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A PRACTICAL LOOK AT THE SENTENCING PROVISIONS OF S. 1722

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The current federal criminal sentencing provisions clearly need re-vamping. As the Senate Committee on the Judiciary has noted:

The sentencing structure of present Federal criminal law . . . is riddled with irrationality and inconsistency. In title 18 alone, there are no fewer than seventeen different maximum terms, apart from the death penalty, and fourteen different fine levels. Only occasionally, as if by accident, are fines related to the amount of injury inflicted or gain realized by the offender. . . . Grading of offenses is also erratic. Similar conduct is often treated with gross disparity. . . . In plain terms, the present penalty structure offends the precept of equality before the law.¹

The present laws give the sentencing judge considerable latitude in imposing sentences. While this latitude furthers the goal of individualized sentencing,² it leaves the judge with little guidance, other than his own experience, in choosing the most appropriate sentence. He has little access to information about the past success of particular sentences or about what other judges in other courts have done with respect to similarly situated defendants.³ Further, each judge has his or her own ideas

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For the past four years Judge Tjoflat has been a member of the Advisory Corrections Council, established by 18 U.S.C. § 5002 (1976). He has served as a member of the Judicial Conference of the United States Committee on the Administration of the Probation System since 1972, and as Chairman of that committee since 1978. The Probation Committee is a standing committee responsible for overseeing the organization and work of the federal probation system and for conducting sentencing institutes for judges and others as authorized by 28 U.S.C. § 334 (1976).

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¹ S. REP. NO. 96-553, 96th Cong., 2d Sess. 5 (1980).

² See note 59 *infra*.

³ The judiciary itself is very concerned about this lack of reliable information. In an attempt to remedy the problem, the Judicial Conference of the United States Committee on the Administration of the Probation System is currently developing a probation information management system, known as "PIMS," which will "[p]rovide up-to-date information to guide sentencing courts in selecting sentences for convicted defendants." DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JU-

about the purposes to be accomplished through sentencing.⁴ As a result, similarly situated defendants often receive widely varying sentences for committing the same crime.⁵

These shortcomings in federal sentencing arise at least in part from the absence of a systematic, comprehensive federal criminal code.⁶ Efforts to correct this deficiency can be traced to 1952, when the American Law Institute began work on a model penal code.⁷ This model code, which was published in official form ten years later,⁸ led many states to enact comprehensive criminal codes.⁹ Following their example, Congress, in 1966, created the National Commission on Reform of Federal Criminal Laws to study the existing law and to recommend "legislation which would improve the Federal system of criminal justice," and "such changes in the penalty structure as the Commission may feel will better serve the ends of justice."¹⁰ The Commission's final report¹¹ has served as the foundation for several proposed bills to codify the United States criminal law. The current Senate bill, S. 1722, which is the subject of this article, is thus the result of considerable thought and labor.¹²

Section 101 of S. 1722 describes the general purposes of the bill. In

DICIAL CONFERENCE OF THE UNITED STATES HELD AT WASHINGTON, D.C., MARCH 10-11, 1977, AND SEPT. 15-16, 1977 74-75. This pilot project, which is still in the developmental stage, is projected to be ready for pilot use in 1983.

⁴ See S. REP. NO. 96-553 at 915.

⁵ See generally Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972). Specific examples of unwarranted sentence disparities have been chronicled elsewhere. See, e.g., A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 29 (1976); *Reform of the Federal Criminal Laws: Hearing before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 3896-912 (1972) (INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, REPORT ON THE INSTITUTE STUDY OF SENTENCING IN FEDERAL DISTRICT COURTS); *Reform of the Federal Criminal Laws: Hearings on S. 1 and S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 8101-32 (1974) (excerpts from THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT) [hereinafter cited as *1974 Hearings*]; Schwartz, *Reform of the Federal Criminal Laws: Choices, Tactics and Prospects*, 1977 DUKE L.J. 171, 174; Zumwalt, *The Anarchy of Sentencing in the Federal Courts*, 57 JUD. 96, 97-98 (1973). But see Hoffman, *Purposes and Philosophies of Sentencing*, 75 F.R.D. 287, 288 (1977) (sentencing disparity is no longer a significant problem).

⁶ See S. REP. NO. 96-553 at 3.

⁷ *Id.* at 11. See generally Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952); Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968).

⁸ See MODEL PENAL CODE (Proposed Official Draft, 1962).

⁹ S. REP. NO. 96-553 at 11-12. See Schwartz, *supra* note 5, at 174.

¹⁰ Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516, 1517, amended, Pub. L. No. 91-39, 83 Stat. 44 (1969). See note preceding 18 U.S.C. § 1 (1976); Schwartz, *supra* note 5, at 175; S. REP. NO. 96-553 at 12.

¹¹ NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971).

¹² S. 1722, 96th Cong., 1st Sess. (1980). S. 1722 is on the floor of the Senate at the time this article is being written. Its counterpart in the House, H.R. 1647 is now in committee.

the area of sentencing, the bill seeks to establish "a system of fair and expeditious procedures" for imposing sentences.¹³ Sentences imposed under the system must be designed to fulfill four specific goals: to deter criminal conduct, to dispense just punishment, to protect the public from further criminal acts of the defendant (to incapacitate the defendant), and to promote correction and rehabilitation.¹⁴

Although these purposes are straightforward, attaining them is not a simple process, and despite the concern and effort that has gone into drafting S. 1722, its sentencing provisions still contain defects. The purpose of this article is to pinpoint several problems generated by the bill's sentencing scheme and to evaluate the likely impact of that scheme on the federal criminal justice system as a whole.

I shall assess the sentencing provisions of S. 1722 from the practical standpoint of a judge who must interpret and apply them. My chief vehicle for discussion will be a hypothetical case, beginning with the arrest of two hypothetical offenders and proceeding through their sentencing hearings, motions to correct their sentences and their various appeals. As a foundation for my hypothetical case, I must predict how S. 1722 would be implemented. In making my predictions I shall use a strictly literal approach to interpreting the bill and attempt to take the most obvious and direct path.

Before commencing with the hypothetical case, I shall give a brief overview of the S. 1722 sentencing provisions. We may then proceed through the hypothetical case and point out problems as they might arise in the context of the various sentencing proceedings. I shall conclude the article with some general observations about the effectiveness of the S. 1722 provisions and some suggestions for improving the quality of the sentencing function.

I. AN OVERVIEW OF S. 1722¹⁵

S. 1722 would create an independent United States Sentencing Commission within the judicial branch to serve as the prime mover in

(The sentencing provisions of H.R. 1647 are substantially the same as those of last year's version, H.R. 6915.)

I have selected S. 1722 for my discussion, rather than its House counterpart, because federal criminal code revision was initiated by the Senate Judiciary Committee and because the sentencing provisions of S. 1722, in their present form, have the unqualified endorsement of the Department of Justice.

¹³ *Id.* tit. I, §§ 101(c), 101(c)(3).

¹⁴ *Id.* § 101(b).

¹⁵ The reader should bear in mind that this review does not purport to be comprehensive or detailed. My object is only to provide an overview of the bill in order to prepare unfamiliar readers for the analysis that follows. I discuss only those portions of the bill that are directly relevant to later discussion.

federal sentencing reform.¹⁶ Under the proposed legislation one of the Commission's chief duties would be to promulgate guidelines for federal sentencing courts to use in determining sentences for criminal defendants. These guidelines, covering "each category of offense involving each category of defendant,"¹⁷ would prescribe the type and extent of sentence to impose in most cases.¹⁸

In order to create the sentencing guidelines, the Commission must categorize federal offenses according to severity.¹⁹ S. 1722 delineates specific matters and circumstances the Commission must consider in performing this task.²⁰ In addition to offense categories, the Commission must establish categories of defendants that reflect different combinations of specified personal characteristics.²¹

The finished guidelines probably would take the form of a grid that reflects the various combinations of offense and offender categories.²² In establishing sentences to fit these different combinations, S. 1722 directs

¹⁶ S. 1722 provides:

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 101(b) of title 18, United States Code [these purposes include just punishment, deterrence, incapacitation and rehabilitation];

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 101(b) of title 18, United States Code.

S. 1722, *supra* note 12, tit. III, § 991(b).

¹⁷ *Id.* § 994(b).

¹⁸ *Id.* § 994(a)(1).

¹⁹ *Id.* § 994(c). See *id.* tit. I, § 2301(b); S. REP. NO. 96-553 at 923.

²⁰ S. 1722, *supra* note 12, tit. III, § 994(c). See notes 55 & 60 & accompanying text *infra*.

²¹ S. 1722, *supra* note 12, tit. III, § 994(d). Two recent amendments to the bill, made after the Senate passed its predecessor, S. 1437, in 1978, might be noted. The first directs the Commission to assure that the guidelines and policy statements remain neutral "as to the race, sex, national origin, creed, and socioeconomic status of offenders." *Id.* The second requires the Commission to ensure that an offender's education, vocational skills, employment record, family ties and responsibilities, and community ties are not considered in the decision to impose a term of imprisonment or in deciding the length of a term of imprisonment. *Id.* § 995(e).

²² This grid might resemble the one the United States Parole Commission currently uses in determining when to release incarcerated offenders. See 28 C.F.R. § 2.20 (1979); Hoffman & Beck, *Parole Decision-Making: A Salient Factor Score* 2 J. CRIM. JUST. 195 (1974); Hoffman & DeGostin, *Parole Decision-Making: Structuring Discretion*, FED. PROBATION, Dec. 1974, at 12-15; Hoffman & Stone-Meierhoefer, *Application of Guidelines to Sentencing*, 3 LAW & PSYCH. REV. 53 (1977).

the Commission to bear in mind the four purposes of sentencing: deterrence, incapacitation (protecting the public), punishment, and rehabilitation.²³ Further, the Commission must take into account "the nature and capacity of the penal, correctional, and other facilities and services available"²⁴ in order to assure full and proper utilization.²⁵

Although implementation of S. 1722 is expected to be an overall reformation of the federal sentencing system, S. 1722 directs the Commission to be guided by the average sentences imposed in similar cases prior to passage of the bill.²⁶ Accordingly, the guidelines should be devised so that a defendant sentenced under S. 1722 would receive a sentence similar to that he would have received under current law. However, notwithstanding this general rule, S. 1722 mandates that the Commission guidelines specify a substantial term of imprisonment for particular types of defendants who have a substantial history of criminal conduct or meet other specified criteria.²⁷

S. 1722 also directs the Commission to issue policy statements to assist district courts in applying the guidelines and in dealing with collateral matters such as probation conditions, modification of sentences, and acceptance or rejection of plea bargains.²⁸

Under the proposed bill, a probation officer initially conducts a presentence investigation and presents the results to the judge.²⁹ Armed with this information and the information produced at the sentencing hearing, the judge must make findings of fact concerning "the nature and circumstances of the offense and the history and characteristics of the defendant."³⁰ These findings will indicate the correct offense and defendant categories, and hence the proper guideline sentencing range to apply. Next the judge must determine the primary purpose for sentencing in the particular case at hand: Is deterrence of great concern? Do the facts indicate that the defendant needs to be incapacitated—that

²³ S. 1722, *supra* note 12, tit. III, § 994(g). The Commission must, however, ensure that defendants are not sentenced to a term of imprisonment for the purpose of rehabilitation. *Id.* § 994(j). The need for rehabilitation may be considered in imposing a sentence of a fine or probation, however. *See* S. REP. NO. 96-553 at 942.

The Commission must also consider the need to provide certainty and fairness in sentencing and to avoid unwarranted sentence disparity among convicted offenders. S. 1722, tit. III, § 994(i).

²⁴ S. 1722, *supra* note 12, tit. III, § 994(g).

²⁵ *Id.*

²⁶ *Id.* § 994(l).

²⁷ *Id.* § 994(h). *See* notes 72-73 & accompanying text *infra*.

²⁸ S. 1722, *supra* note 12, tit. III, § 994(a)(2).

²⁹ *Id.* tit. I, § 2002(a). S. 1722 provides the sentencing judge with other means of gathering information about the defendant. He may order a presentence study and report by the Bureau of Prisons, *id.* § 2002(b), or he may order a presentence examination and report by a psychiatric examiner. *Id.* § 2002(c).

³⁰ *Id.* § 2003(a)(1).

is, physically restrained—in order to protect the public from his future crime? How great is the need for punishment? Does the defendant need “educational or vocational training, medical care, or other correctional treatment”?³¹

Once he has determined the primary purpose for sentencing the defendant, the judge must consider the range of sentences available³² under the guidelines.³³ The judge must impose a sentence of the type and extent set forth in the guidelines unless he or she finds that “an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.”³⁴

Upon pronouncing sentence, the court must state its reasons for imposing that particular sentence. If the sentence is within the guideline range, the court must state why it chose a particular point within the range.³⁵ If the sentence is outside the guideline range, the court must explain why the guideline range was inappropriate in the particular case at hand.³⁶

The defendant may appeal a sentence for a felony or Class A misdemeanor if it falls above the guideline range, and the prosecutor may appeal if the sentence falls below the range.³⁷ The court of appeals, in either case, considers whether the sentence is “unreasonable” in light of the goals of sentencing and the reasons the lower court advanced for

³¹ *Id.* § 2003(a)(2). As noted earlier, the need for rehabilitation cannot serve as a purpose for imprisoning the offender. See note 23 *supra*.

³² S. 1722, *supra* note 12, tit. I, § 2003(a)(3). S. 1722 provides for probation, fines and imprisonment. *Id.* § 2001(b). In addition to these basic sentences, a judge may order criminal forfeiture, *id.* § 2004; notice of conviction to the victims of the crime, *id.* § 2005; restitution, *id.* § 2006; or supervised release after a term of imprisonment, *id.* § 2303.

³³ Under the guidelines the judge will probably have some discretion, within relatively narrow boundaries. For instance, title III, § 994(b) provides that when the guidelines specify a term of imprisonment, the Commission may present the judge with a range in which to set the length of the term, as long as the maximum term in the range does not exceed the minimum term by more than 25%. Similarly, the applicable guidelines might present several alternative types of sentence. On the other hand, the Commission could decide to restrict the sentence to only one type and to provide no sentencing range at all. See note 263 & accompanying text *infra*.

³⁴ S. 1722, *supra* note 12, tit. I, § 2003(b).

³⁵ *Id.* § 2003(c).

³⁶ *Id.*

³⁷ *Id.* § 3725. However, neither side can appeal if “the sentence is equal to or greater than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure” or if “the sentence is that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C).” *Id.* §§ 3725(a) & (b). The prosecutor must have the personal approval of the Attorney General or the Solicitor General before the government may appeal the imposition of a sentence below that specified in the guidelines. *Id.* § 3725(b).

choosing the challenged sentence.³⁸

If the sentence is within the guideline range, neither party may appeal. A party may nonetheless contend that the sentencing judge applied the guidelines incorrectly. In such a case the party may move the sentencing court to correct the sentence under a proposed amendment to Federal Rule of Criminal Procedure 35(b)(2).³⁹ Under this procedure the sentencing court can correct the sentence within 120 days of its imposition.⁴⁰ Either party then can petition a United States Court of Appeals for leave to appeal a district court order granting or denying a rule 35(b)(2) motion.⁴¹

The proposed statute would preserve existing rule 35 provisions allowing correction of an illegal sentence and correction of a sentence imposed in an illegal manner. Correction of a sentence imposed in an illegal manner would have to occur within 120 days of sentencing.⁴² Correction of an illegal sentence can occur at any time.⁴³ S. 1722 does not purport to disturb current methods of appealing lower court decisions when an illegal sentence is alleged.⁴⁴

Finally, under S. 1722 the convicted offender would serve his sentence in full, except for minor "good time" adjustments.⁴⁵ Parole, and the Parole Commission, would be abolished.⁴⁶

With this general overview we can proceed to the hypothetical case. In the text I shall refer to Senate Bill 1722 as "the Code," since I shall be assuming, for the purposes of my analysis, that S. 1722 has been passed in its current form.

³⁸ *Id.* § 3725(e).

³⁹ S. 1722 provides:

Rule 35.—Correction of Sentence

(a) Correction of an Illegal Sentence.—The court may correct an illegal sentence at any time.

(b) Correction of an Illegally or Erroneously Imposed Sentence.—The court, on motion of either party or on its own motion, may correct—

(1) a sentence imposed in an illegal manner;

(2) a sentence imposed as a result of incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

(3) a sentence imposed under 18 U.S.C. 2006 as a result of the use of an inappropriate procedure to determine the amount of restitution;

within 120 days after the sentence is imposed.

Id. tit. II, § 111(t).

⁴⁰ *Id.*

⁴¹ *Id.* tit. I, §§ 3723(b), 3724(d).

⁴² *Id.* tit. II, § 111(t). See note 197 *infra*.

⁴³ S. 1722, *supra* note 12, tit. II, § 111(t). See note 193 & accompanying text *infra*.

⁴⁴ See note 273 & accompanying text *infra*.

⁴⁵ S. REP. NO. 96-553 at 927.

⁴⁶ *Id.* The bill does, however, provide for supervised release after imprisonment. If the court imposes a prison term of over one year, § 2303 allows it to impose a term of supervised release to commence as soon as the prison term ends. S. 1722, *supra* note 12, tit. I, § 2303.

II. THE HYPOTHETICAL CASE

A. THE FACTS, THE CHARGE AND THE PRESENTENCE INVESTIGATION REPORT

Suppose that two individuals, "Advantaged" and "Disadvantaged," are arrested in the Florida Keys while smuggling 5,000 pounds of marijuana and ten kilograms of cocaine into the United States. Thereafter, a grand jury in the United States District Court for the Southern District of Florida returns a one-count indictment charging Advantaged and Disadvantaged with drug smuggling in violation of 18 U.S.C. § 1812, a Class B felony.⁴⁷ At arraignment, the defendants enter pleas of not guilty. They move on fourth amendment grounds to suppress the evidence that the federal officers seized at the time of arrest, but the district judge denies their motion. The defendants then consent to a bench trial and are found guilty as charged. The district judge requests a presentence investigation of each defendant⁴⁸ and instructs the probation officer conducting the investigations to indicate in his reports the sentencing alternatives prescribed in the Commission guidelines and policy statements.⁴⁹ The court subsequently receives reports of

⁴⁷ S. 1722, *supra* note 12, tit. I, § 1812.

⁴⁸ Section 2002(a) requires that probation officers conduct and report presentence investigations in accordance with Federal Rule of Criminal Procedure 32(c). *Id.* § 2002(a). Rule 32(c), as amended by S. 1722, requires an investigation and report in each case unless "the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 2003, and the court explains this finding on the record." *Id.* tit. II, § 111(s)(4).

⁴⁹ Rule 32(c), as amended by S. 1722, requires:

The report of the presentence investigation shall contain—

(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) Verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed; and

(E) such other information as may be required by the court.

Id. § 111(s)(2 Report). The practice prior to S. 1722 has been to include the applicable Parole Commission guidelines in presentence investigation reports. *See* DIVISION OF PROBATION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE INVESTIGATION REPORT 7 (Publication 105, 1978).

those investigations and, in accordance with rule 32(c)(3), Federal Rules of Criminal Procedure, ensures that appropriate disclosure is made to the defendant, the counsel for the defendant, and the attorney for the government.

The presentence investigation reports summarize the evidence produced at trial: Advantaged and Disadvantaged, both twenty-one years of age, played identical roles in the charged offense and are equally culpable. A team of Drug Enforcement Administration and U.S. Customs Service agents arrested them at 2:00 a.m. while they were unloading marijuana and cocaine from a fifty-four-foot motor yacht onto a private dock near Key Largo. A nautical map found on the yacht indicates that the yacht had made a rendezvous with a "mother ship" one hundred miles out in the Gulf of Mexico the previous day, presumably to pick up the contraband. Apparently, other participants in the smuggling operation were to meet the defendants at the dock, but suddenly aborted their mission when they discovered the federal agents staked out around the landing site. The Assistant United States Attorney in charge of the case told the probation officer conducting the presentence investigation that Advantaged and Disadvantaged, along with seven or eight others still at large, had been suspected of smuggling activities for some time and that, following an informant's tip, the government had begun the surveillance that culminated in the defendants' arrests. The presentence investigation reports, however, contain no facts about the defendants' involvement in drug smuggling other than those derived from the recent surveillance. These facts were related by the agents who both participated in that surveillance and arrested the defendants for the charged offense.

Advantaged's presentence investigation report discloses that he comes from a well-to-do, socially prominent Miami family and that he has completed two years of college. He was on a one-semester leave of absence, due to unsatisfactory academic performance, when the offense occurred. Advantaged has been gainfully employed only during summer vacations from school, when he worked as a laborer on some construction jobs for his father, a road builder. His performance on those jobs was rated satisfactory.

Advantaged's parents' marriage is intact and apparently tranquil. Advantaged has two older sisters, both married. His family members told the investigating probation officer that the family is close-knit and that if Advantaged were placed on probation, they would do everything possible to help him rehabilitate himself and complete his college work. They professed to have been completely surprised by Advantaged's involvement in smuggling; nothing had previously occurred, they said, that would have led them to suspect that he was involved with drugs.

Disadvantaged's presentence investigation report discloses an entirely different background. He is the product of a broken home from Miami's inner-city; neither parent could be located. Disadvantaged has had no formal schooling since the ninth grade. He says that he worked briefly for three companies during the past two years, but the investigating probation officer was unable to verify this claim. Although Disadvantaged has had no identifiable means of support, he recently moved into an expensive apartment and he owns a new automobile. He was convicted in state court of possessing marijuana when he was eighteen years old and was placed on probation, which he satisfactorily served, for one year. It is inferrable from the presentence investigation report that he makes his living trafficking drugs.

In his presentence investigation report on each defendant, the probation officer set out the Sentencing Commission guidelines he thought applicable in light of the information he had gathered. As previously noted,⁵⁰ the district court, in determining the appropriate sentence, must first ascertain the appropriate category of offense and category of defendant for the case at hand. Then the court must refer to the Sentencing Commission guidelines and policy statements for the applicable sentencing range. The judge must "impose a sentence of the kind, and within the range," described in the sentencing guidelines.⁵¹ If the judge, however, finds aggravating or mitigating circumstances that the Sentencing Commission did not consider adequately in formulating the guidelines, he may impose a sentence outside of the guideline requirements.⁵²

B. THE APPLICABLE GUIDELINES

According to the probation officer, section 1812 violations committed under the circumstances of this case fall into a "category of offense" that the Commission has designated as "very high severity." Since Advantaged and Disadvantaged played the same role in the offense and are equally culpable, the same category of offense applies to both of them; the guidelines and accompanying policy statements require that both Advantaged and Disadvantaged be sentenced to a term of imprisonment.

The probation officer finds, however, that the guidelines do not place Advantaged and Disadvantaged in the same "category of defendant." The differences in their backgrounds and character traits uncovered during the presentence investigations are significant enough to

⁵⁰ See notes 30-31 & accompanying text *supra*.

⁵¹ S. 1722, *supra* note 12, tit. I, § 2003(b).

⁵² *Id.*

cause them to receive different offender classifications. As a consequence, the terms of imprisonment that the guidelines prescribe are not the same: the guidelines call for a fixed term between forty and fifty months in Advantaged's case, and a fixed term between sixty and seventy-five months in Disadvantaged's case.

At this point, I would like to digress momentarily from the proceedings against Advantaged and Disadvantaged to discuss the way in which the Sentencing Commission might have devised the guidelines that the probation officer has proffered. I suggest that the Commission employed a three-step process to arrive at the kind of sentence and sentencing range applicable to our defendants. First, the Commission categorized the section 1812 offense of drug smuggling, and all other federal crimes, in terms of severity and decided which statutory sentencing purposes were most relevant in fashioning a sentence for each offense. Second, it created categories of defendants, each category consisting of a unique combination of personal characteristics thought to be of significance in designating an overriding sentencing purpose in each case and in fashioning a sentence to promote that purpose. Third, the Commission consolidated the two categories (offense and defendant) to derive the kind of sentence and sentencing range that would, under the circumstances, best promote the four purposes of sentencing prescribed by the Code:⁵³ general deterrence, incapacitation, punishment,

⁵³ It is only *suggested* that the Sentencing Commission employed this three-step process. The Code contains no express mandate that such a process be followed. A brief discussion of what Congress has directed the Commission to consider in promulgating sentencing guidelines, however, indicates that the suggestion is a valid one.

The Code requires the Sentencing Commission to establish a sentencing guideline "for each category of offense involving each category of defendant." *Id.* tit. III, § 994(c). The Code then sets forth specific considerations the Commission should entertain in establishing categories of offense, *id.*, and specific personal characteristics the Commission should consider in establishing categories of defendants, *id.* § 994(d). For each combination of offense and defendant categories the guidelines must specify the type of sentence to be imposed—a fine, probation, imprisonment, or a suitable combination of these sentences—as well as the range, or extent, of that sentence. *Id.* §§ 994(a)(1)(A)-(B). Logically, it is only after the offense and defendant categories are established that the Commission can proceed to sort out the various combinations of offenses and offenders and consider the kind and extent of sentence to prescribe in each instance. The process thus breaks down into three steps.

