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Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws

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NOTE

PROSECUTORIAL SENTENCE APPEALS: REVIVING THE FORGOTTEN DOCTRINE IN STATE LAW AS AN ALTERNATIVE TO MANDATORY SENTENCING LAWS

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INTRODUCTION

In September 2000, Massachusetts Superior Court Judge Maria Lopez sentenced child molester Charles Horton to probation with house arrest,[1] characterizing the defendant's molestation incident as a

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1 The probationary sentence allowed Horton to return to the South Boston housing project where the victim also lived. Jules Crittenden, *Panel to Decide Judge's Future*, BOSTON HERALD, Apr. 13, 2001, at 3.

"low-level crime"[2] and disregarding the prosecutor's request for an eight- to ten-year prison sentence.[3] Horton, while dressed as a woman, lured a twelve-year-old boy into his car and forced him to simulate oral sex on a screwdriver.[4] Judge Lopez's arguably lenient sentence provoked a media frenzy[5] and widespread excoriation from legislators, citizens, and victims' rights advocates.[6] Within days of Hor-

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2 Sacha Pfeiffer, *Cuban Roots Seen as a Key to Judge's Decisions*, BOSTON GLOBE, Dec. 12, 2000, at B1.

3 *See* Jay Lindsay, *Judge's Leniency Enrages Critics*, SUN-SENTINEL (South Florida), Sept. 17, 2000, at 8A. A *Boston Globe* investigation found that Judge Lopez frequently imposes sentences that are sharply at odds with prosecutors' requests. *See* Pfeiffer, *supra* note 2. For instance, Judge Lopez sentenced four defendants in sex-crime cases to probation in Middlesex Superior Court in the spring of 2000. Three of the men were charged with raping or sexually assaulting minors, while the fourth man was charged with beating and raping his former girlfriend. Marcella Bombardieri, *Lawyers Alarmed by Calls to Oust Lopez*, BOSTON GLOBE, Sept. 18, 2000, at B1. As a result of Judge Lopez's sentences, the state's sex offender registry will list none of the four if they follow the terms of their probation. *Id.* Complaints of undue leniency also have arisen over a 1992 case in which Judge Lopez refused to keep convicted killer Matthew Rosenberg in jail after his juvenile sentence for killing his five-year-old neighbor had expired. *See* Lindsay, *supra*; Pfeiffer, *supra* note 2.

4 Brian MacQuarrie, *Cellucci, Legislators Turn Up Heat on Judge*, BOSTON GLOBE, Sept. 12, 2000, at A1.

5 The story leaked when Suffolk County District Attorney Ralph C. Martin II's office notified the media of Horton's sentence. John McElhenny, *Cellucci Wants Prosecutors to Have Appeal Rights on Sentences*, ASSOCIATED PRESS, Sept. 11, 2000, LEXIS, AP File.

On a wholly unrelated, yet rather intriguing note, the prosecutor's tattling incident was not the first time Judge Lopez has experienced the wrath of attorneys who have unsuccessfully argued before her. In 1994, Judge Lopez presided over a highly publicized case in which a jury found that supermarket chain owner Telemachus Demoulas had defrauded his sister-in-law and her family of $850 million. After Judge Lopez ruled against Demoulas, the losing attorneys, Gary C. Crossen and Richard K. Donahue, Sr., instituted an elaborate ruse aimed at proving that the judge was biased against their client. *See* Peter S. Canellos & Judy Rakowsky, *Pawn Fights Back in High-Stakes Arena*, BOSTON GLOBE, Oct. 1, 1997, at A1.

The two prominent attorneys fooled a former clerk to Judge Lopez into believing that a nonexistent offshore company was recruiting him for a high-paying position. They rented offices in Nova Scotia and New York, where it is legal to tape conversations surreptitiously, hired actors, printed phony business cards, and staged a fake job interview with the clerk in an effort to obtain damaging information about Judge Lopez. *See id.* The scheme unraveled, and the two attorneys now face disciplinary action before the state's bar. Ralph Ranalli, *Lawyers in Demoulas Case Face Bar Charges*, BOSTON GLOBE, Jan. 25, 2002, at B2.

6 Most of the responses to Judge Lopez's decision and to her accompanying comments belittling the prosecutor during trial—footage that was captured on videotape and aired repeatedly by the local media—were of general outrage. *See* Andrea Estes & Frank Phillips, *Legislators' Trip with Lopez Raises Questions*, BOSTON GLOBE, Dec. 27, 2000, at A1 (noting that Judge Lopez's actions "sparked a public outcry and calls for her ouster"). One representative and impassioned letter to the editor appearing in *The Boston Globe* exclaimed, "If Judge Lopez's unprofessional behavior is excused and she remains uncensured, God save the Commonwealth of Massachusetts." Hank Maiorana, *Judge's Conduct Cannot Be Excused*, BOSTON GLOBE, Dec. 26, 2000, at A22.

Some supporters, however, also emerged to vocalize their support. The Massachusetts Association of Criminal Defense Lawyers issued a statement labeling calls to investigate or remove Judge Lopez "an outrageous and alarming attack on the independence of the judiciary." Bombardieri, *supra* note 3. Similarly, one *Boston Globe* reader defended Judge Lopez, writing:

ton's sentencing, Massachusetts State Senator James Jajuga filed a complaint against Judge Lopez with the State Commission on Judicial Conduct, while House Minority Leader Francis Marini filed a bill of address, co-signed by other legislators, to begin the process of removing Judge Lopez from the bench.[7] Governor Paul Cellucci responded by filing legislation that would give prosecutors a sentence appeal right analogous to that already enjoyed by defendants.[8]

The response to Judge Lopez's sentencing in the Horton case is paradigmatic of a national climate characterized by pervasive criticism of the state and federal judiciary.[9] Coinciding with this criticism is a panoply of attempts to stifle "judicial activism"[10] and "leniency."[11] The widespread creation of mandatory minimum sentencing guidelines represents one such attempt, while another increasingly common strategy is that which House Minority Leader Marini adopted in response to the Lopez scandal: instituting impeachment proceedings against disfavored judges.[12]

The prosecutorial sentence appeal legislation proposed in Massachusetts fits within this broad category of efforts to control the judiciary. Time-tested, many of these efforts have unduly impaired judicial discretion and independence. The Massachusetts proposal is fairly

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> A judge with the courage to disappoint the district attorney's office runs the risk of being pulverized in the press by mediocre minds.
>
> I appear regularly in Middlesex County Superior Court. In my opinion, Judge Lopez is one of only a bandful of thinking judges on the bench today. She is also a rare commodity: a judge who refuses to be intimidated by the district attorney's office.

Kevin J. Mahoney, *Attacks on Judge Peril Our Rights*, BOSTON GLOBE, Sept. 14, 2000, at A18 (letter to the editor).

7 Lindsay, *supra* note 3; MacQuarrie, *supra* note 4. The bill is still pending. *See* Tom Farmer, *Judge Lopez Under Fire for Son's Booze Bash*, BOSTON HERALD, Jan. 3, 2002, at 1. The Judicial Conduct Commission also appointed a special investigator to explore reports that Judge Lopez and her supporters started a "whisper campaign" to discredit the victim in an effort to bolster her claim that Horton's case involved "'mitigating circumstances.'" *Id.* The special investigator has yet to submit his report. *See id.* For additional accounts of the allegations concerning Judge Lopez's conduct and the resulting investigation, see Jose Martinez, *Mom's Anger: Sex-Assault Victim's Kin Lashes Out at Judge Lopez*, BOSTON HERALD, June 18, 2001, at 1; Frank Phillips, *Inquiry on Judge Said to Focus on Victim, 11*, BOSTON GLOBE, June 14, 2001, at A1; and Jack Sullivan, *Judge's Husband Fights Back: Mindich Battles to Keep E-Mails Private*, BOSTON HERALD, July 13, 2001, at 3.

8 *See* MacQuarrie, *supra* note 4. The Governor also responded by calling for tougher mandatory prison terms and by announcing that his legal staff would analyze the implications of the bill of address filed by House Minority Leader Marini. *Id.*

9 *See* AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997) [hereinafter ABA REPORT], *at* http://www.abanet.org/govaffairs/judiciary/report.html (noting that "[a] new cycle of intense judicial scrutiny and criticism is now upon us").

10 *See id.* § IV.A.1.

11 *See id.*

12 *See, e.g., id.* (citing a booklet widely circulated on Capitol Hill urging members of Congress "to initiate impeachment proceedings against 'activist' judges, regardless of whether such efforts are likely to result in removal").

unique in that only a minority of states have enacted prosecutorial sentence appeal statutes,[13] even though the Supreme Court established the constitutionality of such legislation in the early 1980s.[14] This Note explores the forgotten doctrine to determine its potential revival as a reform measure in state sentencing law.

