

Considering Post-Arrest Rehabilitation of Addicted Offenders Under the Federal Sentencing Guidelines

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On May 31, 1990, Tina Marie Floyd, a single mother of four, was sentenced by a Minnesota federal district court for distributing cocaine and cocaine base (crack) and for aiding and abetting its distribution, charges to which she previously had plead guilty.¹ District Court Judge Rosenbaum sentenced Floyd to sixteen days imprisonment, six months of home detention, and five years of supervised release. According to the Federal Sentencing Guidelines ("Guidelines"),² the judge should have sentenced her to 78-97 months in prison.³ Judge Rosenbaum chose to depart from the Guidelines because he recognized Floyd's remarkable achievement in the year between her arrest and sentencing: she had successfully rehabilitated herself from drug addiction.

Floyd had first attempted to plead guilty in May of 1989. At that time, however, the court recognized that she was under the influence of drugs. The court found her incompetent to enter a plea, and immediately ordered her into custody. After detoxifying in prison, Floyd was allowed to enter her guilty plea. She was released until her sentencing date and was allowed to assume the care and custody of her children. During the year between her pre-sentencing release and her sentencing, Floyd remained drug-free.⁴

At sentencing, Judge Rosenbaum found the punishment prescribed by the Guidelines to be harsher than necessary.⁵ Specifically, the court found that "there [had] been substantial and demonstrable post-crime rehabilitation ... of a kind and nature which [had] not been adequately taken into consideration by the Sentencing Commission."⁶ Thus, the judge departed downward from the

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1. *United States v. Floyd*, 738 F. Supp. 1256 (D. Minn. 1990).

2. UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (Nov. 1992) [hereinafter U.S.S.G.]. For the sake of clarity, reference to the comprehensive body of the Guidelines will be indicated with the use of a capital 'G,' whereas a lower case 'g' will be used to indicate individual guidelines.

3. The Guidelines called for a sentence of 97-121 months. The prescribed sentence was reduced to 78-97 months by factoring in a two-level decrease in offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. Under the Guidelines, an offender's prescribed sentence range is determined on a 258-grid sentencing table. The level of offense committed forms the vertical axis of the table and the offender's criminal history forms the horizontal axis, thus the presumptive sentence is a function of the offense level and the offender's criminal history.

4. The court deferred sentencing for one year, during which Floyd was tested for illegal drugs both on a weekly and a random basis. Every test for illegal drugs was negative. *Floyd*, 738 F. Supp. at 1260.

5. The court noted that home detention was "sufficiently punitive," and that "[f]ull incarceration would be unwarranted and useless." *Id.* at 1261.

6. *Id.* at 1259.

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sentence prescribed by the Guidelines. Had Judge Rosenbaum strictly adhered to the Guidelines sentence, Floyd would have served excessive incarceration at the public's expense.⁷ Fortunately—for Floyd, her children⁸ and the American taxpayer—the judge considered Floyd's post-arrest recovery from drug addiction.

What is noteworthy about Floyd's case is not that she was an addict driven to crime by her addiction. The United States government estimates that half of all federal prison inmates have used drugs and that "many are drug addicts."⁹ Other studies indicate that drugs and alcohol are implicated in as many as three-quarters of the nation's murders and more than half of its rapes.¹⁰ What is unusual about Floyd's case is that the sentencing judge recognized her rehabilitation as a mitigating circumstance and departed downward specifically because of that rehabilitation.

Under the Federal Sentencing Guidelines, written by the U.S. Sentencing Commission ("Commission"),¹¹ judges may not consider addiction a mitigating factor at sentencing.¹² The Commission's express rejection of downward departure for addiction reflects both a concern about the high correlation between substance abuse and the propensity to commit crime and a fear that addiction would be used as an excuse for letting offenders off easily. The Commission's decision regarding addiction appears in policy statement § 5H1.4, p.s.¹³ of the Guidelines: "*Drug or alcohol dependence or abuse is not a reason for imposing a sentence below [the Guidelines].*"¹⁴

What, then, is a judge to do about an offender who, like Floyd, is addicted

7. It currently costs an average of \$20,072 per year to incarcerate an individual in a federal prison. Telephone Interview with Office of Public Information, Bureau of Prisons (July 22, 1992). As further evidence that the Guidelines sentence was excessive, the government itself moved for a downward departure, recommending a sentence of 33-41 months. *United States v. Floyd*, 738 F. Supp. 1256, 1259 (D. Minn. 1990).

8. The court noted that Floyd's children, ranging in age from nine years to three months, were completely dependant upon her, and noted that the lengthy imprisonment prescribed by the Guidelines "would place these minor children at risk." *Id.* at 1261.

9. OFFICE OF NAT'L DRUG CONTROL POLICY, UNDERSTANDING DRUG TREATMENT 27 (June 1990) [hereinafter UNDERSTANDING DRUG TREATMENT]. As used in this Current Topic, the term "addict" refers to someone who is a more-than-occasional drug user. The term "addict" throughout this Current Topic also includes alcoholics. Although drug and alcohol addiction are not substantively equivalent, much case law treats drug and alcohol addiction similarly. *See, e.g., Powell v. Texas*, 392 U.S. 514 (1968). *But see United States v. Moore*, 486 F.2d 1139, 1157 (D.C. Cir. 1973) (noting "significant and difficult differences" between narcotics addiction and chronic alcoholism).

10. Joseph A. Califano, *Addiction in America*, 8 YALE L. & POL'Y REV. 1, 3 & n.14 (1990).

11. The Sentencing Reform Act of 1984 delegates the power to establish a uniform set of sentencing guidelines for federal offenses to the United States Sentencing Commission. Sentencing Reform Act of 1984, Pub. L. 98-473 § 235(a)(1)(B)(i) (effective Oct. 12, 1984) (codified at 28 U.S.C. § 991). The result is the Federal Sentencing Guidelines, which became effective November 1, 1987. The Guidelines are issued pursuant to 28 U.S.C. § 994(a) (1988).

12. *See* U.S.S.G. § 5H1.4, p.s. (1992).

13. "P.s." denotes a policy statement, as opposed to a guideline, in conformity with the recommended citation form of the *Federal Sentencing Guidelines Manual*. U.S.S.G. at xxix (1992).

14. U.S.S.G. § 5H1.4, p.s. (1992).

at the time of the crime, but successfully rehabilitates between arrest and sentencing? Although § 5H1.4 prohibits a judge from treating an addicted defendant more leniently at sentencing,¹⁵ the Guidelines do not explicitly address the issue of sentencing a *rehabilitated* defendant. Indeed, the Guidelines ignore the distinctions between addicted offenders who go through post-arrest, pre-sentencing rehabilitation and those who make no effort to rehabilitate. And yet, as Judge Rosenbaum and others have noted, such distinctions not only exist, but also speak to an offender's culpability. As this Current Topic shall show, the failure of the Guidelines to recognize rehabilitated offenders as a unique class warranting special consideration at sentencing has produced inconsistency in the courts, and has led to unjust results for individual defendants.

Congress established the U.S. Sentencing Commission for a noble purpose: to make sentences more consistent and to establish sentencing practices, [which] provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted 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.¹⁶

In neglecting the issue of post-arrest rehabilitation from addiction, however, the Commission has fallen short of that mandate in numerous ways.

First, the Commission has left courts confused as to how—or even whether—to consider post-arrest rehabilitation at sentencing. Due to the Guidelines' silence on post-arrest rehabilitation, the courts have produced inconsistent rulings in this area. Some courts have interpreted the Guidelines to allow consideration of an offender's efforts to rehabilitate.¹⁷ Other courts have read the current Guidelines to preclude downward departure for post-arrest rehabilitation.¹⁸ Still others appear to be waiting for express permission from the Commission to address this issue.

Secondly, the Commission's silence on post-arrest rehabilitation has weakened courts' ability to achieve the Congressionally mandated goals of

15. See, e.g., *United States v. Borrayo*, 898 F.2d 91 (9th Cir. 1989) (rejecting defendant's request for downward departure based on his long history of alcohol abuse and claim of diminished capacity due to alcohol abuse, under U.S.S.G. § 5H1.4 and § 5K2.13, respectively); *United States v. Richison*, 901 F.2d 778 (9th Cir. 1990) (finding that drug abuse *per se* is normally not considered as mitigating or aggravating factor at sentencing).

16. 28 U.S.C. § 991(b)(1)(A)-(C) (1988).

17. See, e.g., *United States v. Williams*, 948 F.2d 706 (11th Cir. 1991); *United States v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991); *United States v. Whitehorse*, 909 F.2d 316 (8th Cir. 1990); *United States v. Maier*, 777 F. Supp. 293 (S.D.N.Y. 1991); *United States v. Floyd*, 738 F. Supp. 1256 (D. Minn. 1990); *United States v. Rodriguez*, 724 F. Supp. 1118 (S.D.N.Y. 1989).

18. See, e.g., *United States v. Martin*, 938 F.2d 162 (9th Cir. 1991); *United States v. Pharr*, 916 F.2d 129 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991).

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sentencing: retribution, rehabilitation, and deterrence.¹⁹ Rigid rules—including those prohibiting consideration of addiction—prevent judges from administering fair and appropriate sentences. As indicated above, the Guidelines make no accommodation for drug and alcohol treatment. Yet, as D.C. District Court Judge Oberdorfer wrote in one opinion, “successful treatment for drug abuse could lead to a *reduced* propensity to commit crime and thereby reduce the need for the longer periods of incarceration contemplated by the Guidelines.”²⁰ Contrary to Congress’ intent, the Guidelines often produce uncertain, costly,²¹ and arguably unfair sentences. It is time to examine post-arrest rehabilitation as a mitigating factor in criminal sentencing.