The core of the Code's sentencing process is its focus upon the four congressionally designated "purposes of sentencing": deterrence, incapacitation, punishment, and rehabilitation. *Id.* tit. I, § 101(b); S. REP. NO. 96-553 at 930. These four purposes are pervasive. The Code states that the Sentencing Commission exists for the purpose of ensuring that these purposes of sentencing are observed. S. 1722, *supra* note 12, tit. III, § 991(b)(1)(A). Further, the Code specifically requires the Commission to consider these four purposes in creating guidelines, *id.* § 994(g), and in promulgating policy statements, *id.* § 994(a)(2). Again, once the guidelines have been established, the sentencing judge must consider whether the particular sentence imposed will promote adequately these four purposes. *Id.* tit. I, § 2003(a)(2). It stands to reason, then, that the Commission will consider the four statutory purposes in each of the three steps involved in establishing sentencing guidelines.

and rehabilitation.⁵⁴

1. *Establishing the Categories of Offenses*

Categorizing offenses is, in effect, establishing a severity rating for each criminal offense in the Code. Title III, section 994(c) states that in doing this, the Commission shall take into account, to the extent relevant, the following offense characteristics:

- (1) the grade of the offense;
- (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
- (3) the nature and degree of the harm caused by the offense, includ-

⁵⁴ S. 1722, *supra* note 12, tit. I, § 101(b).

At this point it is appropriate to define these four purposes which play such an important role in the structuring of sentencing guidelines. Based on legislative history and the generally accepted meanings of these terms as they are currently used in the field of sentencing, the Commission probably defined them as follows:

(1) "[D]eter [criminal] conduct." *Id.* § 101(b)(1). The Commission clarified that this purpose includes "general deterrence," but not "specific deterrence." "General deterrence" focuses on individuals other than the defendant being sentenced; the goal is to deter others from committing the crime for which the defendant is charged by illustrating the consequences of committing that particular crime. "Specific deterrence," on the other hand, involves deterring the particular defendant being sentenced from committing further crime, in effect locking him away from society. That concept, if included, would duplicate another purpose of sentencing stated in § 101(b)(2): incapacitation of the defendant in order to protect the public.

Focusing its attention on the concept of general deterrence, the Commission acknowledged that the imposition of any criminal sanction may have a broad deterrent effect on the community. It indicates to onlookers that "crime doesn't pay." Further, if publicity about the defendant's sentence describes his personal characteristics—for example, his age, his prior convictions, his drug dependency—then other individuals with the same characteristics who learn of the sentencing may be deterred from committing *any* crime. However, the Commission chose not to include this type of general "bad person" deterrence, and focused on the offense, rather than the offender characteristics. Thus, a sentence for the purpose of deterrence will only encompass deterring others from committing the particular crime the defendant committed. If the defendant has "bad" characteristics, then he may be sentenced in a way that will incapacitate him from committing future crimes, but he will not be sentenced to deter others who are like him from committing crimes generally.

(2) "[P]rotect the public from persons who engage in [criminal] conduct" (incapacitation). *Id.* § 101(b)(2). If the defendant's characteristics indicate that he will commit more crime if given the opportunity, then he must be sentenced in a way that will deprive him of the opportunity. Generally, this will mean imprisonment, though, conceivably, probation may incapacitate if the conditions of probation are highly restrictive.

(3) "[A]ssure just punishment for such [criminal] conduct." *Id.* § 101(b)(3). The Commission will probably consider the purpose of punishment for criminal conduct self-evident and not in need of further definition.

(4) "[T]o promote the correction and rehabilitation of persons who engage in [criminal] conduct." *Id.* § 101(b)(4). Since rehabilitation has been a central focus of sentencing for many years, *see* S. REP. NO. 96-553 at 912, the Commission did not feel a need to enlarge on the concept for purposes of the new Code. Again, however, the Code prohibits making rehabilitation a purpose for sentencing a defendant to prison. S. 1722, *supra* note 12, tit. III, § 994(j).

ing whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

- (4) the community view of the gravity of the offense;
- (5) the public concern generated by the offense;
- (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
- (7) the current incidence of the offense in the community and in the nation as a whole.⁵⁵

For our purposes, I suggest that the Commission established six categories of offenses, graduated in order of severity: "low," "low moderate," "moderate," "high," "very high," and "greatest." It then considered the offense characteristics listed above in deciding which category is most appropriate for each offense.

The Commission decided that six of the seven statutory offense characteristics were relevant in determining the severity of a section 1812 drug smuggling case. It believed these six to be relevant primarily because they bear on the question whether punishment and deterrence, two of the four statutory purposes of sentencing, should determine the sentence in such cases. The first of these criteria, "the grade of the offense," indicates a need for punishment and a high severity rating: section 1812 creates a Class B felony, carrying a maximum of twenty years imprisonment.⁵⁶ The Commission construed the second criterion, "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense," to authorize the sentencing judge to adjust the severity rating depending on the evidence produced at the sentencing hearing.⁵⁷ The Commission deemed the third statutory criterion, concerning the harm caused by the offense, irrelevant because the Commission did not view drug smuggling, as distinguished from drug peddling, as harmful to persons or property or as constituting a breach of public trust. The Commission found the fourth, fifth, and seventh criteria, concerning community view of the offense, public concern, and current incidence of the offense, to be highly relevant. It gave these criteria great weight because drug smuggling and trafficking had reached epidemic proportions "in the community and in the nation as a whole" and had generated deep "public concern." Accordingly, regarding the sixth criterion, the Commission made a judgment that heavy

⁵⁵ S. 1722, *supra* note 12, tit. III, § 994(c).

⁵⁶ *See id.* tit. I, § 2301(b)(2).

⁵⁷ Five of the section 994(d) category of defendant criteria may indicate circumstances that aggravate or mitigate the seriousness of the offense, especially regarding the question of criminal intent: the defendant's "(4) mental and emotional condition . . . ; (5) physical condition, including drug dependence; . . . (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood." *Id.* tit. III, § 994(d). *See* notes 72-77 & accompanying text *infra*.

sanctions must be imposed to deter others from smuggling drugs into the United States.

In light of these statutory criteria, the Sentencing Commission placed section 1812 drug trafficking in the "high" severity category, but instructed sentencing judges to adjust the rating upward to "very high" or downward to "moderate," depending on whether the circumstances under which the charged offense was committed aggravated or mitigated the seriousness of the offense.⁵⁸

The Sentencing Commission also promulgated a policy statement on section 1812 offenses indicating that punishment and general deterrence are mandatory objectives in sentencing one who has engaged in drug smuggling. The policy statement concluded that a prison sentence of at least forty months must be imposed regardless of the defendant's category-of-offender classification.

Despite this policy statement establishing a minimum prison sentence, the Commission still had to establish categories of defendants in order to complete the sentencing guidelines for section 1812 drug smuggling cases.⁵⁹ The Commission undertook this step independently of its performance of the first step.

2. *Establishing the Categories of Defendants*

Section 994(d) of Code title III instructs the Commission to consider the following offender characteristics, to the extent they are relevant, in establishing categories of defendants:

- (1) age;
- (2) education;
- (3) vocational skills;
- (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
- (5) physical conditions, including drug dependence;

⁵⁸ In our hypothetical case the probation officer concluded that the manner in which the defendants carried out the crime and the large amount of contraband involved aggravated the seriousness of the offense. Accordingly, he recommended grading the violation "very high."

⁵⁹ As Congress has instructed, the Commission must promulgate guidelines "for each category of offense involving each category of defendant." S. 1722, *supra* note 12, tit. III, § 994(b). Each category of defendant committing a given offense must be viewed separately in order to accomplish individualized sentencing. Individualized sentencing is required not only by the Code, but also by existing policy, and at least in capital cases, individualized sentencing is required by the eighth and fourteenth amendments. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) ("While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense . . .").

- (6) previous employment record;
- (7) family ties and responsibilities;
- (8) community ties;
- (9) role in the offense;
- (10) criminal history; and
- (11) degree of dependence upon criminal activity for a livelihood.⁶⁰

At the same time, section 994(d) requires the Commission to "assure that the (resulting) guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."⁶¹ The Commission decided that although some of the defendant category criteria might have a heavier impact on persons of a particular race, sex, or socioeconomic status, Congress would not have included them in the statute if it did not intend them to be used. Accordingly, the Commission construed the neutrality requirement to mean that the criteria are to be used, even though they may have a disproportionate impact, as long as they are *applied* neutrally.

I suggest that the Commission determined that all eleven statutory criteria are relevant to the statutory purpose of rehabilitation. The eleven criteria also tend to indicate whether the statutory purpose of incapacitation is an appropriate sentencing goal, although section 994(e) indicates that five of the criteria may not be employed in making this determination.⁶² The Commission also found that five of the eleven section 994(d) criteria relate to whether an added measure of punishment, beyond that required for simple commission of the offense, should be meted out. Finally, the Commission found none of the criteria to be relevant, except in the most incidental way, to determining whether a sentence is to serve the purpose of deterrence.⁶³

The Need for Rehabilitation. The connection between the eleven statutory criteria and the appropriateness of rehabilitation as a sentencing goal becomes plain in the context of a specific case. If, for example, the offender is a young adult male with no education or vocational skills and little history of employment, rehabilitative treatment may be needed to prepare the offender for gainful employment. If the offender has a history of drug dependence and scrapes with the law and has no community or family ties, or if he tends to look to crime as a means of

⁶⁰ S. 1722, *supra* note 12, tit. III, § 994(d).

⁶¹ *Id.*

⁶² See note 21 *supra*.

⁶³ As discussed in note 54 *supra*, the Commission defined the statutory purpose of deterrence to encompass only the deterrence of others from committing the particular crime for which the defendant is sentenced. Since the focus is on the crime defendant committed, the defendant's personal characteristics are largely irrelevant. Deterrence of people *like* the defendant from committing crimes *generally* will occur incidentally, and only to the extent that defendant's characteristics are publicized.

livelihood, the need for corrective treatment is unquestionable. Accordingly, the Sentencing Commission, in defining the categories of defendants, concluded that rehabilitation should be an important objective in sentencing a defendant possessing the foregoing types of characteristics.

The Need for Incapacitation. The same characteristics that indicate a need for rehabilitation may suggest that the defendant is likely to commit further crimes, and thus that he needs to be incapacitated. The Sentencing Commission believed that an offender, such as the one in the example above, who is unemployable and has a history of crime, is likely to engage in further criminal conduct if given his freedom. The eleven statutory offender characteristics, considered together, are recognized predictive criteria. Parole commissions and others charged with making release decisions have often used them to anticipate the probability that convicted persons will engage in criminal conduct following release. Probation and parole officers have also used these criteria to decide what kind of supervision a probationer or parolee must receive in order to abide by the conditions of his release.⁶⁴

Despite the apparent relevance of the section 994(d) criteria in deciding whether a defendant must be incapacitated, Congress has required that the guidelines and policy statements, "in recommending a term of imprisonment or length of imprisonment, reflect the general inappropriateness of considering the [defendant's] education, vocational skills, employment record, family ties and responsibilities, and community ties."⁶⁵ Since the need for incapacitation is generally equivalent to

⁶⁴ See, e.g., U.S. DEPT OF JUSTICE, THE SALIENT FACTOR SCORE—A NONTECHNICAL OVERVIEW (U.S. Parole Comm'n Research Unit Rpt. 22 1979); Hoffman & Beck, *supra* note 22, at 195; Hoffman & Stone-Meierhoefer, *Post Release Arrest Experiences of Federal Prisoners: A Six-year Follow-up*, 7 J. CRIM. JUST. 193 (1979); Hoffman, Stone-Meierhoefer, & Beck, *Salient Factor Score and Release Behavior: Three Validation Samples*, 2 LAW & HUMAN BEHAVIOR 47 (1978); Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1420-21 (1979).

⁶⁵ S. 1722, *supra* note 12, tit. III, § 994(e). The Code does not define "general inappropriateness," and it is not clear under what, if any, circumstances the Commission or the sentencing judge could consider these five offender characteristics in connection with the need for imprisonment, or incapacitation. The Commission did not pursue the question and refrained from considering the five proscribed offender characteristics in deciding what types of offenders should be incapacitated for the protection of the general public.

It is possible that Congress considered education, vocational skills, employment record, and family and community ties to correlate too strongly with race, sex and socioeconomic status, so that consideration of these factors would violate the § 994(d) requirement that guidelines be "neutral as to race, sex, national origin, creed, and socioeconomic status of offenders." See note 21 *supra*. See also *Reform of the Federal Criminal Laws: Hearing on S. 1 before the Subcomm. on Criminal Laws and Procedures*, 94th Cong., 1st Sess. 210 (1975) (statement of Melvin L. Wulf, Legal Director, ACLU). It is not immediately clear, however, why these five factors are a greater threat to the neutrality requirement than some of the other defendant characteristics, such as degree of dependence upon criminal activity for a livelihood, criminal

the need for imprisonment,⁶⁶ Congress basically has precluded the use of these five criteria in determining whether incapacitation is a significant purpose of sentencing in a given case. Despite the deletion of these five predictive elements, the Commission nonetheless determined that the remaining section 994(d) offender characteristics⁶⁷ were adequate to identify those individuals in need of incapacitation.⁶⁸

Prior to passage of the new Code, judges often sentenced offenders to prison for the dual purposes of rehabilitation and incapacitation.⁶⁹ The new Code, however, makes this generally impossible. The new Code unambiguously proscribes imprisonment for the *purpose* of rehabilitation.⁷⁰ A prison sentence, however, is usually the only sentence that

history, and drug dependence. Further, the neutrality requirement applies to all kinds of sentences: if use of these five factors would violate neutrality in the prison sentence context, why would it not violate neutrality in other sentencing contexts, such as probation or fines?

⁶⁶ See note 54 *supra*.

⁶⁷ The remaining characteristics are age, mental and emotional condition, physical condition (including drug dependence), role in the offense, criminal history, and degree of dependence upon criminal activity for a livelihood. S. 1722, *supra* note 12, tit. III, § 994(d).

⁶⁸ Congress apparently considered a history of prior criminal conduct a reliable indicator of future unlawful conduct since it decided to mandate a prison sentence in every case in which the defendant

(1) has a history of two or more prior federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity; or

(4) committed a crime of violence which constitutes a felony while on release pending trial, sentence, or appeal from a federal, State, or local felony for which he was ultimately convicted.

Id. § 994(h). See notes 78-80 & accompanying text *infra*.

A desire to give recidivists enhanced punishment probably also motivated Congress. Section 994(i) supports this conclusion, inversely, by requiring that the Commission "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." If first offenders who commit non-serious crimes are to receive less punishment by virtue of that status, then it stands to reason that habitual offenders, or those who commit serious crimes, must receive greater punishment by virtue of their status.

⁶⁹ Pre-Code law does not require sentencing judges to state the purpose or purposes of a sentence, and few judges do so. However, it is generally understood that judges may and do consider many different purposes in formulating a sentence, including incapacitation and rehabilitation. See, e.g., *United States v. Grayson*, 438 U.S. 41, 46-47 (1978); *Williams v. New York*, 337 U.S. 241, 248 (1949); *Smith v. Estelle*, 602 F.2d 694, 708-09 (5th Cir. 1979), *appeal pending*, 100 S. Ct. 1311 (1980); 18 U.S.C. § 3575(e) (1976).

⁷⁰ "The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment. . . ." S. 1722, *supra* note 12, tit. III, § 994(j). This proscription does not rule out the incidental administration of rehabilitative treatment in a prison setting

will accomplish the purpose of incapacitation.⁷¹ Under the Code, then, rehabilitation and incapacitation cannot serve as simultaneous goals of a sentence; they must be viewed as mutually exclusive.

Since these purposes are mutually exclusive, the Sentencing Commission faced a value judgment in establishing categories of defendants, for it was necessary to determine the priority between rehabilitation and incapacitation when both are needed. The Commission issued a policy statement saying that although a defendant plainly might need corrective treatment, a rehabilitation objective should be subordinated to that of incapacitation if the defendant's age and past history of criminal activity suggest a high probability that he will commit further crime and that he will not be able to complete a sentence of probation successfully even under close supervision. If, however, a comprehensive program of supervision in a non-prison setting would reduce substantially the risk that defendant will break the law, the goal of rehabilitation should predominate and the defendant should not be imprisoned.

The Need for Punishment. Before it finally cast the defendant categories, the Sentencing Commission considered a third statutory sentencing purpose, punishment. The Commission initially decided that five of the eleven defendant characteristics of section 994(d) appeared relevant to the need for punishment beyond that required by the simple commission of the offense.⁷² These five included: "(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical conditions, including drug dependence; . . . (9) role in the offense; (10) criminal history"; and "(11) degree of dependence upon criminal activity for a livelihood."⁷³

The Commission noted that two of these five, mental and emotional condition and physical condition, were related to the second category of offense criterion, "circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense."⁷⁴ Likewise, the defendant's "role in the offense" appeared to be a major

for those imprisoned for other purposes, S. REP. NO. 96-553 at 1244-45. Congress simply has barred the courts from sentencing defendants to prison *in order* to rehabilitate them.

⁷¹ A sentence of probation may incapacitate somewhat if the conditions of probation are sufficiently restrictive. In such cases, rehabilitation and incapacitation could serve as dual purposes of sentencing. Generally, however, the purpose of incapacitation will be served only through imprisonment. See note 54 *supra*.

⁷² Punishment for simple commission of the offense is determined under the category of offense. See text accompanying notes 55-57 *supra*. Category of defendant criteria may be used to determine if *additional* punishment is needed.

⁷³ S. 1722, *supra* note 12, tit. III, § 994(d).

⁷⁴ *Id.* § 994(c)(2).

consideration in categorizing the offense.⁷⁵ Since these three criteria had already been considered in deciding how much punishment was needed under the category of offense, the Commission deemed it inappropriate to use them again to justify inflicting additional punishment because of the category of defendant.

The Commission likewise decided that the second category of offense criteria would subsume the two remaining defendant criteria, "criminal history" and "degree of dependence upon criminal activity for a livelihood," when evidence of past criminal conduct or dependency was probative of the charged crime. In such cases, this evidence should not be considered a second time in choosing the category of defendant. On the other hand, if evidence of the defendant's past criminal activity or dependency was not related to the charged crime, then it would not be relevant in choosing the category of offense and it could be used to determine the appropriate category of defendant. In such cases the evidence might indicate a need for increased punishment beyond that required for simple commission of the charged crime. Operating on this assumption, the Commission, in creating categories of defendants, issued a series of policy statements mandating prison sentences when prior criminal history or obvious dependence on crime for a livelihood appeared, independent of the charged crime, in a sentencing record. For example, the Commission mandated a prison term for defendants convicted of a serious felony during the five years immediately preceding commission of the charged offense.⁷⁶

The Commission, in deciding that prior criminal conduct and dependence on crime for a livelihood merited punishment beyond that mandated by simple commission of the offense, felt that it was acting with congressional endorsement. The Code makes clear that in some cases a defendant's criminal history, standing alone, is enough to warrant a substantial term of imprisonment regardless of the severity of the charged offense. Title III, section 994(h) requires that the sentencing guidelines mandate

a substantial term of imprisonment for categories of defendants in which the defendant—

- (1) has a history of two or more prior federal, State, or local felony convictions for offenses committed on different occasions;
- (2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

⁷⁵ The defendant's role in the offense is directly relevant to the offense severity because proof of the role in the offense is also proof of the specific offense committed. Further, the role defendant played may be an aggravating or mitigating circumstance, *see* note 57, *supra*, as when a defendant serves as the leader in a group crime.

⁷⁶ The Commission defined a "serious felony" as a federal offense classified as greater than or equivalent to one of high severity or a state offense that is of equivalent magnitude.

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity; or

(4) committed a crime of violence which constitutes a felony while on release pending trial, sentence, or appeal from a federal, State, or local felony for which he was ultimately convicted.⁷⁷

Imprisoning an offender fitting one of these descriptions actually may serve two of the four statutory purposes of sentencing: incapacitation and punishment.⁷⁸ If it is predictable that a defendant possessing the characteristics of one of the section 994(h) categories is likely, solely by reason of those characteristics, to commit further crimes upon release, incapacitation by imprisonment seems necessary for society's protection. If, however, such a prediction is not possible, a prison sentence must be seen not as incapacitating the defendant but as punishing him, either for his commission of the charged offense⁷⁹ or for his previous transgressions of the criminal laws.

On the basis of the empirical evidence before it, the Commission concluded that the categories of defendants described in paragraphs (2) and (3) of section 994(h)⁸⁰ should receive prison sentences primarily for incapacitation. Those described in paragraphs (1) and (4) should receive prison sentences primarily as punishment, rather than for the purpose of incapacitation. The Commission reached this conclusion because it was unable to predict, on the basis of the limited criteria set forth in paragraphs (1) and (4), that defendants having the enumerated characteristics are so likely to engage in such further criminal conduct that incapacitation for the public's protection is justified.

After establishing the various categories of defendant and the purposes of sentencing most relevant to each, the Sentencing Commission

⁷⁷ S. 1722, *supra* note 12, tit. III, § 994(g).

⁷⁸ Imposing a prison sentence solely because of an offender's criminal background, when that background has no probative value in establishing the elements of the charged offense, does little to advance the purpose of deterring others from committing the charged offense. Publicizing that individuals received particularly stringent sentences because of their bad prior records and not because of the charged offense might incidentally deter others *like* those individuals who have criminal backgrounds. They might be deterred from committing *any* crime by the knowledge that their past history will ensure a sentence to prison. *See* note 54 *supra*. On the other hand, those with no prior record would learn that they have one free shot at committing the charged offense without risking prison. This analysis assumes that a sentence of probation is not a strong deterrent.

⁷⁹ Section 994(h) criminal conduct may be considered relevant to the charged offense in two ways. First, the criminal conduct may be probative of the elements of the currently charged offense. However, the § 994(h) criteria then would be considered under the second criterion of § 994(c) in categorizing the offense. Second, the § 994(h) criminal conduct, though not probative of guilt in the current offense, may nonetheless make the current offense more serious because the defendant was charged with notice that he might receive greater punishment if convicted of his current crime. *See* notes 122-23 & accompanying text *infra*.

⁸⁰ *See* text accompanying note 78 *supra*.

divided them into two groups. Offenders needing rehabilitative treatment and whose prior criminal conduct is not serious enough to require incapacitation or imprisonment for punishment beyond simple commission of the crime, it decided, should receive probation with provision for the necessary rehabilitative treatment. (The relevant category of offense, however, may still mandate the imposition of a term of imprisonment.) Offenders who must be imprisoned for extra punishment or incapacitation must receive a fixed term, regardless of the sanction mandated by the relevant category of offense.

According to the probation officer's presentence investigation report, Advantaged's offender characteristics do not indicate sufficient likelihood of future criminal conduct to justify incapacitation. Since he has no criminal history, increased punishment is inappropriate. Accordingly, Advantaged's personal history places him in the first defendant group, calling for probation with "moderately close" supervision and rehabilitative treatment.

Disadvantaged clearly needs rehabilitation. However, his presentence investigation report says that his age, his prior conviction, and the evidence that he makes at least part of his livelihood from drug trafficking indicate that he will resort to crime quickly if placed on probation. Accordingly, he falls into the second group of defendant categories. The need to protect the public outweighs the need for rehabilitation, and a prison sentence of sixty to seventy-five months is prescribed for him. The probation officer indicates the potential applicability of title III, section 994(h)(2), requiring a "substantial term of imprisonment" for defendants who commit their offense "as part of a pattern of criminal conduct from which [they derive] a substantial portion of [their] income." He declines to make a recommendation in this matter, however, since Disadvantaged should nevertheless incur a substantial prison term under his applicable category of offense. Even if Disadvantaged meets the section 994(h)(2) specifications, the section's requirements are already satisfied.

3. Establishing Guidelines for Each Category of Offense Involving Each Category of Defendant

In the third step of the guideline formulation process the Commission must amalgamate offense and defendant categories. The Sentencing Commission has already declared that anyone convicted of smuggling drugs in violation of section 1812, under circumstances that aggravate the offense, must be imprisoned for at least forty months, regardless of his defendant category.⁸¹ The Code allows the Commission

⁸¹ See text accompanying notes 58-59 *supra*.

to prescribe a "sentencing range" that will leave the sentencing judge some discretion about the length of the prison term. The maximum of that sentencing range, however, may not exceed the minimum of the range by more than twenty-five percent.⁸² Accordingly, the Commission announced a sentencing range of forty to fifty months for simple commission of the crime.

According to the presentence investigation report, Advantaged's category of defendant calls for no increased punishment or period of incapacitation. Therefore, under the guidelines, he should receive only the sentence mandated by the offense category: imprisonment for a term of not less than forty and not more than fifty months.⁸³ Disadvantaged, on the other hand, falls into a defendant category that calls for incapacitation. He must have a longer term of imprisonment than the term indicated by the offense severity scale alone. A prison term of sixty to seventy-five months is prescribed for defendants of his type.

C. THE SENTENCING HEARING

Upon completion of the presentence investigation report, the parties' counsel have an opportunity to see it and confer with the investigating probation officer about possible corrections and additions.⁸⁴ The final report is then delivered to the district judge. The judge schedules a sentencing hearing⁸⁵ and advises counsel that five days prior to the hearing they must file their motions for consideration in determining the appropriate sentence to be imposed.

