An Agency Cost Analysis of the Sentencing Reform Act: Recalling the Virtues of Delegating Complex Decisions

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INTRODUCTION

With the passage of the Sentencing Reform Act of 1984,[1] Congress imposed strong restrictions on the discretion of federal judges and parole commissioners to prescribe punishments for federal crimes. Prior to the Act, judges exercised almost unfettered discretion in the sentencing of federal defendants. Congress specified a broad range of maximum and minimum sentences,[2] and sentences levied by individual judges within that range were subject to only limited review.[3] The Federal Parole

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[1] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1873, 1987 (codified at 18 U.S.C. §§ 3551-3673, 28 U.S.C. §§ 991-98 (1988)).

[2] For example, before the guidelines, an armed bank robber could be sentenced to anything from probation to 25 years. John O. Newman, *Federal Sentencing Guidelines: A Risk Worth Taking*, THE BROOKINGS REV., Summer 1987, at 29.

[3] If the judge's sentence was within the bounds of the statute, it was unreviewable except for "egregious departures from lawful criteria."

Commission also commonly exercised discretion by releasing prisoners before the full term of their sentences.[4] Under the Sentencing Reform Act, Congress created the United States Sentencing Commission[5] and directed it to promulgate guidelines for the sentencing of all federal criminals.[6] Judges retained only limited discretion, either to vary sentences under the guidelines[7] or to depart from the guidelines,[8] and all departures from the guidelines were made subject to appeal.[9] Finally, Congress eliminated the availability of parole in federal cases.[10]

Congress imposed these restrictions to solve three problems that were perceived to exist under the previous discretionary sentencing regime. These problems were disparity in the sentences levied by different judges, excessive leniency on the part of many judges, and "dishonesty" in sentencing in that most criminals were released on parole before serving their full terms.[11] Although the new restrictions have undoubtedly addressed these problems, they have also given rise to problems of their own. The new guidelines are proving costly to develop and apply.[12] More importantly, they are themselves producing disparity in sen-

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Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 23 (1972). Also, it seems almost any criteria could be lawfully considered in sentencing. *See* United States v. Tucker, 404 U.S. 443, 446 (1972) (noting that sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he can consider, or the source from which it may come").

4 *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990).

5 28 U.S.C. § 991.

6 28 U.S.C. § 994(a).

7 Under the congressional directive, the maximum term in a sentencing range for a particular offense and particular offender characteristic under the guidelines was not to exceed the minimum term in that same range by more than 25% or 6 months, whichever was greater. 28 U.S.C. § 994(b)(2).

8 Judges retain discretion to depart from the guidelines only when there are circumstances not adequately considered by the Commission in promulgating the guidelines. 28 U.S.C. § 3553(b). To date, judges have made little use of this limited authority. *See* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 910-11 (1991) [hereafter *The Failure of Sentencing Guidelines*]; *see also* Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459 (1988).

9 18 U.S.C. § 3742.

10 *See* Nagel, *supra* note 4, at n.236.

11 *Id.* at 883.

12 *The Failure of Sentencing Guidelines*, *supra* note 8, at 906; *see* Charles J.

tencing due to inconsistencies and overbreadth.[13]

Congress's decision to impose greater restrictions on federal judges and parole commissioners, as well as the problems attendant to both the old and new sentencing regimes, can be represented in an economic model of agency costs.[14] Under such a model, Congress is represented as the principal who delegates authority to judges and parole commissioners as its agents to carry out its interests in criminal sentencing. Agency costs arise when a judge's or a parole commissioner's interests in sentencing differ from those of Congress, and the agent pursues its interest at the expense of the principal's interest.[15] While Congress could attempt to control these costs through a system of rules or guidelines that limit the delegation of authority, such rules themselves carry costs in administration and in failing to meet the principal's interest in each case due to over- or under-inclusion. Congress's objective in drafting a sentencing policy should be to minimize the costs of pursuing its interests in criminal sentencing.

In this essay, I present an agency cost analysis of the decision to place greater restrictions on federal judges and parole commissioners in sentencing and the attendant problems of this decision. In Part I, I present a brief discussion of the agency cost model, the various means of controlling agency costs (including the promulgation of rules by the principal), and the application of the agency cost model to Congress's control of judges. Among other things, I argue that the use of rules by the principal to control agency costs will be less effective with more complex tasks because the administrative and overbreadth costs of using a rule rise with the complexity of the task. In Part II, I apply the agency cost model to analyze the old discretionary sentencing regime, the problems that gave rise to the movement for sentencing reform, the new regime of the Sentencing Reform Act of 1984,

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Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1950 (1988).

13 *See The Failure of Sentencing Guidelines*, *supra* note 8, at 918-24.

