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Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences

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Quiet Rebellion?
Explaining Nearly a Decade of Declining Federal Drug Sentences

Frank O. Bowman, III* and Michael Heise**

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I. INTRODUCTION

The conventional critique of federal drug laws in the academic and popular press rests on three articles of faith. First, the advent of the Federal Sentencing Guidelines (Guidelines) in 1987, in combination with congressionally-mandated minimum sentences, dramatically increased sentences for federal drug crimes to historically unprecedented levels. Second, the Guidelines and mandatory minimums conferred immense discretionary authority on federal prosecutors who have employed their power to compel the imposition of draconian sentences on drug offenders. Third, the Guidelines and mandatory minimums have, at the same time, handcuffed judges, depriving them of the power to ameliorate harsh sentences compelled by rigid sentencing rules.¹

If all three articles in the canon of conventional wisdom accurately describe federal narcotics sentencing, one would expect the average sentence for a federal drug offender to have remained roughly the same, or perhaps even to have climbed higher, in the years since the Guidelines were fully implemented following the Supreme Court’s affirmation of their constitutionality in 1989.² Federal drug sentences did indeed rise sharply

¹. For expressions of the common wisdom in law reviews, see Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. CHI. L. REV. 901, 903 (1991) (noting that the Guidelines have confined the discretion of judges and increased the power of prosecutors, especially in drug crimes where the Guidelines have produced “nonsense rules and inequalities”); Marc L. Miller & Ronald F. Wright, Your Cheatin’ Heartland: The Long Search for Administrative Sentencing Justice, 2 BUFF. CRIM. L. REV. 723, 726 (1999) (describing the Guidelines as widely hated, dysfunctional, and one of the great failures of law reform in U.S. history that has been pouring offenders into federal prisons for longer and longer sentences); and Kate Stith & José A. Cabranes, Judging Under the Federal Sentencing Guidelines, 91 NW. U. L. REV. 1247, 1248-52 (1997) (arguing that judges have been reduced to the role of “accountants” or “notary publics”).

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following the passage of the Sentencing Reform Act of 1984 (SRA) and the resultant adoption of the Federal Sentencing Guidelines in 1987. According to the Administrative Office of the United States Courts (AO), the average federal drug sentence rose from 65.7 months in 1984 to its all-time high of 95.7 months in 1991. However, since roughly 1991-92, the length of federal prison sentences imposed on drug offenders has been slowly, but quite steadily, decreasing. According to statistics maintained by the AO, in the eight years between 1991 and 1999, the average federal prison sentence for a drug offender decreased from 95.7 months to 74.6 months, a drop of 22%, or nearly two years, per defendant. United States Sentencing Commission statistics report a somewhat less precipitous, but still unmistakable, seven-year decline in the average drug sentence from 88.2 months in 1992 to 75.2 months in 1999, a drop of 14.7%. This downward trend had until recently gone unobserved and remains generally unknown even among federal criminal justice professionals.


4. Id. See infra Part III.B fig.1 (representing the decline in average federal drug sentences). Figures collected independently by the Department of Justice also show a decline in overall average drug sentences from eighty-six months in 1992 to sixty-seven months in 1993, a 22% decline. See TRAC study, supra note 3, at http://trac.syr.edu/tracdea/findings/aboutDEA/newFindings.html (last visited Feb. 23, 2001).


These United States Sentencing Commission figures represent the average prison sentence imposed on federal narcotics offenders who were actually sentenced to prison. Cases in which probation-only sentences were imposed are not included. The percentage of probation-only sentences ranged from 8.4% of the total number of defendants convicted on drug charges in 1993, see 1993 U.S. SENTENCING COMM’N, 1993 ANN. REP., 73 tbl.23 [hereinafter 1993 ANNUAL REPORT], to 5.8% in 1999, see 1999 SOURCEBOOK, supra, at 28 tbl.12, available at http://www.ussc.gov/ANNURT/1999/table12.pdf (last visited Feb. 22, 2001). If probationary sentences are included in the average as zero months of imprisonment, the yearly averages are slightly lower. For example, the mean drug sentence in 1999 would be roughly seventy-three months, id. at 29 tbl.13, rather than seventy-five months. But the overall downward trend remains the same.

6. The degree to which federal criminal lawyers, judges, and interested academics remain unaware of the continued downward movement in drug sentences is not empirically verifiable. Suffice it to say that in the last year one of us (Bowman) has talked about the subject to several large groups of judges and sentencing specialists, and discussed it many times in private conversations, and reactions continue to range from mild surprise to outright
When it was first pointed out in the spring of 2000,\textsuperscript{7} we think it fair to say that the reaction of most observers, even long-time observers of federal sentencing, was one of considerable surprise. If the law is rigid, the judges powerless, and the prosecutors pitiless, how can the length of federal drug sentences be decreasing year after year? This Article seeks an explanation for a trend that confounds the expectations of many legal professionals.

The Article begins with an examination of three primarily empirical questions. First, is the trend real? In other words, is the apparent decrease in federal drug sentences merely a species of statistical hiccup, a random fluctuation that could move easily and rapidly in the other direction? Or is the decline in average drug sentences large enough, and the trend prolonged enough, that we can safely conclude that something meaningful is occurring?\textsuperscript{8}

Second, assuming that the decrease in federal drug sentences is real, to what degree can the decrease be attributed to “non-discretionary factors”? Non-discretionary factors include changes in statutory or guidelines law, alterations in the mix of criminal cases brought to the federal system, and other considerations that are outside of the range of discretionary choice available to individual federal prosecutors, defense attorneys, probation officers, and district judges who administer federal sentencing law.\textsuperscript{9}

Third, to what degree can the decrease in federal drug sentences be attributed to “discretionary factors,” that is, to evolutionary changes in the way that prosecutors, defense lawyers, judges, and probation officers exercise their discretion? More particularly, if discretionary choice is indeed influencing the downward movement of drug sentences, does the law sanction the result achieved by the discretionary choices? Or are at least some discretionary choices by the official actors in the sentencing process violative of either the letter or spirit of federal sentencing statutes and the Federal Sentencing Guidelines? Put differently, is the decline occurring despite, rather than because of, the nominal constraints of the law?

The difficulty of answering these questions definitively is obvious. Courts now sentence some twenty-three thousand defendants annually for violating federal narcotics statutes.\textsuperscript{10} They are prosecuted in more than

\begin{footnotesize}
\begin{itemize}
\item[8.] See infra Part III (demonstrating that the decline in average drug sentences is significant).
\item[9.] See infra Part IVA (suggesting effects of non-discretionary factors on declining sentence lengths).
\item[10.] In 1999, 23,082 defendants were sentenced in federal district courts for violations of drug statutes. 1999 \textsc{Sourcebook}, supra note 5, at 12 tbl.3.
\end{itemize}
\end{footnotesize}
ninetysy districts staffed by literally thousands of prosecutors, defense lawyers, judges, and probation officers. Each district has its own unique mix of population, cultures, topography, crime types, political identities, and personalities, all of which do, or at least can, influence what criminal cases are brought in federal court and how they are handled once brought. This Article does not attempt to consider these local influences, profound though they may prove to be in any particular district or region. Rather, our more modest objective is to identify, so far as possible, those factors influencing drug sentencing outcomes that are observable on a nationwide basis. In an upcoming article, we will address, so far as is possible, the effects of local or regional factors on the overall trend in federal drug sentences.

Even viewing the problem at a national level, the complications are daunting. Since the adoption of the Federal Sentencing Guidelines in 1987, federal sentencing law, the administrative systems created to implement it, and the world of drug crime have remained in a constant state of change. Neither the law, nor its enforcers, nor its violators have stood still. Trying to trace the interactions of changes in statutory and case law, modifications of prosecutorial policy, and the response of drug traffickers to enforcement initiatives is often bewilderingly complex.

All this having been said, the available information suggests that four conclusions are possible. First, the downward trend in federal drug sentences is real. Second, at least some of the decrease is attributable to non-discretionary causes, such as the passage in 1994 of the so-called “safety valve” measure that allowed a reduced sentence for certain first-time drug offenders. Third, the decrease in federal drug sentences since 1991-92 cannot be entirely explained by non-discretionary causes. Rather, the continuing downward movement in federal drug sentences over nearly the last decade is, to a significant degree, the product of an array of discretionary choices by judges, prosecutors, defense counsel, and probation officers. Finally, we conclude, albeit far more tentatively, that the available evidence suggests these discretionary choices are, at least in part, a product of a widespread perception among the foot soldiers of the criminal justice system—the prosecutors, defense attorneys, probation officers, and district judges—that drug sentences are often too high. Or at the least, numerous front-line sentencing actors seem to have concluded that drug sentences are often higher than necessary to achieve their personal or institutional objectives.

These conclusions have numerous intriguing implications for the overall federal sentencing debate. First, if the discretionary choices of frontline sentencing actors—especially members of the judiciary—have been primarily responsible for the steady decline in average drug sentences, this would seem to pose difficulties for those who argue that the Guidelines represent an intolerable impediment to the exercise of judicial sentencing discretion. Similarly, for those who harbor the view that the Guidelines are
principally a tool of implacable federal prosecutors bent on securing ever longer sentences, evidence of the pervasive exercise of prosecutorial discretion to lower drug sentences suggests a far more complex and nuanced picture.

Second, if, as our study suggests, many of these discretionary choices represent evasions of the formal constraints of the Guidelines and federal sentencing statutes, such evasions might well impair one of the Guidelines' primary objectives, that of eliminating unjustified sentencing disparity. Regardless of its effect on disparity, a pervasive disposition toward discretionary evasions of Guideline and statutory law has important implications for the ongoing struggle among the courts, the Justice Department, the Congress, and the Sentencing Commission for control of sentencing policy.

Finally, if we are correct, if the district courts, probation departments, defense lawyers, and U.S. Attorney's Offices who do the real work of federal sentencing have persistently exercised their discretion over nearly the last decade to reduce drug sentences, their behavior looks very like a form of quiet rebellion against the severity of drug sentences. Whatever their motivations, the cumulative effect of their discretionary choices cannot be ignored in the broader debate over national drug policy.

To appreciate the interplay of the many factors that influence the length of federal drug sentences, one must first understand the Federal Sentencing Guidelines, as well as the interlocking mandatory sentencing provisions of federal narcotics statutes. Section II of this Article provides an explanation of the Federal Sentencing Guidelines and their interaction with statutory mandatory minimum sentences in drug cases. In Section III, we describe the trends in average federal drug sentences between the implementation of the Guidelines in 1987 and 1999 (the last year for which data is available). In Section IV, we analyze the mystery of declining federal drug sentences. In Section V, we consider whether the trends we detail here can fairly be characterized as a quiet rebellion against current federal drug sentencing levels. Finally, in Section VI, we venture some tentative conclusions and a look ahead to the second installment of this Article.

II. A BRIEF INTRODUCTION TO THE FEDERAL SENTENCING GUIDELINES

A. FEDERAL SENTENCING BEFORE THE GUIDELINES

For most of the twentieth century prior to the Sentencing Reform Act of 1984, the rehabilitative or "medical" model of sentencing prevailed in

13. Michigan purportedly was the first state to adopt a sentencing system based at least in
the federal (and state) courts. Sentencing rested on the assumption that criminal deviance could be treated like any other disorder through a combination of deterrence, flowing from fear of incarceration, and personal renewal spurred by counseling, drug treatment, job training, and the like. The system recognized, albeit grudgingly, that some defendants were, in effect, "incurable," and thus had to be quarantined through lengthy sentences. It also recognized that some crimes were so egregious that the public demand for retribution outweighed rehabilitative considerations. But the dominant paradigm was rehabilitative. Therefore, sentences were supposed to be "individualized" in the way that medical treatment is individualized, according to the symptoms and pathology of the offender.

Before the Guidelines, federal sentences were also said to be "indeterminate," a word often used to refer to two different, but related, ideas in the sentencing context. First, an indeterminate sentencing system is one in which the judge sentences a defendant to either a specified term or a range of years (e.g., 5-20), but the number of years the defendant actually served on a "medical model." United States v. Scroggins, 880 F.2d 1204, 1207 n.6 (11th Cir. 1989); see also PAMALA L. GRISSET, DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE 11 (1991) (discussing the "rise of the rehabilitative juggernaut" between 1877-1970, and noting that "[a] medical analogue was frequently invoked"); ALLEN, supra note 12, at 35 (referring to the "medical model" of sentencing). One anonymous prisoner wrote in 1911 that the theory of indeterminate sentencing prescribed that the offender should stay in prison, "until cured, just a person suffering from a physical disease or infection is sent to a hospital or asylum, to remain for such a period as may be necessary for his restoration to health." LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 160 (1993).

14. Professor Allen notes that "rehabilitation ... seen as the exclusive justification of penal sanctions ... was very nearly the stance of some exuberant American theorists in mid-twentieth century..." ALLEN, supra note 12, at 3; see also AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 88 (1971) ("Despite [its] shortcomings the treatment approach receives nearly unanimous support from those working in the field of criminal justice, even the most progressive and humanitarian.").

15. For example, both the death penalty and life imprisonment were imposed throughout the period when the rehabilitative ideal dominated American sentencing, yet no one would seriously have argued that the purpose of either type of sentence was rehabilitation of the offender. See Adam Bedau, The Death Penalty in America: Yesterday and Today, 85 DICk. L. REV. 759, 762-64 (1991) (describing widespread use of death penalty in America throughout twentieth century for crimes including murder, armed robbery, rape, and kidnapping); see also Dane Archer et al., Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis, 74 J. CRIM. L. & CRIMINOLOGY 991, 991-92 (1983) (attributing use of death penalty in part to disbelief in rehabilitation).

16. "Individualized sentencing" was embraced as the philosophy of federal sentencing in Williams v. New York, 337 U.S. 241, 248 (1949) (referring to "[t]oday's philosophy of individualizing sentences"), and Burns v. United States, 287 U.S. 216, 220 (1932) ("It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.").

17. In the pre-Guidelines era, the district court had three options when imposing a sentence of imprisonment: (a) It could impose a sentence under 18 U.S.C. § 4205(a) (repealed 1984), in which case the defendant was obliged to serve one-third of his sentence before

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serves is then entirely in the hands of an administrative body, such as a parole board. For most of the twentieth century prior to the SRA, federal sentencing was indeterminate in this sense. The United States Parole Commission, an executive branch agency, not only created its own guidelines for determining release dates but retained discretionary power to set individual release dates anywhere within the broad parameters dictated by those guidelines.

becoming eligible for parole; (b) Pursuant to 18 U.S.C. § 4205(b)(1) (1976) (repealed 1984), the court could impose a maximum term of imprisonment, but reduce the minimum term required before parole eligibility to less than one-third of the maximum sentence; (c) The court could fix a maximum term and specify that “the prisoner may be released on parole at such time as the [Parole] Commission may determine.” 18 U.S.C. § 4205(b)(2) (repealed 1984). When the court imposed a minimum term under either 18 U.S.C. § 4205(a) or 18 U.S.C. § 4205(b)(1), the Parole Commission retained control over when the defendant would be released after he served the minimum and achieved parole eligibility. In the pre-Guidelines period, “federal courts normally sentenced adult offenders pursuant to” § 4205(a). United States v. Scroggins, 880 F.2d 1204, 1207 n.7 (11th Cir. 1989). There was one other factor at work in determining the actual sentence length of federal prisoners, a statutory entitlement to so-called “good time” credit of up to nearly one-third of the stated sentence. Before the enactment of the SRA, this entitlement was codified at 18 U.S.C. § 4161 (1948) (repealed 1984).


19. In 1910, Congress mandated that each federal prison have its own parole board, constituted of the superintendent of prisons of the Department of Justice, the warden, and the physician of each penitentiary. Act of June 25, 1910, ch. 387, 36 Stat. 819 (1910). The parole board of each prison had the discretionary power to release any prisoner who had served one-third of his original stated sentence if the board was satisfied that “there is a reasonable probability that [the prisoner] will live and remain at liberty without violating the laws,” and that release “is not incompatible with the welfare of society.” Id. § 3. The United States Board of Parole, which later became the United States Parole Commission, was created by Congress in 1930. DON M. GOTTFREDSON ET AL., GUIDELINES FOR PAROLE AND SENTENCING 2 (1978). The legal powers of the Parole Commission as it existed immediately before the adoption of the sentencing guidelines are set out at 18 U.S.C. §§ 4201-4218 (1976) (repealed 1984). For a general study of the operation of parole decision-making, see GOTTFREDSON ET AL., supra.


21. The breadth of the Parole Commission’s discretion is indicated by the language of the statute, 18 U.S.C. § 4206(a) (1976) (repealed 1984), describing its power of parole:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depricate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare; subject to the provisions
Second, the term “indeterminate” is often used (not entirely accurately) to describe the other central aspect of federal sentencing before the Guidelines. The judge had virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction. As long as the judge kept within the statutory range, there were virtually no rules about how he or she made the choice of sentence. There was no limit on the type or quality of information a judge could consider at sentencing. A judge could properly receive and consider evidence about virtually any factor the judge felt to be important—the defendant’s troubled childhood, emotional instability, arrest record, acquitted charges, uncharged conduct, rumored conduct, education, family responsibilities, substance abuse problems, civic activism, and so forth ad infinitum. None of this information was subject to filtering by the rules of evidence, and the judge was required to make no findings of fact. Moreover, so long as the final sentence was within statutory limits, it was essentially unreviewable by a court of appeals.


23. For example, federal law prior to the enactment of the Sentencing Reform Act of 1984 provided that, as to “any offense not punishable by death or life imprisonment,” the court was free to suspend the imposition of a sentence of incarceration and place the defendant on probation, so long as the judge was “satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby.” 18 U.S.C. § 3651 (1948) (repealed 1984).

24. See 18 U.S.C. § 3661 (1948) (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”); see also Williams v. New York, 337 U.S. 241, 249-50 (1949) (stating that due process allows the judge broad discretion as to the sources and types of information relied upon at sentencing).

25. FED. R. EVID. 1101(d)(3) (noting that Federal Rules of Evidence do not apply at sentencing). This rule was adopted in 1975 as part of the original Federal Rules of Evidence, and thus was in effect both before and after the creation of the Federal Sentencing Guidelines. See Pub. L. No. 93-595, § 3, 88 Stat. 1949 (1975); see also Williams, 337 U.S. at 250-51 (1949) (stating that due process does not require confrontation or cross-examination in sentencing or passing on probation).

The pre-Guidelines federal sentencing system was indeterminate in both senses of the word, because its objectives were primarily (though never exclusively) rehabilitative. At the time of sentencing, the system assumed that judges expert in the law and the social sciences, and seasoned by the experience of sentencing many offenders, would choose penalties that maximized the rehabilitative chances of offenders.27 After sentencing, the assumption was that trained penologists could determine when a prisoner had been rehabilitated28 and thus advise the Parole Commission about release dates.29

In the 1970s and 1980s, the rehabilitative model of sentencing fell into disfavor in state and federal courts for a variety of reasons,30 including rising federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.); Dorszynski v. United States, 418 U.S. 424, 431 (1974) (reiterating "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"); see also Solem v. Helm, 463 U.S. 277, 290 n.16 (1983) ("[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence...."); Herron v. United States, 551 F.2d 62, 64 (5th Cir. 1977) ("The severity of a sentence imposed within the statutory limits will not be reviewed."); United States v. Cavazos, 530 F.2d 4, 5 (5th Cir. 1976) (repeating the non-reviewable standard); Fisher, supra note 22, at 745 (noting that before the SRA, there was no appellate review of sentencing decisions); Stith & Koh, supra note 20, at 226 ("For over two hundred years, there was virtually no appellate review of the trial judge's discretion."). Although appellate courts lacked the power to review the length of sentences imposed by district courts, they retained some ability to review the process through which sentences were determined. The outer limits of the district court's discretion were set by concepts of due process. See, e.g., United States v. Tucker, 404 U.S. 443 (1972) (vacating on due process grounds a sentence that relied on prior uncounseled convictions); Townsend v. Burke, 334 U.S. 736, 740-41 (1948) (holding that a sentence based on erroneous factual information violated due process); United States v. Clements, 634 F.2d 183, 186 (5th Cir. 1981) (holding that the court would "not review the severity of a sentence imposed within statutory limits, but will carefully scrutinize the judicial process by which the punishment was imposed"); United States v. Espinoza, 481 F.2d 553, 558 (5th Cir. 1973) ("[T]he discretion [of sentencing judges] is not, and has never been absolute, and while the appellate courts have little if any power to review substantively the length of sentences, it is our duty to insure [sic] that rudimentary notions of fairness are observed in the process at which the sentence is determined." (citation omitted)).

27. See Griset, supra note 13, at 1 (discussing the premises of the "rehabilitative regime" and noting that it rested on the assumptions that "case-by-case decisionmaking should be encouraged; that future behavior could be predicted; that criminal-justice practitioners possessed the expertise required to make individualized sentencing decisions").

28. "The indeterminate sentence... is expressive of the rehabilitation ideal: A convict will be released from an institution, not at the end of a fixed period, but when someone (a parole board, a sentencing board) decides he is 'ready' to be released." JAMES Q. WILSON, THINKING ABOUT CRIME 171 (1975).

29. For a discussion of how social scientists advising the Parole Commission designed and tested statistical models in order to generate predictions about the risk of recidivism for potential parolees, see Gottfredson et al., supra note 19, at 41-67.

30. For a more complete discussion of the fall of the rehabilitative model and the rise of the Federal Sentencing Guidelines, see 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.
crime,\textsuperscript{31} mounting evidence that prisoners were not being rehabilitated,\textsuperscript{52} and increasing concern that indeterminate sentencing produced unjust disparities between similarly situated offenders.\textsuperscript{93} The collapse of the rehabilitative model and a fortuitous alignment of forces from the congressional right and left produced the Sentencing Reform Act of 1984 and, three years later, the Federal Sentencing Guidelines.\textsuperscript{54}

B. \textsc{Drugs, the Sentencing Reform Act, and the Federal Sentencing Guidelines}

1. A Primer on the Federal Sentencing Guidelines

The Federal Sentencing Guidelines\textsuperscript{55} are, in a sense, simply a long set of instructions for one chart—the Sentencing Table.\textsuperscript{55} The goal of Guidelines calculations is to arrive at numbers for the vertical (\textit{offense level}) and horizontal (\textit{criminal history category}) axes on the Sentencing Table grid, which in turn generate an intersection in the body of the grid. Each such intersection corresponds to a \textit{sentencing range} expressed in months. For

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679, 686-89 [hereinafter Bowman, \textit{Quality of Mercy}].

31. \textit{See} Barbara S. Barrett, \textit{Sentencing Guidelines: Recommendations for Sentencing Reform}, 57 Mo. L. Rev. 1077, 1079 (noting that during the 1970s, "the perception that crime rates were out of control led some officials to demand sure and stiffer sanctions against criminals as a means of preventing crime").

32. \textit{See} Andrew Von Hirsch, \textit{Recent Trends in American Criminal Sentencing Theory}, 42 Md. L. Rev. 6, 11 (1983) ("[N]o serious researcher has been able to claim that rehabilitation routinely could be made to work for the bulk of offenders coming before the courts."); Nemerson, \textit{supra} note 22, at 685-86 ("In part, the massive professional and academic disillusionment with the therapeutic model stems from the simple practical inability of the criminal justice system to reform serious offenders effectively through incarceration."). \textit{See generally} Michael Vidullo, \textit{Reconsidering Rehabilitation}, 65 Tul. L. Rev. 1011 (1991) (urging that rehabilitation be revisited as a dominant rationale for criminal sanctions).

33. One of the first and most influential critics of pre-Guidelines sentencing on the ground of unjustifiable sentence disparity was Judge Marvin E. Frankel. He said of the indeterminate sentencing system in the federal courts that, "the 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." \textsc{Marvin E. Frankel, Criminal Sentences: Law Without Order} 5 (1973) [hereinafter \textsc{Frankel, Criminal Sentences}]; \textit{see also} Marvin E. Frankel, \textit{Lawlessness in Sentencing}, 41 U. Cin. L. Rev. 1 (1972) (finding sentencing disparity to be pervasive); \textsc{President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts} 23 (1967) (same); \textsc{National Advisory Commission on Criminal Justice Standards and Goals, Corrections} 142 (1973) (same); Peter B. Hoffman & Barbara Stone-Meierhoefer, \textit{Application of Guidelines to Sentencing}, 3 Law & Psychol. Rev. 53, 53-56 (1977) (describing criticisms of then-extant sentencing practices on the ground of "unwarranted sentencing disparity"). Peter Hoffman later became the principal draftsman of the Federal Sentencing Guidelines.

34. Probably the best historical description of the genesis of the SRA and the Guidelines is \textsc{Stith & Koh, supra} note 20, \textit{passim}.


example, a defendant whose offense level is 26 and whose criminal history category is I is subject to a sentencing range of 63-78 months.\(^3\)

The **criminal history category** reflected on the horizontal axis of the Sentencing Table is a rough effort to quantify the defendant’s disposition to criminality as reflected in the number and nature of his prior contacts with the criminal law.\(^3\) The **offense level** reflected on the vertical axis of the Sentencing Table is a measurement of the seriousness of the present crime. The offense level customarily has three components: (1) a “base offense level,” (2) a set of “specific offense characteristics,” and (3) additional adjustments under Chapter Three of the Guidelines. The base offense level is a seriousness ranking based purely on a conviction for a particular statutory violation. For example, all fraud convictions carry a base offense level of 6.\(^3\) The “specific offense characteristics” are an effort to categorize and account for commonly occurring factors that cause us to think of one crime as worse than another. They “customize” the crime. For example, the Guidelines differentiate between a fraud in which the victim loses $1,000 and a fraud with a loss of $1,000,000.\(^4\) A loss of $1,000 would not increase the base offense level of 6 for fraud, while a loss of $1,000,000 would add eleven levels, and thus increase the offense level from 6 to 17.\(^1\)

Chapter Three of the Guidelines provides for additional adjustments to the offense level. These include increases in the offense level based on factors such as the defendant’s role in the offense,\(^4\) whether the defendant obstructed justice,\(^4\) the commission of an offense against a government official\(^4\) or a particularly vulnerable victim,\(^4\) and the existence of multiple

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38. See U.S.S.G. ch. 4 (2000), for the rules regarding calculation of criminal history category. The basic unit of measurement in this calculation is prior sentences imposed for misdemeanors and felonies.


40. U.S.S.G. § 2B1.1(b)(1) (2000) (reflecting an increase in offense level of two for a theft of $1,000 and increase of thirteen for a theft of $1,000,000).