The order scheduling the sentencing hearing advises counsel that the hearing is adversarial and each side is entitled to present evidence and cross-examine witnesses, including the probation officer who conducted the presentence investigation. At the hearing, counsel must fo-

⁸² "If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such term shall not exceed the minimum of that range by more than 25 percent." S. 1722, *supra* note 12, tit. III, § 994(b). Technically, the Commission could choose not to have a range, thus removing the sentencing judge's discretion altogether, as long as there is no justification under title I, § 2003(b) to depart from the guidelines. See note 263 & accompanying text *infra*.

⁸³ This sentence accomplishes the purposes of deterrence and punishment for commission of the offense.

⁸⁴ See generally Fennell & Hall, *Due Process of Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615 (1980).

⁸⁵ The S. 1722 provisions for guideline application, appellate review, and judicial justifications for sentences make fact-finding a more important aspect of sentencing under the bill than it is currently. The need for more fact-finding will lead to more elaborate hearings at sentencing. The judge will not be able to pronounce sentence without some form of evidentiary hearing unless both sides agree on the facts stated in the presentence investigation report, the inferences to be drawn from them, the weight to be given to the relevant criteria, the applicable guidelines, and the point within the guideline range at which sentence should be set. Evidentiary hearings at sentencing may be informal.

cus on the "factors to be considered in imposing a sentence" set forth in Code title I, section 2003(a).⁸⁶ The court will entertain evidence, including the presentence investigation report,⁸⁷ concerning "the nature and circumstances of the offense [for which the defendant now stands convicted]⁸⁸ and the history and characteristics of the defendant."⁸⁹ In particular, the order invites counsel to submit evidence responsive to the category of offense and category of defendant criteria specified in Code sections 994(c) and (d).

The order further states that the court will consider the four statutory purposes of sentencing: punishment, deterrence, incapacitation and rehabilitation.⁹⁰ Specifically, the court will address two questions: (1) whether the purposes of punishment and deterrence require that defendant be imprisoned; and (2) whether the defendant needs correctional treatment and, if so, whether he should be placed on probation to receive the treatment or whether he should be incapacitated for the public's protection because he is likely to commit further crime while under probation supervision.⁹¹

The court requests that counsel be prepared to indicate which Sentencing Commission guidelines and policy statements they consider applicable in the case and whether the court should fashion a sentence outside the applicable guidelines.⁹² If counsel for the government or the

⁸⁶ See text accompanying notes 30-33 *supra*.

⁸⁷ Section 3714 provides:

Any relevant information concerning the history, characteristics, and conduct of a person found guilty of an offense may be received and considered by a court of the United States for the purpose of ascertaining an appropriate sentence to be imposed, regardless of the admissibility of the information under the Federal Rules of Evidence, except to the extent that receipt and consideration of such information for purposes of sentencing is expressly limited by a section of this title relating to sentencing or by any other federal statute.

S. 1722, *supra* note 12, tit. I, § 3714.

⁸⁸ The evidence introduced at trial relating to the elements of the § 1812 offense will be considered part of the record at the sentencing hearing.

⁸⁹ *Id.* § 2003(a)(1).

⁹⁰ S. 1722, *supra* note 12, tit. I, § 2003(a)(2). The Senate Report indicates that "each of the four stated purposes should be considered in imposing a sentence in a particular case, although one purpose may have more bearing on the imposition of sentence in a particular case than another purpose has." S. REP. NO. 96-553 at 934-35. Evidence of the nature and circumstances of the offense will be relevant to the category of offense and, primarily, to the sentencing purposes of punishment and deterrence. See notes 55-56 & accompanying text *supra*. Evidence of the history and characteristics of the defendant will be relevant to the category of defendant, and, primarily, to the sentencing purposes of incapacitation and rehabilitation. See notes 62-71 & accompanying text *supra*. Evidence of this history and characteristics of the defendant is also relevant to the purpose of punishment—increased punishment beyond that required for simple commission of the crime. See notes 72-77 & accompanying text *supra*.

⁹¹ See text accompanying notes 79-80 *supra*.

⁹² See S. 1722, *supra* note 12, tit. I, §§ 2003(a)(4)-(5), 2003(b).

defendant urges the imposition of a sentence outside the applicable guidelines, he must point to the existence of aggravating or mitigating circumstances that were "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described" in the guidelines.⁹³

According to the court, the government has the burden of proving by a preponderance of the evidence the facts essential to establish the applicability of the guidelines it advocates.⁹⁴

1. *The Pre-Hearing Motions*

Prior to the sentencing hearing, counsel for Disadvantaged moves the court to postpone the hearing indefinitely and to release the defendant from the constraints of the order that admitted him to bail. Counsel contends that the following constitutional and statutory deficiencies render the sentencing structure of the Code a nullity and preclude the

⁹³ *Id.* § 2003(b).

⁹⁴ The judge states, however, that the facts recited in the presentence investigation report will be presumed correct. If it disagrees with the facts recited in the presentence investigation report, the government must place the report in evidence and then, bearing the burden of proof, proceed with its rebuttal. If the defendant desires to rebut the facts in the report, he must go forward with his evidence, although the burden of proof will remain with the government. The only time that the defendant will carry the burden of proof is in a confession-avoidance situation, when the defendant agrees to the facts presented by the government but seeks to avoid the consequences of these facts. For example, the defendant might agree that he has prior convictions, but contend that they should not be considered in sentencing because he lacked the assistance of counsel. In such a case, the defendant would have the burden of proving the lack of counsel in the prior conviction.

Senate Bill 1722 does not address the burden of proof in sentence hearings. The House Bill, H.R. 6915, 96th Cong., 2d Sess., tit. III, § 3105(c)(1)-(2) (1980), provides as follows:

(c)(1) Except as provided in paragraph (2) of this subsection, in a hearing under this subsection, a party alleging a fact shall be required to prove such fact by a preponderance of the evidence.

(2) In a hearing under this section—

(A) no fact proved at trial or established as a result of a plea of guilty or nolo contendere may be disputed by any party;

(B) The Government shall prove beyond a reasonable doubt the existence of any previous criminal conviction of the defendant referred to in the presentence report or otherwise relied on by the Government;

(C) any factual statement (other than a statement of the existence of previous criminal convictions of the defendant) in the presentence report shall be presumed to be true, except that if the defendant offers credible evidence to controvert such statement, the Government shall be required to prove the fact involved by a preponderance of the evidence;

(D) the court may consider any information concerning the history, characteristics, and conduct of the defendant that is relevant to the sentencing decision, unless such consideration is otherwise prohibited by law; and

(E) the court shall assure that any finding of fact by the court that negates a factual statement in the presentence report is made a part of such report.

A byproduct of putting the burden of proof on the prosecutor is that he will have an increased incentive to see that the presentence investigation report is accurate, including the information he furnishes the probation officer. *See also* Fennell & Hall, *supra* note 84.

court from imposing any sentence in the case. Advantaged joins in the motion, although some of the arguments Disadvantaged makes are inapposite in his case.

The Alleged Constitutional Deficiencies—Due Process Objections. Disadvantaged first claims that the Code sections requiring the Sentencing Commission to consider the need for incapacitation in drawing up guidelines and policy statements,⁹⁵ and requiring the court to consider the need for incapacitation in sentencing,⁹⁶ unconstitutionally deny due process both on their face and as applied. First, he argues, incapacitation is unconstitutional as a *purpose* of sentencing: sentencing someone to prison in order "to protect the public from [his] further crimes"⁹⁷ is equivalent to imprisoning him for crimes he has not yet committed. Since he has not been indicted for these crimes, and since his guilt has not been proved beyond a reasonable doubt, he cannot, consistently with the due process clause, be deprived of his liberty for their commission. Disadvantaged points out that if the guidelines recommended in the presentence investigation report are adopted, he may receive from ten to twenty-five months more imprisonment than Advantaged, solely because of the crimes it is believed he will commit in the future.⁹⁸

Second, he argues, even if it is constitutional to sentence for the

⁹⁵ S. 1722, *supra* note 12, tit. III, §§ 994(a)(2) & (g).

⁹⁶ *Id.* tit. I, § 2003(a)(2)(B).

⁹⁷ *Id.*

⁹⁸ Disadvantaged acknowledges that imprisoning for the purpose of incapacitation is not a new concept. *See, e.g.*, MODEL PENAL CODE §§ 7.03-.04 (1962); MODEL SENTENCING ACT § 1, Comment (1972); R. DAWSON, SENTENCING 80 (1969). He states, however, that in the past, offenders seldom could know whether they were being sentenced specifically for incapacitation or for other purposes. *See* A. VON HIRSCH, *supra* note 5, at 20; S. REP. NO. 96-553 at 915, 921. The new Code, however, specifically requires that offenders meeting certain criteria be sentenced for the purpose of incapacitation and that sentencing judges "state in open court the reasons for . . . imposition of the particular sentence." S. 1722, *supra* note 12, tit. I, § 2003(c). Disadvantaged claims that when incapacitation is clearly the purpose for imprisoning a defendant, or increasing his term of imprisonment, the sentence cannot bear constitutional scrutiny.

Many scholars have discussed incapacitation as a purpose of sentencing in general terms of "fairness." *See, e.g.*, N. MORRIS, THE FUTURE OF IMPRISONMENT 58-84' (1974); A. VON HIRSCH, *supra* note 5, at 5, 19-26, 84-88, 124-31; Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 1001-08 (1978); Underwood, *supra* note 64, at 1409-20, 1425-26; von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, *passim* (1972). Others have speculated about the constitutionality of this practice. *See, e.g.*, A. VON HIRSCH, *supra* note 5, at 25-26; Coffee, *supra* at 1001 n.69; Ervin, *Foreword: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291, 298 (1971); von Hirsch, *supra* at 717; Cohen, *The Incapacitative Effect of Imprisonment: A Critical Review of the Literature*, 188-89 (commissioned paper, Nat'l Inst. of Mental Health, Center for Studies of Crime and Delinquency). *See also* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970).

purpose of incapacitation, it is only constitutional to deprive one of his liberty for this purpose if the evidence that he will commit future crimes is highly reliable.⁹⁹ No one has yet discovered a device that can predict future criminal conduct without a very wide margin of error.¹⁰⁰ Thus, the method of categorization undertaken by the Commission can only be viewed as arbitrary and a denial of due process.¹⁰¹

⁹⁹ See A. VON HIRSCH, *supra* note 5, at 25-26.

¹⁰⁰ Experts generally agree that efforts to predict future crime accurately have not been successful. See, e.g., N. MORRIS, *supra* note 98, at 62-72; A. VON HIRSCH, *supra* note 5, at 21-26; Coffee, *supra* note 98, at 993-95; Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL ED. 24, 32 (1971); Monahan & Monahan, *Prediction Research and the Role of Psychologists in Correctional Institutions*, 14 SAN DIEGO L. REV. 1028, 1029-30 (1977); Partridge, SOC. SCI. & SENTENCING, Mar. 10, 1980, at 2, 9-11; Underwood, *supra* note 64, at 1409-12; Cohen, *supra* note 98, at 189. Defendants cite Professor Andrew von Hirsch in his frequently quoted discussion of the "false positives" problem. "False positives" are persons mistakenly predicted to commit further crime. A. VON HIRSCH, *supra* note 5, at 21. According to von Hirsch:

The tendency to overpredict derives from the comparative rarity of the conduct to be predicted. Serious crimes are, statistically speaking, infrequent events; and the rarer the event, the greater will be the incidence of false positives. Thus:

Methods of predicting criminal behavior, whether clinical or statistical, are blunt instruments. Unlike the incipient tubercular, the potential recidivist does not carry easily spotted symptoms of his condition; the predictor has to rely on correlations between offenders' currently observed characteristics and any subsequent criminal behavior on their part. The data will necessarily be crude: only grossly observable characteristics of the offender population can ordinarily be identified; and the measurement of outcome—subsequent criminal conduct—is notoriously unreliable, given the problems of undetected violations and selective enforcement.

If the conduct to be predicted occurs rarely in the sample, the crudity of these inputs takes its toll. With a predictive instrument of so little discernment and a target population so small, the forecaster will be able to spot a significant percentage of the actual violators *only if a large number of false positives is also included*. The process resembles trying to hit a small bull's-eye with a blunderbuss: to strike the center of the target with any of the shot, the marksman will have to allow most of his discharge to hit outside it.

This has been confirmed in a 1971 study of violent crimes by the criminologists Ernst Wenk, James Robison, and Robert Emrich. Their study concerned a group of youthful offenders who had been committed to the California Youth Authority. Since nearly one quarter of the youths in the sample had a history of violent behavior, the potential in this group for new violence was expected to be high. Their behavior on parole was followed up for a period of fifteen months after their release from confinement, with a view to determining how many were returned for assaultive offenses. The investigators found that the incidence of violent recidivism during the fifteen-month follow-up period was only 2.4 percent. A rate that low could be expected to yield a large number of false positives—and that is precisely what happened. The investigators requested a psychologist and a statistician to develop predictive indices for violent recidivism, based upon the data in their sample. The less pessimistic projection—the psychologist's—was that a predictive instrument could be developed from the data which could identify about one half of the true positives—but in which the false positives outnumbered the true by a discouraging eight to one.

Id. at 22-24 (footnotes omitted, emphasis in original). See N. MORRIS, *supra* note 98, at 67-72; Dershowitz, *supra*, at 31-32; von Hirsch, *supra* note 98, at 723. See also Ervin, *supra* note 98, at 298; Hoffman, *supra* note 5, at 290-93; Tribe, *supra* note 98, *passim*; Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 825 (1968).

¹⁰¹ According to Disadvantaged, when the "medical model" of sentencing and parole decisionmaking was still in effect, see notes 232-34 & accompanying text *infra*, the effects of miscalculating a defendant's propensity toward future crime were not so severe. The Parole

Disadvantaged claims that title III, section 994(h), which requires that defendants with certain types of criminal background receive a substantial term of imprisonment regardless of their offense,¹⁰² is likewise unconstitutional to the extent that its purpose is incapacitation. Subsection (2) of that provision mandates a substantial term of imprisonment for an offender who committed his offense "as part of a pattern of criminal conduct from which he derived a substantial portion of his income." The court might rely on this requirement to increase Disadvantaged's term of imprisonment.¹⁰³ Disadvantaged notes that the Commission declared that the purpose of this subsection, as well as of subsection (3) (dealing with offenders serving as leaders of conspiracies), is incapacitation.¹⁰⁴

Disadvantaged also claims that sections 994(h)(2) and (3)¹⁰⁵ unconstitutionally deny due process because they require imprisonment for *past* criminal conduct that has never resulted in an indictment, trial, and conviction. The offender's pattern of criminal conduct or conspiratorial activity is immaterial to the charged offense, he argues, or else it would be covered under the "category of offense" section of the statute.¹⁰⁶ Section 994(h) clearly deals only with categories of defendants,

Commission, monitoring an offender's progress toward rehabilitation, could correct a mistaken prediction by adjusting his date of release on parole. Since the medical model no longer exists, however, *see* text following note 253 *infra*, that safeguard is gone.

Disadvantaged adds that if the predictive device fails for want of empirical justification, a defendant will be incapacitated not because he poses a threat of further crime but because of his personal characteristics. This, he says, amounts to a denial of equal protection. The classification is not justifiable. *But see* Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 874-75 (1975).

¹⁰² *See* notes 78-79 & accompanying text *supra*.

¹⁰³ *See* text accompanying notes 81-82 *supra*. Disadvantaged argues that he might fall into the section 994(h)(2) category directly. Even if he does not, the existence of that category has probably influenced the Commission to give the § 994(d) defendant characteristic, "degree of dependence on criminal activity for a livelihood," special weight in determining the need for incapacitation.

¹⁰⁴ *See* text accompanying note 79 *supra*. Disadvantaged also points to the legislative history of the Code, which states that § 994(h) was based on 18 U.S.C. § 3575 (1976). S. REP. NO. 96-553 at 1244. That statute clearly indicates that its purpose for enhancing the sentences of "dangerous special offenders" is incapacitation: "A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." 18 U.S.C. § 3575(f) (1976).

¹⁰⁵ Under these sections, the Commission must ensure a substantial term of imprisonment for the defendant who: "(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income" or "(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity." S. 1722, *supra* note 12, tit. III, §§ 994(h)(2) & (3).

¹⁰⁶ For instance, such matters, if relevant, would be considered circumstances aggravating the seriousness of the offense. *Id.* § 994(c)(2). In any case, defendants argue, if conspiracy or pattern of criminal conduct *were* material to the offense, it should not be used both to increase

and conspiracy and pattern of criminal conduct are considered in the 994(h) context only as defendant characteristics. Since pattern of criminal conduct and conspiracy are thus divorced from the crime itself, imprisonment, to the extent it is increased under section 994(h), is for the offender's past conduct standing alone. The increased imprisonment is not explainable as somehow enhancing the severity of the charged offense.¹⁰⁷ Since the offenders have never been indicted, tried, or convicted for this past conduct, section 994(h) requires imprisonment without due process.¹⁰⁸

Disadvantaged adds that the last two criteria of the section 994(d) defendant characteristics, criminal history and degree of dependence on criminal activity for a livelihood, are also unconstitutional for the same reasons: they do not relate to the charged offense, and yet they can lead to incapacitation and increased punishment.¹⁰⁹ Further, he argues, to the extent that hearsay information helps to establish the past criminal conduct of section 994(h)(2) and (3) or section 994(d) at the sentencing hearing, defendants are denied their constitutional right to confront witnesses.¹¹⁰ Disadvantaged admits that the Supreme Court has rejected this kind of objection in the past,¹¹¹ but argues that the new Code casts a

the offense severity and to require that the offender receive a greater sentence because of his status.

¹⁰⁷ See *United States v. Bowdach*, 561 F.2d 1160, 1173 n.5 (5th Cir. 1977); A. VON HIRSCH, *supra* note 5, at 84-88; Underwood, *supra* note 64, at 1418-19.

¹⁰⁸ Several circuit courts of appeal have addressed the issue of the degree of due process required in sentencing under 18 U.S.C. § 3575 (1976), the statute on which section 994(h) was based. S. REP. NO. 96-553 at 1224. Though at least two of these courts have expressed some reservations, they have held that sentencing under § 3575 does not require all of the due process rights that arise in the trial itself, such as trial by jury and proof beyond a reasonable doubt, when evidence of past criminal conduct is introduced. See *United States v. Williamson*, 567 F.2d 610 (4th Cir. 1977); *United States v. Ilacqua*, 562 F.2d 399 (6th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978); *United States v. Bowdach*, 561 F.2d 1160; *United States v. Neary*, 552 F.2d 1184 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977); *United States v. Stewart*, 531 F.2d 326 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976).

¹⁰⁹ See notes 67-68, 77 & accompanying text *supra*.

¹¹⁰ U.S. CONST. amend VI. Disadvantaged acknowledges that under title I, § 3714 of the Code,

[a]ny relevant information concerning the history, characteristics, and conduct of a person found guilty of an offense may be received and considered by a court of the United States for the purpose of ascertaining an appropriate sentence to be imposed, regardless of the admissibility of the information under the Federal Rules of Evidence

S. 1722, *supra* note 12, tit. I, § 3714. He contends, however, that this statute cannot abolish the right of confrontation.

¹¹¹ See *Williams v. New York*, 337 U.S. 241 (1949). But see *Specht v. Patterson*, 386 U.S. 605, 608 (1967). In *Specht* a statute subjecting sex offenders to separate proceedings that could lead to an indeterminate term of one day to life without the right to a hearing was held unconstitutional. According to the Supreme Court,

The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the

different light on the situation. In the past, he alleges, sentencing courts allowed hearsay evidence of prior criminal conduct not resulting in a conviction because it was relevant to rehabilitation, a primary purpose of imprisoning defendants at that time.¹¹² Under sections 994(h) and 994(d), however, courts consider prior criminal activity in connection with punishment and incapacitation, not just rehabilitation.¹¹³ Indeed, rehabilitation can never be the purpose for sentencing defendants fitting the section 994(h)(2) and (3) categories, because section 994(h) requires imprisonment, and rehabilitation can never be a reason for imprisonment.¹¹⁴ When the court hears evidence of prior criminal activity for the express purpose of punishment or incapacitation, Disadvantaged argues, the right of confrontation should attach.¹¹⁵ To the extent that title I, section 3714 allows introduction of hearsay evidence for either purpose, therefore, that section is unconstitutional.

Disadvantaged next argues that use of any of the defendant category criteria of section 994(d) to impose or increase a prison sentence

public, or is an habitual offender and mentally ill. That is a new finding of fact . . . that was not an ingredient of the offense charged.

Id. The offender must receive full due process protection in this new inquiry. Disadvantaged argues that the Code's sentencing scheme is closer to that in *Specht* than to that in *Williams* and thus full due process rights should be observed. He also claims that *Gardner v. Florida*, 430 U.S. 349 (1977) is relevant. In that case the Supreme Court held it a denial of due process for a court to consider confidential information, which was included in a presentence investigation report but not disclosed to defendant, in imposing a sentence to death. According to defendants, *Gardner* weakens the influence of *Williams* and indicates a growing concern for ensuring the accuracy of information considered at sentencing. Disadvantaged concedes, however, that *Gardner* did not overturn *Williams*. Further, it is not likely that the rule of *Gardner* would apply in cases in which the death penalty is not considered.

¹¹² See *Williams v. New York*, 337 U.S. at 248-249; S. REP. NO. 96-553 at 912.

¹¹³ See notes 64-77 & accompanying text *supra*. See A. VON HIRSCH, *supra* note 5, at 20: "Historically, the idea of predictive restraint was linked to rehabilitation: the offender was to be treated—but, if likely to offend again, would be isolated from the community while receiving treatment. Recently, however, the notion is coming to stand on its own."

¹¹⁴ See note 23 *supra*.

¹¹⁵ Disadvantaged provides the following illustration of his point: X is convicted of a class A misdemeanor. The applicable category of offense calls for a sentence to probation. At his sentencing, however, the prosecutor presents the testimony of an F.B.I. agent, who says that X committed a serious crime in the recent past, but due to technicalities, the government has not been able to bring charges against him. This statement is the only evidence offered concerning this past crime. In light of this testimony, however, the court finds that X belongs to a category of defendant that falls into guidelines requiring incapacitation or enhanced punishment. Accordingly, the court sentences X to a term of imprisonment.

Y is formally charged with committing the same crime which the F.B.I. agent testified that X had committed. Before conviction and sentencing, however, he is entitled to confrontation of witnesses against him, proof beyond a reasonable doubt, and all the other constitutional guarantees of due process.

Disadvantaged maintains that both individuals are, in effect, sentenced to prison for committing the same crime. One, however, received the benefit of full due process protection while the other did not. Disadvantaged contends that there is no justification for this different treatment.

denies due process. He contends that the Code incarcerates individuals for their personal characteristics rather than for overt conduct. "[T]he criminal law ought to be presented to the citizen in such a form that he can mold his conduct by it, that he can, in short, obey it." Due process forbids punishment that one has no assured way to avoid."¹¹⁶

Finally, Disadvantaged contends that the section 994(d) defendant characteristics, prior criminal history and degree of dependence on criminal activity for a livelihood, as well as the 994(h)(2) and (3) categories, are unconstitutionally vague. Since these provisions could all result in an increased prison term, offenders have a right to prior notice of their substance. Likewise, the purpose of "protecting the public" is unconstitutionally vague. It is not at all clear, Disadvantaged argues, when an offender is "dangerous."¹¹⁷

The Alleged Constitutional Deficiencies—Double Jeopardy Objections. Subsections (1) and (4) of title III, section 994(h) require sentencing a defendant to a substantial term of imprisonment if he: "(1) has a history of two or more prior federal, State, or local felony convictions for offenses committed on different occasions"; or if he "(4) committed a crime of violence which constitutes a felony while on release pending trial, sentence, or appeal from a federal, State, or local felony for which he was ultimately convicted." Although neither Advantaged nor Disadvantaged falls into these categories, they nonetheless seek to attack the provisions¹¹⁸ as violative of the double jeopardy clause.¹¹⁹ In effect, they argue, these section 994(h) provisions require punishment for crimes for which the defendants have already been tried, convicted, and sentenced. Since they have already served a sentence for these past crimes, subjecting them to extra punishment in later proceedings because of the prior convictions subjects them to double jeopardy.

Defendants renew their contention that considerations under section 994(h) relate only to the defendant and are not relevant to the charged offense.¹²⁰ They further note that the Commission has stated

¹¹⁶ Tribe, *supra* note 98, at 395 (quoting L. FULLER, *THE MORALITY OF LAW* 105 (1964)). See also A. VON HIRSCH, *supra* note 5, at 124-25. See generally Robinson v. California, 370 U.S. 660 (1962); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Stoutenburgh v. Frazier, 16 App. D.C. 229 (1900). But see Project, *supra* note 101, at 876-77.

¹¹⁷ See United States v. Duardi, 384 F. Supp. 874, 884-85 (W.D. Mo. 1974), *aff'd on other grounds*, 529 F.2d 123 (8th Cir. 1975).

¹¹⁸ Defendants contend that although neither of them could fall into those categories, they nonetheless may challenge them because the alleged double jeopardy problems, along with the other constitutional infirmities they have found, combine to render the whole Code sentencing scheme unenforceable. See notes 143-47 & accompanying text *infra*.

