46 and accompanying text (discussing Drug Abuse Act of 1986 and creation of mandatory minimum drug sentences). Some states had enacted harsh statutory minimum sentences even earlier. See, e.g., PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND THE REALITY OF RETRIBUTIVE JUSTICE 61-68 (1991) (summarizing enactment, in 1973, of New York’s “Rockefeller Drug Laws,” which established mandatory minimum fifteen-year sentences for many drug offenses).

8. See, e.g., Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 200 (1993) (arguing that “the alleged ill effects of mandatories are on the whole well-established and irrefutable, while the benefits of mandatories are both smaller than expected and almost entirely achievable by other means”). Even the most vocal supporters of the Guidelines system are critical of mandatory drug sentences. See, e.g., Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 336 (2000) (arguing that “the narcotics sentences generated by the Guidelines and the various minimum mandatory statutory sentencing provisions are often, if not always, too high”); Stephen Breyer, *Justice Breyer: Federal Sentencing*

ers remain devoted to incarceration.<sup>9</sup> Politicians fight to see who can be “tougher” on crime,<sup>10</sup> and in the war on drugs, being tough means sending more and more drug dealers to prison for longer and longer terms. Even in the face of promising alternatives,<sup>11</sup> the federal drug war in particular remains obsessed with stiff prison sentences.<sup>12</sup>

Ironically, prosecutors—the front-line soldiers wielding the weapon of incarceration—may be less devoted to stiff prison sentences than the policy-makers in Washington. Indeed, in many federal prosecutors’ offices, uniformity (at least the kind of uniformity envisioned by the federal Sentencing Guidelines) is a myth. In some federal districts, the drug defendant who is given the sentence mandated by the Guidelines is the exception rather than the rule.

This Article will first summarize the extent to which drug sentences fall below the mandatory minimums established by statute and outside the

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*Guidelines Revisited*, 14 CRIM. JUST. 28, 31-34 (1999) (criticizing mandatory minimum sentences); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 191-94 (1993) (questioning effectiveness of mandatory minimum sentences). Indeed, it is hard to find defenders of mandatory sentences. In a 1991 report to Congress, the Sentencing Commission reported the results of a survey it had conducted of federal judges, prosecutors, defense attorneys and probation officers who work with mandatory minimum sentences. The overwhelming impression of these criminal justice professionals was that the mandatory minimum sentences were “too harsh.” See UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 57 (1991). Even among prosecutors—the only group to voice much support for mandatory minimums—almost two-thirds of the respondents reported unfavorable comments. See *id.* at 56-64. For one defense of mandatory minimums, see *Debate: Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion? Judge Stanley Sporken v. Congressman Asa Hutchinson*, 36 AM. CRIM. L. REV. 1279, 1297-98 (1999) (comments of member of Congress arguing that mandatory minimums are effective in reducing crime).

9. See Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 345 (1995) (stating that “Congress wanted to send a message across the country that the war on drugs is on, and that it will be won because drug offenders will either be imprisoned or executed”) (internal quotations omitted). The most obvious indication of Congress’ reluctance to change its approach is the continued existence of the infamous 100:1 ratio between crack sentences and cocaine sentences. Despite a nearly complete consensus among criminal justice professionals, the Sentencing Commission and the Department of Justice that the 100:1 ratio is indefensible, Congress has repeatedly failed to do anything about it. See UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1-2 (1997).

10. See MARC MAUER, *THE RACE TO INCARCERATE: THE SENTENCING PROJECT* 42-80 (1999) (describing rise and triumph of “tough on crime” movement); Spencer, *supra* note 9, at 338 (“For politicians and legislators, being tough on crime is indispensable to survival.”).

11. See generally Douglas B. Marlowe, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 VILL. L. REV. 989 (2002).

12. See Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 839 (2002) (discussing harsh prison sentences for drug crimes, especially for low-level nonviolent offenses).

ranges established by the Sentencing Guidelines. My argument from these statistics will be two-fold. First, the disparity in federal drug sentences (both within districts and across districts) demonstrates the dysfunctional nature of the federal drug sentencing system. Second, and somewhat inconsistently, I will argue for *more* disparity. In particular, I will argue that—at least until Congress fixes the dysfunctional system of mandatory minimums and related Guidelines— federal prosecutors should give more defendants the opportunity to receive a reduced sentence by cooperating with the authorities.

Sentence reductions for cooperators have been much criticized, often with good reason.<sup>13</sup> Indeed, cooperation has been so much criticized that my proposal for more cooperation may sound Swiftian. It is not. In our current war on drugs, cooperation is one of the most viable ways for prosecutors to ameliorate the rigidity and severity of the mandated drug sentences. There are, of course, better ways to fix drug sentences. Most obviously, Congress could eliminate the mandatory minimums and the Sentencing Commission could lower the sentencing ranges for drug offenses. But neither of those reforms is on the political horizon, and neither is within the control of the front-line actors charged with enforcing the drug laws. There are also other ways for prosecutors to ameliorate harsh sentences, such as charge bargaining and fact bargaining. But these methods manipulate the defendant's sentence in a way that is surreptitious, if not dishonest. Cooperation reductions, on the other hand, are visible, lawful and true to the prosecutor's mission in the drug war. Moreover, increasing cooperation may actually help lessen some of the problems associated with the practice—particularly the problems of cooperator perjury and the disparity between cooperators and non-cooperators.

The rest of this Article proceeds in two parts. Part II describes how statutory minimums and the federal Sentencing Guidelines fuel the drive to incarcerate drug offenders.<sup>14</sup> That part also describes the differing ways in which prosecutors use sentencing discounts for cooperators, and the ways in which those discounts undercut the principles of uniformity

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13. See generally Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835 (1993); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994); Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851 (1995); Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027 (1997); Schulhofer, *supra* note 8, at 211-12; Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999).

14. See *infra* notes 17-52 and accompanying text (discussing mandatory minimum drug sentences).

and severity that are supposed to animate drug sentences.<sup>15</sup> Part III argues for more cooperation—as a way to fight crime, as a way to reduce cooperator perjury, as a way to reduce troubling disparities and as a way to lessen drug sentences.<sup>16</sup>

## II. THE SENTENCING GUIDELINES, MANDATORY MINIMUMS AND THE WAR ON DRUGS

### A. *The Demise of Rehabilitation and the Birth of the War on Drugs*

The political history behind the creation of the Sentencing Guidelines is a well-told tale.<sup>17</sup> For most of the last century, the primary objective of federal sentencing was to rehabilitate the offender through an individualized sentence.<sup>18</sup> In federal court, this individualized sentencing was accomplished through an “indeterminate” system in which judges had broad discretion in selecting the defendant’s sentence and the Parole Commission had the ultimate say over how much time the defendant actually spent in prison.<sup>19</sup> The theory was that judges and parole officers could fashion a sentence tailored to an individual offender’s need for rehabilitative “treatment.”<sup>20</sup> In trying to fashion an individualized sentence, judges frequently focused on those factors that made the offender an individual: criminal history, age, education, employment, family background, family responsibilities, charitable works, health, history of substance abuse, behavior at trial, assistance to the authorities, remorse and any other factor that the judge considered relevant.<sup>21</sup>

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15. See *infra* notes 53-127 and accompanying text (analyzing effects of departures from mandatory minimum drug sentences).

16. See *infra* notes 128-49 and accompanying text (arguing in favor of cooperation in exchange for reduced sentence).

17. For the most comprehensive description of the legislative history of the Sentencing Reform Act of 1984 and the Sentencing Guidelines, see generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993). See also KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 38-77 (1998).

18. See *Williams v. New York*, 337 U.S. 241, 248 (1949) (referring to “[t]oday’s philosophy of individualizing sentences”); FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 12-31 (1981) (discussing rise and fall of rehabilitation as theoretical justification for punishment).

19. See *Williams*, 337 U.S. at 248-49 (reflecting role of indeterminate sentences in increase in discretionary powers exercised in fixing punishment).

20. See Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 94 (1999); Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 686-88.

21. See *Williams*, 337 U.S. at 247 (noting that sentencing judge could consider “the fullest information possible concerning the defendant’s life and characteristics”); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 7-8, 18-25 (1973) (discussing factors considered by judges in setting sentences); STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 88-92, 102-105 (1988). Such cases abound. See, e.g.,

By the 1970s, this system had come under increasing attack from sentencing reformers who argued that indeterminate sentencing was fundamentally unjust. The culprit, in the minds of most sentencing reformers, was judicial discretion.<sup>22</sup> Sentencing reformers argued that unfettered judicial discretion led to indefensible disparities among similarly-situated offenders.<sup>23</sup> Because judges' sentencing decisions were neither guided nor reviewed, different judges could impose vastly different sentences for the same offense.<sup>24</sup>

By way of illustration, imagine two co-defendants, Mutt and Jeff, who committed an armed bank robbery together. Assume that Mutt and Jeff were childhood friends, with similar backgrounds and identical criminal records. The only difference between the two is that Mutt was sentenced by Judge Lenient, while Jeff was sentenced by Judge Harsh. Under pre-Guidelines law, it would have been perfectly legal for Mutt to receive a sentence of one day in prison, while Jeff was sentenced to twenty-five years in prison.<sup>25</sup> Similarly, even if Mutt and Jeff were sentenced by the same judge, nothing required the judge to give the two men similar sentences. So, for example, the judge could have given Jeff a harsher sentence for no

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United States v. Hernandez, 617 F. Supp. 83, 85 (S.D.N.Y. 1985) (noting that co-defendant was given leniency because of his age (25), remorse and drug addiction); United States v. Bergman, 416 F. Supp. 496, 501 (S.D.N.Y. 1976) (considering, among other things, defendant's lack of criminal history, age, health, employment and charitable works).

22. By far the most influential critic of judicial discretion and indeterminate sentencing was Judge Marvin Frankel. See FRANKEL, *supra* note 21, at 5 (“[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”); see also STITH & CABRANES, *supra* note 17, at 35 (discussing Frankel's influence on sentencing reform); Berman, *supra* note 20, at 94-95 (same). Although reformers also criticized the discretion exercised by parole boards, see, e.g., GRISET, *supra* note 7, at 36-37, the main focus of sentencing reformers was the discretion exercised by sentencing judges. See STITH & CABRANES, *supra* note 17, at 31.

23. See Bowman, *supra* note 20, at 686-88 (discussing criticisms of indeterminate sentencing).

24. Empirical and anecdotal evidence in the 1970s strongly suggested that inter-judge disparity was rampant. See Berman, *supra* note 20, at 95; see also Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895-97 (1990) (discussing empirical studies from 1970s and 1980s showing widespread disparity in pre-Guidelines sentencing). But see STITH & CABRANES, *supra* note 17, at 105-12 (criticizing empirical studies and arguing that “[i]nter-judge sentence variation was not as rampant or as ‘shameful’ in the federal courts under the pre-Guidelines regime as Congress apparently believed when it enacted the Sentencing Reform Act in 1984”).

25. See 18 U.S.C. § 2113(d) (2001) (fixing sentence for armed bank robbery at “not more than twenty-five years”). As Judge Frankel described it:

[F]ederal trial judges, answerable only to their varieties of consciences, may and do send people to prison for terms that may vary in any given case from none at all up to five, ten, thirty, or more years. This means in the great majority of federal criminal cases that a defendant who comes up for sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a

better reason than that the judge did not like tall people.<sup>26</sup> And while height may not have often entered into pre-Guidelines sentencing decisions, it was possible—and some argued likely—that a defendant’s race, ethnicity or socio-economic status influenced (consciously or unconsciously) many judicial evaluations of rehabilitative potential.<sup>27</sup>

The attack on the perceived inequities caused by judicial discretion found a ready audience in the 1970s and 1980s. In the psychological community, the theoretical justification for indeterminate sentencing—rehabilitation—was collapsing.<sup>28</sup> Empirical studies in the 1970s began to suggest that penal rehabilitation simply did not work,<sup>29</sup> leading to “massive professional and academic disillusionment with the therapeutic

term of years that may consume the rest of his life, or something in between.

FRANKEL, *supra* note 21, at 6.

26. See Bowman, *supra* note 20, at 686 (“Judges were free to give different sentences based on factors as whimsical as dress or hairstyle or a ‘gut feeling’ that this defendant was good and that one was bad, so long as the judges were not impolitic enough to put the more extreme of such subjective assessments on the record.”).

27. See, e.g., FRANKEL, *supra* note 21, at 23 (“[T]here is broad latitude in our sentencing laws for kinds of class bias that are commonly known, never explicitly acknowledged, and at war with the superficial neutrality of the statute as literally written.”); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1059 (2001) (noting that liberal sentencing reformers were motivated by desire to eliminate “the specter of unjust, perhaps racially discriminatory, disparities in punishment produced by the unfettered exercise of judicial sentencing discretion”); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1302 (1995) (“[O]ne of the strongest arguments raised against the broad sentencing discretion entrusted . . . [before the Guidelines] to federal judges was the danger that sentences set arbitrarily would be influenced by race.”). *But see* STITH & CABRANES, *supra* note 17, at 107 (arguing that, according to one study of pre-Guidelines sentencing, “[d]ifferences clearly thought to be unwarranted (e.g., by the offender’s race or ethnicity) were found to be uniformly small or statistically insignificant”) (quoting DOUGLAS McDONALD & KENNETH E. CARLSON, U.S. DEPARTMENT OF JUSTICE, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986-1990 25 (1993)).

28. See ALLEN, *supra* note 18; STITH & CABRANES, *supra* note 17, at 29-35.

29. See DOUGLAS LIPTON, ROBERT MARTINSON & JUDITH WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 627 (1975) (examining over two hundred correctional rehabilitation programs and concluding that “the field of corrections has not as yet found satisfactory ways to reduce recidivism by significant amounts”); Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 25 (1974) (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism”) (emphasis omitted); *see also* GRISSET, *supra* note 7, at 28-29 (“The Martinson study was strong ammunition for the emerging anti-rehabilitationists, as disillusionment with the impact of rehabilitation on recidivism prompted a ‘nothing works’ refrain.”); STITH & CABRANES, *supra* note 17, at 35 (“Martinson’s widely circulated views seemed to be the death knell for an indeterminate sentencing system based on rehabilitative goals . . .”).



model.”<sup>30</sup> Even more important, political support for indeterminate sentencing was evaporating. As crime rates rose throughout the 1970s and early 1980s, the public began to blame the sentencing system.<sup>31</sup> Judges who focused on rehabilitation were seen as “soft on crime” while indeterminate sentences were seen as dishonest and, to put it bluntly, too short.<sup>32</sup>

Of particular concern throughout the 1970s and 1980s was a fear of rising drug abuse and drug-related crime. In the 1970s, the public feared the inner city heroin addict and the attendant property crimes committed to finance that addiction.<sup>33</sup> By the 1980s, however, the “popular image of the menacing drug addict” was no longer the “heroin-using ‘junkie’” but rather the “cocaine-using ‘crack-head.’”<sup>34</sup> And the attendant crime feared by the public was no longer property crime, but violent crime. As “drive-by shooting” entered the popular lexicon,<sup>35</sup> the public came to see drug abuse as not simply a crime that destroyed the lives of users, but as a crime that threatened the lives of innocent bystanders.<sup>36</sup> Importantly, the mid-1980s also saw “widespread fear” that drug abuse—particularly crack use—was “expanding beyond the ghetto into suburbia.”<sup>37</sup> As one scholar ob-

30. Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 685-86 (1980).

