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**RELEVANT CONDUCT:
THE CORNERSTONE OF THE
FEDERAL SENTENCING GUIDELINES**

William W. Wilkins, Jr.

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RELEVANT CONDUCT: THE CORNERSTONE OF THE FEDERAL SENTENCING GUIDELINES

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I. INTRODUCTION***

After more than a decade of deliberation, an overwhelming, bipartisan majority of Congress enacted landmark legislation in 1984 that has revolutionized sentencing in the federal criminal justice system. The Sentencing Reform Act of 1984¹ (Act) created the United States Sentencing Commission to promulgate binding sentencing guidelines for the federal courts.² A major goal of the Act was to reduce disparity in sentencing through a new system in which defendants with similar characteristics who committed similar crimes received similar sentences.³ To accomplish this goal, Congress instructed the Commission to develop a series of sentencing ranges in which the high point of each range did not exceed the low point by more than twenty-five per-

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*** The views expressed herein are those of the authors and do not necessarily represent the official position of the United States Sentencing Commission.

1. Pub. L. No. 98-473, Title II, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3559 (1988); 28 U.S.C. §§ 991-998 (Supp. V 1987)).

2. 28 U.S.C. § 994(a) (Supp. V 1987).

3. *Id.* § 991(b)(1)(B).

II. IMPORTANCE OF THE OFFENSE OF CONVICTION

A. *The Analytical Basis for the Sentencing Guidelines*

Reflecting one of the fundamental policy decisions underlying the federal sentencing guideline system, application of the guidelines begins with consideration of the offense(s) resulting in conviction.¹³ In its deliberations, the Commission debated the merits of a system in which the guideline range would be determined almost entirely from the actual offense behavior.¹⁴ The Commission then considered and sought public comment on a guidelines system in which the offense(s) charged in the indictment would play a much more important role in determining the guideline sentence.¹⁵ The Commission ultimately settled on a system that blends the constraints of the offense of conviction with the reality of the defendant's actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes.¹⁶

Under this scheme, determining the guideline sentencing range applicable to a particular defendant begins with the offense of conviction. At the conclusion of the application process, the statutory provisions governing that offense may constrain the sentence otherwise called for by the guidelines.¹⁷ The sentence may not exceed the statutory maximum for the offense of which the defendant was convicted¹⁸ and may

13. As used in this article and the sentencing guidelines, the term "offense of conviction" generally means a criminal statutory provision that a defendant is convicted of violating. The offense of conviction may or may not coincide with the "real offense," which encompasses the actual criminal conduct associated with the offense of conviction. To illustrate, a defendant's offense of conviction may be a violation of 21 U.S.C. § 843(b) (using a communication facility to arrange a controlled substance offense, commonly known as a "telephone count"), whereas the actual offense conduct may have involved the sale within 1,000 feet of a school (see 21 U.S.C. § 845a) of 1 kilogram of cocaine (see 21 U.S.C. § 841(a)(1)(b)(1)(B)) to a person under the age of 21 (see 21 U.S.C. § 845).

14. UNITED STATES SENTENCING COMMISSION, PRELIMINARY DRAFT SENTENCING GUIDELINES 10-18 (September 1986) [hereinafter PRELIMINARY DRAFT].

15. UNITED STATES SENTENCING COMMISSION, REVISED DRAFT SENTENCING GUIDELINES 3 (January 1987) [hereinafter REVISED DRAFT].

16. For a thorough discussion of this and several other compromises involved in the development of the guidelines, see Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

17. 28 U.S.C. § 994(a) (Supp. V 1987) (Commission to promulgate guidelines and policy statements that are "consistent with all pertinent provisions of [title 28] and title 18, United States Code"). The guidelines must be consistent with the authorized sentences as well as with the applicable statutory maximum and minimum penalties. See *Mistretta v. United States*, 109 S. Ct. 647 (1989); *United States v. Donley*, 878 F.2d 735, 741 (3d Cir.), petition for cert. filed, No. 896108 (U.S. Nov. 13, 1989).

18. U.S.S.G. § 5G1.1(a) (guideline sentence may not exceed statutorily authorized maximum sentence); see *United States v. Lawrence*, 708 F. Supp. 461, 463 (D.P.R. 1989) (guidelines provide that if the sentencing range is greater than the statutory maximum

for bank robbery, not just in terms of the statutory maximum,²⁵ but also with regard to the Chapter Two guideline that will apply at sentencing and the offense conduct that will be taken into account by that guideline,²⁶ subject to possible further adjustments in Chapter Three.

The Commission's decision to place some emphasis on the offense of conviction gives the prosecutor a *limited* role in shaping the guideline sentencing range. Through plea negotiations, the defense attorney also can have some influence over the guideline sentence. Consequently, some have contended that the sentencing guidelines have shifted sentencing discretion from the court to the attorneys.²⁷ This contention, however, is based on an incorrect understanding of the operation of the guidelines.

Although comprehensive analysis of the interaction of guidelines and plea negotiation practices is beyond the scope of this Article,²⁸ such a conclusive characterization is at worst a gross misunderstanding of the manner in which the criminal justice system has operated (both pre- and post-guidelines) and at best an oversimplification and exaggeration. For example, prosecutors have always possessed ultimate authority, subject to constitutional limits, to determine the charge, if any, that will be brought.²⁹ It naturally follows that such decisions dictate the statutory parameters within which courts have had to make sentencing decisions. Although the sentencing guidelines have not changed

lines Manual are determined under a Relevant Conduct standard and potentially may apply depending on the real offense conduct, regardless of which guideline in Chapter Two is dictated by the conduct in the count of conviction. See *infra* notes 58-64 and accompanying text.

25. Compare 18 U.S.C. § 2113(b) (1988) (maximum sentence of 10 years for nonviolent bank theft) with 18 U.S.C. § 2113(a), (d) (1988) (maximum sentence of 20 years, or 25 years if a dangerous weapon is used, for bank theft involving force and violence).

26. Compare U.S.S.G. § 2B1.1 (base offense level for larceny is 4) with U.S.S.G. § 2B3.1 (base offense level for robbery is 20).

27. See, e.g., *United States v. Roberts*, 726 F. Supp. 1359 (D.D.C. 1989); *United States v. Bethancourt*, 692 F. Supp. 1427 (D.D.C. 1988). In *Bethancourt* and *Roberts* the district judge expressed a number of contradictory frustrations, most of which relate to inherent features of plea bargaining that are largely unaffected by the sentencing guidelines. While on the one hand he decried any shift of discretion to the prosecutor, on the other he criticized the central feature of the guidelines (*i.e.*, Relevant Conduct), which significantly reduces the impact of prosecutorial charge selection and plea bargaining by ensuring that the court will be able to consider the defendant's real offense behavior in imposing a guideline sentence.

28. Acting at the Chairman's appointment, Commissioner Ilene H. Nagel, Professor Stephen Saltzburg (*ex officio* member) and Professor Stephen Schulhofer have initiated a comprehensive study of the impact of plea practices on the operation of sentencing guidelines.

29. See *United States v. Nixon*, 418 U.S. 683, 693 (1974); *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979).

lated offense."³⁴

The commentary to this guideline describes in detail the operation and rationale for this exception.³⁵ As indicated in the commentary, this deviation from the general rule is grounded in the legislative history of the Sentencing Reform Act.³⁶ The House version of sentencing reform legislation³⁷ generally provided for a strict, offense of conviction sentencing guideline system. Conversely, the Senate version,³⁸ while it did not expressly specify, seemed to lean toward a real offense system.³⁹ The House bill included one important exception to its offense of conviction system approach: it would have permitted a court to consider facts outside the offense of conviction "if stipulated as part of a plea agreement. For example, if the defendant pled guilty to theft, but admitted the elements of robbery as part of the agreement, the guideline for robbery could be applied. The sentence, of course, could not exceed the maximum sentence for theft."⁴⁰ The Commission adopted this exception to the offense of conviction "starting point" rule because of its sentencing utility and fairness.

The purpose of this exception is to achieve a closer conformity between the charged offense and the real offense conduct in those limited situations in which a defendant admits to conduct that satisfies the elements of a more serious offense than the offense to which he pleads. It is not enough that the defendant simply admit at sentencing to more serious criminal activity than the charged offense proscribes; rather, a negotiated quid pro quo as part of a plea of guilty or nolo contendere is contemplated.⁴¹ In such a case, the Government agrees to forego prosecution of a more serious charge in exchange for gaining application of the guideline applicable to the more serious charge. The defendant agrees to the use of that guideline in exchange for limiting his statutory exposure and, perhaps, avoiding other guideline and statutory consequences.⁴² Accordingly, the guideline application procedure in

34. U.S.S.G. § 1B1.2(a).

35. U.S.S.G. § 1B1.2, comment. (n.1); see also *infra* appendix, at 522-24 (quoting text of comment).

36. See U.S.S.G. § 1B1.2, comment. (n.1).

37. H.R. 6012, Sentencing Revision Act of 1984, 98th Cong., 2d Sess., 130 CONG. REC. 20,702.

38. S. 1762, Title II, 98th Cong., 1st Sess., 129 CONG. REC. 22883-917 (1983); S. 668, 98th Cong., 1st Sess., 129 CONG. REC. 3797-814 (1983). S. 668 and S. 1762, Title II, both were entitled "The Sentencing Reform Act of 1983." The bills were ultimately enacted as Pub. L. No. 98-473, Title II, 98 Stat. 1988 (1984).

39. See S. REP. NO. 225, 98th Cong., 1st Sess. 37, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3220.

40. H.R. REP. NO. 1017, 98th Cong., 2d Sess. 99 (1984).

41. *United States v. Guerrero*, 863 F.2d 245, 248 (2d Cir. 1988).

42. For example, by negotiating a plea to a less serious offense while stipulating to

of Relevant Conduct (or within bounds but not adequately taken into account by the applicable offense conduct guideline and pertinent adjustments) may then be considered by the court under section 1B1.4.⁴⁷ The court may consider the additional information for two important purposes: determining the appropriate sentence within the applicable guideline ranges,⁴⁸ and deciding whether a sentence outside the prescribed range is warranted,⁴⁹ and if so, the extent of the departure.⁵⁰

C. A Composite of Sentencing Information.

Although section 1B1.3 is entitled "Relevant Conduct," the alternative parenthetical title—"Factors that Determine the Guideline Range"—perhaps more accurately describes the scope of this section, since the real offense characteristics section of this guideline encompasses more than just offense conduct. This section also includes other factors and information that the offense guidelines of Chapter Two, general adjustment guidelines of Chapter Three, criminal history guidelines of Chapter Four, and sentence determination guidelines of Chapter Five make relevant for constructing the guideline range.⁵¹ For example, subsection (a)(3) of the guideline encompasses harm that was intended by, or that actually resulted from, the offense conduct. Subsection (a)(4), a "catch-all" provision, includes various other types of information that may be relevant in determining appropriate sentencing ranges for particular offenses.⁵²

III. SCOPE OF RELEVANT CONDUCT

The "acts and omissions" of the defendant and those of accomplices for which the defendant is held accountable comprise the most important elements of "Relevant Conduct." In large measure, the guidelines of Chapters Two and Three place a template over these acts

bilitation. 18 U.S.C. § 3553(a)(2) (1988).