14 The seminal article on the agency cost model is Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

15 Agency costs may be pecuniary in nature: for example, higher costs in administrative salaries, private precautions against crime, etc. They may also be nonpecuniary in nature: for example, higher "social costs" when the actual sentence does not completely fulfill the retributive desires of Congress.

and the problems under the new regime. I also explore the implications of my analysis for future sentencing policy. In particular, I argue that the continuing disparity in sentences under the sentencing guidelines, despite their cost and complexity, suggests that criminal sentencing is too complex a task for the rote application of general rules. Thus, although general rules and appellate review are needed to reduce disparity in sentencing among individual judges, an optimal sentencing policy probably involves more delegation of discretion to individual judges than is achieved under the current system.

I. The Agency Cost Model and Congressional Control of Judges

A. The Agency Cost Model

The agency cost model was originally developed by Michael C. Jensen and William H. Meckling.[16] Under this model, a principal employs an agent because it is too costly for the principal to undertake all of the decisions or tasks that are necessary to further the principal's interests. The principal simply has too many responsibilities for one person or has responsibilities that require special skills too expensive or time consuming for the principal to acquire. Accordingly, to further his or her interests in the cheapest possible way, the principal may seek to delegate some of his or her responsibilities to one or more agents,[17] usually through a system of contracts.[18]

However, delegation of the principal's responsibilities is not without costs. With the delegation of responsibilities to an agent comes the possibility that the agent's interests will diverge from the principal's interests. Assuming that the agent seeks to maximize his or her own utility, this divergence raises the possibility that the agent will sometimes act on his or her own interests to the detriment of the principal.[19] For example, rather than pursue the principal's interests, the agent may pursue his or her own lei-

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[16] Jensen & Meckling, *supra* note 14. For a more detailed summary of this model, from which my summary greatly benefited, see Linz Audain, *The Economics of Law Related Labor V: Judicial Careers, Judicial Selection, and an Agency Cost Model of the Judicial Function*, Am. U. L. Rev. (forthcoming 1992) (on file with author).

[17] Jensen & Meckling, *supra* note 14, at 308.

[18] *Id.* at 310.

[19] *Id.* at 308.

sure and shirk work or undertake decisions on behalf of the principal that actually benefit the agent.

The possibility of divergence in interests between the principal and the agent and the propensity of the agent to act in his or her own interests to the detriment of the principal leads to three forms of agency costs.[20] First, the principal incurs "monitoring costs" in the hope of controlling the agent's actions to conform them to the principal's interests.[21] These include costs incurred in selecting agents that are trustworthy or that have similar interests to those of the principal, compensating the agent, checking on the agent's performance, and promulgating operating directions that give the agent guidance as to the principal's objectives and facilitate monitoring. These expenditures decrease agency costs by identifying agents whose interests are the same as the principal's and by structuring the contractual relationship of the principal and agent so that it is in the agent's interest to pursue the interest of the principal.[22]

Second, the agent incurs "bonding costs" to ensure that he or she will not take actions against the interest of the principal or that, if the agent does, the principal will be compensated.[23] As the name implies, these costs include the costs to the agent of bonding with an outside party, or the principal, against the malfeasance of the agent.[24] Such expenditures decrease agency costs by structuring the contractual relationship of the agent and third parties, or the principal, so that it is in the interest of the agent to pursue the interests of the principal.

Finally, assuming declining marginal productivity in monitoring and bonding efforts, the loss resulting from the divergence of agent and principal interests cannot be efficiently reduced to zero. Even after undertaking all monitoring and bonding procedures for which the benefits of the procedure outweigh the costs, there will still be some room for the agent to pursue his or her own interests at the principal's expense. This third cost of the agency relationship is referred to as the "residual loss."[25]

The principal's objective in hiring agents and structuring the contractual relationship between him or herself and the agent is

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20 *Id.*

21 *Id.*

22 *See* Audain, *supra* note 16, at 25-26.

23 Jensen & Meckling, *supra* note 14, at 308.

24 *Id.* at 325.

25 *Id.* at 308.

to minimize the total costs of pursuing the principal's interests.[26] This minimization problem includes the costs of not delegating jobs to agents as well as the three types of agency costs.

B. Rules Versus Standards as a Means of Controlling Agency Costs

As an essential first step in minimizing agency costs, it would be expected that the principal would give the agent some directions to follow in pursuing the principal's interests. These directions might take the form of a standard that specifies the principal's ultimate objective and leaves it to the agent to determine how to apply the standard in each case. Examples of standards would be directives to "maximize profits," "defend me in this lawsuit," or "do justice." Alternatively, the principal might find it in his or her interest to give more detailed instructions as to what he or she desires the agent to do in a given situation by providing rules of conduct that establish categories for decisions and prescribe the desired response for each category.[27] Examples of such rules include directions that "inventory should never go below 1000 units," "settle for no less than $100,000," or "all armed robbers get 10 to 12 years in jail."