31. See STITH & CABRANES, *supra* note 17, at 31; Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1079 (1992) (discussing effect on sentencing reform of public perception that crime rates were “out of control” in 1970s); Bowman, *supra* note 20, at 688-89.

32. See Bowman, *supra* note 20, at 688 (“[O]bservers had the sense that lazy prosecutors were indiscriminately plea bargaining away cases against vicious criminals to reduce their workloads, and that soft judges were letting criminals get away with minimal sentences.”); Stith & Koh, *supra* note 17, at 227 (discussing pre-Guidelines system and noting that “critics from the political right expressed dissatisfaction with the perceived leniency of sentencing judges and parole officials”).

33. See Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 37 (noting that in 1970s “New York was widely portrayed as suffering a heroin ‘epidemic,’ which was followed in the 1980s by successive cocaine and crack epidemics in various parts of the country”) (citing DAVID MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 244-77 (1987)).

34. Sklansky, *supra* note 27, at 1291 (quoting MARK A.R. KLEIMAN, *AGAINST EXCESS: DRUG POLICY FOR RESULTS* 299 (1992)).

35. See, e.g., *Berkeley Police Link Drugs to Four Drive-By Shootings*, S.F. CHRON., Oct. 9, 1985, at 2 (discussing “a rash of shootings from cars, apparently drug related” that had struck California city).

36. See Sterling, *supra* note 2, at 398 (noting that in mid-1980s, members of Congress, in talking about “drug war,” would refer to “America’s streets” as “riddled by drug-related violence”).

37. Sklansky, *supra* note 27, at 1293; see also *United States v. Clary*, 846 F. Supp. 768, 778 (E.D. Mo. 1994) *rev’d*, 34 F.3d 709 (8th Cir. 1994) (“Most important of all, those parts of a neighborhood believed to be immune to the spread of crime now found that the plague was spreading, first to the edges of the inner cities and then to the affluent suburbs and even to the distant rural towns and villages.”). Sklansky convincingly argues that the fear of rising drug crime was essentially race-based. Crack was seen as “‘a black drug, sold by black men’” and “much of the public anxiety about the feared narcotic stemmed from a concern that use of the drug was spreading beyond the confines of the minority group with which it traditionally had been associated.” Sklansky, *supra* note 27, at 1292-94; see also Sterling,

served, during the 1980s “drug abuse was transformed in the public mind from a social problem of moderate importance to a national crisis of the first order.”<sup>38</sup>

Congress responded in two ways. First, it moved to restrict judicial discretion in all federal sentences through sentencing guidelines. By the 1980s, sentencing reformers had put together an unlikely political coalition. Reformers on the left were eager to restrict judicial discretion to ensure that sentencing decisions were not discriminatory—racially, ethnically or economically. Reformers on the right were eager to restrict judicial discretion to ensure that sentences were not too lenient.<sup>39</sup> The result was the Sentencing Reform Act of 1984, which eliminated parole, established the Sentencing Commission and charged the Commission with writing sentencing guidelines that would bind federal judges.<sup>40</sup>

Second, Congress greatly increased the penalties for drug trafficking. Spurred on by public fears of rising drug abuse and drug-related crime (as well as by an approaching election), Congress passed the Anti-Drug Abuse Act of 1986,<sup>41</sup> which inaugurated our current regime of mandatory minimum drug sentences. Throughout the 1970s and early 1980s, judges could sentence drug offenders to long prison terms, short prison terms or probation, as the judge saw fit.<sup>42</sup> The 1986 Act, however, established mini-

*supra* note 2, at 391-95 (discussing how “cynical exploitation of racial fear and hatred became a central legislative strategy in the enactment of narcotics prohibition” throughout 1990s).

38. Sklansky, *supra* note 27, at 1286. The death of college basketball star Len Bias in June 1986 from a cocaine overdose heightened public fears that the “drug problem” was out of control. Though Bias was black, he did not fit the public image of a drug addict: he was an All-American athlete who had just signed a lucrative contract with the Boston Celtics. As Sklansky argues, “for most white Americans, what [Bias’ death] dramatized was not that drug abuse posed special threats for minority communities, but that drug abuse threatened everyone.” *Id.* at 1295; see also Sterling, *supra* note 2, at 391-95; Roy S. Johnson, *All-America Basketball Star, Celtic Choice, Dies Suddenly*, N.Y. TIMES, June 20, 1986, at A1.

39. See STITH & CABRANES, *supra* note 17, at 47 (noting that “large and unusual alliance” supporting mandatory sentencing guidelines “included House and Senate Republicans, President Reagan, Senator Kennedy, Senator Biden, and liberal sentencing reform advocates”); Bowman & Heise, *supra* note 27, at 1059.

40. See STITH & CABRANES, *supra* note 17, at 51-59; Bowman, *supra* note 20, at 690-92.

41. Pub. L. No. 99-570, 110 Stat. 3207 (Oct. 27, 1986) (codified as amended in 21 U.S.C. §§ 841-969). Like most “comprehensive” crime bills, the 1986 Act was passed in October of a national election year. See Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 902-07 (2000) (summarizing history of federal criminal law and noting that since 1984 every national election year has seen significant federal criminal legislation); UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 9 (1991) (“Beginning in 1984, and every two years thereafter, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime.”).

42. See Spencer, *supra* note 9, at 343. Although Congress had established mandatory minimum penalties for many drug offenses in the 1950s, see Narcotic

imum penalties for offenses involving certain quantities of drugs. In 1988, Congress stiffened those minimum penalties.<sup>43</sup> Thus, offenders convicted of distributing 100 grams of heroin, 500 grams of cocaine or five grams of crack now face a mandatory minimum sentence of five years imprisonment.<sup>44</sup> Offenders convicted of distributing 1000 grams of heroin, 5000 grams of cocaine or fifty grams of crack now face a mandatory minimum sentence of ten years imprisonment.<sup>45</sup> For second offenders, those minimum sentences can be doubled.<sup>46</sup>

The impact of these mandatory minimum sentences was magnified when the Sentencing Guidelines went into effect in 1987. Although the Sentencing Guidelines were intended to fundamentally change the way in which sentences were determined, they were not generally intended to change sentence severity. Thus, with a few exceptions, sentence severity under the Guidelines was designed to reflect pre-Guidelines' practice.<sup>47</sup> For drug offenses, however, pre-Guidelines' sentencing practice had been fundamentally altered by the 1986 Anti-Drug Abuse Act. So when the Sentencing Commission drafted the guidelines for drug offenses, it used the new mandatory minimum sentences as starting points.<sup>48</sup> As a result,

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Control Act of 1956, ch. 629, 70 STAT. 567 (1956), those minimum penalties were eliminated in 1970 for all drug offenses except those involving continuing criminal enterprises, *see* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. *See also* Spencer, *supra* note 9, at 343 n.48.

43. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988) (codified as amended at 21 U.S.C. §§ 841-969).

44. *See* 21 U.S.C. § 841(b)(1)(B) (2001).

45. *See id.* § 841(b)(1)(A).

46. *See id.* § 841(b). Under 21 U.S.C. § 851 (2001), the doubled mandatory minimum sentences for second offenders are triggered only if the prosecutor elects to file what is called a "prior felony information"—a decision that is wholly within the prosecutor's discretion.

47. *See* U.S.S.G. ch. 1, pt. A(3) (2000) (describing how Sentencing Commission used "an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice"); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7 (1988) ("[I]n creating categories and determining sentence lengths, the Commission, by and large, followed typical past practice"). One exception to this past practice approach was the Commission's conscious choice to increase sentence severity for white-collar offenses. *See* Breyer, *supra*, at 20-21 (discussing Commission's "decision to increase the severity of punishment for white-collar crime" by requiring imprisonment "for many white-collar offenders, including tax, insider trading, and antitrust offenders, who previously would have likely received only probation"); U.S.S.G. ch. 1, pt. A(3) (noting Commission's conclusion that economic crime in pre-Guidelines era had been "punished less severely than other apparently equivalent behavior"). The Commission also chose to increase sentences for some violent crimes. *See* STITH & CABRANES, *supra* note 17, at 60-61; Breyer, *supra*, at 19.

48. *See* STITH & CABRANES, *supra* note 17, at 60 & n.155 ("[W]herever Congress had enacted a mandatory minimum sentence, as it already had done for drug dealing and as it would do with increasing frequency throughout the 1980s, the Commission developed Guidelines that require sentences substantially above the statutory minimum in most cases."); U.S.S.G. ch. 1, pt. A(3) (noting that "increased and mandatory minimum sentences" of Anti-Drug Abuse Act of 1986 re-

Guidelines sentences for drug offenses are determined largely by the quantity of the drug involved, and those sentences are directly proportional to the mandatory minimum sentences established by Congress.<sup>49</sup>

The practical effect of these sentence reforms—at least on our prisons<sup>50</sup>—has been striking. Since 1986, the average federal drug sentence has more than doubled,<sup>51</sup> and the number of federal prisoners incarcerated for drug offenses has grown by more than 400%.<sup>52</sup>

### B. *The Sentencing Guidelines and Departures: An Overview*

Since the Sentencing Guidelines went into effect in 1987, sentences have been determined by reference to the infamous “sentencing grid,” which establishes over 250 separate sentencing ranges.<sup>53</sup> No longer are sentences individualized. Instead, a defendant’s sentencing range is determined by combining a mathematical score for the seriousness of the offense with a mathematical score for the defendant’s criminal history.<sup>54</sup>

The resulting process, as intended, significantly restricts judicial discretion.<sup>55</sup> Most obviously, the factors that determine the seriousness of the offense (such as the amount of money stolen, the extent of the physi-

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quired Commission to depart from its normal practice of drafting Guidelines to reflect pre-Guidelines practice).

49. See U.S.S.G. § 2D1.1(c) & cmt. Background (“The base offense levels [for drug trafficking] are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute . . . .”); see also Bowman & Heise, *supra* note 27, at 1060-62 (describing impact on Sentencing Guidelines of 1986 Anti-Drug Abuse Act).

50. Whether these harsher drug sentences have had other practical effects, such as reducing drug abuse, reducing drug trafficking or reducing violent crime, is something about which debate continues to rage. Compare William H. Ryan, Jr., *Fighting the War on Drugs in the Twenty-First Century: A Prosecutor’s Perspective*, 47 VILL. L. REV. 809 (2002) (stating that drug sentences have reduced drug trafficking and violent crime), with Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839 (2002) (asserting that drug sentences are unnecessarily harsh and have resulted in repression of African-Americans).

51. In 1986, before the Sentencing Guidelines went into effect, the average amount of time actually spent in prison by drug offenders was thirty months. See JOHN SCALIA, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: FEDERAL DRUG OFFENDERS, 1999 WITH TRENDS 1984-99, at 1 (2001). In 1999, the average amount of time actually spent in prison by drug offenders was sixty-six months. See *id.*

52. In 1986, 14,976 prisoners were incarcerated for federal drug offenses. See *id.* at 7. By 1999, that figure had risen to over 68,360. See *id.* According to the Federal Bureau of Prisons, 75,625 prisoners were incarcerated for drug offenses as of October 2001. See FEDERAL BUREAU OF PRISONS, QUICK FACTS, OCTOBER 2001, available at <http://www.bop.gov/fact0598.html>.

53. See U.S.S.G. ch. 5, pt. A.

54. For a good introduction to how the Guidelines work, see Bowman, *supra* note 20, at 690-705; see also Breyer, *supra* note 47, at 6-31 (1988).

55. Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence After Koon*, 9 FED. SENT. REP. 19, 19 (1996) (“The whole point of the guidelines was to hem in district courts with a set of rules created by the Commission and enforced by courts of appeals.”); see also STITH & CABRANES, *supra* note 17, at 78-103 (criticizing Guidelines for restricting judicial discretion).

cal injury inflicted or the quantity of drugs distributed) and the factors that determine the blameworthiness of the offender (such as the defendant's role in the offense or abuse of a position of trust) have been spelled out by the Sentencing Commission in minute detail.<sup>56</sup> Notably, many of the individual offender characteristics that often played a central role in pre-Guidelines sentencing have no effect on the mathematical calculation.<sup>57</sup> Moreover, to the extent that judges retain discretion to decide where, within a particular guideline range, the defendant should be sentenced,<sup>58</sup> the ranges in the Guidelines grid are exceedingly narrow—at least when compared to pre-Guidelines law.<sup>59</sup>

Notwithstanding the Guidelines' seemingly rigid commitment to uniformity, judges are given limited authority to "depart" from the narrow ranges set by the Guidelines.<sup>60</sup> First, the sentencing judge may depart if the Guidelines specifically encourage such a departure.<sup>61</sup> Second, the judge may depart if something about the offense or the offender takes the case out of the "heartland" envisioned by the Commission.<sup>62</sup> A "heartland" departure may be appropriate if the judge finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the

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56. By 2000, the Guidelines had grown to over 400 pages of guidelines, policy statements and commentary. See U.S.S.G. ch.5, pt. A.

57. See U.S.S.G. § 5H1.1-12 (describing age, education and vocational skills, mental and emotional conditions, physical condition, employment record, family ties and responsibilities, military, civic, charitable and public service and prior good works as "not ordinarily relevant").

58. Judges are still free to consider most individual sentencing factors in deciding what sentence to impose within the relatively narrow Guidelines sentencing range. See U.S.S.G. § 5C1.1(a) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").

