

# Sentencing Guidelines in South Korea: Lessons from the American Experience\*

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## Abstract

*This article discusses the enactment of the Sentencing Reform Act by the United States Congress, the enactment of sentencing guidelines by the South Korean legislature, and the effects of these enactments on the U.S. and on South Korea. The Sentencing Reform Act in the U.S. was the culmination of almost a decade of hearings, committee mark-ups and floor consideration in the U.S. Congress begun in 1976 with the introduction of a bill by Senator Edward M. Kennedy authorizing the appointment of a commission for the purpose of promulgating sentencing guidelines for court consideration. After enactment in 1984, for over twenty years sentencing power was gradually consolidated into the federal prosecutor's office until in 2005 the United States Supreme Court in a landmark decision deemed unconstitutional the mandatory nature of the sentencing guidelines. However, as the United States Supreme Court was ending the twenty year legislative experiment in mandatory sentencing, the South Korean legislature was beginning the process of enacting legislation that would lead to strict sentencing guidelines for South Korea.*

*The historical background and current approaches of South Korea and the United States in the sentencing guideline area are of interest to prosecutors, the judiciary and public defenders in South Korea. The bulk of the article focuses on the U.S. experience as a guide for the South Korean judiciary, especially due to the current divergence between the U.S. and South Korea in this area. While the United States judicial system is moving decisively towards a system giving greater discretion to the judiciary, South Korea is moving decisively towards a sentencing system giving greater power to the prosecution. In analyzing this divergence, this article presents the original reasons behind mandatory sentencing in the United States, the long debate in the United States as to the efficacy of mandatory sentencing and the current course charted by the U.S. Supreme Court. The article also briefly presents and discusses the history of sentencing guidelines in South Korea, and discusses whether the U.S. experience can be informative in the debate as to whether sentencing guidelines are suitable for the issues currently facing South Korea.*

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In March 2004 pursuant to U. S. federal sentencing guidelines, Jamie Olis, a Korean-American, received a 24-year sentence for his relatively minor role in a financial scandal. During the same time period, the Judicial Review Committee (“JRC”) in South Korea recommended the adoption of sentencing guidelines to enhance the public’s faith in the Korean judicial system. On October 4, 2004 in the United States Supreme Court oral arguments in the case of *U.S. v. Booker*<sup>1)</sup> regarding the constitutionality of mandatory federal sentencing guidelines were heard, and, on January 12, 2005, the court ruled that mandatory federal sentencing guidelines were unconstitutional. In December of 2004, in order to implement the recommendations of the JRC, including the introduction of sentencing guidelines, the South Korean government established the Presidential Committee for Judicial Reform.

During the next three years, the U.S. Supreme Court and the U.S. Circuit Courts, in a series of decisions, reversed and revised 20 years of legislative enactments and returned discretion in sentencing decisions to the U.S. federal judges. During the same three years in South Korea, the South Korean National Assembly worked to establish a sentencing commission within the South Korean judiciary and, on May 2, 2007, the South Korean Supreme Court, pursuant to an amended Court Organization Act, established a sentencing commission to implement fair and objective sentencing practices in South Korea.<sup>2)</sup>

This article will explore the historical background on the present divergent courses of South Korea and the United States in the sentencing guideline area. At a time when the United States, after a 20 year experiment with sentencing guidelines, is moving decisively towards a system giving greater and greater discretion to the judiciary, South Korea is moving decisively towards a sentencing system giving greater power to the prosecution. In analyzing this divergence, this article will present the original reasons behind mandatory sentencing in the United States, the long debate in the United States as to the efficacy of mandatory sentencing and the current course charted by the U.S. Supreme Court. The article will also

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1) 543 U.S. 220 (2005).

2) Beopwon jujuk beop [Court Organization Act], Act No. 51, Sept. 26, 1949, amended by Act. No. 8411, May 1, 2007 (S. Kor.).

briefly present and discuss the history of sentencing guidelines in South Korea, and discuss whether the U.S. experience can be informative in the debate as to whether sentencing guidelines are suitable for the issues currently facing South Korea.

## I. The United States

### 1. *The Roots of the Sentencing Reform Act of 1984*

In 1984 the United States Congress enacted the Sentencing Reform Act (hereinafter “SRA”) as Title II of the Comprehensive Crime Control Act.<sup>3)</sup> The SRA was the culmination of over a decade of hearings, committee mark-ups and floor consideration in the U.S. Congress which began in 1976 with the introduction of a bill by Senator Edward M. Kennedy authorizing Judicial Conference appointment of a commission for the purpose of promulgating sentencing guidelines for court consideration.<sup>4)</sup> Senator Kennedy, in introducing the 1976 bill, stated that this was “the beginning of a concerted legislative effort to deal with sentencing disparity.”<sup>5)</sup> However, the roots of the SRA and of federal sentencing reform can be traced back to the twin American themes of progressivism and populism as reflected in a myriad of twentieth century legal reform movements.<sup>6)</sup> In this characterization, progressivism inspires the creation of expert agencies that, based on empirical research, form public policy and, contrastingly, populism favors the use of common sense and public sentiment in the formation of public policy.

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3) Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) [codified in 18 U.S.C.A. §§991(b), 994(a)(1)-(2) (1988)]. Between 1984 and 1987, the United States Sentencing Commission crafted the Federal Sentencing Guidelines. Since Congress did not object to the guidelines, they became effective on November 1, 1987 (28 U.S.C.A. §994 (1988 & Supp. V. 1993)).

4) S. 2699, 1<sup>st</sup> Sess. (1975).

5) S. REP., 94<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1975).

6) Brooks, Karl, *Sentencing Reform in Historical Context: The Progressive Vision of Sentencing Commissions* (2002) (Paper originally presented at the Society for History in the Federal Government Annual Conference, April 11, 2002).

The progressive impulse in criminal justice appears early in twentieth century America with the growth of indeterminate sentencing and the rise of the ideal of rehabilitation.<sup>7)</sup> In this approach, prisons are institutions where prisoners are transformed into law-abiding citizens. Parole and probation become central components of the approach and psychology and sociology experts design and implement medical treatment and supervision programs. Significantly, indeterminate sentences tailored to each offender's individual circumstances become *de rigueur*. However, by the 1970's the public sentiment towards rehabilitation had declined.<sup>8)</sup> Nonetheless, there remained a strong belief in the ability of expert commissions, and several proposals to rationalize the federal criminal code included proposals for sentencing reform.<sup>9)</sup> In the SRA this new progressive reform model replaced medical expertise with legal expertise that would calibrate the penalties to the seriousness of the crime<sup>10)</sup> and theoretical expertise that would optimize for the maximum control of crime with a minimal expenditure on criminal justice.<sup>11)</sup>

Accompanying the progressive spirited reforms in the SRA were populist inspired sections that reflected the distrust of both "experts" and politically unaccountable judges. Notably the sentencing guidelines significantly curtailed the discretions previously exercised by both judges and the United States Parole Commission which were viewed as "arbitrary and capricious" and an ineffective deterrent to crime.<sup>12)</sup> The SRA contained numerous detailed instructions to the Sentencing Commission, including

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7) Rothman, David, *Sentencing Reform in Historical Perspective* 29, CRIME AND DELINQUENCY 631, 631-647 (1983).

8) ALLEN, FRANCIS A. THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981).

9) American Bar Association, *Standards Relating to Sentencing Alternatives and Procedures* 17, AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE (1968). See also American Bar Association, *Standards Relative to Sentencing Alternatives and Procedures*, in AMERICAN BAR ASSOCIATION TASK FORCE ON SENTENCING ALTERNATIVES AND PROCEDURES (1979). See also DEP'T OF JUSTICE, NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS. FINAL REPORT (1971). Washington, D.C.: DOJ.

10) VON HIRSCH, ANDREW, ET AL. THE COMMISSION AND ITS GUIDELINES (1987).

11) Becker, Gary G., *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 169 (1968).