47. Section 1B1.4 essentially incorporates 18 U.S.C. § 3661 (1988). See U.S.S.G. 1B1.4.

48. In a given case, the guidelines may specify three sentencing ranges: (1) a range of imprisonment; (2) a fine range; and (3) a range for a term of supervised release which, pursuant to 18 U.S.C. § 3583(a) (1988), may be imposed to follow a term of imprisonment.

49. See 18 U.S.C. § 3553(b) (1988) (describing the authority and bases for a court to sentence outside the guidelines range (*i.e.*, "depart")).

50. For a thorough discussion of departures and related issues, see Wilkins, *Sentencing Reform and Appellate Review*, 46 WASH. & LEE L. REV. 429 (1989).

51. See U.S.S.G. § 1B1.3.

52. See U.S.S.G. § 1B1.3(a)(3)-(4). For the text of this section, see *infra* appendix, at 526.

under section 2D1.1 the guidelines mandate a sentence enhancement for possession of a dangerous weapon in connection with a drug offense.⁵⁶ Cases in which this has occurred have included situations in which the weapon was not actually used in the offense, but when it was reasonable to conclude that the weapon was connected with and, therefore, was possessed in furtherance of the offense.⁵⁷

Conduct subsequent to the commission of an offense may affect the guideline sentencing range in a variety of ways. For example, a defendant may receive a two-level enhancement for obstruction under section 3C1.1,⁵⁸ or a two-level reduction for acceptance of responsibility under section 3E1.1.⁵⁹ Courts have recognized sentence enhancements for obstructive conduct occurring at various stages of the criminal justice process. For example, they have given two-level enhancements for obstructive conduct prior to an arrest,⁶⁰ at trial,⁶¹ and after a conviction but prior to sentencing.⁶² With respect to determining whether a defendant has accepted responsibility within the meaning of section 3E1.1, the relevant conduct of the defendant⁶³ may

duct or information, along with other relevant, reliable information outside the bounds of section 1B1.3, may be considered in determining the appropriate sentence within a guideline range or may warrant departure under the standards of 18 U.S.C. § 3553(b) (1988).

56. See U.S.S.G. § 2D1.1(b)(1). This section provides: "If a dangerous weapon (including a firearm) was possessed during commission of the offense, increase by 2 levels." *Id.* The associated commentary indicates that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1), comment. (n.3).

57. See, e.g., *United States v. Hewin*, 877 F.2d 3 (5th Cir. 1989) (enhancement proper for handgun on back seat of auto); *United States v. White*, 875 F.2d 427 (4th Cir. 1989) (enhancement proper for handgun found under front seat of auto); *United States v. Otero*, 868 F.2d 1412 (5th Cir. 1989) (enhancement proper for handgun and ammunition in van); *United States v. Holland*, 884 F.2d 354 (8th Cir. 1989) (enhancement proper for two handguns found during search of defendant's residence), *cert. denied*, 110 S. Ct. 552 (1989). *But see* *United States v. Vasquez*, 874 F.2d 250 (5th Cir. 1989) (enhancement improper where handgun later found in defendant's apartment several miles from point of cocaine buy).

58. U.S.S.G. § 3C1.1.

59. U.S.S.G. § 3E1.1.

60. *United States v. Franco-Torres*, 869 F.2d 797 (5th Cir. 1989) (firing weapon at officer); *United States v. Galvan-Garcia*, 872 F.2d 638 (5th Cir.) (attempted concealment of marijuana and flight from arresting officers), *cert. denied*, 110 S. Ct. 164 (1989); *United States v. Williams*, 879 F.2d 454 (8th Cir. 1989) (threatening informant).

61. *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir.) (perjury at trial), *cert. denied*, 110 S. Ct. 255 (1989).

62. *United States v. Velasquez-Mercado*, 872 F.2d 632 (5th Cir.) (lying to probation officer preparing presentence report, perjury at sentencing hearing, and threatening witness), *cert. denied*, 110 S. Ct. 187 (1989).

63. Relevant Conduct determines not only the base offense level and specific offense characteristics in Chapter Two, but also the adjustments in Chapter Three, including

uted to a defendant includes "all acts and omissions . . . aided and abetted by the defendant, or for which the defendant would be otherwise accountable," that are within the temporal dimension previously described.⁶⁶ The "aided and abetted" aspect of this Relevant Conduct definitional phrase is derived from 18 U.S.C. § 2.⁶⁷ The concept is well understood and requires little amplification here. The illustrations in the commentary to section 1B1.3 provide several examples of aided and abetted activity for which a defendant should be held accountable.⁶⁸ Cases that have applied the guidelines provide further illustrations of how the courts, consistent with the Commission's intent, are interpreting and applying this aspect of Relevant Conduct.⁶⁹

effective November 1, 1989. U.S.S.G. § 1B1.3, comment. (hist. n.). The January 15, 1988 amendments were an effort to clarify, rather than alter, the intent of the Commission. See *United States v. Fredericks*, No. 89-6009 (10th Cir. Feb. 28, 1990); *United States v. Guerrero*, 863 F.2d 245, 250 (2d Cir. 1988). The amendments effective November 1, 1989 similarly reflect the Commission's purpose of refining and clarifying the original intent, rather than substantively changing the scope of the guideline. See U.S.S.G. § 1B1.3, App. C (amendments 76-78, 303).

66. U.S.S.G. § 1B1.3(a)(1).

67. 18 U.S.C. § 2 (1988). This section provides:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Id.

68. See U.S.S.G. § 1B1.3 comment. (n.1). Illustrations b and d describe different types of "aided and abetted" activity:

b. Defendant C, the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

d. Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount (\$55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire \$55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.

Id.

69. See, e.g., *United States v. Moskowitz*, 888 F.2d 223 (2d Cir. 1989) (defendant instructed co-defendant to "cook" cocaine on aircraft and aided transportation of butane); *United States v. White*, 875 F.2d 427 (4th Cir. 1989) (section 1B1.3(a)(1) includes

realm of what is commonly referred to as the "*Pinkerton*" rule.⁷³ Two key points should be noted. First, the guidelines specifically employ this doctrine to cover any "criminal activity undertaken in concert with others, *whether or not charged as a conspiracy*."⁷⁴ This similar sentencing treatment for jointly-undertaken activity, regardless of whether there is an actual conviction for the crime of conspiracy, is consistent with the statutory instructions given to the Commission.⁷⁵ This policy also supports current views that conspiratorial criminal conduct is ordinarily of the same serious character as the underlying crime that is the object of the conspiracy.⁷⁶ Treating concerted activity similarly for sentencing purposes, regardless of how it is charged, is consistent with the "real offense" nature of Relevant Conduct and avoids sentencing disparities that otherwise could result from the exercise of prosecutorial charging discretion. While this objective was intended by the Commission from the outset under its Relevant Conduct guideline, the November 1, 1989 revision of the commentary states the point more clearly.⁷⁷ The clarified commentary should further this important sentencing principle and ensure that, in applying Relevant Conduct, courts look beyond the manner in which jointly-undertaken activity is charged in order to assess the seriousness of that conduct.⁷⁸

73. *Pinkerton v. United States*, 328 U.S. 640 (1946). This decision is regarded as "[t]he leading case for the proposition that membership in a conspiracy is sufficient for criminal liability not only as a conspirator but also for all specified offenses committed in furtherance of the conspiracy. . . ." W. LEFAVE & A. SCOTT, *supra* note 71, § 6.8, at 153.

74. U.S.S.G. § 1B1.3, comment. (n.1) (emphasis added).

75. See 28 U.S.C. § 994(l)(2) (Supp. V 1987). This section instructs the Commission to ensure that the sentencing guidelines reflect the "general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense . . . and for an offense that was the sole object of the conspiracy . . ." While this directive is aimed at the issue of concurrent or consecutive sentencing, it is one indication that, for sentencing purposes, a conspiracy should be punished in a manner similar to the substantive offense that was the object of the conspiracy. See also U.S.S.G. § 1B1.2(d) ("A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant has been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.").

76. See, e.g., *United States v. D'Antoni*, 874 F.2d 1214, 1221 (7th Cir. 1989) ("The proper punishment for conspiracy is a function of the gravity of the crime the defendants conspired to commit. This point, acknowledged both in the new sentencing guidelines . . . and in the second paragraph of [18 U.S.C.] section 371 . . . shows that a five-year ceiling for *all* conspiracies . . . makes no sense.") (Posner, J., concurring) (emphasis original).

77. See U.S.S.G. § 1B1.3, comment. (n.1) (clearly requiring similar treatment for "criminal activity undertaken in concert with others, *whether or not charged as a conspiracy*") (emphasis added). Cf. U.S.S.G. App. C, amend. no. 78 (previous version stated: "If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or reasonably foreseeable by the defendant.").

78. For an example of a case in which an appellate court apparently failed to recog-

[e]ach retailer in an extensive narcotics ring could be held accountable as an accomplice to every sale of narcotics made by every other retailer in that vast conspiracy. Such liability might be justified for those who are at the top directing and controlling the entire operation, but it is clearly inappropriate to visit the same results upon the lesser participants in the conspiracy.⁸⁴

Similar considerations of sentencing proportionality motivated the Commission's approach in the Relevant Conduct guideline. While making some differentiation based on the degree of criminal involvement, the Commission believed it entirely appropriate to hold equally accountable under Relevant Conduct those accomplices who, while not at the apex of a criminal organization, were involved to such a degree that the entire scope of the group criminal conduct should be fairly attributed to them. Thus, a court should focus on the language of the commentary that describes conduct "reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake."⁸⁵

The examples in Application Note 1 of the commentary illustrate various situations in which the "reasonably foreseeable" standard under Relevant Conduct either attributes or precludes attribution of criminal activity of others to a particular defendant. These examples indicate that the reasonably foreseeable standard encompasses certain "natural and probable consequence[s]"⁸⁶ that flow from the acts of an accomplice in concerted criminal activity,⁸⁷ but that accomplice acts not reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake should not be attributed.⁸⁸ The

84. *Id.*

85. U.S.S.G. § 1B1.3, comment. (n.1).

86. 2 W. LAFAYE & A. SCOTT, *supra* note 71, at 157.

87. See U.S.S.G. § 1B1.3, comment. (n.1), illustration (a). The illustration reads:

Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding any claim on his part that he was neither aware of, nor could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading, and hence the importation, of the entire shipment.

Id.

88. See U.S.S.G. § 1B1.3, comment. (n.1), illustration (c). The illustration reads: c. Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check. Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with De-

defendant's mental state,⁹³ or any other subjective information relevant to the circumstances of the particular case. Subsection (a)(1) of the Relevant Conduct guideline thus encompasses both "temporal" and "attribution" dimensions. Moreover, the two are not mutually exclusive. For example, a defendant may be held accountable for acts of accomplices in preparation for an offense or in an attempt to escape from apprehension after the offense. In other words, the attribution dimension can apply in concerted activity at any stage within the temporal dimension.⁹⁴

C. *The Third Dimension of Relevant Conduct*

Section 1B1.3(a)(2) contains a third dimension of the Relevant Conduct guideline. This section provides a definitional rule incorporating both dimensions of subsection (a)(1) which, for certain types of offenses, again reaches beyond the count of conviction to encompass additional criminal activity. This part of the guideline includes, "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the *same course of conduct or common scheme or plan* as the offense of conviction."⁹⁵

In understanding the scope and purpose of this rule, the commentary language in Application Note 2 and the Background Commentary are particularly helpful. Application Note 2 states:

"Such acts and omissions," as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable. This subsection applies to offenses of types for which convictions on multiple counts would be grouped together pursuant to §3D1.2(d); multiple convictions are not required.⁹⁶

The reference to "such acts and omissions" of subsection (a)(2) is an incorporation by reference of the entire scope of conduct, in both "temporal" and "attribution" dimensions discussed above, included within subsection (a)(1). Accordingly, a court must keep in mind this

93. The guidelines and policy statements recognize that mental state may be a basis for departure in exceptional cases. See U.S.S.G. § 5K2.13, p.s.