Rules have both advantages and disadvantages relative to standards for the purpose of controlling agency costs. The advantages of adopting a rule are that rules give clear guidance to agents who are inclined to do the principal's bidding, and make it easier for the principal to monitor and reprimand those agents who are not so inclined. In addition, it is often cheaper for the agent to apply a rule than a standard.[28] The disadvantages of adopting a rule are that rules are costlier for the principal to formulate and maintain,[29] and many rules lead to results inconsistent with the interests of the principal due to over- or under-inclusion.[30] Although on average a rule may serve the interests of

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26 *Id.*

27 My distinction between "rules" and "standards" is of course borrowed from a long literature on these concepts in legal theory. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987); Jason S. Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

28 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 513 (3d ed. 1986).

29 *Id.*

30 KELMAN, *supra* note 27, at 40.

the principal, due to the principal's inability to anticipate and specify every possible contingency, the application of a rule will sometimes result in an outcome that varies from the true interests of the principal which would otherwise be achieved by the agent with a properly applied standard. For example, an agent who loyally follows a rule to "never let inventory go below 1000 units" will miss opportunities for profit unanticipated or unspecified by the principal that an agent loyally following the standard "maximize profits" would not. Rules limit agency costs by limiting the delegation of responsibility from the principal to the agent and by promoting administrative simplicity, but because they limit the principal's delegation of responsibility, the principal suffers the costs of undertaking certain tasks him or herself and forgoes some of the benefits of agency.

Following the postulate of cost minimization, the principal will want to employ rules and standards to direct his or her agents so as to minimize the costs of pursuing the principal's interests. But when will it be less costly for the principal to use a rule and when will it be less costly for him or her to use a standard? One indicator of whether it is better to use a rule or a standard in supervising agents would be the complexity of the decision or task the agent is to undertake. Here, I define a decision or task as more complex when it involves a greater number of factors that must be taken into account to successfully execute the decision or task consistent with the interests of the principal. The more complex the decision or task, the more costly it is to promulgate, update, and apply a rule that anticipates all future scenarios and that adequately meets the principal's interests. Attempts to minimize these costs by applying a simple rule to a complex task will result in increased costs in the form of the rule's failure to adequately serve the interests of the principal in particular cases due to over- or under-inclusion. Moreover, as the complexity of the rule grows to meet the complexity of the task, the value of the rule in improving monitoring will decrease, because it will be more costly for the principal to check on the application of the rule in particular cases. Thus, as the complexity of the delegated task or decision increases, the advantages of rules relative to standards for the purpose of controlling agency costs decrease, and one would expect to see principals using relatively more delegation of authority and applying standards in their employment of agents.

C. Modeling Judges as Agents

Although the agency cost model was originally developed in reference to the business firm, it has obvious implications for the operation of other organizations. Jensen and Meckling themselves recognized the broader implications of their model, arguing that the problem of divergence between principal and agent interests that gives rise to agency costs exists "in all organizations and in all cooperative efforts" including "governmental authorities and bureaus."[31] Recently, the model has been applied to the judicial function. As with many applications of economic arguments to law, the first arguments in this regard were made by Richard Posner.[32] A more complete discussion of the application of the model to the problem has been made by Linz Audain.[33] My analysis in this subsection benefits from the work of both of these authors.

On a superficial level, the application of the agency cost model to the judicial function seems fairly straightforward. It is a fundamental tenet of our democratic government that the courts defer to the will of the elected legislature in statutory interpretation.[34] Similarly, the "intent of the framers" enjoys some preeminence in many theories of constitutional interpretation.[35] Accordingly, one might model Congress as the principal and judges as the agents and analyze the legislature's efforts to control the behavior of judges. However, there are several problems and limitations with this analysis that should be understood before applying the agency cost model to the Sentencing Reform Act and the problem of criminal sentencing.

First, in applying the model to the judicial function, the appropriate definitions of the principal and its interests are far from clear. Is the appropriate principal the enacting Congress, the ruling majority of the current Congress, or perhaps the political coa-

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[31] Jensen & Meckling, *supra* note 14, at 309.

[32] Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4 (1987).

[33] Audain, *supra* note 16, at 29.

[34] WILLIAM N. ESKRIDGE & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION, STATUTES, AND THE CREATION OF PUBLIC POLICY 569-71 (1988); Orrin G. Hatch, *Modern Marbury Myths*, 57 U. CIN. L. REV. 891, 893-94 (1989).

[35] *See, e.g.*, LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 537-39, 1155-56, 1308-10 (2d ed. 1988).

lition that succeeded in getting the judge appointed?[36] Although "strict constructionists" might argue in favor of the enacting legislature, these people may be long dead and the "directions" they left hopelessly vague or irrelevant.[37] The establishment of a "black's" and a "woman's" seat on the Supreme Court and the recent politicization of the appointment and confirmation process lends credence to the argument that the appointing coalition should be viewed as the principal. Moreover, Congress is itself the agent of the ultimate political principal, the electorate. Perhaps an application of the model to the judicial function should take account of the possible divergence of the interests of the elected representatives from their constituencies, and the disproportionate effect some members of the electorate have on the actions of their elected representitives. Finally, even if the appropriate principal can be identified, it may be impossible to define that principal's interest. Political coalitions coalesce on one bill or one judicial candidate for as many reasons as there are coalition members. The problem of discerning a collective purpose or legislative intent from such an amalgam of motivations is a classic conundrum in legislative and constitutional interpretation.[38]