12) S. REP. NO. 225, (1984).

the elimination of sentences that “in many cases...[did] not accurately reflect the seriousness of the offense.”<sup>13)</sup> The Commission was also directed to consider “the community view of the gravity of the offense;” and “the public concern generated by the offense.”<sup>14)</sup> Finally, as a nod to the distrust of experts, Congress reserved to itself the opportunity to review the Commission’s work and to “modify or disapprove” of any of the Commission’s amendments to the guidelines.<sup>15)</sup>

## 2. Disparity, Severity and Discrimination

While the enactment of the SRA had at its root a growing public distrust in the infallibility of judicial discretion and perhaps the inevitable swing of the pendulum away from progressive ideals and towards populist ideals, there were two empirically demonstrated concerns that had arose in the late 1960’s and early 1970’s regarding indeterminate sentencing. The first of these was the concern that judicial discretion gave rise to a “sentencing disparity” which occurred when similarly situated offenders received significantly disparate sentences. Contemporaneous studies showed that defendants with identical offenses and background circumstances frequently received significantly different sentences depending on the judge before which they appeared.<sup>16)</sup> In lay terms a defendant might have a “Hang-em High Harry” or a “Let-em Loose Larry.” This disparate treatment in the vital area of individual liberty struck many as an indefensible violation of the basic American core tenet of fairness.<sup>17)</sup>

Of even greater concern was evidence that disparate sentencing worked

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13) 28 U.S.C. § 994(c).

14) *Id.*

15) 28 U.S.C. § 994(p).

16) Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY, 883 (1990).

17) Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1, 2 (1972) (“Those of us whose profession is the law must not choose any longer to tolerate a regime of unreasoned, unconsidered caprice for exercising the most awful power of organized society, the power to take liberty ... by process of what purports to be law”).

to the disadvantage of minority groups.<sup>18)</sup> As early as 1933 studies revealed that judges were more lenient with offenders with whom they somehow identified than offenders viewed as somehow “different.”<sup>19)</sup> Often the offender’s race, sex, religion, income, education, occupation or other status characteristics affected the sentencing decision.<sup>20)</sup> There seemed to be an inextricable link between judicial discretion and racial discrimination. Evidence of this link was increasingly substantiated in a number of studies conducted in the early 1970’s. During this time a multitude of studies, driven by the public’s dissatisfaction with the federal sentencing scheme, were undertaken.<sup>21)</sup> As a result of this increased attention and advances in research methodology, studies revealed that disparity, and underlying discrimination, were at intolerable levels.<sup>22)</sup> While politically conservative reformers expressed some concern with this issue, it was the politically liberal reformers who made a goal out of eliminating sentencing disparity, and the underlying discriminatory effect, as a central tenet of their agenda.<sup>23)</sup>

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18) Nagel, *supra* note 16, at 895 (“[d]iscretion seemed inextricably linked with discrimination.”).

19) Gaudet, Harris & St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L. & CRIMINOLOGY 811 (1933).

20) R. Martin, *The Defendant and Criminal Justice*, U. OF TEXAS BULL. No 3437 (Bureau of Research in the Social Sciences No. 9, 1934).

21) Wilkins, *Disparity in Dispositions: The Early Ideas and Application of the Guidelines*, in SENTENCING REFORM 2, 11 (Wasik & Pease ed. 1987).

22) See e.g., A. PARTRIDGE & W.B. ELDRIGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES (1974); L. WATKINS, J. KRESS, D. GOTTFREDSON, J. CAIPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, REPORT ON THE FEASIBILITY STUDY (1978); William Austin & Thomas A. Williams, III, *A Survey of Judges’ Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. CRIM. L. & CRIMINOLOGY 306 (1977); Shari Seidman Diamon & Hans Zeisel, *Sentencing Councils: A Study of Disparity and Its Reduction*, 43 U. CHI. L. REV. 109 (1975); Andrew Hopkins, *Is There a Class Bias in Criminal Sentencing?*, 42 AM. SOC. REV. 176 (1977); Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121 (1975); Ilene Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, 4 CRIME & JUSTICE: AN ANNUAL REVIEW OF RESEARCH 91 (1983); Comment, *Texas Sentencing Practices: A Statistical Study*, 45 TEX. L. REV. 471 (1967).

23) See, for example, Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 357-359 (1979) (discussing studies on disparate sentencing). See also Edward M. Kennedy, *Foreword to O’Donnell, Churgin and Curtis, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM*, viii (1977).

The second empirically founded concern was the severity of the sentences imposed for criminal offenses. Many reformers, especially the more conservative, believed that the indeterminate sentencing system resulted in sentences that were far too lenient. They argued that leniency in sentencing was attributable to the tendency of judges to coddle criminals,<sup>24)</sup> a view that was increasingly reflected in public opinion polls.<sup>25)</sup> For these reformers a sentencing commission, with the ability to limit judicial discretion and ensure that sentences matching the severity of the crime were imposed, was perceived as necessary.

For the politically more liberal minded, severity was also a concern. However, this concern revolved around the potential for misdirected Congressional involvement in sentencing. The example of California's extensive sentencing reform enactment in the 1970's fueled this concern.<sup>26)</sup> California's legislative reform of sentencing resulted in a system scholars viewed as excessively harsh and needlessly complex.<sup>27)</sup> Thus liberal minded reformers envisioned a sentencing commission placed under the judiciary that was politically insulated from the crime-wave politics that was sweeping the country.

These two major concerns, severity and disparity, occupied both the liberal-minded and conservative-minded reformers. The more liberal reformers focused extensively on disparity and emphasized issues related

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24) Alan M. Dershowitz, *Let the Punishment Fit the Crime*, N.Y. TIMES, Dec. 28, 1975, Magazine Section, at 7 (“[I]t seems that the day of the indeterminate sentence is passing--and with few regrets. While law-and-order conservatives remain persuaded that indeterminate sentencing is just one more form of coddling criminals, prisoners and their defenders outside the walls are complaining that it has resulted in too much power for parole boards and longer stays in prison...In short, a surprising consensus is emerging around the idea that it is time for a return to uniformity in sentencing”).

25) Nagel, *supra* note 16, at 884 (citing polls showing that, “on the whole, sentences served were considerably and consistently more lenient than public estimates of what ought to be by the normative societal response”).

26) See Raymond I. Parnas & Michael B. Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C. DAVIS L. REV. 29 (1978).

27) See Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 95 (2000) (“California’s experience with a legislature-centered sentencing system in the late 1970s confirmed for many reformers that crime-wave politics would often lead legislatures to enact an incoherent, uncoordinated and ever-increasing set of sentence.”).

to fairness and equality. The conservative-minded reformers focused more on the concern of severity and that “the punishment fit the crime.” However, both sets of reformers and both sets of policy concerns added to the rising tide of sentiment calling for the restructuring of the federal sentencing system.

### 3. *The Legislative History of the SRA*

The impetus for the SRA can be traced back to the creation in 1966 of the Brown Commission by President Lyndon Johnson.<sup>28)</sup> Subsequent hearings on the Brown Commission’s final report were heard before Congress in 1971<sup>29)</sup> with the first specific legislative proposals affecting federal sentencing being introduced in 1973.<sup>30)</sup> Progress was incremental until Senator Kennedy’s introduction in 1976 of Senate Bill 2699 in the 94<sup>th</sup> Congress and Congressional enactment of The Parole Commission and Reorganization Act of 1976. This act codified the Parole Commission program that had applied guidelines to all parole decisions beginning in 1974. Thereafter, in the 95<sup>th</sup> Congress, Senators McClellan and Kennedy sponsored Senate Bill 1437 to re-codify federal criminal laws, restrict parole, and to establish a sentencing commission to draft sentencing guidelines. While an amended bill passed the Senate, the Subcommittee on Criminal Justice of the House Judiciary Committee reported a number of problems during hearings on the bill and took no further action. The bill “died in committee.”

During the following Congress, the Criminal Code Reform Act of 1979 was introduced. Similarly to Senate Bill 1437, it would have created a

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28) The National Commission on Reform of Federal Criminal Laws (Brown Commission) was formed in 1966 under the auspices of President Lyndon Johnson. The Commission published its Final Report in 1971 (United States GPO). NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971).

29) *The National Commission on Reform of Federal Criminal Laws (Brown Commission): Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Comm.*, 92<sup>nd</sup> Cong., 129-514 (1971).