94. Section 3E1.1, which pertains to Acceptance of Responsibility, takes into account only the individual acts or omissions of a defendant. See U.S.S.G. § 3E1.1. The absence of an attribution dimension in this guideline is consistent with both the purpose of sentencing adjustments and the fact that it applies to individual defendant conduct subsequent to the completion of an offense.

95. U.S.S.G. § 1B1.3(a)(2) (emphasis added).

96. U.S.S.G. § 1B1.3(a)(2), comment. (n.2).

duct of any one count of conviction that is part of a scheme or course of conduct includes all of the conduct (within the scope of subsection (a)(1)) that is part of the scheme or pattern. The Multiple Counts guidelines then operate to ensure that there is no double-counting of the same conduct in those situations in which more than one count of conviction of this type is involved.¹⁰³

The terms "same course of conduct" and "common scheme or plan" used in subsection (a)(2)¹⁰⁴ are not defined in the guideline or commentary. The terms, however, have some analog in Federal Rule of Criminal Procedure 8(a),¹⁰⁵ pertaining to Joinder of Offenses, and pre-guideline case law interpreting its terms. Rule 8(a) permits offenses to be charged in the same indictment if the offenses "are based on . . . two or more acts or transactions connected together or constituting parts of a common scheme or plan."¹⁰⁶ The case law interpreting this phrase demonstrates that courts focus on the connection between the offenses in terms of time interval, common accomplices, common victims, similar *modus operandi*, or other evidence of a common criminal endeavor involving separate criminal acts.¹⁰⁷ One could reasonably conclude that the Commission intended similar linkage among acts or omissions in its employment of the "common scheme or plan" phrase in subsection (a)(2). Hence, multiple embezzlements over a period of time, or multiple drug deliveries on different occasions would each be considered part of a "common scheme or plan" within the meaning of section 1B1.3(a)(2).

The phrase "same course of conduct," as used in subsection (a)(2), does not have an exact counterpart in Rule 8(a) of the Federal Rules of Criminal Procedure. The phrase, however, at least encompasses that portion of Rule 8(a) permitting joinder of offenses that "are of the same or similar character" or that involve "two or more acts or transactions connected together."¹⁰⁸ The guideline term is broader than this analogous language, since it does not require a *connection* between the acts in the form of an overall criminal scheme. Rather, the guideline term contemplates that there be sufficient similarity and temporal proximity to reasonably suggest that repeated instances of criminal be-

Id. at 1212 n.20.

103. See U.S.S.G. § 3D1.1-5.

104. See U.S.S.G. § 1B1.3(a)(2).

105. FED. R. CRIM. P. 8(a).

106. *Id.*

107. See, e.g., *United States v. Sanko*, 787 F.2d 1249 (8th Cir. 1986); *United States v. Valentine*, 706 F.2d 282 (10th Cir. 1983); *United States v. Jordan*, 602 F.2d 171 (8th Cir.), *cert. denied*, 444 U.S. 878 (1979); *cf.*, *United States v. Chinchic*, 655 F.2d 547 (4th Cir. 1981) (interpreting Federal Rule of Criminal Procedure 8(b)).

108. FED. R. CRIM. P. 8(a).

whether application of Relevant Conduct section 1B1.3(a)(2) should include eighteen thefts that did not result in a conviction, in determining the appropriate guideline sentence for one theft that did.¹¹³ The *Scroggins* court, like the *Wright* court, recognized that prior to the advent of the guidelines, judges sentenced on the basis of a defendant's real offense conduct. Accordingly, the criminal conduct embodied in the other thefts related to the seriousness of the count of conviction for sentencing purposes.¹¹⁴ Thus, the court upheld the inclusion of the other thefts under Relevant Conduct.¹¹⁵

The remainder of the Relevant Conduct guideline (*i.e.*, subsections (a)(3), (a)(4), and (b)) is generally more straightforward and limited in application, thus requiring little amplification in this article. "Harm," as described in subsection (a)(3), is broadly defined in Application Note 3 to include any harm that results from the acts or omissions encompassed in subsections (a)(1) or (a)(2).¹¹⁶ Intended harm is particularly important with regard to inchoate offenses, such as attempts, solicitations and conspiracies.¹¹⁷ Furthermore, the guidelines consider the creation of a risk of harm for several specific offenses, including a number of environmental offenses.¹¹⁸ Subsections (a)(4) and (b) simply incorporate by reference into the Relevant Conduct guideline any other conduct or information specified in the applicable guidelines.¹¹⁹

IV. STANDARD AND BURDEN OF PROOF APPLICABLE TO RELEVANT CONDUCT

Two important issues related to practical application of Relevant

113. *Id.* at 1211-12.

114. The *Scroggins* court stated:

[I]n assessing the seriousness of that [one theft] offense the guidelines took into account the fact that appellant's offense of conviction was not an isolated event, but rather was the last of a series of offenses. The evidence of these prior thefts eliminates any argument that some concatenation of fortuitous circumstances provoked appellant into committing his offense of conviction on the spur of the moment: appellant's prior thefts establish that he acted purposefully on December 16, having had the opportunity to consider the criminality of his act and its consequences. Such purposeful criminal conduct demands greater punishment, both to reflect society's desire for retribution and to ensure specific deterrence against future criminal conduct by appellant. In aggregating the loss occasioned by all of appellant's thefts, therefore, the guidelines reflect the full magnitude of appellant's culpability.

Id. at 1213.

115. *Id.*

116. See U.S.S.G. § 1B1.3, comment. (n.3).

117. See U.S.S.G. § 1B1.3, comment. (n.4).

118. See *id.*

119. See U.S.S.G. § 1B1.3(a)(4), (b).

Relevant Conduct, are contested. Some lesser standard may be adequate, however, when a factor is uncontested.¹²⁸ The guidelines enhance procedural fairness by largely determining the sentence according to specific, identified factors, each of which a defendant has an opportunity to contest, through evidentiary presentation or allocation, at a sentencing hearing. The advent of guideline sentencing thus presents no convincing reason to conclude that constitutional standards are somehow stricter when guidelines are used to assist in fashioning the appropriate sentence, or that policy considerations compel use of a higher standard.¹²⁹ Hence, courts should apply the guideline adjustments within the realm of Relevant Conduct when those adjustments are established by the preponderance of the evidence.¹³⁰

Similar constitutional and policy considerations apply with respect to the burden of proof or persuasion. A defendant does not have a constitutional right to a specific sentence¹³¹ or to the lowest possible sentence.¹³² Rather, the defendant is "entitled only to have his sentence correctly determined in accordance with the applicable law and based upon reliable evidence."¹³³ Moreover, the authors of the Sentencing Reform Act specifically rejected an approach that would entitle a defendant to the least severe sentence, adopting instead a framework designed to achieve the most appropriate sentence, with the multiple purposes of sentencing in mind.¹³⁴

For these reasons, once the correct guideline and a base offense

128. See *United States v. Smith*, 887 F.2d 104, 108 (6th Cir. 1989) (guidelines case holding that all drug quantities resulting from defendant's course of conduct, scheme or plan, including those charged in dismissed count, should be considered in determining guideline sentence if supported by "some minimal indicium of reliability beyond mere allegation"); *United States v. Restrepo*, 832 F.2d 146, 149-50 (11th Cir. 1987) (pre-guidelines case holding that government need only produce "some reliable proof").

129. See *United States v. Urrego-Linares*, 879 F.2d 1234, 1237-38 (4th Cir.), *cert. denied*, 110 S. Ct. 346 (1989); *United States v. Guerra*, 888 F.2d 247 (2d Cir. 1989).

130. See *Urrego-Linares*, 879 F.2d at 1238; *Guerra*, 888 F.2d 247; see also *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989); *United States v. McDowell*, 888 F.2d 285 (3d Cir. 1989); *United States v. Casto*, 889 F.2d 562 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1164 (1990); *United States v. White*, 888 F.2d 490 (7th Cir. 1989); *United States v. Gooden*, 892 F.2d 725 (8th Cir. 1989), *petition for cert. filed*, No. 89-6786 (U.S. Feb. 6, 1990).

131. *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

132. *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979).

133. *Urrego-Linares*, 879 F.2d at 1239 (citing *Townsend v. Burke*, 334 U.S. 736 (1948)).

134. S. REP. NO. 225, 98th Cong., 1st Sess. 78 (1983) (explaining that the Senate Judiciary Committee had rejected the "lockstep" procedure recommended by the American Bar Association that would have mandated court consideration of sentencing alternatives in increasing order of severity).

ance of responsibility; (2) an accomplice attribution dimension, focusing on the conduct of others acting in concert with the defendant and for which the defendant should be held accountable at sentencing; and (3) a third dimension, limited to certain types of offenses such as drugs or monetary value offenses, that incorporates both of the first two dimensions and permits the court to look beyond the actual offense of conviction to the entire range of a defendant's similar offense behavior.

Once the court has determined the offense conduct guideline most applicable to the offense of conviction, it is this composite of the defendant's conduct and related information that essentially determines the appropriate guideline sentencing range. In applying Relevant Conduct precepts and resolving related disputes, courts generally should be governed by a preponderance of the evidence standard of proof—with the burden of persuasion generally resting on the government to establish aggravating factors and on the defendant to establish mitigating ones. The court can then draw upon any other reliable, relevant information to complete the fashioning of an appropriate sentence. The end result, and the objective of the guideline system, is to balance concerns of uniformity (*i.e.*, treating defendants with similar criminal histories who engage in similar offense conduct in a similar manner) with concerns of individual fairness, so that the sentences imposed by federal courts are just and effective.

only one offense guideline referenced. When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, the court will determine which guideline section applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted.

However, there is a limited exception to this general rule. Where a stipulation as part of a plea of guilty or *nolo contendere* specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. The sentence that may be imposed is limited, however, to the maximum authorized by the statute under which the defendant is convicted. See Chapter Five, Part G (Implementing the Total Sentence of Imprisonment). For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. See H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984).

The exception to the general rule has a practical basis. In cases where the elements of an offense more serious than the offense of conviction are established by the plea, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea. The probation officer would first be required to calculate the guideline for the offense of conviction. However, this guideline might even contain characteristics that are difficult to establish or not very important in the context of the actual offense conduct. As a simple example, §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) contains monetary distinctions which are more significant and more detailed than the monetary distinctions in §2B3.1 (Robbery). Then, the probation officer might need to calculate the robbery guideline to assist the court in determining the appropriate degree of departure in a case in which the defendant pled guilty to theft but admitted committing robbery. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or *nolo contendere* plea cases where it is applicable.

As with any plea agreement, the court must first determine that the agreement is acceptable, in accordance with the policies stated in Chapter Six, Part B (Plea Agreements). The limited exception provided here applies only after the court has determined that a

there are cases in which the jury's verdict does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under §3D1.2(d) (e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because §1B1.3(a)(2) governs consideration of the defendant's conduct.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 2); November 1, 1989 (see Appendix C, amendments 73-75 and 303).