41. The amount of the “loss” is not the only specific offense characteristic for fraud offenses. Section 2F1.1 also provides adjustments for the specific offense characteristics of “more than minimal planning,” U.S.S.G. § 2F1.1(b)(2) (2000), the use of “sophisticated means” to commit the fraud, U.S.S.G. § 2F1.1(b)(6) (2000), jeopardizing the soundness of a financial institution, U.S.S.G. § 2F1.1(b)(8) (2000), and other factors.

42. U.S.S.G. § 3B1.1 (2000). The defendant’s offense level can be enhanced by either two, three, or four levels depending on the degree of control he exercised over the criminal enterprise and on the size of that enterprise.


counts of conviction. There are also possible reductions in offense level based on a defendant's "mitigating role" in the offense or so-called "acceptance of responsibility."

A unique and controversial aspect of the Guidelines is "relevant conduct." The Guidelines require that a judge calculating the applicable offense level and any Chapter Three adjustments must consider both the defendant's own conduct during the commission of the offense, as well as the foreseeable conduct of his criminal partners undertaken as part of the same transaction or common scheme or plan. This is true even if the defendant's own conduct was uncharged, dismissed, or acquitted. The primary purpose of the relevant conduct provision is to prevent the parties (and to a lesser degree the court itself) from circumventing the Guidelines through charge bargaining or manipulation.

In contrast to the pre-Guidelines approach of allowing judges nearly unfettered authority to set the initial sentence, the defining characteristic of the Guidelines regime is its systematic restraint of judicial sentencing

45. See U.S.S.G. § 3A1.1 (2000) (creating an enhancement where a victim was selected based on "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation" and in the case of a victim "unusually vulnerable due to age, physical or mental condition").


47. See U.S.S.G. § 3B1.2 (2000) (allowing decreases in offense level of two or four levels if defendant found to be a "minor participant" or "minimal participant" in the criminal activity, or a decrease of three levels if the defendant's level of participation was between "minor" and "minimal").

48. See U.S.S.G. § 3E1.1 (2000) (allowing reduction of two offense levels where defendant "clearly demonstrates acceptance of responsibility," and three offense levels if otherwise applicable offense level is a least 16 and defendant has "assisted authorities in the investigation or prosecution of his own misconduct" by taking certain steps). Despite the euphemism "acceptance of responsibility," § 3E1.1 is nothing more nor less than an institutionalized incentive for guilty pleas. Id.


52. A judge may consider acquitted conduct if the government proves its occurrence at sentencing by a preponderance of the evidence. See United States v. Watts, 519 U.S. 148, 149 (1997) (finding that a sentencing court is not barred from considering acquitted conduct by the jury's verdict because the burden of proof at the sentencing is preponderance of evidence, rather than the trial standard of beyond a reasonable doubt). 1057

discretion. Once a district court has determined the final offense level on the vertical axis and the criminal history category on the horizontal axis, the Sentencing Table designates the sentencing range. The judge retains effectively unfettered discretion to sentence within that range. However, by design, the SRA and the Guidelines make it very difficult for a judge to "depart," that is, to impose a sentence higher or lower than the designated sentencing range. In order to depart, the judge must justify the departure on the record by reference to factors specified in the Guidelines as appropriate grounds for departure, or by finding "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Moreover, except in unusual circumstances, the Guidelines specifically prohibit a judge from considering traditional "individualizing" factors such as age, employment record, or family ties for purposes of departing outside the guideline range.

Finally, from the point of view of defendants, the most significant feature of sentencing under the Guidelines is probably not the limitations placed on the authority of district judges to set initial sentences, but the elimination of parole and the discretionary authority of correctional officials and the Parole Commission to shorten the nominal sentence announced by the judge in court. The Sentencing Reform Act decrees that, absent very unusual circumstances, a defendant must serve at least 87% of his announced sentence, with only a 13% reduction possible for good behavior in prison. Before the Guidelines, offenders typically served 40-70% of their

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54. See U.S.S.G. § 5C1.1(a) (2000) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").


56. This language appears in the Guidelines' enabling legislation, 18 U.S.C. § 3553(b) (2000), and is repeated in the Guidelines themselves, U.S.S.G. § 5K2.0 (2000).

57. Chapter 5, Part H of the Guidelines lists factors the Commission determined to be "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." These include age, § 5H1.1; educational and vocational skills, § 5H1.2; mental and emotional conditions, § 5H1.3; physical condition, § 5H1.4; history of substance abuse, § 5H1.4; employment record, § 5H1.5; family or community ties, § 5H1.6; socio-economic status, § 5H1.10; military record, § 5H1.11; history of charitable good works, § 5H1.11; and "lack of guidance as a youth," § 5H1.12. In theory, most of these factors nonetheless can justify a departure, but such a departure is permissible only where the excluded factor is present to such an unusual degree that the Commission would not have anticipated its impact and thus did not "adequately [take it] into consideration" when formulating the guidelines. 18 U.S.C. § 3553(b) (2000).

58. See 18 U.S.C. § 3624(b) (2000) (discussing the maximum number of days credit for good behavior).
stated prison term, depending in part on the length of the term originally imposed.\(^5^9\)


The oddity of the political marriage that produced the Sentencing Reform Act is symbolized by the identity of its principal senatorial architects—Senator Edward Kennedy of Massachusetts, tribune of the traditional liberal wing of the Democratic Party, and Strom Thurmond, icon of conservative law-and-order Republicanism.\(^6^3\) For the left, the SRA was an opportunity to eliminate through a system of neutral sentencing guidelines the specter of unjust, perhaps racially discriminatory, disparities in punishment produced by the unfettered exercise of judicial sentencing discretion. For the right, the SRA became a means of ensuring that "soft" federal judges and "lazy" prosecutors did not collude to allow guilty criminals to evade their just punishments.

Conservatives were particularly avid in their determination to increase sentences for narcotics offenses. Their resolve was embodied in the Anti-Drug Abuse Act of 1986 (ADAA), passed two years after the SRA.\(^6^1\) The ADAA had a number of profound effects on drug sentences. First, and most directly, the ADAA enacted a number of quantity-based mandatory minimum sentences for drug offenses. For example, the Act imposed mandatory minimum terms of ten years imprisonment for possession with intent to distribute one kilogram of heroin\(^6^2\) or one hundred grams of methamphetamine.\(^6^3\) It also instituted the now notorious 100-to-1 weight ratio between powder and crack cocaine, whereby possession with intent to distribute five grams of crack results in the same minimum mandatory five-year sentence as possession with intent to distribute five hundred grams of powder cocaine.\(^6^4\)


\(^6^0.\) See Stith & Koh, supra note 20, at 225 (showing, chronologically, Senators Kennedy and Thurmond, individually and jointly, repeatedly introducing criminal law reform bills, including provisions for sentencing reform: in 1975 (Kennedy); 1977 (Kennedy and Sen. McClannel); 1979 (Kennedy and Thurmond); 1981 (Kennedy and Thurmond); 1982 (Thurmond and Sen. Biden co-sponsor criminal justice reform bill with Kennedy sentencing reform provisions)); see also, Editorial, The House Cop-Out on Crime, N.Y. Times, May 17, 1978, at A22 (castigating the House of Representatives for rejecting an early Kennedy-Thurmond criminal law reform package, and impliedly endorsing "political settlements of the kind that were worked out by such divergent Senators as Kennedy and Thurmond").

\(^6^1.\) Pub. L. No. 99-570.


Second, the indirect, but no less profound, consequence of the ADAA was that the Sentencing Commission construed it as a congressional directive to increase drug sentences above historical norms. In setting sentencing levels for most non-drug offenses, the Commission looked to pre-Guidelines practice and, through a process of statistical analysis, attempted to identify those factors judges had traditionally found significant in setting sentence lengths for various types of offenses. In effect, the Commission attempted to discover and codify the pre-existing federal common law of sentencing. In the case of drug crimes, however, the Commission felt bound by the ADAA to raise Guidelines sentences above historical averages. Accordingly, the Commission created a drug sentencing scheme (imposing minimum mandatory five-year sentence for possession with intent to distribute 5 grams of a “mixture or substance” containing “cocaine base [crack]”). Criticism of the crack-powder imbalance has been sustained and withering. See, e.g., Judge John S. Martin, Jr. et al., 1997 Statement on Powder and Crack Cocaine to the Senate and House Judiciary Committees, 10 Fed. Sent. Rep. 194, 194-95 (1998) (letter signed by twenty-seven federal judges stating that the crack/powder sentencing disparity “can not be justified and results in sentences that are unjust and do not serve society's interests”). It has not, as yet, produced any change in the law. And some prominent proposals for reducing the disparity would increase the penalties for powder by lowering the required threshold amounts of powder triggering minimum mandatory sentences, rather than decreasing the penalties for crack by raising the required amounts of crack. See, e.g., Editorial, Cocaine Sentences: Level the Field, L.A. Times, Dec. 2, 1999, available at 1999 WL 26201418 (describing and decrying a proposal by Sen. Orrin Hatch (R-Utah) to reduce the crack-powder disparity by reducing the amount of powder cocaine necessary to trigger a five-year minimum mandatory sentence from five hundred grams to fifty grams).

65. The other notable exception to the original Sentencing Commission's effort to make Guidelines sentences mirror past sentencing practice was white collar crime. See Frank O. Bowman, III, Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines, 51 Vand. L. Rev. 461, 483-84 (1998) [hereinafter Bowman, Coping with Loss], for a discussion of the Sentencing Commission's decision to increase economic crime penalties over historical levels.

66. U.S.S.G. ch. 1, pt. A, § 3 (2000) (describing the Commission's “empirical” and historical approach to setting sentencing levels). Some scholars have questioned the Commission’s claim that the Guidelines correspond very closely to empirical historical data, even in those classes of cases in which the Commission did not avowedly raise sentences over historical norms. See Miller & Wright, supra note 1, at 756-66.

67. In its Introduction to the Guidelines, the original Commission wrote:

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences.


Likewise, in its Chapter One Policy Statement devoted to “The Guidelines' Resolution of Major Issues,” the Commission found that the ADAA's mandate to increase drug sentences was so clear that it trumped the SRA's admonition to consider the impact of guidelines sentences on prison populations, 28 U.S.C. § 994(h) (1994). Said the Commission:
that conformed to the ADAA model in three important ways. First, Guidelines drug sentences, like the minimum mandatory sentences of the ADAA, are based largely on drug quantity. Second, where the ADAA prescribed a minimum mandatory sentence for a particular quantity of drug, the sentence level set by the Guidelines for that quantity corresponds to the ADAA minimum mandatory sentence. For example, the sentencing range under the Guidelines for five hundred grams of powder cocaine, an amount that triggers a five-year minimum mandatory sentence under the ADAA, is set just above five years (63-78 months). Third, the Commission treated the ADAA's two-tiered sentencing approach as the basis for proportionately higher drug quantity sentences. The ADAA prescribes only two quantity-based minimum mandatory sentences per drug type. For example, the ADAA sets minimum mandatory sentences of five years for those who distribute at least five hundred grams of powder cocaine and ten years for those who distribute at least five kilograms of powder cocaine. It does not, however, set specific mandatory sentences for quantities of cocaine less than five hundred grams, between five hundred grams and five kilograms, or greater than five kilograms. Thus, the Commission might have treated the statutory minimum mandatory drug sentences as trumps or plateaus; instead it viewed them as fixed points in a mathematical progression. Therefore, Guidelines sentences for amounts greater than those specified in the ADAA are proportionately higher than the ADAA statutory minimums. Indeed,
offense level increases based on quantity alone may push a first-time drug offender’s sentence up to a range of 235-293 months, or roughly 20-25 years.\textsuperscript{72} Likewise, in setting offense levels for drug amounts below, between, and above the statutorily designated quantities that trigger mandatory sentences, the Commission maintained the identical quantity ratios between drug types specified in the ADAA. For example, the ratio of cocaine to cocaine base ("crack") for every offense level on the Guidelines Drug Quantity Table matches the 100-to-1 ratio in the ADAA, and the cocaine to heroin ratio of 5-to-1 that appears in the ADAA sections triggering mandatory minimum sentences is the same as that in the Guidelines Drug Quantity Table.\textsuperscript{73}

Whether the original Sentencing Commission was obliged either by statute or considerations of sound policy to set drug sentences as high as it did has been the subject of scholarly commentary.\textsuperscript{74} The resolution of that debate would be important to any future Commission decision to lower drug sentences. For the present, it suffices to note that the Guidelines are what they are in significant part because of the original Commission’s perceptions of its legislative mandate in the narcotics field. The Sentencing Commission implemented what it believed to be dual congressional mandates to simultaneously eliminate sentencing disparity and increase drug sentences. The result is a system which, if honestly implemented, requires judges to impose much longer sentences for drug offenses than had previously been the norm, and which seeks to restrict the discretion of those judges to ameliorate the severity of the sentences the law commands.

\textsuperscript{72} See U.S.S.G. § 2D1.1(c)(1) (2000) (setting an Offense Level of 38 for drug offenses involving, e.g., more than 150 kilograms of cocaine); U.S.S.G. § 5A (2000) (providing a Sentencing Table that prescribes a sentencing range of 235-293 months for defendant with Offense Level 38 and a Criminal History Category of I).

\textsuperscript{73} Compare 21 U.S.C. § 841(b) (1994) (setting minimum mandatory terms of ten years for drug offenses involving five kilograms of cocaine, one kilogram of heroin, and fifty grams of crack, and setting minimum mandatory terms of five years for drug offenses involving five hundred grams of cocaine, one hundred grams of heroin, and five grams of crack), with U.S.S.G. § 2D1.1(c) (2000) (specifying base offense levels from 6 to 38, and maintaining throughout the identical 100-to-20-to-1 cocaine-to-heroine-to-crack quantity ratio found in 21 U.S.C. § 841(b)).

\textsuperscript{74} See Michael Tonry, Salvaging the Sentencing Guidelines in Seven Easy Steps, 10 FED. SENT. REP. 51, 51-55 (1997) (arguing that the Sentencing Guidelines could have been fashioned in a more moderate way that would reduce sentencing disparities).
III. THE EFFECT OF FEDERAL SENTENCING REFORM ON DRUG SENTENCES

A. THE RISE...

By any standard, the sentencing reform embodied in the Sentencing Reform Act of 1984, the Anti-Drug Abuse Act of 1986, and the Federal Sentencing Guidelines produced a marked impact on the federal prison population. The triple whammy of the SRA, the ADAA, and the Guidelines produced increases in three areas: the number of federal prisoners serving time for drug crimes; the length of the sentences imposed on narcotics offenders by federal judges; and, perhaps most importantly, the amount of time those offenders actually served in prison. First, the number of persons serving sentences in the Bureau of Prisons for drug offenses has leapt higher since 1986, both in absolute numbers and as a percentage of the federal prison population. In 1986, 12,119, or 38%, of the total of 31,831 federal inmates were serving drug sentences. By May 1998, the number of drug offenders in federal facilities had more than quadrupled to 56,291, or 59% of the total of 95,522 federal inmates. Meanwhile, the number of convicted drug offenders who receive a nonincarcenerative probationary sentence has plummeted from 22% in 1986 to 3.7% in 1999.

Second, in cases in which a sentence of incarceration was imposed on federal narcotics offenders, the length of the terms announced by sentencing judges increased markedly during the years in which the ADAA's mandatory minimum sentences and the Federal Sentencing Guidelines were being implemented. The average imposed federal felony drug sentence increased from under sixty months in 1984 to approximately eighty months in 1990.


76. Meierhoefer, supra note 75, at 34.

77. Id.

78. 1999 SOURCEBOOK, supra note 5, at 28 tbl.12. The Sentencing Commission reported that, in 1999, 21,862 persons were sentenced for drug trafficking offenses, 395 were sentenced for drug offenses involving a communication facility, and 671 were sentenced for simple possession. Id. Within these groups, 475 drug trafficking defendants, 23 communication facility defendants, and 361 simple possession defendants received a straight incarcerative probationary sentence. Id. The drop-off in straight probationary sentences was not limited to drug crimes. In 1988, the fiscal year in which the Guidelines were implemented, the use of probation for all types of crime was cut by over half. Hofer & Semisch, supra note 59, at 15. For white collar crimes, between 1984 and 1991, straight probation declined from over 50% of all cases to roughly 25%. Id. at 15 fig.4. In 1999, 25.5% of all defendants convicted of larceny, fraud, embezzlement, counterfeiting, or forgery were sentenced to straight probation. 1999 SOURCEBOOK, supra note 5, at 28 tbl.12.

79. Hofer & Semisch, supra note 59, at 16 fig.7. Hofer and Semisch chart the nominal
Third, because of the abolition of parole and the onset of the SRA's 87% rule, the amount of time convicted drug offenders could actually expect to serve (the "real" sentence) rose even more dramatically than imposed sentences as mandatory minimums and the Guidelines kicked in. Although there are some methodological disputes among researchers over how to measure "real" sentences, all reported figures show sharp increases during the implementation of federal sentencing reform. The Bureau of Justice Statistics reports that, from 1987 to 1990, the average time expected to be served by a federal drug defendant increased from thirty-two to fifty-eight months. According to U.S. Sentencing Commission researchers Paul Hofer and Courtney Semisch, from 1984 to 1992, the average time a convicted federal drug felon could expect to spend in prison nearly tripled, from 27.2 months in 1984 to 77.4 months in 1992. Hofer and Semisch observe, "The increases begin the year after enactment of mandatory minimum penalties in the Anti-Drug Abuse Act of 1986, and climb dramatically as the guidelines are implemented in 1988 and upheld in 1989." It bears emphasis that, although both imposed and real drug sentences have decreased significantly since their peak in 1991-92, imposed and real federal drug sentences remain substantially above their pre-sentencing-reform levels.

80. See id. at 13-14, 18-19 nn.7, 10, 11 (discussing differences between the methods employed by Hofer and Semisch to calculate prison time actually served and the method of researchers at the Bureau of Justice Statistics).


82. These figures are drawn from the statistics underlying the chart in Hofer & Semisch, supra note 59, at 16 fig.7. The expected sentence for 1984 is a FPSSIS statistic. The expected sentence data for 1992 was calculated by the U.S. Sentencing Commission. E-mail from Courtney Semisch, U.S. Sentencing Comm'n, to Frank Bowman, Professor of Law, School of Law Indianapolis (May 24, 2000) (on file with authors). Bureau of Justice Statistics figures for the period 1986 to 1992 show a similar, though smaller, increase in real sentences for drug offenders, from 29.7 months in 1986 to 62.7 months in 1992. SABOL & MCGREADY, supra note 81, at 5 tbl.2 (BJS statistics reported in the Sabol and McGready study do not go back to 1984).

83. Hofer & Semisch, supra note 59, at 17.

84. The average imposed federal felony drug sentence in 1986 was around sixty months. Id. at 16 fig.7. In 1998, the average imposed federal drug trafficking sentence was 76.2 months. The average time actually served on a federal drug sentence in 1986 was roughly thirty months. Id. In 1998, the average time expected to be served on a federal felony drug sentence was about 66 months. Id. The 1998 expected term figure of sixty-six months can also be derived by multiplying the average drug trafficking sentence reported by the U.S. Sentencing Commission, 76.2 months, U.S. SENTENCING COMM'N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 29 tbl.13 (1999) [hereinafter 1998 SOURCEBOOK], by 87%, the percentage of a sentence required to be served by the SRA. See Hofer & Semisch, supra note 59, at 13-14 (endorsing this method for calculating actual time to be served under the new law).
B. . . . AND FALL OF FEDERAL DRUG SENTENCES

The puzzle we seek to unravel in this Article is why federal drug sentences began to decline so shortly after the impact of federal sentencing reform on drug sentences had been fully absorbed. The year in which federal drug sentences peaked is uncertain. The Administrative Office of the Courts reports that the average federal drug sentence imposed topped out in 1991 at 95.7 months. The Sentencing Commission's figures reflect the peak year as 1992, with an average imposed drug sentence of 88.2 months. Both the AO and the Commission agree that from 1991-92 onward, the average federal drug sentence imposed has trended steadily downward. As noted at the outset of this Article, AO statistics show that during the eight years between 1991 and 1999, the average imposed federal prison sentence for a drug offender decreased from 95.7 months to 74.6 months, a drop of 22%, or nearly two years per defendant. Sentencing Commission statistics report a seven-year decline in the average imposed drug sentence from 88.2 months in 1992 to 75.2 months in 1999, a drop of 14.7%. The year-by-year data from the AO and the Commission are set out in Figure 1 below.

![Figure 1: Average Annual Federal Drug Sentence (months)](image)

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85. TRAC study, supra note 3, at http://trac.syr.edu/tracdea/findings/aboutDEA/newfindings.html (last visited Feb. 23, 2001). The very high average imposed drug sentence reported by the AO for 1991 appears to be something of an anomaly. It is not matched by statistics from either the Sentencing Commission or the Bureau of Justice Statistics. Hofer and Semisch say of it: "This spike in the AO data has defied our best efforts at explanation. It appears not only in average sentences for all cases, but also for separate offense types, as well as in plots of the total number of felony cases sentenced." Hofer & Semisch, supra note 59, at 19 n.13. However, even if one excludes 1991 from consideration, AO data nonetheless show a marked decline in average drug sentence imposed from 87.8 months in 1992 to 74.6 months in 1999.


87. Id.

88. See supra note 5 and accompanying text (describing this trend).
In addition, Sentencing Commission researchers Hofer and Semisch report a corresponding decline in the real (or what they call the "expected") sentence in drug cases. Their study shows real drug sentences peaked in 1992 at 77.4 months and declined to 68.5 months in 1998.89

Given an annual sample size of 15,00090 to 22,00091 drug cases, a measured decline in imposed sentences of between 11.5% (Sentencing Commission data) and 22% (AO data) over a six to eight year period, and a measured decline in real or "expected" sentences of 11.5% between 1992 and 1998, the evidence would seem sufficient to support the reality of the sentence decrease.92

89. Hofer & Semisch, supra note 59, at 16 fig.7. The figures quoted above are drawn from the data underlying Figure 7 in the Hofer & Semisch article; the data was provided by Courtney Semisch and is on file with the authors.


91. 1999 SOURCEBOOK, supra note 5, at 12 tbl.3 (reporting a total of 23,082 sentenced drug defendants in FY 1999).

92. It must be noted that one other study of federal drug sentences, conducted by two researchers at the Urban Institute under contract with the Bureau of Justice Statistics, does not reflect a decrease in "real" drug sentences between 1991-92 and 1997. Rather, the BJS study, which relied on data from the Federal Bureau of Prisons, shows an increase in average real sentences for drug offenders from 61.0 months in 1991 to 69.4 months in 1996, with a decrease to 66.2 months in 1997. SABOL & MCGREADY, supra note 81, at 5 tbl.2. We are unable to entirely explain the conflict between the results of Sabol and McGreedy and those of Hofer and Semisch, and the apparent inconsistency between Sabol and McGreedy and figures generated by the Sentencing Commission and the AO. Some part of the explanation may lie in Sabol and McGreedy’s method of computing what they call “average time to be served by offenders entering Federal prison.” Id. They write:

"Time to be served" is the amount of time that offenders who enter prison on a U.S. district court commitment in given year serve before their first release from prison. Time to be served by offenders entering Federal prison is based on a combination of actual data on time served for offenders who were also released during the study period and estimates of time to be served for those who had not been released.

Id. at 3 (emphasis added). Using actual release dates for persons already released while using projected release dates for those still in prison would tend to shorten the average sentence of entering cohorts in earlier years by comparison with later years for several reasons. First, the projected release dates are calculated by taking the sentences imposed and reducing them by an estimated discount for good time credit. The figures for sentences imposed are, in turn, based on court documents showing the sentence imposed at a defendant’s original sentencing. These documents do not account for sentence reductions based on substantial assistance to the government awarded after the original sentencing date pursuant to Fed. R. Crim. P. 35(b), or for sentence reductions occurring as a result of remand from a court of appeals pursuant to Fed. R. Crim. P. 35(a). Id. at 5. Second, the Bureau of Prisons retains some limited administrative authority to grant early release to some prisoners. For example, 18 U.S.C. § 3621(e)(2)(B) permits a one-year reduction in sentence for prisoners who have successfully completed substance abuse treatment programs in prison.

Sentence reductions under Rule 35, reductions of sentences following appeals, and any special administrative reductions would be reflected in actual release data but not in projected release figures. More importantly, more of such reductions would be reflected in the release data for early years because more persons entering prison in those years would have
IV. EXPLAINING THE DECLINE IN AVERAGE FEDERAL DRUG SENTENCES

Why have federal drug sentences trended steadily downward for nearly a decade? Possible causes are legion and complex. For ease of analysis, we have divided potential causal factors into two broad categories: non-discretionary and discretionary. Non-discretionary factors are changes in the sentencing system or environment not subject to the discretionary choices of front-line actors in the federal criminal sentencing process—district court judges, prosecutors, defense attorneys, and probation officers. Such factors might include changes in federal statutes or in the Guidelines, changes in federal appellate case law regarding sentencing, or changes in the profile of the cases themselves (such as a shift in the mix of drug types prosecuted federally, a change in the average amount of drugs involved in each case, or a trend toward prosecuting more low level offenders). Discretionary factors are changes in the sentencing system or environment that result from discretionary choices made by front-line criminal justice actors during the processing of individual criminal cases from intake to sentencing. Such factors might include increases in the number and size of sentencing departures awarded defendants, an increased tendency to reduce sentences through charge bargaining, or an increased tendency to reduce sentences through fact bargaining.

To foreshadow a bit, our research reveals that both discretionary and non-discretionary factors appear to have influenced the continuing reduction in drug sentences. However, in our view, discretionary factors predominate. Where possible, we offer some tentative conclusions about the relative degree to which each explanatory category has affected the trend, as well as some suggestions about the discretionary and non-discretionary components of the sentencing environment have moved in the directions they have.

