Statement of Judge Jon O. Newman
before a hearing of the
United States Sentencing Commission
New York, NY, July 9, 2009

My name is Jon O. Newman. I am a senior judge on the United States Court of Appeals for the Second Circuit, where I have served for thirty years. Previously I served as a United States District Judge for seven and one-half years and as the United States Attorney for five years in the District of Connecticut. The only other biographical item worth mentioning is that I was one of only a handful of federal judges who supported the idea that became the Sentencing Reform Act of 1984, see, e.g., Jon O. Newman, "A Better Way to Sentence Criminals," 63 A.B.A. Journal 1563 (1977), and urged the adoption of a system of federal sentencing guidelines, see, e.g., "Federal Sentencing Guidelines: A Risk Worth Taking," The Brookings Review, Vol. 5, No. 3, at 29 (Summer 1987). I appreciate the opportunity to present my views to the Sentencing Commission.

Although there are many revisions that ought to be made to the federal Sentencing Guidelines, my principal point today is that the time has come to step back from minute tinkering with the Guidelines and consider fundamental reform.

Some will be tempted to think that United States v. Booker, 543 U.S. 220 (2005), and the advent of an advisory guideline regime have eliminated the need for fundamental Guidelines reform. That view is incorrect. Booker and 28 U.S.C. § 3553(a)(4) require every federal sentencing judge to start the process of selecting a

sentence by making a Guidelines calculation. Only after making that calculation may the judge exercise discretion to impose a non-Guidelines sentence. As a result, the Guidelines continue to exert a major influence on all federal sentences. For all judges, they are at least the beginning of the sentencing process. For some, they are the end of the process.

So the need for thoughtful consideration of Guidelines reform remains. Several types of reform have been proposed. Some want the Guidelines to prescribe less severe punishments. Others recommend greater consideration of individual characteristics of the offender. Some focus primarily on discrete issues like the extraordinary aspect of the Guidelines whereby uncharged, so-called "relevant" conduct is punished at precisely the same level of severity as conduct for which the offender has been convicted. Rather than speak about specific matters warranting revision, my focus today is on one fundamental flaw in the guidelines and one fundamental reform to alleviate that flaw.

Let me summarize my position at the outset. The Guidelines are too complicated. They became too complicated as a result of a fundamental mistake made by the original Sentencing Commission. That mistake can be corrected to a substantial degree within the existing statutory framework. All that is needed is a willingness on the part of the Commission to recognize its original error, reject the premise on which the error rested, and reconstruct the Guidelines with that error discarded.

It should not be necessary to spend much time arguing that the

Guidelines are too complicated. Simply lifting up the current 534-page version of the Guidelines Manual (not counting the appendix and index) should be sufficient. No other guidelines system is so complicated. Many states have implemented guidelines of far greater brevity and simplicity. I know the argument has been made that the federal Guidelines have to be complicated because of the broad range and complexity of the federal offenses to which the Guidelines apply. That argument is false. It is easily refuted by pointing out that the original federal parole guidelines, applicable to all prisoners sentenced for all federal offenses, were set forth in a document filling just one page of the Federal Supplement. See Battle v. Norton, 365 F. Supp. 925, 934 (Appx. A) (D. Conn. 1973). There were six categories of offense severity and four categories of criminal history. There was departure authority. Parole hearing officers and the former parole commission applied those simple guidelines to thousands of parole release decisions. In a word, they worked. Indeed, there is a wonderful irony arising from how simple those parole guidelines were. Because the principal relevant facts bearing on parole release were almost all known prior to the start of the sentence, that is, the determination of the severity of both offense and criminal history category, it soon became apparent that prisoner behavior was almost entirely eliminated from the release decision. That decision was no longer based, as had previously been claimed, on the prisoner's progress toward rehabilitation. Thus, the need for a parole decision-making process had been substantially

eliminated. The candor of the Parole Board in identifying what it was doing led directly to calls for its elimination, and the calls were heeded. The Board effectively put itself out of business.

However, it left behind a valuable lesson, one that the first Sentencing Commission failed to heed. That lesson is that guidelines need not be complicated. Why then did the first Sentencing Commission abandon a simplified approach in favor of the original 105-page manual, ultimately followed by 725 amendments as of November 1, 2008.

The answer arises from a fundamental premise on which the original Guidelines were based, a premise that still underlies the current version. That premise is what I have called the principle of "incremental immorality," see United States v. Dallas, 229 F.3d 105, 107 (2d Cir. 2000), or more accurately, "precise incremental immorality." It means that for every discrete aspect of criminal conduct, there must be a discrete measure of extra punishment. It is a premise unknown to the world of penology before it emerged as the foundation of the original Sentencing Guidelines. And since 1987, no other guideline system in the world has followed it.