The argument in this Current Topic proceeds on two assumptions. First, I assume that sentencing courts would consider recovery from substance abuse as a mitigating factor only where there is a nexus—or causal relationship—between the crime and the addiction.²² The determination of whether such a causal link exists would be left to a district court as a question of fact. Secondly, I assume that drug and alcohol rehabilitation works,²³ and thus can effectively reduce an addicted offender’s criminal tendencies.²⁴

This Current Topic examines why an addicted offender’s rehabilitation between the dates of the offense and sentencing should be available to a judge

19. See *Maier*, 777 F. Supp. at 295 (“[T]he Sentencing Commission has ignored Congress’ mandate to consider the purposes of sentencing.”). In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. & 28 U.S.C. (1988)), Congress specifically set forth four purposes of sentencing, saying: “For the first time, [f]ederal law will assure that the [f]ederal criminal justice system will adhere to a consistent sentencing philosophy.” S. REP. NO. 225, 98th Cong., 2d Sess. 4 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3242 [hereinafter *Legislative History*]. Sentences should:

- (A) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense;
- (B) afford adequate deterrence to criminal conduct;
- (C) protect the public from further crimes of the defendant; and
- (D) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a)(2) (1988).

20. *United States v. Harrington*, 741 F. Supp. 968, 975-76 (D.D.C. 1990), *vacated and remanded for resentencing*, 947 F.2d 956 (D.C. Cir. 1991) (emphasis added). A point often overlooked is that federal law requires that courts “impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing set forth by Congress].” 18 U.S.C. § 3553(a) (1988).

21. America presently spends about \$16 billion per year to incarcerate a prison population of over one million—the highest known incarceration rate in the world. John J. Curtin, Jr., *The Crisis in Corrections*, 77 A.B.A. J. 8 (1991).

22. A readily identifiable causal link between drug addiction and crime is found in the example of the addict who sells drugs or steals to support her addiction. The stronger the connection between the crime and the addiction, of course, the stronger the argument for consideration of rehabilitation from addiction as a relevant factor at sentencing.

23. See UNDERSTANDING DRUG TREATMENT, *supra* note 9, at 30 (“We now know on the basis of two decades of research that drug treatment can work.”).

24. While an in-depth discussion of the merits of rehabilitation *per se* is beyond the scope of this Current Topic, section III cursorily reviews rehabilitation and its impact on addicted offenders. For a more complete analysis of rehabilitation and the criminal justice system, see Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991).

as a relevant factor at sentencing.²⁵ It does not suggest that reduced sentences be mandatory for addicted offenders who put themselves through post-arrest rehabilitation. Rather, it urges the Commission to issue a policy statement that specifically gives the sentencing judge *discretion* to reduce sentences for such defendants. This discretion to depart downward for rehabilitation makes sense because the Federal Sentencing Guidelines were designed to guide judges toward equitable and certain sentencing practices, and not to straight-jacket judges.²⁶ The proposal I present in Section III offers a means by which the Guidelines can better conform with Congress' original intent: creation of a more effective and just sentencing system.

I. STATUTORY GUIDANCE IN CONSIDERING POST-ARREST REHABILITATION AT SENTENCING: A CONFLICT

This section examines how the Guidelines address drug and alcohol addiction to see whether the Commission's decision to preclude addiction as a relevant sentencing factor necessarily applies to post-arrest rehabilitation. First, because the Commission's determination on addiction appears in the form of a policy statement, this section discusses the authoritative difference between guidelines and policy statements issued by the Commission. Secondly, it looks at the confusion caused by conflicting interpretations of the policy statement on addiction, § 5H1.4. Thirdly, it explains why a broad construction of § 5H1.4 contravenes at least two federal sentencing statutes.

A. *The Distinction Between Policy Statements and Guidelines*

Congress created the Sentencing Commission to "establish sentencing policies and practices for the Federal criminal justice system."²⁷ The Commission was to ensure that the purposes of sentencing—set forth by Congress in 18 U.S.C. § 3553(a)(2)—are achieved.²⁸ The Commission acts by issuing both guidelines and policy statements.²⁹

Policy statements and guidelines are not equivalent. Policy statements,

25. I intend "rehabilitation efforts" to mean that the offender is no longer using drugs, is in a rehabilitation program of some sort or is at least being institutionally monitored (for example, by a parole officer), and has made a demonstrative showing that she is making continuing progress away from a life of addiction. Ultimately, it is the judge who must decide whether the offender's rehabilitative efforts are significant enough to be a relevant factor at sentencing.

26. See *Legislative History*, *supra* note 19, at 3235 ("The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.").

27. 28 U.S.C. § 991(b)(1) (1988).

28. 28 U.S.C. § 991(b)(1)(A) (1988); see *supra* note 19.

29. See 28 U.S.C. § 994(1)-(2) (1988).

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unlike guidelines, are “advisory and non-binding.”³⁰ The Commission states: “[A] policy statement ... may provide *guidance* in assessing the reasonableness of any departure” from the Guidelines.³¹ Moreover, as scholars have noted, “Congress plainly did not confer presumptive validity on policy statements as it did with Guidelines.”³²

In chapter 5, section H of the Federal Sentencing Guidelines Manual, the Commission outlined, in policy statements, a number of offender characteristics that it considers either “relevant” or “not ordinarily relevant” to the length of an offender’s sentence. Among the several offender characteristics the Commission considered, but pronounced “not ordinarily relevant” to sentencing, were: mental and emotional condition, and “physical condition including drug dependence.”³³ It concluded that only three described offender characteristics normally should be relevant: criminal history, dependence on criminal activity for livelihood, and role in the offense.³⁴

In addition to writing policy statements to this effect, the Commission later codified the three “relevant” characteristics in binding guidelines elsewhere in the Guidelines.³⁵ This double reference to “relevant” offender characteristics suggests that when the Commission intends for sentencing guidance to be compulsory, it codifies its views on the matter in a binding guideline.³⁶ The Commission has never codified its position on drug and alcohol addiction in such a guideline. And it has not addressed rehabilitation from addiction in any form whatsoever.

Although its policy statements indicate that the Commission intended courts to disregard addiction in most cases, the Commission did not bar, and under current federal law³⁷ cannot absolutely prohibit, a court from considering an offender’s addiction at sentencing.³⁸ Because the Commission used the less authoritative medium of policy statements for communicating its views on addiction, its recommendations on the matter are advisory and not binding.

30. *United States v. Pharr*, 916 F.2d 129, 133 n.6 (3d Cir. 1990), *cert. denied*, 111 S. Ct 2274 (1991); DEPARTMENT OF JUSTICE, PROSECUTORS’ HANDBOOK ON SENTENCING GUIDELINES 1 (1987).

31. U.S.S.G. § 1B1.7 (1992) (emphasis added).

32. Marc Miller & Daniel J. Freed, *Offender Characteristics and Victim Vulnerability: The Differences Between Policy Statements and Guidelines*, 3 FED. SENTENCING REP. 3, 4 (1990); *see also* 28 U.S.C. § 994(p) (requiring that guidelines, unlike policy statements, must be submitted to Congress for a waiting period of approximately six months before they become law).

33. U.S.S.G. §§ 5H1.3-.4, p.s. (1992).

34. U.S.S.G. §§ 5H1.7-.9, p.s. (1992).

35. U.S.S.G. §§ 3B1.1-.2, 4A1.1-.4, 4B1.1-.3 (1992).

36. *Cf. United States v. Stinson*, 957 F.2d 813, 815 n.2 (11th Cir. 1992) (noting that, according to U.S.S.G. § 1B1.7, Commission commentary and policy statements are legal equivalents: “We assume that the commentary does not go through the same intensive review process as the Guidelines themselves, for if they did share the same procedure, there would be no basis for a distinction between the Guidelines and the commentary; and there would be no reason for them to exist separately or to have different weight which the Guidelines commentary, itself, says exists.”).

37. *See* 18 U.S.C. § 3661 (1988).

38. *See infra* part I.C.; *see also* 18 U.S.C. § 3661.

Furthermore, for reasons discussed below, the Commission's policy statements on addiction carry even less weight in cases involving rehabilitation.

B. Courts' Interpretations of § 5H1.4 and Grounds for Departure

Controversy over the appropriate approach to consideration of post-arrest rehabilitation stems mainly from one policy statement, § 5H1.4, which provides in relevant part:

Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the Guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to a supervised release with a requirement that the defendant participate in an appropriate substance abuse program.³⁹

Conflicting interpretations of § 5H1.4 have resulted in inconsistent application of the Guidelines to cases involving addicted offenders who successfully rehabilitate prior to sentencing.

Although § 5H1.4 only explicitly precludes downward departure on grounds of addiction, some courts have held that it implicitly precludes downward departure for rehabilitation as well.⁴⁰ The Ninth Circuit, for example, has stated: "It is clearly the Commission's intent that rehabilitation from drug abuse be factored into post-sentencing supervised release and not be recognized as a ground for departure."⁴¹ The Ninth Circuit presumably based its interpretation on the theory that a person cannot rehabilitate from addiction without first being addicted; i.e., *but for* the addiction, there would be no rehabilitation.⁴² From this interpretation it follows that all circumstances related to addiction, including effective rehabilitation from addiction, are barred from consideration at sentencing.