59. Most federal criminal statutes provide only a maximum sentence, so the statutory range is almost always a term of many years. See, e.g., 18 U.S.C. § 2113(d) (2001) (sentence for armed bank robbery is "not more than twenty-five years"); 18 U.S.C. § 201 (2001) (sentence for bribing public official is "not more than fifteen years"). The Sentencing Reform Act of 1984, by contrast, mandated that the minimum of any Guidelines sentencing range not exceed the maximum by more than 25% or six months. See 28 U.S.C. § 994(b)(2) (2001); U.S.S.G. ch. 1, pt. A(4)(h). Thus, the armed bank robber who faced a pre-Guidelines sentence of between zero and 300 months would face a Guidelines sentence of between seventy and eighty-seven months. See *id.* § 2B3.1. Similarly, the defendant who paid a \$10,000 bribe to a judge and faced a pre-Guidelines sentence between zero and 180 months would now face a Guidelines sentencing of between twenty-seven and thirty-three months. See *id.* § 2C3.1.

60. See *Koon v. United States*, 518 U.S. 81, 109 (1996).

61. *Id.* at 96.

62. *Id.* at 92-93; U.S.S.G. ch. 1, pt. A, 4(b) ("The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.").

guidelines . . . .”<sup>63</sup> Alternatively, a “heartland” departure may be appropriate if the judge finds a sentencing factor that the Commission has deemed “not ordinarily relevant” that is present to an “exceptional” degree.<sup>64</sup>

Within this framework, the Guidelines more or less accomplish their stated purpose of ensuring that defendants with similar criminal records who commit similar offenses receive similar sentences. Nevertheless, this system has one major loophole: the departure for “substantial assistance”—the cooperator’s departure. Section 5K1.1 of the Guidelines provides that a court “may depart” from the sentence mandated by the Guidelines grid “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person.”<sup>65</sup>

Substantial assistance departures differ from most other departures in several important ways. First, because substantial assistance departures are “encouraged,”<sup>66</sup> the sentencing court need not make the threshold legal finding necessary for a heartland departure—that is, that a particular aggravating or mitigating factor was not adequately considered by the Sentencing Commission.<sup>67</sup> This distinction is important because the Sentencing Commission expressed its view early on that heartland depar-

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63. 18 U.S.C. § 3553(b) (1994); U.S.S.G. ch. 1, pt. A(4)(b); *see also Koon*, 518 U.S. at 92.

64. U.S.S.G. § 5K2.0; *see also Koon*, 518 U.S. at 95-96.

65. *See* U.S.S.G. § 5K1.1. The “substantial assistance” departure was created in response to a congressional directive in the Sentencing Reform Act of 1984: “The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” 28 U.S.C. § 994(n) (1984). Although Congress did not direct the Sentencing Commission to condition substantial assistance departures on a government motion, Congress had imposed the government motion requirement in the analogous provision that allows cooperators to receive sentences below the statutory minimum. *See* 18 U.S.C. § 3553(e) (1994).

66. Although “substantial assistance” is not the only encouraged departure, most other encouraged departures are upward departures. *See, e.g.*, U.S.S.G. §§ 5K2.1 (death), 5K2.2 (physical injury), 5K2.3 (extreme psychological injury), 5K2.4 (abduction or unlawful restraint), 5K2.5 (property damage or loss), 5K2.6 (weapons and dangerous instrumentalities), 5K2.7 (disruption of government function), 5K2.8 (extreme conduct), 5K2.14 (public welfare), 5K2.17 (high capacity, semi-automatic firearms), 5K2.18 (violent street gangs), 5K2.21 (dismissed and uncharged conduct). Notwithstanding the number of these encouraged departures, upward departures are imposed in fewer than 1% of all Guidelines sentences. *See* UNITED STATES SENTENCING COMMISSION, 2000 SOURCEBOOK OF SENTENCING STATISTICS fig. G [hereinafter 2000 SOURCEBOOK].

67. *See supra* notes 63 and 66 and accompanying text (discussing how “heartland” departures differ from “substantial assistance” departures).

tures will be “highly infrequent”<sup>68</sup> and “extremely rare,”<sup>69</sup> and many courts of appeals have been reluctant to approve such departures.<sup>70</sup> Second, whether a defendant is eligible for a substantial assistance departure is almost completely discretionary—and that discretion rests entirely with the prosecution. With all other departures (both encouraged departures and heartland departures) the judge must first make independent findings that the defendant is eligible for the departure.<sup>71</sup> With cooperation departures, however, it is the prosecutor who decides whether the defendant has provided “substantial assistance,” and the prosecutor’s decision is effectively unreviewable.<sup>72</sup> Third, the judge’s decision about the extent of a substantial assistance departure is neither constrained by the Guidelines

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68. U.S.S.G. ch. 1, pt. A(4)(b) (explaining Commission’s view that Guidelines already take into account relevant sentencing factors); *see also* *Koon*, 518 U.S. at 96 (noting that Commission anticipated infrequent departures for grounds not in Guidelines).

69. U.S.S.G. § 5K2.0, comment.

70. *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 54-55 (2000) (noting that while some circuit courts—notably the Second, Third and Ninth Circuits—construed departure authority broadly, decisions from other circuit courts “suggested that the Commission’s ‘heartlands’ were large and left little room for departures”). In the early years of the Guidelines, non-cooperation downward departures were given in fewer than 10% of all cases. *See* UNITED STATES SENTENCING COMMISSION, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. G [hereinafter 1996 SOURCEBOOK]. After *Koon* was decided in 1996, some courts began to take a more expansive view of departure authority, *see* Berman, *supra*, at 80-84 (noting that *Koon* has increased departures in circuits that already favored departures), and such departures have gradually increased, rising to 17% by 2000, *see* 2000 SOURCEBOOK, *supra* note 66, at fig. G. Yet, many courts still construe their departure authority very narrowly. *See* Berman, *supra*, at 80-84 (discussing studies showing that *Koon* had little impact on departures in those circuits that generally took more restrictive view of departure authority).

71. *See Koon*, 518 U.S. at 98 (“Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome . . .”). For example, although the Guidelines dictate that a defendant’s “family circumstances” are “not ordinarily relevant” in making a departure decision, *see* U.S.S.G. § 5H1.6, a court may nevertheless depart from the Guidelines if a defendant’s family circumstances are extraordinary, *see* *United States v. Galante*, 111 F.3d 1029, 1036-37 (2d Cir. 1997). Before making such a departure, the sentencing judge must find such extraordinary circumstances—a finding that is subject to appellate review. *Compare Galante*, 111 F.3d at 1036-37 (upholding family circumstances departure), *with* *United States v. Dyce*, 91 F.3d 1466, 1468 (D.C. Cir. 1996) (reversing departure because appellate court disagreed with district court’s finding that defendant’s family circumstances were extraordinary).

72. *See* *Wade v. United States*, 504 U.S. 181, 187 (1992) (upholding government motion requirement in U.S.S.G. § 5K1.1, while noting that government may move (or not move) for substantial assistance departure based on its “rational assessment of the cost and benefit that would flow from moving”). *See generally* Lee, *supra* note 13 (criticizing § 5K1.1’s government motion requirement).

nor reviewable on appeal.<sup>73</sup> Heartland departures, on the other hand, are reviewable both for reasonableness and for consistency with other provisions of the Guidelines.<sup>74</sup> Fourth, a defendant who receives a substantial assistance departure may also receive a sentence below any statutorily mandated minimum.<sup>75</sup> No other downward departure authorizes a sentence below the statutory minimum—no matter how extraordinary the offense or the offender.<sup>76</sup>

The rigidity and severity of the Guidelines create powerful incentives for defendants to cooperate. Indeed, a cooperation departure is usually the only significant sentencing factor over which a defendant has any control, and—because the average cooperation departure cuts a defendant's sentence in half<sup>77</sup>—it is often a defendant's only hope for a reduced sentence.<sup>78</sup> Thus, it is not surprising that cooperation departures have fundamentally changed federal prosecutions.

There are no statistics about the frequency of cooperation in the pre-Guidelines era, but statistics from the earliest days of the Guidelines suggest that cooperation was rare.<sup>79</sup> In 1989, the first year for which the Sen-

73. See *United States v. Khalil*, 132 F.3d 897, 898 (3d Cir. 1997) (holding that appellate court lacks jurisdiction to review extent of substantial assistance departure).

74. See *Koon*, 518 U.S. at 99 (adopting abuse of discretion standard for appellate review of departure decisions); Berman, *supra* note 70, at 75-81 (criticizing *Koon* for sending inconsistent messages about appellate deference to departure decisions).

75. See 18 U.S.C. § 3553(e) (1994) (providing that defendants who provide "substantial assistance" may be sentenced to less than minimum required by statute); U.S.S.G. § 5K1.1, comment. (n.1) (2000) (stating that defendants who provide "substantial assistance" may receive sentence below statutory minimum).

76. The only other Guidelines provision that authorizes a sentence below the statutory minimum is the "safety valve" enacted by Congress in 1994, which permits a modest sentence reduction for the least culpable narcotics offenders. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 U.S.C. § 3553(f) (1994)). A defendant eligible for the "safety valve" is sentenced without regard for any mandatory minimum, and so could receive (in addition to the "safety valve" reduction) a heartland departure that reduced the defendant's sentence even further below the statutory minimum. See *id.*

77. The Sentencing Commission began reporting the average extent of cooperation departures in 1997. Each year since then, the average sentence reduction for a cooperator has been approximately 50%. See 2000 SOURCEBOOK, *supra* note 66, at tbl. 30; UNITED STATES SENTENCING COMMISSION, 1999 SOURCEBOOK OF SENTENCING STATISTICS tbl. 30 [hereinafter 1999 SOURCEBOOK]; UNITED STATES SENTENCING COMMISSION, 1998 SOURCEBOOK OF SENTENCING STATISTICS tbl. 30 [hereinafter 1998 SOURCEBOOK]; UNITED STATES SENTENCING COMMISSION, 1997 SOURCEBOOK OF SENTENCING STATISTICS tbl. 30 [hereinafter 1997 SOURCEBOOK].

78. Defendants can earn a modest sentencing reduction by "accepting responsibility" for their criminal conduct (usually by pleading guilty). See U.S.S.G. § 3E1.1. The resulting two- or three-point reduction in offense level pales in comparison to the three- to four-point departures possible for substantial assistance. See *id.*; Weinstein, *supra* note 13, at 575.

79. See Weinstein, *supra* note 13, at 563 n.2 (noting absence of data on cooperation rates before 1989).



tencing Commission kept statistics, only 3.5% of federal defendants earned cooperation departures (Figure 1).<sup>80</sup> It did not take long, however, for defendants (and defense attorneys) to realize that substantial assistance departures could be the only way out of a harsh Guidelines sentence.<sup>81</sup> Prosecutors, in turn, began to realize the tremendous power they now had to entice defendants to cooperate and the tremendous benefits that cooperation could yield.<sup>82</sup>

Thus, in the early years of the Guidelines, the rate at which defendants cooperated increased dramatically. By 1991, cooperation rates had jumped to over 10%, and they climbed steadily after that: hitting 20% in 1994 and peaking at 23% in 1995. Although overall cooperation rates have gradually declined since 1995, almost one in five federal defendants still receives a cooperation departure.

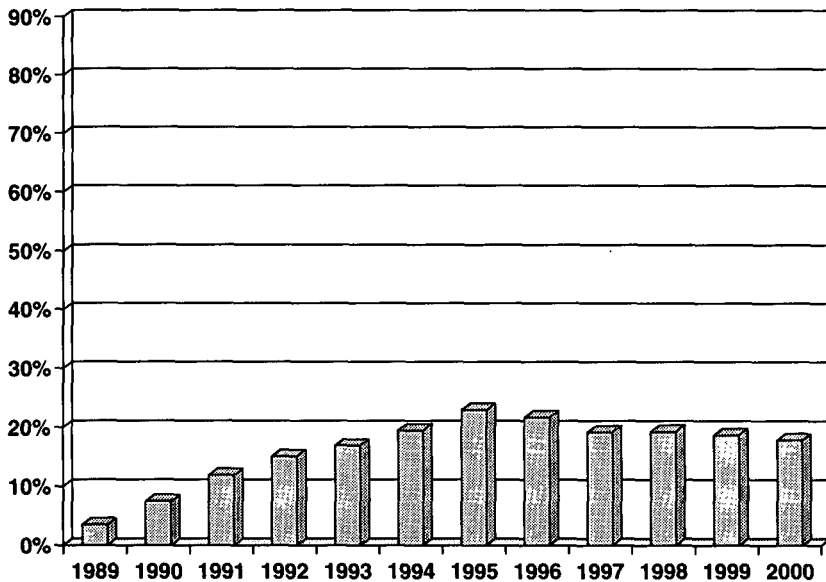
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80. See 1996 SOURCEBOOK, *supra* note 70, at fig. G (showing cooperation statistics for 1989, as determined by a 25% random sample of cases). It is likely that cooperation was even less frequent before 1989 because, by then, the Guidelines had already been in effect for a full year and the harsh mandatory minimum sentences for narcotics offenses established by the Anti-Drug Abuse Act of 1986 had already been in effect for two full years. See Anti-Drug Abuse Act of 1988, Pub L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. §§ 841-848). In 1989, substantial assistance was the *only* way to avoid those mandatory minimum sentences. See *supra* notes 77-78 and accompanying text (discussing circumstances authorizing sentence below minimum).

81. See generally Robert G. Morvillo and Robert J. Anello, *Cooperation: The Pitfalls and Obligations for Defense Attorneys*, N.Y. L.J., Dec. 5, 2000, at 3 (noting that Sentencing Guidelines have made cooperation more appealing to defense bar, "if only by making the alternative that much more threatening"); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 78-84 (1995) (discussing defense attorneys' ethical obligation to explore cooperation with their clients).

82. For a more detailed discussion of the process by which prosecutors decide whether to "sign up" a particular cooperator, see Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. (forthcoming 2003) (on file with author).