Second, to protect federal judges in their role of sustaining individual constitutional rights against infringement by a simple majority, our Constitution protects judges from most of the means a principal might use to control an agent.[39] Federal judges are appointed for life subject only to the extraordinary measure of impeachment.[40] Moreover, their compensation cannot be reduced during their tenure.[41] There is thus little opportunity for the principal to use ex post rewards or punishments to conform judges' behavior to the principal's interests.[42] The primary

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36 Audain discusses even more possibilities. Audain, *supra* note 16, at 36-37. I, of course, recognize the executive's role in enacting legislation and appointing judges and would include it in the "legislative majority" that constitutes the principal. I refer to "Congress" or the "legislature" as enacting statutes or appointing judges only to facilitate exposition.

37 Posner, *supra* note 32, at 7-8.

38 ESKRIDGE & FRICKEY, *supra* note 34, at 84-86, 598-602; TRIBE, *supra* note 35, at 571.

39 Audain, *supra* note 16, at 33.

40 U.S. CONST. art. III, § 1.

41 *Id.*

42 Indeed the only ex post rewards or punishments available are impeachment, failure to give raises, and failure to give promotions to higher levels in the federal government.

means used to control the actions of judges as agents are the selection of individuals who the principal believes will pursue its interests of their own accord,[43] the doctrine of recusal to discourage judges from hearing a case in which they have an individual interest,[44] the promulgation of rules instead of standards to limit the delegation of authority from the principal, and the opportunity for appeal to other judges who are more inclined to act in the principal's interest.[45] However, due to the limited opportunities for ex post reward or punishment of judges based on performance, each of the methods of controlling judges to limit agency costs are, at their heart, based on the selection of individuals who are inclined to pursue the principal's interests. The doctrine of recusal, the promulgation of rules, and the opportunity for appeal would all mean little if at some point in the process there was not a judge who had the same interests as the principal or who was inclined to pursue the principal's interests, despite possibly differing personal interests, in order to make our system of legislation and adjudication work.

These limitations on the application of the agency cost model to the judicial function are somewhat attenuated in analyzing the Sentencing Reform Act and its attendant problems. The legislative coalition that passed the Act is far from dead and probably still rules the Congress and the Executive on the issue of criminal sentencing. As a result, there is no ambiguity between past and present legislative majorities in determining the relevant principal. Moreover, if we analyze the problem of whether the Sentencing Reform Act makes sense from the perspective of the enacting legislature furthering its interests, it seems logical to select the

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[43] The principal could hold this belief either because the individual has the same interests or because the individual possesses an interest in "serving the system" and acting in the principal's interest even though the individual has different interests.

[44] 28 U.S.C. § 455; United States v. Payne, 944 F.2d 1458 (9th Cir. 1991).

[45] The theory of appeal as a check on agency costs would also explain why appeals are generally taken to a *panel* of judges and why appointments of higher court judges are more heavily scrutinized. Appeal to a panel of judges rather than a single judge would decrease the chances that individual interests which diverge from the principal's would prevail in an appeal. Also, since appellate court judges are used as a check on the individual interests of lower court judges, it is particularly important for the principal to scrutinize them to ensure that they will act in accord with the interests of the principal.

legislative majority over the appointing coalition or the electorate as the relevant principal. Although distinguishing the interests of the appointing coalition or the electorate from those of the legislative majority may be important in analyzing some questions, for the purpose of my present analysis such a distinction would add only needless complications. Finally, it is precisely one of the limited means of controlling judicial agency costs, the use of rules over standards, that will be the primary focus of my application of the agency cost model to the Sentencing Reform Act. Thus, assuming that the enacting legislative coalition is the relevant principal and that some reasonable conclusions can be drawn about their collective interests or intent in passing the Sentencing Reform Act, it will be useful to analyze the Act and the resulting guidelines using the agency cost model.

II. Sentencing Reform as a Means of Controlling Agency Costs

A. An Agency Cost Interpretation of the Sentencing Reform Act of 1984

Prior to the Sentencing Reform Act, individual judges and the Parole Commission exercised great discretion in sentencing criminal defendants. Subject to broad statutory guidelines as to minimum and maximum sentences,[46] judges were free to determine both the appropriate theory of punishment for a particular defendant and the appropriate proportion of punishment according to the selected theory. These decisions were subject only to limited review.[47] Parole commissioners also commonly exercised discretion to release prisoners prior to the service of their entire sentence. A prisoner was released when the Commission determined that the interests of society would be better served because either the purposes of punishment had been accomplished or the space in the prison was needed to imprison individuals representing a more immediate threat to the public welfare.[48]

This sentencing regime finds ready representation in the agency cost model. Under this regime, Congress, as the principal, delegated almost the entire responsibility for federal sentencing to the agent judges and parole boards. As previously discussed, there was no effective ex post control exercised by the

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[46] *See supra* note 2.