A. THE EFFECT OF NON-DISCRETIONARY FACTORS ON FEDERAL DRUG SENTENCES

In this section, we consider the effect of seven non-discretionary factors on average drug sentences: (1) changes in federal sentencing statutes, (2)
changes in the Guidelines, (3) changes in federal case law affecting drug sentences, (4) changes in the proportion of drug types prosecuted in federal courts (i.e., changes in the relative percentages of marijuana, methamphetamine, powder cocaine, crack cocaine, and heroin cases), (5) changes in drug quantity per defendant, (6) changes in defendant role (i.e., whether the government was prosecuting an increasing percentage of low-level offenders), and (7) changes in the average criminal history category of defendants (i.e., whether the government was prosecuting an increasing percentage of first-time offenders). Our results appear to rule out changes in the proportion of drug types prosecuted, drug quantity per defendant, and average criminal history category of defendants as causes of the decline in drug sentences. Put more colloquially, the national average federal drug sentence is not declining because the Justice Department is indicting an ever-higher percentage of first-time, dime-bag marijuana dealers. Likewise, almost all changes in statutes, Guidelines, and case law between 1991 and 1999 were neutral in effect or, all else being equal, tended to increase drug sentences. The factors in the non-discretionary category most likely to have lowered drug sentences were the enactment of the statutory and Guidelines "safety valve" adjustments for first-time offenders, the increasing number of drug defendants receiving downward role adjustments, the decreasing number of upward role adjustments, and the Supreme Court's decision in Koon v. United States. Moreover, each of the non-discretionary factors with the greatest probable effect on decreasing sentences proves on close inspection to involve the exercise of discretion.

1. Have Statutory Penalties for Narcotics Offenses Declined?

The most obvious explanation for a decline in sentence length for any criminal offense would be a reduction in the statutory penalties for that crime. The decline in federal drug sentences began in 1992-93. Given the lag between the commission of an offense and sentencing, statutory

94. See supra notes 87-88 and accompanying text (relating that sentence lengths peaked in 1992 and have declined ever since).

95. In so-called "historical" narcotics cases, that is, cases based on past events that come to the attention of authorities after the fact through informant information, financial investigations, or otherwise, there is by definition a gap between commission of the offense and commencement of the investigation, which can range from days to years. Even in drug cases arising from the direct involvement of undercover government agents in the purchase or sale of narcotics, weeks or months may pass between the criminal conduct and closure of the investigation by arrest. Even in a "reactive" drug case—one in which the police observe a narcotics transaction in progress and make immediate arrests—the period between arrest, disposition of the case by trial or plea, and the final sentencing can be many months. For example, in 1999, the median time from indictment to disposition of a federal criminal case was 5.9 months. LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR 229 tbl.D-6 (2000), available at http://www.uscourts.gov/judbus1999/index.html. In 1999, the median time from conviction to sentencing for
changes with effective dates as far back as 1990 might not have had their full effect until 1992. Consequently, we searched for any changes in narcotics sentencing statutes having effective dates on or after January 1, 1990. With a single notable exception, since the effective date of the Guidelines in 1987, every one of the numerous changes in federal statutory law governing narcotics sentences has either defined more conduct as criminal or lengthened prescribed terms of imprisonment. The lone exception is the so-called "safety valve."

96. All the statutory changes in federal drug sentences since 1988 have involved penalty increases. See 21 U.S.C. §§ 841-861 (Supp. I 2000). Several of these amendments have lengthened terms of imprisonment directly. See Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, 110 Stat. 3099 (amending 21 U.S.C. § 841(d) (1996)) (increasing the sentence of ten years to twenty years for violations involving possession or distribution of listed chemicals with an intent to manufacture controlled substances); Anti-Drug Abuse Act of 1998, Pub. L. No. 100-690, 102 Stat. 4181 (amending 21 U.S.C. § 844(a) (1988)) (increasing the penalties in crack possession offenses, subjecting offenders to terms of imprisonment of not less than five years or more than twenty years); id. (amending 21 U.S.C. § 848(a) (1988)) (increasing the minimum terms of imprisonment for first violations of continuing criminal enterprise from ten years to twenty years, and for subsequent violations from twenty years to thirty years); id. (amending 21 U.S.C. § 841(b)(1)(A) (1988)) (providing that any person convicted of manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute, or dispense a controlled substance "after two or more prior convictions for a felony drug offense have become final, . . . shall be sentenced to a mandatory term of life imprisonment without release. . . .")

Other changes have decreased the amount of controlled substances necessary to impose particular sentences. See Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2881 (amending 21 U.S.C. § 841(b)(1)(A)(viii), (B)(viii) (Supp. 1998)) (reducing the amount of methamphetamine used in manufacturing or distribution necessary for not less than ten years imprisonment from one hundred grams to fifty grams, and for a substance containing methamphetamine from one kilogram to five hundred grams, along with reducing the amount necessary for not less than five years imprisonment from ten grams to five grams and one hundred grams to fifty grams for a substance containing methamphetamine); Anti-Drug Abuse Act of 1998, Pub. L. No. 100-690, 102 Stat. 4181 (amending 21 U.S.C. § 841(b)(1)(D) (1988)) (lowering the requirement of one hundred or more marijuana plants to fifty or more plants for a sentence of not more than five years imprisonment).

In 1994, acting in response to criticisms that quantity-driven federal minimum mandatory drug sentences over-punished nonviolent first-time offenders, Congress amended 18 U.S.C. § 3553 by adding subsection (f), which provides that a first-time nonviolent drug offender should be sentenced under the applicable provision of the Federal Sentencing Guidelines, even if an otherwise applicable minimum mandatory sentence would raise his sentence above the bottom of the guideline range. This statutory "safety valve" became effective for defendants sentenced on or after September 23, 1994. It was not retroactive. In the following year, the

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for endangering human life while manufacturing or transporting a controlled substance is a term of imprisonment of not more than ten years).


98. The full text of the statutory safety valve provision, 18 U.S.C. § 3553(f), reads as follows:

Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. §§ 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 961, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.


99. Section 80001(c) of Pub. L. No. 103-322, 108 Stat. 1796 provided that: "The amendment made by subsection (a) [enacting subsec. (f) of this section] shall apply to all sentences imposed on or after the 10th day beginning after the date of enactment of this Act [Sept. 13, 1994]." 18 U.S.C. § 3553 note (1994) (Effective Date of 1994 Amendment).

100. See United States v. Sanchez, 81 F.3d 9, 12 (1st Cir. 1996) (concluding that the amendment is not retroactive); Delgado v. United States, 162 F.3d 981, 983 (8th Cir. 1998)
Sentencing Commission followed Congress's lead and enacted a "safety valve" of its own. The Commission amended the drug guidelines to provide that a defendant who has an offense level of 26 or greater and who otherwise meets the requirements of the statutory safety valve receives a two-level decrease in offense level. The new Guidelines safety valve became effective for cases sentenced on or after November 1, 1995. It applies to all drug offenses, not merely those listed in 18 U.S.C. § 3553(f), which carry minimum mandatory sentences.

The advent of the statutory § 3553(f) safety valve seems to have had virtually no immediate impact on drug sentences. In FY 1995, the first year following its enactment, the statutory safety valve was applied in 2,610 out of 15,282 drug cases, or 17.07% of all drug cases. Yet despite application of the safety valve to over one-sixth of all drug defendants, sentencing figures from the AO show an increase in average drug sentence from 1994 to 1995 (from 84.3 to 88.7 months), and Sentencing Commission statistics record a decrease from 1994 to 1995 of only one month (from 87.6 to 86.6 months). However, the Commission's two-level safety valve, effective November 1, 1995, seems to have effected a more significant reduction. In 1996, the percentage of drug cases receiving either a statutory or Guidelines safety valve reduction totaled 19.2%. And in 1996, AO sentencing figures
show a dramatic drop in average drug sentence (from 88.7 months in 1995 to 82.5 months in 1996)\textsuperscript{108} and the Commission reported a two-month decrease from the preceding year (from 86.6 months in 1995 to 84.3 months in 1996).\textsuperscript{109}

As important as the safety valves may be in explaining sentencing trends from 1994-96, they fail to explain the trend of drug sentences outside that two-year window in light of three factors. The first and most obvious factor relates to timing. The overall decline in federal drug sentences began in 1992-93. However, the statutory and Guidelines safety valve provisions had no measurable effect on drug sentences until FY 1996. Thus, the downward movement in average drug sentences between 1992-93 and 1995 was not materially influenced by either the statutory or Guidelines safety valve.

Second, in the years after the Guidelines safety valve provision first became operative in 1996, the marginal increase in the number of impacted cases was relatively small. For example, the number of drug cases in which at least one of the two safety valve provisions applied increased only slightly from 1996 to 1999 (from 19.2% in 1996\textsuperscript{110} to 23.7% in 1997,\textsuperscript{111} 24.7% in 1998,\textsuperscript{112} and 24.9% in 1999\textsuperscript{113}). The slight increase in the number of safety valve cases cannot adequately explain the magnitude of the continuing decline in average drug sentences from 1996 through 1998.

Third, although we have placed the safety valve among the non-discretionary factors potentially affecting sentence length, there is an underlying element of discretionary choice at work as well. Application of both the statutory and Guidelines safety valves is ostensibly mandatory if a defendant meets all five of the criteria set forth in 18 U.S.C. § 3553(f) and repeated in U.S.S.G. § 5C1.2.\textsuperscript{114} However, the five qualifying criteria clearly leave room for hidden or overt exercises of discretion. Most notably, the statute and the Guidelines require that "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the


\textsuperscript{109} \textit{Id.}

\textsuperscript{110} 1996 SOURCEBOOK, \textit{supra} note 107, \textit{at} 54 tbl.59.


\textsuperscript{112} 1998 SOURCEBOOK, \textit{supra} note 84, \textit{at} 79 tbl.44.

\textsuperscript{113} 1999 SOURCEBOOK, \textit{supra} note 5, \textit{at} 79 tbl.44.

\textsuperscript{114} Title 18 of the United States Code § 3553(f) states that the court "shall" impose a sentence within the guideline range notwithstanding the applicability of a mandatory minimum if the five criteria are met. 18 U.S.C. § 3553(f)(5) (Supp. 2000). Section 2D1.1(b)(6) states flatly that if the defendant meets the five criteria, the effect on the offense level is to "decrease by 2 levels."
offense or offenses that were part of the same course of conduct or of a
course or of a
common scheme or plan ...” A determination of whether the defendant
has provided truthful and complete disclosure rests largely on a necessarily
imprecise and largely unverifiable assessment by the prosecutor of the
veracity and completeness of a defendant's post-plea-agreement debriefing.
Such debriefings can range from an intense grilling to a perfunctory
conversation undertaken primarily to satisfy the formal requirements of the
safety valve in order that the government can fulfill a negotiated promise to
recommend it. The defendant bears the burden of proving his eligibility for
the safety valve. Thus, although the prosecutor's opinion is not binding on
the district court, the prosecutor nonetheless has considerable de facto
discretion either to smooth the path to a safety valve adjustment or to block
it by expressing doubts about the defendant's candor. Likewise, the judge
enjoys de facto discretion to grant or deny the adjustment based on an
ostensibly factual judgment.

Seen in this light, the modest increases in the rate of application of the
safety valve from 1996 to 1999 may represent an increase in the percentage
of defendants who met its factual prerequisites during those years. Or the
increased rate of application could represent a shift in the exercise of
discretion by prosecutors and judges in favor of recommending and

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116. United States v. Flanagan, 80 F.3d 143, 146 (5th Cir. 1996) (reversing where
the district court erroneously placed the burden of proof on the government); United States v.
Ramirez, 94 F.3d 1095, 1101 (7th Cir. 1996) (holding that the burden does not shift to the
government to show that defendant's responses were not truthful or complete); United States v.
Ajugwo, 82 F.3d 925, 929 (9th Cir. 1996) (providing that a defendant's bare assertion that she
had provided all relevant information was insufficient for a preponderance of the evidence).
117. See United States v. Espinosa, 172 F.3d 795, 796 (11th Cir. 1999) (finding that the
district court had independent responsibility to resolve the dispute between the government
and the defendant about the truthfulness and completeness of his disclosure).
118. The discretionary character of the safety valve decision is further highlighted by a
somewhat peculiar provision in both the statutory and guideline safety valve sections. The
 statute requires that the court not make a finding on safety valve eligibility until “after the
Government has been afforded the opportunity to make a recommendation...” 18 U.S.C. §
its determination, the court shall afford the government an opportunity to make a
recommendation.” U.S.S.G. § 5C1.2, cmt. n.8 (2000). The choice of the word
“recommendation,” rather than “presentation” or “evidentiary showing,” implies the existence
of some discretion on the part of the government and the court both in recommending and
granting the safety valve adjustment.

In addition, to qualify for the safety valve, a defendant must prove to the court that he
was “not an organizer, leader, manager, or supervisor of others in the offense.” 18 U.S.C. §
3553(f)(4); U.S.S.G. § 5C1.2(4) (2000). What activities qualify a defendant for status as an
organizer, leader, manager, or supervisor is a question open to considerable debate. See HAINES,
BOWMAN & WOLL, supra note 49, at 754-57 (discussing cases interpreting Guidelines provisions
for role adjustments in drug cases). Therefore, whether a defendant passes this particular
hurdle on the path to safety valve relief will often depend on whether the prosecutor and the
judge elect to take a generous view of the defendant's organizational role.
granting safety valve adjustments to defendants who would not have been awarded them in previous years. Or it may be some combination of both. We will return to the question of which explanation is more probable below.  

2. Have Guidelines Amendments Reduced Drug Sentences?

Since, with the exception of the safety valve, statutory penalties for drug crimes have increased in the last decade the next possible non-discretionary explanation for the continuing decrease in imposed drug sentences is that amendments to the Guidelines have reduced the sentences of significant numbers of drug offenders. The most significant Guidelines amendment was the 1996 enactment of a Guidelines version of the safety valve just discussed. However, there have been several other changes with the potential to increase or decrease substantial numbers of drug sentences.

a. "Super" Acceptance of Responsibility

From the time of their initial adoption in 1987, the Sentencing Guidelines provided a two-offense-level reduction for "acceptance of responsibility." Despite the fancy name given this provision—which implies a focus on the defendant's mental state, his willingness to express contrition, and so forth—the true function of the acceptance reduction has been to serve as a reward for guilty pleas. Indeed, when the Guidelines are applied as their designers intended, the acceptance of responsibility reduction is the only benefit a defendant will receive purely for the act of entering a prompt plea of guilty. Effective November 1, 1992, the Sentencing Commission amended the acceptance guideline to allow an additional third level reduction for what is known in the trade as "super" acceptance of responsibility. A defendant can receive this three-level reduction if his base offense level is 16 or greater and if, in addition to "clearly demonstrat[ing] acceptance of responsibility for his offense," he timely: (a) provides "complete information to the government concerning his own involvement in the offense," and (b) notifies "authorities of his intention to enter a plea of guilty. . . ."

Commission statistics show that in 1993, the year following the adoption of the "super acceptance" guideline, 50.8% of all drug trafficking offenders

119. Infra Part IV.C.
121. See supra note 48.
122. The acceptance of responsibility provision has been repeatedly upheld against claims that it represents an unconstitutional burden on the right to jury trial. See HAINES, BOWMAN & WOLL, supra note 49, at 856-57 (discussing constitutional challenges to the acceptance of responsibility guideline).
received the three-level reduction. Unfortunately, it is impossible to determine precisely what effect the “super acceptance” amendment had on the average drug sentence for three reasons. First, because of the structure of the Guidelines offense table, a one-level reduction in offense level does not necessarily effect the sentence imposed. Each sentencing range overlaps with roughly half of the range one level above and one level below. For example, given the same Criminal History Category of I, the sentencing range for Level 16 is 21-27 months, the range for Level 15 is 18-24 months, and the range for Level 17 is 24-30 months. Thus, a sentence of twenty-four months is within all three ranges and could lawfully be imposed on a defendant at Level 15, 16, or 17.

Second, more than 40% of drug defendants receive some form of downward departure. Because the size of the sentence reduction awarded in a departure is almost completely discretionary and bears no necessary relationship to the sentencing range from which the departure was taken, the award of the third level reduction for “super acceptance” may have no effect on the final sentence of a defendant who also receives a departure. Nonetheless, given the fact that judges sentence the overwhelming majority of drug offenders sentenced within range to a term at or near the bottom of that range, a one-offense-level reduction for 50% of all drug defendants would certainly have affected the overall average drug sentence to some extent.

Finally, it must be emphasized that, just as with the safety valve, the effect of the “super acceptance” reduction on actual sentences depends heavily on the exercise of discretion by judges, prosecutors, and defendants. This aspect of acceptance adjustments is discussed in greater detail below.

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125. 1993 ANNUAL REPORT, supra note 5, at 90 tbl.29. An additional 29.6% of drug trafficking offenders received the two-level acceptance reduction. Id. Thus, a total of 89.4% of drug trafficking offenders received some acceptance reduction in 1993. See also id. at 142 tbl.57 (giving more detailed breakdown of acceptance of responsibility reductions in drug cases during 1993).
127. See 1993 ANNUAL REPORT, supra note 5, at 165 tbl.57 (showing that in 1993, 33.6% of all drug trafficking defendants received a substantial assistance departure, and an additional 7.7% received a non-substantial assistance downward departure). For further discussion of departure rates, see infra Part IV.B.2.b.
128. See United States v. Khalil, 132 F.3d 897, 898 (3d Cir. 1997) (holding that the appellate court has no jurisdiction to review the extent of the substantial assistance departure); United States v. Correa, 995 F.2d 686, 687 (7th Cir. 1993) (holding that the court has no jurisdiction where refusal to depart is an exercise of discretion); United States v. Dickey, 924 F.2d 836, 838 (9th Cir. 1991) (same).
129. For example, in 1993, 42.4% of all drug trafficking defendants received a sentence in the bottom one-quarter of the applicable guideline range. 1993 ANNUAL REPORT, supra note 5, at 165 tbl.67 (noting that 41% of all drug trafficking defendants received some form of downward departure and were sentenced below the otherwise applicable guideline range). Id.
130. See infra notes 239-47 and accompanying text.
but generally the award of a "super acceptance" adjustment can only occur after the parties have reached agreement on a plea, and the judge, with substantial input from the government, has decided that the plea was prompt and the defendant's disclosures to the government were complete. The discretionary character of both the original and "super" acceptance of responsibility reductions is emphasized by the fact that the percentage of drug cases in which either form of acceptance was awarded grew from 80.4% in 1993\(^{131}\) to 89.7% in 1999,\(^{132}\) while the percentage of cases in which "super acceptance" was awarded increased steadily from 50.8% of all drug trafficking offenders in 1995\(^{133}\) to 80.2% of all drug offenders in 1999.\(^{134}\)

b. Eliminating the Top Two Levels of the Drug Quantity Table

Effective November 1, 1994, the Commission amended the drug quantity table, U.S.S.G. § 2D1.1(c), to eliminate the top two levels (Levels 40 and 42).\(^{135}\) The intent was to preclude imposition of a life sentence or a sentence in the 292-365 month range for a first-time offender based purely on drug quantity. The statistical effect of this change seems to have been negligible. The number of cases affected by the amendment is unlikely to have exceeded a few hundred of the nearly 17,000 drug defendants sentenced in 1994.\(^{136}\) Moreover, any effect would have been immediate and

\(^{131}\) 1993 ANNUAL REPORT, supra note 5, at 90 tbl.29.

\(^{132}\) 1999 SOURCEBOOK, supra note 5, at 76 tbl.41.

\(^{133}\) 1993 ANNUAL REPORT, supra note 5, at 90 tbl.29.

\(^{134}\) 1999 SOURCEBOOK, supra note 5, at 76 tbl.41.


\(^{136}\) In 1993, the year before the top two levels of the Drug Quantity Table were eliminated, only 628 of all of the 42,107 defendants sentenced for any federal crime were sentenced at Offense Level 40 or higher. 1993 ANNUAL REPORT, supra note 5, at 97 tbl.32. The Commission did not publish offense level figures for drug defendants alone for 1993. When nondrug defendants are eliminated, and when one recognizes that even drug defendants ultimately sentenced at Offense Level 40 or higher will often have received upward adjustments for aggravating role, weapon possession, or the like, it is clear that the number of drug defendants who actually started with quantity-based offense levels of 40 or 42 was quite small. In 1994, 16,870 defendants were sentenced under U.S.S.G. ch. 2, pt. D (Drugs). 1994 U.S. SENTENCING COMM'N, ANN. REP. 116 tbl.54 n.1 (1995) [hereinafter 1994 ANNUAL REPORT].

Not only is the absolute number of cases potentially affected by this Guidelines change quite low, but the number of defendants within this already small category whose sentences would actually have been lowered is smaller still. The reductions occur at the very top of the Sentencing Table. Therefore, some defendants who were the beneficiaries of the reduction in quantity-based offense level will have been pushed right back up to the top of the Table by other, non-quantity-related factors such as role in the offense, weapon possession, or criminal history. Consider, for example, a first-time offender caught with 1500 kilograms of cocaine. Prior to the amendment, his base offense level would have been 42, with a sentencing range of 360 months to life, exclusive of any other consideration. After the amendment, his base offense level would be 38 (235-293 months). However, if he were found to be an organizer or leader of a crime involving five or more participants, he would receive an upward role adjustment of four levels under U.S.S.G. § 3B1.1(a). Before the 1994 amendment, his offense level would have capped at the Sentencing Table maximum of 43 (mandatory life imprisonment). After the
should have been visible, if at all, in FY 1995—the very same year that the statutory safety valve went into effect. Yet, as noted above, in 1995, average imposed narcotics sentences either increased (according to the AO) or decreased by an average of only one month (according to the Sentencing Commission).137

Perhaps most importantly, as with the safety valve, the effect of the elimination of the top two quantity-based enhancements in U.S.S.G § 2D1.1 would have been felt in its entirety immediately upon adoption. Any reduction in the average imposed drug sentence resulting from this amendment would occur only once. Hence, this Guidelines amendment provides no explanation for the reductions in average drug sentences after 1995.138

c. Change in Weight Equivalency for Marijuana Plants

Prior to 1995, the Guidelines provided that, if fewer than fifty marijuana plants were seized, each plant should be treated as the equivalent of one hundred grams of marijuana, unless its actual weight was greater. But if fifty or more plants were seized, each plant was treated as the equivalent of one thousand grams, even if the actual weight was much less.139 This apparently odd dichotomy was the Commission’s response to the statutory edict in 21 U.S.C. § 841(b)(1)(D) that in cases involving fewer than fifty plants, actual weight should be used, while in cases involving fifty or more plants, each plant should be considered as weighing one thousand grams for purposes of determining eligibility for the five and ten year statutory minimum mandatory sentences imposed for one hundred and one thousand kilograms of marijuana.140 Effective November 1, 1995, the Commission amended the amendment, the four-level role adjustment would put him at Level 42 (360 months to life). Similarly, if he had a significant criminal history, that fact alone could push the defendant back up into the 360 months to life range. See U.S.S.G. § 5A (displaying the Sentencing Table). The defendant’s offense level would be increased a further two levels—and thus back up to the cap of Level 45—if a gun was possessed during the offense, § 2D1.1(b)(1); if the drugs were imported on a non-commercial aircraft, § 2D1.1(b)(2)(A); if the defendant was an operations officer on any vessel used to import the drugs, § 2D1.1(b)(2)(B); if the drugs were to be distributed in a prison, § 2D1.1(b)(3); if the defendant abused a position of trust or used a special skill to commit the offense, § 3B1.3; or if the defendant obstructed justice, § 3C1.1. In short, some number of the defendants affected by the elimination of the top two quantity-based offense levels would be pushed back to the top of the chart by other factors.

137. Supra notes 102-03 and accompanying text.
138. Even if the percentage of high-quantity drug cases that would previously have received Level 40 or 42 quantity adjustments increased after 1995, this would not be reflected in any decrease in average imposed sentence relative to 1995.
139. See HAINES, BOWMAN & WOLL, supra note 49, at 368-69.
140. 21 U.S.C. § 841(b)(1)(B)(vii) (setting a minimum mandatory sentence of five years imprisonment for offenses involving one hundred kilograms or more of marijuana, or one hundred or more marijuana plants); id. § 841(b)(1)(A)(vii) (setting minimum mandatory sentence of ten years imprisonment for offenses involving one thousand kilograms or more of marijuana, or one thousand or more marijuana plants).
Guidelines to provide that all marijuana plants should be treated as weighing one hundred grams (unless the actual weight was greater), regardless of the number of plants seized.\textsuperscript{141} It must be emphasized, however, that despite this Guidelines amendment, for purposes of setting minimum mandatory sentences under 21 U.S.C. § 841(b)(1)(B)(vii), possession of fifty or more marijuana plants still constitutes a weight of one thousand grams per plant.\textsuperscript{142}

The effect of this amendment on marijuana sentences, and on the overall average drug sentence, is unclear. The average marijuana sentence dropped by one month in 1996, the first year after the effective date of the amendment, but it had dropped by three months in 1995, the year before the amendment.\textsuperscript{143}

d. Other Guidelines Amendments Reducing Drug Sentences

Two other Guidelines amendments passed since 1990 would have reduced some defendants' sentences. First, in 1993, the Commission amended the application notes to the drug guidelines to eliminate from the quantity calculation any nonconsumable portion of the "mixture or substance" in which a controlled substance is found.\textsuperscript{144} Prior to the amendment, some courts had interpreted the "mixture or substance" language of the Guidelines and the drug statutes to include material such as the plastic of a suitcase into which one clever trafficker had chemically bonded the cocaine he sought to import.\textsuperscript{145}

Second, effective November 1, 1994, the Commission amended the commentary to the relevant conduct guideline, § 1B1.3, to state that a "defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant's joining the conspiracy, even if the defendant knows of that conduct."\textsuperscript{146} Prior to this amendment, some courts had held a defendant responsible for narcotics distributed by members of an ongoing conspiracy before the defendant joined the group.\textsuperscript{147}


\textsuperscript{142} See United States v. Marshall, 95 F.3d 700, 701 (8th Cir. 1996) (holding that the marijuana guideline amendment cannot lower a sentence below the mandatory minimum).

\textsuperscript{143} In 1994, the mean marijuana sentence was 46.5 months. 1994 ANNUAL REPORT, supra note 136, at 115 fig.K. In 1995, the mean marijuana sentence was 43.1 months. 1995 ANNUAL REPORT, supra note 90, at 110 fig.K. In 1996, the mean marijuana sentence was 42.1 months. 1996 SOURCEBOOK, supra note 107, at 56 fig.I.

\textsuperscript{144} U.S.S.G. app. C, amend. 484 (1998) (amended Nov. 1, 1993) (amending U.S.S.G. § 2D1.1 app. n.1, to state, \textit{inter alia}, "Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used.")

\textsuperscript{145} See United States v. Mahecha-Onofre, 936 F.2d 623, 624-25 (1st Cir. 1991) (holding that the suitcase/cocaine "mixture" or "substance" fits the statutory and Guidelines definitions).