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

- (a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
- (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
 - (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
 - (3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and

neither aware of, nor could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading, and hence the importation, of the entire shipment.

b. Defendant C, the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

c. Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check. Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with Defendant D.

d. Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount (\$55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire \$55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.

e. Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. For the purposes of determining the offense level under this guideline, Defendant J is accountable for the entire single shipment of marihuana he conspired to help import and any acts or omissions in furtherance of the importation that were reasonably foreseeable. He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I if those acts were beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he agreed to jointly undertake with Defendants H and I

forth in 18 U.S.C. § 2242").

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides for grouping together (*i.e.*, treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would *not* be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (*i.e.*, to which §3D1.2(d)

Commentary

Background: This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.,* Chapter Five, Part H (Specific Offender Characteristics).

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (*see* Appendix C, amendment 4); November 1, 1989 (*see* Appendix C, amendment 303).

**THE FEDERAL SENTENCING GUIDELINES
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THE FEDERAL SENTENCING GUIDELINES AND THE KEY COMPROMISES UPON WHICH THEY REST

*Stephen Breyer**

Since November 1987, the new Federal Sentencing Guidelines¹ have been law.² Now that they have survived constitutional attack,³

* Circuit Judge, United States Court of Appeals for the First Circuit. This Article is adapted from the Howard Kaplan Memorial Lecture, delivered by Judge Breyer on April 13, 1988, at the Hofstra University School of Law.

1. UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (1988) [hereinafter SENTENCING GUIDELINES].

2. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017-34 (codified as amended at 28 U.S.C. §§ 991-998 (Supp. IV 1986)), which established the United States Sentencing Commission to promulgate the Sentencing Guidelines, provided that the proposed Guidelines would take effect six months after they were submitted by the Commission, unless Congress modified or disapproved the Guidelines. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017, 2023 (codified as amended at 28 U.S.C. § 994(o) (Supp. IV 1986)).

3. See *United States v. Mistretta*, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989). The Supreme Court granted certiorari before judgment by the Eight Circuit, because of the importance of settling the constitutionality of the Commission and its Guidelines amidst the "disarray among the Federal District Courts" over the issue. *Id.* at 4104-05. The Court concluded that Congress had not violated the separation of powers principle by placing the Commission in the judicial branch, where substantive sentencing decisions and judicial rulemaking have traditionally been carried out by judges. *Id.* at 4111. The Court also concluded that Congress had not violated the non-delegation doctrine in authorizing the Commission to promulgate the Guidelines because Congress had provided "significant statutory direction." *Id.* at 4116. Moreover, the Court noted that "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate . . ." *Id.* at 4107.

basic principles upon which they rest.

A. Comparing State and Federal Guidelines

When the federal Commission began to write the Guidelines in 1985, both Minnesota⁸ and Washington⁹ had somewhat similar guidelines systems in place. The federal task differed from that of the state commissions, however, in two important ways. First, the federal criminal code had many more crimes than most state codes. Minnesota and Washington state commissions wrote guidelines for 251 and 108 statutory crimes, respectively, such as murder, theft, robbery, and rape.¹⁰ The federal Commission had to deal with 688 statutes,¹¹ including such complex criminal laws as the Hobbs Act,¹² the Travel Act,¹³ and the Racketeer Influenced and Corrupt Organizations Act.¹⁴ Second, the political homogeneity in individual states may have made it easier to achieve consensus. At the federal level before 1985, scholars and practitioners in the criminal justice community almost unanimously favored the concept of guidelines.¹⁵ Once the Commission reduced that concept to a detailed reality, however, serious political differences began to emerge.¹⁶ Minnesotans

8. See MINN. STAT. ANN. ch. 244 app. (West Supp. 1989).

9. See WASH. REV. CODE ANN. § 9.94A.010-910 (1988 & West Supp. 1989).

10. See MINN. STAT. ANN. ch. 244 app. at V (West Supp. 1989); WASH. REV. CODE ANN. § 9.94A.320 (West Supp. 1989).

11. See SENTENCING GUIDELINES, *supra* note 1, at app. A (statutory index).

12. 18 U.S.C. § 1951 (1982).

13. 18 U.S.C. § 1952 (1982 & Supp. IV 1986).

14. 18 U.S.C. §§ 1961-1963 (1982 & Supp. IV 1986).

15. See, e.g., S. REP. NO. 225, 98th Cong., 2d Sess. 37-38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3220-21; S. REP. NO. 553, 96th Cong., 2d Sess. 912-13 (1980); Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

16. See, e.g., *Sentencing Guidelines: Hearings on Sentencing Guidelines Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 554-87 (1987) [hereinafter *Hearings Before the Subcomm. on Criminal Justice*] (statement and testimony of Sam J. Buffone, Chairperson, Comm. on the U.S. Sentencing Comm'n, American Bar Ass'n Section of Criminal Justice) (criticizing proposed Guidelines provisions that he asserts would increase prison populations, curtail availability of probation and parole, allow judges to depart from the Guidelines without adequate standards, and fail to adequately specify proper procedures); *Public Hearing Before the U.S. Sentencing Comm'n* 61-68 (Washington, D.C., Dec. 2, 1986) [hereinafter *Washington, D.C., Public Hearing*] (transcript on file at Hofstra Law Review) (testimony of Stephen S. Trott, Assoc. Attorney General, U.S. Dep't of Justice) (arguing that sentencing guidelines should require judges to consider more "real" factors of the crime and the criminal in the cases before them); *id.* at 122-37 (testimony of Marlene Young, Executive Director, Nat'l Org. for Victim Assistance) (arguing that the crime victim should be given a greater role in plea bargaining and sentencing); *id.* at 159 (testimony of Hon. R. Lanier Anderson III, United States Court of Appeals, 11th Cir.) (criticizing excessive amount of judicial resources needed to run newly required sentencing hearings); *id.* at

example, that in the Second Circuit, punishments for identical actual cases could range from three years to twenty years imprisonment.²⁵ The Commission's own work indicates, for example, that:

the region in which the defendant is convicted is likely to change the length of time served from approximately six months more if one is sentenced in the South to twelve months less if one is sentenced in Central California [F]emale bank robbers are likely to serve six months less than their similarly situated male counterparts . . . [and] black [bank robbery] defendants convicted . . . in the South are likely to actually serve approximately thirteen months longer than similarly situated bank robbers convicted . . . in other regions.²⁶

To remedy this problem, Congress created the United States Sentencing Commission, comprised of seven members (including three federal judges) appointed by the President, confirmed by the Senate, and instructed to write, by April 1987, sentencing guidelines which would automatically take effect six months later unless Congress passed another law to the contrary.²⁷ Congress' statute provides instructions to the Commission listing many factors for it to consider.²⁸ The statute suggests (but does not require) that the Guidelines take the form of a grid that determines sentencing in light of characteristics of the offense and characteristics of the offender.²⁹ The resulting Guideline sentence would consist of a range, such as "imprisonment for twenty to twenty-four months," the top of which range cannot exceed the bottom by more than twenty-five percent.³⁰ The judge might depart from the Guideline range,³¹ but if he

25. See S. REP. NO. 225, 98th Cong., 2d Sess. 41 n.22 (citing A. PARTRIDGE & W. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES* 1-3 (1974)), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3224 n.22.

26. *Hearings Before the Subcomm. on Criminal Justice, supra* note 16, at 676-77 (testimony of Ilene H. Nagel, U.S. Sentencing Commissioner). See generally I. Nagel, *The Structure of Discretion under the United States Sentencing Commission Guidelines* (Aug. 5, 1988) (paper presented in Ottawa, Canada) (on file at Hofstra Law Review).

27. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017-34 (codified as amended at 28 U.S.C. §§ 991-998 (Supp. IV 1986)).

28. See 28 U.S.C. § 994(c)-(n) (Supp. IV 1986) (listing the twelve statutory considerations the Commission should have applied when constructing the Guidelines).

29. *Id.* § 994(c)(1)-(7) (offense characteristics); *id.* § 994(d)(1)-(11) (offender characteristics).

30. *Id.* § 994(b).

31. See 18 U.S.C. § 3553(b) (Supp. IV 1986) (stating that a court must presumptively impose sentencing within range specified by Guidelines "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence

6. Look at the table on page 5.2 of the Guidelines⁴¹ to determine the sentence. Here, an offense level of "23," with three points for the prior conviction, yields a range of fifty-one to sixty-three months in prison for this armed robbery by a previously convicted felon.⁴²

7. Impose the Guideline sentence, or, if the court finds unusual factors, depart and impose a non-Guideline sentence.⁴³ The judge must then give reasons for departure,⁴⁴ and the appellate courts may then review the "reasonableness" of the resulting sentence.⁴⁵

The Guidelines also contain rules for calculating a fine,⁴⁶ for imposing a term of supervised release,⁴⁷ for restitution,⁴⁸ and so forth. The basic steps, however, are the seven listed above.

If the Commission has done its job as it hopes, the resulting term of confinement—about four to five years—should strike most observers as about the typical time such an offender would have served prior to the Guidelines.

D. *The Two Basic Principles*

Two principles guided the Commission throughout the period in which it drafted the Guidelines. First, in creating categories and determining sentence lengths, the Commission, by and large, followed typical past practice,⁴⁹ determined by an analysis of 10,000 actual cases.⁵⁰ Second, the Commission remained aware throughout the

41. See *id.* at 5.2, reprinted *infra* app. A at 44.

42. See *id.*

43. 18 U.S.C. § 3553(b) (Supp. IV 1986), discussed *supra* note 31 and accompanying text.

44. 18 U.S.C. § 3553(c) (Supp. IV 1986), discussed *supra* note 32 and accompanying text.

45. 18 U.S.C. § 3742(d) (Supp. IV 1986), discussed *supra* note 33 and accompanying text.

46. See SENTENCING GUIDELINES, *supra* note 1, § 5E4.2.

47. See *id.* § 5D3.1-3.

48. See *id.* § 5E4.1.

49. Use of the phrase "by and large" is necessary because the Commission also made important deviations from typical past practice in the Guidelines. The recommended sentence vis-a-vis certain white-collar criminals is one example. A pre-Guidelines sentence imposed on these criminals would likely take the form of straight probationary sentences. The Guidelines, however, generally provide for short terms of confinement. See *infra* notes 99-117 and accompanying text.

50. The Commission used two data sources to construct its model of current sentencing practice. The Federal Probation Sentencing and Supervision Information System (FPSSIS) provided a computer tape with information regarding nearly 100,000 criminal dispositions during a two-year period. The FPSSIS file contained, for each disposition, information describing the offense, the defendant's background and criminal record, the method of disposition of the

ing system and a "charge offense" system.⁵⁶ It is a compromise forced in part by a conflict inherent in the criminal justice system itself: the conflict between procedural and substantive fairness.