[47] *See supra* note 3.

[48] Nagel, *supra* note 4, at 883.

principal over the judges. Similarly, the only ex post control exercised over parole commissioners was the threat not to reappoint them.[49] Instead, the principal relied on the selection of agents it thought would pursue its interests as the primary means of controlling agency costs, supplementing this with implicit standards to "do justice" and loose rules on minimum and maximum sentences for particular offenses. The sentencing decisions of individual judges were not even subjected to regular review by other agents as a check on the deviation of an individual agent from the interest of the principal.

Not surprisingly, with so little guidance and control exercised by the principal, an agency cost problem arose. Also not surprising were the forms this problem took. First, empirical studies showed disparity in sentences in that similarly situated defendants often received and served very different sentences.[50] Moreover, this disparity was thought to be correlated with the race, sex, and social class of the defendants.[51] Even with the principal's best efforts to choose judges that would pursue its interests, some variation among judges as to what constitutes an appropriate sentence inevitably resulted.[52] With so little guidance, even judges who wanted to serve the principal would have trouble discerning its interests, and, with so little control exercised by the principal, one would expect that some agents would consciously pursue

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[49] Parole commissioners were appointed by the President with the advice and consent of the Senate to six-year terms and were eligible to be reappointed for 1 additional six-year term. 18 U.S.C. § 4202, *repealed by* Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 2027 (1984) (prospectively repealing statute in 1992). The usefulness of this additional means of ex post control over parole commissioners would be fairly limited, at least for the purposes of increasing sentences, since it is the judge who sets the initial sentence and, thus, the maximum time served.

[50] *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); Kevin Clancy, et al., *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentencing Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524 (1981); Whitney N. Seymour, Jr., *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163 (1973).

[51] Nagel, *supra* note 4, at 883-84.

[52] This seems particularly true if there were multiple characteristics upon which judges were chosen and a limited number of potential candidates with the various characteristics. For example, if the principal wanted judges who were intelligent as well as slavishly dedicated to the interests of the principal, the principal may have found a highly intelligent judge desirable even though his or her beliefs about criminal punishment were not identical to those of the principal.

their own interests at the expense of the principal.[53]

Second, it was thought that judges often showed defendants excessive leniency in sentencing. Opinion polls consistently showed that the sentences actually meted out by judges were lower than those the public thought were appropriate.[54] When the agent serves for a life term, the selection of agents the principal believes will serve its interests is a means of controlling agency costs that adjusts very slowly to changes in the principal's interests.[55] With the relatively rapid change in the principal's attitude towards the punishment of criminals that has occurred in the last twenty to thirty years,[56] it seems plausible that the agents' attitudes would lag behind.[57]

Finally, the fact that most criminals were paroled before serving

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[53] Disparity in sentencing can result in a social cost to the principal if the principal has as one of its objectives a more egalitarian distribution of resources in society, because disparity may exacerbate the inequality in the distribution. *See* Isaac Ehrlich, *The Optimum Enforcement of Laws and the Concept of Justice: A Positive Analysis*, 2 INT'L REV. LAW & ECON. 3, 5 (1982). Such disparity in sentencing can also result in a social cost to the principal if one of the principal's objectives is to punish each criminal some "just" amount, perhaps for retributive purposes. *Id.* at 19. Finally, disparity in sentencing may pose a cost to the principal in terms of lost efficiency if the disparity is based on some factor such as race or sex because enforcement resources are then not spent according to their largest marginal benefit in achieving reductions in crime. *Id.* at 9.

[54] Nagel, *supra* note 4, at 884. Leniency in sentencing would impose costs on society, and thus on the principal, in the form of inefficient private expenditures to avoid crime. Also, leniency may impose social costs on the principal in that criminals are not punished to the extent the principal would prefer.

[55] This is so unless, of course, one were willing to use only very old judges. However, the principal undoubtedly receives some benefits in using at least some young judges. For example, the principal saves search and replacement costs and provides a larger pool of potential judges who have interests similar to those of the principal. Suppose one adopts a more sophisticated model of the principal and takes into account that there are various groups with differing interests that vie for control of the legislative majority. In this model, the youth of a judicial appointee can become a major asset to the current majority by ensuring that their interests will be maintained on the judiciary even if they lose the next election. Such a premium on youth has been evident in the conservative judicial appointments of the Reagan and Bush administrations.

[56] Nagel, *supra* note 4, at 895-96 n.75.

[57] It is a fair question to ask why the agents' attitudes did not change along with the principal's. The answer may lie in the argument that, to preserve their interests in the judiciary against possible changes in the

the entire sentence levied by the judge was viewed as "dishonest" in that the public and victim were misled by the judge's sentence as to the actual sanction the criminal would receive.[58] Although I doubt any actual intent to deceive was involved, it is true that this system made it more costly for the public and the principal to monitor the actual sentences served by particular criminals. Rather than being able to rely on the public pronouncement of the judge, the public and the principal would have to follow each successive review of the criminal's case by the parole board.