FIGURE 1  
NATIONWIDE COOPERATION RATES IN ALL CASES<sup>83</sup>



As one scholar described it, there is now a “thriving market” for cooperation: defendants are the “suppliers” and their “commodity” is their cooperation; prosecutors are the “buyers” and their currency is leniency.<sup>84</sup> Yet, not everyone cooperates. To continue the marketplace metaphor, there are three different disincentives for cooperation.<sup>85</sup> First, some defendants do not want to produce the goods. Whether because of fear of retaliation, loyalty to their accomplices or general antipathy to the government, some defendants simply do not want to become a “rat.”<sup>86</sup> Second,

83. Figure 1 shows the percentage of federal defendants who received substantial assistance departures in a particular fiscal year. The information in Figure 1 comes from Figure G of the Sentencing Commission’s Annual Sourcebook of Sentencing Statistics. The percentages from 1989 and 1990 were derived from a 25% random sample of cases. Information from 1991 through 2000 includes all cases. See 2000 SOURCEBOOK, *supra* note 66, at fig. G; 1996 SOURCEBOOK, *supra* note 70, at fig. G. The percentages reflected in Figure 1 are as follows:

Nationwide Cooperation Rates in All Cases											
1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
3.5%	7.5%	11.9%	15.1%	16.9%	19.5%	23.0%	21.7%	19.2%	19.3%	18.7%	17.9%

84. See generally Weinstein, *supra* note 13.

85. See *id.* at 565. Weinstein’s economic analysis of cooperation is detailed and compelling. Although I have argued elsewhere that the purely utilitarian view of cooperation is incomplete, see Simons, *supra* note 82, notions of supply and demand still explain much of what goes on in cooperation.

86. See Richman, *supra* note 81, at 78-84 (discussing “social costs of cooperating,” including disdain, ostracism and physical retaliation); Simons, *supra* note 82.

some defendants cannot produce the goods, even if they want to cooperate. Because they lack both accomplices against whom they can cooperate and serendipitous knowledge of other criminal activity, these defendants have nothing to sell. Third, for some defendants who want to cooperate, prosecutors are not willing to pay the price—either because the defendant is too culpable or because the defendant's information is not valuable enough.<sup>87</sup>

### C. Departures in Drug Cases

In drug cases, the disincentives for cooperation are notably lessened. On the defendant's side, there is a ready supply of cooperators in drug cases. Many drug defendants *want* to cooperate (because of the severe sentences they are facing) and most of them *can* cooperate (because drug trafficking offenses, by their very nature, involve chains of accomplices, associates and co-conspirators).<sup>88</sup> On the prosecutor's side, there is a strong demand for cooperators. Prosecutors often need cooperators to catch the "big fish"—the importers and traffickers who are not out on the street corner where they can be easily seen and caught.<sup>89</sup>

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87. See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 14-15 (1992) (describing prosecutor's decision about who should cooperate as "a difficult calculation" that must weigh moral culpability and future dangerousness of cooperator against moral culpability and future dangerousness of target).

88. A 1997 study by Sentencing Commission staff found that defendants facing mandatory minimum drug sentences were nearly twice as likely to cooperate as other defendants. See UNITED STATES SENTENCING COMMISSION, SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP, FEDERAL COURT PRACTICES: SENTENCE REDUCTIONS BASED ON DEFENDANTS' SUBSTANTIAL ASSISTANCE TO THE GOVERNMENT 156 (1997) [hereinafter SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT]. The study surmised that "these defendants are more willing to provide information to prosecutors in return for their only chance for a sentence reduction below the statutory mandatory minimum." *Id.*

89. See Weinstein, *supra* note 13, at 597 (describing prosecutors' need for evidence in drug cases); Daniel Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT. REP. 292, 293 (1996) (addressing benefits of cooperator system and noting that sentencing reductions may be "the only way to get critical testimony"). A 1997 Sentencing Commission survey of federal prosecutors' offices revealed the importance of cooperation departures in drug prosecutions:

Several districts responded that substantial assistance motions are made frequently in their districts because of the number of multi-defendant narcotics cases prosecuted in the districts and the need to use substantial assistance motions to dismantle large drug organizations. These districts noted that their "ability to prosecute large narcotics cases is directly tied to our use of substantial assistance motion practice." Several districts noted that they have a high volume of drug conspiracy cases dependent on co-conspirator testimony. Others noted that the high sentencing guidelines and statutory mandatory minimums in narcotics cases, particularly drug conspiracy cases, resulted in frequent use of the substantial assistance motions.

SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT, *supra* note 88, at 38.

Moreover, and significantly, many prosecutors are willing to pay the price for cooperation in drug cases because drug sentences are already so severe. In a recent survey of federal drug sentences in the 1990s, Frank Bowman and Michael Heise noted that drug sentences have been gradually, but steadily, declining.<sup>90</sup> In an effort to explain the decline in drug sentences, they examined a multitude of factors from: amendments to the Guidelines, to changes in case law, to changes in the kinds of cases being brought. They concluded that the declining sentences resulted not from those factors, but rather from discretionary decisions made by prosecutors and judges.<sup>91</sup> Their analysis revealed that at almost every place in the system, in which prosecutors and judges have discretion, that discretion is exercised, on average, to ameliorate harsh drug sentences.<sup>92</sup> Bowman and Heise concluded that these discretionary decisions are likely being made by prosecutors and judges who believe that the severe sentences required by the drug guidelines and the mandatory minimums “are often, if not always, too high, or at the least are higher than necessary to achieve the institutional objectives of the system’s front-line actors.”<sup>93</sup> In the context of cooperation, that means prosecutors in drug cases will be more willing to dole out a little leniency (in return for useful cooperation) because the resulting sentence will still be severe enough to accomplish the usual goals of sentencing: retribution and deterrence.<sup>94</sup>

So it is not surprising that, as popular as cooperation is generally, it is even more popular in drug cases. As Figure 2 shows, in 1989, when overall cooperation rates were 3.5%, drug trafficking cooperation rates were already over 10%. By 1991, the drug trafficking cooperation rate had reached 20%. Since then, cooperation rates in drug cases have followed

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90. See Bowman & Heise, *supra* note 27, at 1047 (describing pattern of decline).

91. See *id.* at 1101-03 (explaining which factors affect sentences). While Bowman and Heise identify some non-discretionary factors that appear to have affected sentence length in particular years (e.g., the 1995 incorporation of the safety valve into the Guidelines, see *supra* note 76 and accompanying text), none of those factors explain the decade-long decline in drug sentences.

92. See *id.* at 1130-33. Bowman and Heise concluded that “for the better part of a decade the front-line actors in the federal criminal justice system . . . employed their discretionary powers persistently and progressively to produce ever-lower average drug sentences.” *Id.* at 1127.

93. *Id.* at 1132. Bowman and Heise do not argue that a critical number of prosecutors and judges feel that the severe drug sentences are fundamentally unjust (though some prosecutors and many judges undoubtedly do). Instead, it is enough to explain their results if “a large enough number of front-line actors, particularly judges and prosecutors, believe that strict enforcement of the Guidelines in drug cases is *not necessary* to achieve justice.” *Id.* (emphasis in original).

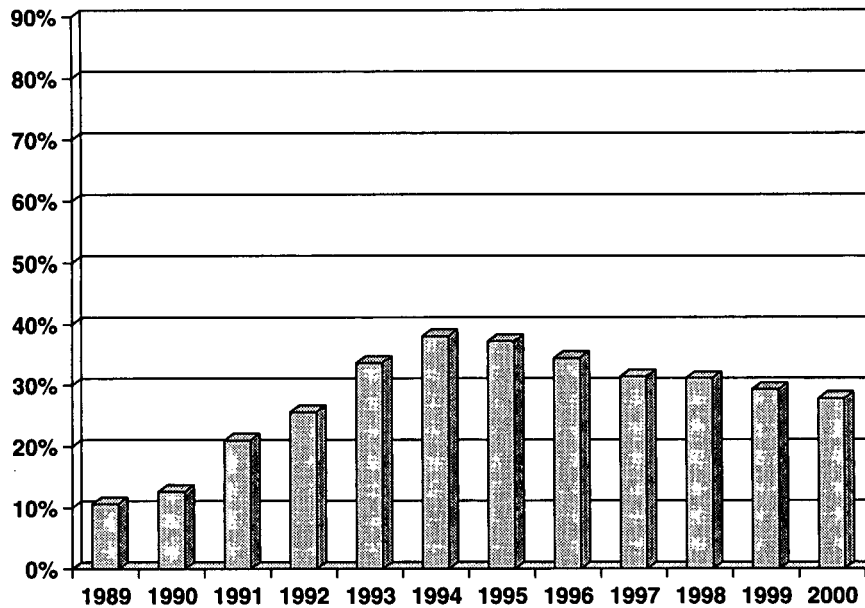
94. See also Bowman, *supra* note 8, at 339-41 (describing—and criticizing—effect that overly severe drug sentences have on prosecutors’ cooperation decisions).

roughly the same trajectory as overall cooperation rates: peaking at 38% in 1994, and gradually declining to just under 30% today.<sup>95</sup>

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95. The recent decline in cooperation rates in drug cases likely has several causes, but one notable cause is the explosion of drug arrests and prosecutions along the Mexican border. Since the federal government began its Southwest Border Initiative around 1995, federal drug prosecutions have almost doubled—from 12,000 to 22,000 each year—and much of that increase has come from the five southwest border districts (Southern California, Arizona, New Mexico, Western Texas and Southern Texas). See WILLIAM H. REHNQUIST, 1996 YEAR-END REPORT OF THE FEDERAL JUDICIARY, IN THE THIRD BRANCH 3 (1997) (noting that increasing criminal caseload in federal courts was primarily due to immigration and drug filings in districts along U.S.-Mexican border); WILLIAM H. REHNQUIST, 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY, IN THE THIRD BRANCH 5 (1999) (same); WILLIAM H. REHNQUIST, 1997 YEAR-END REPORT OF THE FEDERAL JUDICIARY, IN THE THIRD BRANCH 4 (1998) (same). In 2000, almost one-third of all drug trafficking prosecutions were in the five southwest border districts. See UNITED STATES SENTENCING COMMISSION, 2000 SENTENCING STATISTICS BY STATE tbl. 9 [hereinafter 2000 SENTENCING STATISTICS BY STATE], available at <http://www.ussc.gov/judpack/jp2000.html>. Most of those cases were immigration related (i.e., illegal immigrants caught coming across the border with drugs), and many of the defendants did not face severe sentences, either because they were caught with small quantities or because they were caught with marijuana. See Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 290-99 (1998) (describing drug smuggling prosecutions and prosecution policy in Southern District of California). Indeed, in 2000, less than one-third of all drug trafficking prosecutions nationwide involved marijuana, while in the five southwest border districts, approximately 70% of all drug trafficking prosecutions were marijuana cases. See 2000 SENTENCING STATISTICS BY STATE, *supra*, fig. A. The distortion to the overall statistics caused by the border districts is significant: if the border districts are excluded from the nationwide numbers, the cooperation rate for drug trafficking cases in 2000 exceeds 33%. See *id.* at tbl. 9; see also app. tbl. 1 (this Article).

FIGURE 2  
NATIONWIDE COOPERATION RATES IN DRUG TRAFFICKING CASES<sup>96</sup>

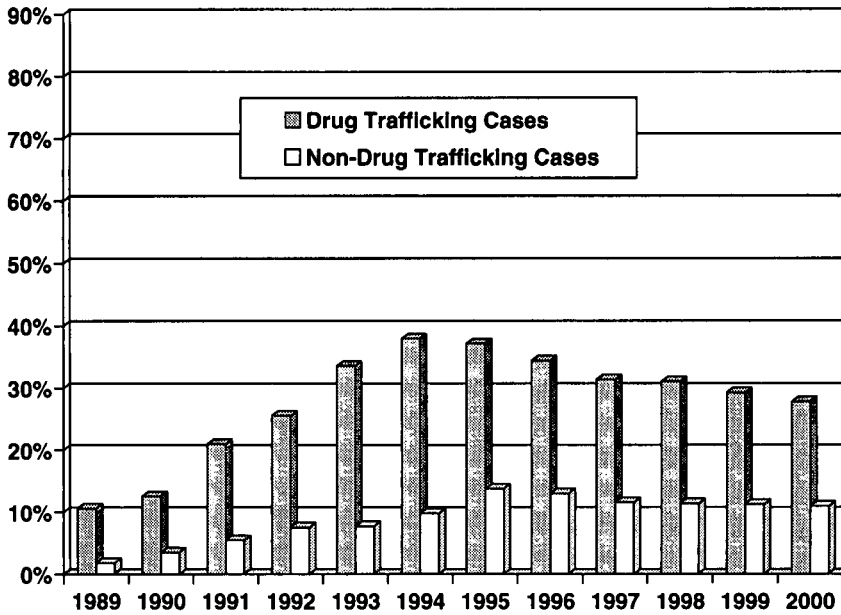


Cooperation rates for drug cases are even more striking when compared to cooperation rates for non-drug cases.