\textsuperscript{147} See, \textit{e.g.}, United States v. Phillips, 37 F.3d 1210, 1214-15 (7th Cir. 1994) (holding
Neither of these two amendments has likely had much statistical impact. First, although the exact number of cases affected by the changes is unknown, the number is likely quite small. While intercepts of drug-impregnated liquor, luggage, and the like are common enough to be familiar to those who have worked in narcotics enforcement, they are a pretty rare event in the greater scheme of the drug trade. Similarly, the number of cases in which the prosecution will have, and seek to use to enhance a sentence, information about drug transactions prior to a defendant’s entry into the conspiracy for which he was convicted is likely to be small. Second, the Commission’s amendments on both issues resolved circuit splits, in which the authority was already heavily on the side of the more lenient interpretation of the Guidelines. Finally, as with the safety

defendant responsible for amounts distributed by the conspiracy two months before he joined it because of his role in collecting debts for cocaine sold before he joined, and his "extensive dealings with two individuals" who joined the conspiracy before him; United States v. Mojica, 984 F.2d 1426, 1446 (7th Cir. 1993) (attributing earlier quantities to defendant who joined in the middle of conspiracy, but who was an experienced dealer who had associated with the conspirators for some time before joining conspiracy).

148. For example, one of us (Bowman), while an Assistant U.S. Attorney in Miami, Florida, tried a case in which cocaine was smuggled into the United States impregnated like starch into clothing carried in the luggage of an airline passenger. Although the case was heard before the 1993 amendment clarifying the point, the district court did not include the weight of the clothes in the drug amount used to sentence the defendant.

149. Several courts have addressed the issue of inclusion of nonconsumable components of a drug mixture. Compare United States v. Eastland, 989 F.2d 760, 767 (5th Cir. 1993) (including 104 pounds of lye water on the surface of which was phenylacetone), and United States v. Killison, 7 F.3d 927, 991-92 (10th Cir. 1993) (rejecting the argument that Chapman v. United States, 500 U.S. 453 (1991), excludes consideration of unusable by-products), and United States v. Walker, 960 F.2d 409, 412-13 (5th Cir. 1992) (including the weight of toluic liquid waste products), and United States v. Mahecha-Onofre, 956 F.2d 623, 628 (1st Cir. 1991) (including the weight of the cocaine with the material in which it was impregnated), with United States v. Palacios-Molina, 7 F.3d 49, 54 (5th Cir. 1993) (distinguishing the exclusion of liquid used to transport cocaine from the inclusion of by-products and precursors of methamphetamine); and United States v. Salgado-Molina, 967 F.2d 27, 28 (2d Cir. 1992) (excluding the weight of liqueur in a liqueur/cocaine mixture since the cocaine was not usable without a chemical extraction process), and United States v. Rodriguez, 975 F.2d 999, 1005 (3d Cir. 1993) (excluding boric acid packaged with cocaine), and United States v. Robins, 967 F.2d 1387, 1399 (9th Cir. 1992) (excluding 2,700 grams of cornmeal combined with 0.10 grams of cocaine to fool buyers), and United States v. Bristol, 964 F.2d 1088, 1090 (11th Cir. 1992) (excluding the weight of wine in a cocaine/wine mixture), and United States v. Jennings, 945 F.2d 129, 134-37 (6th Cir. 1991) (finding it was error to base weight on a batch of methamphetamine seized in the process of “cooking” and containing poisonous chemicals not intended for ingestion).

Courts have also addressed the issue of inclusion of drugs distributed prior to joining a conspiracy. Compare Phillips, 37 F.3d at 1214-15 and Mojica, 984 F.2d at 1446 (including pre-enlistment drugs), with United States v. Peruluna, 146 F.3d 1392, 1396 (11th Cir. 1998) (excluding a drug shipment imported eleven months before defendant joined conspiracy because it was beyond the scope of defendant's agreement with the other conspirators), and United States v. Carreon, 11 F.3d 1225, 1234-35 (5th Cir. 1994) (summarizing the conflict among the circuits), and United States v. Okayfor, 996 F.2d 116, 121-22 (6th Cir. 1993) (vacating and remanding for explicit specification of the evidence on which the district court
valve and the amendment removing the top of the drug quantity chart, any
downward effect would have been a one-time event. The effect of these
amendments should have been felt in the year following their effective
dates—1994 for the mixture-or-substance amendment and 1995 for the
conspiracy amendment. Neither amendment explains the continued

e. Guidelines Amendments that Increased Drug Sentences

Between 1990 and the present, the Guidelines have also been amended
in ways that increase drug sentences. Five notable examples of such
increases involve methamphetamine.

i. D- and L-Methamphetamine

The first methamphetamine amendment involved the differences in the
types of the drug. Methamphetamine is commonly encountered in several
chemical forms (D-methamphetamine, the relatively nonpsychoactive L-
methamphetamine, and mixtures containing both D- and L-
methamphetamine) and myriad purities. Effective November 1, 1992, the

relied to attribute the preparticipation quantities to defendant where district court had simply
stated that a defendant is responsible for all of the quantities dealt in by his conspiracy), and
United States v. Tolson, 988 F.2d 1494, 1495-96 (7th Cir. 1993) (finding that the defendant was
only a peripheral participant early in the conspiracy, and then took a two-year hiatus before
becoming heavily involved in the conspiracy's activities), and United States v. Edwards, 994 F.2d
417, 423 (8th Cir. 1993) (holding drugs were not attributable to defendant unless he was
directly involved in the conspiracy at the time of their distribution), and United States v. Petty,
982 F.2d 1374, 1376 (9th Cir. 1993) (finding defendant could not have "foreseen" drugs
distributed before he joined conspiracy), and United States v. O'Campo, 797 F.2d 1015, 1023
(1st Cir. 1992) (holding new entrant cannot be held responsible for earlier transactions just
because he knew they took place), and United States v. Collado, 975 F.2d 985, 995-97 (3d Cir.
1992) (holding previously undertaken activity normally will not have been committed in
furtherance of the activity defendant agrees to undertake), and United States v. Williams, 977
F.2d 866, 870 (4th Cir. 1992) (citing the argument that defendant had not joined conspiracy
prior to certain activities).

150. Both the "mixture or substance" amendment to § 2D1.1 app. n.1 and the amendment
regarding conspiratorial conduct would have applied immediately to all cases sentenced on or
after their effective dates of November 1, 1993, and November 1, 1994, regardless of when the
offense conduct occurred, because U.S.S.G. § 1B1.10 specifies that sentencing courts are to use
the "[Guidelines Manual] in effect at the time the defendant was sentenced." U.S.S.G. § 1B1.10
(2000). Due to the operation of the Ex Post Facto Clause, this rule does not apply to
the Ex Post Facto Clause barred applying retroactively an amendment to Florida state
sentencing guidelines that increased a penalty); United States v. Harotunian, 920 F.2d 1040,
1046 (1st Cir. 1990) (holding the amendment to U.S.S.G. § 2B1.1(b), regarding embezzlement,
could not be applied retroactively because it increased the penalty). However, the Ex Post Facto
limitation would not apply to either of the amendments at issue here.

151. For a discussion of the chemical subtleties, see United States v. Carroll, 6 F.3d 735,
747-49 (11th Cir. 1993) (discussing the legal treatment of six chemical variations of
methamphetamine).
Sentencing Commission amended the Drug Equivalency Table of U.S.S.G. § 2D1.1 to equate one gram of L-methamphetamine with only forty grams of marijuana, and one gram of D-methamphetamine with ten kilograms of marijuana. This distinction produced substantial litigation over which kind of methamphetamine was possessed. The Commission sought to end this litigation with an amendment, effective November 1, 1995, that deleted the distinction between D- and L-methamphetamine and punished all forms at the higher level previously reserved for D-methamphetamine.

ii. Change in “Mixture or Substance” Rules for Methamphetamine

The second amendment came in response to congressional directives in the Comprehensive Methamphetamine Control Act of 1996 (CMCA). Effective November 1, 1997, the Sentencing Commission increased the base offense level for methamphetamine trafficking offenses by halving the quantity of a mixture or substance containing methamphetamine corresponding to each offense level on the Drug Quantity Table.

iii. Other Methamphetamine Guideline Increases

The remaining three amendments were also in response to the CMCA. The Commission added a two-level enhancement for importation of methamphetamine or its precursor chemicals and another two-level enhancement if the offense involved (as methamphetamine manufacturing often does) the discharge, unlawful transportation, storage, or disposal of hazardous or toxic chemicals. The Commission also complied with the congressional directive to modify the Guidelines to ensure that the base offense level for possession of precursor chemicals be calculated according to the amount of controlled substance that could reasonably be manufactured using the chemicals the defendant possessed.

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154. U.S.S.G. app. C, amend. 555 (1998) (amending U.S.S.G. § 2D1.1(c), Drug Quantity Table). No change was made in the quantities of “methamphetamine (actual),” i.e., pure methamphetamine, that are associated with various offense levels and that trigger minimum mandatory sentences.


156. U.S.S.G. app. C, amend. 555 (1998) (amending U.S.S.G. § 2D1.1(b) to add subsection (4) increasing the methamphetamine trafficking offense level by two levels where methamphetamine or its precursor chemicals are imported and the defendant is not eligible for a mitigating role adjustment pursuant to U.S.S.G. § 3B1.2).

157. Id. (amending U.S.S.G. § 2D1.1(b) to add subsection (4) increasing the methamphetamine trafficking offense level by two levels for environmental infractions).
Commission accomplished this by raising the quantity table for precursor chemicals in U.S.S.G. § 2D1.11(d) by two levels for List I chemicals.\footnote{158}

iv. Effect of Methamphetamine Guideline Increases

Guidelines amendments increasing sentences affect overall sentencing statistics more slowly than amendments decreasing sentences because, while decreases are immediately effective for all cases \textit{sentenced} on or after the effective date of the amendment,\footnote{159} the Ex Post Facto Clause dictates that increases can only affect cases in which the \textit{conduct} occurred or continued on or after the effective date.\footnote{160} The 1995 equalization of D- and L-methamphetamine had no immediately observable effect on methamphetamine sentences; the mean methamphetamine sentence decreased by almost five months from 1995 to 1996. On the other hand, the 1997 amendments of the methamphetamine guidelines in response to the CMCA may have had some immediate impact—the mean methamphetamine sentence increased from 95.1 months in 1997 to 96.8 months in 1998. What may be more telling is that the increase in methamphetamine sentences from 1997 to 1998 was one of only two occasions when the average sentence for any drug increased between 1995 and 1999.\footnote{161} With these two exceptions, average sentences for every major drug type (powder cocaine, crack cocaine, heroin, methamphetamine, and marijuana) decreased every year from 1995 to 1999.\footnote{162}

3. Have Changes in Case Law Reduced Drug Sentences?

A third possible non-discretionary explanation for decreasing drug sentences is changes in case law construing drug statutes or the Sentencing Guidelines. Given the immense body of decisional law from the district and appellate courts, one could undoubtedly spend a lifetime tracing the correlations between particular decisions and sentence lengths in the districts or circuits in which such decisions were issued. We have not attempted anything so ambitious here. Rather, we have examined only decisions of the U.S. Supreme Court that had the potential to affect drug sentences generally.

\footnote{159. U.S.S.G. § 1B1.10 (1998).}
\footnote{160. \textit{See supra} note 147 (citing decisions in which courts held defendants responsible for drug activities that occurred prior to their engagement in the conspiracy).}
\footnote{161. The only other annual increase recorded between 1995 and 1999 was the increase in the average heroin sentence from 58.1 months in 1998 to 61.6 months in 1999. \textit{Compare} 1998 \textit{SOURCEBOOK}, supra note 84, at 81 fig.J, with 1999 \textit{SOURCEBOOK}, supra note 5, at 81 fig.J.}
\footnote{162. \textit{See} 1999 \textit{SOURCEBOOK}, supra note 5, at 83 fig.L (depicting decreases in drug types).}
QUIET REBELLION?

a. Dogs that Never Barked

Before considering the very few Supreme Court cases in the last ten years that would tend to reduce drug sentences, it is important to note the larger class of decisions in which the Court upheld features of federal drug sentencing law that tend to keep sentences high. Beginning with Mistretta v. United States, in which the Court upheld the constitutionality of the SRA, the Court has consistently sustained the major structural components of federal sentencing reform that increased drug sentences in the first place. For example, the Court has relied on the relevant conduct concept, the cornerstone of the modified real offense design of the Guidelines, and has not disputed findings by the courts of appeals upholding the concept’s constitutionality. In United States v. Watts, the Court upheld the controversial Guidelines rule permitting a court to consider in sentencing charges of which a defendant has been acquitted. The Court has on several occasions affirmed the validity of the rule restricting eligibility for substantial assistance downward departures to cases in which the government moves for the departure and certifies that the defendant has been of substantial assistance in the investigation or prosecution of another. More generally, the Court upheld the power of the Sentencing Commission to constrain judicial interpretations of the Guidelines by ruling that the Commission’s commentary to the Guidelines is binding on the courts.

164. See Edwards v. United States, 523 U.S. 511, 513-14 (1998) (relying on the relevant conduct section, § 1B1.3, in upholding a sentence based on the offense level for crack, even though the jury found a conspiracy to sell powder cocaine or crack).
165. See supra notes 49-53 and accompanying text (discussing the “relevant conduct” factor).
166. See, e.g., United States v. Bennett, 928 F.2d 1548 (11th Cir. 1991) (holding that § 1B1.3 is not an unconstitutional bill of attainder); United States v. Ebbole, 917 F.2d 1495 (7th Cir. 1990) (holding that the relevant conduct section does not offend due process).
167. 519 U.S. 148 (1997). In addition, all circuits agree that relevant conduct includes conduct outside the offense of conviction. Haines, Bowman & Woll, supra note 49, at 113 n.604.
In addition to cases directly concerning the Federal Sentencing Guidelines, the Court has handed down decisions in cases originating in state courts that have had the effect of foreclosing challenges to stiff federal drug sentences. For example, in *Harmelin v. Michigan*, the Court held that a state sentence of life imprisonment without parole for a first-time offender who possessed one-and-one-half pounds of cocaine was not cruel and unusual punishment. Relying on *Harmelin*, the circuit courts have uniformly rejected Eighth Amendment challenges to long federal drug sentences.

b. Drugs and Guns

Throughout the 1990s, federal law imposed substantial penalties on those who use, carry, or possess firearms in connection with drug trafficking offenses. Title 18, U.S. Code, Section 924(c) imposes a mandatory minimum prison term on any person who “during and in relation to any... drug trafficking crime... uses or carries a firearm.” A defendant must be sentenced to five years, to be served consecutively to any other sentence, for his first conviction under § 924(c), and to twenty years consecutive “in the case of his second or subsequent” conviction. In addition, the Sentencing Guidelines provide for a two-level offense level enhancement “if a dangerous weapon (including a firearm) was possessed” in connection with a narcotics offense. This enhancement does not apply if the defendant has been convicted of a § 924(c) count for the same weapon in the same case.

In December 1995, the Supreme Court decided in *Bailey v. United States* that a conviction under 18 U.S.C. § 924(c) for “use” of a firearm during and in relation to a drug crime cannot be sustained unless the defendant “actively employed” the weapon in relation to the predicate offense.

468 (1991) (holding that 21 U.S.C. § 841(b)(1) (1994) requires that the “carrier medium” for drugs such as LSD (typically blotter paper or sugar cubes) must be included when determining the weight of the drug for purposes of determining a mandatory minimum sentence).


171. *Id*. at 994.

172. See HAINES, BOWMAN & WOLL, supra note 49, at 20 n.51 (listing numerous cases rejecting Eighth Amendment cruel and unusual punishment challenges to federal drug sentences).


174. *Id*. Moreover, the twenty-year penalty applies even if the defendant suffers his second or subsequent § 924(c) conviction in the same trial as his first. Deal v. United States, 508 U.S. 129, 137 (1993).

175. U.S.S.G. § 2D1.1(b)(1) (2000). Application Note 3 to § 2D1.1 goes on to state: “The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.”


offense. The Bailey decision produced a wave of litigation from prisoners convicted of § 924(c) counts, resulting in a substantial number of reversals of those counts. Effective November 13, 1998, Congress enacted a “Bailey-fix” that broadened the language of § 924(c) to cover anyone who “in furtherance of any [drug trafficking] crime, possesses a firearm.” Nonetheless, between December 1995 and November 1998, Bailey limited to some degree the number of cases in which a § 924(c) count could successfully be prosecuted. The precise degree of constraint imposed by Bailey is necessarily speculative, particularly because the decision did not purport to limit the “carry” prong of § 924(c). Moreover, the effect on sentence length resulting from a failure to bring or obtain a conviction on a § 924(c) count is muddied by the two-offense-level increase under Guidelines § 2D1.1(b)(1) for “possession” of a weapon. That is, because a defendant cannot receive both a § 924(c) conviction and a § 2D1.1(b)(1) guideline increase, some unknown number of defendants who, prior to Bailey, would have received five-year consecutive sentences, instead received two-level increases in their Guidelines range after Bailey.

We do know, however, that in 1996, the year following the Bailey decision, the percentage of drug cases in which a weapon was “involved” (i.e., in which the defendant was either convicted of a § 924(c) count in addition to a drug count, or received a weapon enhancement under § 2D1.1(b)(1)) declined from 17.1% to 14.5%, and then stabilized in 1997 through 1999 between 12.1% and 12.3%. Although Commission statistics lump together § 924(c) and § 2D1.1(b)(1) cases, rendering precise calculation of sentence impact impossible, these decreases would certainly have exerted some downward pressure on the overall average drug sentence imposed between December 1995 and November 1998. This is true because: (a) until November 1998, the Sentencing Commission coded (i.e., counted)

178. Id. at 144.
179. For a listing of a representative sample of such cases, see HAINES, BOWMAN & WOLL, supra note 49, at 234 n.403.
181. In Muscarello v. United States, 524 U.S. 125, 139 (1998), for example, the Supreme Court held that a gun is "carried" even if it is in a locked glove box or in the trunk of a car.
182. To muddy the picture even further, remember that, depending on the quantity of drugs involved in the case at issue, the difference in sentence represented by a two-level increase could range from four or five months to more than five years. See U.S.S.G. §§ 2D1.1(c) (Drug Quantity Table), 5A (Sentencing Table) (1998) (listing different offense levels corresponding with the quantities of controlled substances possessed by the convict, and the convict's criminal history, respectively).
183. 1995 ANNUAL REPORT, supra note 90, at 107 tbl.43.
184. 1996 SOURCEBOOK, supra note 107, at 50 tbl.34.
185. The percentage of cases in which a weapon was involved from 1997 through 1999 were: 12.3% in 1997, 1997 SOURCEBOOK, supra note 111, at 74 tbl.39; 12.1% in 1998, 1998 SOURCEBOOK, supra note 84, at 74 tbl.39; 12.2% in 1999, 1999 SOURCEBOOK, supra note 5, at 74 tbl.39.
cases with § 924(c) convictions as drug cases so long as the defendant was also convicted of a drug crime;\textsuperscript{186} (b) the effect of eliminating a § 924(c) count is large (five or twenty years on a sentence, less a possible two-level weapon possession enhancement, under U.S.S.G. § 2D1.1(b)(1));\textsuperscript{187} and (c) even a two-level weapon enhancement under § 2D1.1(b)(1) generates a potential sentence increase of at least six months to as much as six-and-one-half years.\textsuperscript{188}

Determining the effect of Bailey is rendered still more complicated because, even more so than with the safety valve, there is a substantial element of prosecutorial discretion involved in whether a defendant will receive either a § 924(c) conviction or a § 2D1.1(b)(1) weapon possession enhancement. Prosecutors have absolute discretion on the question of whether to include a § 924(c) count in an indictment, as well as absolute discretion on whether to dismiss such a count in any plea agreement. Even the application of the Guidelines enhancement under § 2D1.1(b)(1) involves considerable government discretion either to press hard for the enhancement or to remain silent on the point. Thus, we cannot know whether the decrease in "weapon involvement" during 1996-99 is due to Bailey, to a change in the exercise of prosecutorial discretion in cases where weapons were found, or even to a real decrease in the number of drug traffickers who carry guns.

\textit{c. The Koon Decision}

Almost without question, the Supreme Court case decided within the last ten years with the most potential downward impact on drug sentences is \textit{Koon v. United States}.\textsuperscript{189} However, because \textit{Koon} addressed the degree of discretion possessed by district court judges to depart from the otherwise applicable guideline sentence, we will consider its effect below in the section on discretionary explanations for the drug sentence decrease.\textsuperscript{190}

\footnotesize{
188. This is so because: (1) the Guidelines Sentencing Table, U.S.S.G. § 5A (1998), is designed with overlapping ranges such that the top of each range is the bottom of the range two levels above it; and (2) the minimum width of a sentencing range is six months, while the maximum width is over eighty-one months. The increase in sentence generated by a two-level base offense level increase is only "potential" because a sentence at the high end of range X will be identical to a sentence at the low end of range X+2. Therefore, a judge could impose identical sentences on a defendant with or without a two-level § 2D1.1(b)(1) weapon enhancement.
190. Infra notes 282-91, 340 and accompanying text.
}
d. Summary

In sum, with the exception of the unquantifiable effect of Bailey on cases involving firearms and the encouragement of departures given by Koon, Supreme Court case law seems to have exerted little or no downward pressure on the length of federal narcotic sentences.

4. Have Changes in Type of Case or Type of Defendant Affected Federal Drug Sentences?

The fourth non-discretionary factor that might reduce average drug sentences is the change in the type of cases or defendants prosecuted under federal drug statutes. We consider four primary variables: (1) changes in drug type, (2) changes in the drug amounts, (3) changes in the defendant's role in the offense, and (4) changes in average criminal history category of the defendant.

a. Changes in Drug Type

Federal drug prosecutions involve five major drug types: powder cocaine, crack cocaine, heroin, methamphetamine, and marijuana. Although federal law criminalizes possession or trafficking in many other drugs (e.g., LSD, PCP, steroids, etc.), these five types account for over 97% of all federal narcotics cases. The average sentence imposed for each of the five primary drug types differs significantly. For example, in 1999, the mean sentences for powder cocaine, crack cocaine, heroin, marijuana, and methamphetamine were, respectively, 79.1 months, 120.3 months, 61.6 months, 33.7 months, and 88.8 months. The task of this Article is to explain the downward movement in the average federal drug sentence between 1992-93 and 1999. Given the substantial difference in the average sentence imposed for each major drug type, a change in the proportion of drug types for which drug offenders as a whole are prosecuted might significantly affect the overall average national drug sentence. For example, if during the study period the number of crack offenders (average sentence 120.3 months) had dramatically decreased, while the number of marijuana offenders (average sentence 33.7 months) dramatically increased, and the number of offenders sentenced for the other three drugs remained constant, the change would push the overall average sentence down. The question for this part is whether there were any changes in the relative


192. 1999 SOURCEBOOK, supra note 5, at 69 tbl.34 (showing that of 22,440 defendants sentenced for drug offenses in 1999, only 405, or 1.8%, were sentenced for drugs other than cocaine (powder or crack), heroin, marijuana, or methamphetamine).

193. Id. at 81 fig.J.
number of offenders for each drug type over the period at issue, and if so, what effect did such changes have?

Figure 2 presents data on the number of drug offenders between 1993 and 1999 and reveals several general trends. Speaking broadly, the number of powder cocaine offenders decreased markedly between 1993 and 1995 and then leveled off. The number of crack cocaine and methamphetamine offenders increased steadily. The number of marijuana offenders decreased between 1993 and 1995, and then increased markedly between 1995 and 1999. The number of heroin offenders remained relatively constant during these years.

Just as important as the raw number of offenders is the percentage of offenders for each drug type relative to the overall pool of drug offenders. This is especially true given the changes in the raw number of drug offenders by drug type over the years. The trends depicted in Figures 2 and 3 augur against the proposition that changes in drug type account for the decrease in drug sentences. As a relative share of the overall drug offender pool, crack cocaine (the drug type with the highest average sentence) increased from 20% of all drug cases in 1993 to 23.9% in 1999. Traffickers in methamphetamine—the drug with the second highest average sentence—more than doubled as a relative share of all drug defendants (from 5.3% to 12.8%). The percentage of heroin cases, which carry the second lowest average sentence among the big five, declined from 10.4% in 1993 to 8.1%

194. The data underlying Figure 2 for the period 1993-98 is drawn from the following sources: 1993 ANNUAL REPORT, supra note 5, at 144 fig.G; 1994 ANNUAL REPORT, supra note 136, at 115 fig.K; 1995 ANNUAL REPORT, supra note 90, at 110 fig.K; 1996 SOURCEBOOK, supra note 107, at 56 fig.J; 1997 SOURCEBOOK, supra note 111, at 81 fig.J; 1998 SOURCEBOOK, supra note 84, at 84 fig.J; 1999 SOURCEBOOK, supra note 5, at 81 fig.J.
in 1999. Moreover, although the relative share of the lowest average sentence drug—marijuana—increased from 25.6% in 1993 to 30.3% in 1999, that increase occurred entirely between 1997 and 1999. For a depiction of the relative share of total drug offenders by drug type, see Figure 3 below.

**Figure 3: Relative Share of Total Drug Offenders, by Drug Type**

Another more refined look at the data suggests that the change in mix of drug types over time has not been the primary determinant in the persistent downward trend in drug sentences. Consistent with the observed overall decline in average drug sentences, illustrated in Figure 1, data on average sentences within each drug type between 1993 and 1999, presented in Figure 4, reveal two important trends. First, the average sentence length for all five major drug types was lower in 1999 than in 1993. Second, with the exception of methamphetamine sentences (which fluctuated throughout

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195. The data underlying Figure 3 for the period 1993-99 is drawn from the following sources: 1993 ANNUAL REPORT, supra note 5, at 144 fig.G; 1994 ANNUAL REPORT, supra note 136, at 115 fig.K; 1995 ANNUAL REPORT, supra note 90, at 110 fig.K; 1996 SOURCEBOOK, supra note 107, at 56 fig.I; 1997 SOURCEBOOK, supra note 111, at 81 fig.J; 1998 SOURCEBOOK, supra note 84, at 84 fig.J; 1999 SOURCEBOOK, supra note 5, at 81 fig.J.