Part I of this Note examines the constitutional basis for a prosecutorial sentence appeal right as established by the Supreme Court in *United States v. DiFrancesco*.[15] It then documents the use of the doctrine in both the federal and state systems and discusses the key components of the legislation proposed in Massachusetts.[16] Part II reviews those forces that threaten the judiciary's independence and discretion, and explores what is perhaps the most serious of these forces: mandatory minimum guidelines. Part II also offers insights into the social sentiments and policy stances that have influenced the development of sentencing law over the past two decades, and attempts to demonstrate why many state legislatures have disregarded the prosecutorial sentence appeal doctrine in favor of mandatory minimums. Part III argues that a prosecutorial sentence appeal right is a more appropriate response than other more prevalent efforts to counteract weaknesses in the judicial system, and outlines a handful of recommendations for sentencing law reform at the state level.

I
BACKGROUND

A. The Constitutional Framework for Prosecutorial Sentence Appeals

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice

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13 In contrast, a distinctive feature of criminal justice systems abroad is the extension of the right of appeal to both defendants and prosecutors. *See, e.g.*, Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 682 (1990) (discussing prosecutorial sentence appeals in France); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 348 (1995) (Germany). Canada also provides for broad appellate review of sentencing. *See* LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING 52 (1994).

14 United States v. DiFrancesco, 449 U.S. 117 (1980).

15 *Id.*

16 The primary focus of this Note is on prosecutorial sentence appeals at the state level. A related issue is whether prosecutors should have the right to obtain review of bail decisions rendered by state courts. On the federal level, the Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. I, § 205, 98 Stat. 1837, 1986, was amended by 18 U.S.C. § 3731 to permit the government as well as a detainee to appeal from a district court order either granting or denying bail. *See* 18 U.S.C. § 3731 (1994). This topic is beyond the scope of the present discussion, although many of the arguments set forth herein apply to bail decision review with equal force.

put in jeopardy of life or limb . . . ."[17] The Clause encompasses three distinct values: "(1) the integrity of jury verdicts of not guilty, (2) the lawful administration of prescribed sentences, and (3) the interest in repose."[18] The U.S. Supreme Court summarized the protection that the Clause affords as follows: "It protects against a second prosecution for the same offense after acquittal; it protects against a second prosecution for the same offense after conviction; and it protects against multiple punishments for the same offense."[19]

What the Double Jeopardy Clause does not protect against is a unilateral[20] government appeal for the purpose of increasing a sentence considered unreasonable or unduly lenient. The Supreme Court first established this principle in *United States v. DiFrancesco*,[21] in which it upheld a statute authorizing the government to appeal a sentence imposed upon a "dangerous special offender."[22] The *DiFrancesco* Court held that prosecutorial sentence appeals authorized by statute do not violate the Fifth Amendment,[23] reasoning that the Double Jeopardy Clause does not accord criminal sentences the constitutional finality of acquittals[24] and "confers upon defendants no right to know the duration of their sentences at any specific time."[25]

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17 U.S. CONST. amend. V.

18 Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1002–03 (1980) ("Each value is entirely distinct from and theoretically independent of the others, all being related to one another only by the 'rubric' of the [D]ouble [J]eopardy clause." (footnotes omitted)).

19 United States v. Warneke, 199 F.3d 906, 907 (7th Cir. 1999) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969), *overruled by* Alabama v. Smith, 490 U.S. 794 (1989)).

20 Prior to the decision in *United States v. DiFrancesco*, federal decisional law held that an increase in a valid sentence following a conviction violated the Double Jeopardy Clause. Jeffrey Allen Cohen, Note, *In the Wake of* DiFrancesco*: Derogation of the Multiple Punishment Bar of the Double Jeopardy Clause*, 17 SUFFOLK U. L. REV. 923, 923 (1983). In contrast, several states had already allowed the prosecution to cross-appeal a defendant's own sentence appeal for the purpose of seeking an increase. At the time of the decision, however, no state permitted the prosecution to initiate such an appeal. Westen, *supra* note 18, at 1001 n.3; *see also* Murphy v. Massachusetts, 177 U.S. 155 (1900) (holding that when a sentence has been vacated after challenge by the defendant, the subsequent imposition of an increased sentence does not offend Double Jeopardy).

21 449 U.S. 117 (1980).

22 Cohen, *supra* note 20, at 923–24.

23 *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 112 (1981).

24 *DiFrancesco*, 449 U.S. at 134. The Court relied on *Bozza v. United States*, 330 U.S. 160 (1947), for the proposition that constitutional finality does not attend to sentences. In *Bozza*, the defendant was convicted of a crime that carried a mandatory minimum sentence of a fine and imprisonment. *Id.* at 165. The trial court incorrectly sentenced the defendant only to imprisonment. *Id.* Later the same day, the judge recalled the defendant and imposed both elements of the mandatory minimum sentence. *Id.* at 165–66. The Court held that the correction of the legally invalid sentence by the imposition of a harsher sentence "did not twice put petitioner in jeopardy for the same offense." *Id.* at 167.

25 Cohen, *supra* note 20, at 924.

DiFrancesco involved the Organized Crime Control Act of 1970,[26] which authorized sentence appeals to a U.S. Court of Appeals by either the government or a defendant when the defendant was sentenced as a "dangerous special offender."[27] According to the Act, a circuit court on review of a sentence could "affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings."[28] The Court reasoned that DiFrancesco could not expect any measure of finality to attach to a sentence imposed under the Act, even after he commenced serving his term, because the law charged him with constructive knowledge of the statutory re-sentencing provisions.[29] The Act did not unlawfully oppress a guilty defendant, the Court reasoned, but rather constituted "a considered legislative attempt to attack . . . the tendency on the part of some trial judges 'to mete out light sentences.'"[30]

The Court further stated that the "Double Jeopardy Clause is *not* a complete barrier to an appeal by the prosecution in a criminal case,"[31] and that "'[w]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended.'"[32] The Court thus held that "the Government's taking a review of respondent's sentence does not in itself offend [D]ouble [J]eopardy principles just because its success might deprive respondent of the benefit of a more lenient sentence."[33]

The *DiFrancesco* Court went a step beyond simply determining the constitutionality of government sentence appeals—it endorsed them. The majority opinion concluded on the following note:

> [S]entencing is one of the areas of the criminal justice system most in need of reform. . . . [T]he "basic problem" in the present system is "the unbridled power of the sentencers to be arbitrary and discriminatory." Appellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing.[34]

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26 Pub. L. No. 91-452, 84 Stat. 922, 950–51, *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, § 212(a)(2), 98 Stat. 1837, 1987; *see also DiFrancesco*, 449 U.S. at 118 n.1, 120 n.2 (reproducing relevant portions of the Organized Crime Control Act).

27 449 U.S. at 118–19.

28 *Id.* at 120 n.2 (quoting the Organized Crime Control Act).

29 *See id.* at 139.

30 *Id.* at 142 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 203 (1967)).

31 *Id.* at 132 (emphasis in original).

32 *Id.* (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 569–70 (1977)).

33 *Id.*

34 *Id.* at 142–43 (citations omitted) (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1973)).

The next section provides an overview of the prosecutorial appeal legislation that Congress and the states have adopted since the *DiFrancesco* decision.

B. Prosecutorial Sentence Appeal Legislation

1. *Federal Law*

The Sentencing Reform Act of 1984[35] permits both defendants and prosecutors to appeal criminal sentences.[36] Either party may challenge legality on the grounds that the sentence "was imposed as a result of an incorrect application of the sentencing guidelines,"[37] or that the sentence "was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable."[38]

Both parties may also challenge the severity of the sentence. The defendant may appeal a sentence that is more severe than what the *Federal Sentencing Guidelines* prescribe,[39] whereas the government, with the approval of either the Attorney General or the Solicitor General,[40] may appeal a sentence that is more lenient than what the *Guidelines* prescribe.[41] The Senate Judiciary Committee explained that these

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35 18 U.S.C. § 3742 (1994). See *infra* notes 94–100 and accompanying text for a discussion of the Sentencing Reform Act's genesis and the sentencing guidelines Congress promulgated as a result of the Act.

36 *See* 18 U.S.C. § 3742. The Act eliminated the sentencing court's power to initiate an appeal through a Rule 35 motion for the correction or reduction of a sentence. *See* FED. R. CRIM. P. 35(b), (c); *Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1987–1988* (pt. 2), 77 GEO. L.J. 931, 1137–38 (1989) [hereinafter *Annual Review*]. In so doing, the Act limited the sentencing court's ability to adjust sentences to correction upon remands of successful appeals. *See Annual Review, supra*, at 1137–38.

37 18 U.S.C. § 3742(a)(2), (b)(2).

38 *Id.* § 3742(a)(4), (b)(4).

39 *See id.* § 3742(a)(3). The defendant may appeal a sentence that

> is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release . . . than the maximum established in the guideline range.