¹¹⁹ "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

¹²⁰ See notes 106-07 & accompanying text *supra*.

that subsections (1) and (4) are to be considered for the purpose of increased punishment beyond that required for simple commission of the crime.¹²¹ While defendants acknowledge that the Supreme Court has refuted arguments that consideration of prior convictions in sentencing constitutes double jeopardy,¹²² they argue that the Court's reasoning cannot apply in the context of the new Code. The Court stated that offenders were not subjected to double jeopardy because an increased sentence due to prior convictions "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."¹²³ Pointing to the structure of the new Code, defendants claim that the enhanced punishment for prior convictions is relevant only to the defendant category, completely apart from the currently charged offense.¹²⁴

In addition, defendants claim that consideration of the section 994(d) defendant criterion, "criminal history," also violates the double jeopardy clause insofar as it requires consideration of prior convictions in deciding if punishment should be increased beyond that required for simple commission of the offense.¹²⁵ Disadvantaged claims that if the court considers his prior conviction for possession of drugs in placing him in a category of defendant, he may be subjected to increased punishment for his past crime and thus to double jeopardy.

The Alleged Statutory Deficiencies. In addition to his constitutional objections to the sentencing provisions of the new Code, Disadvantaged raises several objections concerning the statute's internal structure. He first objects that by requiring imprisonment for a defendant who poses a threat to society while proscribing imprisonment for the purpose of rehabilitation, the Code's sentencing scheme is in irreconcilable conflict. Implicit in the decision to incapacitate a defendant is the assumption that upon his eventual release, he will be rehabilitated; for the justice

¹²¹ See text accompanying notes 78-80 *supra*.

¹²² See, e.g., *Baldasar v. Illinois*, 446 U.S. 222, 227, 231 (1980) (per curiam) (Marshall, J., concurring) (Powell, J., dissenting); *Gryger v. Burke*, 334 U.S. 728, 732 (1948). See generally A. VON HIRSCH, *supra* note 5, at 84-88.

¹²³ *Gryger v. Burke*, 334 U.S. at 732.

¹²⁴ Otherwise, they argue, the § 994(h) considerations would be included in the "category of offense" criteria. See S. 1722, *supra* note 12, tit. III, § 994(c). See text accompanying notes 106-07 *supra*.

¹²⁵ See text accompanying notes 72-73 *supra*. Defendants illustrate their claim by reminding the court that the Sentencing Commission, in considering the relevance of "criminal history" to the statutory purpose of punishment, formulated a policy statement requiring a prison sentence for defendants convicted of a serious felony during the five-year period immediately preceding the commission of the charged offense. See text accompanying note 76 *supra*.

system will not release him until he no longer poses a threat to society. Therefore, Disadvantaged argues, to the extent that a sentence is designed to achieve society's protection, it also is designed to achieve the defendant's rehabilitation, and vice versa. A sentence for one of these purposes is implicitly a sentence for the other purpose.¹²⁶ Since the Code will not permit the imprisonment of a defendant for the purpose of rehabilitation,¹²⁷ it follows that a defendant likewise cannot be imprisoned for the purpose of incapacitation. Since incapacitation, as a rule, cannot be achieved by means other than imprisonment,¹²⁸ the sections of the Code requiring the Sentencing Commission and the court to sentence for the purpose of protecting the public from the defendant¹²⁹ are unenforceable.

The defendants also state that title III, section 994(d) requires the Sentencing Commission's guidelines and policy statements to be "entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." The section 994(d) offender criteria¹³⁰ that the Commission must take into account in formulating categories of defendants, however, are not neutral as to these characteristics.¹³¹ Use of these criteria, according to defendants, necessarily produces defendant categories that correlate substantially with racial and socioeconomic status. For instance, a disproportionate number of persons with a low socioeconomic status will be found to need rehabilitation because they lack education and vocational skills and have poor employment records. Likewise, persons of low socioeconomic status are more likely to depend on their criminal activity for a livelihood. For this reason a court will

¹²⁶ Disadvantaged cites the following statement by Zebulon R. Brockway as illustrative of the link between the concepts of rehabilitation and incapacitation:

No man, be he judge, lawyer or layman, can determine beforehand the date when imprisonment shall work reformation in any case, and it is an outrage upon society to return to the privileges of citizenship those who have proved themselves dangerous and bad by the commission of crime, until a cure is wrought and reformation reached. . . . Therefore . . . sentences should not be determinate, but *indeterminate*. By this is meant (to state briefly) *that all persons in a state, who are convicted of crimes or offenses before a competent court, shall be deemed wards of the state, and shall be committed to the custody of the board of guardians, until, in their judgment, they may be returned to society with ordinary safety, and in accord with their own highest welfare.*

Brockway, *The Ideal of a True Prison System for a State*, in TRANSACTIONS 54 (Nat'l Cong. on Penitentiary and Reformatory Discipline, 1870) (emphasis in original).

¹²⁷ S. 1722, *supra* note 12, tit. III, § 994(j).

¹²⁸ See note 54 & accompanying text *supra*.

¹²⁹ S. 1722, *supra* note 12, tit. III, §§ 994(a)(2), 994(g); *id.* tit. I, § 2003(a)(2)(B).

¹³⁰ See text accompanying note 60 *supra*.

¹³¹ Defendants state that in many cases their claim is self-evident. For instance, education, vocational skills, and previous employment record obviously are related to socioeconomic status. They also cite studies indicating that several of the eleven § 994(d) offender criteria are positively related to racial and socioeconomic status. See, e.g., Coffee, *supra* note 99, at 1002-05.

find them in need of incapacitation more often than those of a higher socioeconomic status. Since the section 994(d) criteria are not neutral, defendants conclude, the statute itself prohibits the Commission from utilizing them, or any criteria like them, to devise categories of defendants. But without the statutory guidance provided by section 994(d), the Commission is helpless to formulate a guideline for "each category of offense involving each category of defendant" as the Code requires, and thus the statute is, by its own commands, unworkable.

The Alleged Deficiencies in the Guidelines and Policy Statements. Paralleling his due process objection,¹³² Disadvantaged contends that the particular Sentencing Commission guideline cited in the presentence investigation report and presumably applicable to his case has an insufficient evidentiary foundation. He does not challenge the Commission's classification of the section 1812 drug smuggling offense, committed under the circumstances of his case, as one of very high severity. He objects, rather, to the Commission's decision to categorize offenders with histories and characteristics such as his as persons who must be incapacitated for society's protection. According to Disadvantaged, the evidence on which the Commission's decision was based does not reasonably permit the inference that he will commit more crimes unless he is removed from society.¹³³ If the category of defendant in question is given effect in the face of this deficiency, the category, and the guidelines that incorporate it, will operate to deny him due process as well as equal protection of the law. The categorization will be arbitrary, and Disadvantaged and others like him will be sentenced not because they are thought likely to commit more crime but solely because of their backgrounds and personal characteristics.¹³⁴

Defendants also object to the Commission's interpretation and implementation of the Code's goal of sentencing for the purpose of punishment. Title I, section 2003(a)(2)(C) directs the court to consider whether the sentence imposes "just punishment for the offense." Title III requires the Sentencing Commission to promulgate guidelines¹³⁵ and policy statements¹³⁶ in such a way as to "assure just punishment for

¹³² See text accompanying notes 99-101 *supra*.

¹³³ Disadvantaged reminds the court that the Commission could only use six of the § 994(d) criteria to make its prediction: age, mental and emotional condition, physical condition, role in the offense, criminal history, and degree of dependence on criminal activity for a livelihood. S. 1722, *supra* note 12, tit. III, § 994(d). See text accompanying notes 65-68 *supra*.

¹³⁴ See U.S. *ex rel.* Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1976).

¹³⁵ S. 1722, *supra* note 12, tit. III, §§ 994(a)(1)-(2).

¹³⁶ *Id.* § 994(a)(2).

[conduct defined as a federal offense]."¹³⁷ In both instances, defendants claim, the statutory language clearly indicates that the punishment is for "the offense" only. According to defendants, "the offense" consists of all the operative facts and circumstances of the crime itself. The elements of the offense—specific intent, particular overt acts, etc.—determine what facts are relevant for punishment. By definition, "the offense" does not embrace extrinsic prior criminal conduct, whether or not reduced to a conviction, that is not probative of the elements of the charged offense.

Nevertheless the Commission, in devising categories of defendants, has found the defendant criteria, "criminal history" and "degree of dependence on crime for a livelihood,"¹³⁸ to be relevant to the purpose of punishment.¹³⁹ Since these considerations are not probative of the charged offense,¹⁴⁰ defendants argue, the Commission has exceeded its statutory authority. Resulting guidelines and policy statements that call for punishment beyond that required for simple commission of the offense, when the last two defendant criteria are met, therefore, are invalid and must be stricken.

Finally, defendants argue that all guideline ranges prescribing imprisonment are illegal under the Code because they impermissibly include considerations of the need for rehabilitation. While title III, section 994(j) forbids the Commission from making the need for rehabilitation a reason for a sentence to prison absent extraordinary circumstances, section 994(1) requires as follows:

The Commission in initially promulgating guidelines for particular categories of cases, shall be guided by the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served, unless the Commission determines that such a length of term of imprisonment does not adequately reflect a basis for a sentencing range that is consistent with the purposes of sentencing described in subsection 101(b) of title 18, United States Code.

Defendants note that until the Code was passed, sentences to prison frequently were imposed for the purpose of rehabilitation.¹⁴¹ To the extent

¹³⁷ *Id.* tit. I, § 101(b)(3).

¹³⁸ *Id.* tit. III, § 994(d).

¹³⁹ Defendants concede that Congress included similar criteria in § 994(h), and that § 994(h) was apparently intended to serve the purpose of punishment. They argue, however, that § 994(h) is separate from these section 994(d) offender characteristics, and that while Congress intended to provide extra punishment for past crimes in section 994(h), it did not intend for the Commission to prescribe, through use of the defendant criteria of section 994(d), extra punishment beyond that required for simple commission of the crime.

¹⁴⁰ If they were probative of the charged offense, defendants argue, they would be included in the category of offense criteria, rather than the category of defendant criteria.

¹⁴¹ See note 112 & accompanying text *supra*.

that the Commission is guided by these past sentences in promulgating its guidelines, the finished guidelines prescribing imprisonment will reflect consideration of the need for rehabilitation.¹⁴² Under section 994(j), these guidelines, including the ones applying to Advantaged and Disadvantaged, must be considered void.

The Relief Sought. Defendants submit that the foregoing constitutional and statutory infirmities of the Code's sentencing scheme preclude the formation and imposition of guidelines. Congress plainly intended that the Sentencing Commission guidelines and policy statements circumscribe and sharply define the courts' exercise of discretion in the performance of the sentencing function. If the statutory directions for formulating those guidelines are a nullity, the Commission is powerless to perform its guideline-drawing function. In that case the only guidance for the courts lies in the general "authorized sentences" for probation,¹⁴³ fines,¹⁴⁴ and imprisonment¹⁴⁵ and three of the four purposes of sentencing—punishment, deterrence, and rehabilita-

¹⁴² According to defendants, the Commission's problem is enhanced if the § 994(f) requirement that the Commission avoid "unwarranted disparity" in establishing guidelines is interpreted to include disparity between sentences under the prior law and sentences under the Code.

¹⁴³ S. 1722 provides: "(b) Authorized Terms.—The authorized terms of probation are— (1) for a felony, not less than one nor more than five years; (2) for a misdemeanor, not more than two years; and (3) for an infraction, not more than one year." S. 1722, *supra* note 12, tit. I, § 2101(b).

¹⁴⁴ S. 1722 provides:

- (6) Authorized Fines—Except as otherwise provided, the authorized fines are—
 - (1) if the defendant is an individual—
 - (A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$250,000;
 - (B) for any other misdemeanor, not more than \$25,000; and
 - (C) for an infraction, not more than \$1,000; and
 - (2) if the defendant is an organization—
 - (A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$1,000,000;
 - (B) for any other misdemeanor, not more than \$100,000; and
 - (C) for an infraction, not more than \$10,000.

Id. § 2201(b).

¹⁴⁵ S. 1722 provides:

- (b) Authorized Terms.—The authorized terms of imprisonment are—
 - (1) for a Class A felony, the duration of the defendant's life or any period of time;
 - (2) for a Class B felony, not more than twenty years;
 - (3) for a Class C felony, not more than ten years;
 - (4) for a Class D felony, not more than five years;
 - (5) for a Class E felony, not more than two years;
 - (6) for a Class A misdemeanor, not more than one year;
 - (7) for a Class B misdemeanor, not more than six months;
 - (8) for a Class C misdemeanor, not more than thirty days; and
 - (9) for an infraction, not more than five days.

Id. § 2301(b).

tion¹⁴⁶—prescribed by the statute.¹⁴⁷ Accordingly, the court cannot perform the sentencing function in this case, and the defendants, though they stand convicted of the offense charged, must be discharged.

2. *The Court's Rulings*

The Court directs the government to file a written response to the defendants' motions and postpones the sentencing hearing. Following the parties' exchange of legal memoranda, the court hears argument of counsel and then issues a memorandum order denying the defendants' motions.

The court initially addresses the issue of standing. The government has objected that Advantaged, and, in some cases, Disadvantaged, lack standing to raise their constitutional and statutory interpretation objections because they cannot show harm from the alleged defects. The defendants respond by claiming that the alleged defects are so pervasive that the sentencing scheme as a whole is incapable of application. The court defers ruling on this issue and states that after the sentencing hearing it will decide whether the sentences can be fashioned without causing prejudice to the defendants. The court then turns its attention to the alleged deficiencies.

The district court prefaces its rulings by observing that many of the new Code's problems arise from the very feature that makes it attractive. Its specificity, designed to assure uniformity and fairness, renders it vulnerable to attack. In the past, challenges to the sentencing process were relatively rare and seldom successful. There was no right of appeal from sentences within the statutory range, and it was difficult, if not impossible, to ascertain and prove the motivation and reasoning process of the judge.¹⁴⁸ In contrast, by setting forth explicit factors the Sentenc-

¹⁴⁶ Incapacitation, defendants claim, is unconstitutional as a purpose of sentencing. See note 97 & accompanying text *supra*.

¹⁴⁷ Defendants also note that without guidelines, appellate rights cannot be exercised. Under the Code, both the government and the defendant have the absolute right to appellate review of sentences imposed outside the guidelines. S. 1722, *supra* note 12, tit. I, §§ 3725(a)-(b). Both parties also have the right, under Federal Rule of Criminal Procedure 35(b)(2), as amended, to move the sentencing court to correct a sentence allegedly imposed through incorrect application of the Commission's guidelines. FED. R. CRIM. P. 35(b)(2), as amended by the Code, S. 1722, *supra* note 12, tit. II, § 111(t). Further, both parties may petition for leave to appeal the district court's disposition of such a motion. S. 1722, *supra* note 12, tit. I, §§ 3723(b), 3724(d). Without a guideline structure, appellate rights, rule 35(b)(2), and its concomitant review procedures are all rendered meaningless.

¹⁴⁸ As is noted in the Senate report, judges have sentenced defendants for a variety of purposes, S. REP. NO. 96-553 at 915, 921, and since they have not been required to state those purposes, they have seldom done so. *Id.* at 921. Certainly the "system" has not encouraged judicial disclosure of the purposes behind sentences. Most sentences set within the legislative range are unreviewable. By stating the purpose behind the sentence, the judge may be providing the defendant with a legislatively unanticipated means to gain appellate review.

ing Commission and the courts must consider in establishing and applying guidelines, and by requiring these sentencing authorities to state the particular factors they find relevant in each case,¹⁴⁹ the Code provides defendants a unique opportunity to "read the minds" of the sentencing authorities and to dissect each component of their reasoning process. By setting forth concrete factors that must be considered, the Code invites challenges to the reliability and constitutionality of each. Likewise, the Code invites challenge by setting forth distinguishable sentencing purposes and mandating apportionment of sentences, according to purpose. In short, the Code's explicit step-by-step breakdown of the sentencing process forces courts to face squarely for the first time the implications of traditional sentencing practices.

The court then acknowledges that Disadvantaged's constitutional objections present several close questions. It indicates considerable concern over the validity of incapacitation as a statutory purpose of sentencing.¹⁵⁰ Further, it seriously questions whether it would be constitutional for a court to sentence a defendant to prison or to an increased term of imprisonment *solely* on the basis of a prediction that the defendant will injure society by committing additional crimes if given his freedom.¹⁵¹ The court also questions the constitutionality of basing that prediction on an assessment of the defendant's past criminal history and the histories of others like the defendant, established by hearsay, at a sentencing hearing.¹⁵²

The court expresses concern, as well, about the constitutional propriety of imposing an extra measure of punishment, beyond that required for simple commission of the crime, *solely* because of the defendant's history of previous criminal conduct unrelated to the charged offense.¹⁵³ The court acknowledges the Supreme Court precedent allowing a sentencing judge to consider a defendant's past criminal conduct in fashioning a prison sentence,¹⁵⁴ but observes that the cases

¹⁴⁹ Title I, § 2003(c) requires the judge to state in open court his reasons for imposing a particular sentence. Section 2003(b) requires judges to consider whether the Commission took particular aggravating or mitigating circumstances into consideration in formulating its guidelines. Judges may impose a sentence outside the guidelines only if they find that the Commission failed to consider, in developing the guidelines, an important circumstance revealed at the sentencing hearing. These requirements imply that, to facilitate this inquiry, the Sentencing Commission must disclose its reasoning process in formulating the guidelines.

¹⁵⁰ See note 97 & accompanying text *supra*.

¹⁵¹ See notes 99-104 & accompanying text *supra*. See A. VON HIRSCH, *supra* note 5, at 20-21.

¹⁵² See note 110 & accompanying text *supra*.

¹⁵³ See notes 106-08 & accompanying text *supra*.

¹⁵⁴ See, e.g., *United States v. Grayson*, 438 U.S. 41 (1978); *Williams v. New York*, 337 U.S. 241. While the Court has prohibited such consideration of prior convictions in which the defendant was not represented by counsel, this prohibition appears to be based primarily on a desire to protect from erosion the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963). See, e.g.,

creating this precedent invariably involved sentencing schemes in which a defendant could be imprisoned for rehabilitative purposes, as well as for punishment and deterrence.¹⁵⁵ Under these schemes, courts considered prior criminal history highly relevant in determining whether a defendant needed correctional treatment and, if so, whether that treatment should be administered on probation or in prison. Since the sentencing judge was not required to articulate his reasons for fashioning a particular sentence, and since his exercise of sentencing discretion was virtually unreviewable, it was seldom clear whether he considered the defendant's criminal history only as it related to the need for rehabilitative treatment or whether he used it as a basis for imposing an extra measure of punishment. Although it may be appropriate to consider criminal history in the former instance,¹⁵⁶ its use in the later instance leads inexorably to questions of due process and double jeopardy. An enhanced sentence predicated on criminal conduct not reduced to a conviction might be equated to punishment for crimes for which a defendant was not charged or convicted—an obvious deprivation of due process.¹⁵⁷ Increased punishment based on prior convictions might be equated to punishment for crimes for which the defendant has already served a sentence—a clear infringement of the right against double jeop-

United States v. Tucker, 404 U.S. 443, 448-49 (1972); *Burgett v. Texas*, 389 U.S. 109, 115 (1967). It is an interesting question whether a court could consider the *facts* underlying an uncounseled conviction in sentencing under the new Code.

¹⁵⁵ See note 112 & accompanying text *supra*. See S. REP. NO. 96-553 at 912.

¹⁵⁶ Two creations of prior sentencing law boosted the acceptability of considering past criminal history in a rehabilitative context: indeterminate sentences and a parole commission to monitor them. Together these two creations comprised the "medical model." Under the prior law, a court might use a defendant's past criminal history to decide whether the defendant was in need of rehabilitative treatment and, if so, whether it should be administered in a prison or nonprison setting. See A. VON HIRSCH, *supra* note 5, at 20. More specifically, the court might imprison the defendant needing treatment because, based on the defendant's prior criminal history, it anticipated that he would commit further crime, and thus violate his conditions of release if placed on probation. Under the medical model, however, this defendant would be "treated" and released from prison as soon as the parole commission found him "cured," or rehabilitated. The parole commission's careful surveillance theoretically mitigated the harmful effect of any error in the predictive criteria used by the court in fashioning the sentence. See note 234 & accompanying text *infra*.

At least as a simple matter of fairness, use of prior criminal history in this context seems less objectionable than its use under S. 1722. The bill does away with the medical model, with its rehabilitative purpose, and imposes instead determinate sentencing for the purpose of incapacitation or punishment beyond that required for simple commission of the crime. Since the parole commission will no longer be on hand to monitor the defendant's progress toward rehabilitation and to correct any errors in sentencing, it is arguable that the information relied on by the judge in incarcerating the defendant must be far more reliable than it was under the old system of rehabilitation. More specifically, it may be argued that hearsay, which was previously admitted into evidence to show the need for correctional treatment, should not be admissible to show the need for incapacitation for a fixed term that may endure beyond that necessary for the defendant's rehabilitation.

¹⁵⁷ See notes 106-08 & accompanying text *supra*.

ardy.¹⁵⁸ The precedent neither illuminates nor answers these problems, but they come sharply into focus under the sentencing procedure ordained by the Code.

The court finally determines that, depending on the record developed at the sentencing hearing and the findings and conclusions the court draws from the evidence, it may be unnecessary to rule on any of the constitutional questions presented. Accordingly, the court decides to defer any decision on these questions until the sentencing hearing, and turns to the statutory interpretation issues and defendants' objections to the Sentencing Commission's guidelines and policy statements.

The judge first addresses the contention that the rules controlling the use of incapacitation and rehabilitation as sentencing objectives are irreconcilable and thereby unenforceable.¹⁵⁹ He acknowledges that a sentence to protect the public from the defendant's future crime may be indistinguishable from a sentence to rehabilitate the defendant: both purposes theoretically require the defendant's detention until he is able to lead a law-abiding life. The judge notes, however, that the maximum prison sentences provided by the Code, or by the Commission under its guidelines, are seldom lengthy enough to accomplish a defendant's complete rehabilitation. The court observes that over forty percent of convicted federal defendants are twenty-nine years old or under.¹⁶⁰ These individuals, when truly dedicated to a life of crime, often may be dangerous to society until they are past middle age. Since prison sentences designed for incapacitation are generally not that long, sentencing for incapacitation apparently does not, under the Code, also serve the purpose of rehabilitation. Rather, incapacitation is a means of sparing society from the defendant's crimes for a limited and arbitrary period of time. The two sentencing purposes are separate and distinct, mutually exclusive, and therefore reconcilable.

The court next addresses the question whether use of the various section 994(d) defendant criteria violates the Code's requirement of racial, sexual, and socioeconomic neutrality.¹⁶¹ The court concludes that an obvious correlation between a person's socioeconomic status and his education, vocational skills, and previous employment record, for example, does not permit the conclusion that as a matter of law every use of the criteria by the Commission or the courts violates the neutral guidelines requirement. The court acknowledges, however, that the guidelines in the context of a particular case might lack the requisite

¹⁵⁸ See notes 118-25 & accompanying text *supra*.

¹⁵⁹ See notes 126-29 & accompanying text *supra*.

¹⁶⁰ ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS FOR 1979 (forthcoming).

¹⁶¹ See notes 130-31 & accompanying text *supra*.

neutrality; therefore, the defendants can renew the objection at the sentencing hearing.

The court also reserves ruling on Disadvantaged's challenge to the empirical evidence underlying the Commission's conclusion that he or members of his category of defendant will commit further crime if placed on probation. Here, too, the disposition of the case may render a decision unnecessary.

The court considers whether Congress intended extrinsic criminal acts not probative of the present charge to be used in imposing punishment beyond that required for commission of the crime.¹⁶² The court disagrees with the defendants' interpretation of the statute and finds that Congress intended prior criminal history and degree of dependence on criminal conduct for a livelihood to be considered for the purpose of punishment whenever the Sentencing Commission deems this information relevant.

Finally, the court dismisses the defendants' contention that the guideline ranges prescribing imprisonment impermissibly include considerations of rehabilitation because they are based on sentences imposed under prior law.¹⁶³ Any influence the purpose of rehabilitation might have had on prior average sentences is too remote to the new guidelines to invalidate them.

3. *The Hearing*

In the first part of the sentencing hearing, involving the category of offense, the court considers the cases of both defendants together to facilitate development of the evidence.¹⁶⁴ The judge receives all the offense-related evidence, including the transcript of the trial, and hears argument of counsel concerning the applicable category of offense. He rules

¹⁶² See notes 135-40 & accompanying text *supra*.

¹⁶³ See notes 141-42 & accompanying text *supra*.

¹⁶⁴ Had the court decided to convene separate sentencing hearings for Advantaged and Disadvantaged, the defendant whose case was heard second undoubtedly would object. He would claim that he was denied a fair hearing before an impartial judge because the judge had already determined his offense severity rating in arriving at the sentence to be imposed for the first defendant. The judge, having already considered the same facts and issues in the earlier hearing and having made a determination, would allegedly turn deaf ears on arguments in the second case that a different category of offense should apply. The second defendant would claim that the judge came to his hearing with the decision already made.