To respond to these problems, Congress enacted the Sentencing Reform Act of 1984.[59] Pursuant to the Act, the Sentencing Commission prescribed sentencing guidelines for all federal cases based upon the offense and the criminal history of the defendant.[60] Congress had previously established certain principles for the promulgation of these guidelines[61] and provided a 180 day "report and wait" period before they became effective, during which time Congress could countermand undesirable guidelines.[62] Judges retain only limited discretion to vary particular sentences under the guidelines,[63] and, at least to date, have exercised limited discretion in departing from the guidelines.[64] Any deviation from the guidelines is subject to appeal.[65] Finally, there is no parole under the Sentencing Reform Act.[66]

These reforms seem well designed to address the agency cost problems that arose under the old sentencing regime. To address the problems of disparity and leniency in sentencing, the Act prescribed the promulgation of a comprehensive set of sen-

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legislative majority, current members of the legislative majority select judges whose attitudes are resistant to change. *See supra* note 55.

58 Nagel, *supra* note 4, at 884.

59 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1873, 1987 (codified at 18 U.S.C. §§ 3551-3673, 28 U.S.C. §§ 991-98 (1988)).

60 UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 1B1.1 (Nov. 1991) [hereafter U.S.S.G.].

61 28 U.S.C. § 994.

62 *Id.* § 994(p); United States v. Litteral, 910 F.2d 547, 551-52 (9th Cir. 1990).

63 *See supra* note 7.

64 The law allows judges to vary sentences in cases presenting circumstances not adequately accounted for in the guidelines. 18 U.S.C. § 3553(b). However, to date judges have shown little propensity to exercise this discretion. *See supra* note 8.

65 *See supra* note 9 and accompanying text.

66 *See supra* note 10 and accompanying text.

tencing guidelines by the newly-created United States Sentencing Commission, subject to direction and disapproval by Congress. In this way, the principal offered more guidance and asserted more control over its agents by prescribing a narrowly circumscribed set of rules for them to follow in sentencing criminals.[67] This system of comprehensive rules would both decrease individual judge's variation from the principal's interest, as represented in the sentencing guidelines, and allow for a general increase in prescribed punishments. The Sentencing Reform Act also made any deviations from the prescribed guidelines appealable by either party. This would also limit deviation from the principal's interest because other agents who held more closely to the principal's interests would be able to overturn errant decisions. Finally, the Sentencing Reform Act did away with the federal system of parole. By ending the parole system and by centralizing control over federal sentencing in the Sentencing Commission, the principal greatly simplified its problem of monitoring the furtherance of its interests in criminal sentencing.

However, the new sentencing regime has created its own problems, problems that also are cognizable within the context of the agency cost model. First, critics have argued that the guidelines have been costly to develop.[68] The annual budget of the United States Sentencing Commission is currently about $10,000,000.[69] The prescription and maintenance of a set of rules which anticipate the various cases that will confront the agent generally involves some cost to the principal.[70] These costs

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[67] Although the principal used yet another agent, the Sentencing Commission, to promulgate these rules, this agent was subject to much tighter direction by the principal. The restrictions on the agent existed in the form of statutory directives regarding the substance of the guidelines and the possibility of a legislative veto. As the Sentencing Commission was also newly-appointed, its interests would coincide closely with those of the principal, and the Commissioners were subject to the ex post discipline of not being reappointed for failure to act in the interests of the principal. When applied to the Sentencing Commission, this form of discipline does not suffer from the same infirmity as it did when applied to the parole commissioners, because the Commission establishes the guidelines upon which the judges' initial sentences are based. *See supra* note 49 and accompanying text.

[68] *See The Failure of Sentencing Guidelines*, *supra* note 8, at 906.

[69] OFFICE OF MANAGEMENT AND BUDGET: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1992 pt. 4, at 195 (1991).

[70] Posner, *supra* note 32, at 7-8.

logically would be substantial for a problem as complex as assigning sentences for all future federal crimes.

Second, the sentencing guidelines are proving more time consuming and therefore costly to apply than the previous, less structured system.[71] In a study by the Federal Courts Study Committee, ninety percent of the judges responding to the survey said that the guidelines have made sentencing procedures more, not less, time consuming.[72] This is somewhat surprising since it is generally believed that rules are administratively cheaper to apply than standards.[73] However, where a decision is very complex, the rule that is necessary to describe the desired result may be much more difficult to apply accurately than a standard aimed at the same result.[74] Thus, it is the complexity of the problem of criminal sentencing and the corresponding complexity of the guidelines that produces this result.[75]

Finally, despite their complexity, the guidelines create some serious sentencing disparities. Over-broad categorization and the failure of the guidelines to take account of all relevant factors have led to anomalous results.[76] Indeed, the disparity in sentenc-

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71 *The Failure of Sentencing Guidelines, supra* note 8, at 906; Ogletree, *supra* note 12, at 1950.