Id.

40 Congress required this approval to ensure that the government does not routinely file appeals for every sentence below the appropriate federal sentencing guideline range. *See* S. REP. No. 98-225, at 154 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3337.

41 *See* 18 U.S.C. § 3742(b)(3). The government may appeal the sentence if it

> is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release . . . than the minimum established in the guideline range . . . .

Id.

provisions were designed to reduce unwarranted sentencing disparity.[42]

If the appellate court finds that the lower court imposed a sentence in violation of the law as a result of an incorrect application of the guidelines, or that the sentence is outside the applicable guideline range and is unreasonable, the court must set aside the sentence and remand for reconsideration, with any instructions it considers appropriate.[43] Further, if the appellate court concludes that a sentence is unreasonable, it must state specific reasons for its conclusion.[44] The appellate court must "give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous."[45] The court must also grant "due deference to the district court's application of the guidelines to the facts."[46] The Act requires sentencing judges to explain their reasons for particular sentencing decisions,[47] thereby facilitating a stricter and more informed appellate review.

2. *State Law*

Although the Supreme Court established the constitutionality of prosecutorial sentence appeals over two decades ago, only a relatively small number of states have since adopted these statutes.[48] Of those that exist, many refer to the state's right to appeal "illegal" sentences, while others use different wording to achieve the same effect. In essence, an illegal sentence is one that departs from the requirements of sentencing laws in some manner. In states with sentencing guidelines, these "illegality" appeal statutes typically focus on instances of deviation from the guidelines. States that have provisions for the appeal of illegal sentences include Arizona,[49] Delaware,[50] Florida,[51] Kansas,[52]

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42 *See* S. REP. NO. 98-225, at 151 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334.

43 18 U.S.C. § 3742(f)(1)-(2).

44 *See id.* § 3742(f)(2).

45 *Id.* § 3742(e).

46 *Id.*

47 *Id.* § 3553(c).

48 *See Lawyers Oppose Bill Giving Prosecutors Right to Appeal*, PROVIDENCE J., Sept. 28, 2000, at C5.

49 ARIZ. REV. STAT. ANN. § 13-4032(5) (West 2001).

50 Delaware's statute states that "[t]he State shall have an absolute right to appeal any sentence on the grounds that it is unauthorized by, or contrary to, any statute or court rule, in which case the decision or result of the State's appeal shall affect the rights of the accused." DEL. CODE ANN. tit. 10, § 9902(f) (1999).

51 FLA. STAT. ANN. § 924.07(1)(e) (West 2001).

52 KAN. STAT. ANN. § 21-4721(d), (e) (1995).

Louisiana,[53] Minnesota,[54] New Jersey,[55] Ohio,[56] Pennsylvania,[57] and Tennessee.[58]

In contrast to these statutes, Alaska's enabling statute authorizes prosecutors to appeal sentences on the broad ground of leniency. Under the Alaska statute:

> A sentence of imprisonment lawfully imposed by the superior court may be appealed to the court of appeals by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.[59]

A handful of statutes in guideline states incorporate both of these approaches and provide for appeals on grounds linked to sentencing guidelines and on broader grounds such as unreasonableness. Pennsylvania's statute, for instance, specifies a right to appeal when "the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously,"[60] as well as when "the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable."[61] Similarly, the Tennessee statute permits appeals when "[t]he court improperly sentenced the defendant to the wrong sentence range,"[62] when "[t]he court improperly found the defendant to be an especially mitigated offender,"[63] or where "[t]he enhancement and mitigating factors were not weighed properly."[64] And Minnesota permits the reviewing court to vacate or set aside a sentence that is "inconsistent with statutory requirements, unreasonable, inappropriate, . . . unjustifiably disparate, or not warranted by the findings of fact."[65]

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53 LA. CODE CRIM. PROC. ANN. art. 882 (West 1997).

54 MINN. STAT. ANN. § 244.11(2)(b) (West Supp. 2002).

55 N.J. STAT. ANN. § 2C:44-1(f)(2) (West 1995).

56 The Ohio statute, like the Delaware statute, allows for appeals of sentences that are "contrary to law." OHIO REV. CODE ANN. § 2953.08(A)(4) (Anderson Supp. 2001).

57 42 PA. CONS. STAT. ANN. § 9781(a) (West 1998).

58 TENN. CODE ANN. § 27-4-101 (2000); *id.* § 40-35-402(b)(1) (Supp. 2001).

59 ALASKA STAT. § 12.55.120(b) (Michie 2000).

60 42 PA. CONS. STAT. ANN. § 9781(c)(1).

61 *Id.* § 9781(c)(2).

62 TENN. CODE ANN. § 40-35-402(b)(1).

63 *Id.* § 40-35-402(b)(4).

64 *Id.* § 40-35-402(b)(5).

65 MINN. STAT. ANN. § 244.11(2)(b) (West Supp. 2002).

Some statutes also permit state appeals of noncustodial or probationary sentences. The New Jersey,[66] Ohio,[67] and Tennessee[68] statutes have such provisions. The Ohio statute permits appeals by the prosecutor when the "sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed,"[69] while the Tennessee statute broadly permits prosecutorial sentence appeals whenever the court grants "all or part of the sentence on probation."[70] The New Jersey sentencing statute, in addition to providing for appeals of non-custodial sentences, also contains a provision that may have proved useful in the Horton case. The statute requires that when the court imposes a noncustodial sentence for a crime that resulted in serious injury or that involved a particularly vulnerable victim, the reasons for the noncustodial sentence must be entered on the record.[71]

Like the Alaska statute, the legislation pending in Massachusetts ("Massachusetts Proposal") is broadly drafted, directing an appellate panel of trial judges to "consider whether any such sentence is appropriate, excessively lenient or excessively harsh."[72] The panel would hear appeals at least once every sixty days.[73] The bill also provides that the sentencing judge who imposed the sentence has the option of "transmit[ting] to the appellate division a statement of his reasons for imposing the sentence," and is required to "make such a statement within seven days if requested to do so by the appellate division."[74]

The Massachusetts Proposal, if adopted, would integrate prosecutorial sentence appeals into an indeterminate sentencing sys-

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66 N.J. STAT. ANN. § 2C:44-1(f)(2) (1995).

67 OHIO REV. CODE ANN. § 2953.08(B)(1) (Anderson Supp. 2001).

68 TENN. CODE ANN. § 40-35-402(b)(2).

69 OHIO REV. CODE ANN. § 2953.08(B)(1).

70 TENN. CODE ANN. § 40-35-402(b)(2).

71 *See* N.J. STAT. ANN. § 2C:44-1(g).

72 H.R. 3900, 182d Gen. Ct., Reg. Sess. § 2 (Mass.) [hereinafter Massachusetts Proposal] (text of bill available on Westlaw at 2001 MA H.B. 3900 (SN)). The Massachusetts Proposal was submitted to the Joint Committee on Criminal Justice on February 5, 2001, was heard by that Committee on March 19, 2002, and became eligible for Executive Session on that date. Under the proposed legislation, within ten days of the imposition of the sentence, the appeal would be forwarded to a panel of three sitting Superior Court judges designated by the chief Superior Court judge for a quick (within ninety days of the appeal date) reasonableness review. *Id.* At present, Massachusetts has a statute that appears to permit the prosecution to initiate an appeal of a sentence for the purpose of seeking an increase; however, the First Circuit has construed the statute to mean that the prosecution may not appeal except in response to a defendant's prior appeal. *See* MASS. ANN. LAWS ch. 278, § 28B (Law. Co-op. 1992); Walsh v. Picard, 446 F.2d 1209 (1st Cir. 1971); Westen, *supra* note 18, at 1001 n.3.

73 Massachusetts Proposal, *supra* note 72, § 1.

74 *Id.* § 2.

tem.[75] Part III.A of this Note addresses the merits of judicial appeals in the context of an indeterminate sentencing scheme. Suffice it to say here that such a system would establish a balance of power in the courtroom, properly leaving sentencing discretion to judges while equipping prosecutors with a powerful remedy with which to respond to judicial sentencing error.