An alternative interpretation of § 5H1.4 (and in the author's opinion the more defensible interpretation) is that nothing in the section prohibits sentencing judges from considering post-arrest rehabilitation.⁴³ This reading assumes that rehabilitation differs from "drug or alcohol dependence" *per se*.⁴⁴ It also assumes, notwithstanding the necessary connection between addiction and rehabilitation, that rehabilitated offenders deserve recognition for their clear assumption of responsibility and affirmative steps to conform their behavior

39. U.S.S.G. § 5H1.4, p.s. (1992).

40. *See, e.g.*, *United States v. Martin*, 938 F.2d 162, 164 (9th Cir. 1991); *United States v. Pharr*, 916 F.2d 129, 133 (3d Cir. 1990), *cert. denied*, 111 S. Ct 2274 (1991).

41. *Martin*, 938 F.2d at 164.

42. *See id.*

43. *See United States v. Williams*, 948 F.2d 706, 710 (11th Cir. 1991).

44. *See id.* ("[Section 5H1.4, p.s.] states that drug dependence cannot be the *reason* for a downward departure. Hence, Section 5H1.4 does not prohibit downward departure based on recoveries; it merely prohibits downward departures on the basis of a defendant's theoretical diminished capacity because of his drug dependence.") (emphasis in original).

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to societal norms.⁴⁵ Furthermore, this interpretation recognizes that the Commission made no direct reference to post-arrest, pre-sentencing rehabilitation *anywhere* in the Guidelines.⁴⁶

The Eleventh Circuit adheres to this second interpretation of § 5H1.4. It has stated:

We are of the opinion that the Ninth Circuit read too much into the Commission's recommendation for supervised release conditioned on drug treatment. That recommendation pertains solely to whether the *type* of sentence should reflect the defendant's drug *dependence*, and it does not pertain to whether the *duration of incarceration* should be decreased based on the defendant's *recovery* from drug addiction.⁴⁷

According to the Eleventh Circuit, then, § 5H1.4 does not address the impact that post-arrest rehabilitation should have on sentence length.

Bolstering the Eleventh Circuit's interpretation is the fact that § 5H1.4 is not mandatory. The first paragraph of the policy statement provides, in relevant part: "physical condition [including addiction] is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."⁴⁸ As one court has noted, "The assertion that [physical condition is] not *ordinarily* relevant carries by hypothesis the implication that [it] sometimes [is] relevant."⁴⁹

*United States v. Rodriguez*⁵⁰ provides an example of when post-arrest rehabilitation becomes relevant. Rodriguez, a thirty-five year-old addict who was separated from his wife and children at the time of his offense, was convicted of violating narcotics laws by selling two vials of crack cocaine for ten dollars. Subsequent to his arrest, he obtained employment, reunited with his wife, and succeeded in staying drug-free for two years. The Guidelines called for a sentence of at least one year in prison.⁵¹ The court found that, due to the defendant's "impressive rehabilitation," he no longer posed a danger to society, and that the Guidelines-prescribed sentence "would serve no end but ritualistic punishment with a high potential for destruction."⁵² The court departed downward because of Rodriguez' rehabilitative efforts and accomplishments prior to sentencing. Like Floyd's mitigated sentence, Rodriguez's

45. See *United States v. Maier*, 777 F. Supp. 293, 295 (S.D.N.Y. 1991) (After citing the above language of § 5H1.4, the court states: "However, Maier seeks to end her [drug] dependency and end any propensity she has for committing crime. The Policy Statement therefore is not applicable.")

46. See Tony Garoppolo, *Downward Departure Under the Federal Sentencing Guidelines*, 26 CRIM. L. BULL. 291, 299 (1990).

47. *Williams*, 948 F.2d at 710 (emphasis in original).

48. U.S.S.G. § 5H1.4, p.s. (1992).

49. *United States v. Rodriguez*, 724 F. Supp. 1118, 1121 (S.D.N.Y. 1989).

50. 724 F. Supp. 1118 (S.D.N.Y. 1989).

51. *Id.* at 1119.

52. *Id.*

lightened punishment reflects the view that the Commission's policy statements on addiction do not proscribe consideration of rehabilitation from addiction.⁵³

C. A Broad Construction of § 5H1.4 Contravenes Federal Sentencing Statutes

A broad construction of § 5H1.4—that prohibition of addiction as a mitigating circumstance at sentencing prohibits all factors related to addiction—creates a conflict with at least two federal statutes. The first, 18 U.S.C. § 3661, states: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”⁵⁴ Given § 3661, a court cannot read § 5H1.4 to absolutely bar consideration of post-arrest rehabilitation at sentencing. Furthermore, the Commission's own guideline, U.S.S.G. § 1B1.4, confirms the need to interpret § 5H1.4 more narrowly in light of § 3661. Section 1B1.4 reads, in pertinent part, “[I]n determining a sentence . . . the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, *unless otherwise prohibited by law*.”⁵⁵ No federal law explicitly prohibits the consideration of rehabilitative efforts at sentencing.

A broad construction of § 5H1.4 also contravenes a second federal statute, 18 U.S.C. § 3553, which governs actual imposition of a sentence. Section 3553(a)(1) instructs judges to “consider the nature and circumstances of the offense and the *history and characteristics of the defendant*.”⁵⁶ Recovery from substance abuse *is* part of the offender's “history and characteristics.”⁵⁷ If the Guidelines are to be consistent with federal sentencing statutes, then

53. See also *United States v. Maier*, 777 F. Supp. 293 (S.D.N.Y. 1991).

54. 18 U.S.C. § 3661 (1988). Congress recodified this statute in 1984 as part of the Sentencing Reform Act (which established the Commission and the Guidelines). Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

55. U.S.S.G. § 1B1.4 (1988) (emphasis added). This guideline refers the judge to 18 U.S.C. § 3661. Presumably, offender characteristics prohibited by law would be those characteristics forbidden by the equal protection clause of the Fourteenth Amendment. By law, guidelines and policy statements must be entirely neutral as to race, sex, national origin, creed, and socioeconomic status of offenders. 28 U.S.C. § 994(d) (1988).

56. 18 U.S.C. § 3553(a)(1) (1988) (emphasis added).

57. In addition to the offender's history and characteristics, 18 U.S.C. § 3553(a) mandates that judges, in imposing a sentence “sufficient but not greater than necessary,” consider the following: (1) the need for the sentence imposed (based on the four purposes of sentencing, see *supra* note 19); (2) the kinds of sentences available; (3) the kinds of sentences and the sentencing range according to Guidelines issued by the Commission; (4) any pertinent policy statements issued by the Commission; (5) the need to avoid unwarranted disparity; and (6) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a)(2-7) (1988). Congress obviously meant for the Guidelines to be binding in most cases, and intended for the Commission, in promulgating the Guidelines, to decide which personal characteristics are normally relevant to sentencing. See 18 U.S.C. § 3553(b); 28 U.S.C. § 994(d) (1988). If, however, Congress had meant for judges to be able to consider only the Guidelines, then it would seem reasonable that 18 U.S.C. § 3553(a) would instruct judges to consider only the Guidelines and pertinent policy statements rather than instruct them to consider the seven factors described above.

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§ 5H1.4 should be read narrowly, and the courts should retain the discretion to consider post-arrest rehabilitation at sentencing.

II. WHERE THE COURTS STAND TODAY: THE METHODS BY WHICH COURTS CURRENTLY CONSIDER POST-ARREST REHABILITATION UNDER THE GUIDELINES

This section describes how courts currently consider post-arrest rehabilitation when determining a defendant's sentence. It presents the courts' varied approaches to this issue as a demonstration that the present Guidelines offer uncertain and incomplete guidance on sentencing rehabilitated offenders.

The courts are split on the issue of whether—and to what degree—post-arrest rehabilitation merits consideration at sentencing. The Third and Ninth Circuits prohibit lower courts from treating post-arrest rehabilitation as a mitigating factor at sentencing.⁵⁸ In contrast, the Sixth Circuit allows sentencing courts complete discretion to depart downward on grounds of post-arrest rehabilitation.⁵⁹ The First, Fourth, Eleventh, and D.C. Circuits have adopted a middle ground: they recognize the relevancy of post-arrest rehabilitation efforts, but restrict the type and degree of consideration that may attach to such efforts.⁶⁰ Both the Second and Eighth Circuits have addressed the issue of post-arrest rehabilitation only indirectly. They have neither reversed nor remanded district court decisions to depart downward on such grounds.⁶¹ As of this writing, the Fifth, Seventh and Tenth Circuits, have not addressed this issue.

58. See *United States v. Martin*, 938 F.2d 162, 164 (9th Cir. 1991) (“[A] defendant’s post-arrest rehabilitation efforts afford no basis for downward departure from the guideline sentencing range....”); *United States v. Pharr*, 916 F.2d 129, 132 (3d Cir. 1990), *cert. denied*, 111 S. Ct 2274 (1991) (“[P]ost-arrest drug rehabilitation efforts ... are not appropriate grounds for discretionary departure from the Sentencing Guidelines under 18 U.S.C. § 3553(b).” The court did find, however, that it “need not reach in this case the issue of whether drug rehabilitation can be considered acceptance of responsibility for section 3E1.1 purposes....”).

59. *United States v. Troyer*, No. 91-3294, 1991 U.S. App. LEXIS 24383, at *6-7 (N.D. Ohio Oct. 7, 1991) (reported as Table Case at 946 F.2d 896) (“Troyer requested downward departure on several grounds [including] ... that the robberies were aberrant behavior resulting from his drug addiction and that he is now rehabilitated.” Although the sentencing court refused to depart downward, it “understood it had the discretionary power to consider mitigating circumstances such as Troyer’s.”); see also *United States v. Maddalena*, 893 F.2d 815, 818 (6th Cir. 1989) (finding that the district court “may, but need not consider the [addicted] defendant’s effort to stay away from drugs as a basis for departing from the Guidelines”).

60. These circuits have limited consideration of post-arrest rehabilitation to departure under U.S.S.G. § 3E1.1 for acceptance of responsibility. See *infra* section II.A.