If the judge did deviate in the second case, whichever defendant received the harshest disposition might claim a denial of equal protection: the judge unreasonably applied the law in a different fashion to an offense committed under identical circumstances, with the different application perhaps resulting in a deprivation of liberty.

In either case, the second defendant could claim that the judge should have disqualified himself from presiding over the second hearing to "avoid the appearance of impropriety." ABA CODE OF JUDICIAL CONDUCT Canon 2.

that the "very high severity" category of offense applies¹⁶⁵ and then, bifurcating the hearing for consideration of the applicable categories of defendants and the imposition of sentence, he proceeds initially with Advantaged's case.

The prosecutor introduces Advantaged's presentence investigation report into evidence and rests. The defendant thus has the burden of going forward with evidence to refute the report.¹⁶⁶ Advantaged does not challenge the probation officer's conclusion that he is within the category of defendants who are good candidates for a sentence of probation. In fact, he buttresses that conclusion by presenting the testimony of his parents and close friends. They represent that he will have strong family support and the backing of several in the community if placed on probation. Advantaged exercises his right of allocution and makes a strong plea for leniency. The government offers no rebutting evidence, and counsel begin their arguments over the proper sentence.

The category of offense clearly requires a sentence to prison for forty to fifty months, regardless of the defendant category. The prosecutor urges the court to sentence Advantaged to fifty months, the maximum prison term allowed. Defense counsel, on the other hand, urges the court to step outside the guidelines and sentence Advantaged to probation or, alternatively, to a lesser prison term than that specified in the guidelines. Defense counsel argues that leniency is appropriate in this case because title III, section 994(i) states that imprisonment is not appropriate for a first offense unless that offense is "a crime of violence or an otherwise serious offense."¹⁶⁷ Advantaged contends that the charged offense is not "serious."

The court responds that section 1812 drug smuggling, under the circumstances presented in this case, is a serious offense and that section 994(i) is therefore inapposite. The judge then reminds counsel that he must impose a sentence within the guidelines unless he finds an aggra-

¹⁶⁵ In categorizing drug trafficking, the Sentencing Commission reviewed considerable empirical evidence and statistical analyses and consulted experts on the points of inquiry mandated by the seven offense criteria of title III, § 994(c). For example, the Commission conducted surveys to measure the community view of the gravity of drug trafficking on the national, state and local level. See S. 1722, *supra* note 12, tit. III, § 994(c)(4). It also conducted surveys of the "public concern generated by the offense." *Id.* § 994(c)(5). Experts testified about deterrence, see *id.* § 994(c)(6); statistics, amplified by expert opinion, showed the incidence of the offense. See *id.* § 994(c)(7).

Neither Advantaged nor Disadvantaged challenge the Commission's findings based on this evidence or the relative weight the Commission assigned to each criterion in arriving at a severity level. The Court would allow such a challenge, whether centered only on the Commission's evidence or on that evidence in light of additional evidence subsequently produced by the defendant.

¹⁶⁶ See note 94 & accompanying text *supra*.

¹⁶⁷ S. 1722, *supra* note 12, tit. III, § 994(i).

vating or mitigating circumstance "that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."¹⁶⁸ He inquires whether Advantaged has any evidence of mitigating circumstances that the Commission did not consider. Counsel responds that he has no such evidence to offer.¹⁶⁹

At the conclusion of Advantaged's hearing, the court summarizes the situation: Advantaged's offense category is "very high," and it requires imprisonment for the purposes of punishment and deterrence. His defendant category calls for a sentence of probation with moderate supervision for the purpose of rehabilitation. The guidelines subordinate the need for rehabilitation to the need for punishment and deterrence, and therefore Advantaged must be sentenced to prison. For lack of any foundation in the record, the court rejects the defendant's prayer for a sentence below the guidelines and imposes the maximum sentence allowed—fifty months. Complying with the requirement that he state his reasons for imposing a particular sentence,¹⁷⁰ the judge states that he selected fifty months because he anticipates having to sentence Disadvantaged to an even longer prison term. Since the defendants are equally culpable, their sentences should be as nearly equal as possible.¹⁷¹ The judge overrules Advantaged's objection that it is improper to be influenced by one defendant's sentence in fashioning the sentence of another.¹⁷²

The court also finds that since Advantaged's sentence is based only on the category of offense requirement, and does not involve the purposes of incapacitation or punishment beyond that required for simple commission of the crime, it is unnecessary to rule on Advantaged's

¹⁶⁸ *Id.* tit. I, § 2003(b).

¹⁶⁹ Implicit in § 2003(b) is the notion that the Commission must issue a comprehensive statement with each guideline, explaining what it considered in designing the offense and defendant categories making up the guideline. Without such a statement, or to the extent the statement is inadequate or ambiguous, the district court would have too much discretion to fashion sentences outside the guidelines. The absence of a statement would thus defeat the goal of strict guideline sentencing and lead to more direct appeals. Moreover, parties might have to subpoena commissioners to testify about what they did or did not consider in formulating the guidelines. The need for such testimony would increase or decrease depending on the adequacy of the Commission's initial explanation.

¹⁷⁰ "The court at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence is not of the kind, or is outside the range described in [the applicable guidelines], the specific reason for the imposition of a sentence different from that described." S. 1722, *supra* note 12, tit. I, § 2003(c).

¹⁷¹ One of the goals the judge must consider in imposing a sentence is the need to avoid unwarranted disparity among the sentences of similarly situated defendants. *Id.* § 2003(a)(6).

¹⁷² To avoid disparate sentencing, courts historically have considered sentences imposed in cases other than the one at bench. *See* Frankel, *supra* note 5. A sentence in one case will be relevant in another case only if the purposes of sentencing are the same in both cases and the circumstances of the offense and the nature of the defendant, to the extent relevant to the sentencing purposes, are also the same.

guideline, statutory, and constitutional objections.¹⁷³

The court then turns to Disadvantaged's case. Disadvantaged immediately objects that the judge, by justifying his high sentence for Advantaged on the grounds that it would be more nearly equal to Disadvantaged's sentence, has illustrated his predetermination of Disadvantaged's sentence and thus denied him a fair hearing. The judge overrules the objection and proceeds to hear the evidence. The prosecutor again introduces the presentence investigation report into evidence and rests, and Disadvantaged must assume the burden of going forward with the evidence.

Disadvantaged does not rebut the probation officer's representations about his upbringing in Miami's inner city, his lack of formal schooling beyond the ninth grade, and his previous conviction for possession of marijuana. Disadvantaged does challenge, however, the officer's conclusion, based in part on the Sentencing Commission guidelines and policy statements, that he is a poor risk for probation and that he needs incapacitation. According to Disadvantaged, the guidelines would not indicate a need for incapacitation but for the finding that he obtains much of his livelihood from criminal conduct. This finding, he argues, is inappropriate.¹⁷⁴ For the same reasons he protests the probation officer's suggestion that he might meet the requirements of title III, section 994(h)(2), which mandates a substantial term of imprisonment for defendants who commit their offenses as part of a pattern of criminal conduct from which they derive a substantial portion of their income. Disadvantaged objects because the finding of dependency on criminal conduct for a livelihood is based on the introduction, through the presentence investigation report, of hearsay evidence.¹⁷⁵ Through use of this evidence, he claims, he will be imprisoned for conduct never reduced to a conviction and without the usual due process protections that attend a conviction.¹⁷⁶ Overruling this objection, the court states that the evidence might not be used for the purposes of incapacitation or punishment, but might, instead, be used only for the purpose of rehabilitation.¹⁷⁷ Use of the information for this latter purpose, it concludes, is an acceptable practice.¹⁷⁸

Disadvantaged then proceeds to produce positive evidence to refute

¹⁷³ The judge finds that Advantaged lacks standing to challenge the sentencing provisions since the provisions do not affect him adversely.

¹⁷⁴ See S. 1722, *supra* note 12, tit. III, 994(d). See notes 102-15 & accompanying text *supra*.

¹⁷⁵ See note 110 & accompanying text *supra*.

¹⁷⁶ See notes 106-15 & accompanying text *supra*.

¹⁷⁷ Disadvantaged argues that the use of hearsay evidence of prior criminal conduct is unconstitutional even for the purpose of rehabilitation, but concedes Supreme Court precedent allowing it. See note 112 *supra*.

¹⁷⁸ See note 112 & accompanying text *supra*.

the probation officer's conclusion that he should be incapacitated. He calls two relatives to the stand to testify. They indicate that they are well settled family men, residents of a middle class neighborhood in Miami, and steadily employed as skilled workers in the construction industry. Both are willing to take Disadvantaged into their homes. They claim that they can find work for Disadvantaged as an apprentice carpenter and are confident that he can lead a law-abiding life if placed on probation.

Disadvantaged also calls the Chairman of the Sentencing Commission to testify. The questioning centers on how the Commission concluded that persons of Disadvantaged's background will commit more crime unless removed from society. The Chairman states that the Commission based its conclusion on empirical evidence gathered from various state and federal authorities engaged in parole decisionmaking. He explains that in formulating devices to single out those offenders who are likely to become recidivists, these parole authorities use a variety of offender characteristics, such as education, vocational skills, unemployment record, family ties and responsibilities, and community ties. The Commission used these five characteristics, along with the others listed in title III, section 994(d), to decide whether a particular class of defendants should be sentenced to probation for rehabilitative purposes. The Chairman insists, however, that the Commission heeded the prohibition of section 994(e) against considering the five quoted offender characteristics in determining whether to imprison a defendant.¹⁷⁹ These characteristics, he says, were not part of the predictive device that the Commission used to select those offenders who must be incapacitated for society's protection. The predictive device employed for that purpose mainly used offender age and criminal history.¹⁸⁰ The chairman declines to venture an opinion about the predictive device's accuracy, other than that the Commission held the device to be reliable.

With the conclusion of the Chairman's testimony, the presentation of evidence ends and the arguments of counsel commence. Counsel for Disadvantaged begins and renews the various constitutional objections he made in his prehearing motion.¹⁸¹ He also renews his objection to the sufficiency of the evidence underlying the Commission's decision that offenders such as he will commit more crime and thereby pose an

¹⁷⁹ See notes 65-68 & accompanying text *supra*.

¹⁸⁰ The Chairman acknowledges, as he must, that the predictive device mandating the disposition recommended for Disadvantaged has never been challenged in a judicial proceeding. This proceeding is, after all, the first sentencing under the new Code. He also acknowledges that the reliability of the state and federal parole commission predictive devices considered by the Sentencing Commission has not been ascertained in an adversarial judicial proceeding.

¹⁸¹ See notes 95-125 & accompanying text *supra*.

unacceptable threat to society, unless they are incapacitated.¹⁸² To imprison such persons on the evidence presented to the Commission is not to remove them from society for society's protection, counsel submits, but to punish them arbitrarily on account of their personal characteristics and, thus, to deny them due process and the equal protection of the laws.¹⁸³ Next, counsel reasserts his argument that the guidelines applicable to Disadvantaged violate the section 994(d) requirement of neutrality because of the correlation between the section 994(d) defendant criteria and race, sex, and socioeconomic status.¹⁸⁴ According to counsel, minorities and individuals of low socioeconomic status are more likely to receive a prison sentence, as opposed to probation, than whites of middle or high socioeconomic status.

Finally, counsel for Disadvantaged adds a new objection to his collection: all guidelines calling for incapacitation are invalid because the Commission violated section 994(e) in formulating them. According to counsel, the decision that a particular type of defendant needs incapacitation must be based on a threshold determination that the defendant is not amenable to rehabilitation on probation.¹⁸⁵ This threshold decision must be made through use of all eleven of the title III, section 994(d) defendant criteria.¹⁸⁶ Therefore, the Commission must have considered, at least indirectly, the five defendant criteria that section 994(e) says may not be considered in deciding whether to incapacitate a defendant.¹⁸⁷

After hearing the government's argument in rebuttal, the court articulates its findings and conclusions from the bench. It finds first, contrary to the probation officer's recommendation, that Disadvantaged should not be categorized as one who will commit more crime. According to the court, Disadvantaged is among those defendants considered an acceptable risk for a sentence of probation.¹⁸⁸ Likewise, the court

¹⁸² See notes 132-34 & accompanying text *supra*.

¹⁸³ See note 134 & accompanying text *supra*.

¹⁸⁴ See notes 130-31 & accompanying text *supra*.

¹⁸⁵ See text accompanying notes 80-81 *supra*. The Commission must make this threshold decision because the Code requires it to consider rehabilitation in sentencing. S. 1722, *supra* note 12, tit. III, § 994(g). See S. REP. NO. 96-553 at 934-35.

¹⁸⁶ See text accompanying notes 61-62 *supra*.

¹⁸⁷ Among the eleven criteria are education, vocational skills, employment record, family ties and responsibilities, and community ties. S. 1722, *supra* note 12, tit. III, § 994(d).

¹⁸⁸ As required by the Code, see notes 53, 90 & accompanying text *supra*, the court categorizing the defendant in the case at hand makes findings on the need for rehabilitation, incapacitation, and increased punishment beyond that required for simple commission of the crime. In considering the need for rehabilitation, the Commission's policy statements direct the court to the eleven criteria of section 994(d), each of which calls for a factual determination.

The court accordingly makes findings corresponding to the eleven criteria. (1) The parties have stipulated that Disadvantaged is 21 years old. (2) The court finds that Disadvan-

does not believe that under section 994(h)(2), Disadvantaged must be sentenced to a substantial term of imprisonment. Since, however, the category of offense in this case is "very high" and the guidelines mandate a prison sentence regardless of the applicable defendant category, Disadvantaged, like Advantaged, is not entitled to probation.

Since the defendant category applicable to Disadvantaged does not call for incapacitation, or imprisonment for enhanced punishment, the court finds that Disadvantaged lacks standing to object to the sufficiency of the evidence underpinning the Sentencing Commission's method for predicting future criminal conduct. Disadvantaged likewise lacks standing to object to the lack of neutrality of the section 994(d) offender criteria. Further, the court, as in Advantaged's case, finds it unnecessary to reach the constitutional questions.

The court concludes by reiterating its earlier findings, in Advantaged's case, on the offense severity and the need for imprisonment for punishment and deterrence. It sentences Disadvantaged to the guidelines' maximum, fifty months imprisonment, which is the same sentence given Advantaged.

tagged has a ninth-grade education, and (3) that, although he lacks vocational skills, he will gain carpenter's skills if placed on probation. (4) Since there is no evidence that Disadvantaged suffers from mental or emotional incapacity, the court makes no finding on this criterion. (5) The court infers from Disadvantaged's history of drug dealing that he uses marijuana but is not drug dependent. Disadvantaged has not denied prior use of marijuana. (6) The court finds that Disadvantaged has no employment experience, except in drug trafficking, but that he is employable as a carpenter's apprentice. (7) The court believes the testimony of Disadvantaged's relatives and finds that although he has no ties or responsibilities to his immediate family, Disadvantaged nevertheless has ties with the relatives who testified on his behalf. (8) The court finds no ties with the Miami community, however, except with individuals dealing in drugs. (9) The court observes that although Disadvantaged's role in the offense was considered in assessing offense severity, it can also be considered in assessing the need for rehabilitation. Disadvantaged's role was significant and substantial, which indicates a need for correction. (10) Since Disadvantaged has not rebutted the statement in the presentence investigation report that he was convicted in state court for possession of marijuana, the court accepts it as true. (11) The court finds that Disadvantaged has been supporting himself by trafficking drugs.

From these facts the court finds a clear need for rehabilitation. It bases this conclusion mainly on defendant's age, his limited education and employment skills and his tendency to resort to crime for survival. Because of the informal, but close, around-the-clock supervision Disadvantaged would receive while living with his relatives and working as an apprentice carpenter, the court believes it likely that he can complete a term of probation without violating the law. The court stresses that maximum supervision by the probation officer would be required, along with tightly drawn, restrictive conditions of probation.

With regard to incapacitation, the court finds that since Disadvantaged is an acceptable risk for probation, he probably will not commit more crime and therefore does not need to be incapacitated.

Finally, the court finds that under the guidelines, Disadvantaged's past criminal history is not so severe that he should be punished more than is required for simple commission of the crime.

D. REVIEW OF THE SENTENCE

Both Advantaged and Disadvantaged appeal their convictions, claiming that the district court committed reversible error in denying their motion to suppress the evidence seized at the time of their arrests. The Code preserves a defendant's right to challenge the validity of his conviction on direct appeal,¹⁸⁹ and it also grants a defendant the right to appeal his sentence if it is greater than the maximum sentence prescribed by the guidelines the district court finds applicable.¹⁹⁰ The government has a reciprocal right to appeal if the sentence is below the guideline minimum.¹⁹¹ Since the sentence given each defendant in this case is within the Commission guidelines that the court found applicable, neither defendants nor the government possesses a right to direct appellate review.¹⁹²

¹⁸⁹ As to a direct appeal by a defendant, S. 1722 provides: "(a) Appeal in General.—Except as provided in subsection (b), a defendant may appeal to a United States court of appeals from a final decision, judgment, or order entered by a district court of the United States in a criminal case." S. 1722, *supra* note 12, tit. I, § 3723(a).

¹⁹⁰ As to a defendant's appeal of his sentence, S. 1722 provides:

(a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence imposed for a felony or a Class A misdemeanor if the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guidelines, or includes a more limiting condition of probation or supervised release under section 2103(b)(6) or (b)(11) than the maximum established in the guidelines, that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and that are found by the sentencing court to be applicable to the case, unless—

(1) the sentence is equal to or less than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure; or

(2) the sentence is that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

Id. § 3725(a).

¹⁹¹ As to an appeal of a sentence by the government, S. 1722 provides:

(b) Appeal by the Government.—The government may, with the approval of the Attorney General or his designee, file a notice of appeal in the district court for review of an otherwise final sentence imposed for a felony or a Class A misdemeanor if the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guidelines, or includes a less limiting condition of probation or supervised release under section 2103(b)(6) or (b)(11) than the minimum established in the guidelines, that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and that are found by the sentencing court to be applicable to the case, unless—

(1) the sentence is equal to or greater than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedures; or

(2) the sentence is that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

Id. § 3725(b).

¹⁹² A direct appeal under §§ 3725(a)-(b) assumes that the lower court applied the guidelines properly. The only question is whether it was appropriate for the court to impose a sentence outside those guidelines. The parties must seek remedy for alleged error in the court's selection of guidelines, whether it relates to the court's fact findings or its application of the guidelines to the facts, in rule 35(b)(2) proceedings before the lower court. *Id.* tit. II,

The defendants remain convinced, however, that the constitutional, statutory, and guidelines deficiencies they alleged in their presentence hearing motions are of sufficient magnitude to render the Code's sentencing scheme unenforceable and their sentences a nullity. At the same time, the government stands convinced that the district court erred in finding inapplicable the category of defendant recommended for Disadvantaged in his presentence investigation report. According to the government, Disadvantaged belongs to a category of defendant requiring imprisonment for sixty to seventy-five months for the public's safety.

The defendants act first. While prosecuting their direct appeals in the court of appeals, they move the district court to set aside their sentences on the ground that the sentences are illegal or that they were imposed in an illegal manner. Federal Rule of Criminal Procedure 35(a) provides that "[t]he court may correct an illegal sentence at any time." Although the defendants have been admitted to bail pending resolution of their direct appeals and could defer such a rule 35(a) motion indefinitely, they are not confident that the reviewing court will reverse their convictions. They do not want to risk being taken into custody in the event their convictions are affirmed before the attacks on their sentences have run their course.¹⁹³ Accordingly, the defendants

§ 111(t). After the lower court rules on the rule 35(b)(2) motion, a dissatisfied party can petition for leave to appeal the lower court's determination. *Id.* tit. I, §§ 3723(b), 3724(d). If error in guideline application were reviewable on direct appeal, rule 35(b)(2) would be useless.

Claims that a sentence is illegal or imposed in an illegal manner also arise under rule 35, rather than under the direct appeal provisions. The Senate bill does not change substantively the existing provisions of Federal Rule of Criminal Procedure 35(a), which provides for district court review of such claims before an appeal may be taken. *But see* note 274 & accompanying text *infra*. The text of the pertinent rule 35 sections, as amended by S. 1722, is as follows:

(a) Correction of an Illegal Sentence.—The court may correct an illegal sentence at any time.

(b) Correction of an Illegally or Erroneously Imposed Sentence.—The court, on motion of either party or on its own motion, may correct—

(1) a sentence imposed in an illegal manner;

(2) a sentence imposed as a result of incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)

S. 1722, *supra* note 12, tit. II, § 111(t).

The ultimate standard of review on direct appeal is whether the sentence imposed outside the guidelines is "unreasonable." *Id.* tit. I, § 3725(d). Practically speaking, it must be assumed that the court of appeals would first consider whether the lower court's finding of an aggravating or mitigating circumstance unforeseen by the Sentencing Commission in formulating the guidelines, *id.*, § 2003(b), is "clearly erroneous." Then if the lower court's fact finding withstood scrutiny, the court of appeals would consider whether the sentence the lower court fashioned to accommodate the unforeseen circumstance is "unreasonable." It can only be assumed that the "clearly erroneous" standard would apply to review of the lower court's fact finding, for S. 1722 does not specify the standard.

¹⁹³ Defendants are not certain that they will remain free once their appeals on the merits have been resolved against them. Although the new Code indicates that a court may grant

proceed with the rule 35(a) motions without delay, advancing all the arguments made in their presentence motions.¹⁹⁴ Simultaneously, they file a motion under rule 35(b)(1), claiming that their sentences were imposed in an illegal manner, and a motion under 28 U.S.C. § 2255 (1976), the habeas corpus provision for federal prisoners, attacking their sentences on the grounds that they were imposed "in violation of the Constitution or laws of the United States."¹⁹⁵

The government, meanwhile, files a rule 35(b)(2) motion with the district court claiming error in its selection of Disadvantaged's defendant category and thus in its application of the Sentencing Commission's guidelines. Rule 35(b)(2), as amended by the Code, provides that "[t]he [district] court, on motion of either party or on its own motion, may correct . . . a sentence imposed as a result of incorrect application of the sentencing guidelines . . . within 120 days after sentence is imposed."¹⁹⁶ The government files its motion well within the 120-day time period¹⁹⁷

bail pending appeal of the conviction or of a sentence outside the guidelines, S. 1722, *supra* note 12, tit. I, § 3504, it is not clear whether the court may grant bail pending resolution of a petition for leave to appeal or an appeal of a rule 35 ruling. *Id.* See S. REP. NO. 96-553 at 1082-84. Although the Code and the legislative history are vague concerning this issue, cases under prior law provide some encouragement to defendants. See, e.g., *Binion v. United States*, 352 U.S. 1028 (1957); *Davis v. United States*, 243 F.2d 69 (6th Cir. 1957); *United States v. Thompson*, 152 F. Supp. 292 (S.D.N.Y. 1957).

¹⁹⁴ Advantaged adds another ground to his rule 35(a) motion attacking his sentence as illegal. He alludes to the court's statement of reasons for his sentence of 50 months, *see* text accompanying note 171 *supra*. The court stated that it had imposed this sentence, which was the maximum within the guideline range, because it anticipated giving Disadvantaged a greater sentence. Advantaged believes that at the time, the court anticipated placing Disadvantaged in the category of defendant recommended by the presentence investigation report. This category called for incapacitation and a sentence of 60 to 75 months. As it turned out, the court chose a different category of defendant for Disadvantaged, which lead to a sentence of 50 months. Advantaged renews his earlier objection to being sentenced "extra" on account of Disadvantaged's offender characteristics and adds that there now is no basis for requiring him to serve 50, as opposed to 40, months. The sentence was based on an erroneous perception of the facts and thus should be set aside.

When Advantaged makes his motion, Disadvantaged moves the court to set aside his sentence of 50 months, as well. He argues that the court was influenced in setting Advantaged's sentence by the defendant category recommended for Disadvantaged. Since the court did not adopt this defendant category for Disadvantaged, Advantaged's sentence is improper. Since Advantaged's sentence is improper, Disadvantaged's sentence, which the court meant to be equal to Advantaged's because the two were equally culpable, is also incorrect.

¹⁹⁵ 28 U.S.C. § 2255 (1976). A defendant can also make a § 2255 motion attacking a sentence on the grounds that it is "in excess of the maximum authorized by law." It is possible that this section would permit a claim that the court applied the wrong guidelines or improperly set a sentence above the guidelines.

Defendants invoke all of these possibilities as a matter of precaution. If the court should reject one or several of them, review may still be obtained through another.

¹⁹⁶ S. 1722, *supra* note 12, tit. II, § 111(t).

¹⁹⁷ The Code's amendments to rule 35 do not resolve a controversy that has arisen under the current rule. Both the current rule and the amended rule provide that under certain

and requests the court to impose the guidelines recommended in Disadvantaged's presentence investigation report and to resentence the defendant accordingly.¹⁹⁸ The government requests an evidentiary hearing in order to show, first, that the court was incorrect in categorizing Disadvantaged as an acceptable probation risk, and, second, that the Sentencing Commission's predictive device indicates that Disadvantaged should be incapacitated.