II
A System in Need of Urgent Reform

A. A Judiciary Under Attack

The controversy that sparked the introduction of the Massachusetts Proposal is only one of the many instances in recent years in which elected officials, the press, and the public criticized judges for seemingly soft-on-crime decisions.[76] In a 1981 address to the American Bar Association (ABA), Chief Justice Warren Burger captured the sentiments of many Americans when he asked, "Is a society redeemed if it provides massive safeguards for accused persons . . . and yet fails

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75 This characterization must be qualified. Mandatory minimums are already in place for drug offenses. *See* John Laidler, *Action Looms on Criminal Sentencing*, Boston Globe, Aug. 5, 2001, at 7. And while Massachusetts does not presently have sentencing guidelines that have been enacted into law, the work of the Massachusetts Sentencing Commission is not entirely without influence. The Commission first recommended sentencing guidelines in 1997; however, the numerous bills it has filed on Beacon Hill over the years have been unsuccessful. *See* Karen E. Crummy, *Gov's Sentence-Appeal Bill Blasted as 'Waste of Time'*, Boston Herald, Sept. 27, 2000, at 12. But as the *Massachusetts Superior Court Criminal Practice Manual* explains: "[A]s a practical matter, these guidelines are being used by prosecutors, defense attorneys, probation departments and judges every day. The guidelines have become a starting point for meaningful discussion about sentencing, and a judge will likely sentence within their framework." D. Dunbar Livingston et al., *Sentencing and Alternative Dispositions*, *in* Massachusetts Superior Court Criminal Practice Manual § 22-6 (1999). The *Manual* goes on to acknowledge the non-binding influence of the guidelines, noting: "Each judge will have a different approach to using the *Massachusetts Sentencing Guidelines*. . . . Some judges will use the guidelines as written, as if they were already enacted into law. Others will consult them for advice, and others are not interested in their highly structured approach to sentencing." *Id.*

More recently, in May 2001, Acting Governor Jane Swift proposed her own mandatory sentencing guideline bill. Franci Richardson, *Swift Justice: Acting Gov Pushes Mandatory Sentencing Guidelines*, Boston Herald, May 7, 2001, at 1. Then in October 2001, the Criminal Justice Committee of the Massachusetts House of Representatives unveiled a plan that crafted a compromise between previous failed proposals. *See* Ralph Ranalli, *House Courts Compromise with Its Plan*, Boston Globe, Oct. 2, 2001, at B3. The House passed the compromise plan on October 9, 2001; however, no further action has been taken since the bill was passed to the Senate Committee on Ways and Means. *See* H.R. 4642, 182d Gen. Ct., Reg. Sess. (Mass.) (text of bill available on Westlaw at 2001 MA H.B. 4642 (SN)).

76 *See, e.g.*, ABA Report, *supra* note 9, § IV.A.1. The *ABA Report* describes the fallout that occurred following an unpopular ruling in favor of a defendant by District Court Judge Harold Baer of the Southern District of New York in 1996. According to the *Report*, Senate Majority Leader Bob Dole and Speaker of the House Newt Gingrich threatened to initiate impeachment proceedings, while President Clinton hinted that he might request resignation if Judge Baer did not change his ruling.

to provide elementary protection for its law-abiding citizens?"[77] Indeed, many Americans have come to regard the courtroom as a place where the rights of the guilty are protected at the expense of the rights of the innocent.[78] They blame lenient judges for the crime on the streets, ignoring the complex assortment of social and economic forces which are the true causes of crime.[79]

Perceptions of judicial leniency have led to the mobilization of a victims' rights movement[80] and to a nationwide call to strengthen prevailing approaches to crime with "'more police, more prisons, and more money for the criminal justice system.'"[81] These movements

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77 Sol Wachtler, *Crime and Punishment*, NEW YORKER, July 15, 1996, at 72, 72 (quoting Chief Justice Burger).

78 Journalist Max Boot takes this view, characterizing one judge's sentence in a particular case as

> display[ing] her weakness for geriatric thugs—and her disdain for the victims of crime. . . .
>
> It's a gross abuse of discretion for a judge to give [rapists], no matter how advanced in years, nothing but probation. In all too many instances, judges' leniency in handing out probation only creates more victims of crime.

MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH 47 (1998).

79 One commentator has suggested that this mass misunderstanding of crime derives partly from a persistent bombardment by the media of images portraying an ineffective justice system. "[W]hile the docu-dramas and news tabloid shows repeatedly represent the police as gallant warriors fighting the forces of evil, on the one side, mainstream news constructions, on the other side, often personify the agents of crime control as . . . ineffective and incompetent." Gregg Barak, *Media, Society, and Criminology*, *in* MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME: STUDIES IN NEWSMAKING CRIMINOLOGY 3, 11 (Gregg Barak ed., 1994). These portrayals are not consistent with the reality of crime in America, but are largely distortions. *See id.* But because the "cultural visions of crime projected by the mass media . . . are . . . the principal vehicle by which the average person comes to know crime and justice," *see id.* at 3, the crime problem has, in large part, been blamed on our courts.

80 Thirty-three states have passed victims' rights amendments to their state constitutions. *See GOP Senator Pushes for Victims' Rights Amendment*, CNN.COM, Feb. 5, 2000, *at* http://www.cnn.com/2000/ALLPOLITICS/stories/02/05/gop.radio. In April 2000, Democratic Senator Dianne Feinstein of California and Republican Senator John Kyl of Arizona proposed a victims' rights amendment to the U.S. Constitution, but their proposal did not come to a vote. *See* Yvonne Abraham, *Victims' Rights Plan Draws GOP Response*, BOSTON GLOBE, July 19, 2000, at A16. President Clinton supported a victims' rights amendment to the U.S. Constitution, calling it a matter of "simple fairness." *Clinton Wants a Victims' Rights Amendment*, CNN.COM, June 25, 1996, *at* http://europe.cnn.com/US/9606/25/clinton.victim.rights. President George W. Bush has also spoken out strongly in support of a constitutional victims' rights amendment. *See* National Victims' Constitutional Amendment Network, *Recent News/Chronology*, *at* http://www.nvcan.org (last visited Apr. 19, 2002).

Groups that oppose the adoption of a constitutional amendment for victims' rights include the American Civil Liberties Union, the National Network to End Domestic Violence, and the National Clearinghouse for the Defense of Battered Women. *See* Citizens for the Fair Treatment of Victims, *Organizations and Individuals Against the Amendment*, *at* http://www.geocities.com/citizensftv/against.html (last visited Apr. 19, 2002).

81 Barak, *supra* note 79, at 11 (quoting RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES 249 (1992)). This approach has been described as "fighting

have, in turn, resulted in a multitude of threats to judicial independence and discretion. The ABA Commission on Separation of Powers and Judicial Independence explains: "A new cycle of intense judicial scrutiny and criticism is now upon us; one that has been forming over the last decade."[82] This scrutiny threatens the core value of our judicial system, "[a]n independent judiciary with judges who decide issues under law without fear or favor."[83]

An ABA poll of "bar leaders" found that over two-thirds of the respondents "perceived a major or a minor threat to decision-making independence in their state."[84] These respondents perceived four factors, in descending order of importance, as responsible for that threat: "1) judicial [independence] is being eroded by excessive criticism of judges; 2) judicial reelection is too politicized; 3) judicial selection is too politicized; and 4) judges are too dependent on campaign contributions."[85]

Judges are not above human error, and the First Amendment, of course, fully protects criticism of judicial decisions.[86] Criticism of sentences for leniency may in certain circumstances reflect a misunderstanding of the judge's decisionmaking process.[87] In other circumstances, allegations of undue leniency may be an accurate assessment and may have a corrective influence on faulty decisionmaking that otherwise would remain undetected.[88] The challenge,

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crime with more time." Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 93 (1999).

82 ABA REPORT, *supra* note 9, at Opening.

83 *Id.*

84 *Id.* § V.D.

85 *Id.* § V.D. In thirty-eight states, judges face some form of popular election. *Id.* § V.B. Whether a judge who is subject to elections can truly maintain independence on the bench is a subject of debate. "'A key issue is whether judges can be independent if their rulings can be the basis of a . . . negative vote at the polls.'" *Id.* (quoting prepared statement of Erwin Chemerinsky, Feb. 21, 1997).

86 *Id.* § VI.B.1(a).

87 Aggravating this misunderstanding is the judicial convention that judges refrain from entering the political fray to defend decisions that have been criticized. The following excerpt from the *ABA Report* explains why judicial silence is problematic:

> One assumption underlying the First Amendment freedom to criticize institutions of government is that, through an open exchange of ideas and information, the truth may prevail, to the ultimate benefit of the governmental institutions criticized. When a judicial decision is criticized, however, the author of that decision is often prohibited by the rules of judicial ethics from entering the debate. As a consequence, the exchange of ideas and information on the case in question is less than open, which increases the risk that misinformation, rather than the truth, will emerge, to the ultimate detriment of public confidence in the judiciary.
>
> As one commentator observed, it is not a "fair fight" to leave the judges to respond to unfair and inaccurate criticism without allies.

Id. § VI.B.1(a)(3) (quoting Robert H. Henry, Address at the Meeting of the American College of Trial Lawyers, Boca Raton, Fla. (Mar. 21, 1997)).