30) “The Criminal Justice Codification, Revision and Reform Act of 1973” was introduced by Senators McClellan, Ervin, and Hruska. S. 1, 93<sup>rd</sup> Cong., §§1-4A1-A5 (1973). “The Criminal Code Reform Act of 1973” was introduced by Senators Hruska and McClellan on behalf of the Nixon Administration, S. 1400, 93<sup>rd</sup> Cong., §§ 2001-2402 (1973).



sentencing commission, however this bill would have abolished parole and extended the terms of supervised releases. The House Judiciary Committee approved a sentencing bill that proposed sentencing guidelines promulgation by a seven-member, part-time, Judicial Conference Committee on Sentencing.<sup>31)</sup> However, neither the House nor the Senate acted on this version of the legislation. Two years later in the 97<sup>th</sup> Congress, the Senate Judiciary Committee reported a comprehensive criminal code revision bill, but no Senate action occurred on the proposal.<sup>32)</sup> At the same time a nearly identical bill passed the Senate but was deleted from the House version of the bill.<sup>33)</sup>

Finally, in the 98<sup>th</sup> Congress Senators Strom Thurmond and Paul Laxalt introduced Senate Bill 829, a comprehensive crime control legislation that contained sentencing reforms as Title II. The Senate Judiciary Committee held hearings and eventually broke the bill into several bills, including Senate Bill 1762, the Comprehensive Crime Control Act of 1983. This comprehensive act contained a major section on sentencing reform. Also emerging from the judiciary committee was Senate Bill 668, a bill by Senator Kennedy that was virtually identical to Title II of the crime control legislation. Both of these bills passed the Senate in 1984.

In the House during the 98<sup>th</sup> Congress, H.R. 6012, as reported out by the House Judiciary Committee was considered. This bill called for determinate parole terms and the creation of a part-time commission within the Judicial Conference to draft advisory sentencing guidelines. However, the bill was not considered by the full House, again “dying in committee.”

During the three Congresses that followed Senator Kennedy’s initial introduction of the legislation addressing the need for a sentencing commission, the Senate continued to regard the sentencing guideline concept as an integral part of any effort to reform the federal criminal laws and, due to the extended legislative process, the proposal gained broad bi-partisan support. However, in the House, the House Judiciary Committee leadership remained less than enthusiastic about the worth of the legislation. This concern heightened as each successive Senate recast the

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31) H.R. 6915, 96<sup>th</sup> Cong. (1980).

32) S. 1630, 97<sup>th</sup> Cong. (1982).

33) S. 2572, 97<sup>th</sup> Cong. (1982).

legislation and progressively tightened the intended guidelines constraints on judicial discretion and decreased the relative influence of the Judiciary while increasing the role of the Executive Branch over the construction of the guidelines.

Nonetheless, in the second session of the 98<sup>th</sup> Congress an amended Comprehensive Crime Control Act was made a part of a continuing appropriations bill and passed by both chambers of Congress. The Act was signed into law by President Ronald Reagan on October 12, 1984. While the Act enjoyed strong bi-partisan support in the Senate, where it passed on a vote of ninety-nine to one,<sup>34)</sup> in the House, the Senate-passed bill was passed without amendment, and over the opposition of the House Judiciary Committee leadership, as a rider on a continuing appropriations bill.<sup>35)</sup> Nonetheless this method of House passage did not result in any significant impediment to the actions of the Sentencing Commission or the implementations of its proposed guidelines.

#### 4. *The SRA in Action: Disparity, Severity, Olis and Thurston*

Pursuant to statutory authority the Sentencing Commission regular reviews and revises the sentencing guidelines and prepares a written report assessing the operation and effectiveness of the sentencing guidelines.<sup>36)</sup> These reports have shown a significant reduction in disparity and a significant increase in severity after the effective date of the sentencing guidelines. Despite that success, the SRA is a significant transference of power from the judiciary to the prosecution.<sup>37)</sup> The effects of this

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34) Senator Charles Mathias opposed passage of the SRA solely on the issue of mandatory versus recommended guidelines.

35) See generally U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 1-8 (1987); William W. Wilkins, Jr., Phyllis J. Newton, and John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L. FORUM 355 (1991).

36) 28 U.S.C.A. §994 (o).

37) The Senate Judiciary Committee received testimony from Professor Stephen Schulhofer concerning the circumvention of the guidelines by prosecutors via plea bargaining. S. REP. No. 225, at 66 (1983). While the Sentencing Commission attempted to address this problem through study and possible further regulations regarding plea bargaining, the Sentencing Commission, which is placed in the Judicial Branch, cannot dictate

transference of power is arguable deleterious to the exercise of a citizen's right to a trial by one's peers.<sup>38)</sup>

Sentencing guidelines were enacted with the twin goals of reducing sentencing disparity and increasing sentencing severity. As an ever greater number of defendants received disparate and/or unjustifiable harsh sentences, cracks began to appear in the mandatory sentencing schemes at both the federal and state level. Over time the mandatory character of the guidelines gave rise to individual cases where the severity of the sentence imposed shocked the public's notions of fairness and equity. The pendulum began to swing back towards the necessity for greater judicial discretion.<sup>39)</sup> Three areas in particular were demonstrative of the growing disparity and excessive severity of the federal sentencing guidelines. First, the disproportionate sentences received for crack cocaine as compared to cocaine, second the excessive penalties in the white collar arena, and, finally, the excessive power of the prosecution to penalize an individual exercising the right to a jury trial.

#### 1) *Five Years for Five Grams: Crack Cocaine Sentencing*

Crack cocaine entered the public awareness in the 1980s and quickly garnered extensive media coverage, partly due to the exponential growth of the crack cocaine market. The appeal of crack cocaine came from its cheap price which, for the first time, made cocaine accessible to every socio-economic class. Crack cocaine quickly spread into urban and suburban households and the media used words like "epidemic" and "crisis" when discussing the issue. The political hysteria that ensued led to the Anti-Drug Abuse Act of 1986 which enacted some of the harshest mandatory sentencing guidelines for low level drug offenses and created drastically

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to a United States Attorney, who lies within the Executive Branch, what counts to charge.

38) See *infra* Section IE.

39) See, e.g., Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y.L.J., 2 (1992); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93 (1993) ("[B]arely a decade since the...reforms became effective, many judges, lawyers and scholars contend that the federal sentencing laws and practices are now as bad as, or even worse than, ever").

different sentencing regimes for powder cocaine and crack cocaine.<sup>40)</sup> The result was that defendants possessing over five grams of crack cocaine received a minimum five year sentence in federal prison.<sup>41)</sup> A defendant would need to possess over five hundred grams of powder cocaine to receive the same mandatory minimum sentence.<sup>42)</sup> This 100:1 ratio between crack cocaine and powder cocaine became the source of vast racial disparities in sentencing over the next two decades.

United States government data on drug use rates reports that approximately two-thirds of drug users are Caucasian or Hispanic. The data shows the same percentages apply for cocaine usage overall although substantially more Blacks use crack cocaine. Due to the preference for crack cocaine among Black users, Blacks have been disproportionately sentenced to prison for cocaine usage. This is almost entirely a result of the mandatory sentencing scheme for crack cocaine possession and trafficking. In 1994, 84.5 percent of crack cocaine possession convictions were for Blacks, only 10.3% for Caucasians and 5.2% for Hispanics.<sup>43)</sup> For crack cocaine trafficking offenses, 88.3% of offenders sentenced were Blacks, 7.1% were Hispanics and 4.1% were Caucasian.<sup>44)</sup> For powder cocaine offender sentencing was more in line with general drug usage statistics; 58% of offenders sentenced for possession were Caucasian, 26.7% Black, and 15% Hispanic.<sup>45)</sup> Offenders sentenced for trafficking powder cocaine were 39.3% Hispanic, 32% Caucasian and 27.4% Black, also in line with usage statistics.<sup>46)</sup> By 2006 the figures for Black offenders remained at 81.8% of all offenders sentenced for crack cocaine offenses.<sup>47)</sup> Due to the low level of crack cocaine possession

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40) Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

41) 21 U.S.C. §§841(a)(1), b(1)(B). Five grams of crack cocaine yields approximately 10 to 50 doses. UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 73 (2007).

42) 21 U.S.C. §§841(a)(1), b(1)(B). Five hundred grams of powder cocaine yields between 2,500 and 5,000 doses. UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 73 (2007).

43) UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY. Chapter 3 (1995).

44) *Id.*

45) *Id.*

46) *Id.*

47) UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL

necessary to incur a five year mandatory minimum sentence, during the period from 1994 to 2003 the average time served by Blacks for drug offenses increased by 62 percent as compared to an increase of only 17% for Caucasian drug defenders.<sup>48)</sup> As of 2006, Blacks were serving an average of 58.7 months in prison for non-violent drug offenses while Caucasians were serving an average of 61.7 months for violent offenses including murder, rape, and armed robbery.<sup>49)</sup>

This extreme racial disparity drew heavy criticism from commentators, media, and, most notably, from the United States Sentencing Commission. The Commission reported in 2004 that “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”<sup>50)</sup> Further, the Commission stated that even “[p]erceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system.”<sup>51)</sup> Over a period of greater than twenty years the Commission repeatedly asked for a reduction in the ratio between crack cocaine and powder cocaine offenses. Finally on August 3, 2010, President Barack Obama signed a law changing the ratio to 18:1. As a result of this, an offender must now possess approximately 28 grams of crack cocaine to trigger the mandatory five year minimum penalty. This is the first time in the history of the United States that a law has been passed lessening a mandatory minimum sentence and that fact, by itself, demonstrates the severe problem that came from disparate sentencing under the crack cocaine regime.

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SENTENCING POLICY, 15 (2007).

48) Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 1994* 85 (Table 6.11) (March 1998); Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003* 112 (Table 7.16) (Oct. 2004).

49) Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003* 112 (Table 7.16) (Oct. 2004).

50) UNITED STATES SENTENCING COMMISSION, *FIFTEEN YEARS OF GUIDELINES SENTENCING* 132 (2004).

51) UNITED STATES SENTENCING COMMISSION, *REPORT TO CONGRESS, COCAINE AND FEDERAL SENTENCING POLICY* 103 (May, 2002).

## 2) *White Collar Crime: The Case of Jamie Olis*

In 2001, Jamie Olis, a 38 year old Korean-American father, at the direction of his boss and a colleague used a “special purpose entity” to temporarily increase the operating cash flow at his publicly traded company. At the time the rules governing “special use entities” were fuzzy and, while the particular method used by Mr. Olis was accepted under standard accounting rules, the addition of various side agreements rendered the scheme in violation of sections of the Securities Exchange Act of 1934. Eventually the company at which Mr. Olis worked was forced to restate its earnings. This restatement of earnings initiated a precipitous drop in the price of the publicly traded stock. By themselves these facts do not seem exceptional, but the resulting prosecution, the sentence imposed, and the circumstances of Mr. Olis’ life brought this case to the attention of the media and the public.<sup>52)</sup>

The story of Jamie Olis’ life before his involvement in Project Alpha was an embodiment of the American dream. As the illegitimate son of a South Korean prostitute impregnated by an American military soldier on tour in South Korea he was fated to life as an impoverished outcast in his home country. In the hope for a better life Jamie emigrated with his mother to Texas. However, once in America he endured physical abuse from a second American soldier with whom his mother was romantically involved. His life eventually improved when his mother remarried and his step-father adopted him and helped guide the young man. Over time Mr. Olis turned his life story into the American dream; marrying his college sweetheart, and becoming a C.P.A. and an attorney. By the time of his involvement in the “special use entity” he was 35 years old and a mid-level executive of a high flying energy company.

Mr. Olis’ troubles began in 2001 when he, as the senior director of tax planning at Dynegey, Incorporated, and under the direction of his boss, initiated Project Alpha.<sup>53)</sup> At that time, senior management at Dynegey was

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52) Henry Blodget, *Zero to Life: The Injustice of White-Collar Sentencing Rules*, SLATE (May 6, 2004) at <http://www.slate.com/id/2100055>.

53) See Securities and Exchange Commission, Plaintiff v. Gene S. Foster, Jamie Olis, Helen C. Sharkey, Defendants, 2003 WL 22331369 (Trial Proceeding) (No. 03-CR-217). Complaint dated June 12, 2003 in the United States District Court for the Southern District of Texas (hereinafter “SEC Complaint”) at section i.

looking for methods to increase operating cash flow through inventive energy trading activities. This need arose due to expressed concerns by the investment community over Dynegy's widening gap between its net income and operating cash flow due to mark-to-market accounting. Project Alpha was a special use entity arrangement which converted cash from financing income into cash flow that was included in Dynegy's public statements as cash from operating income.<sup>54)</sup> This restatement substantially boosted Dynegy's cash from operating income and, as a result, its stock price.

However, during the period of Project Alpha's existence, Dynegy engaged in various derivative transactions, including commodity price swaps and interest rate swaps, linked to Project Alpha's underlying energy trading activity.<sup>55)</sup> These derivative transactions essentially eliminated any risk for Dynegy or its co-investors as regarded the underlying trading activities and effectively turned the trading activities into a financing arrangement. Nonetheless, Mr. Olis and his co-conspirators at Dynegy knowingly and intentionally concealed the existence of the derivative transactions from the accounting firm which issued the report for the Securities Exchange Commission.<sup>56)</sup> This resulted in the accounting firm including nearly \$300 million dollars as cash from operating income in 2001 public statements which should have been listed as cash from financing.<sup>57)</sup> Concealing material facts which affect statements made in public releases is fraud under the Securities Exchange Act of 1934.<sup>58)</sup>

In 2002, when the accounting firm became aware of the derivative transactions, Dynegy was forced to restate the Project Alpha earnings as cash flow from financing operations and not as cash from operating

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54) See Dynegy 2001 Form 10K filed on March 13, 2002 with the Securities and Exchange Commission, Accession Number: 0000912057-02-009822. Therein Dynegy reported \$290 million in operating cash flow attributable to Alpha. This amounted to approximately 36% of Dynegy's reported cash flow from operations in 2001.

55) *Supra* note 53 *see also*, SEC Complaint at sections iii and xxxii.

56) *Supra* note 53 *see also*, SEC Complaint at section xxxv and sections xli to xliv.

57) *Supra* note 54.

58) Section 10(b) of the Securities Exchange Act (15 U.S.C. § 78j(b)) and Rule 10b-5 of the Regulations promulgated thereunder (17 C.F.R. § 240.10b-5).



income.<sup>59)</sup> This restatement precipitated a substantial drop in the price of the publicly traded stock. As summarized by the sentencing judge, the drop in share price caused a loss of approximately \$105 million for the investment arm of the University of California Retirement System.<sup>60)</sup> Based on the guidelines promulgated by the federal sentencing commission, Olis' base level offense of 6 was enhanced by 26.5 points on this factor alone. The judge then added an additional 8 points because there were more than fifty victims of the fraud, the fraud was via the use of a sophisticated means, and that Mr. Olis had used a special skill in committing the fraud. This resulted in a final enhanced offense level adjustment of 34.5 which resulted in a total offense figure of 40.<sup>61)</sup>

Under the federal sentencing guidelines, an adjusted offense level of 40 for a first-time offender resulted in an incarceration range of 292 to 365 months. The prosecutor requested the lowest possible sentence which the judge complied with, thus sentencing Mr. Olis for 24 years and 4 months in federal incarceration.<sup>62)</sup> Subsequent to sentencing Mr. Olis' defense attorney and the media in general expressed dismay and shock at the results under the federal sentencing guidelines.<sup>63)</sup> Mr. Olis' district court judge stated, "Let me just say that I take no pleasure in sentencing you to 292 months, but my job is to follow the law."<sup>64)</sup> In comparison to the twenty-four years received by Mr. Olis, the median term in 2004 for state level conviction of

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59) Form 8-K filed on November 15, 2002 with the Securities Exchange Commission.

60) U.S. v. Jamie Olis, 429 F.2d 540, 542 (5<sup>th</sup> Circuit, 2005).

61) *Id.* at 543.

62) On appeal, the Fifth Circuit reversed, based on a re-computation of the loss due to fraud. *United States v. Olis*, 429 F.2d 540 (5<sup>th</sup> Cir. 2005). The district court resentenced Olis on September 22, 2006 to a more reasonable six-year term, principally because the Sentencing Guidelines were no longer mandatory under the U.S. Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *See infra Section IE*. Nonetheless, the six year term is roughly equivalent to a pre-Sentencing Guidelines sentence of eighteen years, a particular severe term for Mr. Olis considering his offense and his background.