Let me be clear. I fully recognize, as do all sentencing regimes, that seriousness of the offense should be considered a basis for increasing a sentence. Murder is properly punished more severely than theft. And within the offense of theft, stealing one million dollars is properly punished more severely than stealing one hundred dollars. The issue is not whether seriousness of the offense should increase severity of the sentence. The issue is

whether every minute increment of offense conduct must result in a minute increment of punishment. The original Commission was persuaded that the answer to that issue is "yes."

Examples abound throughout the Guidelines. The original monetary loss table contained 14 categories of loss amounts. See U.S.S.G. § 2B1.1 (1987). The current Guidelines provide a loss table with 16 categories of loss amounts for theft and fraud offenses, see U.S.S.G. § 2B1.1(b)(1) (2008), and 16 categories of loss amounts for income tax evasion, see id. § 2T4.1. A guideline range for stealing $6,000 is 2 levels higher than the range for stealing $4,000. The distinction makes very little sense. As I have said on other occasions, no criminal wakes up in the morning and decides that he is going to steal $4,000 dollars but not $6,000 dollars. He might make a conscious decision to rob a convenience store rather than a bank, but once inside the convenience store, he opens the till and takes what is there. The fortuity of whether the till contains $4,000 or $6,000 dollars should not result in added punishment.

Similarly with narcotics quantities. The original guidelines established a drug quantity table with 16 categories. See U.S.S.G. § 2D1.1 (1987) (drug quantity table). The current Guidelines provide 17 categories of drug quantities. See U.S.S.G. 2d1.1(c) (2008). Of course, the trafficker in kilogram quantities should be punished more severely than the trafficker in gram quantities. But the minute gradations of the Guidelines carry this point to extreme lengths. Indeed, when sentencing for narcotics offenses, role in

the offense should be the major determinate of sentence severity, with quantity of lesser significance. The drug kingpin should be sentenced far more severely than the mule. But the Guidelines today add only slight adjustments for role in the offense, see id. §§ 3B1.1, 3B1.2, yet call for more punishment for the mule who carries 700 grams of heroin than for the mule who carries 400 grams, see id. § 2D1.1(c)(5), (6).

The excessive segmentation of these monetary loss tables has three unfortunate effects. First, it requires sentencing judges to do detailed fact-finding, far beyond what is needed to select an appropriate sentence. This consequence is particularly pronounced with tax offenses. In a criminal tax case, the amount of the tax loss must be determined with considerable precision. That can be a difficult and time-consuming task. To cite one example, a sentencing judge was obliged to make a detailed analysis of a tax loss in order to calculate a loss of $1,525,513.87, an amount that our Court ultimately determined, in an opinion spanning sixteen pages, was slightly incorrect and required revision. See United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998). Such precise calculation, in order to determine the applicable level of the tax loss table, is a needlessly burdensome tax. Indeed, it is a task required only by the Guidelines, since the civil tax collection case is normally settled.

The second unfortunate consequence of a detailed monetary loss table is more serious. Such a table permits investigating agents to determine the amount of punishment. The postal inspector or the

SEC enforcement officer can either terminate an investigation as soon as criminality has been established, or, if his time and inclination permit, continue the investigation until a large amount of fraud has been committed or at least discovered. In such cases, punishment geared to the loss table bears little relationship to the criminality of the offender. And, as with monetary losses, the precise gradations of the drug quantity table result in the amount of punishment being largely determined by the length of time the undercover drug enforcement officer continues to purchase from an offender, rather than by the intrinsic wrongfulness of the offender's conduct.

The third unfortunate consequence of these detailed tables is that they create an illusion of precision that is divorced from reality. When the loss for one stock fraud defendant is calculated to be $370,000 and that of another to be $420,000, these numbers create the appearance that the losses caused by each defendant have been accurately determined so that precisely appropriate, different punishments may be imposed. But in reality there are so many variables in determining losses and so many problems in gathering evidence that the loss figures used for determining punishment in many cases will at best only approximate the true (and often unknowable) loss amounts.