196. The average (mean) sentence for powder cocaine declined from 96.5 months in 1993 to 79.1 months in 1999. The average (mean) sentence for crack cocaine was 123.1 months in 1993, increased to 133.4 months in 1994, and declined steadily to 120.3 months in 1999. The average (mean) sentence for heroin was 72.3 months in 1993, which increased to 76.2 months in 1994, declined steadily thereafter to 58.1 months in 1998, but increased to 61.6 months in 1999. The average (mean) sentence for marijuana was 45.4 months in 1993, which increased to 46.5 months in 1994, and then decreased steadily thereafter to 33.7 months in 1999. The average (mean) sentence for methamphetamine was 106.0 months in 1993, and 88.8 months in 1998. 1993 ANNUAL REPORT, supra note 5, at 144 fig.G; 1994 ANNUAL REPORT, supra note 136, at 115 fig.K; 1998 SOURCEBOOK, supra note 84, at 81 fig.J; 1999 SOURCEBOOK, supra note 5, at 81 fig.J.
the period in response to statutory changes) and a single uptick in heroin sentences from 1998 to 1999, the average sentence for all major drug types declined every year between 1994 and 1999. For a depiction of sentencing by drug type, see Figure 4 below.

**FIGURE 4: AVERAGE PRISON SENTENCE, BY DRUG TYPE (MONTHS)**

Thus, on balance, it is unlikely that changes in the percentage of offenders convicted of possessing or selling each drug type can account for much—if any—of the steady decline in average drug sentences between 1993 and 1999.

b. Changes in Drug Quantity

Because federal drug sentences are so heavily driven by drug quantity, average sentences should decrease when the average amount of drugs per defendant decreases. Unfortunately, data on drug quantity per defendant are not readily available. However, data on federal drug seizures and on base offense levels are available. Individually and collectively, these data sources serve as a crude proxy for drug quantity. Taken together, federal drug seizure and base offense level data suggest that drug quantity is increasing. A more conservative interpretation of the data is that drug quantity is not decreasing. Consequently, it is unlikely that changes in drug quantity can explain the decrease in the length of federal drug sentences between 1992 and 1999.

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197. Supra notes 151-62 and accompanying text.

198. The data underlying Figure 4 for the period 1993-98 is drawn from the following sources: 1993 ANNUAL REPORT, supra note 5, at 144 fig.G; 1994 ANNUAL REPORT, supra note 136, at 115 fig.K; 1995 ANNUAL REPORT, supra note 90, at 110 fig.K; 1996 SOURCEBOOK, supra note 107, at 56 fig.I; 1997 SOURCEBOOK, supra note 111, at 81 fig.J; 1998 SOURCEBOOK, supra note 84, at 81 fig.J; 1999 SOURCEBOOK, supra note 5, at 81 fig.J.
i. Federal Drug Seizures

Data from the White House Office on Drug Policy, presented in Figure 5 below, illustrate a 140% increase in the amount of drugs seized by federal law enforcement agencies between 1992 and 1999. During the same period, the number of federal drug defendants increased by only 31%, from 17,251 offenders in 1993 to 22,682 in 1999. There is, at best, an imperfect correlation between the amount of drugs seized and the amount that makes its way into pre-sentence reports as the basis for a Guidelines sentence. Not every drug seizure becomes the basis for a criminal prosecution. The total quantity of drugs seized is not distributed evenly among all federal drug defendants. Not all the drugs actually seized in connection with a case may be reported to the court. And in so-called “reverse” cases, when the government offers to sell nonexistent drugs, the basis for a defendant’s sentence is the amount of drugs that he or she agrees to buy. Nonetheless, during a period in which the amount of real narcotics reported seized increased more than four times faster than the number of drug defendants sentenced, one can reasonably infer that drug quantity per defendant increased during these same years. In any event, it is decidedly less plausible to infer that drug quantity levels per defendant fell during this period.

**Figure 5: Total Federal Drug Seizures (lbs.)**

![Graph showing total federal drug seizures from 1992 to 1999.]

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ii. Base Offense Levels

A second source of data also bears on drug quantity. In theory, base offense levels (BOL) should correspond well with drug quantity levels.\(^\text{202}\) As noted above, drug sentences under the Guidelines are largely determined by drug quantity.\(^\text{203}\) The type and amount of drugs attributable to the defendant pursuant to the relevant conduct rules determine his base offense level.\(^\text{204}\) The higher the drug quantity, the higher the BOL, and consequently, the higher the BOL, the higher the resultant sentence.

As Figure 6 illustrates, between 1992 and 1999 the overall blended BOL average increased by almost 4\% (from a BOL of 26.31 in 1992 to a BOL of 27.33 in 1999). That is, during these years the average BOL increased by just over one full level. A closer look at the data reveals interesting changes. Between 1992 and 1996, the average BOL increased by almost two full levels. Such an increase almost assuredly reflects some increase in drug quantity. Moreover, this trend should lead to higher average sentences. Some of the increases realized between 1992 and 1996 have eroded since then. Between 1996 and 1999, the average BOL decreased from 28.24 to 27.33, or almost one full level. Despite the drop between 1996 and 1999, it is important to note that there was still a net increase in BOL between 1992 and 1999.

\begin{figure}[h]
\centering
\includegraphics[width=0.8\textwidth]{AVG_BOL}
\caption{Average Base Offense Level, by Year}
\end{figure}

202. Indeed, the close nexus between BOL and drug quantity is underscored by the U.S. Sentencing Commission's use of BOL as a proxy for drug quantity in its own reports through 1996. \textit{See, e.g.}, 1995 \textit{Annual Report, supra} note 90, at 113-16.

203. \textit{See supra} notes 60-84 and accompanying text (describing the Federal sentencing guidelines).

Another perspective is provided by base offense level averages for each of the five major drug types. Figure 7 illustrates that the annual movement of BOLs for each of those drug types is minimal and, with the exception of marijuana, BOLs for all drug types increased between 1992 and 1999.

**Figure 7: Average Base Offense Level, by Drug Type and Year**

Finally, when examining the averages in Figures 6 and 7, above, it is helpful to know whether any substantial changes took place at either end of the distribution. Specifically, might the increase in the overall BOL average reflect dramatic increases in the percentage of sentences at either the low or high BOLs? To explore this possibility we divided BOLs into three groups: sentences below level 26 (the level corresponding roughly to the quantity of drugs necessary to trigger a minimum mandatory five-year sentence), sentences above level 34 (the level corresponding roughly to the quantity of drugs necessary to trigger a minimum mandatory ten-year sentence), and those sentences residing in between. Figure 8 presents these findings. Clearly the overall increase in the average base offense level from 1992 to 1999 flows from neither a dramatic increase in sentences at the high BOLs nor a dramatic decrease in sentences at the low BOLs. Rather, the slight increase appears to flow from a systematic increase in BOLs throughout the range of levels.
In summary, both the drug seizure and base offense level data suggest that average drug quantity per sentenced defendant did not decrease between 1992 and 1999. Rather, the most likely inference from this data is that average drug quantity per defendant increased. Assuming that drug quantity levels did indeed rise between 1992 and 1999, we would expect to find a corresponding increase in average sentence length. That we found the opposite is surprising to say the least.

c. Changes in Defendant’s Role in the Offense

Although drug quantity sets the base offense level for drug offenses, both reductions and increases in offense level are possible depending on a defendant’s role in the offense. Section 3B1.1 of the Guidelines provides for increases of two, three, or four offense levels for a defendant’s “aggravating role” in cases of group criminality. The number of levels added depends on the size and complexity of the criminal organization and the defendant’s position in it. Conversely, § 3B1.2 provides that defendants in cases involving groups may receive decreases of two, three, or four offense levels for their “mitigating roles.” Consequently, average drug sentences could

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206. For example, four offense levels are added if “the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive,” U.S.S.G. § 3B1.1(a) (2000), while only three levels are added if “the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive.” U.S.S.G. § 3B1.1(b) (2000).
decrease if the average amount of additional time imposed on defendants as a result of upward adjustments for aggravating role decreased over time, or the average amount of sentence reduction received by defendants as a result of downward adjustments for mitigating role increased over time.

We phrase the alternatives in this somewhat strained fashion because each contains two components. A decrease in the average upward adjustment for aggravating role could be the result of either a decrease in the total number of defendants receiving aggravating role enhancements or a change in the distribution of aggravating role enhancements (such that a higher percentage of the total number of recipients of role increases receives the smaller two- or three-level increases, as opposed to the maximum four-level increase), or both. Likewise, an increase in the average downward adjustment for mitigating role could be the result of either an increase in the total number of defendants receiving mitigating role enhancements or a change in the distribution of mitigating role enhancements (such that a higher percentage of the total number of recipients of role decreases receive the larger three- or four-level decreases, as opposed to the minimum two-level decrease), or both.

As Figure 9 indicates, the percentage of downward mitigating role adjustments has increased every year since 1993 (from 16.3% in 1993 to 26.2% in 1999), while the percentage of upward aggravating role adjustments has decreased every year since 1994 (from 9.3% in 1994 to 6.7% in 1999). Because we are unable to obtain precise data on the

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208. The data underlying Figure 9 for the period 1993-98 is drawn from the following sources: 1993 ANNUAL REPORT, supra note 5, at 141 tbl.58; 1994 ANNUAL REPORT, supra note 136, at 112 tbl.51; 1995 ANNUAL REPORT, supra note 90, at 108 tbl.44; 1996 SOURCEBOOK, supra note 107, at 51 tbl.35; 1997 SOURCEBOOK, supra note 111, at 75 tbl.40; 1998 SOURCEBOOK, supra note 84, at 75 tbl.40; 1999 SOURCEBOOK, supra note 5, at 75 tbl.40.

209. Supra note 208.
number of levels of decrease or increase received by defendants in the mitigating and aggravating categories (i.e., two, three, or four levels up or down), we are unable to quantify the precise effect of this trend on average drug sentences. However, the simultaneous decrease in upward adjustments and increase in downward adjustments undoubtedly influenced sentence averages. The difficulty is in trying to assess the influence with precision.

It is also difficult to assign a precise cause for the observed trends in upward and downward role adjustments. One possible explanation is that the nature of the drug cases prosecuted by U.S. Attorneys has changed since 1993. In other words, it is possible that fewer aggravating role adjustments are imposed each year because federal agents and prosecutors are apprehending fewer drug conspiracies that involve “five or more participants or are otherwise extensive.” It also may be that more mitigating role adjustments are awarded each year because federal authorities are electing to indict more minor or minimal participants in the drug conspiracies they prosecute. It is, however, also possible that the paradigm of drug crimes prosecuted in the federal system and the distribution of aggravating and mitigating roles of defendants have changed not at all, and that, instead, prosecutors and judges have progressively changed the way they assess the eligibility of defendants for aggravating and mitigating role adjustments. In other words, this trend may not represent a change in the population of defendants on which the Guidelines are operating but may instead reflect a progressive change in the way judges and prosecutors make the partly discretionary choices about who deserves aggravating or mitigating role adjustments.

It is impossible to determine with certainty whether the discretionary or non-discretionary hypothesis is the correct one, and there may be elements of both at work. However, on balance, the available evidence suggests that an increasingly lenient exercise of discretion is a more plausible explanation than are changes in the cases and defendants themselves.

i. The Decrease in Aggravating Role Adjustments

Because the number of participants in the crime is key to imposing an aggravating role adjustment on one or more members of a criminal group and the number of defendants eligible for aggravating role adjustments was declining from 1993 through 1998, one would expect to see a progressive decline in multidefendant drug prosecutions during this period. We have, to date, been unable to find any data reporting on an annual basis the number of multidefendant prosecutions, or reflecting the average number of defendants per federal drug case. The best rough approximation we could devise was a comparison of the number of drug cases filed annually with the number of defendants sentenced annually to produce a ratio of defendants

to filed cases. Because there is a time lag (averaging roughly nine months) between case filing and sentencing, we calculated the ratio of defendants to cases by dividing the number of defendants sentenced in one year by the number of cases filed the year before. Using this concededly rough yardstick, it appears that the number of multidefendant prosecutions increased between 1993 and 1996 and then declined to nearly its 1993-94 level in 1999. Thus, to the extent our rough yardstick reflects at least the gross trends in numbers of multidefendant drug cases, the fluctuations in the numbers of such cases do not appear to have any observable causal relationship to the number of upward adjustments for aggravating role.

**Table 1: Drug Cases Filed and Number of Defendants**

<table>
<thead>
<tr>
<th>Year</th>
<th>Case Filed</th>
<th>Def.'s Sentenced</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>12,329</td>
<td>1994: 16,700</td>
<td>1.35</td>
</tr>
<tr>
<td>1994</td>
<td>11,356</td>
<td>1995: 15,288</td>
<td>1.35</td>
</tr>
<tr>
<td>1995</td>
<td>11,304</td>
<td>1996: 17,261</td>
<td>1.53</td>
</tr>
<tr>
<td>1996</td>
<td>12,068</td>
<td>1997: 19,089</td>
<td>1.58</td>
</tr>
<tr>
<td>1997</td>
<td>13,121</td>
<td>1998: 20,618</td>
<td>1.57</td>
</tr>
<tr>
<td>1998</td>
<td>16,281</td>
<td>1999: 23,082</td>
<td>1.41</td>
</tr>
</tbody>
</table>

---

211. See *supra* note 95 (noting that the average time lag in 1999 was nearly nine months).


ii. The Increase in Mitigating Role Adjustments

In evaluating the increase in mitigating role adjustments, it is important to note that the award of a mitigating role adjustment involves both a comparative and an absolute measurement of culpability. First, the court must make a judgment about a defendant's relative culpability within the particular criminal group whose activities led to his conviction.\(^{214}\) Second, even if a defendant is relatively less culpable than the other members of his group, his culpability must be measured against the elements of the offense.\(^{215}\) That is, merely being less culpable than others in a successful criminal group does not qualify a defendant for a mitigating role adjustment if the defendant's conduct was nonetheless significant and important to the success of the venture.\(^{216}\)

The comparative element in the mitigating role determination means that, as a general rule, only defendants prosecuted jointly with other coconspirators to whom their culpability may be compared will be eligible for the adjustment.\(^{217}\) For example, the sole defendant in a street corner buy-bust will not ordinarily be eligible for a downward role adjustment. Thus, one possible explanation for the increase in mitigating role adjustments would be an increase in the percentage of drug defendants prosecuted in multidefendant cases. If the government were prosecuting more groups, there might be more low-level defendants in the system eligible for role reductions. There are two objections to this explanation.

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214. See U.S.S.G. § 3B1.2, cmt. n.1 (2000) ("Subsection (a) [(minimal participant adjustment)] ... is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group."); U.S.S.G. § 3B1.2, cmt. n.3 (2000) ("For purposes of § 3B1.2(b), a minor participant means any participant who is less culpable than most other participants.").

215. See, e.g., United States v. Caruth, 930 F.2d 811, 815 (10th Cir. 1991); United States v. Ocasio, 914 F.2d 330, 333 (1st Cir. 1990); United States v. Daughtrey, 874 F.2d 213, 216-17 (4th Cir. 1989).

216. See, e.g., United States v. Posada-Rios, 158 F.3d 832, 880 (5th Cir. 1998) (holding that defendant was not entitled to a reduction merely because he was less culpable than his co-defendants); United States v. Pena, 33 F.3d 2, 3 (2d Cir. 1994) (rejecting the argument that the focus should be only on a comparison of defendant to his cohorts); United States v. Zaccardl, 924 F.2d 201, 208 (11th Cir. 1991) (holding that fact that the defendant may have been the least culpable did not show that his role in the conspiracy was minor).

217. Sometimes a defendant who is actually part of a group might be prosecuted alone. For example, a defendant apprehended with drugs might be prosecuted in a separate case where other known members of his conspiracy had already been prosecuted or had not yet been apprehended. In such cases, the defendant might be eligible for a mitigating role adjustment, particularly if his relevant conduct was determined in whole or in part based on the conduct of other members of the group. See, e.g., United States v. James, 157 F.3d 1218, 1220 (10th Cir. 1998) (rejecting role reduction where the sentence was based only on the drugs defendant himself distributed); United States v. Caballero, 956 F.2d 1292, 1299 (D.C. Cir. 1991) (holding that defendant must show (1) that there was more than one participant in the relevant conduct and (2) that defendant's culpability for the relevant conduct was relatively minor compared to the other participants).
First, as noted above, there does not appear to be any sustained trend toward a higher percentage of multidefendant prosecutions. Second, if there were a higher percentage of multidefendant prosecutions, one would expect to see a corresponding increase in upward aggravating role adjustments. Yet, as already observed, the trend is moving in the opposite direction.\footnote{218}

Alternatively, mitigating role adjustments might increase over time if the government adopted a policy of prosecuting low-level members of criminal groups whom it would not previously have prosecuted, either because of evidentiary deficiencies or due to the relative culpability of the defendants in question. However, this explanation seems improbable. In the first place, it presumes that, prior to 1993, in cases that were actually prosecuted, there existed a substantial pool of \textit{additional} potential defendants whom the government elected not to prosecute even though it had (or could easily have obtained) sufficient evidence to bring charges and prove them beyond a reasonable doubt. It further presumes that, beginning in 1993, the government began a sustained nationwide effort to prosecute more of these guilty, but previously unprosecuted, offenders and that this effort produced a steady linear yearly increase in such prosecutions, as reflected in the increase in mitigating role adjustments between 1993 and 1998.

We think it unlikely that there ever was a statistically significant number of potential defendants in cases the government was going to prosecute anyway whom the government elected to throw back like fish too small for the fry pan. If there was in these hypothetical cases, as by hypothesis there must have been, enough evidence to prosecute the defendants, we can think of no reason why prosecutors would systematically elect to decline prosecution. Nor are we aware of any government initiative to begin prosecuting members of this hypothetically excluded group.\footnote{219} Even if such a prosecution-eligible, but unprosecuted, group existed, and the government had undertaken to prosecute them, we think it improbable that the results of such an effort would have been reflected in a steady, linear, yearly increase in such prosecutions mirrored by a steady, linear, yearly increase in the percentage of mitigating role adjustments between 1993 and 1999.

The explanation for the steady increase in downward role adjustments more likely resides in the application of the objective prong of the test for mitigating role. In the early 1990s, appellate courts set the bar for satisfying the objective prong quite high. For example, courts nationwide held that

\footnote{218. See \textit{supra} note 208 and accompanying text (noting that § 3B1.1 of the Guidelines provides differing levels of offense severity); \textit{supra} fig.9 (relating the statistics on this decrease).}

\footnote{219. As noted, one of us (Bowman) was an Assistant U.S. Attorney in the Southern District of Florida (Miami) from 1989-96. He is unaware of any nationwide initiative to cast the net of conspiratorial liability in drug cases wider and is extremely skeptical that any such initiative occurred or could have been implemented on a nationwide basis.}

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moving drugs across borders and from place to place within the country is an indispensable part of the illegal narcotics trade and therefore, that merely being a drug courier did not necessarily qualify a defendant for a mitigating role adjustment.\textsuperscript{220} It is likely that prosecutors in the early 1990s adopted a correspondingly tough policy and recommended mitigating role adjustments infrequently in drug cases and hardly ever simply because a defendant was a courier. The 50\% increase in mitigating role adjustments between 1993 and 1998—from 16.3\% to 24.7\%—is difficult to explain in the absence of significant alterations in judicial and prosecutorial attitudes over this period. One manifestation of this attitudinal shift may be observable in a series of recent appellate cases adopting a markedly more liberal attitude toward mitigating role adjustments for drug couriers. For example, several courts have held that a courier can have a minor role even if charged only with the drugs he carried.\textsuperscript{221}

\textit{d. Changes in Criminal History Category}

To this point, we have focused exclusively on factors that might affect the sentences of federal drug defendants by raising or lowering their offense level, which is measured on the vertical axis of the Guidelines Sentencing Table.\textsuperscript{222} However, a defendant's sentence is also affected, albeit less dramatically, by his position on the horizontal axis of the Sentencing Table, which is determined by his placement in one of six Criminal History Categories. Persons in Criminal History Category I have essentially no prior criminal record, while those in Criminal History Categories II through VI have increasingly seriously records of recidivism. An increase in the criminal history category generates a corresponding increase in sentencing range.

\textsuperscript{220} See, e.g., United States v. Lopez-Gil, 965 F.2d 1124, 1131 (1st Cir. 1992) (affirming the denial of minor role); United States v. Rossy, 953 F.2d 321, 326 (7th Cir. 1992) (same); United States v. Cacho, 951 F.2d 308, 309-10 (11th Cir. 1992) (same); United States v. Garcia, 920 F.2d 153, 155 (2d Cir. 1990) (same); United States v. Zweber, 919 F.2d 705, 710 (9th Cir. 1990) (same); United States v. Williams, 890 F.2d 102, 104 (9th Cir. 1989) (same); United States v. White, 875 F.2d 427, 429 (10th Cir. 1989) (same); United States v. Buenrostro, 868 F.2d 135, 138 (5th Cir. 1989) (same); see also United States v. Caballero, 936 F.2d 1292, 1299-1300 (D.C. Cir. 1991) (remanding because the sentence was adjusted solely because of courier status).

\textsuperscript{221} See, e.g., United States v. Harfst, 168 F.3d 398, 402-03 (10th Cir. 1999) (holding courier eligible for a reduction even when he is only held accountable for the drugs he actually carried); United States v. Isaza-Zapata, 148 F.3d 236, 242 (3d Cir. 1998) (holding that courier can have a minor role even if only charged with drugs he actually carried); see also United States v. Campbell, 139 F.3d 820, 822 (11th Cir. 1998) (reversing where the district court apparently denied a role reduction solely because defendant was a courier); United States v. DeVaron, 136 F.3d 740, 746 (11th Cir. 1998) (reversing where the district court came close to stating incorrectly that couriers are ineligible for role adjustments as a matter of law); United States v. Soto, 132 F.3d 56, 59 (D.C. Cir. 1997) (finding counsel ineffective in failing to seek role reductions for courier where it was hard to "imagine a defendant better suited for serious consideration").

\textsuperscript{222} U.S.S.G. § 5A (1998).
For example, a defendant with an offense level of 28 would have a sentencing range of 78-97 months if he were a first-time offender in Criminal History Category I, but would be sentenced within a range of 97-121 months if he had several prior convictions placing him in Criminal History Category III. Thus, average drug sentences might decline if, over time, the government prosecuted an increasing percentage of first-time offenders, or more generally, a population of defendants with a progressively decreasing average criminal history score.

This does not appear to have been the case. Indeed, the trend has been in the opposite direction. From 1993 through 1999, the percentage of convicted Criminal History Category I drug defendants (first-time offenders) decreased from 62.5% to 55.6%. Likewise, from 1993 to 1999, the average Criminal History Category (and thus the average severity of drug defendants' prior criminal records) increased from 1.87 to 2.12. All else being equal, this trend in criminal history category would tend to have increased, rather than decreased, the average sentence of narcotics defendants between 1993 and 1999.

4. Summary: Non-Discretionary Factors Affecting Average Drug Sentence Length

The non-discretionary factors we have been able to identify do not appear to provide an adequate explanation for the decline in average federal drug sentence length since 1991-92. Moreover, those non-discretionary factors that have had the greatest probable effect prove, on closer examination, to have a significant discretionary component.

First, statutory penalties for federal drug offenses have, with a single exception, increased since 1988. The sole exception was the statutory

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223. Id.
224. The percentages of sentenced federal drug defendants in Criminal History Category I from 1993 through 1998 were as follows: 62.5% in 1993, 1993 ANNUAL REPORT, supra note 5, at 139 tbl.54; 59.0% in 1994, 1994 ANNUAL REPORT, supra note 136, at 109 tbl.48; 57.8% in 1995, 1995 ANNUAL REPORT, supra note 90, at 106 tbl.41; 55.8% in 1996, 1996 SOURCEBOOK, supra note 107, at 49 tbl.32; 57.1% in 1997, 1997 SOURCEBOOK, supra note 111, at 72 tbl.37; 55.7% in 1998, 1998 SOURCEBOOK, supra note 84, at 72 tbl.37; 55.6% in 1999, 1999 SOURCEBOOK, supra note 5, at 72 tbl.37.
225. These figures were determined by multiplying the percentage of defendants in each criminal history category by that category's numerical value (e.g., if 7.4% of the drug defendants sentenced in 1998 fell into Criminal History Category VI, the product of these values was 7.4 x 6), adding the resulting products from all six criminal history categories, and dividing by one hundred. The average criminal history category from 1993 through 1998 was as follows: 1.87 in 1993, 1993 ANNUAL REPORT, supra note 5, at 139 tbl.54; 1.98 in 1994, 1994 ANNUAL REPORT, supra note 135, at 109 tbl.48; 2.02 in 1995, 1995 ANNUAL REPORT, supra note 90, at 106 tbl.41; 2.10 in 1996, 1996 SOURCEBOOK, supra note 106, at 49 tbl.32; 2.06 in 1997, 1997 SOURCEBOOK, supra note 110, at 72 tbl.37; 2.08 in 1998, 1998 SOURCEBOOK, supra note 84, at 72 tbl.37; 2.12 in 1999, 1999 SOURCEBOOK, supra note 5, at 72 tbl.37.
226. Supra notes 94-119 and accompanying text.
safety valve passed in 1994 which, standing alone, had no immediate observable downward effect on drug sentences. However, the Sentencing Commission's passage of a Guidelines safety valve provision in 1995 was followed immediately in 1996 by a decrease in drug sentences. Nonetheless, the very modest increases in percentage of cases to which the statutory and Guidelines safety valves were applied in 1997 through 1999 make it unlikely that the safety valve was a significant factor in the reductions in average sentence that occurred in those years.

Second, between 1991 and 1999, the Sentencing Commission adopted a number of amendments to the Guidelines, some of which increased and some of which decreased drug sentences. We are unable to quantify the net effect of these amendments on average drug sentences. However, it is fair to conclude that, taken as a group, these amendments have only a weak explanatory connection to the continuing decline in drug sentences. Most of the amendments lowering sentences would have affected only a small number of cases. Each amendment would have had its greatest effect on the overall average drug sentence in the year following its adoption, with little measurable impact on the overall average in ensuing years. Yet all the amendments we have identified with a potential to push average sentences down were enacted from 1993-95, and would have taken effect no later than 1996. Thus, these amendments cannot help explain the continuing decline in average sentences in 1997-99. Finally, the downward pressure exerted by some Guidelines amendments would have been counteracted by other amendments (particularly those involving methamphetamine, enacted between 1995 and 1997) that increased drug sentences.