88 *See id.* § IV.A.1.

then, is to strike an appropriate balance between judicial independence and accountability.[89]

Contributing to perceptions of an *imbalance* between judicial independence and accountability is the absence of a requirement in most states that trial judges articulate the reasons for the sentences they impose.[90] Opponents have emerged en masse to express their outrage at the sentence rendered in the Horton case; however, the sentence was not per se the result of undue leniency. There may have been mitigating considerations—relating to both the victim and the victimizer—rendering the sentence entirely appropriate and reasonable under the circumstances.[91] However, in the absence of a written opinion, one can only speculate as to the basis and propriety of Judge Lopez's decision.[92] Such unexplained decisions have led not only to

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89 *See id.* § II (providing an overview of the independence-accountability debate).

90 *See* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1445 & n.22 (1997). In contrast, under federal law, sentencing judges generally must explain their reasons for particular sentencing decisions. *See* 18 U.S.C. § 3553(c) (1994).

91 See *infra* note 92 for a discussion of possible bases for Judge Lopez's sentencing decision. *See also* Amy K. Tchao, Comment, *One Step Forward, One Step Back: Emergency Reform and Appellate Sentence Review in Maine*, 44 ME. L. REV. 345, 346–47 (1992) (discussing the range of decisional factors relevant to the sentencing of a hypothetical child molester). When faced with the formidable task of devising a sentence proportionate to the crime, a judge will likely consider any of the following factors: the nature and seriousness of the defendant's conduct, prior criminal convictions, psychological problems, and the impact of the assault on the victim. *See id.* Another critical consideration is the need to protect the public by incarcerating the defendant. *Id.* at 347. The judge must weigh these considerations against the goal of rehabilitating the defendant, which might be best achieved with a lesser period of incarceration or no incarceration at all. *See id.* To determine the appropriate length of punishment, the sentencing judge must decide which of these conflicting goals is primary, and then assign relative weights to all of the other relevant variables. *Id.*

However, not all crimes within a particular category are deserving of the same punishment and different judges may have cause to render different sentences. For instance, in one child molestation case, victim impact may be especially severe, whereas in another, it may be relatively less serious. *See id.* Mandatory sentencing guidelines attempt to ease the sentencing judge's burden by fitting these complicated factors into a precise scientific formula. *See infra* text accompanying notes 103–04. However, the sum of these factors in a given case is neither precise nor scientific, and instead of easing the sentencing judge's burden, such guidelines may often complicate it. *See infra* note 108 and accompanying text.

92 Judge Lopez's silence on her reasons for giving Horton no jail time has sparked a range of speculation in the Boston community regarding the basis for her decision. One theory cast her Cuban origin as "a key to her temperament and her avowed skepticism about government power. . . . Lopez comes from 'a tradition, a country and culture, with a raised eyebrow about the government.'" Pfeiffer, *supra* note 2 (quoting a "court colleague familiar with her background"). A group of supporters attempted to justify Judge Lopez's decision by characterizing the molestation victim as a less-than-innocent individual. That tactic backfired, creating greater controversy instead of diffusing it. *See* Ralph Ranalli, *Ethics-Law Limit on Judges at Issue in Lopez Dispute*, BOSTON GLOBE, Sept. 14, 2000, at A13. Another commentator speculated: "Charles Horton was given excessively lenient treatment because he is a member of a victim class: a 'transgendered person.' Since he practices an

charges of leniency, but also to attacks on the criminal justice system for its failure to provide uniformity.[93]

B. The Misguided Response by the Federal and State Governments

In response to inter-judge sentencing disparity and in an attempt to reduce undue judicial lenity, the federal and state governments have adopted increasingly severe sentencing laws since the 1970s.[94] This movement rejected the merits of a rehabilitative approach[95] to the criminal justice system in favor of a "just deserts" philosophy.[96] Proponents of mandatory sentencing laws argued that indeterminate

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alternative lifestyle, he deserves special treatment because in Judge Lopez's eyes]he represents diversity." Mark Charalambous, *Heterosexual Fathers Receive No Justice in Child Custody Cases*, TELEGRAM & GAZETTE (Worcester, Mass.), Oct. 3, 2000, at A9.

93 The California Judges Association has developed a protocol for selected judges to respond to allegations of leniency that are perceived as unwarranted through publication or broadcast. *See* ABA REPORT, *supra* note 9, § VI.C. Similarly, some state and local bar associations have developed their own methods of responding to criticism. *Id.* The ABA has expressed concern as to the "propriety and desirability of judges defending decisions of their brethren in the media." *Id.*

94 *See* Neil Steinberg, *The Law of Unintended Consequences*, ROLLING STONE, May 5, 1994, at 33, *reprinted in* CRIMINAL SENTENCING 41, 42 (Robert Emmet Long ed., 1995). Judge Marvin E. Frankel is credited with sparking the movement for sentencing guidelines, publishing influential books on the subject in 1972 and 1976. *See* FORER, *supra* note 13, at 56 & 180 n.17.

95 *See* Elizabeth A. Parsons, Note, *Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines*, 29 VAL. U. L. REV. 417, 430–32 (1994). Parsons explains:

> As crime increased, Americans wanted tougher sanctions for criminals. Because of the growing number of repeat offenders, the public no longer believed in the rehabilitative process. Americans thought the solution to escalating crime was to send offenders to jail for a long time, rather than to rehabilitate them. Accordingly, state governments responded to their constituencies' demands in the form of new sentencing systems.
>
> . . . Following the state legislatures' lead, Congress . . . abandoned the rehabilitative model.

Id. at 431–32 (footnotes omitted). Lois G. Forer, a former trial judge, offers another explanation, placing the onus on lawmakers instead of constituents:

> Legislators were motivated to "do something" about crime. "Soft judges" were a ready target. The old philosophy of rehabilitating felons was deemed to have failed.
>
> . . . The doctrine of "just deserts" was appealing. Exactly what a felon "deserves" as punishment for his or her offense was never articulated. It was assumed to be either a long period of imprisonment or the death penalty.
>
> With little discussion and no empirical evidence as to the effect the application of this theory would have on the public, the offenders and their families, the courts, and the prisons, legislators embraced the new dogma.

FORER, *supra* note 13, at 8.

96 *See* FORER, *supra* note 13, at 61–63. Forer argues that the present sentencing model is reflective of America's "rage to punish." According to Forer, this punitive model ignores the social factors causing rising crime and recidivism, and disregards alternative solutions to crime such as rehabilitation. *See id.* at 8–10.

sentencing schemes permit judges to sentence criminals to minimum time, thereby allowing them a swift opportunity to return to the streets and recidivate.[97] More structured sentencing, they argued, would deter crime while ensuring that criminals are punished.[98] Many states and the federal government[99] established sentencing commissions, and these commissions devised categories of offenses with corresponding punishment ranges.[100]

A 1998 national survey conducted by the National Institute of Justice reported that nineteen states presently have sentencing commissions, while ten states have implemented mandatory sentencing guidelines and seven states have adopted voluntary guidelines.[101] All states employ some form of mandatory minimum sentences.[102] Typically, under sentencing guideline systems, sentence length is determined by reference to sentencing grids that incorporate two general criteria: the nature of the crime and the background and character of the defendant.[103] These general criteria are broken down further to

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97 *See, e.g.*, BOOT, *supra* note 78, at 51 (arguing that longer incarceration periods are the solution to reducing crime).

98 *But cf.* FORER, *supra* note 13, at 62 (arguing that this deterrence theory is "patently fallacious" in regards to street criminals, white-collar felons, and professional criminals alike).

99 The federal version was the U.S. Sentencing Commission. *See* Parsons, *supra* note 95, at 420–21. The Commission's mandate was to help enact reform legislation to reduce disparities in sentencing. *See id.* at 421. Accordingly, the Commission created sentencing guidelines, which became effective on November 1, 1987. 18 U.S.C. § 3551 note (2000).

100 *See* FORER, *supra* note 13, at 56. One commentator argues that "since the passage of the [Sentencing Reform Act of 1984], federal judges have not effectively helped develop the rules which govern federal sentencing; they have been involved in sentencing, but largely uninvolved in sentencing lawmaking." Berman, *supra* note 81, at 93.

101 James Austin, *Sentencing Guidelines: A State Perspective*, NAT'L INST. JUST. J., Mar. 1998, at 25, 25. Mandatory, or "presumptive," guidelines establish rebuttable presumptions about appropriate sentences in individual cases. *See id.* Voluntary guidelines function as suggestions that the judge may look to for guidance, but which are nonbinding. *See* Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines*, 23 CRIME & JUST. 199, 201 (1998). The *Federal Sentencing Guidelines* do not establish rebuttable presumptions but are binding on the federal judiciary. Under the *Guidelines*, however, the judge may impose a sentence outside of the applicable guideline range upon finding that the case includes an aggravating or mitigating circumstance that the Sentencing Commission did not adequately consider, or if the government makes a motion for a downward departure based on "substantial assistance" to the government. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1998); *id.* § 5K1.1 (1989); *Twenty-Ninth Annual Review of Criminal Procedure*, 88 GEO. L.J. 799, 1503–04 (2000).