96. Figure 2 shows the percentage of federal defendants in narcotics trafficking cases who received substantial assistance departures in a particular fiscal year (“narcotics trafficking offenses” excludes prosecutions for simple narcotics possession and prosecutions for using a communications facility to commit a narcotics offense). The information in Figure 2 comes from the Sentencing Commission’s ANNUAL SOURCEBOOK OF SENTENCING STATISTICS (1996-2000) and ANNUAL REPORT (1989-1995). The percentages from 1989 and 1990 were derived from a 25% random sample of cases. Information from 1991 through 2000 includes all cases. See 2000 SOURCEBOOK, *supra* note 66, at tbl. 27; 1999 SOURCEBOOK, *supra* note 77, at tbl. 27; 1998 SOURCEBOOK, *supra* note 77, at tbl. 27; 1997 SOURCEBOOK, *supra* note 77, at tbl. 27; 1996 SOURCEBOOK, *supra* note 70, at tbl. 27; UNITED STATES SENTENCING COMMISSION, 1995 ANNUAL REPORT tbl. 32 [hereinafter 1995 ANNUAL REPORT]; UNITED STATES SENTENCING COMMISSION, 1994 ANNUAL REPORT tbl. 34 [hereinafter 1994 ANNUAL REPORT]; UNITED STATES SENTENCING COMMISSION, 1993 ANNUAL REPORT tbl. 67 [hereinafter 1993 ANNUAL REPORT]; UNITED STATES SENTENCING COMMISSION, 1992 ANNUAL REPORT tbl. 5 [hereinafter 1992 ANNUAL REPORT]; UNITED STATES SENTENCING COMMISSION, 1991 ANNUAL REPORT tbl. 55 [hereinafter 1991 ANNUAL REPORT]; UNITED STATES SENTENCING COMMISSION, 1990 ANNUAL REPORT tbl. 5 [hereinafter 1990 ANNUAL REPORT]; UNITED STATES SENTENCING COMMISSION, 1989 ANNUAL REPORT tbl. XII [hereinafter 1989 ANNUAL REPORT]. The percentages reflected in Figure 2 are as follows:

Nationwide Cooperation Rates in Drug Trafficking Cases											
1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
10.6%	12.6%	21.0%	25.6%	33.6%	38.0%	37.2%	34.4%	31.4%	31.1%	29.3%	27.8%

FIGURE 3  
NATIONWIDE COOPERATION RATES IN DRUG TRAFFICKING CASES AND NON-DRUG TRAFFICKING CASES<sup>97</sup>



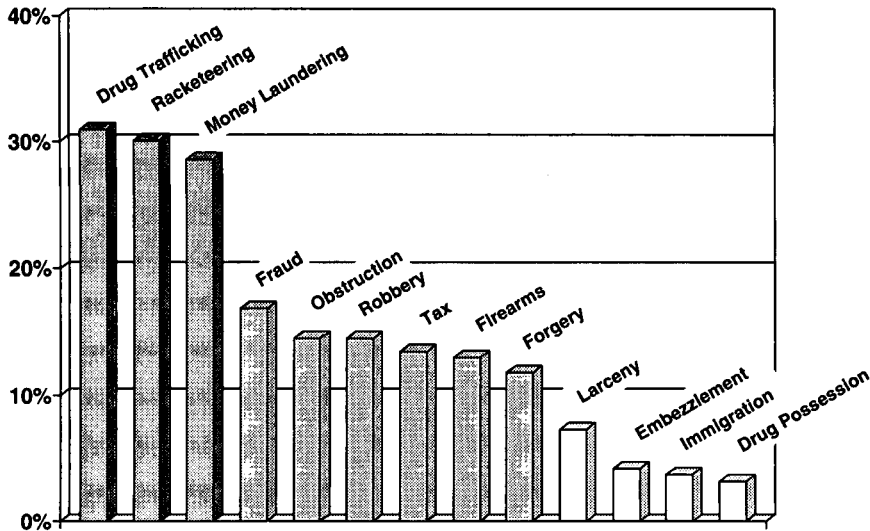
As Figure 3 shows, consistently over the past five years, one out of every three or four drug defendants has cooperated, while only about one out of every ten other defendants has cooperated. The difference is largely explained by two factors: the extent to which drug offenders can cooperate (because of the availability of accomplices) and the extent to which drug offenders are willing to cooperate (because of the severe sentences for drug offenses). The interplay of these factors can be illus-

97. Figure 3 shows the percentage of federal defendants in narcotics trafficking cases that received substantial assistance departures in a particular fiscal year and the percentage of defendants in all other cases who received substantial assistance departures in a particular fiscal year. The percentages from 1989 and 1990 were derived from a 25% random sample of cases. Information from 1991 through 2000 includes all cases. The percentages for drug trafficking cases come from the ANNUAL SOURCEBOOKS and ANNUAL REPORTS listed *supra* in note 96. The percentages for non-drug trafficking cases were computed from the same sources. The percentages reflected in Figure 3 are as follows:

Nationwide Cooperation Rates											
1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
<b>Drug Trafficking Cases</b>											
10.6%	12.6%	21.0%	25.6%	33.6%	38.0%	37.2%	34.4%	31.4%	31.1%	29.3%	27.8%
<b>Non-Drug Trafficking Cases</b>											
1.8%	3.5%	5.5%	7.5%	7.7%	9.8%	13.8%	13.0%	11.6%	11.4%	11.3%	11.0%

trated by comparing cooperation rates for different types offenses (Figure 4).

FIGURE 4  
NATIONWIDE COOPERATION RATES FOR SELECTED PRIMARY  
OFFENSES (1996-2000)<sup>98</sup>



With respect to cooperation rates, these primary offenses fall into three groups. In one group—the high cooperation rate group—are those offenses that typically involve accomplices and typically carry severe sentences. Drug trafficking leads the way, followed closely by racketeering and money laundering.<sup>99</sup> In the middle group are various offenses—some white-collar, some violent—that sometimes (but not always) involve accomplices and sometimes (but not always) carry severe sentences: fraud,

98. Figure 4 shows the percentage of federal defendants who received substantial assistance departures for particular types of offenses during fiscal years 1996 through 2000. The information in Figure 4 comes from the 1996-2000 SOURCEBOOKS. See *supra* note 101. The percentages reflected in Figure 4 are as follows: drug trafficking (31.0%); racketeering (30.1%); money laundering (28.6%); fraud (16.9%); obstruction (14.5%); robbery (14.5%); tax (13.5%); firearms (13.0%); forgery (11.8%); larceny (7.3%); embezzlement (4.2%); immigration (3.7%); and drug possession (3.2%).

99. It is not surprising to find racketeering and money laundering in the same group as drug trafficking. Indeed, not only do those offenses often involve criminal groups organized like drug trafficking rings, but those criminal groups are often engaged in drug trafficking itself. Indeed, racketeering and money laundering prosecutions are often used as vehicles to attack drug trafficking organizations. See, e.g., Matthew Purdy, *Using the Racketeering Law to Bring Down Street Gangs*, N.Y. TIMES, Oct. 19, 1994, at 1 (describing federal RICO prosecutions brought against violent drug gangs).



obstruction of justice, robbery, tax offenses, firearms offenses and forgery. In the last group—the low-cooperation rate group—are those offenses that typically do not involve accomplices and typically do not carry severe sentences: larceny, embezzlement, immigration offenses and drug possession.

#### D. *Cooperation Departures and Disparity*

This picture of rampant cooperation is, to many, disturbing.<sup>100</sup> Most commentators view cooperation as a necessary evil that should be tolerated but not encouraged.<sup>101</sup> The criticisms of cooperation generally come in three forms. First, cooperation is said to engender perjury.<sup>102</sup> Cooperator perjury is a risk in all cases, but it is a particularly serious risk in drug cases, because the incentives for defendants to cooperate are so high. Second, cooperation is criticized for sending a mixed moral message—for rewarding betrayal at the expense of loyalty.<sup>103</sup>

The third (and to me the most powerful) criticism of cooperation is that it undermines uniformity and results in disproportionate and unfair sentences.<sup>104</sup> Put simply, if 30% of drug defendants are cooperating, those defendants receive a monumental sentencing benefit (on average, half-off their sentence)<sup>105</sup> that the other 70% simply do not receive. And what is most troubling about that disparity is that these sentencing benefits may be given out by prosecutors in a way that has a disparate racial impact. In 1997, the Sentencing Commission published the results of a sophisticated multivariate study of cooperation and race in drug cases, which found that non-minority defendants were significantly more likely to receive cooperation departures than Black and Hispanic defendants.<sup>106</sup>

100. See Weinstein, *supra* note 13, at 564-65.

101. See Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 46 (1999) (describing cooperation as example of prosecutors "using unsavory methods in pursuit of laudable ends"); Weinstein, *supra* note 13, at 568 (stating that cooperation is "a uniquely powerful and problematic prosecutorial weapon" and noting that it is necessary to "control this exercise of discretion"). These criticisms come from both sides of the criminal practice aisle. For example, Frank Bowman is a former federal prosecutor and former counsel to the Sentencing Commission. Ian Weinstein is a former federal defender.

102. See generally Ellen Yaroshesky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 921 (1999) (examining, through interviews with former prosecutors, extent to which cooperators lie and ability of prosecutors to detect those lies).

103. See Gould, *supra* note 13, at 873 (examining inmate moral systems); Weinstein, *supra* note 13, at 621-25 (criticizing "government endorsement of morally ambiguous behavior").

104. See, e.g., Bowman, *supra* note 8, at 341-44 (describing negative effects of cooperation); Weinstein, *supra* note 13, at 611-17 (explaining who benefits).

105. See *supra* note 77 and accompanying text (discussing trends in sentencing and cooperation rates since implementation of Guidelines).

106. See SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT, *supra* note 88, at 149. The Commission examined drug trafficking cases from 1994 and found

This racial disparity in cooperation probably stems, in part, from overt prosecutorial preferences for cooperators who the prosecutor thinks will make “good” witnesses: those who speak English, those who are better educated and more articulate and those whom a jury may find more appealing (or less threatening).<sup>107</sup> This racial disparity is also, no doubt, the result of pernicious, but persistent, racial biases. There is little reason to think that prosecutors are more able to avoid unconscious racism than the rest of us.<sup>108</sup> Although it cannot be proven empirically, it is not hard to imagine that prosecutors are more likely to “sign up” defendants with whom they can more easily identify and are more likely to give a sentencing benefit to defendants with whom they can empathize.<sup>109</sup> The result—the troubling result—is that the benefit of the cooperation departure falls inordinately to white defendants.

There is more to the story of disparity, because many defendants who do not receive cooperation departures nevertheless receive some other kind of downward departure, such as a heartland departure. When cooperation departures are combined with these other departures, almost 45% of drug defendants are sentenced outside the Guidelines grid (Figure 5).<sup>110</sup> Uniformity and the restriction of discretion may be the theoretical foundation of the Guidelines system, but the practice—at least in drug trafficking cases—is quite different.

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that “Non-Minorities was the most likely racial group to receive a substantial assistance motion [30%], followed by Blacks [21%] and Hispanics [19%].” *Id.*

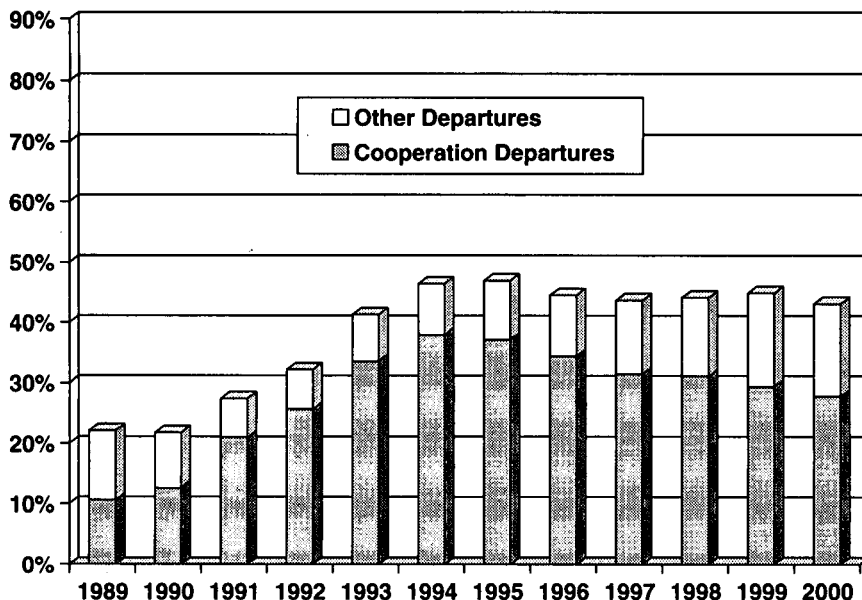
107. *See id.* at 148, tbl. 22. The Sentencing Commission study also found other variables in drug trafficking cases consistent with this conclusion: United States citizens (25%) were more likely than non-citizens (21%) to cooperate; defendants with high school degrees (26%) were more likely to cooperate than less educated defendants (23%) and women (31%) were more likely to cooperate than men (24%); English-speakers, and women were more likely to receive cooperation departures. *See id.*

108. *See United States v. Clary*, 846 F. Supp. 768, 778-82 (E.D. Mo.) (discussing persistence of unconscious racism in criminal law), *rev'd* 34 F.3d 709 (8th Cir. 1994); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 34-38 (1998) (describing how unconscious racism may permeate race-neutral prosecutorial decisions); Charles R. Lawrence III, *The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 323 (1987).

109. *See supra* note 27 and accompanying text. This unproven, but reasonable, fear of racial empathy lay at the heart of the criticisms of judicial discretion in pre-Guidelines sentencing.

110. *See supra* note 101 and accompanying text.

FIGURE 5  
NATIONWIDE DEPARTURE RATES FOR DRUG TRAFFICKING CASES<sup>111</sup>



Even this picture does not do justice to the depth of disparity in federal drug sentences, because the single most important factor in determining whether a defendant gets a cooperation departure is not the defendant's race, his role in the offense or the type of drug involved in the offense, but rather *where* he commits his offense—in other words, which United States Attorney's Office ends up prosecuting him.<sup>112</sup>

There has always been variation among districts in their cooperation rates. On one level, this variation is not surprising. U.S. Attorneys are

111. Figure 5 shows the percentage of federal defendants in narcotics trafficking cases that received substantial assistance departures in a particular fiscal year and the percentage of federal defendants in narcotics trafficking cases who received other kinds of downward departures in a particular fiscal year. The information in Figure 5 comes from the ANNUAL SOURCEBOOKS and ANNUAL REPORTS listed *supra* in note 96. The percentages for 1989 and 1990 were derived from a 25% random sample of cases. Information from 1991 through 2000 includes all cases. The percentages in Figure 5 are as follows:

Nationwide Departure Rates for Drug Trafficking Cases												
	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
5K	10.6%	12.6%	21.0%	25.6%	33.6%	38.0%	37.2%	34.4%	31.4%	31.1%	29.3%	27.8%
Other	11.5%	9.2%	6.4%	6.6%	7.7%	8.4%	9.7%	10.1%	12.3%	13.0%	15.6%	15.3%
Total	22.1%	21.8%	27.4%	33.2%	41.3%	46.4%	46.9%	44.5%	43.7%	44.1%	44.9%	43.1%

112. See SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT, *supra* note 88, at 161 (finding district's substantial assistance rate had more effect on whether defendant cooperated than any other factor).

essentially local operatives.<sup>113</sup> Though they are a part of the Justice Department and report to the Attorney General, they are—and should be—responsive to local concerns and sensitive to the local legal culture.<sup>114</sup> But even accounting for local variations, the geographic disparity in cooperation rates is astonishing. In 2000, overall cooperation rates ranged from a low of 3% to a high of 50%.<sup>115</sup> In drug prosecutions, those differences are even starker, ranging from a low of 0% to a high of 80%.<sup>116</sup>

A comparison of high-cooperation districts and low-cooperation districts will illustrate the disparate approaches used by various U.S. Attorney's Offices in prosecuting drug offenses. Figure 6 shows the drug cooperation rates of twelve districts: the six districts with the highest drug cooperation rates and the six districts with the lowest drug cooperation rates (See Table 1 in Appendix for complete 2000 drug departure rates and median drug sentences for all federal district courts). The six high-cooperation districts all have drug cooperation rates over 60%. The six low-cooperation districts all have drug cooperation rates below 12%.