Some experts urged the adoption of a pure, or a nearly pure, "charge offense" system.⁵⁷ Such a system would tie punishments directly to the offense for which the defendant was convicted. One would simply look to the criminal statute, for example, bank robbery, and read off the punishment provided in the sentencing guidelines. The basic premise underlying a "charge offense" system is that the guideline punishment is presumed to reflect the severity of the corresponding statutory crime.⁵⁸ The judge could deviate from the presumptive sentence, however, in light of certain aggravating or mitigating factors articulated in the sentencing guidelines.⁵⁹

The principal difficulty with a presumptive sentencing system is that it tends to overlook the fact that particular crimes may be committed in different ways, which in the past have made, and still should make, an important difference in terms of the punishment imposed. A bank robber, for example, might, or might not, use a gun; he might take a little, or a lot, of money; he might, or might not, injure the teller. The typical armed robbery statute, however, does not distinguish among these different ways of committing the crime.⁶⁰ Nor does such a statute necessarily distinguish between how cruelly the defendant treated the victims, whether the victims were

56. See, e.g., Robinson, *supra* note 4, at 15-32 (articulating principles which explain the germane factors a sentencing judge must consider in order to distribute sanctions on a fact-sensitive basis); Tonry & Coffee, *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 142, 152-63 (A. von Hirsch, K. Knapp & M. Tonry eds. 1987) (discussing the "real offense" system and the effect the Guidelines would have on prosecutors' conduct and defendants' proclivity to plea bargain). For elaboration on a "real offense" sentencing system, see *infra* notes 64-68 and accompanying text. For a discussion on a "charge offense" system, see *infra* notes 57-63 and accompanying text.

57. The system of sentencing guidelines proposed (and ultimately rejected) in New York State was largely a "charge offense" system, in which the "severity of the offense" was determined almost exclusively by the charge under which the defendant was convicted. See NEW YORK STATE COMM. ON SENTENCING GUIDELINES, DETERMINATE SENTENCING REPORT AND RECOMMENDATIONS 6 (1985). Of course, under the proposed New York plan, the sentencing judge retained the power to depart from the guidelines range of sentence based on "aggravating factors" or "mitigating factors," some of which were based on the "real offense," such as whether the defendant treated the victim with deliberate cruelty (aggravating) or whether the victim initiated the incident (mitigating). *Id.* at 86-89.

58. See sources cited *infra* note 59.

59. See, e.g., MINN. STAT. ANN. ch. 244 app. at II.D (West Supp. 1989); H.R. 5690, 98th Cong., 2d Sess., 130 CONG. REC. 10,690 (1984).

60. See, e.g., MASS. GEN. LAWS ANN. ch. 265, § 17 (West 1970).

rules of evidence as the hearsay⁶⁵ or best evidence rules,⁶⁶ or the requirement of proof of facts beyond a reasonable doubt.⁶⁷

Of course, the more facts the court must find in this informal way, the more unwieldy the process becomes, and the less fair that process appears to be. At the same time, however, the requirement of full blown trial-type post-trial procedures, which include jury determinations of fact, would threaten the manageability that the procedures of the criminal justice system were designed to safeguard.

Those who favor a "real offense" system argue that pre-Guideline systems were actually "real offense" systems in that judges took into account all the real facts of an offense (which they learned about by reading the pre-sentence report), and did not make clear which particular facts they relied upon when handing down the sentence.⁶⁸ Too much weight cannot be placed upon this argument, however, first, because it is not entirely true,⁶⁹ and second, because it was the unfair, hidden nature of prior sentencing practices that the Guidelines set about to change.

The upshot is a need for compromise. A sentencing guideline system must have some real elements, but not so many that it becomes unwieldy or procedurally unfair. The Commission's system makes such a compromise. It looks to the offense *charged* to secure

65. See, e.g., *United States v. Fatico*, 603 F.2d 1053, 1057 (2d Cir. 1979) (maintaining that hearsay, if reliable, is admissible at sentencing proceedings), *cert. denied*, 444 U.S. 1073 (1980).

66. See, e.g., *United States v. Jarrett*, 705 F.2d 198 (7th Cir. 1983) (holding that rules of evidence, specifically best evidence and hearsay rules, do not apply to a sentencing hearing), *cert. denied*, 465 U.S. 1004 (1984).

67. See, e.g., *McMillan v. Pennsylvania*, 477 U.S. 79, 85-87 (1986) (upholding a Pennsylvania law providing that proof of the visible possession of a firearm may be considered by a judge at sentencing, even though such proof was not necessary to prove defendant's guilt at trial beyond a reasonable doubt).

68. See *Tonry & Coffee*, *supra* note 56, at 152-54.

69. See, e.g., FED. R. CRIM. P. 32(c)(3)(D) (allowing the court to make a finding regarding allegations presented by the defendant that the pre-sentence investigation was inaccurate, or to make a determination that such a finding is unnecessary since the alleged inaccuracy will not be considered in sentencing); see also *United States v. O'Neill*, 767 F.2d 780, 787 (11th Cir. 1985) (vacating sentence and remanding case for resentencing since trial court failed to make findings pursuant to Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure as to each controverted point of the presentence investigation, or, alternatively, to determine that no finding was necessary); *United States v. Petitto*, 767 F.2d 607, 609 (9th Cir. 1985) (stating that the purpose of Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure is to "ensure that a record is made as to exactly what resolution occurred as to the controverted matter," thereby ensuring accuracy of the record to be used by the Parole Board or the Bureau of Prisons (quoting FED. R. CRIM. P. 32 advisory committee's note)).

B. *Administrative Needs*

A second, related critical compromise concerns the level of detail appropriate within the system. This compromise was forced on the Commission by the fact that the criminal justice system is an administrative system and, accordingly, must be administratively workable.

The problem of manageability arises in the context of two competing goals of a sentencing system: uniformity and proportionality. Uniformity essentially means treating similar cases alike. Of course, this goal could be achieved simply by giving every criminal offender the same sentence. It can also be approached by creating only several relevant sentencing categories, such as "crimes of violence," "property crimes," or "drug crimes." In order to achieve uniformity, however, a simple category such as "bank robberies" would lump together cases which, in punitive terms, should be treated differently.

To avoid these obvious inequities, the proportionality goal seeks to approach each of the myriad bank robbery scenarios from varying sentencing perspectives. The more the system recognizes the tendency to treat different cases differently, however, the less manageable the sentencing system becomes.⁷⁶ The punishment system becomes much harder to apply as more and more factors are considered, and the probability increases that different probation officers and judges will classify and treat differently cases that are essentially similar. Accordingly, it becomes harder to accurately predict how these factors will interact to produce specific punishments in particular cases.

In its initial draft efforts,⁷⁷ the Commission went much too far to further proportionality goals. Subsequently, the Commission realized that the number of possible relevant distinctions is endless. One can always find an additional characteristic *X* such that if the bank

76. Consider the following hypothetical posed by the Commission to expose the unmanageability of a sentencing system which adopts numerous factors in setting punishment: 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, a teller, or a customer, at night (or at noon), for a bad (or arguably less bad) motive, 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 that day, while sober (or under the influence of drugs or alcohol), and so forth.

SENTENCING GUIDELINES, *supra* note 1, at 1.2.

77. See UNITED STATES SENTENCING COMM'N, SENTENCING GUIDELINES: PRELIMINARY DRAFT (1986).

C. *The Nature of a Commission*

A third important compromise is reflected in the philosophical premises upon which the Commission rested its concept of the Guidelines. It is a compromise forced upon the Commission by the institutional nature of the group guidelines writing process. Those individuals disappointed by the compromise⁸⁰ may have failed to adequately consider the way in which governmental processes must inevitably work.

More specifically, some students of the criminal justice system strenuously urged the Commission to follow what they call a "just deserts" approach to punishment. The "just deserts" approach would require that the Commission list criminal behaviors in rank order of severity and then apply similarly ranked punishments proportionately.⁸¹ For example, if theft is considered a more serious or harmful crime than pollution, then the thief should be punished more severely than the polluter.⁸²

The difficulty that arises in applying this approach is that different Commissioners have different views about the correct rank order of the seriousness of different crimes. In a group guideline writing process, the members of the group inherently tend to "trade" over particular items so that each person finds his own views reflected only some, but not all, of the time. In other words, the group may first accept the singular views of Commissioner A, who believes that environmental crimes are particularly serious; later, the group would strongly address the criminal conduct which Commissioner B finds repugnant; then the Commission would turn the floor over to Commissioner C, who feels strongly about some other set of crimes. This process tends to create increased punishments in each area.⁸³

80. See *supra* note 4.

81. See SUPPLEMENTARY REPORT, *supra* note 50, at 15-16; see also *Washington, D.C., Public Hearing*, *supra* note 16, at 63 (testimony of Stephen S. Trott, Assoc. Attorney General, U.S. Dep't of Justice); Nagel, *supra* note 26, at 18.

82. See *Washington, D.C., Public Hearing*, *supra* note 16, at 65-66 (testimony of Stephen S. Trott, Assoc. Attorney General, U.S. Dep't of Justice).

83. For example, the Sentencing Guidelines Commission in the District of Columbia promulgated a proposed set of guidelines in which "Incest, Except Between Consenting Adults" was assigned a "seriousness level" of 6, higher than the "seriousness level" assigned to such arguably equal or more serious crimes as "assault with a dangerous weapon," "extortion," "threatening to kidnap," and "assault on a police officer," and equal to the "seriousness level" assigned to such crimes as "arson," "residential burglary," "assaulting a police officer with a deadly weapon," and "violent robbery." SUPERIOR COURT OF THE DISTRICT OF COLUMBIA SENTENCING GUIDELINES COMM'N, INITIAL REPORT: THE DEVELOPMENT OF FELONY SENTENCING GUIDELINES FOR THE DISTRICT OF COLUMBIA 54-56 (1985) [hereinafter D.C. GUIDE-

ing less emphasis on the just deserts of the offender,⁸⁶ provided important insights. For example, the deterrence theory suggested that very long sentences might not be worth their extra cost, since sentences of medium length might provide nearly equal deterrence.⁸⁷ Furthermore, it suggested that in the case of many "white-collar" crimes, a short period of confinement might be preferable to lengthy probation, for the added deterrent value of even a very brief confinement might be high.⁸⁸ The empirical work with respect to deterrence, however, could not provide the Commission with the specific information necessary to draft detailed sentences with respect to most forms of criminal behavior.⁸⁹

Faced, on the one hand, with those who advocated "just deserts" but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other hand, with those who advocated "deterrence" but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the Guidelines primarily upon typical, or average, actual past practice. The distinctions that the Guidelines make in terms of punishment are primarily those which past practice has shown were actually important factors in pre-Guideline sentencing. The numbers used and the punishments imposed would come fairly close to replicating the average pre-Guidelines sentence handed down to particular categories of criminals. Where the Commission did not follow

Law Enforcement, 1 J. LEGAL STUD. 259, 259-76 (1972) (providing an economic analysis of the extent to which law enforcement deters criminality); van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706, 718-19 (1981) (comparing "deterrent" and "retributionist" theories of punishment).

86. See van den Haag, *supra* note 85, at 714.

87. See Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 430-32 (1980) (discussing reasons why incarceration as a white-collar criminal penalty is "front-loaded" in its costs to the offender and its deterrent value).

88. See Baker & Reeves, *The Paper Label Sentences: Critique*, 86 YALE L.J. 619, 621-23 (1977) (criticizing alternative probationary penalties and identifying imprisonment as a uniquely effective deterrent of white-collar crime); Coffee, *supra* note 87, at 425 (stating that a "legion of legal commentators have confidently asserted that only the threat of imprisonment can truly deter the businessman" from crime); Liman, *The Paper Label Sentences: Critique*, 86 YALE L.J. 630, 631 (1977) (commenting that the threat of imprisonment remains the most meaningful deterrent to antitrust violations).