61. See *United States v. Maier*, 777 F. Supp. 293 (S.D.N.Y. 1991); *United States v. Floyd*, 738 F. Supp. 1256 (D. Minn. 1990); *United States v. Rodriguez*, 724 F. Supp. 1118 (S.D.N.Y. 1989).

A. Acceptance of Responsibility under § 3E1.1

Because the Commission has issued neither a guideline nor a policy statement concerning the effect that rehabilitation from substance abuse should have on sentence length, a judge who wishes to depart downward based on an offender's post-arrest rehabilitation might do so indirectly. For example, the First,⁶² Fourth,⁶³ Eleventh,⁶⁴ and D.C.⁶⁵ Circuits have examined defendants' efforts to rehabilitate from addiction under U.S.S.G. § 3E1.1. That provision instructs a judge to reduce the offense level⁶⁶ by two levels, "[if] the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct."⁶⁷

Section 3E1.1 provides little guidance for considering post-arrest rehabilitation, however, for two reasons. First, § 3E1.1 does not expressly implicate rehabilitation. The Commission's commentary contains no suggestion that post-arrest rehabilitation fits the type of behavior contemplated by the section, and none of the examples provided in § 3E1.1 involve behavior similar to or indicative of rehabilitation.⁶⁸ To catalogue post-arrest rehabilitation under § 3E1.1 is to reach far beyond the language of the guideline.

The second problem with considering rehabilitation under § 3E1.1 is that the section allows at most a two-level reduction in offense level, regardless of the steps taken toward assumption of personal responsibility. An offender who merely pleads guilty and voluntarily admits her involvement in the crime may qualify for a two-level offense reduction under § 3E1.1. Essentially, a defendant must simply say "I violated the law and I am sorry."⁶⁹ Yet, an addicted offender who fully rehabilitates accomplishes much more.⁷⁰ She not

62. See *United States v. Sklar*, 920 F.2d 107, 115-116 (1st Cir. 1990).

63. See *United States v. Van Dyke*, 895 F.2d 984, 986-87 (4th Cir.), *cert. denied*, 111 S. Ct 112 (1990).

64. See *United States v. Williams*, 948 F.2d 706, 710 (11th Cir. 1990).

65. See *United States v. Harrington*, 947 F.2d 956, 962 (D.C. Cir. 1991).

66. See *supra* note 3.

67. U.S.S.G. § 3E1.1(a) (1992).

68. The Fourth Circuit, however, has indicated that all post-offense conduct is presumptively adequately considered by the Commission in either § 3E1.1 or § 3C1.1 (obstructing administration of justice). "The *Guidelines Manual* specifically addresses post offense conduct and its influence on the ultimate sentence." *United States v. Van Dyke*, 895 F.2d 984, 985-86 (4th Cir. 1990). That Commissioner Wilkins, Chairman of the Sentencing Commission, authored this opinion gives this presumption some credence, but if § 3E1.1 and § 3C1.1 are meant to apply to all post-arrest behavior, it is hard to imagine how the Commission can have considered all post-arrest rehabilitation "adequately."

69. See U.S.S.G. § 3E1.1, cmt. (background) (1992).

70. Even the Ninth Circuit, which denies post-arrest rehabilitation as a mitigating circumstance, recognizes the enormity of this accomplishment. See, e.g., *United States v. Martin*, 938 F.2d 162, 163 (1991) ("[R]esolving to become drug-free is perhaps the most constructive thing a drug dependent defendant can do...."); see also UNDERSTANDING DRUG TREATMENT, *supra* note 9, at 1 ("The common tendency to think of drug treatment as a soft, nurturing, and easy route away from drugs could not be further from the truth. To the drug addict, genuine drug treatment that works can be demanding, difficult, and physically and emotionally exhausting.").

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only claims responsibility for and acknowledges the cause of her criminal behavior, but also takes affirmative action to avoid criminal behavior in the future. Section 3E1.1 does not sufficiently recognize these more profound accomplishments.⁷¹ That the courts have considered post-arrest rehabilitation through such awkward downward departure rulings based on § 3E1.1 is further evidence that the Commission ought to establish a more appropriate method for consideration of post-arrest rehabilitation.

B. Discretionary Departure

Another method by which some courts address post-arrest rehabilitation is discretionary departure.⁷² Although courts must normally impose the sentences prescribed by the Sentencing Commission, Congress does allow courts to depart from the Guidelines when “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described.”⁷³

Courts employing discretionary departure generally decide questions of kind and degree in deciding whether or not to do so.⁷⁴ A district court must first determine whether an aggravating or mitigating circumstance exists. If the circumstance does exist, the court then looks at whether the Commission considered that circumstance. If the court determines that the Commission did not consider the factor or characteristic in question, then it may depart on that ground. If, however, the Commission did consider the circumstance, the court then determines whether the Commission gave it *adequate* consideration.⁷⁵ If the court decides that the Commission adequately considered the circumstance at issue, then it probably will follow the Guidelines. But it is not bound to do so: courts still retain the power to decide, “in light of unusual circumstances,” that the guideline level attached to a given factor is inadequate and that departure is warranted.⁷⁶

Following this process, certain district courts have granted downward

71. See *United States v. Harrington*, 947 F.2d 956, 968 (D.C. Cir. 1991) (Edwards, J., concurring) (“I am troubled by the fact that our holding will benefit addicts who accomplish the laudable and difficult task of rehabilitation no more than they would have benefitted had they demonstrated sincere contrition to the Probation Officer.”).

72. Discretionary departures are issued pursuant to 18 U.S.C. § 3553(b) (1988) and U.S.S.G. § 5K2.0, p.s. (1992).

73. 18 U.S.C. § 3553(b) (1988) (emphasis added); U.S.S.G. § 5K2.0, p.s. (1992).

74. These considerations are outlined in U.S.S.G. § 5K2.0, p.s. (Policy Statement concerning Grounds for Departure) (1992) and 18 U.S.C. § 3553(b) (1992).

75. Consideration by the Commission of an offender characteristic—such as addiction—however, does not necessarily mean adequate consideration. Daniel J. Freed & Marc Miller, *Handcuffing the Sentencing Judge: Are Offender Characteristics Becoming Irrelevant? Are Congressionally Mandated Sentences Displacing Judicial Discretion?* 2 FED. SENTENCING REP. 189, 190 (Dec. 1989/Jan. 1990).

76. 18 U.S.C. § 3553(b) (1988); U.S.S.G. § 5K2.0, p.s. (1992).

departures based on a defendant's post-arrest rehabilitation because it was a kind of circumstance not adequately considered by the Commission. These courts have held that, although the Commission considered and rejected addiction as a mitigating circumstance, it failed to consider rehabilitation from addiction.⁷⁷

Some circuits have held as a matter of law, however, that post-arrest rehabilitation may not be considered as a mitigating factor at sentencing, on the ground that the Commission "considered and rejected" addiction as a basis for departure.⁷⁸ These courts have broadly construed the term "addiction" to include post-arrest rehabilitation. As mentioned above, however, the Commission has never specifically mentioned post-arrest rehabilitation in any of its guidelines or policy statements.⁷⁹

Even if a circuit determines that the Commission did adequately consider a factor, however, a trial court may find that factor to be a mitigating or aggravating circumstance present "to a *degree* not adequately taken into consideration."⁸⁰ Thus, in circuits holding that rehabilitated defendants may be granted lesser sentences only under § 3E1.1 for acceptance of responsibility, a court may find the offender's rehabilitation to be so extraordinary as to render the usual two-level reduction in offense level inadequate and further reduce a sentence based on finding that the circumstance is present to a degree which was not anticipated by the Commission when formulating a departure guideline for acceptance of responsibility.⁸¹

Discretionary departure in many ways complements Congress' goals for the Guidelines. Congress did not intend for courts to be bound by the Commission's prescribed sentences in every case, nor for courts to impose the Guidelines "in a mechanistic fashion."⁸² Rather, Congress preserved departure power for the courts, in part, so that judges would not be forced to adhere to the Guidelines at the expense of fairness. In its own words, Congress intended "the sentencing judge [to act on her] obligation to consider all the relevant factors in a case and to impose a sentence outside the Guidelines in an appro-

77. *United States v. Maier*, 777 F. Supp. 293, 295 (S.D.N.Y. 1991); *United States v. Floyd*, 738 F. Supp. 1256 (D. Minn.); *United States v. Rodriguez*, 724 F. Supp. 1118 (S.D.N.Y. 1989).

78. *United States v. Martin*, 938 F.2d 162 (9th Cir. 1991); *United States v. Pharr*, 916 F.2d 129 (3d Cir. 1990), *cert. denied*, 111 S. Ct 2274 (1991).

79. This is of particular importance, because "in determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statement, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b) (1988).

80. *Id.*

81. U.S.S.G. § 5K2.0., p.s. (1992). Most of the circuit courts which have limited consideration of post-arrest rehabilitation to consideration under § 3E1.1 have acknowledged that an extraordinary rehabilitation might warrant departure under U.S.S.G. § 5K2.0, p.s. *See, e.g.*, *United States v. Harrington*, 947 F.2d 956, 962 (D.C. Cir. 1991); *United States v. Williams*, 948 F.2d 706, 710-11 (11th Cir. 1991); *United States v. Sklar*, 920 F.2d 107, 116 (1st Cir. 1990).

82. *See Legislative History, supra* note 19, at 3234 ("The sentencing guideline system will not remove all of the judge's sentencing discretion. Instead, it will *guide* the judge in making his decision on the appropriate sentence.") (emphasis added).