Disadvantaged objects to an evidentiary hearing for these purposes on the grounds that the government had ample opportunity to develop these points at the sentencing hearing. According to Disadvantaged, the policy reasons that undergird the doctrines of *res judicata* and *law-of-the-case* should preclude relitigation of the issues. Neither party has any excuse for failing to produce at the sentencing hearing all the relevant evidence it has, especially in a case such as this, in which the issues are clear. Disadvantaged argues that it is manifestly unfair to allow a party who fails to produce all its evidence at the sentencing hearing a second chance to do so in a rule 35(b)(2) context.

According to Disadvantaged, the court should only consider on a rule 35(b)(2) motion whether the existing evidence is sufficient to support the court's fact-finding and subsequent selection of guidelines. If the evidence is insufficient, the court must decide what facts are determinable from the record and what guidelines apply under those findings. Although it may be necessary to make additional findings, depending on how extensive the court's fact findings were at sentencing, the court should make these findings on the existing record. It is unnecessary and inappropriate, Disadvantaged argues, to begin taking new evidence at this point.

The government responds that the sentencing process under the Code does not end with the imposition of sentence and, thus, that res

circumstances a court may correct a sentence "within 120 days after the sentence is imposed." FED. R. CRIM. P. 35(b); S. 1722, *supra* note 12, tit. II, § 111(t)(b). A problem arises when the parties file a proper rule 35 motion before the 120-day deadline, but the court is unable to rule on their motion until after 120 days have passed. Can the court still correct the sentence? Several circuit courts of appeal have ruled that in such situations the court may go ahead and decide the motion within a reasonable time after the deadline expires. *United States v. Mendoza*, 581 F.2d 89 (5th Cir. 1978) (en banc); *United States v. Stallings*, 516 F.2d 1287 (4th Cir. 1975); *United States v. United States District Court*, 509 F.2d 1352 (9th Cir.), *cert. denied*, 421 U.S. 962 (1975); *United States v. Janiec*, 505 F.2d 983 (3d Cir. 1974), *cert. denied*, 420 U.S. 948 (1975); *United States v. Polizzi*, 500 F.2d 856, 896 n.73 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975); *Leyvas v. United States*, 371 F.2d 714 (9th Cir. 1967); *Dodge v. Bennett*, 335 F.2d 657 (1st Cir. 1964).

¹⁹⁸ The government would like the court to decide its rule 35(b)(2) motion as quickly as possible because, if it loses, it would like to petition the higher court for leave to appeal, S. 1722, *supra* note 12, tit. I, § 3724(d), and to argue its case while the defendant's appeal on the merits is still pending. The two appeals might then be consolidated. It is not clear, however, that this could occur in this case. See note 228 *infra*.

judicata and law-of-the-case policies are inapplicable. According to the government, the sentencing process embraces not only the sentencing itself, but also: direct appellate review of sentences outside the guidelines; rule 35(b)(2) proceedings to reconsider the selection of guidelines, and subsequent appellate review; and motions under rule 35(a) and 35(b)(1) to set aside illegal sentences or sentences imposed in an illegal manner and subsequent appellate review. Rule 35(b)(2) proceedings, in particular, accommodate the introduction of further evidence, especially when the court holds different guidelines to apply and the defendant must be resentenced. At resentencing the defendant may exercise the right of allocution. The government should have an opportunity to counterbalance the defendant's remarks with evidence of its own. Further, the government contends, closing the evidence once the parties rest at the sentencing hearing would be unfair and could lead to injustice in a case in which the court fashioned the defendant's sentence from guidelines not anticipated at the sentencing hearing. In such cases, the parties might not have anticipated the sort of evidence that eventually dictated the sentence imposed.

The district court agrees with Disadvantaged and denies the government's request for an evidentiary hearing in the rule 35(b)(2) proceeding. The court notes that the government had every reason to know at the time of the original sentencing hearing that the evidence now in question would be relevant; it relates to the guideline recommended in the presentence investigation report. Further, the government has not indicated that the proffered evidence could not have been known at the time of the sentencing hearing. Under the circumstances, it would be unfair, the court reasons, to allow the government a second chance to prove the same points.¹⁹⁹

The government immediately petitions the court of appeals for a writ of mandamus on the grounds that the district court abused its discretion in refusing to grant an evidentiary hearing in the rule 35(b)(2) proceeding.²⁰⁰ The court of appeals denies the government's motion be-

¹⁹⁹ This ruling conforms with the reigning proposition prior to passage of the Code that inquiries under rule 35 must be limited to the existing record. *See, e.g.,* *Semet v. United States*, 422 F.2d 1269, 1271 (10th Cir. 1970); *Gilinsky v. United States*, 335 F.2d 914, 916-17 (9th Cir. 1964); 2 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 582 (1969).

²⁰⁰ The government petitions for mandamus for three reasons: First, it is questionable whether the district court's decision not to consider the evidence *can* be reviewed in appellate proceedings instituted under title I, § 3724(d). The government points out that neither § 3724(d) nor any other provision of the Code specifies when a court of appeals may grant a petition for leave to appeal. Second, even if the district court's ruling on the acceptance of evidence is reviewable under § 3724(d), there is no guarantee that this review will occur. The court of appeals may decline, in the exercise of its discretion, to grant the petition. Third, there is no authority delineating the appropriate standard of review applicable to a district

cause it believes the government can obtain review through other means. If the government loses the rule 35(b)(2) motion, it can petition for leave to appeal. If its argument is strong enough, the court of appeals will grant review. If the government wins the motion, it will not need appellate review. If the defendant obtains review of the 35(b)(2) ruling, the government can cross-appeal the question of receiving additional evidence.

1. The Rule 35(a), (b)(1), and (b)(2) and Section 2255 Motions

In order to preserve on appeal its right to question the district court's decision not to allow introduction of additional evidence, the government proffers, at the beginning of the hearing, the evidence it had sought to have admitted. Disadvantaged renews his objections to hearsay evidence concerning his criminal background.²⁰¹ The court overrules his objection and allows the government to proceed with its proffer.

The government first augments the history of Disadvantaged's criminal activity developed at the sentencing hearing in order to demonstrate that Disadvantaged is not amenable to corrective treatment on probation and that he must be incapacitated for the public's protection. The government calls several witnesses, including law enforcement officers, who are familiar with the circumstances of Disadvantaged's earlier state court conviction for possession of marijuana. Their testimony, consisting mostly of hearsay, indicates that Disadvantaged was a drug pusher of no small magnitude at the time he committed the possession offense. They testify that Disadvantaged had direct connections with marijuana smugglers. The state charged Disadvantaged only with possession, the best case it could make out at the time. This newly presented evidence,

court's disposition of a rule 35(b)(2) motion once the petition for leave to appeal has been granted. Title I, § 3722, empowers the Supreme Court to "prescribe rules of pleadings, practice, and procedure with respect to appeals from decisions, judgments, and orders entered in criminal cases in the district courts" S. 1722, *supra* note 12, tit. I, § 3722(a). It is not clear, however, whether this grant encompasses the power to make rules dictating when a petition for leave to appeal may or must be granted, what claims may or must be considered when a petition is granted, or the standard of review that an appellate court must employ.

By petitioning for mandamus, the government hopes to avoid these problems. According to the government, the petition must be granted if, as here, the district court clearly abused its discretion and, as here, there may be no other means to obtain appellate review. *See Kerr v. United States District Court*, 426 U.S. 394, 403 (1976); *Arthur Young & Company v. United States District Court*, 549 F.2d 686, 691-92 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977); *Holms v. United States Board of Parole*, 541 F.2d 1243, 1247 (7th Cir. 1976).

The government suggests that it might also be entitled to a writ of mandamus when a district court makes a clearly erroneous decision at a sentencing hearing that cannot be reviewed on direct appeal because the sentence imposed falls within the guidelines. There is no assurance that review of such sentences will be obtainable under title I, § 3724(d).

²⁰¹ *See* notes 106-15 & accompanying text *supra*.

when considered with the other evidence brought out in the sentencing hearing, indicates that, for at least the last three years, Disadvantaged has made his living unlawfully in the narcotics trade.

The government also produces the testimony of persons who helped formulate the Commission's guidelines, as well as that of several experts involved in devising predictive devices for state parole commissions. These individuals testify that the predictive device the Commission used in creating categories of defendants is founded on strong empirical evidence. Furthermore, in their opinion Disadvantaged's age and history of criminal activity, as portrayed by the record now before the court, indicate that Disadvantaged will commit further crime, even if given maximum supervision on probation.

At the conclusion of the government's proffer,²⁰² the court again states that it will not consider this additional evidence in deciding whether it applied the proper guidelines to Disadvantaged. It then entertains argument of counsel over whether the evidence on the record made at the sentencing hearing is sufficient to support the factual findings necessary to make the court's chosen guidelines applicable. The court, after careful consideration, rules that its earlier factual findings are not sufficiently supported by the evidence after all: on reexamination, the facts indicate the need to incapacitate Disadvantaged. Therefore, the court should apply the defendant category recommended in Disadvantaged's presentence investigation report. According to the guidelines, this defendant category requires imprisonment for sixty to seventy-five months. After affording Disadvantaged the right of allocution, and allowing counsel to argue about the appropriate sentence within that range, the court resentences Disadvantaged. Because it is a close question whether Disadvantaged really needs to be incapacitated, the court decides upon sixty months. Further, the court still views Advantaged and Disadvantaged as equally culpable, and it wishes to make their sentences as nearly equal as possible.

After resentencing Disadvantaged, the court addresses defendants' rule 35(a) and (b)(1) and section 2255 motions. Disadvantaged's motions relate to his first sentence, not imposed for the purpose of incapacitation, rather than to his new rule 35(b)(2) sentence. In briefing his rule 35(a) and (b)(1) and section 2255 motions, therefore, he has directed his arguments solely toward the implications of his initial sentence. Focusing on standing, he argues that he may challenge the constitutionality of the entire sentencing system, even though the alleged deficiencies do not relate directly to the particular guidelines actually applied to him. It

²⁰² Disadvantaged has been allowed to cross-examine the government's witnesses without forsaking his objection to the proffered evidence.

also sets forth his argument that his sentence is improper because it was based on Advantaged's sentence, which in turn was influenced by the judge's incorrect expectation that he would set Disadvantaged's sentence according to the recommendations of the presentence investigation report.²⁰³ The court questions the necessity, in view of the new sentence, of ruling on the motions Disadvantaged has addressed to his first sentence. Disadvantaged states, however, that he intends to petition for leave to appeal the court's decision to apply the guidelines advocated by the government and change his sentence. Under these circumstances, the court considers it necessary to decide his rule 35(a) and (b)(1) and section 2255 motions. The court reasons that if the court of appeals grants Disadvantaged leave to appeal and finds in his favor, the original sentence will probably be reinstated;²⁰⁴ if so, the motions will have to be addressed. It is in the interest of judicial economy for the court to decide the motions now.²⁰⁵

Turning to the merits of the rule 35(a) and (b)(1) motions the judge finds that counsel have added nothing new to their constitutional, statutory, and guideline arguments. He adheres to his earlier rulings and finds against defendants. Regarding the section 2255 motion, the court hears two objections from the government. First, the government argues that the court cannot hear the motion because the sentence is not yet final. Under the system created by the new Code, a defendant must pursue all his rule 35 motions to correct or vacate the sentence, as well as a direct appeal of his sentence, if he has one, before the sentence can be

²⁰³ See note 194 & accompanying text *supra*.

²⁰⁴ While S. 1722 clearly delineates what the court of appeals can do when it finds a sentence outside the guidelines to be unreasonable, S. 1722, *supra* note 12, tit. I, § 3725(e), the bill gives no indication of what the higher court should do if it finds the lower court in error in a rule 35(b)(2) ruling.

²⁰⁵ The court wishes to avoid having to rule on Disadvantaged's motions at a later time. Especially since it must rule on Advantaged's rule 35(a) and (b)(1) and § 2255 motions, which are identical to Disadvantaged's, it makes sense to dispose presently of all the motions.

For the same reasons the court declares that it will rule on Advantaged's argument that his sentence improperly was set on the judge's mistaken supposition that he would follow the recommendations of Disadvantaged's presentence investigation report. See note 194 & accompanying text *supra*. Although this motion is arguably moot, given Disadvantaged's new sentence, it might become relevant again should Disadvantaged's old sentence be reinstated. The mootness issue cannot be decided until the court of appeals acts on Disadvantaged's petition for leave to appeal. If it grants the petition, determination of mootness must await decision on the merits.

Even if the errors alleged and the briefs submitted in the rule 35(a) and (b)(1) and § 2255 motions addressing Disadvantaged's first sentence were identical to those required to oppose the second sentence, it can be argued that a second round of motions and appeals would be required in order to preserve the objections. The court might hold that all errors subject to attack in the first sentencing will be abandoned unless raised again at the second sentencing. The court of appeals, upon considering the first set of motions, might find them moot on the theory that the subsequent sentencing was an entirely "new ballgame."

considered "imposed" for section 2255 purposes. Second, the government argues that a defendant cannot bring a section 2255 motion while the appeal of his conviction is still pending, absent extraordinary circumstances.²⁰⁶ According to the government, no extraordinary circumstances exist in these cases which allow the court to hear defendants' motions at this time. It is appropriate to wait because if defendants win their appeals and their convictions are set aside, the challenges to their sentences will be moot.²⁰⁷

Defendants reply to the government's first argument by pointing to title I, section 2302(b), which states that despite provisions allowing subsequent modification, correction, or appeal of a sentence, "a judgment of conviction that includes [a sentence to prison] constitutes a final judgment for all other purposes."²⁰⁸ Defendants note that "provisions allowing subsequent modification, correction, or appeal" refers only to those provisions for modification, correction, or appeal that are within the Code.²⁰⁹ Since section 2255 is not part of the Code, it is an "other purpose," and their sentences are therefore "final." Accordingly, they argue, the motion is timely.

In response to the government's second argument, defendants note that the courts have not claimed jurisdictional grounds for their practice of refusing to hear section 2255 motions prior to resolution of the appeal on the merits.²¹⁰ Rather, the practice is a judge-made rule based on considerations of judicial convenience and economy and the fear of inconsistent rulings.²¹¹ The Code changes prior law requiring postponement of rule 35 motions until after resolution of the appeal on the merits.²¹² Rule 35 motions under the Code generally will be resolved before the appeal of the conviction.²¹³ In the case at bar, judicial convenience and economy dictate that defendants bring their section 2255 motions simultaneously with their rule 35 motions. In this manner, the court may dispose of them in a single proceeding. Since the rule against bringing section 2255 motions before resolution of the appeal is one of administrative convenience, defendants argue, it "should not be uncom-

²⁰⁶ The government cites the following cases as support for its contention: *United States v. Davis*, 604 F.2d 474, 484-85 (7th Cir. 1979); *United States v. Tindle*, 522 F.2d 689 (D.C. Cir. 1975); *Welsh v. United States*, 404 F.2d 333 (5th Cir. 1968); *Womack v. United States*, 395 F.2d 630 (D.C. Cir. 1968); *Moshers v. Eide*, 353 F.2d 517 (8th Cir. 1965); *Nemec v. United States*, 184 F.2d 355 (9th Cir. 1950).

²⁰⁷ *See Womack v. United States*, 395 F.2d at 631; *Welsh v. United States*, 404 F.2d 333.

²⁰⁸ S. 1722, *supra* note 12, tit. I, § 2302(b).

²⁰⁹ *See id.* § 2302(b)(1).

²¹⁰ *See Womack v. United States*, 395 F.2d at 631.

²¹¹ *See United States v. Davis*, 604 F.2d at 485; *Womack v. United States*, 395 F.2d at 631; *Welsh v. United States* 404 F.2d 333.

²¹² *See* note 275 & accompanying text *infra*.

²¹³ *See id.*

promisingly applied to effect an unfair result.”²¹⁴

The court agrees with defendants that it is more sensible to allow the section 2255 motion to be filed and prosecuted at this time, since the constitutional and statutory arguments are the same as those made under the rule 35 motions. The court rules against defendants on the merits, however, for the same reasons adduced in denying the rule 35(a) and (b)(1) motions.²¹⁵

2. *Further Motions and the Appeals*

Both defendants take separate appeals from the trial court's disposition of their rule 35(a) and (b)(1) and section 2255 motions. The government cross appeals the court's ruling that defendants can bring a section 2255 motion while the appeal of a conviction is pending. Disadvantaged also petitions the court of appeals for leave to appeal the disposition of the government's rule 35(b)(2) motion. The court of appeals, without oral argument, grants the petition.²¹⁶ The government then cross-assigns error on the part of the district court in refusing to hear its proffered evidence at the rule 35(b)(2) hearing.

Meanwhile, Disadvantaged launches an additional series of attacks against his new, higher sentence. Resorting to rule 35(b)(2), he claims that the court imposed his new sentence “as a result of incorrect application of the sentencing guidelines.”²¹⁷ In addition, he again moves for relief under rule 35(a) and (b)(1) and section 2255, addressing his arguments to the new sentence, which calls for incapacitation.

The trial court, in considering these new motions, finds that it can no longer avoid ruling on the merits of Disadvantaged's claims because, under the newly applied guidelines, Disadvantaged's sentence is for the purpose of incapacitation, and consideration of his criminal background, as well as of his other personal characteristics, has served to increase his sentence. The court rules that earlier Supreme Court law, allowing consideration in sentencing of prior criminal conduct, whether or not reduced to a conviction,²¹⁸ still prevails under the new Code. Despite the radical changes the Code brings to the sentencing law,²¹⁹

²¹⁴ United States v. Tindle, 522 F.2d 689, 693 n.10 (D.C. Cir. 1975).

²¹⁵ See text following note 205 *supra*.

²¹⁶ Currently statutory law does not indicate what should be included in a § 3724(d) petition for leave to appeal or the appropriate response. The Supreme Court must promulgate rules governing these matters under title I, § 3722(a).

²¹⁷ S. 1722, *supra* note 12, tit. II, § 111(t). In this motion Disadvantaged argues that the facts brought forth at the original sentencing hearing do not support selection of a defendant category calling for incapacitation. He also claims that the judge misapplied the guidelines because of the constitutional, statutory, and guideline deficiencies previously asserted.

²¹⁸ See note 112 & accompanying text *supra*.

²¹⁹ See, e.g., note 113 & accompanying text *supra*.

Supreme Court precedent controls until the Court rules otherwise. Likewise, the court rules that sentencing for the sole purpose of incapacitation does not violate the due process clause,²²⁰ and that the Sentencing Commission had ample evidence on which to base its predictive devices.²²¹ It rejects Disadvantaged's arguments that the new Code sentences according to status, rather than acts,²²² and that its provisions are unconstitutionally vague.²²³ Further, the court finds no reason to change its earlier ruling on the arguments that the sentencing purposes of rehabilitation and incapacitation are irreconcilable,²²⁴ that the guidelines requiring imprisonment for the purpose of incapacitation impermissibly reflect considerations of rehabilitation inevitable in pre-Code sentencing patterns²²⁵ and that use of the section 994(d) defendant criteria violates the Code's neutrality requirement.²²⁶

When the court turns to Disadvantaged's rule 35(b)(2) motion attacking his new sentence, the government again proffers the evidence buttressing the need to incapacitate Disadvantaged which it had sought to enter on the first rule 35(b)(2) hearing. The court again refuses to admit the evidence and then summarily rejects Disadvantaged's arguments that the facts gathered at the original sentencing hearing do not support selecting a category of defendant that requires incapacitation. The court, accordingly, denies Disadvantaged's rule 35 and section 2255 motions addressed to his new sentence.

Disadvantaged subsequently petitions the court of appeals for leave to appeal the trial court's disposition of this latest rule 35(b)(2) motion. Since the matter of guideline application is already pending before the court of appeals from the earlier 35(b)(2) proceeding, the court grants the petition. The government then cross appeals the proffered evidence question. Disadvantaged also appeals the court's decision in his new rule 35(a) and (b)(1) and section 2255 proceedings.

The court of appeals now has pending before it a total of thirteen appeals by the defendants and two cross appeals by the government.²²⁷

²²⁰ See note 97 & accompanying text *supra*.

²²¹ See notes 99-101 & accompanying text *supra*.

²²² See note 116 & accompanying text *supra*.

²²³ See note 117 & accompanying text *supra*.

²²⁴ See text accompanying notes 159-60 *supra*.

²²⁵ See text accompanying note 163 *supra*.

²²⁶ See text accompanying note 161 *supra*.

²²⁷ The court of appeals has both defendants' appeals of their convictions and Disadvantaged's rule 35(a) and (b)(1) and § 2255 appeals, as well as the government's cross appeal on the question of whether a § 2255 motion can be brought challenging a sentence while the appeal of the conviction is still pending. Likewise, it has Disadvantaged's rule 35(a) and (b)(1) and § 2255 motions relating to his first sentence and his appeal of the trial court's disposition of the government's rule 35(b)(2) motion imposing a higher sentence. The court of appeals also has the government's cross appeal on the question of admitting new evidence

They have been consolidated into three groups, at the request of the parties: the direct appeals from the defendants' convictions, the appeals from the rule 35(a) and (b)(1) and section 2255 proceedings, and the rule 35(b)(2) appeals.²²⁸

One hundred and thirty-five days after the defendants' convictions,

at a rule 35(b)(2) hearing. Further, the court has Disadvantaged's rule 35(a) and (b)(1) and § 2255 appeals relating to his second sentence, as well as his appeal of the trial court's disposition of his rule 35(b)(2) motion.

²²⁸ At this point it might be useful to compare the respective time frames of defendants' rule 35 activities and of their appeals from their convictions.

Under the Federal Rules of Appellate Procedure, a defendant has ten days to file notice of his intention to appeal his conviction. FED. R. APP. P. 4(b). He then has roughly 40 days to have the record filed with the court of appeals, FED. R. APP. P. 10(b)(1), 11(b), and 40 days after that to file his brief. The government then has 30 days to file its brief, and the appellant has 14 days to reply. FED. R. APP. P. 31(a). Assuming no extensions are granted, four and a half months may pass between the time of the conviction and the time the last brief is filed. The median time actually taken in 1979-80 was five months. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR A-11. The Fifth Circuit normally reaches a decision in a criminal case submitted to the summary calendar, FED. R. APP. P. 34(a), one and two-thirds months after briefing is closed. Direct criminal appeals are submitted to oral argument one and a half months after briefing and, on the average, are decided two months after submission. The total time from conviction to resolution of the appeal, then, is roughly six and two-thirds months on summary calendar, or eight and one-half months if the appeal is argued.

Under rule 35(b)(2), as amended by S. 1722, a defendant must file a motion alleging improper application of the guidelines within 120 days of the time his sentence is imposed. S. 1722, *supra* note 12, tit. II, § 111(t). Current rule 35(b) has been construed to allow invocation of its provisions at any time within the 120-day limit. *See* note 197 *supra*. When motions are filed near the end of the time limit, and an evidentiary hearing is required, or extensive briefing is involved, the district court may be unable to dispose of the motion until well after the 120-day period. It is not inconceivable that as many as five months may pass before the rule 35(b)(2) motion is resolved. Under FED. R. APP. P. 4(b), defendants have ten days from entry of a judgment or order to file notice of their intention to appeal. (The government has 30 days). We will assume that this general rule will be held applicable to petitions for leave to appeal under the new Code. *See* S. 1722, *supra* note 12, tit. I, § 3723(b). It is impossible to know at this point how much time the parties will be given to file briefs supporting and opposing the petition for leave to appeal. Assuming, for the sake of discussion, that they have a total of 40 days for briefing, and a three-judge panel of the court of appeals, using the summary calendar procedure, takes an average of twenty days to grant or deny the petition, seven and one-third months may have passed from the filing of the rule 35(b)(2) motion to the granting of the petition for leave to appeal. If the petition is submitted to oral argument, because one or more members of the panel wishes to hear argument or the case does not meet the summary calendar criteria of FED. R. APP. P. 34(a), the court's disposition of the petition may take much longer. Once the petition is granted, the record on appeal must be prepared and filed, and further briefing on the merits of the district court's rule 35(b)(2) disposition must follow. Thereafter, whether the merits of the appeal are disposed of summarily, or after oral argument, more time must pass. A full year could pass before the guidelines appropriate to the defendant's case are finally determined.

The rule 35(b)(1) process does not include the extra step of seeking leave to appeal. Nevertheless, it is still quite possible that the court of appeals will resolve a rule 35(b)(1) appeal after it has already acted on the defendant's appeal of his conviction. This could also happen under rule 35(a), for motions under this section can be filed at any time. S. 1722,

the court of appeals, according customary priority to criminal cases,²²⁹ decides on summary calendar the appeals taken from their convictions. It reverses the convictions, and remands the cases for a new trial. The court dismisses as moot the appeals based on the first round of sentence attacks, which the parties are still in the process of briefing, and the appeals based on the second round of attacks, notices of which have only recently been filed.

III. FURTHER OBSERVATIONS AND SUGGESTIONS

A. THE NEED FOR CHANGE

The present federal sentencing system needs revision not only because of the great disparity in treatment it engenders,²³⁰ but also because of the irreconcilable conflict between the policy underlying the current sentencing statutes and that underlying both the parole determination guidelines and presumptive release dates required under the Parole Commission and Reorganization Act of 1976.²³¹

The sentencing statutes were designed to implement several variations of the "medical model" concept. Under the medical model, the judge sentences a defendant to an indeterminate term of imprisonment²³² for the purpose of rehabilitation.²³³ The Parole Commission, as

supra note 12, tit. II, § 111(t). Thus, motions under all three provisions of rule 35 could be finally resolved after the appeal of the conviction is completed.