89. See, e.g., Braun, *Statistical Estimation of the Probability of Detection of Certain Crimes* (July 14, 1988) (draft paper prepared for U.S. Sentencing Comm'n) (on file at Hofstra Law Review) (describing the difficulty of estimating the likelihood of detection of antitrust crimes, a key component of deterrence analysis).

more traditional, involving "trade-offs" among Commissioners with different viewpoints and resulting in substantive proposals midway between their differing views. Such compromises normally took place when the Commission deviated from average past practice, when, for one reason or another, it wished to modify the typical results which occurred in pre-Guideline sentencing.

One important area of such compromise concerns "offender" characteristics. The Commission extensively debated which offender characteristics should make a difference in sentencing; that is, which characteristics were important enough to warrant formal reflection within the Guidelines and which should constitute possible grounds for departure. Some argued in favor of taking past arrest records into account as an aggravating factor, on the ground that they generally were accurate predictors of recidivism.⁹⁵ Others argued that factors such as age, employment history, and family ties should be treated as mitigating factors.⁹⁶

Eventually, in light of the arguments based in part on considerations of fairness and in part on the uncertainty as to how a sentencing judge would actually account for the aggravating and/or mitigating factors, the Commission decided to write its offender characteristics rules with an eye towards the Parole Commission's previous work in the area.⁹⁷ As a result, the current offender charac-

95. See, e.g., J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 71-72 (1981); Gottfredson & Gottfredson, *Accuracy of Prediction Models*, in 2 *CRIMINAL CAREERS AND "CAREER CRIMINALS"* 239-41 (1986).

96. See, e.g., J. MONAHAN, *supra* note 95, at 72 (treating age as a mitigating factor); Gottfredson & Gottfredson, *supra* note 95, at 241-44 (treating age as a mitigating factor and noting other possible factors such as sex, race, type of offense, prior drug or alcohol use, and education); Hoffman, *Screening for Risk: A Revised Salient Factor Score (SFS 81)*, 11 *J. CRIM. JUST.* 539, 542 (1983) (treating age as a mitigating factor); Hoffman & Beck, *Parole Decision-Making: A Salient Factor Score*, 2 *J. CRIM. JUST.* 195, 199-200 (1974) (treating age, employment history, prior offenses, education, and "living arrangement" as mitigating factors).

97. The Parole Commission has adopted guidelines, codified at 28 C.F.R. § 2.20 (1988), on which it bases parole release decisions. These guidelines are based upon the calculation of a "salient factor score" determined by six characteristics of the convict in question: (1) total prior convictions; (2) prior commitments of more than thirty days; (3) age at current and prior offenses; (4) length of most recent commitment-free period; (5) whether on probation, parole, confinement, or escape at the time of the current offense; and (6) heroin/opiate dependence. See *id.* The "salient factor score" assigns points to those aspects of the convict's record which militate against predicted recidivism; for example, a convict with no prior convictions would score three points on the first characteristic, while a convict with four or more prior convictions would score zero. 3 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1234-44 (S. Kadish ed. 1983). Under the Sentencing Guidelines, the court calculates a "Criminal History Score" which is based upon five characteristics: (1) prior prison sentences exceeding thirteen months; (2) prior

insider trading, and antitrust offenders, who previously would have likely received only probation.

It is important to understand how the resulting compromise modified pre-existing probation practices.¹⁰² The Guidelines apply the following probation rules with respect to a first offender. For offense levels "1" through "6," the Guidelines specify a minimum prison term of zero months and authorize the sentencing court to sentence the offender to probation unaccompanied by any confinement term.¹⁰³ For offense levels "7" through "10," which carry minimum prison terms of one to six months, the court may substitute probation for a prison term, but the probation must include either intermittent confinement or community confinement or both.¹⁰⁴ The Guidelines define "intermittent confinement" as confinement "in prison or jail" during each day of which "the defendant is employed in the community and confined during all remaining hours."¹⁰⁵ They define "community confinement" as "residence in a community treatment center, halfway house or similar facility."¹⁰⁶ For offense levels "11" and "12," which have minimum prison terms of eight to ten months, the court must impose at least one-half of the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement.¹⁰⁷ At higher offense levels, the court may impose probation as a sentence only by departing from the Guidelines. In such cases, the court must provide its reasons, and the sentence will be subject to appellate review for "reasonableness."¹⁰⁸

To understand how these rules work in practice, consider three

102. The definition of "probation" used by the Sentencing Commission is provided by statute. Section 3563 of Title 18 provides that the conditions of "probation" may include residence at a "community corrections facility," 18 U.S.C. § 3563(b)(12) (Supp. IV 1986), and prison confinement "during nights, weekends, or other intervals of time," *id.* § 3563(b)(11). Rather than referring to such confinement conditions as "probation," the American Bar Association and others now describe such conditions as "intermediate sanctions." *Breyer Testimony, supra* note 92, at 10. This terminological matter is important because the precise difference between present probationary practice and the Commission's approach appears at lower sentencing levels where the Guidelines impose short terms of non-prison confinement or intermittent confinement. It is the existence of these non-prison confinement conditions and the option of intermittent confinement that most significantly changes present probationary practices.

103. See SENTENCING GUIDELINES, *supra* note 1, § 5B1.1(a)(1).

104. *Id.* § 5B1.1(a)(2).

105. *Id.* § 5C2.1(e)(1).

106. *Id.* § 5B1.4(b)(19).

107. *Id.* § 5C2.1(d).

108. See *supra* notes 31-33 and accompanying text.

have some freedom to shape probation programs to promote these goals of fairness and deterrence, as well as the goals of rehabilitation and counseling.

Some critics complain that the resulting Commission rules are too harsh. One judge, for example, testified at congressional hearings that a woman who embezzles \$14,000, returns it, pleads guilty, and who (the judge believes) is unlikely to repeat the offense, cannot, without departure, receive probation; she must serve a period of confinement in a half-way house or a community treatment center, or spend nights and weekends in jail.¹¹⁷ That period of confinement is not long, however, amounting to one month of evenings and weekends. Obviously, once the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad. The resulting compromises do not seem terribly severe.

The areas in which the Commission deviated from its past practices approach have generated considerable controversy.¹¹⁸ However, such deviations constitute a fairly small part of the entire Guideline enterprise. The Commission felt constrained to minimize deviations from its past practice approach, in part because of some concern about prison impact.¹¹⁹ The Guideline enterprise reflected a broad political consensus in Congress.¹²⁰ Initial Guidelines that would have

confinement" as "residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility; and participation in gainful employment, employment search efforts, community service, vocations training, treatment, educational programs, or similar facility-approved programs during non-residential hours." *Id.*

117. See *Hearings Before the Subcomm. on Criminal Justice, supra* note 16, at 195 (statement of Hon. Thomas Wiseman, United States District Court, M.D. Tenn.).

118. See, e.g., *Hearings Before the Subcomm. on Criminal Justice, supra* note 16, at 554-87 (statement and testimony of Sam J. Buffone, Chairperson, Comm. on the U.S. Sentencing Comm'n, American Bar Ass'n Section of Criminal Justice) (criticizing proposed Guidelines provisions that he asserts would increase prison populations, curtail availability of probation and parole, allow judges to depart from the Guidelines without adequate standards, and fail to adequately specify proper procedures); AD HOC SENTENCING STUDY GROUP, *supra* note 16, at 1-4 (criticizing aspects of the proposed Sentencing Guidelines which limit the use of noncustodial sanctions and restrict sentencing judges' discretion to sentence outside a narrow range without stating grounds for departure).

119. The Sentencing statute, in principle, left the Commission free to develop a system that was either more lenient or more harsh than the pre-Guideline system. It instructed the Commission "as a starting point" to "ascertain . . . the length of [prison] terms actually served," but also instructed the Commission that it "shall not be bound by such average sentences, and shall independently develop a sentencing range." 28 U.S.C. § 994(m) (Supp. IV 1986); see also *id.* § 994(g) (instructing the Commission to formulate guidelines that will "minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons.")

120. See S. REP. NO. 225, 98th Cong., 2d Sess. 37-38, reprinted in 1984 U.S. CODE

within its strictures.¹²³ In this area, where the Commission had little legal room to set sentences, prison sentences will increase.¹²⁴ Other areas in which the Commission deviated from its past practice rules, while controversial, have a more moderate impact upon the total sentencing system.

E. *Special Problems*

The fifth kind of compromise emerges from the "intractable sentencing problem." This problem must be solved in order to produce a meaningful set of guidelines. Technically speaking, however, the problem is so complex that only a rough approach to a solution is possible. The best example is the Guidelines' treatment of multiple counts.

To illustrate the problem, consider the following examples:

<u>Column A</u>	<u>Column B</u>
1. D, in a brawl, injures one person seriously.	1. D, in a brawl, injures six persons seriously.
2. D sells 100 grams of cocaine.	2. D sells 600 grams of cocaine.
3. D robs one bank.	3. D robs six banks.
4. D, driving recklessly, forces another car over a cliff, injuring the other driver.	4. D, driving recklessly, forces another car over a cliff, injuring the other driver and five passengers.

Most persons react to these examples in accordance with two principles:

1. The behavior in Column B warrants more severe punishment

123. See 28 U.S.C. § 994(h) (Supp. IV 1986).

124. The Commission ran its prison population model based on several changing assumptions regarding (1) the growth of prosecutions, (2) the impact of the Guidelines on plea bargaining, and (3) the extent to which sentencing judges would depart from Guidelines sentencing ranges. See SUPPLEMENTARY REPORT, *supra* note 50, at 53-75 (presenting these projections in greater detail); see also *supra* note 92. What the projections indicate is that, given the implementation of the new drug laws, career offender provisions, and the Guidelines, total prison population will rise from its 1987 level of 42,000 to anywhere between 105,000 and 165,000 by the year 2002, an increase of roughly 150-300%. SUPPLEMENTARY REPORT, *supra* note 50, at 72-75. Under all of these scenarios, however, the projections suggest that the part of that increase due to implementation of the Guidelines is between zero and 10% after the other sources of prison population increase have been accounted for. *Id.* In other words, while the implementation of the Guidelines may, when combined with the new drug laws and career offender provisions, account for an increase of 15,000 prisoners (a population almost 40% of current levels), in a world in which there were no new drug law or career offender provisions, the Guidelines would generate an increase in prison population of no more than 5,000.

ing property crimes but consecutive sentences for crimes against the person.¹²⁷ This approach, however, violates both principles. It violates the first principle with respect to property crimes, since it would treat the Column *B* defendants no more severely than the Column *A* defendants; it violates the second principle with respect to crimes against the person, because it is too severe. The federal Commission has tried to satisfy both principles through a system that treats additional counts as warranting additional punishment but in progressively diminishing amounts.