Third, there have been only two Supreme Court decisions altering case law in ways that would tend to reduce federal drug sentences: the 1995 Bailey decision interpreting 18 U.S.C. § 924(c) and the 1996 Koon decision on departures. There was a marked decrease in cases with "weapon involvement" in the two years following Bailey, but the decline leveled off in 1998. Whatever effect Bailey may have had on the overall average federal drug sentence, it cannot explain the decline between 1991-92 and 1995, and can have, at best, a tenuous connection to the continued decline between 1997 and 1999. Moreover, the decline in cases with sentences involving weapon enhancements may be partially attributable to discretionary prosecutorial choices during the charging and plea bargaining phases of the process. The effect of the Koon decision is more properly considered in the

227. Supra notes 98-113 and accompanying text.
228. Supra notes 107-09 and accompanying text.
229. Supra notes 110-13 and accompanying text.
230. Supra notes 151-62 and accompanying text.
231. Supra notes 177-88 and accompanying text.
233. Supra notes 173-88 and accompanying text.
next section, because its essence was an encouragement of discretionary choices to depart.

Fourth, we conclude, with a high degree of confidence, that the change in the mix of drug types for which defendants were sentenced during the period 1993-98 did not contribute to the decline in average federal narcotics sentence.\footnote{Supra notes 196-97 and accompanying text.}

Fifth, to the extent we have been able to determine it, the average quantity of drugs per sentenced defendant has, if anything, increased from 1993 to 1999. More conservatively, there is no evidence that the average quantity of drugs per sentenced defendant decreased.\footnote{Supra notes 199-201 and accompanying text.} Thus, there is no evidence that changes in drug quantity caused the decrease in average drug sentences.

Sixth, the steady rise in the percentage of mitigating role adjustments from 1992 to 1999, combined with the steady decline in the percentage of aggravating role adjustments in the same period, certainly contributed to the overall decrease in average drug sentence. However, our research suggests that these complementary trends are more likely to have been the result of evolutionary changes in discretionary judicial and prosecutorial behavior than of real changes in the population of defendants upon whom the Guidelines were operating.

Seventh, the number of first-time offenders prosecuted for federal drug crimes decreased and the seriousness of the prior criminal records of federal drug defendants grew progressively worse between 1993 and 1999. If anything, this trend would have increased average narcotics sentences.

Finally, and perhaps most importantly, all of the non-discretionary factors with the largest probable downward effect on overall sentence average have markedly discretionary components. The implementation of the statutory and Guidelines safety valves, the award of two and three-level acceptance of responsibility offense level reductions, the choice of whether to file and pursue gun charges and enhancements, and the steady alteration in role adjustments (aggravating role down, mitigating role up) all contain significant discretionary choices by judges, prosecutors, and defendants. And, as noted, the Koon decision is an invitation to increased exercise of judicial sentencing discretion.

B. THE EFFECT OF DISCRETIONARY CHOICES ON FEDERAL DRUG SENTENCES

1. Guilty Plea Rate and “Acceptance of Responsibility”

Most discretionary methods of influencing sentencing outcomes can only be employed (or at least are more likely to be employed) in the context of a plea bargain. For example, a “charge bargain” in which the
government agrees to dismiss or not file a charge carrying enhanced penalties (such as a weapons count under 18 U.S.C. § 924(c)) only occurs as part of a negotiated plea. Likewise, "fact bargains"—agreements between the prosecution and defense as to the facts relevant to sentencing which will be urged upon the probation department and the court—can, by definition, be reached only in plea negotiations. Similarly, the government only rarely agrees to recommend a substantial assistance departure for cooperation in the prosecution of others for a defendant who has put the government to its proof at trial. Even a non-substantial assistance departure, for which a government motion is not a prerequisite, is more likely to be granted in the case of a defendant who has admitted guilt and exhibited some measure of contrition by entering a plea than for a defendant who faces sentencing after vigorously denying guilt in a hotly contested trial.

a. Guilty Plea Rates

Consequently, if prosecutors, defendants, and judges were, to an increasing extent, employing discretionary means of circumventing strict application of the Guidelines, one would expect to see a steadily increasing percentage of cases resolved by plea rather than trial. And indeed, that is exactly what has happened. As Table 2 below illustrates, the guilty plea rate for drug trafficking offenses climbed steadily from 82% in 1992 to 94.2% in 1999.

236. There are certainly exceptions to this rule. Occasionally, the government will need the testimony of a defendant badly enough to be willing to try and convict him, and then use the leverage of the impending sentence to make a cooperation agreement. Nonetheless, such situations are rare exceptions to the general practice of conferring substantial assistance motions only on those who plead guilty and cooperate freely.


### Table 2: Guilty Pleas and Acceptance of Responsibility

<table>
<thead>
<tr>
<th>Year</th>
<th>Guilty Plea Rates (%)</th>
<th>Accept. Respon. Rates (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>82</td>
<td>78.1</td>
</tr>
<tr>
<td>1993</td>
<td>85.3</td>
<td>80.9</td>
</tr>
<tr>
<td>1994</td>
<td>87.8</td>
<td>81.8</td>
</tr>
<tr>
<td>1995</td>
<td>89.8</td>
<td>84.6</td>
</tr>
<tr>
<td>1996</td>
<td>90.2</td>
<td>85.5</td>
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<tr>
<td>1997</td>
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<td>88.5</td>
</tr>
<tr>
<td>1999</td>
<td>94.2</td>
<td>89.7</td>
</tr>
</tbody>
</table>

The rise in the guilty plea rate is merely an indicator of an increase in the exercise of other discretionary choices by judges and prosecutors. The decision by the parties to enter into a plea agreement and the judge's acceptance of such an agreement are discretionary choices. Prosecutors are not obliged to make plea agreements or to acquiesce in sentencing concessions to induce a plea. Defendants have a right to insist on a trial. Judges are not obliged to accept plea agreements.\(^\text{239}\)

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237. The data underlying the “Guilty Plea Rates” column of Table 2 for the period 1993-99 is drawn from the following sources: 1993 ANNUAL REPORT, supra note 5, at 140 tbl.55; 1994 ANNUAL REPORT, supra note 136, at 111 tbl.50; 1995 ANNUAL REPORT, supra note 90, at 113; 1996 SOURCEBOOK, supra note 107, at 50 tbl.33; 1997 SOURCEBOOK, supra note 111, at 73 tbl.40; 1998 SOURCEBOOK, supra note 84, at 73 tbl.38; 1999 SOURCEBOOK, supra note 5, at 73 tbl.38. The figure for 1992 comes from the 1995 ANNUAL REPORT, supra note 90, at 113.

238. The data underlying the “Accept. Respon. Rates” column of Table 2 for the period 1993-99 is drawn from the following sources: 1993 ANNUAL REPORT, supra note 5, at 150 tbl.60; 1994 ANNUAL REPORT, supra note 136, at 118 tbl.55; 1995 ANNUAL REPORT, supra note 90, at 120; 1996 SOURCEBOOK, supra note 107, at 51 tbl.35; 1997 SOURCEBOOK, supra note 111, at 76 tbl.41; 1998 SOURCEBOOK, supra note 84, at 76 tbl.41; 1999 SOURCEBOOK, supra note 5, at 73 tbl.38. The figure for 1992 is from 1995 ANNUAL REPORT, supra note 90, at 120.

239. See FED. R. CRIM. P. 11(e)(3), (4) (describing the procedure when a judge accepts or
b. Acceptance of Responsibility

As discussed above, under the Sentencing Guidelines, the discretionary choices of the government and defendant to make, and the court to accept, a plea agreement have a direct effect on sentence length because the Guidelines provide a two- or three-level reduction in offense level for “acceptance of responsibility.”

Not every defendant who pleads guilty receives an acceptance of responsibility credit, and not every defendant who goes to trial is denied one. Nonetheless, as Table 2 suggests, a link exists between pleading guilty and receiving an acceptance of responsibility adjustment. Between 1992 and 1999, the guilty plea rate for drug offenses stayed in a tight band, four to six percent above the acceptance of responsibility rate. Consequently, the steady rise in the guilty plea rate for drug offenses between 1993 and 1999 should, in itself and exclusive of any other factor, have caused some reduction in average sentence length.

An even more telling indicator of the role of discretion in the plea process and in the progressive decrease in drug sentences is the rise in three-level “super” acceptance of responsibility adjustments under U.S.S.G. § 3E1.1(b). While the two-level acceptance adjustment has always been a nearly automatic benefit of a guilty plea, the award of the third level is contingent on satisfaction of additional criteria, each requiring the exercise of multiple discretionary judgments. The first prerequisite for receiving the extra level is an early decision to plead guilty, one made, as the Guidelines say, sufficiently soon to permit “the government to avoid preparing for trial” and “the court to allocate its resources efficiently.”

Although the government need not offer a plea agreement, if it chooses to do so, only the defendant can decide whether and when to accept the offer and plead guilty. The second prerequisite for “super acceptance” is that the defendant “timely” provide “complete information to the government concerning his own involvement in the offense.” In determining whether this condition has been met, the sentencing judge necessarily relies heavily on the

rejects a plea agreement).

240. U.S.S.G. § 3E1.1 (1998) (providing a two-level reduction where “the defendant clearly demonstrates acceptance of responsibility for his offense” and a three-level reduction for defendants whose base offense level is 16 or higher and who (a) timely provide complete information to the government about their own involvement in the offense, and (b) timely notify authorities of their intention to plead guilty “thereby permitting the government to avoid preparing for trial, and permitting the court to allocate its resources efficiently”). For a discussion of the 1992 Guidelines amendment adding U.S.S.G. § 3E1.1(b), providing an additional third level of reduction for acceptance, see supra notes 123-34 and accompanying text.

241. In addition to the data reported in Table 2, see 1996 SOURCEBOOK, supra note 107, at 62 fig.S (showing, in a bar graph, that acceptance of responsibility rates increased in every drug type from 1992 through 1996).


assessment of government counsel. That assessment has a significant
discretionary element. Finally, although the award of the third level is
mandatory once the judge has found that the defendant has met the factual
prerequisites, the reality is that a judge has tremendous de facto
discretion to award or withhold the adjustment. Whether a defendant has truly
"accepted responsibility," has "timely" notified the prosecution of his intent
to plead guilty, and has given "complete" disclosure to the government are
all highly subjective, and thus partly discretionary, judgments.

While the percentage of drug cases in which either form of "acceptance
of responsibility" was awarded grew from 80.9% in 1993 (the first year "super
acceptance" was available) to 89.7% in 1999 and paralleled almost
exactly the increase in the guilty plea rate for that period, the proportion of
drug cases in which "super acceptance" was awarded increased by more than half, from 49.1% in 1993 to 80.2% in 1999.

2. Sentencing Within Range and Departures

The Guidelines have frequently been criticized for restricting judicial
sentencing discretion. Two areas in which judges retain substantial and
unambiguous discretion are the power to depart from the otherwise
applicable guideline range and, in cases where no departure will be granted,
the power to set a sentence within the applicable guideline range. We will
consider these in reverse order.

a. Sentences Within Range

Each intersection on the grid of the Guidelines Sentencing Table is a
range of months, the top of which is 25% higher than the bottom. As
noted in the opening summary of the salient features of the Guidelines, the
judge retains effectively unfettered discretion to sentence within this
range. Two aspects of judicial sentencing behavior for within-range drug
sentences are worthy of note. First, throughout the Guidelines period,
judges have sentenced the overwhelming majority of drug defendants
sentenced within range at or near the bottom of the range. Second,
although the Sentencing Commission changed its way of reporting statistics on within-range sentences in 1997, and therefore it is difficult to be precise, the available evidence suggests that from 1993 through 1999 judges sentenced a steadily increasing percentage of drug defendants to the low end of the applicable guideline range. From 1993 to 1996, the number of drug trafficking defendants sentenced within the lowest quartile of the applicable sentencing range increased from 72.7% to 74.8%. From 1997 to 1999, the number of drug trafficking defendants sentenced to the minimum possible sentence within the applicable range increased from 65.9% to 71.2%.

b. Departures

The most obvious arena for the operation of discretionary sentencing authority is the departure power. There are three main categories of departures—upward departures, downward departures for substantial assistance to the government, and non-substantial assistance downward departures.

i. Upward Departures

Data on upward departures are presented in Table 3 below. It is important to note that the number of upward departures for all types of

In 1999, 71.2% of drug trafficking defendants were sentenced at the absolute bottom of the applicable range, and 81.2% were sentenced below the midpoint in the range. 1999 SOURCEBOOK, supra note 5, at 59 tbl.29 (The Sentencing Commission changed its method of reporting sentences within range in 1997. See infra note 253.). See also Alex Kosinski, Carthage Must Be Destroyed, 12 FED. SENT. REP. 67, 67 (1999), for a discussion in which Judge Kosinski of the United States Court of Appeals for the Ninth Circuit describes his experiences as a trial judge as follows: "Once I have figured out the range, I always sentence at the very bottom ...."

253. From 1993-96, the Sentencing Commission reported the percentage of defendants sentenced within each quartile of the sentencing range. See, e.g., 1993 ANNUAL REPORT, supra note 5, at 165 tbl.67 (depicting such figures in tabular form for 1993). Beginning in 1997, the Commission stopped providing figures by quartile, and instead reported the percentage of defendants sentenced to: (a) the minimum possible sentence within the range, (b) between the minimum and the midpoint in the range, (c) the midpoint in the range, (d) between the midpoint and the maximum possible sentence in the range, and (e) the maximum possible sentence within the range. See, e.g., 1997 SOURCEBOOK, supra note 110, at 59 tbl.29 (showing the data divided into these five categories for 1997).

254. The percentage of drug trafficking defendants sentenced within the lowest quartile of the applicable sentencing range from 1993 to 1996 was as follows: 72.7% in 1993, 1993 ANNUAL REPORT, supra note 5, at 165 tbl.67; 72.9% in 1994, 1994 ANNUAL REPORT, supra note 136, at 87 tbl.35; 74.5% in 1995, 1995 ANNUAL REPORT, supra note 90, at 92 tbl.32; 78.4% in 1996, 1996 SOURCEBOOK, supra note 107, at 44 tbl.27. The figures in the Commission reports for this period are expressed as percentages of the entire group of drug trafficking defendants sentenced within the reporting year, rather than as a percentage of defendants sentenced within range. However, the conversion to percentage of all defendants sentenced within range and within a given quartile is easily accomplished.

255. 1997 SOURCEBOOK, supra note 111, at 59 tbl.29; 1998 SOURCEBOOK, supra note 84, at 59 tbl.29; 1999 SOURCEBOOK, supra note 5, at 59 tbl.29.
crimes sentenced under the Guidelines has always been very small. For example, in 1990, only 2.3% of all defendants received upward departures.\textsuperscript{256} By 1999, the overall upward departure rate declined to a mere 0.6% of all defendants.\textsuperscript{257} Upward departures in drug cases are scarcer still. In 1990, the upward departure rate for drug offenses was 0.8%,\textsuperscript{223} a figure that declined steadily to 0.2% in 1999.\textsuperscript{259} To put this figure in perspective, in 1999, only thirty-eight out of 21,942 drug defendants, or one in every 577 persons sentenced for drug crimes, received an upward departure.\textsuperscript{259}

<table>
<thead>
<tr>
<th>Year</th>
<th>Upward Depart. (All Cases) (%)\textsuperscript{261}</th>
<th>Upward Depart. (Drug Cases) (%)\textsuperscript{262}</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>--</td>
<td>0.6</td>
</tr>
<tr>
<td>1993</td>
<td>1.1</td>
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<td>1994</td>
<td>1.2</td>
<td>0.6</td>
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<tr>
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<tr>
<td>1996</td>
<td>0.9</td>
<td>0.3</td>
</tr>
<tr>
<td>1997</td>
<td>0.8</td>
<td>0.2</td>
</tr>
<tr>
<td>1998</td>
<td>0.8</td>
<td>0.2</td>
</tr>
<tr>
<td>1999</td>
<td>0.6</td>
<td>0.2</td>
</tr>
</tbody>
</table>

\textsuperscript{256} 1990 U.S. SENTENCING COMM'N, ANN. REP. 74 tbl.4 (1991) [hereinafter 1990 ANNUAL REPORT].

\textsuperscript{257} 1999 SOURCEBOOK, supra note 5, at 51 fig.G.

\textsuperscript{258} 1990 ANNUAL REPORT, supra note 256, at 74 tbl.4.

\textsuperscript{259} 1999 SOURCEBOOK, supra note 5, at 80 tbl.45.

\textsuperscript{260} Id.

\textsuperscript{261} The data in the "Upward Depart. (All Cases) (%)" column of Table 3 for the period 1993-97 is drawn from the 1997 SOURCEBOOK, supra note 111, at 51 fig.G. The 1998 data is from the 1998 SOURCEBOOK, supra note 84, at 51 fig.G.

\textsuperscript{262} The data in the "Upward Depart. (Drug Cases) (%)" column of Table 3 for the period 1993-98 is drawn from the following sources: 1993 ANNUAL REPORT, supra note 5, at 143 tbl.58; 1994 ANNUAL REPORT, supra note 136, at 113 tbl.55; 1995 ANNUAL REPORT, supra note 90, at 109 tbl.46; 1996 SOURCEBOOK, supra note 107, at 55 tbl.40; 1997 SOURCEBOOK, supra note 111, at 89 tbl.45; 1998 SOURCEBOOK, supra note 84, at 89 tbl.45; 1999 SOURCEBOOK, supra note 5, at 89 tbl.45. The figure for 1992 is from 1995 ANNUAL REPORT, supra note 90, at 120.
ii. Substantial Assistance Departures

The Sentencing Reform Act of 1984 directed the Sentencing Commission to ensure 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.263

Before the Guidelines went into effect, Congress enacted the Anti Drug Abuse Act of 1986, which added subsection (e) to 18 U.S.C. § 3553.264 Section 3553(e) authorized departures below statutory minimum sentences in a narrowly circumscribed situation: “Upon motion of the government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.”265 The Guidelines promulgated by the Sentencing Commission and approved by Congress in 1987 contained § 5K1.1, which mirrored § 3553(e) in permitting downward departures from the otherwise applicable Guidelines sentence based on cooperation and conditioned on a motion by the government. When we speak of “substantial assistance departures” we include both departures from the statutory minimum mandatory sentence pursuant to 18 U.S.C. § 3553, and to departures below the otherwise applicable guideline range pursuant to § 5K1.1.

The number of substantial assistance departures granted in drug cases is very high, both in absolute terms and relative to the percentage of substantial assistance departures awarded in all other categories of crime. As Table 4 illustrates, since 1994, roughly one in every three federal drug defendants has received a substantial assistance departure.266 Even more

266. The percentages in Table 4 underestimate the frequency of substantial assistance reductions because, although the Sentencing Commission only counts substantial assistance reductions accomplished at the time of the original sentencing through § 5K1.1 motions, a number of districts commonly grant these reductions only after sentencing under Fed. R. Crim. P. 35. See Linda Drazga Maxfield & John H. Kramer, U.S. SENTENCING COMMISSION SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 5 n.11 (Jan. 1998) (noting that Rule 35(b) data is not collected, but estimating that Rule 35(b) motions occur in roughly five hundred cases per year). For example, if Maxfield and Kramer are correct and an additional five hundred defendants received Rule 35(b) substantial assistance motions in 1998, the total percentage of drug defendants receiving substantial assistance motions for that year would rise from 30.1% to 32.7%. See 1998 SOURCEBOOK, supra note 84, at 80 tbl.45. Based on anecdotal reports and personal experience as an Assistant U.S. Attorney, Bowman suspects that the five hundred cases per year estimate
strikingly, the rate of substantial assistance departures in drug cases is *triple* that for all other crimes.

### Table 4: Substantial Assistance

<table>
<thead>
<tr>
<th>Year</th>
<th>Sub. Assist. Depart. (Non-Drug Cases) (%)</th>
<th>Sub. Assist. Depart. (Drug Cases) (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>--</td>
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<td>1994</td>
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<td>1995</td>
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<td>1996</td>
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<td>1997</td>
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</tr>
<tr>
<td>1999</td>
<td>10.4</td>
<td>28.5</td>
</tr>
</tbody>
</table>

The very high percentage of substantial assistance departures in narcotics cases has undoubtedly been a significant factor in holding down


average drug sentences throughout the period 1992-99. In addition, the 7.7% increase in drug substantial assistance departures from 24% of all drug defendants in 1992\textsuperscript{269} to 31.7% in 1994,\textsuperscript{270} was likely a contributing factor in the decline in average drug sentences in that two-year period.

Nonetheless, substantial assistance departures do not appear to have contributed to the continuing decrease in average drug sentences after 1994. First, the percentage of defendants who receive substantial assistance departures has not increased. Indeed, between 1994 and 1999, the proportion of drug defendants to whom substantial assistance motions were awarded actually fell from 31.7% in 1994\textsuperscript{271} to 28.5% in 1999.\textsuperscript{272} Second, the average size of substantial assistance departures also decreased.\textsuperscript{273} According to Sentencing Commission figures, in 1993, the median substantial assistance departure for drug trafficking cases was forty-eight months (53.2%) below the minimum of the applicable Guidelines range. The size of substantial assistance departures increased over the next two years to fifty months in 1994 and fifty-one months in 1995, but it took a pronounced downward turn soon after. In 1996, the median drug substantial assistance departure declined to forty-six months (50.0%) below the bottom of the applicable Guidelines range.\textsuperscript{274} In 1997, the average substantial assistance departure dropped dramatically to thirty-seven months (49.6%) below the Guidelines minimum.\textsuperscript{275} In 1998, the median departure held steady at thirty-seven months, but declined as a percentage of the Guidelines minimum.\textsuperscript{276} In 1999, the median substantial assistance departure increased slightly to

\begin{footnotesize}
\begin{enumerate}
\item[269.] 1995 ANNUAL REPORT, supra note 90, at 120.
\item[270.] 1994 ANNUAL REPORT, supra note 136, at 113 tbl.53.
\item[271.] Id.
\item[272.] 1999 SOURCEBOOK, supra note 5, at 80 tbl.45.
\item[273.] We have no definitive explanation for the apparent decrease in the average size of substantial assistance departures in drug cases. However, the apparent trend is consistent with anecdotal information suggesting that U.S. Attorney's Offices and district judges are increasingly adopting standardized local practices regarding the size of substantial assistance departures. Such local practices tend to create customary discounts for substantial assistance, expressed as a percentage of the bottom of the otherwise applicable guideline range, \textit{see}, \textit{e.g.}, United States v. Cosgrove, 73 F.3d 297, 301, 303 (11th Cir. 1996) (approving the district judge's announced practice of awarding a standard substantial assistance reduction of one-third off the low end of the applicable guideline range), or as a standard number of levels off the low end of the applicable range. \textit{See}, \textit{e.g.}, United States v. King, 53 F.3d 589, 591-92 (3d Cir. 1995) (describing the district court's practice of reducing the sentence of cooperators under § 5K1.1 by three levels by analogy to acceptance of responsibility reduction).
\item[274.] Figures on the degree of substantial assistance departure from 1993 to 1996 are taken from Sentencing Commission figures provided in a fax to Frank Bowman from Courtney Semisch, U.S. Sentencing Commission (Apr. 18, 2000) (on file with author).
\item[275.] 1997 SOURCEBOOK, supra note 111, at 61 tbl.30.
\item[276.] 1998 SOURCEBOOK, supra note 84, at 61 tbl.30.
\end{enumerate}
\end{footnotesize}
thirty-eight months, but continued to decline as a percentage of the Guideline minimum.\textsuperscript{277}

iii. Non-Substantial Assistance Departures Under Section 5K2.0

"Non-substantial assistance" departures are those awarded pursuant to § 5K2.0 of the Guidelines.\textsuperscript{278} A judge may depart either upward or downward from the otherwise applicable guideline range if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ."\textsuperscript{279} A judge's power to depart pursuant to § 5K2.0 is both more and less constrained than in the case of departures for substantial assistance. On the one hand, no government motion is required for a § 5K2.0 departure. On the other hand, unlike substantial assistance departures awarded in response to a government motion under section 18 U.S.C. § 3553, the judge may not invoke § 5K2.0 to depart below a statutory minimum mandatory sentence.

In contrast to substantial assistance departures, the percentage of downward departures in drug cases pursuant to Guidelines § 5K2.0, as illustrated in Table 5, has steadily increased since 1992. Also in contrast to substantial assistance departures, the proportion of § 5K2.0 departures in drug cases is virtually identical in drug cases and cases generally.

\begin{footnotes}
277. 1999 SOURCEBOOK, supra note 5, at 61 tbl.30.
279. Id. (quoting 18 U.S.C. § 3553(b) (1994)).
\end{footnotes}
TABLE 5: NON-SUBSTANTIAL ASSISTANCE DEPARTURES

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<tbody>
<tr>
<td></td>
<td>Sec. 5K2.0 (Drug Cases) (%)</td>
<td>Sec. 5K2.0 (All Cases) (%)</td>
</tr>
<tr>
<td>1992</td>
<td>6.3</td>
<td>6.0</td>
</tr>
<tr>
<td>1993</td>
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<td>1999</td>
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<td>15.8</td>
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</tbody>
</table>

One event that may have influenced the rate of non-substantial assistance downward departures was the decision in *Koon v. United States*. In this 1996 case, the Supreme Court considered the sentencing appeal of Stacey Koon, one of the Los Angeles police officers convicted of civil rights violations for his part in the infamous Rodney King beating. In sentencing Koon, the district court departed downward from the Guidelines sentencing range of 70-87 months and imposed a sentence of thirty months.

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280. The data in the "Down. Depart. Sec. 5K2.0 (Drug Cases)" column of Table 5 for the period 1993-98 is drawn from the following sources: 1993 ANNUAL REPORT, supra note 5, at 143 tbl.58; 1994 ANNUAL REPORT, supra note 136, at 113 tbl.53; 1995 ANNUAL REPORT, supra note 90, at 109 tbl.46; 1996 SOURCEBOOK, supra note 107, at 55 tbl.40; 1997 SOURCEBOOK, supra note 111, at 80 tbl.45; 1998 SOURCEBOOK, supra note 84, at 80 tbl.45; 1999 SOURCEBOOK, supra note 5, at 80 tbl.5. The figure for 1992 is from 1995 ANNUAL REPORT, supra note 90, at 120.

281. The data in the "Down. Depart. Sec. 5K2.0 (All Cases)" column of Table 5 for the period 1993-98 is drawn from the 1998 SOURCEBOOK, supra note 84, at 51 fig.G. The figure for 1999 is from 1999 SOURCEBOOK, supra note 84, at 80 tbl.5. The figure for 1992 is from 1995 ANNUAL REPORT, supra note 90, at 86 fig.H.