63) *See* James K. Glassman, *Regulatory Hysteria*, SCRIPPS HOWARD NEWS SERVICE, March 29, 2004.

64) U.S. v. Jamie Olis, 2004 WL 3756361 (S.D. Tex., Mar 24, 2004) Trial Transcript (No. H-03-217-01) in which the judge continued, "[t]he role of a district judge, therefore, is not to act as a roving chancellor in equity meting out individual justice as he or she sees fit. It is to conscientiously follow the letter and spirit of the law. Among the laws the Court is required to follow are the federal sentencing guidelines" (Trial Transcript at 14-15).



murder was thirteen years; for drug trafficking, four years; and for sexual abuse, three years.<sup>65)</sup>

### 3) *Plea Bargaining Disparity: The Case of William Thurston*

William Thurston was the Regional and Senior Vice President<sup>66)</sup> of a Massachusetts corporation (hereinafter “Damon”) that provided clinical laboratory testing services to hospitals, health maintenance organizations, physicians and patients nationwide. In the 1980’s Damon earned approximately thirty percent (30%) of its revenue from Medicare, a government insurance program for the elderly administered by the Health Care Financing Administration (“HCFA”).<sup>67)</sup>

In late 1987, HCFA announced that as of April 1, 1988, Medicare would reduce the fees paid to laboratories, including Damon, for providing clinical services to beneficiaries.<sup>68)</sup> Immediately after the announcement there were corporate discussions at Damon, including Mr. Thurston, regarding the reduction in fees and potential methods of recouping the losses. As a result of these discussions, Damon added a ferritin blood test<sup>69)</sup> to a standard LabScan, a panel of more than a dozen blood chemistry tests performed on a single machine. The ferritin test was performed on a separate machine, was medically necessary in only about one percent of the cases, and was billed separately to Medicare but not to the doctor. Thurston and his fellow executives endeavored to prevent the doctors ordering the tests from becoming aware of the separate charges to Medicare or that the LabScan panel could be ordered without the ferritin test.<sup>70)</sup> Over the next five years, the change to the LabScan blood panel more than offset the loss

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65) Glassman, *Supra* note 63.

66) Thurston served as Regional Vice President of Damon from 1987 to 1990. He was promoted to Senior Vice President of Operations in 1990 to 1993.

67) Medicare was created under The Social Security Amendments of 1965, Pub. L. 89-97, 79 Stat.286, codified as amended at 42 U.S.C. 1395-1395ccc. Medicaid was created under The Social Security Amendments of 1965, Pub. L. 89-97, 79 Stat. 343, codified as amended at 42 U.S.C. 1396-1396v.

68) U.S. v. Thurston, 358 F.3d 51, 56 (1<sup>st</sup> Cir. 2004).

69) The ferritin iron test measures the number of atoms per molecule of circulating ferritin. Ferritin is a binding protein that delivers iron to iron storage cells. U.S. v. Thurston, 358 F.2d 51, at FN2 (2004).

70) U.S. v. Thurston, 358 F.3d 51, 56 (2004).

fees from Medicare's reduction in the amount paid for lab services.<sup>71)</sup>

On January 22, 1998, a thirty-nine paragraph single-count indictment charged Thurston and three other former Damon executives with conspiring to defraud HCFA by causing physicians to unknowingly and unnecessarily order extra tests by adding the ferritin test to the pre-existing panel of diagnostic blood tests.<sup>72)</sup> The indictment charged that a conspiracy existed from July 1987 to August 1993. Mr. Thurston's co-conspirator, the president of the company, reached a plea agreement with the prosecution and was sentenced to three years probation.<sup>73)</sup> After conclusion of trial, the jury found Mr. Thurston guilty of conspiracy to defraud the federal government. The penalty under the law that Thurston was charged with violating prescribed a maximum penalty of sixty months, or five years in prison.<sup>74)</sup> Despite this maximum penalty prescribed under the statute, the penalty prescribed under the federal sentencing guidelines for a first-time offender called for a sentence of sixty-three to seventy-eight months. The government, bound by the statutory maximum and disregarding Mr. Thurston's co-conspirators probationary sentence, requested the judge to sentence Mr. Thurston to the maximum period of sixty months in federal prison.

Despite the government's request for the maximum penalty, and despite the sentencing guidelines, the district court sentenced Mr. Thurston to three months' imprisonment (to be served in a halfway house), followed by two years of supervised release, the first three months of which were to be served under house arrest. The district court also imposed a one hundred dollar special assessment and no fine. This sentence, based

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71) At trial the prosecution introduced evidence demonstrating fees in excess of \$5 million dollars solely attributable to fees from unnecessary ferritin tests. After pleading guilty, Damon paid a fine of \$35,273,141 and, pursuant to a civil settlement, paid reimbursement of \$83,756,904 to the United States and the state Medicaid programs.

72) *Id.* at 60.

73) *Id.* at 55. ("[T]he company president, Joseph Isola, who had pled nolo contendere and assisted the government...[received] three years' probation").

74) 18 U.S.C. § 371 ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."). Pub. L. 103-322, Title XXXIII, § 330016(1)(L), 108 Stat. 2147.

primarily on the sentence Mr. Thurston's co-conspirator received under a plea bargain, outraged the prosecution, who appealed. The prosecution argued on appeal that the district court lacked the power to grant a downward departure. On appeal, the First Circuit Court of Appeals agreed with the prosecution and imposed a sixty-month sentence on Mr. Thurston to be served in federal prison.<sup>75)</sup> Over the next four years Mr. Thurston repeated appealed to the United States Supreme Court and, finally, in 2008 the First Circuit Court of Appeals, after being twice reversed by the U.S. Supreme Court, agreed with the District Court's original sentence.<sup>76)</sup>

#### 4) *United States v. Booker: Returning Sentencing Discretion to the Courts*

While Mr. Olis, Mr. Thurston and a multitude of Black offenders were being sentenced to years and decades of incarceration under the federal sentencing guidelines, the U.S. Supreme Court was gradually developing its jurisprudence concerning the constitutional right to a jury trial contained in the Sixth Amendment to the U.S. Constitution. This case law began with the case of Apprendi<sup>77)</sup> a case challenging judicial fact-finding used during sentencing decisions.

In Apprendi the defendant was convicted of a firearms violation after he fired several shots into the home of a Black family. During questioning the defendant had stated that he did not want the family in his neighborhood because of their race, however, he later withdrew this statement. After the defendant pled guilty, the trial court found, by a preponderance of the evidence, that the shooting was racially motivated and, under a hate-crime enhancement statute, increased defendant's sentence above the statutory maximum of ten years, to impose a sentence of twelve years. The state appellate court and the state supreme court upheld the sentence and rejected defendant's claim that the Sixth Amendment right to a jury trial via the Due Process Clause of the Fourteenth Amendment

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75) U.S. v. Thurston, 351 F.3d 58 (1<sup>st</sup> Cir., 2004).

76) U.S. v. Thurston, 544 F.3d 22 (1<sup>st</sup> Cir., 2008). The U.S. Supreme Court's reversal of the First Circuit was based on its decision in U.S. v. Booker, 543 U.S. 220 (2005).

77) U.S. v. Apprendi, 530 U.S. 466 (2000). Justice Stevens wrote the opinion, joined by Justices Souter, Scalia, Thomas and Ginsburg.

requires, for state law sentencing purposes, that a bias finding be proved to a jury beyond a reasonable doubt. The U.S. Supreme Court reversed the lower courts stating that the U.S. Constitution required any fact that increased a period of incarceration beyond the prescribed statutory maximum for that crime, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.<sup>78)</sup>

Over the next four years, Apprendi was further interpreted, limited and explained by the Supreme Court, and then, in 2004, the Supreme Court decided Blakely v. Washington.<sup>79)</sup> In Blakely, the Supreme Court held that under Washington State's determinate sentencing scheme the "statutory maximum" is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.<sup>80)</sup> Therefore, the defendant's sentence could not be lengthened beyond the 49 to 53 month statutory standard range for the offense despite the fact that the statutory maximum under the law was 10 years.<sup>81)</sup> Prior to Blakely the federal circuit courts of appeals had determined that the maximum sentence was the maximum penalty set forth in the statute under which a defendant was convicted.<sup>82)</sup> The Supreme Court's redefinition of "statutory maximum" to mean the top of the guidelines sentencing range mandated by the particular facts of a defendant's case called into question the reasoning behind the circuit court decisions.