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priate case.”⁸³ Ultimately, the Federal Sentencing Guidelines are just that—guidelines.⁸⁴

III. A PROPOSAL TO ADDRESS POST-ARREST REHABILITATION UNDER THE GUIDELINES

In light of Congress’ intentions for the Guidelines, it is time for the Sentencing Commission—or Congress itself—to recognize this reality: in a number of areas the Guidelines are not working as planned.⁸⁵ The Commission should seize the opportunity to improve the Guidelines by comprehensively addressing neglected issues such as post-arrest rehabilitation. At the very least, for example, the Commission should issue a policy statement providing that its existing policy statements, including § 5H1.4, do not preclude consideration of post-arrest rehabilitation at sentencing. In other words, the Commission ought at least to legitimate the option of discretionary departure. I shall argue, however, that the Commission should take more decisive action on the issue of post-arrest rehabilitation.

One approach to amending the Guidelines would be for the Commission to issue a guideline specific to post-arrest rehabilitation. This new guideline would provide for mitigated sentences where an addicted defendant achieves significant rehabilitation between the dates of arrest and sentencing. The guideline could provide for a specific offense-level decrease similar to the offense-level decrease presently assigned to post-arrest actions under § 3E1.1.⁸⁶ Such an amendment would give the Commission more control—as compared with discretionary departure—over *how much* mitigation post-arrest rehabilitation should warrant. The biggest drawback to this approach would be the certain degree of rigidity that inheres in guidelines. Nevertheless, a new guideline on rehabilitation would promote one of the primary goals of the Guidelines: reduced sentencing disparity.

83. *Id.*

84. The Guidelines are pervasively construed as compulsory, and a clearer statement from Congress on the extent to which they are advisory is needed. In nine public hearings held by the Federal Courts Study Committee in which 270 persons testified, only four persons spoke against a proposal that Congress should amend the Sentencing Reform Act to state clearly that the Guidelines are “general standards regarding the appropriate sentence in a typical case, not compulsory rules.” The four persons who spoke against this proposal were three former or present members of the Commission and the Attorney General of the United States. Subsequently, the Federal Courts Study Committee refrained from either approving or disapproving of the proposal but “endorse[d] serious consideration” of it. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 136-137, 142 (1990).

85. *See id.* at 136 (“Although past and present members of the Sentencing Commission testified that the guidelines are working well [and] that no substantial change is needed ... every one of the numerous other witnesses who addressed this subject—including trial and appellate judges—supported modification of the character of the guidelines.”).

86. *See* U.S.S.G. § 3E1.1 (1992).

An even better approach would be for the Commission to promulgate a policy statement expressly authorizing downward departure for post-arrest rehabilitation. Because policy statements are non-binding, they allow for more flexibility than guidelines, which too often assume the form of unyielding commandments. A policy statement on rehabilitation would provide courts with a specific basis for downward departure and still allow them discretion to determine the appropriate sentence reduction for each particular defendant.⁸⁷

In designing a departure policy for post-arrest rehabilitation, the Commission could use a method similar to that used for departure on grounds of substantial assistance to authorities.⁸⁸ It could, for instance, list factors a judge should consider in evaluating a request for departure due to a defendant's rehabilitative actions. The factors available for consideration might include the following: (1) existence of a causal nexus between the addiction and the crime, (2) adequate evidence of rehabilitation, and (3) duration of the offender's post-arrest rehabilitation.⁸⁹

Either alternative, a new guideline or a new policy statement specifically discussing post-arrest rehabilitation, would more effectively foster the Commission's mandate from Congress—to promote fair and consistent sentences—than do the current Guidelines. As noted above, Congress charged the Sentencing Commission with establishing sentencing policies and practices that promote the sentencing purposes set forth in 18 U.S.C. § 3553(a)(2): retribution, deterrence, and rehabilitation. It has been argued that the Commission has ignored Congress' mandate to consider these purposes.⁹⁰ This proposed model for addressing post-arrest rehabilitation both considers the purposes of sentencing and would more fully achieve them. Moreover, this new approach would discourage unwarranted sentencing disparity, since it would require "specific findings of the court," and since each sentence would be "subject to appellate review."⁹¹

First, the model presented in this Current Topic promotes the sentencing purpose of retribution. The Commission itself recognizes that, under the principle of retribution or "just deserts," punishment "should be scaled to the offender's culpability *and* the resulting harms."⁹² Traditionally, courts have

87. See, e.g., U.S.S.G. § 5K1.1, p.s. (1992).

88. The departure for substantial assistance is issued pursuant to a policy statement. This policy statement lists (although not exhaustively) factors which a judge may choose to consider in determining the amount of reduction that an offender's assistance to authorities warrants. U.S.S.G. § 5K1.1, p.s. (1992).

89. See William W. Wilkins, *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of the Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 202 (1988).

90. See *United States v. Maier*, 777 F. Supp. 293, 295 (S.D.N.Y. 1991); see also Kenneth R. Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing*, 3 FED. SENTENCING REP. 326 (1991).

91. See 28 U.S.C. § 991(b)(1)(A) (1988); 18 U.S.C. § 3553(a)(2) (1988); see also *supra* note 19.

92. U.S.S.G. Ch.1, Pt.A.3, intro. cmt. (1992) (emphasis added).

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recognized culpability as a function not only of an offender's level of blameworthiness at the time of the offense, but also of her pre- and post-offense conduct.⁹³ The Commission, likewise recognizes the effect of post-arrest conduct on culpability, as evidenced by its allowance for sentencing adjustments based on such post-offense conduct as providing restitution and suborning perjury.⁹⁴ This proposal would merely extend similar considerations to post-arrest rehabilitative efforts.

Because retribution necessarily incorporates culpability, judges must be able to consider an addicted offender's post-arrest rehabilitation in order to accurately assess her culpability and thus ensure Congress' mandate of "just punishment." It is, of course, arguable whether a rehabilitated addict is less culpable than a non-addicted offender solely on account of the addiction-crime nexus. But it seems clear that the rehabilitated addict is—to some degree—less blameworthy than the persistent addict: only the former has assumed responsibility for her criminal behavior and taken steps to conform her behavior to societal norms.

Secondly, consideration of post-arrest rehabilitation better achieves deterrence than does failure to consider such rehabilitation. By factoring a defendant's rehabilitative achievements into sentencing, courts can send an important message to addicted offenders: Take actions to cure your disease and to prevent future criminal behavior, and we will lighten your punishment accordingly.⁹⁵ When an offender recognizes the role of addiction in her criminal behavior, takes responsibility for her addicted condition, and makes significant efforts to remedy her condition, she also reduces her propensity to commit crime. We ought to acknowledge and encourage such actions.

Encouraging offenders to rehabilitate provides deterrence by reducing recidivism.⁹⁶ Numerous studies have shown the following: (1) a nexus exists

93. See STANTON WHEELER ET AL., *SITTING IN JUDGEMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* 88 (1988) (In assessing the defendant's blameworthiness courts look "both backward and forward—backward chronologically to an assessment of the defendant's past conduct, his personality, his motivational structure, and many attributes of his personal and social history. [They then look] forward chronologically to include character readings based upon the defendant's conduct after the offense but preceding sentence....").

94. Under the Guidelines, for example, attempting to suborn perjury may be considered as an aggravating factor at sentencing, while providing restitution may be a mitigating factor. U.S.S.G. §§ 3C1.1, cmt. (n.3(b)); 3E1.1, cmt. (n.1(b)) (1992).

95. Some might argue that a judge can best achieve deterrence by pronouncing lengthy and certain sentences to addicted offenders so that the public refrains from engaging in criminal behavior because it perceives that the possible "cost" of punishment outweighs the possible "benefits" of criminal conduct. The "cost" of punishment, however, is not usually a concern for offenders whose criminal behavior is causally related to their addiction. See *UNDERSTANDING DRUG TREATMENT*, *supra* note 9, at 29 (The Office of National Drug Control Policy states: "We have to remind ourselves that drug addicts are primarily concerned with the instant gratification of drugs; their horizons are extremely limited.").

96. See *United States v. Maier*, 777 F. Supp. 293, 296 (S.D.N.Y. 1991) ("By breaking the defendant of her habit, she will be deterred from committing additional crimes of this nature, thus protecting the general public from the commission of such crimes.").

between the reduction of drug and alcohol abuse and a reduction in crime;⁹⁷ (2) persons under legal pressure to participate and/or continue in drug or alcohol treatment do as well, if not better than, people not under legal pressure to do so;⁹⁸ and (3) a sentence which is more severe than necessary may actually trigger an *increased* propensity to commit crime.⁹⁹ Moreover, the Office of National Drug Control Policy has said: "Drug treatment and criminal justice must be understood as allies in our fight against drug use."¹⁰⁰ Thus, to afford the public the best protection against future crime by an addicted offender, the criminal justice system should encourage, rather than ignore, rehabilitation.¹⁰¹

Finally, the proposal in this Current Topic actively promotes the sentencing purpose of rehabilitation. While "recognizing ... that imprisonment is not an appropriate means of promoting correction and rehabilitation,"¹⁰² Congress has retained rehabilitation as a goal of sentencing.¹⁰³ A Court may encourage rehabilitation in that it may stay an offender's sentence for an extended period of time or make a reduced sentence dependent on the defendant's continued abstention from drugs. To ensure that the offender continues in her rehabilitative progress, for example, the court may order that she be subject to random

97. See Carl G. Leukefeld & Frank M. Tims, *Compulsory Treatment: A Review of Findings, in COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE* 236, 242 (indicating that it is critical that drug abusers be identified, because reducing drug abuse reduces crime), 246 (using data from the Treatment Outcome Prospective Study, it appears that after "12 months, as well as at 24 and 48 months ... virtually all economic measures show that crime is lower after treatment than before treatment") (Carl G. Leukefeld & Frank M. Tims eds., 1988); Charles J. Felker, *Considering Offender Intoxication at Sentencing*, FED. SENTENCING REP. 192 (Dec. 1989/Jan 1990) (arguing that treatment of alcohol abuse problems may remove an offender's tendency to commit crime); UNDERSTANDING DRUG TREATMENT, *supra* note 19, at 15 (declaring that abusers who spend more than three months in a therapeutic community (TC) reduce drug use and criminal behavior, even if they do not complete the TC program).