If, as in the hypothetical case, there is a second, or, theoretically, a third, rule 35(b)(2) motion, the chances of the court of appeals deciding the appeal of the conviction, as well as the appeal of a sentence outside the guidelines, *before* it acts on the rule 35(b)(2) petition and any concomitant rule 35(a) and (b)(1) and § 2255 motions are even greater.

²²⁹ FED. R. APP. P. 45(b).

²³⁰ See notes 2-5 & accompanying text *supra*.

²³¹ Pub. L. No. 94-233, 90 Stat. 219 (1976) (codified in scattered sections of 5, 18 U.S.C.). Future references to specific parts of the Act will be to the Code section in which the part is located.

²³² Alan Dershowitz has defined indeterminate sentences as follows:

The indeterminate sentence is not a unitary concept of precise definition. It is a continuum of devices designed to tailor punishment, particularly the duration of confinement, to the rehabilitative needs and special dangers of the particular criminal (or more realistically, the category of criminals).

A sentence is more or less indeterminate to the extent that the amount of time actually to be served is decided not by the judge at the time sentence is imposed, but rather by an administrative board while the sentence is being served. Thus, a judicially imposed sentence of one day to life, the actual duration to be determined by the parole board after service of sentence has commenced, is entirely indeterminate; a judicially imposed sentence of life imprisonment with no possibility of parole (or other discretionary reduction) is entirely determinate. Between these terminal points of the continuum lie a wide range of more or less indeterminate sentences. A judicially imposed sentence of not less than five or more than ten years is partially indeterminate: although its maximum and minimum are fixed at the time of sentencing, the actual time to be served within those limits will be decided subsequently by some administrative authority. Another form of indeterminate sentence is the judicially imposed term of imprisonment for what appears to be a fixed period, say ten years, but subject to the normal rules of parole,

"doctor," monitors the defendant's response to treatment and decides

under which an administrative board has discretion to authorize release after a statutorily prescribed percentage of "the sentence" has been served. Thus, all sentences subject to parole (the vast majority of prison sentences imposed in the United States today) are indeterminate to some degree.

Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 297-98 (1974) (footnotes omitted).

Under the present sentencing statutes, all convicted offenders sentenced to prison will receive a form of indeterminate sentence unless they have a life sentence, 18 U.S.C. § 3651 (1976), or are sentenced to less than one year of imprisonment. 18 U.S.C. § 4205(a) (1976). The "pure" medical model concept encompasses only the wholly indeterminate sentence.

²³³ Four federal sentencing statutes are relevant to this discussion. The first one, 18 U.S.C. § 4205 (1976), applies generally to adult offenders. It has three parts: § 4205(a) is the least like the pure medical model, because sentences imposed under this subsection are only partially indeterminate. The judge sets a definite term of imprisonment; once the offender has completed one-third of that sentence, he is eligible for release on parole at any time the Parole Commission designates. Subsection (b)(2) is the fully indeterminate sentence; it allows a judge to fix a maximum term of imprisonment but specify that the Parole Commission can release the prisoner on parole at any time prior to that maximum. Subsection (b)(1) is a compromise between subsections (a) and (b)(2), allowing the judge to designate a maximum sentence and a minimum time that the offender must spend in prison, after which the Parole Commission may elect to place him on parole. The minimum time designated must be less than one-third of the offender's total sentence.

The Federal Youth Corrections Act, 18 U.S.C. §§ 5005-26 (1976), allows the judge to forego sentencing under the law a youth has been convicted of breaking and instead "sentence the youth offender to the custody of the Attorney General for treatment and supervision . . . until discharged by the [Parole] Commission . . ." *Id.* § 5010(b). Rehabilitative treatment is to be provided in special facilities. *Id.* § 5011. The Parole Commission releases youthful offenders on parole according to the same basic criteria used for adults in 18 U.S.C. § 4206 (1976), however. *Id.* § 5017(a). *See* Deperalta v. Garrison, 575 F.2d 749, 751 (9th Cir. 1978); Fronczak v. Warden, El Reno Reformatory, 553 F.2d 1219, 1221 (10th Cir. 1977). *See generally* FEDERAL JUDICIAL CENTER, THE SENTENCING OPTIONS OF FEDERAL DISTRICT JUDGES 27-32 (1980); Gottshall, *Sentencing the Youth and Young Adult Offender*, FED. PROBATION, June 1962, at 17.

Under 18 U.S.C. §§ 4251-55 (1976), the Narcotic Addicts Act, a judge may "place [an offender] in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment." *Id.* § 4252. If the results are positive, the judge may commit the offender to the custody of the Attorney General for treatment. The commitment is "for an indeterminate period of time not to exceed ten years, but in no event shall it exceed the maximum sentence that could otherwise have been imposed." *Id.* § 4253(a). After a mandatory six months of treatment, *id.* § 4254, the offender can be released at any time the Parole Commission designates, *id.* § 4254. The criteria the Parole Commission uses are similar to those used for offenders sentenced under 18 U.S.C. § 4206. *See* FEDERAL JUDICIAL CENTER, *supra*, at 33-36.

Finally, the Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42 (1976), allows the district court to commit juveniles to the custody of the Attorney General for a period not to extend "beyond the juvenile's twenty-first birthday or the maximum term which could have been imposed on an adult convicted of the same offense, whichever is sooner . . ." *Id.* § 5037(b). Once committed, a juvenile delinquent "may be released on parole at any time under such conditions and regulations as the United States Parole Commission deems proper" in accordance with 28 U.S.C. § 4206 (1976). *Id.* § 5041.

All of the above sentencing provisions clearly were fashioned primarily to serve the purpose of rehabilitation. The hybrids, those provisions that set a minimum time that the offender must remain in prison before the Parole Commission may release him, might be said to serve the purposes of punishment, deterrence, and incapacitation as well as that of rehabilita-

when he is "cured." The prisoner is released as soon as he is fully rehabilitated.²³⁴

Over the years, however, many experts have grown disillusioned with the medical model.²³⁵ Studies have failed to demonstrate that institutional rehabilitation programs are effective or that the Parole Commission is capable of determining the optimal time for release.²³⁶ Further, behavior in prison has been found an unsatisfactory predictor of future criminal conduct.²³⁷ In addition to questioning the effectiveness of the medical model, many have criticized indeterminate sentences as being inhumane. Opponents of indeterminate sentences have claimed that "the psychological stress engendered by not knowing one's release date is morally unjustifiable,"²³⁸ and adds to prison unrest.²³⁹ They have advocated a system that would allow the prisoner to know his release date as early in the process as possible.

There have also been frequent expressions of concern about the great disparity in the sentences of similarly situated defendants under the medical model.²⁴⁰ Many people have sought to alleviate that disparity by advocating a parole system that would release similarly situated defendants at the same time, regardless of their original sentences.²⁴¹

In the late 1960s, prompted by these and other concerns, the Parole Commission began to develop guidelines to be followed in the parole

tion. By requiring offenders to spend at least one-third of their sentences in prison, for instance, § 4205(a) ensures that the offender will receive a certain measure of punishment and that society will be protected from his future crimes for that length of time. Further, other potential offenders might be deterred by the prospect of spending at least one-third of a sentence in prison if they commit the offense.

²³⁴ Accordingly, the decision about when the offender will be released is not made until he has served at least part of his sentence. Hearings on the prisoner's progress are held periodically until he is deemed ready for release or until his sentence is served in full.

From the perspective of the traditional rehabilitative model, this practice is both necessary and desirable. Under a treatment philosophy, parole release decisions are to be based primarily on rehabilitative concerns. The goal of the parole release authority is to identify the "optimum time" for the prisoner's release. Thus, deferral of the release decision is necessary to enable rehabilitative progress to be monitored.

Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 91 (1979).

²³⁵ See, e.g., Dershowitz, *supra* note 232, at 319-23.

²³⁶ Hoffman & Stover, *supra* note 234, at 91. See Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 551-55 (1978).

²³⁷ See FEDERAL JUDICIAL CENTER, *supra* note 233, at 18-20; Hoffman & Stover, *supra* note 234, at 91; Project, *supra* note 101, at 873-74.

²³⁸ Hoffman & Stover, *supra* note 234, at 92. See also N. MORRIS, *supra* note 98, at 43; Alschuler, *supra* note 236, at 553.

²³⁹ *Id.*

²⁴⁰ See, e.g., Gottfredson, *Parole Guidelines and the Reduction of Sentencing Disparity*, 16 J. RESEARCH CRIME & DELINQUENCY 218 (1979).

²⁴¹ See, e.g., *id.*; Hoffman & Stone-Meierhoefer, *supra* note 22.

decisionmaking process.²⁴² The Parole Commission and Reorganization Act of 1976 adopts the concept of using guidelines for parole decisions, and mandates continued use of the guideline system.²⁴³ The guidelines apply uniformly to defendants, no matter which version of the medical model sentencing scheme was used to incarcerate them.²⁴⁴

The guidelines the Parole Commission uses operate much like the sentencing guidelines proposed in S. 1722. They take the form of a two-axis chart. One axis, labeled "Offense Characteristics," is used to indicate the severity or gravity of the prisoner's offense, and ranges from "low" to "greatest II." The horizontal axis, labeled "Offender Characteristics," provides four categories, ranging from "very good" to "poor."²⁴⁵ The guidelines establish a range of release dates for each combination of offense and offender characteristics.²⁴⁶ The Commission must set the prisoner's parole date within that range unless it determines that there is "good cause" for doing otherwise.²⁴⁷ If it does refrain from applying the guideline-prescribed date, the Commission must give the prisoner "written notice stating with particularity the reasons for its determination, including a summary of the information relied upon."²⁴⁸

A prisoner is released pursuant to the guidelines if he has "substantially observed the rules of the institution"²⁴⁹ of confinement and if the Parole 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 depreciate the seriousness of his offense or promote disrespect for the law; and (2) that release would not jeopardize the public welfare."²⁵⁰ In effect, under the 1976 Act, the primary consideration in determining parole is no longer rehabilitation, as is required under the medical model. Rather, like S. 1722, the Act dis-

²⁴² Hoffman & Stone-Meierhoefer, *supra* note 22, at 63; Hoffman & Stover, *supra* note 234, at 102-03.

²⁴³ 18 U.S.C. § 4203(a)(1) (1976).

²⁴⁴ See S. REP. NO. 94-369, 94th Cong., 2d Sess. 18, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 335, 340. See note 233 *supra*.

²⁴⁵ For a copy of the guidelines, see 28 C.F.R. § 2.20 (1979). An offender's placement within the four offender categories depends on his salient factor score. The salient factor score is a number between 0 and 11 that is derived from the answers to seven questions about the offender. These questions deal with the offender's prior convictions, prior incarcerations, prior revocations of parole, age at first commitment, commitment offense, drug history, and employment history. See Hoffman & Stover, *supra* note 234, at 207. Cf. S. 1722, *supra* note 12, tit. III, §§ 994(d)-(e).

²⁴⁶ Cf. S. 1722, *supra* note 12, tit. III, § 994(b) ("The Commission . . . shall, for each category of offense involving each category of defendant, establish a sentencing range . . .").

²⁴⁷ 18 U.S.C. §§ 4206(a)-(c) (1976). See Hoffman & Stover, *supra* note 234, at 108. Cf. S. 1722, *supra* note 12, tit. I, § 2003(b) ("The court shall impose a sentence of the kind, and within the range, described in [the guidelines] unless the court finds that an aggravating or mitigating circumstance exists . . .").

²⁴⁸ 18 U.S.C. § 4206(c) (1976). Compare S. 1722, *supra* note 12, tit. I, § 2003(c)(2).

²⁴⁹ 18 U.S.C. § 4206(a) (1976).

²⁵⁰ *Id.*

cards rehabilitation and focuses upon punishment, deterrence and incapacitation.²⁵¹

The 1976 Act also requires, in many cases, that the Commission notify prisoners with indeterminate sentences of their presumptive release dates within 120 days of imprisonment.²⁵² This practice makes it impossible for the Parole Commission to consider progress toward rehabilitation in setting release dates for these offenders. Indeed, all of the information considered in the process of determining release on parole is known at the time of sentencing.²⁵³

Although the Parole Commission and Reorganization Act's success in eliminating sentence disparity and prison unrest is debatable, it clearly departs from the medical model used in current sentencing statutes. The 1976 Act, in effect, turns indeterminate sentences into determinate sentences. When a judge imposes an indeterminate or partly indeterminate sentence for the purpose of rehabilitation, his intent will be frustrated. In effect, he will only be delegating to the Parole Commission the task of resentencing the prisoner for the purposes of deterrence, punishment, and incapacitation, based on the same information he possessed himself. Therefore, the sentencing statutes and the statutes governing the actions of the Parole Commission are in irreconcilable conflict. The Congress must determine which approach it wishes to prevail.

B. MATTERS TO BE CONSIDERED IN EVALUATING S. 1722

The need for sentencing reform is manifest. Before acting, however, legislators must evaluate carefully the many approaches to alleviating the problems in the current federal sentencing scheme. The provisions of S.1722 cannot be evaluated standing alone. Congress must consider them in the context of the criminal justice system as a whole. The following are some matters that need special consideration.

²⁵¹ Under the Parole Commission guidelines the minimum prison term prescribed under the offense severity rating, that applies to all offenders regardless of their characteristics, serves the purposes of punishment and deterrence. Any extra time served because of offender characteristics achieves the purpose of incapacitation. See FEDERAL JUDICIAL CENTER, *supra* note 233, at 18-21; Project, *supra* note 101, at 873-74.

²⁵² 18 U.S.C. § 4208(a) (1976). In its regulations promulgated pursuant to the Act, the Parole Commission requires that an initial hearing be conducted within 120 days of a prisoner's incarceration unless his sentence includes a minimum term of parole eligibility of ten years or more. 28 C.F.R. § 2.12(a) (1979). Following this hearing the Commission must set a presumptive release date. *Id.* § 2.12(b).

²⁵³ S. REP. NO. 96-553 at 983-84. Good institutional adjustment is assumed when the release date is set. 28 C.F.R. § 212(d) (1979).

1. Alleviation of Unwarranted Disparity

Although one of the primary purposes of S. 1722 is to alleviate unwarranted sentencing disparity,²⁵⁴ it is highly questionable whether it can accomplish this end in its current form. There are four primary components in the criminal justice system: the police, the prosecutor, the judge, and the Parole Commission. Each of these four enjoys considerable discretion that may affect directly the sentence of an offender going through the system.²⁵⁵ S. 1722 sharply limits the discretion of judges and abolishes the Parole Commission, but it makes no attempt to control the discretion of the federal police or the United States Attorneys.

The federal police agencies may have considerable influence on the sentence an offender ultimately may face, though this influence is seldom publicized or discussed. Law enforcement officials decide what to investigate and when to arrest. They set their own investigation priorities according to their resources and the type of criminal violations prevalent in a given geographical area. Since investigative criteria vary from one part of the country to another, suspected violators receive disparate treatment.²⁵⁶

The federal government has numerous specialized police agencies: the Federal Bureau of Investigation; the Drug Enforcement Administration; the Secret Service; the Immigration and Naturalization Service; the Customs Service; the Bureau of Alcohol, Tobacco, and Firearms; the Internal Revenue Service, and the Postal Service are only some of the better known ones. Many criminal transactions may violate several laws and implicate more than one federal police agency. For instance, in a drug smuggling case, the Drug Enforcement Agency or Customs Service

²⁵⁴ See S. 1722, *supra* note 12, tit. III, § 994(f).

²⁵⁵ The discretion of four other entities also affects an offender's ultimate sentence: (1) The Congress is the first participant in the sentencing function; it prescribes sanctions for offenses and the sentencing options available to the judge. (2) The probation officer, through his presentence investigation report, may influence the judge in fashioning the sentence. He may also influence the Parole Commission in determining the offender's parole release date, since the presentence investigation report is the basic document on which the Commission bases its deliberations. See 18 U.S.C. § 4207 (1976). (3) The Bureau of Prisons may affect the term of imprisonment the offender actually serves through its method of classifying offenders and assigning them to correctional facilities. A facility's conditions of confinement may play a major role in determining whether the offender makes good institutional adjustment. For instance, if the offender is assigned to a "safe" institution, where there is relatively little criminal influence in his surroundings, he may be less likely to be held beyond his presumptive release date due to his misbehavior while in the facility. (4) Finally, the offender's defense counsel has an impact on the sentence imposed. Generally, the more competent the defense counsel is the more able he may be in obtaining plea bargaining concessions from the prosecutor.

²⁵⁶ GENERAL ACCOUNTING OFFICE, REDUCING FEDERAL JUDICIAL SENTENCING AND PROSECUTING DISPARITIES: A SYSTEMWIDE APPROACH NEEDED 16 (1979).

might be primarily involved, but if the offenders have used interstate facilities, the Federal Bureau of Investigation might also consider the matter. Generally, only one agency, the one that first becomes involved in a case, carries it through to prosecution. Because of their specialization, these agencies are likely to concentrate on the violation of different laws. Indeed, more than simple expertise may motivate an agency to pursue only those violations that fall within its own legislatively mandated jurisdiction. Each agency wishes to justify its existence as a specialized bureaucratic entity and to increase its own funding. Since prosecutions for violations of laws under another agency's jurisdiction will do little to further these goals, the agency will concentrate its investigation on the area of law that is in its particular care. In so doing, it may fail to advise the prosecutor objectively, so that he may fail to charge the most serious offense demonstrable by the evidence.²⁵⁷

Prosecutorial discretion has an even greater influence on an offender's sentence than police discretion²⁵⁸ and harbors many of the evils

²⁵⁷ If the prosecutor fails to charge the most serious offense demonstrable by the evidence, the seeds of disparity have been sown.

"The most serious offense demonstrable by the evidence" encompasses charges that are reduced because of obvious practical and legitimate prosecutorial considerations, such as the availability of witnesses and the likelihood that leniency will induce the defendant to testify against others.

²⁵⁸ United States Attorneys exercise discretion in deciding whether to prosecute, what charges to bring, and whether to reduce charges or plea bargain a case. As a result of this discretion, the prosecutor controls the possibility of punishment and, in many cases, the range of sentence the judge can impose. As the Comptroller General explained in a recent report:

Because of heavy workloads, lack of evidence, insufficient staff, and/or because the complaint did not warrant the cost of prosecution, U.S. attorneys declined to prosecute 62 percent of the criminal complaints available for prosecution during fiscal years 1970 to 1976. In order to handle the large number of complaints, each U.S. attorney has established his own priorities and guidelines for declining cases. . . . These guidelines, however, are not uniform, nor do they reflect a national policy. As a result, disparity in criminal prosecutions may occur when a defendant in one district is formally charged with an offense but never prosecuted, whereas another defendant, similarly charged—in the same or another district—is prosecuted. . . .

The offense charged and plea bargains may also affect a defendant's sentence by limiting the sentencing options available to a judge. For example, there are frequently a number of different statutes under which a defendant may be prosecuted for a particular criminal act. These criminal statutes may carry different maximum sentences. The U.S. attorney's decision to prosecute under a particular criminal statute can affect the sentence range available upon conviction. To illustrate, a person accused of bank robbery can be charged with "bank robbery," which has a maximum penalty of \$5,000 and 20 years, or "stealing from a bank," which has a \$5,000 and 10-year maximum sentence. Subject to considerations involving the sufficiency of evidence, U.S. attorneys have discretion to charge a defendant accused of armed bank robbery with either one or both of these statutes. This can result in similarly situated defendants being charged and possibly convicted under different statutes, thereby restricting the maximum sentence a judge can impose.

U.S. attorneys also have authority to plea bargain with defendants, whereby charges will be dropped or reduced in exchange for a guilty plea to a lesser offense. . . . [P]lea bargaining occurs in a large percentage of criminal cases. Plea bargaining can have a significant effect on the disposition and sentence of a convicted defendant. Since U.S.

of judicial discretion. In a recent article, Professor Alschuler compared the relative evils of judicial and prosecutorial discretion:

There is hardly any objection to judicial sentencing discretion that does not apply in full measure to prosecutorial sentencing discretion—a discretion which has been, in practice, every bit as broad and broader. As much as judicial discretion, the discretion of American prosecutors lends itself to inequalities and disparities of treatment because of disagreements concerning issues of sentencing policy. Like judicial discretion, prosecutorial discretion permits at least the occasional dominance of illegitimate considerations such as race and personal or political influence in sentencing decisions. It may also lead to a general perception of unfairness, arbitrariness and uncertainty and may even undercut the deterrent force of the criminal law.

There are additional objections to prosecutorial sentencing discretion that do not apply with nearly so much force to judicial discretion. The exercise of prosecutorial discretion is more frequently made contingent upon a waiver of constitutional rights. It is generally exercised less openly. It is more likely to be influenced by considerations of friendship and by reciprocal favors of a dubious character. It is commonly exercised for the purpose of obtaining convictions in cases in which guilt could not be proven at trial. It is usually exercised by people of less experience and less objectivity than judges. It is commonly exercised on the basis of less information than judges possess. Indeed, its exercise may depend less upon considerations of desert, deterrence and reformation than upon a desire to avoid the hard work of preparing and trying cases. In short, prosecutorial discretion has the same faults as judicial discretion and more.²⁵⁹

Assessing the provisions of S. 1437,²⁶⁰ the predecessor to S. 1722, Professor Steven Schulhofer has pointed out that while a reform plan limiting the discretion of judges and the Parole Commission may reduce abuse and arbitrary decisions by those officials, it may also “limit their ability to counteract abuses of prosecutorial power in plea negotiation.”²⁶¹ Currently, the various components of the sentencing system

attorneys do not have systematic procedures and controls governing the use of plea bargaining, the opportunity for disparate plea bargaining decisions is significant.

GENERAL ACCOUNTING OFFICE, *supra* note 256, at 15-16. See generally Holderman, *Pre-indictment Prosecutorial Conduct in the Federal System*, 71 J. CRIM. L. & C. 1 (1980); Mellon, Jacoby & Brewer, *The Prosecutor Constrained by his Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & C. 52 (1981); Comment, *Duplicative Statutes, Prosecutorial Discretion, and the Illinois Armed Violence Statute*, 71 J. CRIM. L. & C. 226 (1980).

²⁵⁹ Alschuler, *supra* note 236, at 564 (citations omitted).

²⁶⁰ S. 1437, 95th Cong., 1st Sess. (1977).

²⁶¹ Schulhofer, *Due Process in Sentencing*, 128 U. PA. L. REV. 733, 742-43 (1980).

Moreover, even if overall disparity did not increase, the quality of the discretion exercised might be adversely affected because, in effect, discretion would be transferred from federal district judges to assistant United States attorneys. No matter how conscientious they are, assistant United States attorneys are almost uniformly far younger and less experienced than district judges, and their decisions are typically far less visible.

1 S. SCHULHOFER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM 1-3 (1979) (report of studies performed under contract with the Federal Judicial Center). See also

tend to offset one another and control excesses. If two are limited and another is left with no checks on its discretion, even greater sentencing disparities may be generated than those resulting from the present system.

Chief Judge Donald Lay, speaking for the Judicial Conference of the Eighth Circuit, has agreed that reform provisions restricting the judiciary, but not the prosecution, not only may fail to curb disparity but may in fact enhance it. In a letter to Senator Edward Kennedy, then Chairman of the Senate Judiciary Committee, about the sentencing provisions of S. 1722, he stated:

The prosecutor already plays a considerable role in the decision as to how long an offender may be incarcerated; the prosecutor selects a statute on which to base the charge and, thus, establishes the maximum possible term of imprisonment, and through the plea bargaining process, he may fashion the sentence actually handed down. Under S. 1722, the prosecutor, having preindictment notice of the precise sentencing guidelines that would apply to the putative defendant, could control the sentencing judge's exercise of the very narrow discretion allotted him under the bill [and] be confident of obtaining a particular sentence. He would simply choose a charge that would produce the desired sentence. We question the wisdom of placing that kind of discretion in the typical Assistant United States Attorney whether or not his exercise of that discretion is supervised personally by the United States Attorney.²⁶²

Under S. 1722 the Sentencing Commission has some leeway in constructing its policy statements and guidelines and its choices may affect the amount of influence prosecutors ultimately have on sentencing. According to a recent study, prosecutorial influence will be stronger if the Commission strictly curtails judicial discretion, and weaker if the Commission takes a more lenient approach.²⁶³ Even if the Sentencing Com-

Coffee, *supra* note 98, at 979; McCall, *The Future of Parole—In Rebuttal of S. 1437*, FED. PROBATION, Dec. 1978, at 6.

²⁶² Letter from Donald P. Lay, Chief Judge of the United States Court of Appeals for the Eighth Circuit, to Senator Edward M. Kennedy, Chairman, Senate Judiciary Committee (August 12, 1980). See GENERAL ACCOUNTING OFFICE, *supra* note 256, at 20-21.