The subsequent upheaval created in the federal courts by the Blakely decision forced the Supreme Court to quickly address the issue.<sup>83)</sup> On

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78) *Id.* at 476-478.

79) *Washington v. Blakely*, 542 U.S. 296 (2004).

80) *Id.* at 303.

81) *Id.* at 303-304.

82) See *United States v. Reyes-Echevarria*, 345 F.3d 1 (1<sup>st</sup> Cir. 2003); *United States v. Garcia*, 240 F.3d 180 (2<sup>nd</sup> Cir. 2001); *United States v. Williams*, 235 F.3d 858 (3<sup>rd</sup> Cir. 2000); *United States v. Kinter*, 235 F.3d 192 (4<sup>th</sup> Cir. 2000); *United States v. Doggett*, 230 F.3d 160 (5<sup>th</sup> Cir. 2000); *United States v. Lawrence*, 308 F.3d 623 (6<sup>th</sup> Cir. 2002); *United States v. Knox*, 301 F.3d 616 (7<sup>th</sup> Cir. 2002); *United States v. Walker*, 324 F.3d 1032 (8<sup>th</sup> Cir. 2003); *United States v. Ochoa*, 311 F.3d 1133 (9<sup>th</sup> Cir. 2002); *United States v. Jackson*, 204 F.3d 1245 (10<sup>th</sup> Cir. 2001); *United States v. Harris*, 244 F.3d 828 (11<sup>th</sup> Cir. 2001); *United States v. Fields*, 251 F.3d 1043 (D.C.Cir. 2001).

83) Subsequent to Blakely two circuit courts declared that the federal sentencing guidelines violated the Sixth Amendment. United States v. Booker, 375 F.3d 508 (7<sup>th</sup> Cir. 2004)

August 2, 2004, the Supreme Court accepted for expedited review two federal sentencing guidelines cases, *United States v. Booker*<sup>84)</sup> and *United State v. Fanfan*,<sup>85)</sup> in order to clarify to what extent the Blakely decision affected the federal sentencing guidelines. The first issue to be determined by the Court was whether a Sixth Amendment violation occurred if a sentencing judge used, in determining sentence, facts that were not found by the jury or admitted by the defendant. If a Sixth Amendment violation were found, then the second issue concerned whether the sentencing guidelines as a whole were to be inapplicable so that a sentencing court would be required to use its own discretion when sentencing an offender. Such discretion being only limited by the maximum and minimum set forth under the statute for the offense under which the defendant was convicted.<sup>86)</sup>

In addressing whether there was a violation of the Sixth Amendment right to trial by jury, the Court reviewed its decisions in Apprendi and Blakely as well as other peripherally important cases. In its decision the Court focused on a contemporaneous trend by which the legislature placed increasing emphasis on sentence enhancement facts. In almost all cases, these sentence enhancement facts were not required to be raised before trial or to be proved beyond a reasonable doubt, and thus the judge, and not the jury, was increasingly called upon to determine the upper limits of sentencing. The Court saw this trend as reducing the importance of the right to trial by jury and worried as to how the jury would be able to maintain its position between the individual defendant and power of government in this type of sentencing regime.<sup>87)</sup> Ultimately the Court decided that it must follow the Apprendi reasoning and “preserve Sixth Amendment substance.”<sup>88)</sup>

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and *United States v. Ameline*, 376 F.3d 967 (9<sup>th</sup> Cir. 2004). Simultaneously five other circuit courts held Blakely did not affect the constitutionality of the federal sentencing guidelines. *See United States v. Pineiro*, 377 F.3d 464 (5<sup>th</sup> Cir. 2004); *United States v. Mincey*, 380 F.3d 102 (2<sup>nd</sup> Cir. 2004); *United States v. Hammoud*, 381 F.3d 316 (4<sup>th</sup> Cir. 2004); *United States v. Koch* 383 F.3d 436 (6<sup>th</sup> Cir. 2004); and *United States v. Reese*, 382 F.3d 1308 (11<sup>th</sup> Cir. 2004).

84) 543 U.S. 220 (2005).

85) 543 U.S. 220 (2005). Note: Fanfan was consolidated with Booker.

86) *United States v. Booker*, 543 U.S. 220, 229, n.1.

87) *Id.* at 237.

88) *Id.*

In a rare double majority opinion, a separate majority of Justices, in an opinion authored by Justice Breyer, addressed the issue of severability of the sentencing guidelines.<sup>89)</sup> In this second majority, the Court excised two provisions from the federal sentencing guidelines that made the guidelines mandatory. In excising these provisions the Court decided that other remedies would fail to preserve the intent of Congress in enacting the SRA. In conclusion the Court stated “[s]o modified, the Federal Sentencing Act... makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges... but it permit’s the court to tailor the sentence in light of other statutory concerns as well.”<sup>90)</sup>

With the SRA as the beginning bookend and, the aptly named case of Booker as the ending bookend, the twenty year experiment in mandatory sentencing was ended. While subsequent to Booker federal district and circuit courts have generally followed the sentencing guidelines, the ability to depart from the guidelines has rebalanced the power between the judiciary and the prosecution. The ability to examine the seven factors listed in Title 18 of the U.S. Code enables judges to more fully fulfill their role.<sup>91)</sup>

## II. South Korea

As the United States Supreme Court was ending a twenty year legislative experiment in mandatory sentencing, the South Korean legislature was beginning the process of enacting legislation that would lead to strict sentencing guidelines for South Korea. The process leading to this legislation is the focus of this section. To conclude this article will discuss, taking into account the United States’ experience, factors that the

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89) Chief Justice Rehnquist and Justices Breyer, O’Connor, Kennedy and Ginsburg formed the majority that fashioned the remedy.

90) *United States v. Booker*, 543 U.S. 220, 245. Note that 18 U.S.C. §3553(a) lists seven factors, including the guidelines and policy statements, that must be taken into consideration in imposing a sentence.

91) See, e.g., Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681 (1992) for an early discussion of the appropriate role of the Guidelines in sentencing decisions.

South Korean sentencing commission might consider in establishing the South Korean sentencing guidelines.

### *1. The History of the Sentencing Commission in South Korea*

Discussions regarding the establishment of a sentencing commission between the President of the Republic of Korea and the Chief Justice of the Supreme Court began in August of 2003. However, it took until December of 2006 before the Korean National Assembly revised the Court Organization Act (“COA”) and established the Korean Sentencing Commission.<sup>92)</sup> Similar to the U.S., the Korean Sentencing Commission is located within the judiciary, and, similar to the U.S., it performs its functions independent of the judiciary.<sup>93)</sup> The Korean Sentencing Commission, again like the U.S., is minimally described in the legislation authorizing its existence. The COA consists of twelve articles regarding reform. Most of the implementation of the goals of the COA are left to the sentencing commission. Thus, the commission is responsible for setting and revising sentencing guidelines and issuing regular reports on sentencing policy and statistics. The goal of the commission is to establish fair and objective sentencing and, thereby, restore the public confidence in the judiciary.

The Korean Sentencing Commission is composed of thirteen commissioners each appointed to a two year term, subject to unlimited reappointment.<sup>94)</sup> The Chief Justice of the Korean Supreme Court appoints all commissioners. Under the COA the sentencing commission is composed of one chairperson, four judges, two public prosecutors (recommended by the Ministry of Justice), two defense attorneys (recommended by the president of the Korean Bar Association), two law professors and two persons with expertise and experience in Korean criminal law.<sup>95)</sup> The result of this structure is that the commission is dominated by the judiciary and its

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92) Amendment to the Court Organization Act, Article 81-2 to 81-14, effective April 27, 2007.

93) *Id.* at Art. 81-2, para 3.

94) *Id.*

95) *Id.* at Art 81-3.

interests.