98. UNDERSTANDING DRUG TREATMENT, *supra* note 19, at 11.

99. See James Bonta & Laurence Motuik, *The Diversion of Incarcerated Offenders to Correctional Halfway Houses*, 24 J. RES. CRIME & DELINQ. 302, 311-12. The authors suggest that incarcerated low-risk offenders show a shift in pro-criminal attitudes and behavior upon exposure to higher-risk offenders in institutions. In one particular study minimum-risk offenders who were incarcerated showed a reincarceration rate three times higher than minimum-risk offenders who were sent to halfway houses. It is important to note that length of incarceration increased risk of recidivism. The authors conclude that "if we fail to divert low-risk inmates from continued imprisonment we may actually *increase* the risk for future recidivism." *Id.* (emphasis added).

100. UNDERSTANDING DRUG TREATMENT, *supra* note 19, at 1-2.

101. Although the Commission has ignored rehabilitation as a mitigating factor at sentencing, it has included poor candidacy for rehabilitation as an aggravating factor directly relevant to sentencing. U.S.S.G. § 4A1.1. "A defendant's record of past criminal conduct is directly relevant" to the purposes of sentencing, in part because, "[r]epeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." U.S.S.G. Ch.4, Pt.A, intro. cmt. (1992).

102. *Legislative History*, *supra* note 19, at 3259; 18 U.S.C. § 3582(a) (1988).

103. 18 U.S.C. § 3553(a)(1)(D) (1988).

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drug testing.¹⁰⁴ Additionally, under this model courts can incorporate rehabilitation into a sentence by counting “supervised released”—both pre- and post-incarceration—as part of the cumulative sentence, thus reducing actual prison time.¹⁰⁵

In short, only with the Commission’s clearer guidance will courts be able to achieve the sentencing goals contemplated by Congress: retribution, deterrence, and rehabilitation. Consideration of post-arrest rehabilitation in appropriate cases furthers these purposes of sentencing; imposition of uniform sentences irrespective of a defendant’s rehabilitation efforts does not. Moreover, unlike the current Guidelines, this proposal fulfills the federal statutory requirement that the Guidelines “[maintain] sufficient flexibility to permit individualized sentencing when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.”¹⁰⁶ In order to maintain the highest degree of flexibility in the Guidelines, the Commission should address the issue of post-arrest rehabilitation through an instructional policy statement rather than through a strict guideline.

IV. POTENTIAL PROBLEMS IN ESTABLISHING POST-ARREST REHABILITATION AS A MITIGATING FACTOR AT SENTENCING

This proposal to consider post-arrest rehabilitation as a mitigating factor at sentencing through downward-departure policy statements raises important concerns: (1) creation of a legal “loophole” for addicts at sentencing; (2) disparate impact due to access and treatment; (3) excessive judicial discretion. These are legitimate concerns. Nevertheless, for reasons set forth below, the benefits of accepting substance abuse rehabilitation as a mitigating factor at sentencing would outweigh the costs. Furthermore, certain structural safeguards already exist within the Guidelines to decrease the likelihood that these concerns would be realized.

104. In *United States v. Floyd*, for example, the court deferred sentencing after the offender’s last plea, allowing the court to monitor her behavior for one year, during which she remained drug-free. 738 F. Supp. 1256, 1260 (D. Minn. 1990).

105. This approach appears to be consistent with Congressional intent. See *Legislative History, supra* note 19, at 3233. The Guidelines take this approach to pre-Guidelines sentencing, in part, because pre-Guidelines law “[was] not particularly flexible in providing ... a range of options from which to fashion an appropriate sentence. The result [is] that a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available.” *Id.*

106. 28 U.S.C. § 991(b)(1)(B) (1988).

A. *Creation of a "Loophole for Addicts"*

Some see mitigation for rehabilitation from addiction as a way of "rewarding" the addict. This reward theory assumes that addicted offenders would gain a benefit unavailable to non-addicted offenders: the possibility of downward departure.¹⁰⁷ The Guidelines, however, anticipate that all departures will not be equally available to each defendant. Section 5K1.1, providing for downward departures for reason of substantial assistance to authorities, for example, is available only to those defendants who have knowledge of the illegal acts of others and can therefore provide assistance.¹⁰⁸ This type of departure is unavailable to the offender who acts alone or who is only minimally involved in illegal activity and therefore cannot offer substantial information.¹⁰⁹ Thus, in light of the present Guidelines scheme, arguments that consideration of post-arrest rehabilitation would unfairly "reward" rehabilitated addict-offenders are unpersuasive.

Additionally, the "reward" theory ignores the qualitative difference between addicted and nonaddicted offenders: the former's addiction is causally connected to her crime; i.e., *but for* addiction, the former's crime would not have occurred. More significantly, the reward theory ignores the distinction between the rehabilitated offender and the persistent addict. Only the former has taken affirmative steps to conform her behavior to law. Just as we recognize the acceptance of personal responsibility as a mitigating factor, so should we regard rehabilitation as a reason for downward departure.

Rather than worry about rewarding addicted offenders, we should be concerned with encouraging rehabilitation and preventing recidivism. Recognizing rehabilitated offenders as a unique class deserving of special consideration at sentencing accomplishes these latter goals. Rather than a "loophole," this model provides a scheme in which the addicted offender is punished in proportion to her culpability. Finally, this proposed model for departure would not be compulsory. Judges would retain discretion to allow departure only when a variety of criteria are met.

B. *The Possibility of Disparate Impact*

Another plausible criticism of this departure proposal concerns sentencing disparity among addicted offenders. In *Harrington II*,¹¹⁰ for example, the court voiced this concern:

107. See *United States v. Williams*, 948 F.2d 706, 710 n.6 (11th Cir. 1991). As for non-addict offenders attempting to feign addiction in order to receive a reduced sentence, in today's technological world, the use of blood and urine tests would make it difficult for a non-addict to feign addiction.

108. U.S.S.G. § 5K1.1, p.s. (1992).

109. See *United States v. Floyd*, 738 F. Supp. 1256 (D. Minn. 1990).

110. *United States v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991).

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Defendants without access to the psychiatric evaluation afforded Harrington might be similarly situated, yet unable to make the case that he did for leniency. The disparate sentences that could result would in turn frustrate one of the prime objectives Congress had in view when it established the Commission and directed it to develop the Guidelines.¹¹¹

Although some addicted offenders may not gain access to rehabilitation programs, and thus could not be afforded the benefit of a reduced sentence, the Harrington court's concern about disparate impact is not a persuasive reason to deny all rehabilitated offenders the opportunity for a mitigated sentence. Nevertheless, we should take seriously the criticism concerning the cost and availability of drug and alcohol treatment programs.¹¹² Money saved on prison costs as a result of this proposal would be well spent on developing additional treatment centers and improving access to existing treatment programs.

C. *The Risk of Sentencing Disparity*

One of the most powerful objections to pre-Guidelines indeterminate sentencing was that it led to inequality.¹¹³ Through the Commission and the Guidelines, Congress sought "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."¹¹⁴ However, "[e]xcessive aggregation—treating unlike cases alike—can violate rather than promote the principle of equality."¹¹⁵ Considering post-arrest rehabilitation at sentencing recognizes that non-addicted and addicted offenders are different, and thus may accomplish more uniformity in sentencing than it destroys.

According to Irene Nagel of the Commission, "[p]artly because of time constraints,... the emphasis [in constructing the Guidelines] was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment."¹¹⁶ The new disparity problem shows itself clearly in the sentencing of formerly addicted offenders under the present scheme. For a given crime, where post-arrest rehabilitation is not considered

111. *Id.* at 960 (Harrington was evaluated and found amenable to rehabilitative treatment).

112. There are not nearly enough treatment centers to accommodate every offender with a drug or alcohol addiction. The National Drug Control Strategy has called upon states, third parties, and insurance companies to help rectify the situation by increasing the number of drug treatment centers both within and outside of the criminal justice system. WHITE HOUSE NATIONAL DRUG CONTROL STRATEGY 45 (1991).

113. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER*, ch. 2 (1973); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 27-32 (1976); Vitiello, *supra* note 24, at 1051.

114. U.S.S.G. Ch.1, Pt.A(3) intro. cmt. (1992).

115. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 916 (1991).

116. Irene H. Nagel, *Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 934 (1990).

at sentencing, the same punishment will be meted out to very different types of offenders: (1) formerly addicted offenders, who have successfully rehabilitated; (2) addicted offenders who have made no rehabilitative efforts; and (3) non-addicted offenders. Instead of the pre-Guidelines form of disparity, which resulted from unfettered judicial discretion, different offenders are now receiving the same sentences.