The Guidelines consider three types of circumstances in the multiple count situation. First, the multiple counts may be related to one another in that one charges an inchoate offense (e.g. attempt or conspiracy) and the other charges the completed version of the same crime. In that event, the multiple count rules collapse the two counts and punish only the more serious crime.¹²⁸ Second, the multiple counts may all charge similar crimes involving fungible items such as drugs or money. The multiple count rules then add up the fungible items that are the subject of the several counts and punish the offender as if there were a single count involving the total amount. Since the Commission's punishments for most drug and money crimes are determined by tables that increase punishment at a rate less than proportional to the amounts of drugs or money, collapsing the counts and using the tables produces a result that conforms to both principles—the punishment increases, but at a less than proportional rate.¹²⁹

The most difficult problem arises when the subject matters of several counts are neither fungible nor choate/inchoate. This situation would arise, for example, where count one charges an assault and count two charges a robbery. In that event, the Commission's rules involve two operations. Operation One requires separating the subject matters of all counts into separate events. The rules for collapsing subject matters into single events require that two or more acts which are part of a *single* transaction involving a *single* victim (robbing and assaulting one person at one time, for example) count as *one* event; but *two* acts involving *two* victims (or one victim on two occasions) will count as *two* events. Operation Two involves assigning a score, in units, to each separate event. The units are then

127. D.C. GUIDELINES REPORT, *supra* note 83, at 85.

128. See SENTENCING GUIDELINES, *supra* note 1, § 3D1.2(b)(1)-(3).

129. See *id.* § 3D1.2(d) (citing *id.* § 2D1.1 (quantity of drugs); *id.* § 2S1.1 (amount of money laundered)).

problem is to provide a two-level discount (amounting to approximately twenty to thirty percent) for what the Guidelines call "acceptance of responsibility."¹³⁴ The Guidelines are vague regarding the precise meaning of "acceptance of responsibility."¹³⁵ The Guidelines state that a court can give the reduction for a guilty plea, but it is not required to do so. In effect, the Guidelines leave the matter to the discretion of the trial court.

Plea bargaining presents another controversial issue. Some witnesses argued before the Commission that the practice of plea bargaining should be abolished.¹³⁶ Others argued that plea bargaining was highly desirable and practically necessary.¹³⁷ Eighty-five percent of the sample of federal criminal sentences reviewed by the Commis-

134. See SENTENCING GUIDELINES, *supra* note 1, § 3E1.1(b). For a discussion of § 3E1.1(b), see *infra* note 135. Some critics maintain that the Guidelines' "acceptance of responsibility" discount does not mitigate the disparities between sentences of defendants who plead guilty and those who are convicted by juries. Professor Alschuler, for example, has argued that:

The two level reduction for an "acceptance of responsibility" could simply become an "add on"—an extra benefit that a defendant receives after striking a bargain with an Assistant United States Attorney: "Come to our showroom; make your best deal with one of our friendly sales personnel; and then use the enclosed certificate—Guidelines section 3E1.1—to receive an additional twenty percent discount from the price of your new car."

Alschuler, *Departures and Plea Agreements under the Sentencing Guidelines*, 117 F.R.D. 459, 472 (1988).

135. On the one hand, by definition, a guilty plea is a "clear[] demonstrat[ion] of a recognition and [an] affirmative acceptance of personal responsibility" for criminal conduct. SENTENCING GUIDELINES, *supra* note 1, § 3E1.1(a). On the other hand, a defendant may qualify, in certain circumstances, for an "acceptance of responsibility" reduction even though he did not plead guilty to the offense. For example, § 3E1.1(b) may apply when the defendant asserts issues at trial not related to factual guilt, such as the constitutionality of the statute under which he has been charged. *Id.* § 3E1.1(b). Also, a guilty plea does not automatically qualify a defendant for an "acceptance of responsibility" reduction. *Id.* § 3E1.1(c). Other factors to consider include the defendant's behavior both prior to arrest and during the time between arrest and judgment. See *id.* § 3E1.1 commentary, application notes.

136. See, e.g., *Public Hearing Before the U.S. Sentencing Comm'n* 182-97 (Chicago, Ill., Oct. 17, 1986) (on file at Hofstra Law Review) (testimony of Professor Albert Alschuler); *id.* at 168 (testimony of Professor Stephen Schulhofer); Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing*, 126 U. PENN. L. REV. 550, 565 (1978); Alschuler, *supra* note 134, at 472-76. To support his position in favor of the abandonment of plea bargaining, Professor Alschuler has emphasized that "jurisdictions abroad resolve their criminal cases without plea bargaining," even though these nations are "far poorer" and have less judicial resources than the United States. See Alschuler, *supra*, at 565.

137. See, e.g., *Washington, D.C., Public Hearing, supra* note 16, at 25-26 (testimony of Bobby Lee Cook, Esq.); *Public Hearing Before the U.S. Sentencing Comm'n* 199-200 (Denver, Colo., Nov. 5, 1986) (on file at Hofstra Law Review) (testimony of Hon. Bobby R. Baldock, United States Court of Appeals, 10th Cir.).

mended and Guidelines sentences. By collecting the reasons that judges give for accepting plea agreements, the Commission will be able to study the plea bargaining practice systematically and make whatever changes it believes appropriate in future years.¹⁴⁶ With respect to both acceptance of responsibility and plea bargaining, the Commission has basically left the problem, for the present, where it found it.

III. CONCLUSION

A number of lessons may be drawn from this discussion. First, only a few of the many compromises the Commission made reflect a conscious effort to reconcile politically-based differences among Commissioners. Most of the compromises reflect the efforts of a multi-member governmental body to deal with institutionally-related considerations of administration and management, with the competing principles of fairness and efficiency, and with disparate aims and tendencies now found within the criminal justice system. The institutional needs that led to the Commission's compromises exist irrespective of the particular membership of the Commission.

Second, commentary, discussion, and criticism regarding the Commission's work must begin with a recognition of these same six sources of compromise (as well as a seventh—fidelity to contradictory expressions of Congressional intent¹⁴⁷) which underlie many, if not all, of the Guidelines. As a result, while it may be possible to imagine another world where another set of sentencing guidelines would be superior to the Sentencing Commission's efforts, such an enterprise may shed little light on how to construct a better set of guidelines for our own world.

146. Consider the case of a defendant who has been charged, in a 10-count indictment, of "laundering" \$100,000 on each of ten separate occasions in violation of 18 U.S.C. § 1956(a)(1)(A) (Supp. IV 1986). Under current practice, the defendant and prosecution may reach a "plea bargain" under which nine of the counts are dismissed and the defendant pleads guilty to one count of laundering \$100,000. Under the Guidelines, however, the one-count guilty plea would be adjusted to reflect the fact that a total of \$1,000,000 was laundered. See SENTENCING GUIDELINES, *supra* note 1, § 2S1.1(b)(2)(E). As a result, defendant's sentence would be increased four levels from 23 to 27, a change which increases the presumptive sentencing range by, on the average, more than 50%. To avoid this result, the parties would have to present to the court a plea agreement *in respect to recommended sentence* (not in respect to charges) that departs from this presumptive range. See *id.* ch. 6. They will have to tell the court why the departure is needed. The Commission, by collecting such reasons, could, through future revision, create guidelines that reflect such reasons, permitting the sentence without the need for departures.

147. This matter is explored fully in Nagel, *supra* note 26, at 32-41.

APPENDIX A

CONTENTS

1. Pages 34 and 35 contain the "general application principles" of § 1B1.1, which apply to all cases.
2. Pages 36 and 37 are a copy of the federal bank robbery statute, 18 U.S.C. § 2113 (1982 & Supp. IV 1986). On the facts of this case, the defendant has been convicted of violating subsections (a), (b), and (d).
3. Page 38 is part of the Guidelines' "statutory index," which indicates that, for the crime described, §§ 2B1.1, 2B1.2, 2B3.1, and 2B3.2 may apply. For the sake of simplicity, assume that the defendant was convicted on a one-count indictment charging a violation of § 2113(d) only, so that only Guideline § 2B3.1 applies.
4. Pages 39-40 are a copy of Guidelines § 2B3.1. The "base offense level" is 18. The applicable "specific offense characteristics" are (b)(1)(C) (2 levels) and (b)(2) (3 levels). At this point, the subtotal is $18 + 2 + 3 = 23$ levels.
5. Page 41, copied from the *Guidelines Manual* table of contents, indicates the possible "adjustments" that should be made under Chapter Three. For the sake of simplicity, assume that none of these applies.
6. Pages 42-43 are a copy of Guidelines § 4A1.1. For this example, assume that the defendant's prior, "serious" conviction resulted in a prison sentence exceeding 13 months. As a result, § 4A1.1(a) applies, and the defendant's total "criminal history score" is 3 points.
7. The defendant's "offense level" is 23, and his "criminal history score" places him in "criminal history category" II. Application of the sentencing table, copied onto Page 44, results in a "sentencing range" of 51-63 months.
8. Page 45 contains a portion of the Introduction to the *Guidelines Manual* which provides that the judge may depart from the Guidelines in unusual cases.

Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

3. ROBBERY, EXTORTION, AND BLACKMAIL

§2B3.1. Robbery

- (a) Base Offense Level: 18
- (b) Specific Offense Characteristics
 - (1) If the value of the property taken or destroyed exceeded \$2,500, increase the offense level as follows:

	<i>Loss</i>	<i>Increase in Level</i>
(A)	\$2,500 or less	no increase
(B)	\$2,501 - \$10,000	add 1
(C)	\$10,001 - \$50,000	add 2
(D)	\$50,001 - \$250,000	add 3
(E)	\$250,001 - \$1,000,000	add 4
(F)	\$1,00,001 - \$5,000,000	add 5
(G)	more than \$5,000,000	add 6

Treat the loss for a financial institution or post office as at least \$5,000.

- (2) (A) If a firearm was discharged increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels.
- (3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent or Life-Threatening Bodily Injury	add 6

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

CHAPTER THREE: Adjustments	3.1
Part A - Victim-Related Adjustments	3.1
Part B - Role in the Offense	3.3
Part C - Obstruction	3.7
Part D - Multiple Counts	3.9
Part E - Acceptance of Responsibility	3.21

onment, work release, or escape status.

- (e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b). If 2 points are added for item (d), add only 1 point for this item.

(b) *Departures*

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance in kind or degree . . . that was not adequately taken into consideration by the sentencing commission" 18 U.S.C. § 3553(b). Thus, in principle the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of § 5H1.4, and the last sentence of § 5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

***Principles Governing the
Redrafting of the Preliminary Guidelines¹***

1. The Guidelines will contain a general statement of principles to guide the courts in their application. This statement will indicate that:
 - a. The Guidelines seek to insure that *all* sentences imposed will fulfill the purposes of sentencing mandated by Congress.
 - b. The Guidelines seek to insure that *all* sentences convey the fact that crime does not and will not pay.
 - c. The Guidelines seek to diminish unwarranted disparity in sentencing.
 - d. The Guidelines seek to increase the degree to which punishments are commensurate with the seriousness of the offense and the offender's blameworthiness so that sentences imposed will sufficiently punish offenders proportionately.
 - e. The Guidelines will seek honesty in sentencing, so that the public will know what sentence will be imposed for a specific crime and that the sentence given will approximate the sentence served.
 - f. The Guidelines will seek certainty of punishment so that those with similar characteristics who are convicted of similar crimes will know they will receive similar sentences.
 - g. The overall purpose of the institution of punishment, like the criminal law itself, is to control crime.
 - h. The basic principles governing the distribution of punishment are to provide punishments that (1) efficiently decrease the level of crime through deterrence and incapacitation, and (2) are commensurate with the seriousness of the offense and the offender's blameworthiness.
 - i. Usually the two principles dictate similar punishments, but sometimes they do not. Sometimes, for example, a greater punishment might be called for (as in the case of tax evasion) in order to deter behavior that is particularly hard to detect or for the purposes of incapacitating dangerous of-

¹ As amended and adopted by the Commission at its December 16, 1986, meeting.

practical to include and the statutes and the current practice data should be examined as a rich source for finding relevant distinctions.