102 *See* Austin, *supra* note 101, at 25. According to one commentator,

> [F]orty states have mandatory minimums for repeat or habitual offenders, and twenty-four of these states do so in the form of a Three Strikes measure; thirty-eight states impose mandatory minimums for crimes involving use of a deadly weapon; thirty-six have mandatory minimums for drug possession or trafficking; and thirty states impose mandatory minimums for certain sex offenses.

Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 851 (2000).

103 Tchao, *supra* note 91, at 348.

incorporate a mélange of fact-specific criteria such as presence or absence of a weapon, the amount of drugs in possession, and prior criminal record. Sentence length is determined by locating the profile of the defendant and his crime on the grid.[104] Under these sentencing regimes, judges are no longer able to give flexible weight to the sundry factors properly relevant to a sentencing decision.[105] As former New York State judge Sol Wachtler stated, "[i]nstead, the judge simply applies a graded scale, adds up points (a job that has already been done by the prosecutor), and mechanically arrives at the sentence."[106] As another critic maintained: "[Judges] can only process, stamping defendants as they pass by like slabs of meat on a judicial conveyor belt."[107] In such a system, the punishment these laws force judges to impose often does not fit the crime.[108]

Moreover, mandatory sentencing laws cause judicial backlogs, require continual administrative oversight, and substitute judicial discretion with prosecutorial discretion.[109] The increase in prosecutorial discretion derives from the fact that the prosecutor's choice of which

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104 *Id.*

105 *See* FORER, *supra* note 13, at 58 ("[Judges] are required to follow guidelines that make sense in the majority of cases but operate unfairly on large numbers of persons. They are prohibited from considering facts and motives and conditions that should be the basis of every sentence.").

106 Wachtler, *supra* note 77, at 72.

107 Colman McCarthy, *Justice Mocked; The Farce of Mandatory Minimum Sentences, at* http://www.lectlaw.com/files/cri08.htm (last visited Apr. 19, 2002).

108 The story of Johnny Patillo, who is presently serving a mandatory minimum sentence of ten years without parole for possessing with intent to distribute crack cocaine, is paradigmatic of the inflexible constraints mandatory minimum laws place on judges. *See Prisoners of the Drug War: Johnny Patillo, at* http://www.stopthedrugwar.org/prisoners/patillo.html (last visited Apr. 19, 2002). Mandatory minimum sentencing laws for drug offenses take into account only two factors: the type of narcotic and its amount. *See* Eric E. Sterling, *Drug Laws and Snitching: A Primer* (1999), *at* http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer. The result is that

> the guy who sells the heroin to schoolchildren and the buddy who watches out for the police are guilty of the same crime. The girlfriend who gives a DEA informant the boyfriend's phone number and the mook who lets the kilo sit in his locker overnight for $10 are also guilty of the same crime.

Steinberg, *supra* note 94, at 43.

Some judges have thrown up their hands in disgust at the injustices wrought by the sentencing system and have resigned from the bench. Former trial judge Lois G. Forer was ordered by the Supreme Court of Pennsylvania to sentence a first-time robbery offender to five years in the penitentiary in compliance with a mandatory sentencing law. FORER, *supra* note 13, at 2. "Faced with the choice of violating a court order or imposing a sentence that [Forer] believed was contrary to long-established principles of justice and fairness," she left the bench. *Id.* at 4. Another judge in San Diego, Federal Judge Lawrence Irving, resigned in 1990 because of mandatory minimums, explaining that they "have destroyed the discretion of judges." McCarthy, *supra* note 107. In 2001, U.S. District Court Judge Edward F. Harrington announced he would no longer hear criminal cases "as a protest against federal sentencing guidelines." J.M. Lawrence, *Judge Riled by Guidelines Won't Take Criminal Cases,* BOSTON HERALD, June 28, 2001, at 12.

109 *See* Tchao, *supra* note 91, at 348–49; Parsons, *supra* note 95, at 422–23.

charges to bring dictates the judge's subsequent "choice" of which sentence to impose.[110] By increasing or decreasing the number of counts, or by bringing certain charges instead of others, a prosecutor can have a decisive influence on sentence length.[111] This dynamic arguably threatens the separation of powers doctrine, for it vests the sentencing power in the executive branch instead of in the judiciary.[112]

Further, under the *Federal Sentencing Guidelines*, there is little incentive for the defendant to plea-bargain because the defendant can calculate the likely punishment well before sentencing.[113] This situation has prompted prosecutors to engage in fact bargaining (for example, stipulating to certain facts, such as that a smaller quantity of drugs was found in the defendant's possession, in return for the defendant's cooperation) and charge bargaining (for example, dropping certain charges in striking a deal).[114] Because sentencing judges have little power to depart from the *Guidelines*, they are unable to reign in these prosecutorial abuses when they occur.[115] The result is that the *Guidelines* arguably produce even greater and more insidious disparity than would an indeterminate model.[116]

III
THE PROPOSED SOLUTION

A. Prosecutorial Sentence Appeals as an Alternative to Mandatory Sentencing Laws

The present system of sentencing laws, instead of alleviating many of the difficulties judges encounter, serves only to perpetuate them by

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110 *See* FORER, *supra* note 13, at 173 n.3.

111 Parsons, *supra* note 95, at 422; *see also* Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1314–15 (1997).

112 *See* FORER, *supra* note 13, at 3. The enactment of the *Guidelines* provoked an outcry from the federal judiciary. *See* Parsons, *supra* note 95, at 424. In fact, many judges disregarded the *Guidelines* until the Supreme Court rendered its decision in *Mistretta v. United States*, 488 U.S. 361 (1989). *See* Parsons, *supra* note 95, at 424. There, the Court held that Congress had not violated either the separation of powers doctrine or the nondelegation doctrine by requiring federal judges to serve on the newly created Sentencing Commission. *Mistretta*, 488 U.S. at 412.

113 *See* FORER, *supra* note 13, at 63 ("Since the adoption of guidelines and mandatory sentences, fewer defendants are willing to plead guilty knowing in advance the harsh sentences that will be imposed. Many prosecutors now oppose these laws because of the added burdens such trials impose.").

114 *See* Frank O. Bowman, III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 343–50 (2000); *cf.* Parsons, *supra* note 95, at 464 (describing how prosecutors may disadvantage defendants by presenting uncharged or unproven offenses at the defendants' sentencing hearings in support of a sentence enhancement).

115 *See* Parsons, *supra* note 95, at 423–24.

116 *See* Tchao, *supra* note 91, at 348 n.9.

obliterating judicial discretion. These laws, and the frequent retaliatory response by legislators to independent-minded judges—the threat of impeachment—essentially leave judges with their hands tied.[117] Legislatures have relegated sentencing judges to the task of grid-reading, thus taking their ability to "judge"—within the traditional meaning of the word—from them.[118] The resulting system leads to far more irrational results than would a wholly discretionary system and does nothing to restore the public's lost confidence in the judiciary.

The first step in regaining this confidence and restoring the integrity of the judicial system is to return to a discretionary, indeterminate sentencing model in which judges are given the freedom *to judge.* This proposition may appear radical to those who fear that judges will inevitably make grave mistakes under a discretionary system. The following anecdote by journalist Max Boot provides one example of this fear of judicial error:

> Kevin Roberson was furious with a former girlfriend. . . . He drove over [to where she was]. Once he arrived, witnesses later testified, she ran into the shower and tried to hide from him. But he found her, pistol-whipped her, and then shot her in the chest with a 9 millimeter semiautomatic. . . .
>
> What makes this tragedy even more disturbing is that it could easily have been prevented. At the time of the shooting, Roberson was awaiting trial in five cases, and he was still on probation for five other crimes. It didn't take a genius to see that Roberson was not somebody who should be on the street; though only twenty-three years old, he'd already piled up fourteen convictions. . . .
>
> But Judge Terry McDonald, of the 186th District Court in San Antonio, Texas, simply refused to crack down on Roberson. Prosecutors had tried to revoke Roberson's probation, but McDonald refused. On February 23, 1995, Roberson walked out of jail on a $5,000 bond set by Judge McDonald. A month later, Roberson's former girlfriend was dead.[119]

The potency of anecdotes like the one above lies in their heart-rending truth. Despite the inequities of mandatory sentencing laws, one could argue that they are a necessary evil to prevent judicial leniency. After all, had a mandatory sentencing scheme been in place, Judge McDonald may never have had the chance to have Kevin Roberson released from police custody. Many state legislatures, however, seem to have forgotten that there is an alternative to mandatory sentencing laws that does not require a trade-off between discretion and

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117 *See, e.g., supra* notes 12, 76 and accompanying text.

118 *See supra* notes 106–07 and accompanying text.

119 BOOT, *supra* note 78, at 31–32.

accuracy. Prosecutorial sentence appeals maintain judicial discretion while at the same time providing a mechanism for correcting judicial mistakes.