Commissioner Nagel's warning that "while one kind of disparity is likely [to be] reduced by the adopted system, yet another kind may be introduced"¹¹⁷ has come to fruition. Because an offender's "history and characteristics" includes both pre- and post-arrest behavior,¹¹⁸ the history and characteristics of the addicted offender who goes through post-arrest rehabilitation is different from one who does not. As long as this disparity continues, Congress' goal that similar offenders receive similar sentences for the same crimes will remain thwarted.¹¹⁹

V. CONCLUSION

The Sentencing Commission is required by law to revise the Guidelines periodically.¹²⁰ It is clear that revision is needed now. In a recent survey, a majority of federal trial judges in the Second Circuit said that only one-fourth of the sentences they have imposed under the Guidelines have been "fair and just."¹²¹ Additionally, 91% of those judges said that the Guidelines wrongly disregard offender characteristics.¹²² Such disregard for offender characteristics is especially disconcerting given Congress' intent that "the purpose of the sentencing Guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the imposition of individualized sentences."¹²³

Refusing to recognize the unique status of the rehabilitated offender threatens to undermine Congress' sentencing goals as well as to diminish respect for the criminal justice system as a whole. Consider the case of *United States v. Harrington*, in which one concurring judge wrote that the case, was "an example of how the [g]uidelines work at their worst."¹²⁴ The judge explained

117. *Id.*

118. *See supra* note 97.

119. *United States v. Harrington*, 947 F.2d 956, 964 (D.C. Cir. 1991) (Edwards, J., concurring) ("[W]e also have come to understand that the Guidelines do not, by any stretch of the imagination, ensure uniformity in sentencing.")

120. 28 U.S.C. § 994(o) (1988).

121. Deborah Pines, *Federal Judges Critical of the Sentencing Guidelines*, N.Y. L.J., Mar. 13, 1992, at 1.

122. *Id.*

123. *Legislative History*, *supra* note 19, at 3235.

124. *United States v. Harrington*, 947 F.2d 956, 967 (D.C. Cir. 1991) (Edwards, J., concurring).

Considering Post-Arrest Rehabilitation of Addicted Offenders

his reason for concurring with the majority's decision: he felt hamstrung by the Guidelines, which he believed did not allow for rehabilitation reduction of greater than the two-level decrease provided by § 3E1.1 for acceptance of responsibility. If the judges who uphold the Guidelines doubt their value and validity (and numerous other judges have expressed these very doubts),¹²⁵ then it is difficult to see how the public¹²⁶—or especially defendants¹²⁷—can respect the sentencing system of the United States.

This Current Topic has argued that judges should be able to reduce an offender's sentence if that offender has rehabilitated successfully. Mitigation does not mean exoneration. By considering post-arrest rehabilitation as a mitigating factor at sentencing, rather than at trial, the State may preserve the power to punish the addicted offender and simultaneously recognize her reduced culpability.¹²⁸ In so doing, it will create a criminal justice system that more closely adheres to the four Congressionally mandated purposes of sentencing. To reiterate: Congress has said that sentences should: (1) reflect the seriousness of the crime, (2) provide adequate deterrence to criminal conduct, (3) protect the public from further crimes of the defendant, and (4) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.¹²⁹ Consideration of post-arrest rehabilitation is consistent with each of these goals.

Downward departure for post-arrest rehabilitation complements the notion of just retribution, because the rehabilitated offender—in contrast with the persistent substance-abusing offender—has both asserted responsibility for her actions and taken positive steps toward reintegration into productive society. Downward departure likewise promotes the goals of deterrence and rehabilitation. Furthermore, consideration of rehabilitation may help relieve the public of the cost of incarcerating persons longer than the courts may find necessary, and should reduce the U.S. prison population by reducing recidivism. As suggested above, the money saved could be spent on developing new treatment programs both in and outside of the prison system.

If we are to maintain a guidelines system, those involved with the Guidelines should be continually monitoring their effectiveness and working to improve them. Attorneys and judges familiar with the Guidelines, both with

125. See, e.g., *supra* notes 86 and 123.

126. This is particularly interesting in light of recent findings that public officials and criminal justice personnel "erroneously perceive the public to be more punitive and thus less receptive to alternatives [to prison] than is actually the case." Marcia G. Shein & Jana L. Jopson, *Sentencing Drug Offenders: The Need to Sensitize the Sentencing Judge*, 24 CRIM. L. BULL. 146, 147 (1988) (citations omitted).

127. See Bonta & Motuik, *supra* note 98, at 312 (arguing that excessively punishing low-risk offenders can actually increase pro-criminal attitudes in low-risk offenders).

128. See *supra* text accompanying notes 93-95.

129. 18 U.S.C. § 3553(2) (1988).

their legislative history and the practical application by the courts, should create records to guide the Commission on how to approach issues such as post-arrest rehabilitation. Ultimately, however, a definitive policy statement or guideline addressing the availability of downward departure for post-arrest rehabilitation must be issued by the Commission. The Congressionally mandated goals of sentencing remind us that different defendants who commit similar crimes sometimes should receive different sentences.¹³⁰ The Commission should act to enable judges to consider post-arrest rehabilitation when relevant so as to better achieve the purposes of criminal sentencing.

130. *See, e.g., United States v. Maier*, 777 F. Supp. 293 (S.D.N.Y. 1991).

Health Care Reform Proposals

BILL	ACCESS			BENEFITS			COST RESTRAINTS			FINANCING & ADMINISTRATION			ADDITIONAL FACTORS		
	Coverage ¹	Portability/ No Job Lock-In	Comprehensiveness ²	Additional ³	Freedom of choice of provider	Global Restraints ⁴	Patient Cost Sharing ⁵	Administrative Simplification	Managed Care	Medical Malpractice	Financing/Spending ⁶	Administration	Role of private insurance	Consumer Participation	
TAX CREDITS															
President Bush proposal	Expands access; tax credits, SGR, and LIFECR (lock of SGR) in rural and inner city areas	No, but SGR	No	No, but increases funding for government provided services	Yes	None	Yes, according to private plans	Only minor	Incentives to individuals and employers; pre-empt state anti-managed care laws; some minimum benefit laws	Yes; incentives to states	F: Tax credits or deductions up to max of \$3,750; financing unspecified, may come from limits on Medicaid/Medicare E: Taxes I: Eliminates employer health insurance tax exclusion; provides personal inc. tax credits based on health costs & income S: E	F: IRS S: Flexibility on Medicaid	Continue or expand existing role	Information	
Heritage Foundation proposal	Universal (individuals required to buy their own health insurance)	Yes	No; pre-empt state minimum benefit laws, and provides only catastrophic protection	LTC	Yes	None	Yes, high patient payments for all common medical services, incl. those provided by Medicare/Medicaid	None	Tax incentives; pre-empt state anti-managed care laws	No	F: IRS S: Establish risk pools E: Taxes, prems., & cost sharing I: Foregoes tax revenues E: E	F: IRS	Continue or expand existing role	Information access	
Chaffee S.1938 (GOP Health Care Task Force)	Might expand access because of SGR	No, but SGR	No	No (but tax incentives for preventive care)	Yes	None	As determined by private plans	None	Tax incentives; pre-empt state anti-managed care laws	Yes	F: Taxes, prems., & cost sharing I: Foregoes tax revenues E: E	F: IRS	Continue or expand existing role with new regulations	None	
WALSH REFORM															
Ky. H.R. 3518	N/A	N/A	N/A	N/A	Yes	N/A	N/A	N/A	Yes; grants health incentives to employers who set up health plans with less administrative burdens	Yes; grants health incentives to employers who set up health plans with less administrative burdens	F: Regulate on pre-emptive basis S: Develop alternative dispute resolution E: E	F: Regulate on pre-emptive basis S: Develop alternative dispute resolution E: E	Unchanged	N/A	
STATE INSURANCE PLANS															
Sabo H.R. 2114	Expands access with low-income state insurance plans	No	No	LTC (catastrophic protection only)	Yes	None	Yes	None	None	No	F: Grants to states S: Must offer insurance plan to receive Medicaid funds E: Income surtax	F: Grants to states S: Must offer insurance plan to receive Medicaid funds E: Income surtax	Continue or expand existing role	N/A	
Grandy H.R. 1230	Expands access; for those with un-insurable risks or material pre-existing conditions	No	No	No	Yes	None	Yes, according to state or private plan	None	Pre-empt state anti-managed care laws	No	F: Grants to states; increases self-employed deduction to 100% S: E	F: Health care research agency and advisory council	Unchanged	Consumers may be on advisory council	
Dingell H.R. 16	Expands access (Medicaid, new state public plans, Medicare, other reforms)	No	No	D	Yes	State choice of fee schedules, capitation, salaries, etc; state hospital reimbursement rates	not specified	None	Permitted	No	F: Value added tax S: State choice E: E	F: Trust fund; advisory council; local agencies admin. plans with state coordination	Continue or expand existing role	Consumers on advisory council; local grievance procedures; hearing rights	
SMALL GROUP REFORM															
Waters H.R. 1468	Might expand access because of SGR	No, but SGR	No	No	Yes	None	As determined by private plans	None	Tax incentives; pre-empt state anti-managed care laws	Yes	F: Cap on employer health subsidy; reinstatement; interest based if no SGR S: Gen. revenues & retire. br. E: E, premiums	F: IRS; IRS S: May develop equivalent of major program step E: E	Continue or expand existing role with new regulations	None	
INTERNATIONAL COMPARISONS															
Canada	Universal (provincial insurance plans)	Yes	Yes	LTC (with some patient cost-sharing); additional benefits permitted if province chooses to provide	Yes	Provincial single-payers, negotiated fee schedules, hospital budgets and capital budgets	No	Yes, major	No	N/A	F: Tax revenues; 40% contribution to provinces S: Provincial taxes E: Provincial taxes	F: General regulations for funding development and administration of market plans	Non-profit fiscal intermediaries; small supplemental insurance market	Negotiations; concentrated political and financial accountability	
Germany	Universal (non-profit sickness funds)	No, but usually covered by same sickness fund for life (employer-based funds cover the unemployed)	Yes	LTC (in-hospital only); Rx (with use guidelines and pharmaceutical equivalents), D, V	Yes	Spending limits set by non-gov't body; regional negotiated fee schedules & glob. at hosp. budgets	Nominal patient cost-sharing for hospital (\$6/day) and for some non-generic Rx	Yes, strict regulation of negotiations between non-profit sickness funds and providers	No	N/A	F: Payroll tax S: Payroll tax (13% of earnings, with maximum levy rate)	F: Non-gov't negotiating forum of providers, employers, state and local gov'ts	1000 non-profit sickness funds; small private and supplemental insurance market	Key role in negotiations regarding benefit limits	

1 Universal covers all citizens except those who opt out by choosing to pay for their own insurance. SGR=small group insurance reform. LTC=limits pre-existing condition causes (community rating required)

2 Comprehensive includes basic, preventive, pregnancy, well-child, and some mental health care. Medicare limitations include routine physical and eye exams, as well as administrative judgments about "medically unnecessary" care

3 LTC= long term care; Rx= prescription drugs; D=dental; V= vision

4 NHE-National Health Expenditure (excludes total health care spending in US); Small number of governmental or quasi-governmental entities like state insurers receive a set payment rate from all payers (insurers or consumers) for each service.