72 FEDERAL COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 137 (Apr. 2, 1990).

73 POSNER, *supra* note 28, at 513.

74 Take for example the problem of driving for a lay-up—a feat of incredible complexity when you stop to think about all the decisions that must be made as to where to place your feet and hands and what force to apply. If you give a person a map and the solution to the differential equations necessary to put the ball in the basket, it would probably take even a skilled mathematician several hours to complete the task. But, if you tell the average Indiana teen to "drive for two," the ball will be in the basket in a matter of seconds.

This limitation of rules could be greatly alleviated through the use of computers to apply the rule. However, I doubt society is ready for the delegation of significant duties in criminal sentencing or other legal decisions to computers. In any case, the pros and cons of such a use of computers is probably an ample subject for a symposium of its own.

75 Consistent with this explanation, one judge explains the increase in judges' time required by the guidelines, saying that they "require time-consuming calculations on issues tangential to the case, [and] . . . create a host of litigable uncertainties for appeal, as well as a number of other undesirable side effects . . . ." United States v. Reich, 661 F. Supp. 371, 374 (S.D.N.Y. 1987).

76 *See The Failure of Sentencing Guidelines, supra* note 8, at 918-24. For

ing under the guidelines has led some judges to rebel against their application.[77] The application of rules always produces costs in the form of over- and under-inclusiveness.[78] In using a simplified rule to control an agent's behavior, the principal must accept that the rule cannot adequately anticipate and prescribe the principal's interests in every case.[79]

The simple fact that the new sentencing regime also incurs agency costs does not itself condemn that regime. I hope my previous discussion of the agency cost model has made it clear that a sentencing system without some delegation of responsibility from Congress to judges would be impractically costly and that any other system of sentencing inevitably involves some agency costs. The issue for the principal is which system minimizes costs. Did the old sentencing regime of implicit standards and judicial dis-

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example, because under the guidelines sentences in drug cases depend on the weight of the drug, including the medium in which it is contained, a drug dealer who sells LSD in sugar cubes will be subject to much higher penalties than a dealer who sells the same amount of LSD in blotter paper. *Id.* at 918-19 (discussing Chapman v. United States, 111 S. Ct. 1919 (1991)); *see also* Albert W. Alschuler, *Sugar Cubes, Blotting Paper and the Courts*, 141 NEW L.J. 785 (1991); Debra Young, *Rethinking the Commision's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENTENCING REP., 63 (1990). Similarly, the guidelines can lead to anomalous results in which derivative criminals are punished more severely than the perpetrator of the original crime. Professor Alschuler outlines examples in which a jewelry dealer who knowingly accepts $15,000 in embezzled money is punished, as a money launderer, six times more severely than the original convicted embezzler, and a blackmailer who extorts half of the $15,000 from the embezzler is punished twice as severely as the embezzler. *The Failure of Sentencing Guidelines*, *supra* note 8, at 923. Such disparities cause social costs and efficiency losses in the same ways as disparities under the old sentencing regime. *See supra* note 50 and accompanying text.

77 *See The Failure of Sentencing Guidelines*, *supra* note 8, at 924-25. The inflexibility of the guidelines led to the decision by Judge Lawrence Irving—a Reagan appointee—to resign from the bench. *Id.* at 925; *U.S. Judge Quits Over Sentencing Rules*, CHI. TRIB., Oct. 1, 1990, § 1A, at 6.

78 *See supra* text accompanying note 30.

79 There is an additional cost of the provisions of the Sentencing Reform Act that has not yet been discussed in the literature. With the end of the parole system, criminals who are originally sentenced too long to serve the interests of the principal have no possibility of early release. Even if the judge initially makes a correct sentencing decision, it is plausible that in at least some cases there will be changed circumstances, suggesting that the principal's interests would be served by the prisoner's early release. Under the Sentencing Reform Act, no such later adjustment of a person's sentence is possible.

cretion minimize agency costs despite its serious problems of disparity, leniency, and "dishonesty"? Does the new system of rules minimize agency costs despite its costly administration and over- and under-inclusiveness? Or is there some third alternative that would better serve the principal's interests and minimize agency costs?

B. Implications for Future Sentencing Policy: Recalling the Virtues of Delegating Complex Decisions

There is no scientific method for determining which sentencing system the legislature should adopt to minimize agency costs. Although some of the costs of various systems are readily measurable, such as the cost of operating the United States Sentencing Commission, others are not subject to precise measurement, such as the costs of divergence from the principal's interests under either the old or new sentencing regimes.[80] The best that can be hoped for is a careful comparison of the measurable monetary costs and probable disparity under the various possible systems and persuasive normative arguments as to which best suits the principal's needs. I would argue, however, that the above discussion suggests some means of improving the current sentencing regime and further reducing agency costs.