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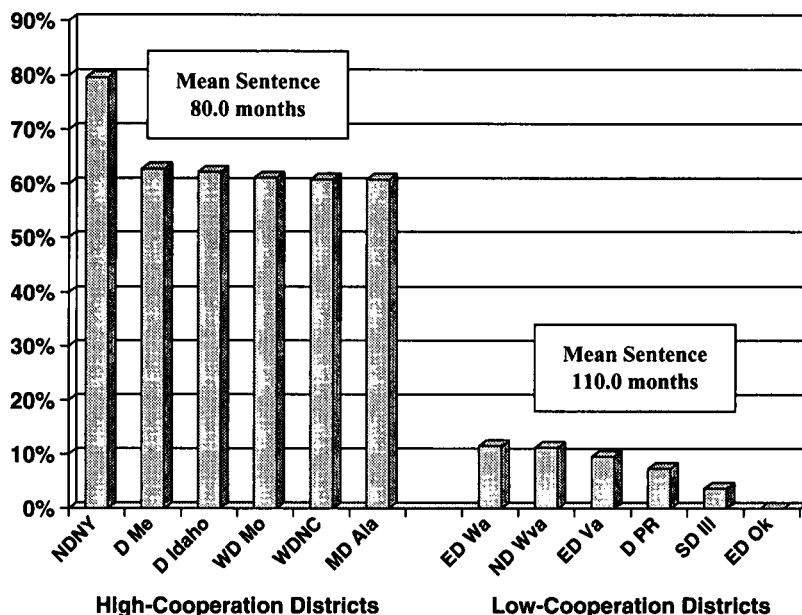
113. See JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 198-206 (1978) (discussing ways in which “direct and indirect pressures from the district affect [U.S. Attorneys’] behavior”).

114. See Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 92 (Charles M. Friel ed., 2000) (noting that involvement of individual members of Congress in appointment of U.S. Attorneys makes it likely that U.S. Attorneys will be quite responsive to local political concerns).

115. See 2000 SOURCEBOOK, *supra* note 66, at tbl. 26. The Eastern District of Oklahoma had the lowest overall cooperation rate at 3.1%, while the Northern District of New York had the highest overall rate at 50.9%.

116. See *supra* note 102 and accompanying text (showing significant disparity in statistics). Although the Sentencing Commission’s Sourcebooks do not include district-by-district statistics broken down by primary offense, the Commission’s 2000 SENTENCING STATISTICS BY STATE, *supra* note 95, which is available on the Commission’s web site, does. In 2000, the Eastern District of Oklahoma had a drug cooperation rate of 0% (out of eighteen cases); the Northern District of New York had a drug cooperation rate of 80% (160 out of 201 cases). See *id.* For a similar analysis of inter-district cooperation disparities in 1996, see Weinstein, *supra* note 13, at 602-08.

FIGURE 6  
COOPERATION RATES IN DRUG TRAFFICKING CASES BY DISTRICT (2000)<sup>117</sup>



The disparity in cooperation rates among these districts is striking: in the six high-departure districts, 65% of drug defendants received a cooperation departure; in the six low-departure districts, only 8% of drug defendants cooperated. When heartland departures are added, the disparities are just as striking: in the high-cooperation districts, over 70% of defendants received some kind of downward departure; in the low-cooperation districts, only 13% received a downward departure. For the defendants, this difference is real: drug defendants sentenced in the six high-departure districts received an average sentence of eighty months' imprisonment, while defendants sentenced in the six low-departure districts received an average sentence of 110 months.<sup>118</sup>

117. Figure 6 shows the percentage of federal defendants in drug cases that received substantial assistance departures during fiscal year 2000. The information in Figure 6 comes from 2000 SENTENCING STATISTICS BY STATE, *supra* note 95, tbls. 7, 9 for each respective district. The complete 2000 drug departure rates and median drug sentences for all federal judicial districts (including the twelve districts in Figure 6) are shown in Table 1, which appears in the Appendix to this Article. Because its sample was so small, I have excluded the Northern Mariana Islands, which actually had the highest drug cooperation rate (four out of five cases). See app. tbl. 1; 2000 SENTENCING STATISTICS BY STATE, *supra* note 95, at tbl. 9.

118. While the thirty-month differential between the average sentence in the high-cooperation group and the average sentence in the low-cooperation group is noteworthy, caution is warranted in drawing broad conclusions from that differential. Because the Guidelines system is so complex and because so many different factors affect each sentence, see *infra* notes 53-127 and accompanying text, it is difficult to draw conclusions about the relationship of two variables without a re-

Is there any explanation for these widely divergent approaches? Not one that is readily apparent.<sup>119</sup> The volume of drug cases in a particular district does not explain the variation because both the high-cooperation group and the low-cooperation group contain districts with large numbers of drug cases, districts with average numbers of drug cases and districts with small numbers of drug cases.<sup>120</sup>

gression analysis. See Linda Drazga Maxfield, *Trends in the Criminal History Category Under the Federal Sentencing Guidelines*, 13 FED. SENTENCING REP. 318, 322 (2001) (cautioning against using aggregate sentencing statistics that “mask the individual guidelines patterns of guideline case mix” and noting that such variables as “district policy and district case characteristic variations [may] mask impacts and lead to analytical misinterpretations”). Indeed, when Ian Weinstein did a regression analysis of district cooperation rates and sentence severity in 1996, he found no significant correlation. See Weinstein, *supra* note 13, at 608-11, 633-44. Those results may be explained by the distorting effect of the southwest border districts. The prevalence of small immigration-related drug cases (including large numbers of marijuana prosecutions) in those districts gives them low cooperation rates and low sentences. In 2000, the five border districts (Southern California, Arizona, New Mexico, Western Texas and Southern Texas) accounted for 31% of all drug cases. Their combined cooperation rate was 16% and their mean sentence was 40 months. See 2000 SENTENCING STATISTICS BY STATE, *supra* note 95, at tbls. 7, 9. See generally *supra* note 95 and accompanying text; Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897 (2002).

119. A few high or low cooperation rates do have ready explanations. For example, the cooperation rate in the Eastern District of Virginia is low, in part, because of that district’s “rocket docket.” Because judges in the Eastern District of Virginia generally insist that criminal cases go to trial or plea within seventy days of indictment, prosecutors often do not have enough time to complete the proffer sessions needed to reach cooperation agreements. As a result, cooperators in that district typically do not receive “substantial assistance” departures, but rather have their sentences reduced after the fact pursuant to Rule 35 of the Federal Rules of Criminal Procedure. See Daniel C. Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 FED. SENT. REP. 75, 75 (1998). Even if the Eastern District of Virginia is excluded from the low-cooperation group, the sentencing differential is still significant, with the average sentence in the low-cooperation group 15% higher than the average sentence in the high-cooperation group. See 2000 SENTENCING STATISTICS BY STATE, *supra* note 95, at tbls. 7, 9.

120. The median number of drug cases for all districts in 2000 was 135.5. As the following shows, the districts in both the high-cooperation group and the low-cooperation group fall evenly above and below that median:

Drug Prosecutions by District (2000)			
High-Departure Districts	Total Drug Cases	Low-Departure Districts	Total Drug Cases
D. Idaho	37	E.D. Okla.	18
D. Me.	43	E.D. Wa.	69
M.D. Ala.	79	N.D. W. Va.	115
N.D.N.Y.	201	S.D. Ill.	244
W.D.N.C.	291	D.P.R.	325
W.D. Mo.	296	E.D. Va.	415

The information in this table comes from 2000 SENTENCING STATISTICS BY STATE, *supra* note 95, at tbl. 9. A 1997 Sentencing Commission study, after a much more sophisticated statistical analysis, reached a similar conclusion: a district’s caseload

Nor does geography explain much of the variation. Both groups contain urban districts and rural districts, eastern districts and western districts and northern districts and southern districts.<sup>121</sup> Comparing districts within the same state yields similar incongruities: the Southern District of Illinois had a drug cooperation rate in 2000 of 4%, while the Central District of Illinois had a rate more than thirteen times higher at 54%; the Southern District of New York had a drug cooperation rate of 23%, while the Northern District of New York had a rate more than three times higher at 80%; the Middle District of North Carolina had a drug cooperation rate of 22%, while the Western District of North Carolina had a rate almost three times higher at 61%; the Southern District of Florida had a rate of 19%, while the Northern District of Florida had more than double that rate at 45%.<sup>122</sup>

It is difficult to pinpoint any one characteristic—whether it be geography, district caseload or any other factor—that drives cooperation rates. These differences most likely result from a complex mix of factors best described as “local culture.” As one commentator has argued, the Guidelines have created a system of separate local systems, each operating within the framework set up by the Guidelines, but adhering to different local customs and practices.<sup>123</sup> Within the local systems, the repeat players in the process—particularly prosecutors and judges—can manipulate various Guidelines factors to arrive at customary sentences.<sup>124</sup> Substantial assistance departures are a significant part of these local cultures.<sup>125</sup>

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has no significant effect on the probability of receiving a substantial assistance departure. See SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT, *supra* note 88, at 160. The study did find, however, some statistical correlation between substantial assistance rates in drug cases and individual prosecutor caseloads (computed by dividing the total cases in a district by the number of prosecutors in that district). Defendants prosecuted in districts with higher prosecutor caseloads were more likely to receive a substantial assistance departure, while defendants prosecuted in districts with lower prosecutor caseloads were less likely to receive such departures. See *id.* Interestingly, however, the study found no correlation between substantial assistance rates and a district’s drug caseload ratio. See *id.* at 160-61.

121. Notwithstanding the mix of urban and rural districts in both the high-cooperation group and the low-cooperation group, there is some correlation between geography and substantial assistance rate. A 1997 Sentencing Commission study found that defendants in the Northeast and the South were somewhat more likely to receive substantial assistance departures than defendants in the Midwest and West. See SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT, *supra* note 88, at 158.

122. See *infra* app. tbl. 1; see also Weinstein, *supra* note 13, at 603-04 (showing similar, albeit smaller, variations within states).

123. See Bowman, *supra* note 8, at 349 (describing how similarly-situated defendants within region are treated similarly).

124. See *id.* at 341-47 (discussing departures, charge bargaining and fact bargaining as methods used by prosecutors to manipulate Guidelines sentences).

125. See SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT, *supra* note 88, at 42-52 (discussing widely varied substantial assistance practices in eight different districts based on interviews of judges, prosecutors, defense attorneys and probation officers); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing*

Indeed, and this is an important caveat, it is impossible to know how much weight to attach to cooperation rates alone, because cooperation departures are only one factor at work in this complex system. It may be that prosecutors and judges in low cooperation districts are using other methods (such as charge bargaining, fact bargaining or heartland departures) to ameliorate harsh drug sentences.<sup>126</sup>

Whatever the cause, these gross disparities in cooperation rates are an indictment of a Guidelines system premised on uniformity.<sup>127</sup> In some districts, over 90% of all drug defendants receive the (often severe) sentence mandated by the Guidelines grid, while in other districts, nearly two-thirds of drug defendants are sentenced by judges who have unfettered discretion to impose any sentence outside the grid. Something needs to be fixed.

### III. IN DEFENSE OF COOPERATION (AND DISPARITY)

There are several possible ways to remedy these disparities. One is to scrap the Guidelines and the mandatory minimums and to reduce overall drug sentences. If drug sentences were less severe and more flexible, defendants would have much less incentive to cooperate and prosecutors would be much less tempted to use cooperation as a way to ameliorate harsh sentences. Congress, however, has shown little sign of wavering in its commitment either to the Guidelines or to fighting a war on drugs through stiff prison sentences.<sup>128</sup>

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*Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 588-91 (1998) (comparing prosecutors' differing views of substantial assistance departures in District of Massachusetts and District of Connecticut); Lee, *supra* note 13, at 125-27 (summarizing prosecutors' differing departure policies in Central District of Illinois and District of Columbia); 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, 556 (1992) (comparing 5K1.1 practices in three U.S. Attorney's Offices and concluding that one office "has the tightest policy with respect to what is required" for cooperation departure, while second office has "a rather liberal definition of who and what qualify" for departure, and third office has "virtually no standard for determining what qualifies" for departure).

126. See Richman, *supra* note 119, at 75 (noting that it is difficult "for an outsider to figure out exactly when charge discounts or sentencing fact discounts are used in lieu of § 5K1.1 motions"); Weinstein, *supra* note 13, at 608 (noting "other ways" in which prosecutor can mitigate non-cooperator's sentence: "[t]he prosecutor may choose to offer a lenient plea bargain, manipulate the sentence calculations through sentence factor bargaining or by omission of relevant conduct or agree not to oppose a defendant's motion for a non-substantial assistance downward departure").

127. See Bowman, *supra* note 8, at 349 ("For Guidelines supporters like myself, it becomes increasingly difficult to say that the Guidelines have succeeded in producing a sentencing regime that is applied uniformly nationwide."); Weinstein, *supra* note 13, at 615-16 (noting that most defenders of Sentencing Guidelines "equate fairness with uniformity").

128. See *supra* notes 8-12 and accompanying text; see also Bowman, *supra* note 8, at 350 ("Leaving all other considerations aside, the political realities are that the Guidelines will not be abolished anytime soon, if ever."). At this point, any assault



Another option is to impose national uniformity on prosecutors' cooperation practices. Many commentators have argued that the Department of Justice should enact (and enforce) centralized policies to reduce the variation in cooperation rates among districts.<sup>129</sup> Such centralized policies would, in my opinion, be a cure worse than the disease. The political history of our war on drugs has demonstrated that the further removed policy-makers are from the real defendants impacted by their policies, the harsher their policies are likely to be. As Bowman and Heise have shown, the recent decline in drug sentences has not come from enactments by Congress or by the Sentencing Commission, nor from changes in Justice Department policy, but rather from discretionary decisions made by the prosecutors and judges who see the defendants and know the realities of their offenses.<sup>130</sup> A centralized cooperation policy, if enforced, would almost certainly reduce overall cooperation rates and raise overall drug sentences.

A third solution for the disparity problem would be to *increase* cooperation in drug cases. As counterintuitive as it may sound, if more districts adopted the high-cooperation, high-departure approach, we might end up with less disparity (or, at least, less offensive disparity).