²⁶³ 1 S. SCHULHOFER, *supra* note 261. See also Schulhofer, *supra* note 261, at 749-51. The study, which involved the provisions of S. 1437, the predecessor of S. 1722, pinpointed several issues whose resolution might affect the degree of prosecutorial influence on sentencing allowed under the bill:

The "in-out" decision. The commission could promulgate guidelines that, for most cases, would make no recommendation on the vitally important question whether the offender should be imprisoned. The guidelines could leave this decision to the unguided discretion of the judge and indicate only the term to be served if imprisonment were in fact imposed. Alternatively, commission guidelines could make a definite recommendation for or against incarceration in every offense-offender category, enhancing the importance of the prosecutor's characterization of the charges.

Prison sentences for nonviolent offenders. [The bill] requires that the sentencing guidelines generally specify a sentence other than imprisonment for "a first offender who has not been convicted of a crime of violence or an otherwise serious offense." [S. 1722, *supra* note 12, tit. III, § 994(b)] In determining which nonviolent offenses are "serious," the

mission did everything possible under the existing provisions of S. 1722

commission will again influence the range of cases over which imprisonment will be required, foreclosed, or left to the discretion of the sentencing judge.

Longer prison terms for certain offenders. The bill mandates a substantial term of imprisonment for offenders associated with "racketeering" or deriving a substantial livelihood from criminal activity. Proof of these factors is likely to remain within the control of the United States attorney's office, but the significance of this prosecutorial power will depend upon the commission's decision regarding the length of the additional prison term that will be triggered once the required showing is made.

Width of the guideline sentencing range. For any offense-offender category, the recommended term of imprisonment could consist of a single number, or the guidelines could be stated as a range within which choice would be left to the judge's discretion. . . .

Range of offense and offender information. In identifying the facts that will determine which offense and offender category applies in a given case, the commission could restrict consideration to information readily ascertainable by the probation service, so that decisions concerning the offense-offender category would be relatively immune from manipulation by prosecution and defense. Alternatively, the commission could cause certain facts ordinarily developed only by the prosecution (e.g., scope of the criminal enterprise) to become critical. Beyond this, the commission could require that the prosecution allege and prove *all* offense or offender characteristics deemed aggravating. Under this approach, the prosecution could influence the offense-offender determination even on issues for which the necessary information could be obtained without its cooperation.

Aggravating and mitigating factors not used to establish offense-offender categories. Inevitably, some relevant circumstances will not be included in the initial calculation of the offense-offender category. The commission could specify that the existence of such circumstances should normally justify variations within the authorized guidelines range, specified departures from the guidelines range, or even departures determined on an ad hoc basis by the sentencing judge.

Inter-district variation. [The bill] permits the commission to preserve a substantial area of judicial sentencing discretion by authorizing departures from the guidelines on the basis of local circumstances—either the incidence of a kind of offense or the community concern generated by a particular crime.

Guilty pleas. The commission could choose to preserve or restrict another important source of judicial discretion by specifying that the entry of a guilty plea should be given no weight, a specified weight, or a weight to be determined by the sentencing judge.

Multiple counts and charges. Over a wide range of situations involving conviction on several counts, the commission could forbid incremental penalties, eliminating a significant source of both prosecutorial and judicial discretion. And in the few areas in which the bill appears to *require* some incremental penalty, the commission could achieve a similar result by prescribing only a modest increase in the severity of punishment. Alternatively, commission guidelines could specify a very substantial incremental penalty in most multi-count situations. This approach would still constrain judicial discretion, but it would enormously enhance the significance of the prosecutor's charging discretion; the prosecutor's sentencing power in fact would become far greater than it is under current law. Finally, the commission could leave questions concerning the existence and extent of any incremental penalty for the sentencing judge to determine on a case-by-case basis. If implemented in this way, [the bill] would not only preserve but would probably enhance the unchecked discretionary power of the trial judge, because the Parole Commission would no longer be able to order early release for offenders receiving aberrantly long terms as a result of cumulative sentences.

1 S. SCHULHOFER, *supra* note 261, at 23-28. See also 2 S. SCHULHOFER, *supra* note 261, at 1-34.

A couple of Professor Schulhofer's points evoke response. First, it seems unlikely that the Sentencing Commission could or would delegate the "in-out" decision to the unguided discretion of the judge. The overriding spirit and intent of S. 1722 indicates that judges should not have full discretion in such important matters. Also, S. 1722 specifically requires the Commission to direct judges not to imprison certain first offenders, S. 1722, *supra* note 12, tit. III, § 994(i), and to imprison those meeting the criteria of § 994(h). *Id.* § 994(h).

Further, restricting the facts that can be considered in determining offender and offense

to keep prosecutorial discretion in check, however, amendments to the bill would probably be needed to ensure control of both prosecutorial and judicial discretion.²⁶⁴ One suggestion that has been made for curbing prosecutorial discretion is that judges be instructed to ignore the offense for which the defendant was charged and convicted and to use his "real offense" to determine the appropriate "category of offense" and sentence.²⁶⁵ Under this approach, it is claimed that prosecutorial tinkering with the charge would not influence the sentence. A second suggestion is that judges be authorized to "forbid or restrict charge bargaining" and to "reject charge-reduction plea agreements."²⁶⁶ Yet another suggestion is that the Congress eliminate plea bargaining and simply specify the exact reward that defendants will receive for pleading guilty; for instance, the entry of a guilty plea could be treated as "a mitigating factor leading to a specified reduction in penalty."²⁶⁷

I do not propose to delve into the merits of these proposals here. I only stress that Congress must study carefully the problems of sentencing disparity engendered by uncontrolled police and prosecutorial discretion, and fully explore possible remedies. A piecemeal approach to sentencing reform is unlikely to work. Any attempts to alleviate sentencing disparity must be examined in the context of the whole criminal justice system. Only from that vantage point can Congress properly reallocate the exercise of discretion and install the necessary checks and balances.²⁶⁸

Congress also should consider carefully the degree and type of dis-

categories to those contained in the probation report would interfere with the sentencing court's fact-finding duty and could deprive the parties of due process. Neither the Sentencing Commission nor the court properly could delegate the fact-finding duty to the probation officer, and it seems unlikely that they would attempt to do so.

²⁶⁴ See 1 S. SCHULHOFER, *supra* note 261, at 5, 31.

²⁶⁵ See *id.* at 49-72; Schulhofer, *supra* note 261, at 757-72.

²⁶⁶ Schulhofer, *supra* note 261 at 772-98. See 1 S. SCHULHOFER, *supra* note 261, at 73-132.

Congress amended S. 1722 to require the Sentencing Commission to issue policy statements concerning the appropriate use of "the authority granted under Rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to Rule 11(e)(1)." S. 1722, *supra* note 12, tit. III, § 994(a)(2)(D). On its face this provision does not promise resolution of the problem of prosecutorial discretion. *But see* S. REP. NO. 96-553 at 1236-37 (§ 994(a)(2)(D) of the Code was meant "to provide an opportunity for meaningful judicial review of proposed charge-reduction plea agreements.")

The existing Federal Rule of Criminal Procedure 48(a), which S. 1722 does not purport to change, requires that a prosecutor obtain leave of court before filing a dismissal of an indictment, information, or complaint. The primary purpose of this requirement, however, is to prevent harassment of defendants, *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965), and so the rule is of questionable use in providing day-by-day judicial control over prosecutorial discretion. See 3 C. WRIGHT & A. MILLER, *supra* note 199, § 812.

²⁶⁷ Alschuler, *supra* note 236, at 575-76.

²⁶⁸ See GENERAL ACCOUNTING OFFICE, *supra* note 256, at 19.

parity potentially perpetuated or generated by use of the section 994(d) defendant characteristics.²⁶⁹ Considering the disparity that may result from their use, is there sufficient evidence that these characteristics are truly relevant to legitimate sentencing considerations to justify their inclusion in the Code? Furthermore, what will be the effect of a judge's specifically local consideration of "the community view of the gravity of the offense" and "the public concern generated by the offense"?²⁷⁰ Will such considerations lead to inappropriate inter-circuit disparity?²⁷¹ Finally, Congress should consider whether the very complexity of the Act might lead to difficult or undesirable variations in interpretation that will result in unwarranted sentencing disparity.

2. Appellate Review

The hypothetical case illustrated some of the numerous paths parties might pursue to obtain appellate review under S. 1722. As noted earlier, title I, section 3725 allows the defendant and the government a direct, immediate appeal of sentences imposed outside the guidelines,²⁷² and rule 35, as amended, allows either party to seek simultaneous review of any sentence in the sentencing court. The defendant subsequently may appeal the sentencing court's disposition of a rule 35(a) or (b)(1) motion,²⁷³ and both the defendant and the government may petition for leave to appeal the disposition of a rule 35(b)(2) motion.²⁷⁴ Rules 35(b)(1) and (b)(2) require, and rule 35(a) allows, review to be instigated immediately after the judge pronounces sentence, even though the defendant contests on direct appeal the merits of his conviction and the reasonableness of a sentence outside the guidelines.²⁷⁵

²⁶⁹ S. 1722, *supra* note 12, tit. III, § 994(d).

²⁷⁰ *Id.* §§ 994(c)(4)-(5).

²⁷¹ See 1974 Hearings, *supra* note 5, at 8083 (statement of William James Zumwalt).

²⁷² There are exceptions: sentences for misdemeanors of Class B and below may not be appealed, and sentences resulting from plea bargains, under certain circumstances, may not be appealed. S. 1722, *supra* note 12, tit. I, § 3725.

²⁷³ 28 U.S.C. § 1291 (1976). Although the government may not appeal in these cases, *see* 18 U.S.C. § 3731 (1976), it may seek review through a writ of mandamus under extraordinary circumstances when the judge clearly has violated his duty. *See* *United States v. Lane*, 284 F.2d 935, 938-39 (9th Cir. 1960).

²⁷⁴ S. 1722, *supra* note 12, tit. I, §§ 3723(b), 3724(d).

In practice, appellate review of guideline application is likely as a matter of course either through granting petitions for leave to appeal or in the context of appeals from rule 35(a) and (b)(1) and § 2255 orders. The sentencing court's resolution of rule 35(a), (b)(1), and § 2255 motions may well, directly or indirectly, have encompassed guideline issues cognizable under rule 35(b)(2).

²⁷⁵ Under the currently existing rule 35, a sentence may not be reduced or corrected while the defendant's appeal of his conviction is pending. *See* *Berman v. United States*, 302 U.S. 211, 214 (1937); *United States v. Mack*, 466 F.2d 333, 340 (D.C. Cir.); *cert. denied*, 409 U.S. 952 (1972); *United States v. Burns*, 446 F.2d 896, 897 (9th Cir. 1971); 8a MOORE'S FEDERAL PRACTICE ¶ 35.02[1] (2d ed. 1980). Therefore, when a defendant appeals, the rule allows him

The defendant also can use 28 U.S.C. § 2255 to attack his sentence. Under this provision he may move the sentencing court to vacate his sentence on grounds, *inter alia*, that it "was imposed in violation of the Constitution or laws of the United States . . . or . . . was in excess of the maximum authorized by law."²⁷⁶ As noted earlier, current law requires, absent extraordinary circumstances, postponement of a section 2255 motion until after resolution of the conviction appeal.²⁷⁷ However, since it no longer will be necessary to wait to bring rule 35 motions, which may be very similar to a habeas petition, defendants undoubtedly will attempt to bring their section 2255 motions prior to resolution of their appeals. Both the government and the defendant may appeal from the court's disposition of a section 2255 attack.²⁷⁸

The overall effect of the S. 1722 sentencing reform provisions is to create three specialized categories of appellate review of a sentence: (1) appeal of sentencing outside the guidelines, (2) appeal of the guideline application, and (3) appeal of the legality of the sentence in other contexts. Whether or not Congress so intended, through this maze of particularized attacks and procedures it has provided nearly full appellate review. As is illustrated in the hypothetical case, however, this piecemeal review will produce three highly unsatisfactory results. First, it will involve a substantial waste of judicial and para-judicial resources.²⁷⁹

to move to correct a sentence "within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal or within 120 days after entry of any order of judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction." FED. R. CRIM. P. 35(b).

S. 1722 restricts the period of filing motions to correct an illegally or erroneously imposed sentence to "within 120 days after the sentence is imposed." S. 1722, *supra* note 12, tit. II, § 111(t). According to the legislative history, "the 120 days runs, under the proposed Rule, only from the time of sentence, and not, as under present Rule 35, from the date of court action on direct appeal upholding the judgment of conviction." S. REP. NO. 96-553 at 1213 n.76. Thus, the amendment indicates that Congress envisions proceedings to correct sentences while appeals are pending, contrary to prior practice. The only alternative explanation for the amendment is that Congress wanted to prohibit defendant from simultaneously appealing his conviction and seeking review under rule 35. The proposed law thus would force him to choose between his right to appeal his conviction and his right to seek a correction of his sentence; it is unlikely that Congress intended to impose this dilemma.

²⁷⁶ 28 U.S.C. § 2255 (1976). Arguably, a sentence imposed above the guidelines but not supported by the requisite § 2003(b) findings could be a sentence "in excess of the maximum authorized by law." Also, it is arguable that an erroneous application of the guidelines could result in such an "excess" sentence. For instance, a defendant sentenced to five years imprisonment, a term within the guidelines that the court chose, might contend that if the court had applied the "correct" guidelines, he would have received no more than four years imprisonment. If the defendant is right, he received a sentence in excess of that authorized by law—the guidelines having the force of law.

²⁷⁷ See note 206 & accompanying text *supra*.

²⁷⁸ See *United States v. Williamson*, 255 F.2d 512, 515-16 (5th Cir. 1958), *cert. denied*, 358 U.S. 941 (1959).

²⁷⁹ Trial courts, of course, will attempt to maximize efficiency. For instance, they un-

The paperwork involved will be many times greater than what one di-

doubtedly will resort to the kinds of techniques used to ready cases for trial. Federal Rule of Criminal Procedure 17.1 provides for pretrial conferences in criminal cases. Arguably, this rule would allow a presentencing conference. If not, the courts have inherent power to order such conferences under their power to manage cases.

The starting-point in a presentencing conference should be the presentence investigation. If counsel do not dispute the factual recitations contained in the presentence investigation report, and they agree that the guidelines and concomitant policy statements recommended in the report control the judge's sentencing discretion, then they can so stipulate. At such times, the sentencing hearing will be routine, limited to argument over the selection of the sentence from the sentencing range prescribed by the guidelines. This supposition assumes that neither party plans to insist on a sentence outside the guidelines. If a party announces its intent to seek a sentence outside the guidelines, the court can inquire about the type of proof he will offer to satisfy the § 2003(b) requirements and the nature of his opponent's rebuttal, if any. This inquiry will define this narrow issue and facilitate a streamlined presentation at the hearing.

If either party disputes the factual recitations of the presentence investigation report, the court can ask counsel to relate his understanding of the true facts and the set of Sentencing Commission guidelines and policy statements he believes applicable to such facts. With representations of counsel in hand, the court will be able to frame adequately the issues of fact to be tried. The facts deemed relevant depend on the criteria that underpin the defendant category in the selected set of guidelines. The number of fact issues to be tried at the sentencing hearing thus will depend on the differing criteria that are brought into play by the total number of guidelines that might be applicable.

Without delineated issues, the court's only guides to the admissibility of evidence would be the statutory purposes of sentencing and the criteria the Code required the Commission to consider in formulating its various guidelines. With only these guides, at the commencement of the sentencing hearing neither the court nor counsel would have any way of assessing accurately the significance of certain evidence for fashioning a sentence. Without specified issues, a court could not limit the introduction of evidence without inviting a post-sentencing claim of error.

By narrowing the number of possibly applicable guidelines, defining the factual issues to be tried, and resolving some facts by stipulation in a presentencing conference, however, the judge will have set the stage for an orderly and time-conserving hearing. He will have reduced the potential for a post-sentencing rule 35(b)(2) motion requesting the court to apply a different set of guidelines, as well as for motions requesting evidentiary hearings, such as the government's in *Disadvantaged's* case. See text following note 198 *supra*. Further, he also will have reduced the potential for meritorious appeals of sentences outside the guidelines.

By encouraging the defendant to raise all his objections to the validity of the Code's sentencing scheme or to the potentially applicable guidelines, and by dealing with those objections prior to the imposition of sentence, the court will minimize the time and resources necessary to dispose of the same objections later in post-sentencing motions under rule 35 or 28 U.S.C. § 2255 (1976). Since the objections have been fully briefed, argued, and considered prior to the imposition of sentence, usually the judge will be required simply to reconsider counsels' points, along with any new matters arising after sentencing, and issue his rulings.

Everyone involved in the sentencing process should have a keen interest in using the pretrial conference technique to ferret out, in advance of the sentencing hearing, the legal and factual issues likely to be raised. First, the prosecutor should welcome the opportunity to know what objections the defense will raise to the findings and conclusions of the presentence investigation report or to the validity of the guidelines themselves. The prosecutor will bear the burden of meeting these objections. Further, meaningful pretrial settlement of issues can help reduce the frequency and scope of post-conviction collateral attacks and thereby free the prosecutor's time and resources for other pressing business.

Defense counsel should be interested in using the pretrial conference technique because

rect, comprehensive review of a sentence would require. Further, if some of the appeals cannot be consolidated, judges and lawyers may devote considerable time to redundant considerations.

This piecemeal review might also erode even further the alarmingly low esteem in which the public holds our criminal sentencing rationale. The Code's review scheme provides ample opportunity for apparently inconsistent dispositions—a result the public undoubtedly will find both unpalatable and indicative of poor planning. For example, a court of appeals might affirm a conviction and a sentence outside the guidelines only to reverse and remand for resentencing in a subsequent rule 35(b)(2) appeal because the lower court applied the wrong guidelines. Similarly, it later might reverse and remand for resentencing in a rule 35(a) or a section 2255 appeal because the sentence was illegal. While these decisions are not technically inconsistent, they would appear so to the general public. That perception would not be entirely unwarranted, and neither would the hostile reaction it could generate. Certainly the people must be the ultimate beneficiaries of any criminal sentencing code, and thus this potential for incurring their disfavor and frustration is a decidedly untoward possibility. A reform measure that does not engender public respect and support calls into question the efficacy of that measure's corrective impact.

Finally, all these various routes to sentence review create substantial delay in achieving finality. Speed in resolving questions of criminality has always been important in the American legal scheme.²⁸⁰ Surely it is just as important that questions about sentences be resolved quickly, too. Yet, as has been demonstrated, challenges to a sentence may linger on well beyond the time needed to dispatch an appeal of a conviction on

preparation for the conference may reveal issues otherwise left for post-sentence collateral attack. By raising these issues before sentencing, counsel does not run the risk, in subsequent collateral proceedings, of being held to have waived his objections by failing to present them seasonably prior to the imposition of sentence.

Defense counsel should also have substantial incentive to telescope the sentencing hearing and the collateral attack hearings so that the latter simply become perfunctory. Defense counsel usually will have no economic incentive to drag out the sentencing process. Moreover, such a strategy would undermine his obligation to render his client effective assistance of counsel, especially if his client is not free on bail or his bail is likely to terminate upon affirmation of his conviction on appeal. The client may be forced to remain in prison, or return there, while he awaits rulings on his post-sentencing motions. *See* note 193 & accompanying text *supra*.

The defendant, and society as well, will be the greatest beneficiaries of organized presentencing procedures, for these procedures will ensure more rational, just application of the law to the case.

²⁸⁰ *See, e.g.*, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."); 18 U.S.C. §§ 3161, *et seq.* (1976) (Speedy Trial Act); FED. R. APP. P. 45(b) (docketing priority to appeals in criminal cases); FED. R. CRIM. P. 50(b) (plans for achieving prompt disposition of criminal cases).

the merits.²⁸¹

3. *Constitutional Questions and Questions of Statutory Interpretation*

The constitutional questions discussed in the hypothetical case need further debate in light of considered alternatives to S. 1722.²⁸² While Congress may find that the questions lack merit, it is far better to consider them carefully before the bill is passed and to find ways to avoid them whenever possible than to face these problems after the bill becomes law. A judicial decision striking down all or part of the guideline sentencing structure after it is implemented could mean the dissipation of much legislative energy, not to mention the wreaking of havoc in the criminal justice system.

Further, as has been illustrated in the hypothetical case, S. 1722 has many apparent internal inconsistencies and it leaves many questions unanswered. Before acting, Congress should comb the bill carefully for inconsistencies that may lead to problems of interpretation and supply some missing answers.

C. SUGGESTIONS FOR REFORM

Whether or not Congress passes S. 1722 or a similar bill, the proposed bill will have served the worthy function of raising practical, legal and theoretical questions about our criminal justice system that scholars, Congress and the judiciary alike must address before selecting the best mode of reform. Having considered some of these issues in the context of writing this article, I will pose a few suggestions of my own.

Congress might further the goal of reform and avoid the problems generated by S. 1722 by passing a bill that (1) sets forth statutory purposes for sentencing, (2) requires judges to state their reasons for imposing each sentence in light of these purposes, and (3) provides one comprehensive direct appeal of sentences and one mode of collateral review.

One comprehensive direct appeal of sentences would be much simpler and more efficient than the mode of review provided by S. 1722.²⁸³

²⁸¹ See note 228 *supra*. The figures used in estimating the duration of the various types of sentencing appeals assume that sentence appeals are "appeals in criminal cases" under FED. R. APP. P. 45(b), and thus will receive docketing priority. If they are not, these sentence appeals will last even longer.

²⁸² The lack of legal challenges to similar problems arising under the current Parole Commission guidelines system may be attributed in part to fewer modes of review and a lack of economic incentive for defense counsel to pursue such challenges.

²⁸³ Indeed, in the context of continuing its debates on the merits of S. 1722, Congress should request an "impact on the judiciary" statement in order to assess the impact of the bill's appeal provisions on the time and resources of the courts. Apparently, this practical consideration has enjoyed little attention.

The desire to avoid burdening the appellate courts with responsibility for reviewing all sentences at least partially motivated Congress in designing the bill's piecemeal system of review.²⁸⁴ Yet, as has been demonstrated, this system will create more problems than it will solve. Collateral review should be necessary only in limited instances when a problem is not proper for appeal—for example, when it involves an issue that the defendant could not have raised at the sentencing hearing, such as inadequate assistance of counsel. The currently existing provisions of 28 U.S.C. § 2255 would satisfy fully any need for collateral review that might arise.

With statutory sentencing purposes and the trial court's statement of reasons for imposing a sentence, the appellate court should be able to provide meaningful sentence review. Over a period of time the courts would create a common law of sentencing that would, in itself, cut down appreciably on unwarranted disparity.²⁸⁵ Judicial reliance on information-gathering projects, such as the PIMS program currently being developed under the auspices of the Judicial Conference,²⁸⁶ would also help to alleviate the problems of sentencing disparity.

Leaving some judicial sentencing discretion intact would help to counterbalance and control the effect of prosecutorial discretion in the sentencing function. If discretion to fashion sentences for criminal offenders must exist within the system, it is better to leave it with federal judges, whose form of selection, tenure, and compensation better ensures impartiality and experience. It would be helpful if Congress clarified the precise role the judiciary should play in the plea bargaining context.²⁸⁷ Further, Congress should examine the effect of police and prosecutorial discretion in sentencing disparity and explore new means of controlling this discretion or ensuring its proper use. It should consider consolidating the many police agencies to eliminate interagency specialization and rivalry and the disparity these characteristics engender. This consolidation in turn would aid the prosecutor in charging the most serious offense demonstrable by the evidence. It is, after all, beyond question that the executive department has a constitutional obli-

²⁸⁴ See, e.g., S. REP. NO. 96-553 at 1133, 1139.

²⁸⁵ The argument that review under the proposed Code would lead to less disparity among the circuits than might arise through simple appellate review without nationwide sentencing guidelines is not persuasive. Under the S. 1722 guideline system, disparity among circuits would be inevitable. The category of offense criteria—community view of the offense, public concern generated by the offense, and incidence of the offense in the community, S. 1722, *supra* note 12, tit. III, § 994(c)—are subject, to some extent, to the determination of individual sentencing judges. Over time, their decisions would establish intercircuit conflicts reflecting these differing attitudes about offense severity.

²⁸⁶ See note 3 *supra*.

²⁸⁷ See note 266 & accompanying text *supra*.

gation, under the equal protection and due process guarantees of the fifth amendment, to enforce the criminal laws in a non-arbitrary manner. Indeed, if non-arbitrary enforcement is to be the keystone to federal criminal sentencing reform, Congress should also evaluate the current method of selection, tenure and compensation of federal prosecutors and consider whether change might be needed.

Through these various means, Congress and the four primary components of the criminal justice system, working together, could devise a system-wide means to eliminate unwarranted sentencing disparity while avoiding many of the complexities and pitfalls of S. 1722 demonstrated in the hypothetical case.

IV. CONCLUSION

Much has been written and said about the need for federal sentencing reform and the ability of S. 1722, its predecessors, and its House counterparts to achieve it. In this article I have put the S. 1722 sentencing provisions to a practical test by imagining how they would operate in a real case.

Based on the results of this test, it must be concluded that the current reform effort has several major deficiencies. It needs refinement, and once in its final form, it needs to be compared with wholly different alternatives. Only through this painstaking process can we assure a federal criminal code that will gain the faith of the people.