283. See id. at 86-88 (explaining Koon's role in the beating).

284. *Id.* at 89.
judge gave five reasons for the departure, only one of which (that the victim's "wrongful conduct contributed significantly to provoking the offense behavior") was a reason specifically sanctioned by the Guidelines. The Ninth Circuit held that none of the district court's five reasons for departure were proper grounds for departure in this case, but the Supreme Court reversed. The Court held that the standard of appellate review for departures outside the otherwise applicable guideline range is "abuse of discretion," and that the district court did not abuse its discretion in relying on victim provocation and two of the other four grounds for departure unmentioned in the Guidelines.

The Koon Court created a multitiered analytical structure for evaluating whether a sentencing judge abused his discretion in relying on a particular departure factor:

If the special [departure] factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. If the factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be "highly infrequent."

285. The five reasons were: (1) "the victim's wrongful conduct contributed significantly to provoking the offense behavior," § 5K2.10; (2) because of the "widespread publicity and emotional outrage which have surrounded this case," Koon and his co-defendant Powell were "particularly likely to be targets of abuse" in prison; (3) Koon would lose his job as a police officer and suffer "anguish and disgrace"; (4) Koon had been "significantly burdened" by successive state and federal prosecutions; and (5) Koon was not "violent, dangerous, or likely to engage in future criminal conduct" so there was no need to impose a sentence to protect the public from any future criminality. Id. at 89-90.

286. Id. at 90; see also United States v. Koon, 34 F.3d 1416, 1461 (9th Cir. 1994) (rejecting the district court's holding), aff'd in part, rev'd in part, 518 U.S. 81 (1996).


288. The Supreme Court found that neither petitioners' career loss nor the low likelihood of recidivism was an appropriate departure factor. Id. at 110-11. However, the Court sustained the district court's reliance on the unusual susceptibility of Koon and Powell to abuse in prison, as well its reliance on the fact that petitioners were subjected to successive prosecutions in state and federal court. Id. at 112.

289. Id. at 95-96 (emphasis added) (citations omitted).
The *Koon* decision is subject to a number of criticisms. Not least among these is that the division of permitted departure factors into "discouraged," "encouraged," and "unmentioned" categories proves singularly unhelpful in practice because the Court never explained how the exercise of a sentencing court's discretion differs among the categories. Read carefully, the Court's opinion says nothing more than what the Guidelines themselves say—departure is permitted if the judge finds that any factor, whether discouraged, encouraged, or unmentioned, is of a type or degree that takes the case outside the "heartland" of cases considered by the Commission in creating the Guidelines.

Whatever its analytical deficiencies, *Koon* was clearly intended as a signal to district court judges across the country that they should be more open to the possibility of using their departure power. It was also a signal to appellate courts to be less restrictive in reviewing departures. District court judges seem to have heeded the signal. As shown in Table 5 above, in 1997, the year following *Koon*, non-substantial assistance departures increased by 2.9% in drug cases, and by 1.8% for all cases. The rate continued to rise in 1998, increasing by 0.8% in drug cases, and by 1.5% for cases generally; and again in 1999, it increased by 2.5% in drug cases, and by 2.2% for cases generally. Nonetheless, while *Koon* may have acted as a stimulus for departures in 1997-98, the increase in § 5K2.0 downward departures in those years was only a continuation of an uninterrupted trend throughout the 1992-99 period.

iv. Departures—A Summary

The overall rate of downward departures in drug cases (including both substantial assistance and non-substantial assistance departures) has increased steadily from 30.9% in 1992 to 43.8% in 1999. In drug trafficking cases (a category that excludes possession cases and convictions for use of a communications facility to commit a narcotics crime), the...
percentage is higher still—44.2%. In 1999, 29.3% of all drug traffickers nationwide received sentence reductions for substantial assistance to the government, and judges found an additional 15.6% to have demonstrated mitigating circumstances so unusual that they fell outside the heartland of cases contemplated by the Sentencing Commission in creating the drug guidelines. In sum, only just over half of all drug trafficking defendants are now sentenced within or above the guideline range. These figures strongly suggest that judges and prosecutors are using the discretionary powers granted by the departure provisions of the SRA and the Guidelines for purposes other than those for which those departure provisions were intended.

Substantial assistance departures exist based on the hardheaded utilitarian calculation that offering sentence reductions in return for testimony is sometimes necessary to detect and successfully prosecute certain crimes. Hence, both § 3553 and Guidelines § 5K1.1 restrict such departures to those who have provided truly "substantial" aid to the project of convicting some other guilty person. Implicit in the idea of substantiality is at least some degree of real governmental need for the proffered help, as well as proof that the assistance materially advanced the prosecutorial enterprise. We suggest that the government does not need to make cooperation agreements with one-third of the drug trafficking defendants in America to successfully prosecute drug crime. Nor do one-third of all drug trafficking defendants actually provide genuinely "substantial" assistance in the prosecution of one or more other persons.

We recognize that these two claims cannot be proven empirically. Nonetheless, we make them confident that they will not be seriously contested by any experienced federal criminal practitioner. Our confidence rests in part on Professor Bowman’s long personal experience as a federal and state prosecutor and defense attorney. It is bolstered by the fact that, despite the profligate national use of substantial assistance motions, many districts, including some with the largest volume of difficult drug cases, have

294. See id. at 56 tbl.27 (showing an overall departure rate for drug trafficking cases of 45.1%, a substantial assistance departure rate of 29.3%, a non-substantial assistance departure rate of 15.6%, and an upward departure rate in such cases of 0.2%).
295. Id.
296. Id.
297. We say "one-third" because the reported figures on substantial assistance departures show that 31.1% of drug trafficking defendants receive such departures at sentencing, id., while an unknown additional number receive such departures after the initial sentencing under FED. R. CRIM. P. Rule 35(b), supra note 266.
298. And conversely, as David Sklansky has pointed out, there is no empirical proof that cooperation agreements are necessary to the successful prosecution of any class of cases, even though the felt necessity of such agreements has been "conventional wisdom for generations." David A. Sklansky, Starr, Singleton, and the Prosecutor's Role, 29 FORDHAM URB. L.J. 503, 526 (1999).
substantial assistance rates a fraction of the national average yet prosecute drug crimes with immense success. The prime example is the home of “Miami Vice” itself, the Southern District of Florida. In 1999, South Florida ranked fourth among the ninety-four federal judicial districts in volume of drug convictions. It is also a jurisdiction in which complex, multidefendant, multinational drug prosecutions are commonplace. Nonetheless, in 1999 it had a substantial assistance departure rate of 13.3%. Similarly, the Western District of Texas, which ranked first in number of drug convictions, had a substantial assistance departure rate of 7.8%, and the Central District of California (Los Angeles) has a substantial assistance departure rate of 8.4%. Thus, we think it fair to conclude that, in some unknown but significant proportion of substantial assistance cases, the government (with the cooperation of the courts) is using substantial assistance not to build cases against others, but as a caseload management tool and/or as a means to circumvent the Guidelines in cases where they are perceived to be unreasonably high.

Carefully considered, the national 15.6% non-substantial assistance departure rate for drug cases is equally striking. Since 29.3% of all drug offenders now receive § 5K1.1 substantial assistance departures, to say that another 15.6% of all drug offenders get § 5K2.0 departures means that 22% of those who do not get § 5K1.1 departures do get § 5K2.0 departures. That is, nationwide, more than one in five drug defendants who do not get a substantial assistance reduction are granted a downward departure nonetheless because judges find that their cases present facts “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines.”

If one considers the entire population of drug offenders, and subtracts from that population the one-third who receive substantial assistance departures, it seems implausible at best that more than one-fifth of the remainder are so extraordinary or atypical that a downward departure would be warranted under a fair reading of the Guidelines as written.

299. 1999 SOURCEBOOK, supra note 5, at app. B.
300. Id. In addition, South Florida had a non-substantial assistance departure rate of 7.3%, id., roughly half the national average, confirming that it was not keeping substantial assistance motions low by acceding promiscuously to other departures.
301. Id. The Western District of Texas has a non-substantial assistance departure rate of 15.7%, right at the national average. Id.
302. Id. The Central District of California also has a non-substantial assistance departure rate of 9.6%, well below the national average. Id.
303. For more extended discussions of the proposition that prosecutors are using substantial assistance motions more often than necessary to achieve the ostensible goals of such motions, see Bowman, Departing, supra note 168, at 57-58, 62-63; Bowman, Defending Substantial Assistance, supra note 168, at 48.
305. There is, of course, considerable debate about when a departure is appropriate, much
3. Charge Bargaining

Another discretionary method of reducing sentences is charge bargaining. Charge bargaining can take the form of charging or accepting a plea to an offense less serious than the defendant's conduct would support. It may also involve the prosecution charging fewer counts than the government could actually prove, in theory subjecting a defendant to liability for only a limited subset of all his criminal conduct. The Guidelines do not explicitly prohibit charge bargaining. However, the relevant conduct feature of the Guidelines is designed to nullify the effect of such bargains. Pursuant to § 1B1.3, the sentencing judge is required to take into account in setting the base offense level and all adjustments "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," as well as all the foreseeable acts of his coconspirators, that occurred in relation to the offense of conviction or as part of "the same course of conduct or common scheme or plan as the offense of conviction." As a result, the judge is to sentence each defendant for everything he actually did in relation to the course of criminal conduct that led to his conviction, regardless of the specific offense to which he pled guilty. The judge is to include both uncharged and acquitted conduct, if proven at sentencing by a preponderance of the evidence. As a general rule, if the sentencing judge has full information about the case, i.e., all the facts about the entire course of conduct that resulted in the defendant's conviction, charge bargaining can only influence the sentence if the statutory maximum sentence for the bargained-for offense of conviction is less than the sentence the Guidelines would dictate for the same course of conduct. For example, if the conduct of a wire fraud defendant would ordinarily generate a guideline sentence in excess of five years, a charge bargain could limit his sentencing exposure by permitting him to plead guilty to a only single count of wire fraud with a statutory maximum sentence of five years. In drug cases, again assuming that the judge has full

of it centering on whether given facts fall within the Guidelines "heartland" and on what the term "heartland" means in Guidelines parlance. See, e.g., Koon v. United States, 518 U.S. 81, 95-96 (1996); Bowman, Places in the Heartland, supra note 290 at 19; Miller and Wright, Your Cheatin' Heartland, supra note 1 at 1. Resolution of the fine points of this debate is unnecessary to the point made in the text. All of the commentators would agree that the term heartland refers in some sense to the ordinary or typical Guidelines case.

310. See United States v. Watts, 519 U.S. 148, 157 (1997) (holding that relevant conduct includes acquitted conduct proven by a preponderance of evidence at sentencing); Haines, Bowman & Woll, supra note 49, at 114 ("All circuits agree that relevant conduct includes uncharged conduct outside the offense of conviction.").
information, charge bargaining often will not help very much. If the defendant sold one kilogram of cocaine to Buyer X the first week of the month, and then sold five kilograms to the same buyer each of the remaining three weeks in the month, the government could choose to charge him with only one count of distribution of one kilogram. But the judge still would be obliged to calculate the defendant's offense level based on all sixteen kilograms because the entire month's transactions were plainly part of the "same course of conduct or common scheme or plan." The Guidelines dictate a sentence of at least 151-188 months (about twelve to fifteen years) for distribution of sixteen kilograms of cocaine. Therefore, because the statutory maximum sentence for a single count of cocaine distribution is twenty years, a plea to a single count will not cap the sentence below the guideline range.

There are, nonetheless, a variety of ways a prosecutor can employ charge bargains to reduce a drug sentence, even if the judge has full information. For example, a prosecutor may agree to dismiss (or not charge) a weapon count under 18 U.S.C. § 924(c), thus sparing the defendant a five-year extension of his sentence. Likewise, a prosecutor might agree not to file a "second offender information." The narcotics statutes provide for doubled penalties when a defendant has been convicted of a prior felony drug offense, but such penalties cannot be imposed unless the government files an information pursuant to 21 U.S.C. § 851(a) advising the defendant of its intention to seek the enhanced sentence and of the convictions upon which it intends to rely. Similarly, a prosecutor could agree to dismiss or not file a charge of engaging in a "continuing criminal enterprise" (CCE), under 21 U.S.C. § 848, which carries a minimum mandatory penalty of twenty years imprisonment, in lieu of a plea to another drug offense with a lower penalty. It is indisputable that prosecutors make charge bargains of these and other types. No lawyer who has ever practiced federal criminal law would deny it. The insuperable difficulties lie in quantifying the frequency of such bargains, and still worse, in determining whether they have become more or less common over time. There is no central repository of information about the details of plea bargains. The

314. For discussion of the operation of 18 U.S.C. § 924(c) (1994), see supra notes 173-82 and accompanying text.
316. A defendant commits the crime of "engaging in a continuing criminal enterprise" when: (a) he commits a felony narcotics crime in violation of Title 21, United States Code, (b) that violation is part of a "continuing series of violations" undertaken by the defendant in concert with at least five other persons and he occupies an organizational, managerial, or supervisory position, and (c) the defendant "obtains substantial income or resources" from the enterprise. Id. § 848(c) (1994).
Department of Justice keeps no such records, and the Sentencing Commission gathers information, not about what defendants are charged with, but about what they were sentenced for. The best one can do is glean some hints from the statistics that are reported.

For example, reported statistics show that the government commonly agrees or unilaterally elects not to file second offender informations. In any case where a defendant is found responsible for a quantity of drugs generating a minimum mandatory sentence of ten years, a second offender status would double that mandatory minimum. Yet in 1998, only 459 of 7,362 defendants with minimum mandatory sentences of greater than ten years actually received sentences of at least ten years. Roughly fifteen of these defendants were convicted of CCE. Some additional number may have received enhanced minimum mandatory sentences for committing drug offenses that involved bodily harm to others. Thus, it is fair to estimate that roughly 425, or less than 6%, of the over seven thousand defendants who dealt in drug quantities large enough to generate a ten-year mandatory sentence had their sentences enhanced for prior drug convictions. Given that in 1999 more than 81% of all drug defendants had criminal history categories of III or higher, indicating multiple prior criminal convictions, it seems improbable that only 6% of those convicted of the most serious federal drug crimes had a prior felony drug conviction. The far more probable explanation for the tiny percentage of minimum mandatory sentences over ten years is that prosecutors routinely agree not to seek this enhancement.

Another method of charge bargaining detectable from an examination of national statistics is the defendant's plea of guilty to use of a communication facility to carry out a drug trafficking offense under 21 U.S.C. § 843(b), known in the trade as a "phone count." Anyone guilty of a phone count is also, by definition, guilty of a substantive drug offense or of conspiracy to commit one. But any defendant who pleads guilty only to a phone count is likely to have received an immense break because the statutory maximum sentence for this offense is four years, a term that will

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317. 1999 SOURCEBOOK, supra note 5, at 78 tbl.43 n.3.
318. Id. at 67.
320. 1999 SOURCEBOOK, supra note 5, at 72 tbl.37.
321. Section 843(b) makes it a crime "for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony" under the provisions of the remainder of Title 21. Thus, any defendant who violates § 843(b) must commit, or cause or facilitate the commission of, another drug felony, in which case he is also guilty of the other felony as a principal, a co-conspirator under 21 U.S.C. § 846 or 21 U.S.C. § 963, or on an aiding and abetting theory under 18 U.S.C. § 2.
often be years less than the guideline sentence to which the defendant would be subject if charged with a trafficking crime. The fact that such cases are almost always Guidelines-evading plea bargains is buttressed by a striking statistical comparison. In 1999, seven out of ten phone count cases were sentenced at the absolute top of the guideline range, while seven out of ten drug trafficking defendants were sentenced at the absolute bottom of the applicable guideline range, and only 9.4% were sentenced to the top of the range. 322 In the phone cases, prosecutors almost certainly made deals (to which judges acquiesced) to allow the defendant to plead guilty to a phone count and be sentenced at the top of the range in return for dismissal of (or an agreement not to file) drug trafficking charges. 323

While one can reliably infer the existence of some kinds of charge bargains from available statistical information, there is insufficient data to draw conclusions about trends in these practices. 324

4. Fact Bargaining

The most direct, if disingenuous, method of evading a fact-driven real offense sentencing system is for the parties to conceal (or for the court to turn a blind eye to) facts that would increase the sentence beyond the agreed-upon level. 325 No serious observer doubts that fact bargaining occurs.

322. 1999 SOURCEBOOK, supra note 5, at 59 tbl.29. In 1999, of all cases sentenced under the “Communications Facility—Drugs” category, 68.3% were sentenced at the top of the guideline range. Id. This is more than four times the rate for all crimes (14.3%), and more than half again higher than the percentage for any other type of crime, the next highest being 44.2% for arson, roughly 42% for murder and manslaughter, and 31.7% for racketeering/extortion. Id. In contrast, only 9.4% of drug trafficking cases were sentenced at the top of the range, and 71.2% were sentenced at the absolute bottom. Id. The same pattern appeared in 1998, when 68.3% of phone count cases were sentenced at the top of the applicable guideline range, while only 10.1% of drug trafficking cases were sentenced at the guidelines maximum. 1998 SOURCEBOOK, supra note 84, at 59 tbl.29. Likewise, in 1997, 69.8% of phone count cases were sentenced at the top of the applicable guideline range, while only 10.8% of drug trafficking cases were sentenced at the guidelines maximum. 1997 SOURCEBOOK, supra note 111, at 59 tbl.29.

323. Roger Groot has reminded me of another method of limiting sentencing exposure in a drug case: plead guilty to a conspiracy to commit “an offense against the United States” (drugs) under the general federal conspiracy statute, 18 U.S.C. § 371 (1994). Such a plea would limit the defendant’s sentence to five years, the statutory maximum under § 371.

324. For example, the numbers and percentages of defendants receiving drug mandatory minimum sentences greater than ten years from 1997-99 vary as follows: 1997 - 498 (7.67% of those with ten-year-or-greater drug minimum mandatory), 1997 SOURCEBOOK, supra note 111, at 78 tbl.43 n.3.; 1998 - 417 (5.76%), 1998 SOURCEBOOK, supra note 84, at 78 tbl.43 n.3.; and 1999 - 459 (6.23%), 1999 SOURCEBOOK, supra note 5, at 78 tbl.43 n.3. However, the Commission did not collect data on such sentences prior to 1997, and thus the time frame within which statistics are available is too short, and the data too uneven, to draw reliable conclusions about any trend. Likewise, although the Commission did collect data on “phone count” cases throughout 1993-98, it did so for only just over half of an already small sample, and also changed the reporting format in 1997, with the result that no conclusions about trends can be reached.

325. See, e.g., David Yellen, Probation Officers Look at Plea Bargaining, and Do Not Like What
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The debate is over whether it happens a lot or occurs relatively rarely. The debate is peculiarly difficult to resolve because fact bargains are entered into for the express purpose of keeping facts from the probation department and the sentencing judge, and thus out of the record. The Sentencing Guidelines are a self-contained system. That is, if a sentencing judge finds that Fact A exists, and if the Guidelines dictate certain sentencing consequences upon a finding of Fact A, then those consequences must follow; both Fact A and its consequences will appear in the record to be tabulated by Sentencing Commission researchers. Conversely, if Fact A exists, but is suppressed by the parties pursuant to a plea agreement, its existence will be reflected nowhere except the files of the prosecutor. Thus, if prosecutors in a particular district were to adopt a practice of entering plea agreements in which the amount of drugs possessed by defendants was routinely under-reported to the probation department, there would be no mechanism for determining either the existence or frequency of the practice, or the degree to which it affected sentences imposed.

In 1996, writing in response to a survey of probation officers that suggested prosecutors across the country commonly withheld facts from the probation department (and thus from the sentencing judge) "to protect a plea agreement," Professor Bowman was skeptical that the phenomenon was a very common one. Five years on, although there is no more conclusive data, there is reason to suspect that this view was unduly sanguine.

Anecdotal information and conversations with lawyers and judges across the country suggest a creeping increase in the willingness by all parties, lawyers and judges alike, to fudge the facts a little to achieve desired sentencing outcomes. As but one example, at dinner before a January 2000 symposium on sentencing at St. Louis University, a district judge mentioned that judges in her district formerly spent a good deal of time resolving disputes between what the parties claimed the facts to be and the

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328. To some degree, Professor Bowman's thinking on this subject is undoubtedly influenced by having spent seven years as an Assistant U.S. Attorney in the Southern District of Florida, a district in which the U.S. Attorney's Office has historically been among the strictest in insisting that its prosecutors enforce the Sentencing Guidelines as written. He still does not believe that prosecutors across the country are routinely giving away the store in the form of outrageous fact bargains, but does think that the Southern District of Florida was and is at one end of a spectrum that includes at its other end offices which are very flexible indeed.

version of the facts presented by the probation officer in the pre-sentence report based on the officer's own investigation. The judge said that this problem was solved by adopting a local practice of having the parties to plea agreements stipulate to all the facts necessary to Guidelines calculations. The story is revealing at both ends. It tells us that, under the old system in this judge's district, probation officers often thought the parties were manipulating the facts, while under the new system, the judicial branch, probation officers and judges alike, have simply abdicated any responsibility for policing the accuracy of the parties' claims about the facts of the case.

From an empirical perspective, the most that can be said is that some fact bargaining undoubtedly occurs in federal drug cases and that the effect of such bargains is to reduce some sentences. It is, however, impossible to quantify the frequency of this practice or the magnitude of the effect on average drug sentences. Nor is it possible to determine whether fact bargaining has become more or less common over time.

5. Discretionary Factors Affecting Average Sentence Length: A Summary

In the aggregate, the discretionary factors discussed here have exerted a powerful downward influence on average drug sentences in the years since 1992.

First, the increase in the percentage of federal drug cases disposed of by plea from 82% in 1992 to 94.2% in 1999 would, in itself, have tended to reduce average sentence length because virtually all defendants who plead guilty receive a two- or three-level reduction for "acceptance of responsibility" under U.S.S.G. § 3E1.1. Moreover, a negotiated plea is a necessary precondition for the exercise of other discretionary choices by prosecutors, defense lawyers, and judges that can produce far larger sentence reductions. The consistent increase in pleas is, at the very least, suggestive of an environment increasingly hospitable to such exercises of discretion.

Second, the dramatic rise in so-called "super acceptance of responsibility" adjustments from 49.1% in 1993 to 80.2% in 1999 would likely have reduced the average length of drug sentences and is strongly indicative of an increasingly lenient exercise of discretion by prosecutors and judges.

Third, although the data is not conclusive, our research strongly suggests that between 1993 and 1999 judges sentenced an increasing proportion of offenders to prison terms, which in turn lowered the average sentence length.

330. Supra tbl. 2.
331. Supra notes 48, 240-48 and accompanying text.
332. "Super acceptance of responsibility" adjustments allow the subtraction of a third offense level for those defendants receiving the regular acceptance reduction who also plead guilty early and provide full information about their crime. Supra notes 120-34 and accompanying text.
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percentage of drug defendants to the low end of the applicable guideline range.\textsuperscript{333}

Fourth, the number of upward departures in drug cases, negligible to begin with, decreased throughout the period 1993-99.\textsuperscript{334}

Fifth, throughout the period 1992-99, the rate at which prosecutors recommended and judges awarded substantial assistance departures in drug cases was extraordinarily high. The rate was significantly higher than all other types of cases\textsuperscript{335} and sufficiently high to support an inference that such departures were commonly being used, not to secure needed evidence, but as tools of case management or sentence manipulation. However, although the rate of substantial assistance departures increased markedly between 1992 and 1994—rising from 24\% to 31.7\%—it then leveled off.\textsuperscript{336} Indeed, the drug case substantial assistance rate actually declined slightly from 1994 to 1999, dropping from 31.7\% to 28.5\%.\textsuperscript{337} Between 1993 and 1995, the evidence suggests that the size of substantial assistance departures increased; however, from 1995 to 1999 the size of such departures decreased, both in number of months and as a percentage of the otherwise applicable guideline minimum.\textsuperscript{338} Accordingly, the continuing high percentage of substantial assistance departures kept average drug sentences down throughout the study period, and the increase in the number of substantial assistance departures between 1992 and 1994, and in the size of such departures from 1993 through 1995, probably contributed to the decline in average drug sentence in those periods. We nonetheless conclude, somewhat to our surprise, that substantial assistance has no observable causal connection to the relative decrease in average drug sentences between 1995 and 1999.

Sixth, by contrast, non-substantial assistance departures under U.S.S.G. § 5K2.0 more than doubled in drug cases from 6.3\% in 1992 to 15.3\% in 1998.\textsuperscript{339} This increase was doubtless encouraged by the Supreme Court's 1996 decision in \textit{Koon v. United States},\textsuperscript{340} but the trend substantially predates \textit{Koon}. The marked increase in use of non-substantial assistance downward departures was purely discretionary in character and undoubtedly contributed to the reduction in average drug sentences.

Finally, our study supports the conclusion that prosecutors employ both charge and fact bargaining to confer sentencing discounts on some

\begin{itemize}
\item \textsuperscript{333} \textit{Supra} note 252 and accompanying text.
\item \textsuperscript{334} \textit{Supra} notes 258-59 and accompanying text.
\item \textsuperscript{335} \textit{Supra} notes 266-70 and accompanying text.
\item \textsuperscript{336} \textit{Id}.
\item \textsuperscript{337} \textit{Supra} text accompanying notes 271-72.
\item \textsuperscript{338} \textit{Supra} notes 273-77 and accompanying text.
\item \textsuperscript{339} \textit{Supra} tbl. 5.
\item \textsuperscript{340} 518 U.S. 81 (1996).
\end{itemize}
defendants. However, despite the prevalence of anecdotal information, there is insufficient data to determine empirically whether the incidence of charge and fact bargaining increased between 1992 and 1999.

C. THE COMBINED EFFECT OF DISCRETIONARY AND NON-DISCRETIONARY FACTORS ON FEDERAL DRUG SENTENCES

In summary, the foregoing examination of both non-discretionary and discretionary factors affecting sentence length leads to the following conclusions. First, some non-discretionary factors operative between 1992 and 1999 undoubtedly had some causal relationship to the continuing decline in average drug sentences. However, such non-discretionary factors were too few in number and too weak in probable effect to explain fully either the size or the persistence of the observed decline in sentence length. Several non-discretionary factors—notably the change in mix of drug types for which defendants were convicted, the apparent increase in average quantity of drugs per defendant, and drug defendants' rising average criminal history score—would, all else being equal, have increased average sentence length. Moreover, those supposedly non-discretionary factors with the greatest likely downward impact on sentence length—the rates of application of safety valve and acceptance of responsibility adjustments, the percentage of gun charges or enhancements, and the rates of aggravating and mitigating role adjustments—prove on inspection to depend heavily on discretionary choices by parties and judges.