Pursuant to the COA, the commission issued its first set of sentencing guidelines on April 24, 2009. These became effective on July 1, 2009. This first set of guidelines encompassed eight areas of criminal conduct deemed to be most in need of uniform enforcement.<sup>96)</sup> The sentencing commission guidelines issued are not mandatory, however judges are required to strictly adhere to the guidelines when imposing criminal sentences and any departure from the guidelines must be justified pursuant to specific exception and set forth in a written decision.

## 2. South Korea Demographics and Sentencing Disparity

These guidelines arose because many commentators, politicians and judges argue the same issues that the United States faced in the late 1970s, those of sentencing disparity and sentencing leniency, face South Korea today. Public perception in South Korea supports the argument regarding sentencing leniency. The sentencing commission's survey in 2007 showed that greater than fifty-nine percent of the public thought that excessive leniency existed in sentencing decisions. Among members of the Korean Bar, that percentage rose to over seventy-two percent.<sup>97)</sup> Of particular note is the tendency in South Korea to grant downward adjustments to prison sentences due to the mitigating factors, including alcohol and remorse. Downward adjustments due to alcohol in particular have resulted in substantial public outcry, along with lenient sentences for repeat offenders and those in positions of authority.<sup>98)</sup> Thus sentencing leniency is a legitimate issue facing the South Korean judiciary, however, the debate is

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96) These guidelines cover the following types of crimes: homicides, bribery, sex crimes, perjury, slandering (false accusation), embezzlement, misappropriation, and robbery.

97) KOREAN SENTENCING COMMISSION, THE ANNUAL REPORT TO THE NATIONAL ASSEMBLY OF 2007, p. 164.

98) See *Court Ruling on Rapist Draws Anger*, KOREA TIMES, Nov. 24, 2008 (detailing public outcry when family that raped teenage daughter receives suspended sentences and daughter is returned to family for care due to her disability). See also *Light Jail Term for Children's Rapist Enrages Koreans*, KOREA TIMES, Mar., 30, 2010 (discussing public outcry over 12-year sentence for repeat child sex offender). See also *Pardons granted to tycoons and pols*, JOONGANG DAILY, Aug. 13, 2008 (discussing pardoning of high profile offenders including Hyundai Motor Chairman Chung Mong-koo, SK Chairman Chey Tae-won and Hanwha Chairman Kim Seung-young).



whether a sentencing commission is necessary to address leniency without additional issues.

Sentencing disparity combined with sentencing leniency could create the necessary environment in which a sentencing commission is necessary. However, the U.S. disparity issue, which was a pressing concern due to disparate treatment among ethnic and racial groups, is unknown in South Korea. South Korean demographics as of 2010 show a still virtually homogenous nation, and an even more homogenous offender class. Foreign nationalities comprise only 2.7% of the population<sup>99)</sup> while they comprise a mere 1.6% of those accused of criminal activity. The numbers are even starker when looking at violent crimes, of which a mere 0.7% were committed by an offender not of Korean ethnicity.<sup>100)</sup> These statistics demonstrate that any individual Korean judge, and the Korean judiciary in general, is rarely, if ever, required to sentence an offender with a different ethnic or racial background.<sup>101)</sup> Thus, any sentencing disparity issue involving judges sentencing offenders with whom they identify more lightly than those they regard as different is effectively non-existent. The sentencing commission's annual report also showed that there was a dearth of official statistics regarding regional disparities or disparities among

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99) Ministry of Public Administration and Security, May 2010 (There are currently 1,106,884 foreigners residing in the nation, accounting for 2.2 percent of the nation's entire population of 49,593,665). Ethnic breakdown was as follows: Chinese: 624,994, 56.5%; Southeast Asians: 230,577, 21.2%; Americans: 59,870, 5.4%; Others 191,443; 17.2%. However, note that this survey included foreign-born Koreans in the totals, thus increasing the amount by an estimated 200,000. Note that this number does not include the estimated 225,273 foreigners illegally residing in South Korea bring the foreigner population to 2.7%.

100) In August of 2010 the Korean National Police Agency released the following figures for violent crime committed by foreign offenders in 2009. Out of a total of 23,344 foreign criminals caught, violent offenders account for 7,812. Offense Numbers: Murder 103; Robbery 260; Rape 126; Larceny 2,001; Assault 5,322. See <http://www.fnn.co.kr/content.asp?aid=a60cc76bc0e7425aba10ba548f3e6c6d>. That the Korean citizen crime rate is several times higher than non-citizen resident crime rate is not controversial. See Oegukin Beomjoeyuleun Natjuman Geonsuneun Keuge Neuleo (Foreigner's crime rate still low, but number rapidly increasing), CHOSUN ILBO, July 9, 2008. Available at [http://news.chosun.com/site/data/html\\_dir/2008/07/09/2008070900054.html](http://news.chosun.com/site/data/html_dir/2008/07/09/2008070900054.html).

101) As of July 31, 2010 there were 1014 foreigners serving time in Korean prisons among a total inmate population of 47,110. See [www.corrections.go.kr/HP/TCOR/cor\\_04/cor\\_0404/cor\\_404010.jsp](http://www.corrections.go.kr/HP/TCOR/cor_04/cor_0404/cor_404010.jsp). At the end of 2009 there were 2,468 sitting judges in South Korea. Thus, a majority of judges have never sentenced a non-Korean defendant for a violent offense.

judges in sentencing decisions.<sup>102)</sup> Combining the relative scarcity of foreign offenders in South Korea with the Ministry of Justice's policy on expulsion of foreign convicts after completion of their sentence, the recidivism rate for foreigners in South Korea is similarly statistically non-existent.

Despite the current dearth of non-ethnic Korean criminal defendants in the South Korean courts, this situation will most likely change in the future. As of 2010 approximately 40% of marriages in the countryside are between Korean men and foreign wives, generally of Vietnamese or Pilipino ethnicity. Further, due to Korea's economic success, there is a steadily increasing influx of southeast Asian workers. These workers come from rural areas of China and from undeveloped economies such as Vietnam and Mongolia. While arguably Mongolians share ethnicity with Koreans,<sup>103)</sup> the Korean population views Mongolians and other East Asian ethnicities as foreigners. Nonetheless, this influx of workers and the general increasing foreign population will undoubtedly result in a rise in the number of foreign defenders appearing before Korean courts. While the Korean media often extrapolates sensationally about a rise in the number of foreign offenders,<sup>104)</sup> it is statistically likely that the foreigner offense rate will eventually equal that of the Korean offense rate at 3.5%. Thus, as the number of foreigners and foreign descendants increase, the number of actual foreign defenders will also increase. At that time, and provided empirical evidence shows actual sentencing disparity between ethnic Korean offenders and non-ethnic offenders, a sentencing commission could be necessary.

### 3. "Jeon-Kwan-Ye-Woo"

Although a majority of judges in South Korea have never encountered racial disparity among the criminal offenders appearing in their courtroom,

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102) See KOREAN SENTENCING COMMISSION, THE ANNUAL REPORT TO THE NATIONAL ASSEMBLY OF 2007, p. 165.

103) See BARNES, GINA L., THE RISE OF CIVILIZATION IN EAST ASIA: THE ARCHAEOLOGY OF CHINA, KOREA AND JAPAN, 165 (1999). See also Saha N. and Tay J.S., *Origin of the Koreans: a population genetic study*, 88 AM. J. PHYS. ANTHROPOL. 27-36 (1992).

104) See *Oegukin Beomjoe Geupjeung* (Foreigner crime rapidly increasing), CHOSUN ILBO, Oct. 18, 2007.

there is a potential for disparity arising from another factor. This is a unique feature of South Korean jurisprudence and is known as “Jeon-Kwan-Ye-Woo.” Jeon-Kwan-Ye-Woo is a term used by the public to describe a perceived leniency granted to former prosecutors and judges when defending their first case as a defense attorney. Literally the term means to grant an honorable reception to one who held a former post as a judge or prosecutor. Thus the public believes that a criminal offender who is fortunate to hire such a former judge or prosecutor as their attorney is more likely to be acquitted or to receive a lesser sentence. Despite this public perception, judges and prosecutors strongly deny that this practice exists. Nonetheless, this perception contributes to the underlying distrust of the public in the judiciary.