The sentencing of criminals according to the interests of the principal is a very complex task. The principal's interests in criminal punishment are varied and may range from rehabilitation to retribution. No single theory of punishment is right in every case,[81] and the appropriate type and proportion of punishment

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[80] For one thing, the legislature's collective interest in criminal punishment is not subject to precise definition. Even under simple harm-based theories of criminal punishment, the precise measurement of the total harm from many criminal acts would be impossible. *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). As a result, it is impossible to precisely measure the extent to which criminal sentencing under a particular sentencing regime varies from the collective interest. Moreover, even if such measurement were possible, there exists no scientific way to convert the social costs from such variation into a dollar amount comparable to those of the other agency costs.

[81] This point is illustrated by the Sentencing Commission's inability to adopt a single theory of punishment despite congressional directives that they express some theory. Although the sentencing guidelines are largely harm based, it should be noted that they do take account of such individual characteristics as criminal history and remorse. 28 U.S.C. § 994(d). I have argued elsewhere that simple harm-based theories of punishment are inadequate for the purposes of criminal law. *See* Kenneth G. Dau-Schmidt,

under a given theory can vary with the circumstances of the case and the individual characteristics of the defendant.

As previously discussed, complexity in a task is an indicator of the need for delegation of authority and the application of standards. This is not to argue for a return to the pre-Sentencing Reform Act system of discretionary sentencing. Under that system, there was so little direction from the principal that even judges who wanted to act in the principal's interests had almost no guidance as to how to do so. In this regard, the Sentencing Reform Act provided needed reforms by providing guidance for judges' sentencing decisions and making those decisions subject to appeal. However, the costs of administering the sentencing guidelines and the serious disparities that have arisen in the application of those guidelines due to over- and under-inclusion suggest that criminal sentencing is too complex a problem for the rote application of a comprehensive system of rules. The minimization of agency costs would seem to require some delegation of authority to judges beyond what is presently allowed under the new sentencing regime.

Professor Alschuler has made a proposal which seems worthy of serious consideration.[82] He argues on behalf of a "precedential system" in which the sentencing guidelines would be binding on judges, but only in the way that precedent is binding. A judge could depart from the guidelines in a case that was reasonably distinguishable from the "normal case," subject to appellate review.[83] Moreover, Professor Alschuler would have the Commission promulgate a mixed system of rules and standards, using rules to resolve the recurring paradigmatic cases and standards to resolve policy issues, which would help judges decide cases with less typical fact situations.[84] Professor Alschuler's proposal

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An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 DUKE L.J. 1; Kenneth G. Dau-Schmidt, *Sentencing Antitrust Offenders: Reconciling Economic Theory with Legal Theory*, 9 WM. MITCHELL L. REV. 75 (1983).

[82] *See The Failure of Sentencing Guidelines*, *supra* note 8, at 934-49. Indeed, my heavy reliance on Professor Alschuler's work throughout this essay can be explained by the fact that the arguments the Professor uses to support his proposal bear a striking resemblance to the arguments generated by the agency cost model. Professor Ogletree also argues for the delegation of more authority under the sentencing guidelines. *See* Ogletree, *supra* note 12, at 1956-58.

[83] *See The Failure of Sentencing Guidelines*, *supra* note 8, at 939, 945-47.

[84] *Id.* at 939-41.

would seem to retain the primary benefits of the current guidelines in providing guidance and appellate review while allowing enough delegation and flexibility to avoid the most serious cases of disparity that occur under the present system. Administratively, Alschuler's system would be no more costly than the precedential system we use to resolve most other legal issues. It may even be cheaper than the sentencing system under the Sentencing Reform Act because judges' decisions distinguishing individual cases could be used by higher courts or the Commission to improve the guidelines. Accordingly, it seems quite plausible that Professor Alschuler's proposal would be superior to the current system or the prior discretionary system for the purpose of minimizing agency costs.

CONCLUSION

Under an agency cost analysis, the challenge of sentencing reform for Congress is to devise a sentencing system that minimizes agency costs in the form of administrative costs and sentencing outcomes that deviate from the interests of Congress. In devising such a system, Congress can employ either rules or standards to direct judges in their sentencing decisions, and can provide for appellate review as a check on the deviation of individual judges from the interests of Congress. In the choice between rules and standards, rules have the advantage of limiting judges' abilities to pursue individual interests by giving clear directives and making monitoring easier. Such rules were the logical response to the problems experienced under the old discretionary sentencing regime: disparity and excessive leniency. However, rules also have disadvantages in that they are costly to promulgate and maintain and result in outcomes that will differ from the interests of Congress due to over- and under-inclusion. Such disadvantages would be especially acute in the application of rules to a complex problem such as criminal sentencing, and many of the complaints about the Sentencing Reform Act can be traced to these disadvantages. As a result, the optimal sentencing policy to minimize agency costs may be one that retains the guidance and appellate review of the new sentencing regime, but employs more standards and allows for greater delegation of authority to judges to minimize administrative costs and the costs of over- and under-inclusion.