Returning to a discretionary system, then, does not require the sacrifice of judicial accountability. In recognition of judicial fallibility, state legislatures should uniformly adopt prosecutorial sentence appeal legislation as an alternative to and substitute for sentencing guidelines. As Governor George E. Pataki of New York explained in a speech addressing his own proposed legislation:

> [Prosecutorial sentence appeals] represent no attack on the judiciary; [r]ather, they rest on the undeniable proposition that even the best of judges make mistakes. . . . [T]hese mistakes can have tragic consequences for the victims of domestic violence and other crimes. . . .
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> Our system of criminal justice is, after all, not just about criminals, and lawyers, and judges and juries[.] . . . It is about people. Most of all, it is about the innocent people who are victims of crime. . . .
>
> . . . .
>
> The victims of crime love and laugh. They are just like you, and they are just like me. They hope and dream. They are happy, and they feel sadness. They get lonely, and they enjoy the company of others. Too often, they get killed, and all of the joys and wonders of their humanity are taken from them, and from us.[120]

While bordering on the melodramatic, Governor Pataki did convey three appropriate rationales for the adoption of prosecutorial sentence appeal legislation. First, he correctly assessed that "even the best of judges make mistakes."[121] Sentence review, prompted by prosecutorial appeals, could serve as a corrective for undue leniency, just as it serves as a corrective for undue severity when it is the defendant who appeals.[122] Second, unlike rigid guideline structures, prosecutorial sentence appeals could provide a mechanism for correcting errors without sacrificing judicial discretion. And third,

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120 George Pataki, *Law Day at Pace University School of Law, May 1, 1996*, 16 PACE L. REV. 463, 468–69 (1996) (discussing a proposed bill that would have authorized prosecutorial appeals of unduly lenient sentences).

121 *Id.* at 468.

122 Massachusetts Governor Cellucci also made an argument for parity of sentence appeals between prosecutors and defendants in a letter to the Massachusetts legislature accompanying his filing of the Massachusetts Proposal in September 2000: "Current law guards against excessively harsh sentences by allowing defendants the right to appeal their sentences to the appellate division of the superior court. Prosecutors, however, have no similar redress in the law to protect the public against the injustice of an excessively lenient sentence . . . ." Letter from Argeo Paul Cellucci, Governor of Massachusetts, and Jane Swift, Lieutenant Governor of Massachusetts, to the Massachusetts Senate and House of Representatives (Sept. 12, 2000) (on file with author).

prosecutorial sentence appeals could satisfy, at least to a degree, the current public dissatisfaction with the judicial system[123] by instilling a sense that error, when it occurs, will be corrected.

In short, prosecutorial sentence appeals may be the mechanism by which state courts could finally achieve a balance between judicial independence and accountability. Moreover, granting prosecutors the same right to appeal as defendants creates symmetry, a core tenet of the adversarial system.[124] And prosecutorial sentence appeals provide the judiciary with "the internal means to correct its own mistakes."[125] By dispensing with sentencing guidelines and adopting prosecutorial sentence appeal legislation, states will return the sentencing function to the branch in which it belongs—the judiciary.[126] Prosecutorial sentence appeal legislation may be conceptualized as a compromise,[127] one which strikes an appropriate balance between the rigidity of sentencing guidelines and the inevitable inconsistency and occasional misjudgments of individual sentencing judges.[128] Judge Learned Hand once said that "while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties [in judging]. . . . Let [judges] be severely brought to book, when they go wrong, but by those who will take the trouble to understand."[129] Prosecutorial sentence appeals brought before review boards composed of other judges would accomplish Judge Hand's aspiration. For it is other judges who are most likely to have the skills, experience, and knowledge to bring misguided judges "to book, when they go wrong" and who will most likely "take the trouble to understand" them.

B. Mandatory Written Explanations of Sentences

A return to a discretionary system should and must be accompanied by the adoption of legislation that would require judges to ex-

123 *See supra* Part II.A; *see also* Tchao, *supra* note 91, at 362 (noting that appellate review "instills public confidence in the criminal justice system").

124 *See* Forrest G. Alogna, Note, *Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction*, 86 CORNELL L. REV. 1131, 1141 (2001).

125 Tchao, *supra* note 91, at 361.

126 *Cf.* Berman, *supra* note 81, at 93–94 (arguing that federal judges' marginalization in modern federal sentencing stems from their failure to "fulfill their role as sentencing lawmakers within the [Sentencing Reform Act]").

127 *See* Tchao, *supra* note 91, at 349.

128 *Id.* As Simon E. Sobeloff, former Solicitor General and Chief Judge of the U.S. Court of Appeals for the Fourth Circuit, commented: "Equally to be avoided are two extremes: on the one hand the undeviating rigidity of statutes and on the other unappealable and sometimes capricious and inflamed sentencing by a single [person] on the bench." Simon E. Sobeloff, *The Sentence of the Court: Should There Be Appellate Review?*, 41 A.B.A. J. 13, 17 (1955), *quoted in* Tchao, *supra* note 91, at 349.

129 LEARNED HAND, *How Far Is a Judge Free in Rendering a Decision?*, *in* THE SPIRIT OF LIBERTY 103, 110 (3d ed. 1963), *quoted in* Pataki, *supra* note 120, at 470.

plain the basis for their sentencing decisions in written opinions.[130] In the absence of written opinions, judges are frequently rendered voiceless and defenseless in the face of public scrutiny.[131] Instituting a system requiring mandatory written explanations would not hinder judicial independence and would greatly strengthen judicial accountability. It would provide reasonable explanations for sentences that might otherwise be considered unjustifiably disparate or unduly lenient. Finally, it would provide a basis for informed appellate review.[132]

C. Broad "Unduly Lenient or Unreasonable" Appeal Provisions

What this Note does not advocate is the adoption of a prosecutorial sentence appeal right without first dispensing with existing sentencing guidelines.[133] Adopting prosecutorial sentence appeals while maintaining existing guidelines would only magnify the already expansive degree of prosecutorial discretion and the potential for abuse that exist under the prevailing sentencing models.[134] As Professor Jeffrey Standen notes, the prosecutor is "clearly now the most powerful player in the criminal justice system."[135] He further explains:

> It was predictable that an attempt to control the discretion inherent in the criminal justice system by trying to eliminate one facet of it, as was attempted with the Sentencing Guidelines, would have the harmful consequence of merely concentrating its exercise in the hands of another actor. The guidelines transfer the power of the judge to the prosecutor.[136]

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130 One argument against instituting a requirement for written explanations is that it would add substantially to the workload of trial judges. The same argument may be made against instituting prosecutorial sentence appeals because such a system would increase the workload of appellate judges. While this argument is undoubtedly true, as Judge Frankel has stated, it is hardly enough "to warrant much discussion. Considering all the things on which . . . judges ponder, the effort to make sentences more rational and just would hardly seem unworthy of their labors." MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 78 (1973).

131 *See supra* notes 92–93.

132 Discretionary sentencing schemes traditionally have not required written explanations for sentences,

> and that may explain in part why in many jurisdictions allowing for limited appellate review under an abuse standard, such review has had only a limited impact. . . . [M]eaningful review [is] often impossible to achieve absent a statement of grounds by the sentencing judge and the development of standards against wbich those grounds [can] be assessed.

WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.3(d) (2d ed. 1992).

133 Notably, no other Western country has adopted sentencing guidelines comparable to those of the United States. Tonry, *supra* note 101, at 200.

134 *See supra* notes 109–16 and accompanying text.

135 Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1513 (1993).

136 *Id.* at 1537–38.

The very premise of this Note is that prosecutorial sentence appeal legislation be adopted *as a substitute* for sentencing guidelines and mandatory minimums.[137] A return to a discretionary system, coupled with the introduction of prosecutorial sentence appeal legislation, would return sentencing discretion to an appropriately impartial party—the judge—while confining prosecutorial discretion to a more reasonable yet sufficiently accommodating level. It would establish a balance of power in the courtroom, giving sentencing judges the ability to control prosecutorial abuses of discretion[138] while affording prosecutors a concomitant right to correct judicial abuses of discretion through appeal.