5 Patient cost sharing includes copays, deductibles, out of pocket expenses. S, I, E=denotes individual/family amounts. F=denotes federal; P=denotes provincial; L=individual. For total amount, individuals pay, see also "financing."

6 F: Federal; S: State; P: Provincial; L: Individual

Health Care Reform Proposals

BILL ACCESS

BENEFITS

COST RESTRAINTS

FINANCING & ADMINISTRATION

ADDITIONAL FACTORS

Bill	Coverage ¹	Availability/Restrictions	Comprehensive ²	Additional ³	Excludes/Provider	Global Restraints ⁴	Permit Cost Sharing ⁵	Administrative Simplification	Managed Care	Medical Malpractice Reform	Financing/Spending ⁶	Administration	Rate of Private Practices/Compliance	Consumer Participation	
SINGLE-PAYER Russo H.R. 1300 and Wellstone S. 2320	Universal (in national plan)	Yes	Yes	Rx, LTC, D, V	Yes	Single-payer; NHE budget; Fee Schedules; Hospital Budgets Capital Budgets	None	Yes, major	No, but HMO options	No	F: Income tax, corporate tax, SSI tax increase G: Maintain expenditures H: Payroll taxes; corp. taxes I: Income taxes, LTC premiums for non-poor elderly J: Income surtax, corp. tax K: Maintain expenditures L: Sliding scale premium & cost sharing	F: HCFA, Advisory Board & Trust Fund G: Admin. if requests, also advisory boards H: Trust fund	None, but may act as fiscal intermediaries and sell supplemental insurance	Consumers on Health Care Payment Comm'n.	
Stark H.R. 650	Universal (in national plan)	Yes	Yes (with some Medicare limitations)	Rx (low-income only), LTC, V (low income & children only)	Yes	Single-payer; Medicare payment rules	Yes, except pregnant women, children, the poor; Acute 20% copay; \$500 deductible; \$2500 cap.	Yes, major	Permitted	No	F: Income surtax, corp. tax G: Maintain expenditures H: Corp. tax and payroll tax I: Sliding scale premium & cost sharing	F: Sets regulations G: Administers program with federal funds and regional funds and insurance	Act as fiscal intermediaries and carriers (as under current Medicare); self-supplemental insurance	Consumers on Health Care Payment Comm'n.	
Kerry S. 1446	Universal (in private plans or state plan as per of last resort)	Yes	Yes	Rx, LTC (with 80% copay deduct. or no copay), LTC, V (with social security benefits)	Yes	Single-payer; State & NHE budgets; All-payer; Hospital budgets	Acute 20% copay; \$500 deductible; \$1000/2000 out of pocket cap.	Yes	HMO and other options	Yes	F: Increased personal, corporate and SSI income taxes, social taxes G: Taxes H: Payroll taxes I: Sliding scale premium & cost sharing	F: Sets regulations G: Administers program with federal funds and regional funds and insurance	Consumers on Health Care Payment Comm'n.	Consumers on Health Care Payment Comm'n.	
STATE SINGLE-PAYER Collier H.R. 8	Universal (in state plan)	CR	Yes	LTC (with subsidized premium)	Yes	Single-payer; State budgets; All-payer; State hospital budgets	Acute 20% copay; \$1000/2500 out of pocket cap.	Yes, state choice	No	No	F: Enhanced per capita federal subsidy to states G: Revenue H: Cost sharing	F: Sets regulations G: Administers program with federal funds and regional funds and insurance	States choose	Consumers on Health Care Payment Comm'n.	
Johnson H.R. 3689	Universal (local insurance plans)	Yes	Yes	LTC, Rx	Yes	Local all-payer; Regulated fee schedules; Local hospital budgets	Yes, except for pregnancy, well child, preventive care Acute 20% copay; No deductibles; \$1000/2500 cap.	Yes, but dependent on local structure	Optional	Yes, organizational flexibility to provide services; punitive damages	F: Personal and corporate income tax increases; FICA G: Share of Medicaid, payroll tax or premium H: Cost sharing	F: Sets regulations G: Administers program with federal funds and regional funds and insurance	States may contract with private insurers to administer programs or may contract on limited basis	Local health care district boards	
Wellstone Amendment to S. 1227	Universal (in state plan)	Yes	Yes	No	Yes	Net expenditures targets for each state; Fee schedule; State choice on payments, etc.	Yes, except for one-payer; Acute 20% copay; \$2500 deductible; \$3000 out of pocket cap.	Yes (state choice)	Optional	No	F: Payments to equalize states would otherwise receive from federal gov't G: State tax revenue H: Cost sharing	F: Public authority; medical body; independent	May act as fiscal intermediaries	Consumers on Health Care Payment Comm'n.	
EMPLOYER-BASED Mitchell/Kennedy/Riegle/Rockefeller S. 1227	Universal (in new public plan, Medicare, or employer plan)	No, but SGIR, LPEC, CR	Yes (with some limitations on preventative care)	No	Yes	All-Payer; Negotiated payment rates guided by NHE goals	Acute 20% copay; \$250/500 deductible; \$3000 out of pocket cap.	Only minor	Incentives	Incentives to develop malpractice reform programs	F: Enhanced matching funds to states G: Partial funding H: Payroll tax or premium I: Premium, payroll tax & cost sharing	F: Health Bd; Admin. program with Fed. aids; form contracts to negotiate provider rates	Continue or expand existing regulations	Consumers on Health Care Payment Comm'n.	
Rostenkowski H.R. 2495	Universal (in new public plan, Medicare if over 60, or employer plan)	No, but SGIR, LPEC, CR	Yes (with Medicare limitations)	LTC	Yes	All-Payer; Negotiated payment rates within overall NHE targets; Capital budgets	Acute 20% copay; \$2500/2000 out of pocket cap.	Only minor	Incentives	No	F: Income surtax, increase Medicare payroll tax G: Maintain expenditures H: Payroll tax or premium; corp. surtax I: Prem., Inc. trust surtg. & cost-sharing	F: Health Care Cost Commission; HHS G: Fiscal intermediaries	Continue or expand existing regulations	Consumers on Health Care Cost Comm'n.	
Waxman H.R. 2325 and Rockefeller S. 1177	Universal (in new public plan, Medicare, or employer plan)	No, but SGIR, LPEC, CR	Yes (with some Medicare and other limitations)	No (except for children who may be covered for D, V)	Yes	Medicare payment rates (applied for public plan, optional for private plans)	Acute 20% copay; \$250/500 deductible; \$3000 out of pocket cap.	Only minor	Incentives; Penalties to states for regulating	No (demonstration studies only)	F: Premiums or payroll tax; corp. income surtax G: Premiums, income surtax H: Cost sharing	F: Trust fund; HCFA	Continue or expand existing regulations	Toll-free number for information; grievance procedures	Consumers on Health Care Payment Comm'n.
Roybal H.R. 3535	Universal (in new public plan, Medicaid, Medicare, or employer plan)	No, but LPEC, CR, and renewability regulations	Yes (including check-ups every two years)	LTC, Rx (with use guidelines, pharmaceutical, equipment, lenses, & payment limits), D, V (exams, lenses & frames)	Yes	Medicare payment rates (applied for public plan, optional for private plans)	Acute 20% copay; \$250/500 deductible; \$3000 out of pocket cap.	Only minor	Incentives; Penalties to states for regulating	No	F: Premiums or payroll tax; corp. income surtax G: Premiums, income surtax H: Cost sharing	F: Independent agency administers trust fund	Continue or expand existing regulations	Consumer bill of rights; expanded existing role	Consumers on Health Care Payment Comm'n.

1 Universal/does all states except those who opt out of choosing and covering for their own insurance. SGIR = small group insurance reform. LPEC = limits pre-existing condition clauses. CR = community rating required.

2 Comprehensive includes basic, preventive, LTC, long term care; LPEC = long term care; D = dental; V = vision.

3 LTC, long term care; Comprehensive includes basic, preventive, LTC, long term care; LPEC = long term care; D = dental; V = vision.

4 NHE = National Health Expenditure (total health care spending in US); Single-payer systems determine financial and political accountability in one or a few systems; All-payer systems do not limit the number of providers but require that providers receive a set payment rate from all payers (insurers or consumers) for each service.

5 Patient cost sharing includes copay, deductibles, out of pocket maximums, etc.; State choice = state choice; For total amount, individuals pay, see also financing.

6 F = Federal; S = State; CR = community rating; I = individual.