#### A. Cooperation in a High-Cooperation, High-Departure District

Cooperation in a high-cooperation, high-departure district should look different from cooperation in other districts in two ways. First, prosecutors will be less discerning about who gets to cooperate. In this high-cooperation model, almost any drug defendant who wants to cooperate can, so long as the defendant is completely forthcoming and entirely truthful. That does not mean that every drug defendant will cooperate. As noted above, some defendants will refuse to cooperate under any circumstances, either because they fear retaliation or because they refuse to betray their accomplices. Moreover, prosecutors will rightly refuse cooperation—even very valuable cooperation—offered by a defendant whose crimes were particularly egregious (for example, a defendant who committed homicide in connection with drug dealing).<sup>131</sup>

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on the Guidelines system is more likely to come from the Supreme Court, not Congress. See generally Jacqueline E. Ross, *What Makes Sentencing Facts Controversial? Four Problems Obscured By One Solution*, 47 VILL. L. REV. 965, 981 (2002) (indicating that Supreme Court might find Sentencing Guidelines unconstitutional).

129. See, e.g., SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT, *supra* note 88, at 194 (Sentencing Commission study recommending, among other things, “[e]stablishment of a national policy on substantial assistance for prosecutors”); Lee, *supra* note 13, at 129-30 (criticizing Department of Justice for not sufficiently controlling inter-district disparity in cooperation policies and practices).

130. See Bowman & Heise, *supra* note 27, at 1130-33; *supra* notes 89-92 and accompanying text.

131. Of course, even extremely high culpability can sometimes be outweighed by extraordinarily valuable cooperation. For example, Sammy “the Bull” Gravano was a star cooperating witness in the successful prosecution of Gambino family

It is impossible to predict with any precision how many drug defendants will be willing and able to cooperate under this model, but a reasonable estimate is that at least two-thirds of all drug defendants would attempt to cooperate if given the chance.<sup>132</sup> In 1997, a Sentencing Commission working group reviewed sixty-four conspiracies (most of them drug conspiracies) in thirty-nine different districts.<sup>133</sup> The Commission found that two-thirds of all defendants provided some sort of assistance though only one-third received a cooperation departure.<sup>134</sup> That percentage is consistent with my experience prosecuting drug cases; on average, about two-thirds of all drug defendants wanted to cooperate.<sup>135</sup> Incidentally, that was also the drug cooperation rate of the three highest cooperation districts in 1999.<sup>136</sup>

The second way in which high-cooperation districts differ from low-cooperation districts is in the average size of the sentence reduction for cooperators. In theory, as cooperation rates increase, the extent of cooperation departures should decrease. In a low-cooperation district, prosecutors will seek out defendants whose cooperation will be extremely valuable. In a high-cooperation district, where prosecutors are less selective in choosing cooperators, more defendants with less to offer will become cooperators. Presumably, those defendants with less to offer will receive smaller departures, at least on average.<sup>137</sup>

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crime boss John Gotti, notwithstanding the nineteen murders that Gravano himself committed. See *United States v. Locascio*, 6 F.3d 924, 948-50 (2d Cir. 1993).

132. See LINDA DRAGZA MAXFIELD & JOHN H. KRAMER, *SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY* 9, 26, ex. 5 (1998) (showing that two-thirds of defendants try to cooperate).

133. See *SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT*, *supra* note 88, at 76-77 (detailing conspiracy study).

134. See MAXFIELD & KRAMER, *supra* note 132, at 26, ex. 5 (showing that only half of defendants who cooperate receive departure). The working group reviewed sixty-four randomly selected conspiracy prosecutions from 1992 in which at least one defendant cooperated. Of the 234 defendants in those cases for which information was available, 158 (or 67.5%) provided some kind of assistance to the government, though only sixty-one (or 36.8%) received substantial assistance departures. See *id.* at 26, ex. 5; *SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT*, *supra* note 88, at 73-108 (analyzing conspiracy prosecutions).

135. Not all of those defendants ultimately became cooperators. The Southern District of New York, where I was a prosecutor from 1995 through 1998, is not a "high-cooperation" district. Instead, its drug cooperation rate has consistently been near the national average of approximately 33%. See Weinstein, *supra* note 13, at 564, 592 (former federal defender noting that many defendants offer to cooperate but fail to "close the deal" and that "[d]espite all the disincentive and risks, defendants flock to proffer sessions"); *SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT*, *supra* note 88, at 48 (reporting that in one large U.S. Attorney's office "it was not unusual for all the defendants in a drug conspiracy to cooperate and receive a departure") (emphasis added).

136. See fig. 6, *supra* note 117 and accompanying text (Northern District of New York: 69.7%; Western District of North Carolina: 68.7%; Southern District of Indiana: 67%).

137. The Guidelines list several factors that the court should consider in deciding whether and how much to depart for a cooperator. The first factor is "the

There is only limited empirical support for my hypothesis that an increase in cooperation rates should yield a decrease in the extent of the average cooperation departures. The Sentencing Commission's Substantial Assistance Staff Working Group study found a statistically significant correlation between overall cooperation rates and the extent of cooperation departures.<sup>138</sup> As hypothesized, cooperators sentenced in districts with high overall cooperation rates received smaller departures than cooperators sentenced in districts with low or medium cooperation rates. Interestingly, however, this correlation was not evident in drug cases.<sup>139</sup>

The absence of this correlation in drug cases could result from several factors. First, a district's drug cooperation rate may be related to judges' overall views of the appropriateness of drug sentences under the Guidelines. In other words, a district's choice of the high-cooperation approach may reflect a local culture that is unenthusiastic about harsh drug sentences. If so, judges in that district would be expected to award rather large departures to drug cooperators when given the chance. Similarly, if a district's low-cooperation rate reflects a local culture that is comfortable with harsh sentences in drug cases, judges would be expected to be true to that culture in deciding how far to depart for drug cooperators.<sup>140</sup> Sec-

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court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered." U.S.S.G. § 5K1.1(a)(1) (2000).

138. See SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP REPORT, *supra* note 88, at 177 (explaining relationship between cooperation rates and departures).

139. See *id.*

140. Technically, under the Guidelines system, a judge sentencing a cooperator is supposed to determine the extent of the departure simply by evaluating the defendant's cooperation, not by considering the overall appropriateness of the sentences. Section 5K1.1 instructs the court to determine the "appropriate reduction" by considering the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

U.S.S.G. § 5K1.1(a). And although section 5K1.1 indicates that the court may consider other factors, the strong implication is that those factors must be related to the defendant's cooperation. See *id.* at cmt. n.2 ("The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct."). In reality, however, a judge freed from the Guidelines grid by a substantial assistance motion will often award whatever sentence that the judge feels is just, considering not only the defendant's cooperation, but the overall appropriateness of the sentence as well. See Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combating Ultra-Uniformity*, 35 B.C. L. REV. 799, 819 (1994) (federal district judges arguing that latitude afforded sentencing judges to sentence cooperator based upon "variable

ond, as with most drug prosecution statistics, the overall correlation between cooperation rate and departure size will be distorted by the border districts, all of which have low cooperation rates, low averages sentences and, presumably, small average cooperation departures.<sup>141</sup>

My point, however, is not that high-cooperation districts will always have smaller departures than low-cooperation districts. Indeed, because so many factors are at work in cooperator sentencing, it is not surprising that there is no simple bivariate relationship between cooperation rates and sentence lengths. Rather, the point is that as a district *moves* from a low-cooperation approach to a high-cooperation approach, assuming all other factors remain constant, the extent of the average cooperation departure should decrease because the average cooperator will be less valuable.

The same argument applies to sentence severity. As Figure 6 shows, sentences in the six highest cooperation districts were thirty months shorter than sentences in the six lowest cooperation districts. While these numbers do not necessarily suggest a direct correlation between cooperation rates and sentence severity across all districts,<sup>142</sup> they do provide an indication of what a difference cooperation departures can make. The average departure for a drug cooperator in 2000 was thirty-eight months.<sup>143</sup> As a district moves from a low-cooperation approach to a high-cooperation approach, assuming all other factors remain the same, sentence severity cannot help but decrease.

#### B. *The Advantages of the High-Cooperation Approach*

The high-cooperation approach has several advantages over other approaches. Let me start with the obvious.

##### 1. *Crime Fighting*

Cooperation is an extraordinarily effective tool in fighting drug trafficking. Increased cooperation will mean more cases made against more drug traffickers.<sup>144</sup> Of course, if most defendants are cooperating, the net result may not be an increase in aggregate prison time served by those

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relevant factors" gives judges ability "to import a wide range of mitigating circumstances into the departure calculus").

141. See *supra* notes 95, 118 and accompanying text (explaining how drug cooperation rates have followed same trend as overall cooperation rates).

142. As noted above, Ian Weinstein's 1996 regression analysis of cooperation rates and sentence severity found no significant correlation between the two. That analysis, however, may have been distorted by large numbers of marijuana cases in the border districts. See *supra* note 119 (discussing correlation between cooperation rates and reduced sentences in border districts).

143. See 2000 SOURCEBOOK, *supra* note 66, at tbl. 30 (providing degree of decrease for substantial assistance).

144. It is true that most prosecutors already seek to maximize the crime-fighting benefits resulting from cooperation. But, in the low cooperation districts, prosecutors put greater limits on their use of cooperation so as to limit the result-

prosecuted. But, at least in the context of the war on drugs, who needs more prison time?<sup>145</sup> Moreover, because arrests and convictions are far more important for deterrence than sentence length,<sup>146</sup> the crime fighting benefits to society will be greater in a system that focuses on making cases and getting convictions, even at the expense of a few less years of jail time. Moreover, as to specific deterrence, cooperation is a particularly powerful tool, as the cooperator's status as a "rat" often makes it impossible for him to return to his old haunts.<sup>147</sup>

## 2. *Perjury*

The high-cooperation approach also has less obvious benefits. For one, the high-departure approach should lessen cooperator perjury. Perjury is always a risk with cooperators, and the only protection against perjury is skeptical prosecutors who are willing to take the time and make the effort to rigorously corroborate their cooperators.<sup>148</sup> That being said, the risk of perjury is reduced under the high-cooperation model.

For the cooperator, the important event is not providing the cooperation (such as testifying at a trial), but rather getting the cooperation agreement. The typical would-be cooperator knows that his story—what he has to offer—must be "good enough" for it to be worth the prosecutor's while. He must have good evidence about other criminal activity or about more culpable participants in his own criminal activity. Either implicitly or explicitly, prosecutors convey this message, defense lawyers convey this message and, perhaps most importantly, the prison grapevine conveys this message.

Lying, of course, carries a risk. If the cooperator is caught in the lie, he most likely will not get signed up (or, if the lie is not uncovered until after he signs up, he may not get the cooperation departure). The defendant who is trying to get a cooperation agreement in a low-cooperation district must make a decision: he can tell the truth and hope that the truth is good enough to warrant an agreement; or, he can embellish (or completely fabricate) the story to ensure it is good enough.

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ing leniency for cooperators. My point is that—at least in drug cases—trading leniency for cooperation is almost always a good deal for prosecutors.

145. See, e.g., Bowman, *supra* note 8, at 337 ("Drug sentences are long as a proportion of any human life. They are often longer than can be rationally justified to achieve deterrence. They are very long in comparison to the settled pre-Guidelines expectations of federal lawyers and judges. They are so long that they frequently seem disproportionate and inhumane to the judges obliged to impose them, and even to the prosecutors who work so diligently to secure them.").

146. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 461-62 (1997) (discussing why "lengthy prison terms are not a particularly useful method of increasing deterrence effects").

147. See Simons, *supra* note 82.

148. See Yaroshfsky, *supra* note 102, at 934-40 (discussing importance of corroborating cooperators); Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1405-09 (1996) (discussing ways in which prosecutor can test cooperator's story).

Thus, the important lies told by a cooperatoꝛ are not the lies told on the witness stand; the important lies are those told in the proffer sessions *before* the cooperatoꝛ is signed up—because once the cooperatoꝛ is signed up, his story is not likely to change. So, one way to lessen cooperatoꝛ perjury is to lessen cooperatoꝛs' incentives to lie at the outset. If prosecutors set the bar lower by not being so exacting in their demands for "good" evidence, cooperatoꝛs' incentives to lie in proffer sessions will decrease.

### 3. *Unwarranted Disparity*

There is no doubt that cooperation departures introduce disparity. But the high-cooperation approach makes those disparities less offensive in two ways: (1) the extent of the disparity (on average) will be less; and (2) fewer defendants will be unfairly affected by the disparity. What is offensive about disparity is not that defendants are sentenced outside the Guidelines grid, but rather that similarly-situated defendants will receive vastly different sentences for the same conduct. Under the current system, approximately one-third of drug defendants nationwide receive a tremendous benefit—the cooperation departure—while the other two-thirds do not. In the high-cooperation districts, twice as many defendants—approximately two-thirds—receive the cooperation benefit. In other words, disparity is unfair not to those defendants who get the more lenient sentences, but rather to those defendants who get the more severe sentences. In the low-cooperation districts, that unfairness is visited upon 90% of the defendants; in the high-cooperation districts, that unfairness is visited upon only one-third.

Moreover, and significantly, the high-cooperation approach should lessen racial disparities in cooperation practices. The vast majority of drug defendants—75%—are minorities.<sup>149</sup> If the cooperation departure is limited (whether by local culture or official policy), prosecutors will be more likely to favor "better" witnesses. If the threshold is lowered, however, and anyone who is forthcoming and truthful can cooperate, then the benefit will be opened to far more minority defendants. Put more bluntly, if prosecutors are being racist—consciously or unconsciously—in making cooperation decisions, the high-departure model is better because it requires prosecutors to make fewer decisions. More generally, because so many drug defendants are minorities, anything that gives judges more discretion to reduce sentences will, in the aggregate, benefit minority defendants.

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149. In 2000, 25% of drug defendants were White, 30% were Black, 43% were Hispanic and 2% were "other." See 2000 SOURCEBOOK, *supra* note 66, at tbl. 34. By contrast, minorities are sorely underrepresented in the ranks of federal prosecutors. See, e.g., Sharon E. Grubin & John M. Walker, Jr., *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 9, 32 (1997) (reporting that, in 1995, only 10% of Assistant U.S. Attorneys in Second Circuit were minorities).