Why do the guidelines specify such detailed monetary loss and drug quantity tables? The first reason is the one I have already identified: the theory that every increment of offense conduct, no matter how slight, must result in a corresponding increment of

punishment. But there is a second reason, arising not from the field of penology but from the field of statistics. Those versed in statistics persuaded the original Commission of the related twin evils of discontinuity and cliffs. See, e.g., Donald L. Thistlethwaite and Donald T. Campbell, "Regression-Discontinuity Analysis: An Alternative to the Ex-Post Facto Experiment," Journal of Educational Psychology 51, 309–317 (December 1960). Consider a simplified loss table with only four categories of loss amounts: small losses of under $10,000, moderate losses from $10,00 to under $100,000, large losses from $100,00 to under $1,000,000, and very large losses above $1,000,000. If, as probably would occur, the sentencing ranges for crimes involving these amounts would not be adjacent, the resulting distribution of sentences would not be continuous, i.e., there might be a gap between the top of one range and the bottom of the next higher range. Statisticians prefer continuous distributions. In the current loss table with its 16 categories of loss amounts for theft, see id. § 2B1.1(b)(1), as the amount of loss increases, the amount of punishment smoothly increases. It is a statistician's dream, but it is a sentencing judge's nightmare, because the judge then has to calculate the precise amount of loss in every case, a task often difficult in many cases, and especially difficult for complicated offenses like tax and securities fraud. My concern, however, is not simply to ease the task of judges, although that would not be a useless objective. My concern is that it makes no penological sense to insist that nearly every extra dollar of loss should result in some

extra punishment.

Related to the argument about discontinuity is the argument about cliffs. A former member of the Sentencing Commission once explained to me that the defect of a simplified loss table becomes apparent when one considers two robbers, one who stole $999,999 and the other who stole $1,000,001. If the top of the sentencing range for losses under $1,000,000 was eight years, and the bottom of the range for losses of more than $1,000,000, was 10 years, the second robber in the example would receive two added years of punishment for stealing two more dollars. Or, as the statisticians would say, the first robber, by stealing two dollars less, has fallen over a statistical cliff that resulted in a much lower sentence, instead of stumbling down to only a slightly lower sentence.

I thought then and still do that such a rare anomaly was a totally insufficient reason for making the guidelines so complicated. Even before Booker, a judge could ameliorate odd fact patterns with departures. Under an advisory guidelines regime, the issue is totally eliminated.

The Guidelines' application of the principle of precise incremental immorality is not confined to highly segmented monetary loss and drug quantity tables. Refined distinctions permeate the Guidelines. Precise additional offense levels are prescribed for a bodily injury, a serious bodily injury, and an injury in between these two categories. See id. § 2A2.2(3)(A), (B), (D). A simpler system would just allow the judge to consider the seriousness of the injury within a range of offense levels. Offense levels are

finely calibrated on the downside of severity as well. If an offender's role in an offense is found to be "minor," the guidelines prescribe a two-level reduction, but if the role is deemed "minimal," the reduction is four levels. See id. § eB1.2(a), (b). Apparently no one thought to consider when the Guidelines were formulated whether it made sense to require judges to make precise distinctions between a "minor" and a "minimal" role. The evil of discontinuity needed to be avoided no matter what.

The proliferation of minute adjustments required by the Guidelines for myriad forms of distinctions among types of offense conduct resulted in an unfortunate consequence beyond complexity. By prescribing a series of upward adjustments for each aspect of what was essentially one type of offense conduct, the Guidelines enabled prosecutors to control sentences, and generally move them upwards, by identifying numerous facts of a case to which the Guidelines assigned discrete offense level increments. Thus, to take one example from a case that I heard, a defendant whose offense was viewing child pornography on his home computer was assigned 15 added levels for five adjustments. See United States v. Sofsky, 287 F.3d 122, 124 n.1 (2d Cir. 2002). However severely one thinks a viewer of child pornography should be sentenced, I suggest it makes no sense to sentence one such viewer to two years for the basic offense of viewing child pornography and then aggregate five adjustments for another viewer like Sofsky so that his sentence becomes ten years. Indeed, the aggregation of adjustments for such factors as trading images, see U.S.S.G. § 2G2.2(b)(3)(A) (2003),

and transmitting them by computer, see id. § 2G2.2(b)(6), raised Sofsky's minimum guideline range of punishment for viewing to a level 51 months higher than the then-minimum range for producing child pornography, see id. § 2G2.1(a). The proliferation of discrete adjustments also has the effect of significantly increasing the punishment resulting from any one adjustment when several are aggregated. Because of the aggregation of discrete adjustments in Sofsky's case, the two-level adjustment for using a computer added two years to his minimum sentence range, whereas that same adjustment alone would have added only six months to that range.

