Considerin 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. 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"), the judge should have sentenced her to 78-97 months in prison. 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.

At sentencing, Judge Rosenbaum found the punishment prescribed by the Guidelines to be harsher than necessary. 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." Thus, the judge departed downward from the

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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

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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 dependent 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).
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, 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. 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. Other courts have read the current Guidelines to preclude downward departure for post-arrest rehabilitation. 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. Borrero, 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).
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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

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(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).
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. 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. 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." The Commission was to ensure that the purposes of sentencing—set forth by Congress in 18 U.S.C. § 3553(a)(2)—are achieved. The Commission acts by issuing both guidelines and policy statements. Policy statements and guidelines are not equivalent. Policy statements,
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unlike guidelines, are "advisory and non-binding." The Commission states: 
"[A] policy statement ... may provide guidance in assessing the reasonableness of any departure" from the Guidelines. Moreover, as scholars have noted, "Congress plainly did not confer presumptive validity on policy statements as it did with Guidelines."

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." 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.

In addition to writing policy statements to this effect, the Commission later codified the three "relevant" characteristics in binding guidelines elsewhere in the Guidelines. 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. 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 law cannot absolutely prohibit, a court from considering an offender's addiction at sentencing. 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.
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

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

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.

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.” As one court has noted, “The assertion that [physical condition is] not ordinarily relevant carries by hypothesis the implication that [it] sometimes [is] relevant.”

United States v. Rodriguez 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. 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.” 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.”).
47. Williams, 948 F.2d at 710 (emphasis in original).
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


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. In contrast, the Sixth Circuit allows sentencing courts complete discretion to depart downward on grounds of post-arrest rehabilitation. 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. 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. As of this writing, the Fifth, Seventh and Tenth Circuits, have not addressed this issue.

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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 found, 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.

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, Fourth, Eleventh, and D.C. 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 level by two levels, "[i]f 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

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62. See United States v. Sklar, 920 F.2d 107, 115-116 (1st Cir. 1990).
64. See United States v. Williams, 948 F.2d 706, 710 (11th Cir. 1990).
66. See supra note 3.
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."
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) ("Irresolving 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.").


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.  

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. 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.

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." 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.

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." 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-


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. 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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Ultimately, the Federal Sentencing Guidelines are just that—guidelines. 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).

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.").
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.  

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. 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.  

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. 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.”  

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.” Traditionally, courts have

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).
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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. 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.

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. 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. 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]epetited criminal behavior is an indicator of a limited likelihood of successful rehabilitation.” U.S.S.G. Ch.4, Pt.A, intro. cmt. (1992).


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drug testing. 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.

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." 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.

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. 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. 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. 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, 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.
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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.
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,\(^{124}\) in which one concurring judge wrote that the case, was "an example of how the [g]uidelines work at their worst." The judge explained

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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.").
122. Id.
123. Legislative History, supra note 19, at 3235.
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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), then it is difficult to see how the public—or especially defendants—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. 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. 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.
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.\textsuperscript{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.

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<th>BILL</th>
<th>ACCESS</th>
<th>BENEFITS</th>
<th>COST RESTRAINTS</th>
<th>FINANCING &amp; ADMINISTRATION</th>
<th>ADDITIONAL FACTORS</th>
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<td><strong>President Bush proposal</strong></td>
<td>Yes, but SGR, LFPR, or increased availability for rural and inner city access</td>
<td>Yes, increased funding for government provided preventive services</td>
<td>Only minor decreases in Medicare and states</td>
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<td>Yes, expected state minimum benefit laws, and only osteopathic practitioners</td>
<td>Yes, high risk patient payments for all continuum of medical services, including those provided by Medicare/Medicaid</td>
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<td>As determined by private plans</td>
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<td>Forever tax reconciliation, develop alternative dispute resolution, and expand existing role</td>
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<td>Yes, state coverage for all mental health benefits, including mental health professionals</td>
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1 Universal covers all citizens except those who opt out by choosing a health savings account and a high deductible plan. SGR = small group insurance reform. LFPR = life expectancy reduction.
2 Comprehensive includes basic, preventive, ambulatory, and acute care, and some mental health care. Medicare benefits include routine physical and eye exams, as well as administrative judgments about "medically unnecessary" care.
3 LTC = long term care; for pre-retirement or age-related health care services.
4 Public Health Committee gives total health care spending in U.S. by disease category. PPS = prospective payment system. See note 2 for a smaller version of governmental or quasi-governmental entities that act as insurers. All payer systems do not limit the number of insurers, but those that provide care, some of which receive a portion of payment from all payers insurers or contractors for each service.
5 Patient cost sharing includes copays, deductibles, out of pocket expenses, and others. Individual average family income.
6 Federal = federal government. Employer = individual.
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<td>Yes</td>
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