Second, the statistical evidence reveals a series of purely or primarily discretionary factors—plea bargain rates, "super acceptance of responsibility" rates, position of sentences within guideline ranges, the decline of the already minuscule rate of upward departures, the high substantial assistance departure rate, the doubled non-substantial assistance departure rate, and charge and fact bargaining—all of which appear to have a strong causal connection to the persistent decline in the length of federal drug sentences.

Although we are unable to perform a regression analysis that would quantify precisely the relative effect of each of the various factors, viewed in the aggregate, the evidence we have reviewed shows the following: (1) at virtually every point in the Guidelines sentencing process where prosecutors and judges can exercise discretionary authority to reduce drug sentences, they have done so; and (2) where we can measure trends, the trend since roughly 1992 has always been toward exercising discretion in favor of leniency with increasing frequency.

341. See supra text accompanying notes 306-29 (discussing in detail the charge and fact bargaining methods).

342. See supra text accompanying note 329 (recounting, as an example, one anecdote from the St. Louis University Sentencing Symposium).
V. Is This a Quiet Rebellion?

If we are correct, for the better part of a decade the front-line actors in the federal criminal justice system have employed their discretionary powers persistently and progressively to produce ever-lower average drug sentences. The question remains: Why? The answer to this question is not susceptible of empirical proof. Moreover, we are particularly loath to make any definitive pronouncements before concluding the analysis of regional and local data that will form the basis of the next Article in this two-part project. Nonetheless, we can posit some possible causes for the observed behavior.

One might posit, for example, that the decline in drug sentences has been the product of pressure on prosecutors to settle cases because of an increasing number of drug cases being handled by a decreasing number of government lawyers. However, although it is true that from 1993 to 1999 the number of convicted federal drug defendants increased from 18,452\(^{343}\) to 23,082,\(^{344}\) the size of United States Attorney's Offices has grown as well, albeit by a lower percentage, from 8,362 authorized positions in 1993 to 9,044 authorized positions in 1999.\(^{345}\) Nevertheless, the number of federal criminal cases, narcotic and non-narcotic, is hardly so large as to create an overwhelming caseload pressure on Assistant United States Attorneys (AUSA). In 1999, a total of 55,408 persons\(^{346}\) were convicted of federal crimes, 23,082 of them for drug offenses.\(^{347}\) Given that there were roughly five thousand AUSAs working in 1999, the average annual criminal caseload for an AUSA was only eleven cases.\(^{348}\) While this overall average oversimplifies the matter by glossing over regional differences and ignoring the fact that federal cases are often so complex that a single case will occupy one or more prosecutors for months or even years, the fact remains that federal prosecutors, as a class, operate under very little caseload pressure.\(^{349}\) The imperative to move an omnipresent backlog of cases through the

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343. 1993 ANNUAL REPORT, supra note 5, at 56 tbl.13.
344. 1999 SOURCEBOOK, supra note 5, at 12 tbl.3.
345. 2000 EXECUTIVE OFFICE FOR U.S. ATTORNEYS, FY BUDGET REPORT 107. These figures include attorney and nonattorney personnel.
346. 1999 SOURCEBOOK, supra note 5 app. B (national data).
347. Id. at 12 tbl.3.
349. There are a variety of reasons for the relatively low federal criminal caseload, but principal among them is the fact that most federal offenses are also violations of state law. Hence, U.S. Attorney's Offices have the luxury of picking and choosing among the cases presented to them, secure in the knowledge that a case declined for prosecution at the federal level will not necessarily go unpunished. Instead, if the case is provable, but relatively insignificant by federal standards, it will be handled by local authorities.
system, so common in state prosecutors' offices, is rarely a consideration among United States Attorney's Offices.

Another indication that changes in the overall number of federal prosecutors lacks a strong correlation to drug sentencing length may be gleaned by comparing the twenty-three month period between April 1993 and December 1994, when hiring for AUSA positions was frozen, and the period following the hiring freeze. As noted above, the average federal drug sentence actually increased slightly from 1993 to 1994. Yet once the hiring freeze ended and U.S. Attorney staffing began to increase, average drug sentences resumed the decline begun in 1992-93.

Alternatively, one might posit that increases in judicial workload between 1992 and 1999 created pressures to resolve drug cases expeditiously, and thus for prosecutors to enter into and judges to ratify increasingly lenient plea bargains. While this hypothesis deserves further study, a review of existing data is, at best, inconclusive. For example, the Administrative Office of the U.S. Courts has issued a study of the federal judicial caseload between 1993 and 1997. During that period, the number of authorized federal judgeships remained static. From 1993 to 1995, the overall number of federal criminal case filings decreased by 3%. The number of drug case filings also decreased from 1993-95, and, although the number of drug cases increased from 1995 to 1996, the total number of

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350. By way of comparison, when Bowman was a Deputy District Attorney in Denver in the early 1980s, his average felony caseload was several hundred cases annually.

351. One potentially important exception to this generalization may exist in a handful of very busy border jurisdictions, notably the Southern District of California, Arizona, New Mexico, and the Southern and Western Districts of Texas. Between 1993 and 1999, the total number of narcotics defendants convicted in these districts more than doubled, from 3276 to 6605. Compare 1993 ANNUAL REPORT, supra note 5 app. B, with 1999 SOURCEBOOK, supra note 5 app. B. We know that the size of the U.S. Attorney's Offices in these districts increased, but we do not as yet know whether the increase approximated the percentage of the increase in drug cases. If not, one might expect to find a greater-than-average decline in drug sentences in these districts in response to case pressure. The average drug sentence did decrease markedly in Arizona, the Southern District of California, and the two Texas districts (Ariz.: 49.6 months in 1993, 28.2 months in 1999; S.D. Cal.: 54.7 months in 1993, 22.4 months in 1999; S.D. Tex.: 78.7 months in 1993, 50.7 months in 1999; W.D. Tex.: 78.1 months in 1993, 38.6 months in 1999). Id. However, in New Mexico, the average drug sentence actually increased (N.M.:32.4 months in 1993 and 41.3 months in 1999). Id. Given that roughly 30% of all drug cases nationwide now arise in these five jurisdictions, what happens there has the potential for disproportionate impact on national drug statistics. We are in the midst of making a more detailed study of these and other regional phenomena for publication in a subsequent article.


353. Supra fig.9 and accompanying text (noting decline in drug sentences).

354. Id.

355. See CASELOAD RETROSPECTIVE, supra note 212, at 16.

356. Id. at 1.

357. Id. at 9.
drug cases filed in 1996 was still lower than it had been in 1993.\footnote{358} Only in 1997 did drug case filings finally rise above their 1993 level.\footnote{359} Moreover, by 1997 the criminal caseload generally was only 6.7\% greater than it had been in 1993.\footnote{359} Thus, in 1993-97, the federal judicial caseload in criminal cases generally, and drug cases in particular, declined for two years, then rose modestly for two years. In the same period, according to Sentencing Commission data, the average federal drug sentence rose slightly from 1993 to 1994, then declined steadily from 1994 to 1997.\footnote{361} Using the slightly different figures from the AO, average drug sentences rose slightly from 1993 through 1995, then declined from 1995 through 1997.\footnote{362} Whether the modest fluctuations in judicial caseload from 1993-97 had any causal relationship to the movement of average drug sentences seems doubtful.

A third possible explanation for the changing discretionary behavior documented in this Article is politics, or more precisely, the fact that the onset of the national decline in average drug sentences coincided with the inauguration of the first Clinton Administration and the transition from twelve years of Republican control of the executive branch to eight years of Democratic ascendancy. In theory, a change in political party could have a marked effect on criminal justice policy, and in turn on sentencing outcomes. United States Attorneys appointed by the newly ascendant party could be the instruments of conscious, centrally-mandated changes in prosecutorial policy, or they could collectively manifest a general change in attitude or philosophy that would work systemic change over time. Likewise, the judicial nominees of the new party might tend, as a group, to bring a different sentencing philosophy to criminal cases.

At this point, we have no way of determining empirically whether the identities and philosophies of the prosecutors and judges placed in office by the Clinton Administration had any influence on the trend we are examining.\footnote{363} We can say with some assurance that there were no formal changes in policy on the part of the Clinton Justice Department favoring more lenient sentences for drug offenders. Indeed, the available evidence is to the contrary. For example, opposition from the Clinton Justice Department was in significant part responsible for scuttling the Sentencing Commission’s effort to equalize the treatment of crack and powder cocaine.

\footnote{358}{Id.}
\footnote{359}{Id.}
\footnote{360}{CASELOAD RETROSPECTIVE, supra note 212, at 16.}
\footnote{361}{TRAC study, supra note 3, at http://trac.syr.edu/tracdea/findings/aboutDEA/newFindings.html (last visited Feb. 23, 2001).}
\footnote{362}{Id.}
\footnote{363}{We are considering whether it may be possible to study the impact of the changed composition of the district court bench during the Clinton years had any measurable impact on sentencing outcomes. If so, the results of this study will be included in our subsequent paper.}
which would have had the effect of lowering crack sentences. Indeed, if a wholly nonempirical observation may be permitted, criminal justice policymaking in the Clinton years often seemed driven by a settled determination never to be outflanked to the right. Of course, one primary conclusion of this study is that the decisions that produce real sentences for real defendants are often invisible and not consonant with the ostensibly binding rules governing those decisions. Consequently, we cannot rule out some influence on drug sentences from the presence of a Democratic administration, Democratic United States Attorneys, and a rising percentage of Democrat-appointed judges.

Nonetheless, if prosecutorial or judicial workload, or a Democratic Administration, were the cause of drug sentence decline, one would expect to see a decrease in sentences for all types of crime. However, there has been no across-the-board decline in federal criminal sentences. Sentences for some non-drug crimes have declined since 1993. However, the average sentences for immigration and fraud offenses, the second and third most common categories of federal offenses after narcotics, have actually increased since 1993. Likewise, the average sentences for tax offenses, bribery, burglary, and auto theft have all increased during the same period that drug sentences have steadily declined. Factors such as the political orientations of judges and U.S. Attorneys or increased caseload pressures on judges and prosecutors, either nationally or regionally, may have some causal relation to the decline in drug sentences. However, based on our review of the data, it seems improbable that either politics or increased caseloads are the primary cause of declining drug sentences.

At the end of the day, we incline to the view that the ever-increasing exercise of discretion to lower federal drug sentences cannot be entirely explained without reference to the one thing that distinguishes drug cases—and the perception of drug cases in the eyes of those who adjudicate them—


365. For example, the average robbery sentence has declined slightly from 113.7 months in 1993 to 106.9 months in 1999. Compare 1993 ANNUAL REPORT, supra note 5, at 76 tbl.24, with 1999 SOURCEBOOK, supra note 5, at 30 tbl.14.

366. In 1993, the average immigration sentence was 18.9 months; in 1999, it was 28.4 months. In 1993, the average fraud sentence was 17.2 months; in 1999, it was 18.7 months. Compare 1993 ANNUAL REPORT, supra note 5, at 76 tbl.4, with 1999 SOURCEBOOK, supra note 5, at 30 tbl.14. Moreover, the number of fraud and immigration cases has increased, as well. Sentenced fraud defendants have increased from 5,528 in 1993 to 6,199 in 1999. Compare 1993 ANNUAL REPORT, supra note 5 app. B, with 1999 SOURCEBOOK, supra note 5 app. B. The number of sentenced immigration defendants more than quintupled in the same period, from 1,824 to 9,669. Id.

from most other sorts of crimes. Federal drug sentences, even after nearly a
decade of incremental decline, are simply, undeniably, very long.

For example, in 1999, the average sentence length for crack cocaine
offenses was over ten years. The average sentence for methamphetamine
offenses was over eight years and the average sentence for powder cocaine
offenses was more than six-and-one-half years. Given that more than
23,000 persons are now sentenced annually for federal drug crimes,
literally thousands of defendants each year receive sentences higher, and
sometimes far higher, than these averages. Moreover, it may be worth noting
that 55.6% of all drug offenders sentenced in 1999 were first-time
offenders.

These sentences are long in comparison to sentences customarily meted
out for other crimes of equal or greater seriousness. For example, in 1999,
the average sentence for robbery, 111.5 months, was less than the 120.3-
month average sentence for crack offenses. In 1998, the average sentence
for methamphetamine cases was higher than the average sentence for sexual
abuse, nine months longer than the average sentence for arson, more than
double the average sentence for assault, and nearly four times the average
sentence for burglary. Drug sentences are long in proportion to any
human life. They are very long in comparison to the settled pre-Guidelines
expectations of federal lawyers and judges. It can be fairly argued that they
are often longer than can be rationally justified to achieve deterrence.

There is some direct evidence that many judges and probation officers
view drug sentences as too severe. In addition to occasional public
complaints about the severity of drug sentences by individual judges, the

368. 1999 SOURCEBOOK, supra note 5, at 83 fig.I (showing the mean sentence length for
crack offenders between 1995 and 1998 remained above 120 months); see also id. at 81 fig.J
(showing that the mean sentence for crack offenders in 1999 was 120.3 months and the median
sentence for crack offenders was ninety-four months).
369. Id. at 81 fig.J (showing that the mean sentence for methamphetamine offenders in
1999 was 88.8 months, and the median sentence for methamphetamine offenders was seventy
months).
370. Id. (showing that the mean sentence for powder cocaine offenders in 1999 was 79.1
months, and the median sentence for powder cocaine offenders was sixty months).
371. Id. at 12 tbl.3 (stating that 23,082 cases were sentenced for drug violations in 1999).
372. Id. at 72 tbl.37.
373. Compare 1999 SOURCEBOOK, supra note 5, at 31, tbl.14, with id. at 81 fig.J.
374. Compare 1998 SOURCEBOOK, supra note 84, at 81 fig.J (showing that the median
sentence for methamphetamine in 1998 was 96.8 months), with id. at 30 tbl.14 (showing that
the median sentence in 1998 for sexual abuse was 75.7 months, arson was 65.5 months, assault
was 39.5 months, and burglary was 26.3 months).
375. See Frank O. Bowman, III, Playing *21* with Narcotics Enforcement: A Response to Professor
Carrington, 52 WASH. & LEE L. REV. 937, 980-81 (1995) (discussing deterrence as a rationale for
narcotics sentences) [hereinafter Bowman, Playing].
376. For example, in a speech given at Benjamin N. Cardozo School of Law in April 1993,
Senior U.S. District Court Judge Jack Weinstein declared that he was withdrawing his
1996 Federal Judicial Center survey of federal judges and probation officers reported that both groups viewed drug guidelines as "the most harsh."\textsuperscript{377} What federal prosecutors think about the length of drug sentences is not subject to direct proof because line prosecutors are, to put it mildly, discouraged from making public pronouncements about matters of policy.

The findings of this Article are, at the least, not inconsistent with the conclusion that many judges, prosecutors, probation officers, and (naturally enough) defense lawyers\textsuperscript{378} share an unspoken consensus that federal narcotics sentences generated by a scrupulous adherence to the Federal Sentencing Guidelines and the mandatory minimum sentencing statutes are often, if not always, too high, or at least are higher than necessary to achieve the institutional objectives of the system's front-line actors. In saying this, we do not suggest that the federal criminal justice system is in the throes of a conscious insurrection against national drug policy. Nor do we suggest that the majority of judges, probation officers, prosecutors, or even defense attorneys necessarily view drug sentencing levels under existing rules as immoral or unjust. We suspect that the reality, particularly in the case of prosecutors and judges, is a good deal more complex.

There are doubtless a good number of judges, probation officers, and lawyers who feel strongly that the Guidelines, strictly applied, produce drug sentences so long as to be unjust, either generally or at least frequently. However, criminal law decision-makers need not feel that strict application of federal drug sentencing laws would be categorically \textit{unjust} in order to facilitate a prolonged downward trend in drug sentences. It is sufficient that a large enough number of front-line actors, particularly judges and prosecutors, believe that strict enforcement of the Guidelines in drug cases is \textit{not necessary} to achieve justice.

For example, a prosecutor may see no injustice whatsoever in imposing a Guidelines-mandated fifteen-year sentence on a trafficker in crack cocaine, but may be essentially indifferent to whether the trafficker receives fifteen years or "only" ten. In either case, the defendant has been convicted and has

\footnotesize{"name ... [from] the wheel for drug cases ... [because] I simply cannot sentence another impoverished person whose destruction has no discernible effect on the drug trade." Keri A. Gould, \textit{Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?}, 10 \textit{N.Y.L. Sch. J. Hum. Rts.} 835, 846 n.40 (1993).}

\textsuperscript{377} MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, \textit{FEDERAL JUDICIAL CENTER, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY} 19 (1997) ("Drug guidelines--particularly those for drug manufacture and drug trafficking--were rated the most harsh by both [judges and probation officers]. The view that these guidelines are somewhat too harsh may reflect respondents' disapproval of the effect of mandatory minimums on the guidelines, including their emphasis on quantity-based drug sentences.")

\textsuperscript{378} \textit{See} Michael Katz & Caroline Durham, \textit{Department of Justice Low-Level Drug Offender Study: A Defense Perspective}, 7 \textit{Fed. Sent. Rep.} 28, 28 (1994) (drawing the "inescapable" conclusion that the "drug guidelines and mandatory minimum sentencing laws are clogging federal prisons with non-violent offenders who don't need to be there").
received a lengthy term of imprisonment. If, to secure the fifteen-year sentence, such a prosecutor must try the case and conduct a contested sentencing hearing, but could guarantee imposition of the ten-year sentence by entering a plea agreement not strictly in conformity with Guidelines rules, the temptation to take that shortcut will be strong. Most importantly, the temptation will not be counteracted by the first and great commandment of the prosecutor's creed—"thou shalt not get away with it." Ten years may not be the punishment that strict application of the law prescribes, but few would view a decade in a prison cell as "getting away with it." Although the numbers vary from case to case, the key point is that the law, strictly applied, mandates substantial sentences of incarceration for virtually all federally prosecuted drug cases. Therefore, prosecutors can almost always acquiesce in less punishment than the law nominally requires and still secure very substantial sentences.

In such a system, it is unsurprising that prosecutors may not feel the need to enforce Guidelines and statutory rules in their full rigor. By cutting corners on sentencing rules, prosecutors save their own time and resources and nonetheless produce sentencing outcomes that remain quite satisfactory, even by the standards of the toughest antidrug crusader. Similarly, when a judge, even a very tough-minded judge, is routinely confronted with plea bargains that shade the facts and bend the rules but nonetheless consistently require the imposition of significant prison time, there is very little incentive to stop the train. We think it fair to conclude that prosecutors and judges who behave in this way are acting on the unstated, and perhaps even unconscious, conviction that, while the Guidelines may not generate sentences that are too long in the abstract, such sentences are in practice often longer than necessary. Moreover, we believe that our findings in this Article are consistent with this model of prosecutorial and judicial attitudes.

If we are right, there has indeed been a quiet rebellion against the severity of federal drug sentences among the very people whose job it is to seek and impose those sentences. But it is important to understand the nature of the rebellion. Revolutionary movements rarely, if ever, succeed due to the exertions of their most ardent supporters. Rather old regimes succumb to revolutionary pressures only when their defenders lose the will to fight to uphold them. Part of the explanation for the continued downward drift of federal drug sentences is surely that some of the front-line actors in the federal criminal system feel passionately that drug sentencing rules are too harsh. But a far more important consideration may be that a critical mass of those front-line actors are simply unconvinced of the imperative to commit the time, institutional resources, and emotional capital necessary to defend strict interpretation of drug sentencing rules. If indeed the drug sentencing Bastille is falling, it is doing so just as the real
one did, not so much because of a heroic and bloody frontal assault, but rather in consequence of a long, slow atrophy of the will of its defenders.\textsuperscript{379}

VI. SOME TENTATIVE CONCLUSIONS AND A LOOK AHEAD

The ongoing decline in drug sentences and our findings about the causes of that decline have a number of implications, and raise additional questions for study.

A. IMPLICATIONS FOR THE GUIDELINES SYSTEM

Whatever the motives of those who have effected the decline in federal drug sentences, both the decline itself and the mechanisms by which it has been accomplished run counter to much of the received opinion about the Guidelines system and the roles of the actors in it. For example, our findings call into question two of the three tenets of the common wisdom described at the beginning of this Article. It turns out that the Guidelines system is, or at least can be made to be, more flexible than its critics charge. Judges are not powerless in the face of Guidelines rules. Federal drug prosecutors are not without pity, or at least, their sense of mission does not appear to require exacting the last pound of flesh the law permits. Nonetheless, our findings hardly represent an unqualified validation of any view of the federal sentencing system.

Even if one approves of the continuing trend toward lower drug sentences, the methods employed to achieve it are troublesome. The system we have described here is one in which lawyers and judges are actively manipulating the Guidelines system to avoid sentencing consequences that the rules, rigorously applied, would otherwise require. Some of the methods employed are consistent with the letter and spirit of federal sentencing law, but other methods routinely employed are not. This sort of behavior, when it becomes common, is likely to have deleterious effects on the Sentencing Guidelines system as a whole.

Because this study has considered national trends, the data we have reported can yield the misimpression that an overall increase in the incidence of, for example, non-substantial assistance downward departures, is occurring uniformly in every district across the country. Although we have not yet analyzed the data in detail, the reality is plainly to the contrary. It turns out, for example, that rates of both substantial assistance and non-substantial assistance departures vary significantly from district to district and region to region.\textsuperscript{380} Moreover, the available evidence suggests that

\textsuperscript{379} See Will Durant & Ariel Durant, The Age of Napoleon 18-19 (1975) (describing the surrender of the Bastille by the governor of the fort at the end of a series of negotiations and skirmishes in which the attackers were receiving by far the worst of the exchange).

\textsuperscript{380} For example, in FY 1998 the non-substantial assistance rate in Arizona was 61.0%, while in Arkansas the rate was 1.7%. 1998 SOURCEBOOK, supra note 84, at app. B. Similarly, the substantial assistance departure rate varied from a low of 11.3% in the Ninth Circuit to as high
locally differing applications of rules regarding departures, role adjustments, and the like may be producing measurable local and regional disparities in sentencing outcomes. Several very credible studies have now found that the Sentencing Guidelines have measurably reduced "inter-judge" disparity within judicial districts, that is differences between the sentences of similarly situated defendants attributable to differences in sentencing approach among judges in the same district. However, the most comprehensive of these recent studies, authored by Paul Hofer, Kevin R. Blackwell, and R. Barry Ruback, also finds that disparities among judges in different regions and districts have markedly increased since the advent of the Guidelines in 1987. Moreover, the increase in inter-city disparity occurred almost entirely in drug cases, lending support to the idea that drug sentences under the Guidelines provide a particularly powerful stimulus to manipulations of the system.

In the next installment of this study, we consider (among other things) federal drug sentencing in light of local and regional data. We hypothesize that, in place of a single uniform national sentencing system, the Guidelines have created a network of separate local and regional systems. We consider the possibility that each judicial district has tended to create a local equilibrium in which the customary sentencing players—judges, prosecutors, defense lawyers, law enforcement officers, and probation officers—have reached accommodations regarding the commonly occurring issues in Guidelines application. Such a local equilibrium might enhance predictability and ensure that similarly situated defendants within the same district receive similar sentences.

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381. Paul J. Hofer et al., The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity, 90 J. OF CRIM. L. & CRIMINOLOGY 239, 240 (1999) ("[T]he evidence is persuasive that the pre-guideline era differences among judges in sentencing philosophies were the primary sources of unwarranted disparity."); James M. Anderson et al., Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines, 42 J.L. & Econ. 271 (1999) (concluding "the expected difference between two typical judges in the average sentence length was about 17 percent (or 4.9 months) in 1986-87 prior to the Guidelines and fell to about 11 percent (or 3.9 months) in 1988-93 during the early years of the Guidelines"); Abigail Payne, Does Inter-Judge Disparity Really Matter? An Analysis of the Effects of Sentencing Reform in Three Federal District Courts, 17 INT'L REV. L. & Econ. 337, 338, 357-58 (1997) (concluding from a study of three judicial districts that the Guidelines did reduce inter-judge disparity, but only by a small amount). But see Joel Waldfogel, Aggregate Inter-Judge Disparity in Federal Sentencing: Evidence from Three Districts, 4 Fed. Sent. Rep. 151, 153 (1991) (concluding that inter-judge disparity before and after the adoption of the Guidelines stayed the same in one district and increased in the others). See also Hofer et al., supra, at 279 (questioning Waldfogel's results).

382. Id. at note 381, at 304-05.

384. Hofer, Blackwell, and Ruback express the same point, albeit in the understated language of the social scientist. They say that their results suggest "that the drug guidelines are affecting different cities differently, both through development of distinct citywide adaptations and also in the degree to which the guidelines constrain individual judge discretion." Id. at 295-96.
district are sentenced reasonably uniformly, regardless of the identity of the sentencing judge. However, the sentencing outcomes produced by the local practices in one district may be markedly dissimilar to outcomes in similar cases in courts just across the district line. If this model accurately describes current federal drug sentencing practice, the Guidelines may be thought of as the common framework on which each local system is built. The local craftsmen in each district have made different choices—some sanctioned by the official rules, and some sub rosa adjustments made despite the rules—such that the final structure erected on the Guidelines framework in each district is a little bit different.

B. IMPLICATIONS FOR DRUG SENTENCING POLICY

One possible reaction to the findings of this Article, a reaction that would be most likely among those most committed to fighting drug trafficking and the undoubted evils of drug abuse through the mechanisms of the criminal law, would be outrage that unelected judges and prosecutors have quietly subverted the will of Congress expressed in statute after statute raising the penalties for drug trafficking. This view is not without force. Nonetheless, one can hope that those most disposed to such a reaction would take a long look at our results before devising a response.

The men and women who have made the thousands of incremental decisions that produced the long decline in federal drug sentences are not, as a class, disposed to be "soft" on crime generally or drug crime in particular. Rather, they are career prosecutors who measure their professional success by convictions won and punishments inflicted, and federal judges, most of whom are cautious and conservative by nature, whatever their political leanings. Precious few of them would advocate decriminalization of drugs or cessation of the effort to interdict and punish the flow of narcotics into and through this country. It is entirely fair to conclude that the view they are expressing through their conduct is not that drug trafficking should not be punished, but that federal law punishes this class of offenses somewhat more severely than is necessary to achieve the law's legitimate goals. When the entire class of those who are on the front lines of the fight against crime express, through their conduct over many years, a settled judgment about some aspect of the criminal law, it behooves policy makers with less personal experience to listen.