As noted in Part I, some states with existing statutes condition the availability of prosecutorial sentence appeals on judicial deviation from existing sentencing guidelines.[139] These statutes should be dispensed with, along with the sentencing guidelines to which they are tied, and replaced with "unduly lenient or otherwise unreasonable" appeal provisions.[140] Some may worry that allowing for sentence appeals on such broad grounds could open the floodgates to a stream of baseless appeals by prosecutors. This concern, however, should be tempered by the fact that prosecutors, as compared to defendants, have less personal investment in appealing sentences. This, coupled with the fact that prosecutors are frequently overburdened with heavy caseloads, leads to the conclusion that most prosecutorial appeals will

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137 It remains to be seen whether the Massachusetts legislature will take this approach to sentencing reform. Despite widespread calls for sentencing reform, the passing of 2001 merely saw the maintenance of the status quo. Both the Massachusetts Proposal for prosecutorial sentence appeals, *see supra* note 72, and the most recent sentencing guideline bill, *see supra* note 75, were introduced without being enacted into law. *See also* Ralph Ranalli, *Finneran Vows to Pass Sentence Guidelines*, BOSTON GLOBE, Mar. 14, 2001, at B1 (acknowledging "long wrangling" from camps with competing viewpoints over the proper form reform should take). The sentencing guideline bill incorporates prosecutorial sentence appeals into its mandatory sentencing guideline scheme. *See* Ranalli, *supra* note 75. Thus, should this bill be passed by the Massachusetts Senate, the balance of power in Massachusetts courts will be unduly tipped towards the prosecutors.

138 *See supra* text accompanying note 115.

139 *See supra* Part I.B.2.

140 It is unlikely that Congress will abolish the *Federal Sentencing Guidelines* any time in the near future. *See* Bowman, *supra* note 114, at 350. *See generally* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (discussing proposals for reforming the *Guidelines* themselves as well as alternative proposals for reforming the federal sentencing system upon the eventual rejection of the *Guidelines*). This Note therefore advocates state reform. Many states, including Massachusetts, still have indeterminate sentencing structures, while states with determinate structures may be more inclined than Congress to dispense with their existing guidelines. *See* Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 427 (2000). Louisiana and Wisconsin both had sentencing guidelines that they later repealed, and "three other states have substantially weakened their guidelines." *Id.* Furthermore, "at least six states have considered and rejected the idea of sentencing guidelines." *Id.*

be grounded in professional judgment that an error has occurred, and not in frivolity. As an added safeguard, state legislatures could adopt an approval procedure similar to that under the federal system,[141] requiring prosecutors to obtain the approval of the state attorney general as a prerequisite to appealing.

D. Abuse of Discretion Standard of Review

Further, the adoption of an abuse of discretion review standard would deter overzealous prosecutors from making unfounded "leniency" or "unreasonableness" appeals in the first instance, and would ensure their failure when they do occur. Indeed, a summary dismissal procedure, akin to a motion for summary judgment, could be utilized by appeal boards to extinguish patently unfounded appeals before they are given any serious consideration.

In 1996, the Supreme Court established that appellate sentence review under the *Federal Sentencing Guidelines* requires a deferential standard of review, especially on findings of fact.[142] In *Koon v. United States*,[143] the government appealed the sentences imposed on two Los Angeles Police Department officers convicted on federal charges for the beating of Rodney King.[144] The federal district court had granted a downward departure from the *Federal Sentencing Guidelines*, and the Court of Appeals for the Ninth Circuit reviewed the resulting sentences de novo.[145] The Supreme Court ruled that the Court of Appeals should have deferred to the trial court under an abuse of discretion standard.[146]

Koon established that an abuse of discretion standard applies to sentence review under the *Guidelines*. However, it remains unclear whether the Court's holding would apply to appellate sentence review outside of guideline structures, as when an appeal occurs under the broad "leniency" or "unreasonableness" grounds advocated for in this Note. Policy dictates that abuse of discretion is indeed the appropriate standard for appellate review under "leniency" or "unreasonable-

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141 *See supra* note 40 and accompanying text.

142 *Cf.* Tchao, *supra* note 91, at 346 n.3 (explaining that "the fact that sentencing may require a discretionary judgment does not mean that it should escape review altogether," and noting that "in other areas of the law discretionary judgments are subject to a deferential standard of review (i.e., abuse of discretion)" (citing Daniel E. Wathen, *Disparity and the Need for Sentencing Guidelines in Maine: A Proposal for Enhanced Appellate Review*, 40 ME. L. REV. 1, 5 n.10 (1988))).

143 518 U.S. 81 (1996).

144 *See id.* at 85–90.

145 *See id.* at 89–90.

146 *Id.* at 91; *cf.* Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion:* Koon*'s Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 550 (1999) (critiquing the lack of clarity of the abuse of discretion standard of review adopted in *Koon*).

ness" appeal statutes. Taking the Horton case as an example, if critics of the decision are correct, then appellate review under an abuse of discretion standard would have sufficed to correct Judge Lopez's misjudgment.[147] A more searching standard of review is neither necessary for sentence review to function effectively nor desirable, for a stricter review standard would only unnecessarily complicate the review board's task. Further, the abuse of discretion standard alleviates the main argument against appellate review: that the appellate court's lack of personal exposure to defendants and victims impairs its ability to make intelligent sentencing decisions.[148]

E. Administrative Agencies Charged with the Task of Compiling State Sentencing Statistics

Admittedly, if prosecutorial appeal legislation were to replace existing mandatory sentencing laws, one of the goals behind the existing legislation—reducing disparity in sentences—would be sacrificed to some degree. However, the number of disparate sentences could be limited by creating administrative agencies charged with the task of compiling state sentencing statistics.[149] These statistics could assist both trial judges devising sentences and appellate judges reviewing those sentences, thereby reducing disparity.[150] Furthermore, after prosecutorial sentence appeal legislation has been in place for some time, a common law on sentencing, arising from appellate opinions, will emerge.[151] This body of law will then help guide sentencing judges, further reducing sentencing disparity.[152]

In any event, the overriding emphasis that sentencing guidelines place on uniformity is often at the expense of individual fairness. While it is important to prevent substantial sentencing disparities, it is also important to keep in mind the fact that no two defendants are completely alike. As the French philosopher Michel de Montaigue once said, "[r]esemblance does not make things so much alike as dif-

147 *Cf. supra* note 6 and accompanying text (describing public outrage at Judge Lopez's ruling).

148 *See* Tchao, *supra* note 91, at 401 (explaining that this argument against appellate review is further alleviated by removing the appellate court's power to alter sentences under its review).

149 *Id.* at 402 (footnote omitted).

150 *See id.* at 402–03.

151 *Id.* at 403. According to Professor Richard Frase, a "rich body of appellate case law" surrounding Minnesota's sentencing guidelines has already emerged in that state's courts. *See* Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 398 (1997). Indeed, had prosecutorial sentence appeals been implemented sooner, a common law on sentencing would presumably already be in place. The sentencing principles emerging from this common law perhaps could have prevented the many current proposals for "drastic remedies which cut against the grain of the law." LOIS G. FORER, CRIMINALS AND VICTIMS 311 (1980).

152 *See* Tchao, *supra* note 91, at 403.

ference makes them unlike. Nature has committed herself to make nothing other that was not different."[153] Prosecutorial sentence appeals, as an alternative to mandatory sentencing laws, will shift the main focus of sentencing policy from uniformity to judicial accountability. In doing so, only blind uniformity in sentencing will be sacrificed.

CONCLUSION

On a final note, state legislatures and the public must acknowledge that retribution, deterrence, and incapacitation are not the only functions our criminal justice system is designed to serve. If more attention were paid to the goal of rehabilitation, recidivism rates would be lower, prisons would be less crowded,[154] and crime would be less prevalent. Rehabilitation, however, often is achieved more effectively outside of prison walls than within them. In an appropriate case, where an assessment of all relevant variables leads to the conclusion that imprisonment may do more harm than good, a supervised noncustodial sentence may be best for the individual as well as for society. This proposition, when expressed by others in the past, has met with stiff resistance from the victims' rights movement. However, under a system of prosecutorial sentence appeals, misjudgments regarding the propriety of a probationary sentence in a given case will not only be less frequent, but will also be more susceptible to correction. Both the Supreme Court and the ABA[155] have expressed their support for prosecutorial sentence appeals—the former having done so more than two decades ago.[156] State legislatures would be wise to follow.

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153 Wathen, *supra* note 142, at 1 (quoting *Of Experience*, *in* MONTAIGNE, SELECTED ESSAYS 537, 537 (Charles Cotton–W. Hazlitt trans., 1949)).

154 A 1998 study by the National Council on Crime and Delinquency attributes the increased incarceration rates of recent years to overall increases in sentence lengths. *See* Austin, *supra* note 101, at 26.

155 *See* STANDARDS FOR CRIMINAL JUSTICE SENTENCING Standard 18-8.3 (3d ed. 1994). The most recent *Standards for Criminal Justice Sentencing*, promulgated by the ABA, takes the following view:

> [A]ppeals from sentences should be subject to the normal principle that the right to initiate appeals should be afforded to both parties to the trial court proceedings. The law regarding sentence determination and sentence imposition has matured in the past twenty-five years. An important part of any mature body of legal norms and procedures is the oversight provided by appellate review. . . . The manifest value of appellate review of sentences is best realized if both parties have the right to take appeals.

Id.

156 *See supra* note 34 and accompanying text.