In its original research, the Commission apparently identified many factors, each of which seemed to result, before the Guidelines, in a somewhat higher sentence where present. The Commission then mechanically assigned offense level increments to each such factor, apparently in total unawareness that aggregating these adjustments would lead to vastly increased sentences unlike any that had existed prior to the Guidelines.

What should now be done? First, the Commission should reexamine and discard its basic premise that for every discrete increment of criminal conduct there must be a discrete increment of punishment. Then, after considering the far less complicated guideline systems in the states that have adopted sentencing guidelines, it should start all over and fashion a simplified guideline system. Such a system would abandon the current 43 levels of sentencing ranges in favor of a sentencing table with far

fewer ranges. A reformed system would also abandon the multi-layered monetary loss and drug quantity tables in favor of tables with just a few gradations. A reformed system would list several factors, such as role in the offense and type of injury, that generally justify a higher or lower than normal sentence and specify broad ranges in which judges would make adjustments. In sum, the entire manual should be reexamined with a view to making it truly a simplified system that provides guidance for imposing punishments, instead of requiring precise calculations and precise determinations of numerous factors that no other sentencing system in the world requires a sentencing judge to undertake.

One of the ironies of the initial Guidelines manual, still carried forward almost verbatim in the current manual, is the Commission's disavowal of excessive complexity, set forth in the Introduction as follows:

> A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes, in the company of a few (or many) other robbers, for the first (or fourth) time.
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> The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system.

U.S.S.G. Part A(3)(1987); see id. Part A(1)(3)(2008).

Regrettably, the first Commission and all of those that followed failed to heed this very good advice. In fact, the current Guidelines require adjustments for nearly all the factors listed in the Commission's own example of undue complexity: whether the robber had a gun, id. § 1B1.1(b)((13); whether the gun was brandished, id. § 2B3.1(b)(2)(C); whether a threat of death was made, id. § 2B3.1(b)(2)(F), whether injury was serious, id. § 2B3.1)b)(3)(B), whether anyone was physically restrained, id. § 2B3.1(b)(4)(B), whether the robber was a supervisor of five or more participants, id. § 3B1.1(b), and whether the crime was the robber's first or fourth offense, id. § 4A1.1, and at least consideration of whether the robber depends on criminal activity for a livelihood, id. § 5H1.9. I take little comfort from the Commission's decision not to require an adjustment for the time of day when the robbery was committed.

I recognize the argument some have made that any attempt to simplify the Guidelines by broadening the ranges in which a sentencing judge may assign values to various forms of offense conduct and eliminating or combining some categories of adjustments risks conflict with the requirement of the Sentencing Reform Act of 1984 that the top of a sentencing range must be no more than 25 percent greater than the bottom of the range. See 28 U.S.C. § 994(b)(2). I believe that statutory limitation should be applied, as it states, only to the maximum and minimum of the "range" of a "term of imprisonment," and should not be extended to

limit the intermediate decisions of a sentencing judge in determining the ultimate offense level. This position is well set forth in the brief prepared by Catharine M. Goodwin for the Administrative Office of the United States Courts. See "Memorandum Opinion of the General Counsel's Office, Administrative Office of the United States Courts–Interpretation of 28 U.S.C. § 994(b)(2), the '25% Rule' and Analysis on its Effects on the Federal Sentencing Guideline Interpretation and Analysis of Section 994(b)(2)," reprinted in 8 Fed. Sent. Rep. 110 (Sept.-Oct. 1995); see also Catharine M. Goodwin, "Background of the AO Memorandum Opinion on the 25% Rule," id. at 109. However, if the Commission, after due consideration, believes that the 25 percent limit on ranges limits fundamental reform of the Guidelines calculation process, then it should seek an appropriate legislative amendment.

The first Commission's Guidelines Manual wisely stated that the Commission "views the guideline-writing process as evolutionary." U.S.S.G. Ch. 1, Pt. A(2), ¶5 (1987). The current manual states that "the statutes and the Guidelines themselves foresee continuous evolution." U.S.S.G. Ch 1, Pt. A(2) ¶7 (2008). Unfortunately, ever since 1987, we have not seen any evidence of evolution. Instead successive Commissions have rigidly maintained the fundamental approach taken by the first Commission and carried it to an illogical extreme, adding amendment after amendment, commentary after commentary, complexity after complexity. The Commission's Guidelines, with their extraordinary level of detail and complexity, stand alone among sentencing systems anywhere on

earth. Now that constitutional considerations have rendered the Guidelines advisory, the ideal moment has arrived to undertake a major reform to provide a simplified system of Guidelines that can usefully guide sentencing discretion. It is time for the evolution to begin.