While it cannot be shown that Jeon-Wwan-Ye-Woo is practiced by the judiciary, Korean culture is strongly based on relationships. Since January 1, 1971 all individuals who have passed the Korean bar exam have been required to spend two years at the Judicial Research and Training Institute (“JRTI”). On completion of their studies at JRTI the graduates are either appointed as a judge or prosecutor or go into private practice. Thus every lawyer is a graduate of JRTI and a part of an elite and closely knit community.<sup>105)</sup> Further, many judges and prosecutors resign their positions in their late 40s or early 50s and go into private practice. Given the Korean cultural focus on the primacy of relationships it is natural that the Korean public believes these new defense attorneys will be given special consideration when trying a case before a former colleague.

### III. Analysis

The U.S. sentencing guidelines were created in response to perceived racial disparities in sentencing as well as public perception of excessive sentence leniency. As has been shown, no statistically significant racial

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105) From 1971 to 1996 only 300 individuals per year passed the Korean bar exam. In 1997 the number was 500. In 1998 and 1999 the number was 700. In 2000 and 2001 the number was 800. And as of 2002 this number was increased to 1,000. See Judicial Research and Training Institute <http://jrta.scourt.go.kr>.

disparities among criminal offenders yet exist in South Korea. Nonetheless, public perception in South Korea mirrors that of the U.S. public in the 1970s and, while the phenomenon of Jeon-Kwan-Ye-Woo may be a chimera, the public perception has resulted in a response from the government. However, this response must be a measured one, for societal demand for ever harsher punishment of criminals can lead to rigid enforcement schemes which eventually shock even those who originally supported such schemes. As in the United States, South Korea has embarked on a project to enact a broad set of sentencing guidelines. While to date the sentencing regime is not mandatory, deviations from the sentencing range are tightly curtailed and, therefore, the U.S. experience is relevant.

Sentencing guideline regimes have at their core the three primary goals of uniformity, proportionality and honesty. Moreover, when a sentencing guideline regime becomes too strict, power devolves from the judiciary to the prosecution. In the case of William Thurston described above, the goal of uniformity was violated when the prosecutors were free to grant his co-conspirator a suspended sentence under a plea bargain agreement while they simultaneously demanded that Mr. Thurston be sentenced to 5 years incarceration for the same offense.<sup>106)</sup> This disparity in sentences was not the result of any consideration of culpability or due to any criteria used in calculating Mr. Thurston's sentence under the guidelines. Rather Mr. Thurston's co-defendants were able to remove themselves from the application of the guidelines via plea bargaining, thus making themselves eligible for prosecutorial discretion. This discrepancy had the effect of punishing Mr. Thurston for his temerity in demanding a court decide his guilt rather than accept the heavy hand of the prosecutor. Likewise, the South Korea sentencing guidelines should address the issue of the power of the prosecutor's office when reaching agreements with defendants outside the sentencing guidelines. The sentencing commission should also consider what results occur when prosecutors file excessive charges against defendants exercising their right to trial. A factor could be added that allows South Korean courts to consider co-defendants who have not been subject to the sentencing guidelines and to consider whether the

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106) See *supra* Section ID3.

co-defendants sentences call for mitigation or aggravation of the defendant who has demanded that his innocence or guilt be decided by the court.

The second goal of a sentencing guidelines regime, proportionality, has at its root the concepts of retribution and justice. The more culpable a defendant, the more atrocious the offense, the greater the punishment invoked by the State. However, in the case of Mr. Odis, the finding of the amount of loss was the largest factor used in determining his sentence. The fact that one large institutional investor had seen a paper loss of over one hundred million dollars increased Mr. Odis' sentence by more than 20 years despite the fact that multiple other factors, including simple market movement, could have attributed for this loss. Regardless of whether there were other factors that may have caused this investor's loss, the criteria itself violates the proportionality goal. It simply cannot be concluded that using a third party's loss on publicly traded stock as a criteria to impose sentence will achieve a goal of proportionality because of the volatility and unpredictability of financial markets. Another defendant committing the exact same act at a non-publicly traded company or a company with a lesser or greater market capitalization could receive a dramatically different sentence based on market events outside of the control of the offender. Thus, Mr. Odis' sentence had nothing to do with the perceived wrongness of his conduct or his degree of culpability. The South Korea sentencing commission should also consider Mr. Odis' case and consider carefully any criteria used in developing sentencing guidelines that may result in disproportionate results for offenders with equivalent culpability.

Finally, sentencing guidelines have a goal of honesty in sentencing. This reflects the public's desire that offenders are sentenced to terms that are real and meaningful and not dependent on an indeterminate sentencing scheme. Before the U.S. sentencing guidelines were enacted offenders could receive various reductions in their time served once in the prison system. Often these reductions could result in an offender serving merely a third of the time to which the offender was actually sentenced. Once the U.S. guidelines were enacted the public could be sure that a defendant sentenced to ten years would actually serve ten years. However, the goal of honesty goes beyond merely assuring that an offender serve the time he was sentenced to by the court. Honesty must also encompass the fundamental policies of criminal justice, including general deterrence, specific deterrence,

rehabilitation, and retribution. Shifting to a more determinate sentencing structure enhances these fundamental policies. If a potential offender is cognizant of the consistency of the time actually served by similar offenders, there is more of a deterrent effect on such potential offender. Thus, in both case histories explored above this honesty was broken. Neither Mr. Thurston nor Mr. Olis would have been, or could have been, aware of the extensive time of incarceration to which they were exposing themselves by their conduct. At Mr. Olis' sentencing hearing his experienced defense attorney stated he was "at a loss to understand" the sentence imposed under the guidelines, and found himself "speechless."<sup>107</sup> To avoid any such future problems in South Korea, the sentencing commission cognizance of these cases should inform the process of creating and reviewing its sentencing calculations. Calculations that may result in lengthy sentences that cannot be anticipated by offenders will not create any deterrence effect and will eventually serve to undermine the public's faith in the sentencing guidelines. The South Korean sentencing commission has to reach a medium imposition where honesty in deterrent effect is satisfied while the public's desire for appropriate punishment levels is also met. The U.S. experience is instructive in this regard.

Finally, the discrepancy between crack cocaine and powder cocaine sentencing regimes and the resultant harsh outcomes can aid the South Korean sentencing commission. The crack cocaine sentencing regime experience shows the inherent dangers of public outcry. Current South Korea public outcry is focused on perceived leniency in sentences for sex offenders and to a lesser extent on perceived foreign offenders.<sup>108</sup> This outcry is leading to the imposition of harsh penalties for sex offenders and to increased regulation of foreign individuals living legally within South Korea. While the call for stronger sentencing of the sex offenders is arguably justifiable, recent enactments on the regulation of foreigners are in violation of South Korea's duties under international agreements.<sup>109</sup>

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107) United States v. Olis, H-03-CR-217 (S.D. Texas), March 24, 2004 Tr. At 14-15.

108) See *supra* note 98, 104 and accompanying text.

109) Some recent legislative enactments on the treatment of legal foreign residents are arguably in violation of the United Nations Agreement on Human Rights. See Joseph Amon, *Blaming Foreigners*, KOREA TIMES, Mar. 12, 2009. ("The International Covenant on Civil and

Regardless of the similarity or differences between those two issues, the sentencing commission's overarching duty is to gain understanding from the experience of the U.S. and to moderate the public outcry in South Korea in order to prevent similar excessive measures.

#### IV. Conclusion

The South Korean sentencing commission's familiarity with some of the issues confronted by the U.S. during the last twenty years under its federal sentencing guideline regime will allow the members of the commission to perform their duties with greater sophistication. This familiarity will allow the commission to address potential problems proactively before these issues can undermine the effectiveness of the new sentencing regime. This article's exposition of the experience of the U.S. and its comparison to South Korea's current position will hopefully aid the commission and other readers in constructively critiquing South Korea's current approach to sentencing guidelines.

KEY WORDS: Sentencing Guidelines, Sentencing Reform Act of 1984, Criminal Sentencing, Judicial Discretion

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Political Rights (ICCPR), which South Korea has acceded to, guarantees everyone the right to equal protection of the law without discrimination, a provision interpreted to include barring discrimination based on HIV/AIDS status.") See also Adam Walsh, *Korea's New Rules on HIV Cause Confusion*, KOREA HERALD, Mar. 29, 2010.