#### IV. CONCLUSION

I recognize that my proposal is, in some respects, an attack on the entire system of drug sentencing set up by the Anti-Drug Abuse Act of 1986 and the Sentencing Guidelines. That is not to suggest that my proposal—that more districts adopt the high-cooperation approach—is lawless or requires prosecutors to do anything improper. Indeed, it is the approach followed by several United States Attorney's Offices around the country (most notably the Northern District of New York with its nearly 80% drug cooperation rate). Nevertheless, what I am proposing, while both legal and perfectly appropriate, likely would not meet with the approval of Congress, the Sentencing Commission or the Department of Justice (the Northern District of New York notwithstanding). It is those Washington-based institutions that have set up our current system of drug sentences, and it is those institutions that deserve the blame for the excessive sentences that result.<sup>150</sup>

Our current system of fixed sentences for drug offenses puts prosecutors in a unique position. Like defense attorneys and judges, prosecutors are on the front lines, face to face with the defendants who are being sent to prison. But unlike defense attorneys, and even judges, prosecutors are in a position to make a difference. Prosecutors, through their charging decisions, plea bargains and sentencing practices, can actually do something to ameliorate the irrational severity of many drug sentences.

Some might argue that it is not for prosecutors to decide whether the sentences enacted by Congress and the Sentencing Commission are just.<sup>151</sup> I emphatically disagree.<sup>152</sup> A prosecutor's obligation to ensure that "justice shall be done"<sup>153</sup> does not begin and end with convicting only

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150. I understand that, in some districts, a low drug cooperation rate may result from a local culture that is entirely comfortable with the severe sentences typically meted out under the drug Guidelines and mandatory minimums. In a district with that culture, my argument will necessarily fall on deaf ears. I suspect, however, that prosecutorial dissatisfaction with drug sentences is widespread, even in low-cooperation districts. My argument to those dissatisfied prosecutors is not that they should attempt to change their local culture, but that they should not let their local culture be dictated by policy-makers in Washington who never see the defendants affected by those policies.

151. See Bowman & Heise, *supra* note 27, at 1136 (noting that many drug war policy-makers would be "outrage[d]" to learn that "prosecutors have quietly subverted the will of Congress expressed in statute after statute raising the penalties for drug trafficking").

152. In this respect, I am answering in the affirmative (rather cursorily I admit) the questions posed by David Sklansky: "[H]ow should prosecutors operate under a system of fixed sentences? Should sentencing considerations influence charging decisions and plea offers, and if so, how?" See David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 *FORDHAM URB. L.J.* 509, 533 (1999) (noting that "[t]he academy has ignored these questions").

153. *Berger v. United States*, 295 U.S. 78, 88 (1935).

the guilty.<sup>154</sup> In the prosecutor's world, sentencing is the bottom line—and if sentences are not just, prosecutors are not doing their job.

There are, of course, other methods that prosecutors can—and do—use to ameliorate harsh drug sentences. They can engage in fact bargaining: a lawless approach that often involves misleading the court and the probation department.<sup>155</sup> They can engage in charge bargaining, which may not be lawless, but hides, or at least disguises, the sentencing reduction.<sup>156</sup> Cooperation reductions, on the other hand, fall squarely within the four corners of the Guidelines.<sup>157</sup> Indeed, such departures are “encouraged”<sup>158</sup>—so long as the government receives “substantial assistance” in return.<sup>159</sup>

The assistance—rendered by the cooperator—is the main advantage of cooperation departures. Prosecutors who follow the high-cooperation approach are not simply doling out leniency to drug dealers. Instead, they are wielding an effective crime-fighting weapon. They are staying true to their mission—waging war on drugs—while simultaneously tempering the excesses of that war. The end result is more sentences that are more just for more defendants.

154. See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 60-65 (1991) (describing prosecutor's duties at trial).

155. “Fact bargaining” refers to the process by which the prosecutor and defense attorney agree on the “facts” that will go into the Guidelines calculation. See Bowman, *supra* note 8, at 347 (discussing fact bargaining and describing it as “[t]he most direct, if disingenuous, method of evading a fact-driven real offense sentencing system”).

156. “Charge bargaining” generally refers to the negotiation between the prosecutor and the defense attorney about the charges to which the defendant will plead. Under the Guidelines “real offense” system, charge bargaining usually will not affect the Guidelines calculation (because uncharged conduct will still be included as “relevant conduct”). See U.S.S.G. § 1B1.3(a)(1)(A) (2000); Breyer, *supra* note 47, at 10-12. The one exception is when the agreed upon charge carries a maximum sentence that is less than the Guidelines sentence. See Bowman, *supra* note 8, at 343-46 (describing how charge bargaining can “circumvent” Guidelines and noting that, while it is not forbidden by Guidelines, it seems inconsistent with Department of Justice policy that prosecutors are to charge “most serious readily provable offense”) (citing U.S. ATTORNEY'S MANUAL 9-27.410 (1995)).

157. Prosecutors can also reduce sentences through bargaining about non-cooperation departures, either by consenting to or agreeing not to oppose a defendant's request for a downward departure. In many ways, this approach would be preferable to a high-cooperation approach, because the sentence reductions would be more explicitly connected to the equities that call for a mitigated sentence. See generally Berman, *supra* note 70, at 96-100 (advocating greater—and more thoughtful—use of such departures).

158. See *Koon v. United States*, 518 U.S. 81, 96 (1996).

159. Nor does the high-cooperation approach require prosecutors to manipulate the Guidelines or mislead the sentencing court. At least in drug cases, it is the rare defendant who cannot provide the government with some assistance that can be fairly described as “substantial” (a word that is admittedly imprecise).



## APPENDIX

SORTED BY COOPERATION DEPARTURE RATE	TOTAL DRUG CASES	SENTENCED WITHIN RANGE		DEPARTURES						MEAN PRISON SENTENCE  MONTHS
				COOPERATION		OTHER DOWNWARD		UPWARD		
				N	%	N	%	N	%	
ALL DISTRICTS	22,253	12,596	56.6	6,197	27.8	3,410	15.3	50	0.2	75.3
Northern Mariana Islands	5	1	20.0	4	80.0	0	0.0	0	0.0	29.0
New York, Northern	201	31	15.4	160	79.6	10	5.0	0	0.0	42.0
Maine	43	15	34.9	27	62.8	1	2.3	3	7.0	45.4
Idaho	37	11	29.7	23	62.2	3	8.1	0	0.0	88.3
Missouri, Western	296	105	35.5	181	61.1	10	3.4	0	0.0	72.5
North Carolina, Western	291	97	33.3	177	60.8	17	5.8	0	0.0	112.8
Alabama, Middle	79	25	31.6	48	60.8	5	6.3	1	1.3	92.0
Louisiana, Middle	17	7	41.2	10	58.8	0	0.0	0	0.0	58.0
Pennsylvania, Middle	148	52	35.1	86	58.1	10	6.8	0	0.0	80.0
Alabama, Southern	99	33	33.3	57	57.6	9	9.1	0	0.0	95.7
Guam	40	16	40.0	23	57.5	0	0.0	1	2.5	66.1
Colorado	112	40	35.7	61	54.5	11	9.8	0	0.0	56.7
Indiana, Southern	93	40	43.0	50	53.8	3	3.2	0	0.0	133.6
Illinois, Central	144	56	38.9	77	53.5	10	6.9	1	0.7	121.4
Ohio, Northern	191	77	40.3	101	52.9	12	6.3	1	0.5	80.9
Pennsylvania, Eastern	332	134	40.4	175	52.7	22	6.6	1	0.3	78.7
Ohio, Southern	140	56	40.0	71	50.7	13	9.3	0	0.0	68.5
Maryland	169	64	37.9	82	48.5	22	13.0	1	0.6	128.8
Alabama, Northern	131	66	50.4	62	47.3	3	2.3	0	0.0	77.1
New York, Western	113	55	48.7	53	46.9	5	4.4	0	0.0	56.2

Florida, Northern	199	107	53.8	90	45.2	2	1.0	0	0.0	140.3
Michigan, Eastern	275	132	48.0	123	44.7	20	7.3	0	0.0	70.6
Georgia, Middle	169	87	51.5	74	43.8	8	4.7	0	0.0	91.6
Tennessee, Eastern	252	140	55.6	110	43.7	2	0.8	0	0.0	84.7
South Carolina	331	182	55.0	142	42.9	6	1.8	1	0.3	108.9
Iowa, Northern	155	74	47.7	66	42.6	11	7.1	4	2.6	100.1
Mississippi, Southern	86	48	55.8	36	41.9	2	2.3	0	0.0	68.9
Wyoming	77	38	49.4	32	41.6	7	9.1	0	0.0	77.6
Illinois, Northern	252	127	50.4	104	41.3	21	8.3	0	0.0	86.1
Montana	147	75	51.0	59	40.1	13	8.8	0	0.0	104.7
Delaware	20	11	55.0	8	40.0	1	5.0	0	0.0	116.4
Louisiana, Western	166	94	56.6	66	39.8	6	3.6	0	0.0	126.2
Michigan, Western	107	55	51.4	42	39.3	9	8.4	1	0.9	94.4
Iowa, Southern	256	124	48.4	100	39.1	31	12.1	1	0.4	119.8
Virginia, Western	195	115	59.0	75	38.5	4	2.1	1	0.5	103.5
Kentucky, Eastern	273	161	59.0	103	37.7	8	2.9	1	0.4	55.3
Washington, Western	175	86	49.1	66	37.7	22	12.6	1	0.6	60.9
North Carolina, Eastern	183	111	60.7	69	37.7	3	1.6	0	0.0	155.5
Florida, Middle	697	398	57.1	260	37.3	38	5.5	1	0.1	94.6
Tennessee, Western	188	111	59.0	69	36.7	7	3.7	1	0.5	98.4
Texas, Northern	268	162	60.4	98	36.6	8	3.0	0	0.0	97.6
Missouri, Eastern	327	195	59.6	119	36.4	13	4.0	0	0.0	73.6
New Hampshire	56	28	50.0	20	35.7	7	12.5	1	1.8	58.2
Wisconsin, Eastern	67	44	65.7	23	34.3	0	0.0	0	0.0	121.5
Oregon	109	59	54.1	37	33.9	12	11.0	1	0.9	92.9

Massachusetts	227	104	45.8	77	33.9	45	19.8	1	0.4	64.2
Pennsylvania, Western	124	70	56.5	42	33.9	12	9.7	0	0.0	86.3
New Jersey	230	141	61.3	73	31.7	16	7.0	0	0.0	73.4
District of Columbia	117	56	47.9	37	31.6	24	20.5	0	0.0	81.3
Indiana, Northern	139	89	64.0	43	30.9	6	4.3	1	0.7	92.6
Kansas	179	105	58.7	55	30.7	19	10.6	0	0.0	85.3
Mississippi, Northern	62	37	59.7	19	30.6	6	9.7	0	0.0	97.4
Vermont	79	36	45.6	24	30.4	19	24.1	0	0.0	51.8
Georgia, Southern	56	36	64.3	17	30.4	3	5.4	0	0.0	126.9
Minnesota	206	114	55.3	59	28.6	33	16.0	0	0.0	79.5
Tennessee, Middle	44	30	68.2	12	27.3	2	4.5	0	0.0	96.9
Georgia, Northern	245	148	60.4	64	26.1	31	12.7	2	0.8	101.2
Alaska	69	44	63.8	18	26.1	7	10.1	0	0.0	78.5
New York, Eastern	688	297	43.2	172	25.0	216	31.4	3	0.4	53.8
Oklahoma, Western	64	46	71.9	16	25.0	1	1.6	1	1.6	124.9
Texas, Southern	1,694	1,152	68.0	415	24.5	123	7.3	4	0.2	58.3
Hawaii	138	86	62.3	33	23.9	18	13.0	1	0.7	78.8
Oklahoma, Northern	51	35	68.6	12	23.5	3	5.9	1	2.0	146.1
New York, Southern	540	351	65.0	124	23.0	61	11.3	4	0.7	80.8
California, Eastern	137	89	65.0	31	22.6	17	12.4	0	0.0	107.9
North Dakota	31	18	58.1	7	22.6	6	19.4	0	0.0	90.9
North Carolina, Middle	137	103	75.2	30	21.9	3	2.2	1	0.7	139.9
South Dakota	60	39	65.0	13	21.7	8	13.3	0	0.0	69.3
Arkansas, Western	57	44	77.2	12	21.1	1	1.8	0	0.0	74.8
California, Central	137	91	66.4	28	20.4	16	11.7	0	0.0	98.4

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## DEPARTING WAYS

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Louisiana, Eastern	162	120	74.1	33	20.4	9	5.6	0	0.0	98.2
Kentucky, Western	81	62	76.5	16	19.8	3	3.7	0	0.0	89.7
Nebraska	318	227	71.4	61	19.2	30	9.4	0	0.0	85.6
Florida, Southern	1,068	820	76.8	200	18.7	47	4.4	1	0.1	92.5
Wisconsin, Western	45	35	77.8	8	17.8	2	4.4	0	0.0	99.7
Nevada	102	65	63.7	17	16.7	20	19.6	0	0.0	81.4
Texas, Eastern	264	201	76.1	43	16.3	20	7.6	0	0.0	89.0
Arkansas, Eastern	78	62	79.5	12	15.4	4	5.1	0	0.0	105.7
Virgin Islands	20	13	65.0	3	15.0	4	20.0	0	0.0	54.4
California, Southern	1,608	290	18.0	235	14.6	1,081	67.2	2	0.1	28.2
West Virginia, Southern	132	108	81.8	19	14.4	5	3.8	0	0.0	100.1
California, Northern	129	74	57.4	18	14.0	35	27.1	2	1.6	74.7
Connecticut	73	33	45.2	10	13.7	30	41.1	0	0.0	103.1
Utah	69	42	60.9	9	13.0	18	26.1	0	0.0	60.0
Texas, Western	2,182	1,589	72.8	283	13.0	309	14.2	1	0.0	38.4
Rhode Island	62	43	69.4	8	12.9	11	17.7	0	0.0	75.4
New Mexico	586	427	72.9	72	12.3	87	14.8	0	0.0	39.4
Arizona	866	247	28.5	104	12.0	514	59.4	1	0.1	28.6
Washington, Eastern	69	45	65.2	8	11.6	16	23.2	0	0.0	55.1
West Virginia, Northern	115	101	87.8	13	11.3	1	0.9	0	0.0	81.5
Virginia, Eastern	415	359	86.5	40	9.6	15	3.6	1	0.2	135.0
Puerto Rico	325	289	88.9	24	7.4	11	3.4	1	0.3	79.5
Illinois, Southern	244	227	93.0	9	3.7	6	2.5	2	0.8	122.4
Oklahoma, Eastern	18	9	50.0	0	0.0	9	50.0	0	0.0	148.8