- c. Cross references will be eliminated. If a relevant element commonly occurs in a specific offense it may be included explicitly in the guidelines for that offense. In addition, the Guidelines will employ a general section containing a list of relevant elements that may aggravate or mitigate punishment in a variety of circumstances, along with guidance to the judges as to how to take account of those elements.
4. The next draft will increase the Guidelines' flexibility. It will also minimize the number and complexity of mathematical computations.
 - a. The Guidelines will use an offense level approach that will minimize explicit mathematical computations.
 - b. Wherever possible overlapping ranges will be employed.
 - c. The width of the range for 'cooperation,' will be increased.
 - d. The draft will state that not every factor has been given adequate consideration for every offense. In the Commission's view, the statutory standard for departure from the guidelines when "the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. Sec. 3553(b), does not mean that a sentencing judge must review the administrative record of the Commission to determine the extent of adequacy of consideration the Commission gave to any particular factor. Rather, the standard means that a sentencing judge may depart from the Guidelines when an aggravating or mitigating factor is present to such an unusual degree or in such unusual circumstances as to support a reasonable conclusion that the Guideline is not likely to have contemplated the facts substantially similar to those confronting the sentencing judge. In all cases, departures should be no more than necessary and when the Guidelines require a specific type of sanction (e.g. imprisonment) the judge should impose that type of sanction. All sentences whether within or without the Guidelines should be constrained by the principle that they in no way contradict the purposes of

**PLEA NEGOTIATIONS, ACCEPTANCE OF RESPONSIBILITY,
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POLICY DECISIONS IN THE PROMULGATION OF
FEDERAL SENTENCING GUIDELINES**

William W. Wilkins, Jr.

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PLEA NEGOTIATIONS, ACCEPTANCE OF RESPONSIBILITY, ROLE OF THE OFFENDER, AND DEPARTURES: POLICY DECISIONS IN THE PROMULGATION OF FEDERAL SENTENCING GUIDELINES

*William W. Wilkins, Jr.**

INTRODUCTION

On November 1, 1987, sentencing guidelines promulgated by the United States Sentencing Commission became effective for the federal courts throughout the country.¹ Implementation of these guidelines capped two decades of bipartisan effort² toward federal sentencing reform and signaled a move from judicial discretion that was largely unguided and unreviewable³ to a process of accountability, greater uniformity, and articulated reasons for punishment.⁴ The purpose of this article is to pro-

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* This article should not be interpreted as a statement by the United States Sentencing Commission.

1. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 235, 98 Stat. 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728 (1985); Pub. L. No. 99-646, § 35, 100 Stat. 3599 (1986) (codified as amended at 18 U.S.C.A. § 3551 (West 1985 & Supp. 1987)).

2. For the legislative history of Pub. L. No. 98-473, see 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3220.

3. Traditionally, a trial judge in the federal system has enjoyed wide discretion in all sentencing matters. If a sentence imposed was within statutory limits, it was generally not subject to review. See *Gore v. United States*, 357 U.S. 386, 393 (1958); see also *United States v. Tucker*, 404 U.S. 443, 447 (1972).

4. Under the new law, the court must, at the time of sentencing, state in open court the reasons for its imposition of the particular sentence. 18 U.S.C.A. § 3553 (West 1985 &

promulgation of the Commission's initial guidelines.⁵

I. THE COMMISSION AND THE INTENT OF CONGRESS

The Sentencing Commission was established as "an independent commission in the judicial branch of the United States."⁶ The purposes of the Commission are to establish sentencing policies and practices for the federal criminal justice system and to develop means of measuring the degree to which sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.⁷ Pursuant to these purposes, the Commission is charged with promulgating guidelines for courts to use in determining the sentences to be imposed in criminal cases.⁸ Furthermore, it is the Commission's duty to adopt policy statements regarding application of the guidelines or any other aspect of sentencing that, in its view would further the purposes of sentencing.⁹ Importantly, throughout the Sentencing Reform Act¹⁰ there is a recurrent emphasis on balancing these objectives with the reality that our courts are institutions historically better suited to incremental rather than revolutionary change.

The Act enumerates various congressional priorities to guide the Commission in promulgating its guidelines and policy statements. In many instances these priorities are clear legislative statements that the guidelines are intended to satisfy sentencing ideals such as "certainty and fairness," while addressing other important goals such as avoiding unwarranted disparities and assuring a system of sufficient flexibility to permit individualized sentences.¹¹ Therefore, many decisions made by the Commission were dictated by statute.

For example, the provisions of the Act require the Commission to assure that the guidelines specify sentences of substantial terms of imprisonment for defendants who: (1) have two or more felony convictions; (2) committed the offense for which they are sentenced as part of a pattern of criminal conduct from which a substantial portion of their income was derived; (3) committed the crime in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant acted as a manager or supervisor; (4) committed a violent felony while on release pending trial, sentence, or appeal from another felony; or (5) were convicted of trafficking in substantial amounts of

5. The Commission's task is to be ongoing. The language of the various related sentencing provisions, as well as the legislative history, support the conclusion that the process of guideline promulgation and sentencing reform is to be an incremental one. 28 U.S.C.A. §§ 994(o)-(s) (West Supp. 1987); S. REP. NO. 225, 98th Cong., 1st Sess. 178 (1983), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3361.

6. 28 U.S.C.A. § 991(a) (West Supp. 1987).

7. *Id.* § 991(b).

8. *Id.* § 994(a)(1).

9. *Id.* § 994(a)(2).

10. Pub. L. No. 98-473, § 211 provides that the short title of various related sentencing provisions addressed to reform of this aspect of the federal criminal code may be cited as the "Sentencing Reform Act of 1984" [hereinafter "the Act"].

11. 28 U.S.C.A. § 991(b)(1)(B) (West Supp. 1987).

limited only by the statutory maximum penalties and, in some cases, by mandatory minimum sentencing provisions.

Although different from past practices in many respects, determination of a sentence under the guidelines is intended to be relatively simple and straightforward. The guidelines are to be applied in a manner similar to the thought process of a judge determining an appropriate sentence. The guidelines manual consists of seven chapters divided into alphabetical parts, which in turn are broken down into subparts and individual guidelines. Policy statements are provided as required by Congress.²⁰ Commentary accompanying individual guidelines provides explanation, illustration, underlying rationale, and background information.²¹

Sentencing under the guidelines involves an average of nine steps. First, the judge determines the offense in Chapter Two most applicable to the statute of conviction. The guidelines manual provides a statutory index to assist in this determination.²² Next, the judge determines the base offense level in addition to any appropriate specific offense characteristics listed under the guideline.²³ Third, if appropriate, the judge makes adjustments for special victim circumstances, the defendant's role in the offense, and obstruction of justice.²⁴ If there are multiple counts of conviction, the preceding steps are repeated, the counts are grouped, and the offense level is accordingly adjusted.²⁵ If appropriate, the judge makes an adjustment for the defendant's acceptance of responsibility for his conduct, resulting in a total adjusted offense level.²⁶

Next, the judge determines the defendant's criminal history category and any related adjustments under Chapter Four.²⁷ The judge then uses the sentencing table to determine a guideline range that corresponds to the total offense level and criminal history category.²⁸ Except in atypical cases, sentences should be within the guideline range.²⁹

III. PLEA NEGOTIATIONS UNDER THE GUIDELINES

Plea bargaining is the process by which a majority of cases reach the sentencing stage in criminal proceedings in the federal courts. Generally, this is accomplished by either what is known as "sentence bargaining" or by "charge bargaining."

Under sentence bargaining, the prosecution and defense agree to rec-

20. 28 U.S.C.A. § 994(a)(2) (West Supp. 1987).

21. In some instances the commentary will identify circumstances that provide an appropriate basis for departure. U.S. Sentencing Commission, Guidelines Manual, § 1H1.7 (Oct. 1987) [hereinafter "Guidelines Manual"].

22. Guidelines Manual, Appendix A, Statutory Index, A.1-A.33.

23. The base offense level is provided under each offense catalogued in Chapter 2 of the Guidelines Manual.

24. Guidelines Manual, §§ 3A1.1-3C1.1.

25. *Id.* §§ 3D1.1-3D1.5.

26. *Id.* § 3E1.1.

27. *Id.* §§ 4A1.1-4B1.3.

28. *Id.* § 5A.

29. *Id.* § 1A4(b).

A federal statute³⁸ directs the Sentencing Commission to promulgate policy statements to assist sentencing courts in exercising their authority under Rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject plea agreements. Significantly, this directive calls for promulgation of policy statements as opposed to guidelines. Policy statements are substantially different from guidelines. Guidelines, under the statutory scheme, are intended to be specific in nature and mandatory in application. Policy statements, on the other hand, are intended by Congress to provide general guidance on a variety of concerns involved in the sentencing process.³⁹ A sentence imposed that is inconsistent with the guidelines is subject to appellate review, while one that is only inconsistent with the policy statements is not.⁴⁰

In providing for general policy statements rather than guidelines for plea negotiations, Congress no doubt recognized the delicate balance to be struck between the ideals of sentencing reform and the practical realities of a system, however imperfect, that must dispose of thousands of criminal cases every year. For example, although a primary purpose of the reform intended by Congress is equity among "defendants with similar records who have been found guilty of similar criminal conduct,"⁴¹ there is an inherent tension between such equity and the primary goal of a defendant in plea bargaining. Generally, in a guilty plea, it is the goal of the defendant to obtain a more lenient sentence than he might otherwise receive.⁴² Thus, while in the ideal world all defendants want "equity" in sentencing, the reality is that courts dispose of most cases by guilty plea, illustrating that the defendant's goal in most cases has not been equity, but a lighter sentence.

The Commission decided early in its deliberations on all guideline issues, including plea bargaining, that the most appropriate way to develop practical and workable sentencing guidelines was through an open process that involved as many interested individuals and groups as possible. By tapping the expertise and experience of those who worked in the system, the Commission ensured that its guidelines would be grounded in reason and practicality. Advisory and working groups of federal judges, United States attorneys, federal public defenders, state district attorneys, federal probation officers, private defense attorneys, academics, and researchers met frequently with the Commission to discuss

38. 28 U.S.C.A. § 994(a)(2)(E) (West Supp. 1987).

39. S. REP. No. 225, 98th Cong., 1st Sess. 165-68 (1983), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3348-51.

40. *Id.* at 3350. The Senate report states that "[t]his is not intended to undermine the value of the policy statements. It is, instead, a recognition that the policy statements may be more general in nature than the guidelines and thus more difficult to use in determining the right to appellate review." *Id.* (footnote omitted).

41. 28 U.S.C.A. § 991(b)(1)(B) (West Supp. 1987).

42. A. VON HIRSCH, K. KNAPP, & M. TONRY, *THE SENTENCING COMMISSION AND ITS GUIDELINES* 143 (1987) ("The goal of sentencing equity—provisionally defined as the treatment of 'like cases alike'—is in direct conflict with every criminal defendant's desire to secure favorable treatment.") *Id.*

to be imposed without plea negotiations, which will provide a standard to which judges can refer when deciding whether to accept or reject a plea agreement.

The Commission has issued initial plea agreement policy statements which substantially track the procedural requirements of Rule 11 of the Federal Rules of Criminal Procedure.⁴⁹ For example, under Rule 11(e) the parties may recommend, or agree not to oppose, a particular sentence with an understanding that the recommendation or agreement is not binding on the court.⁵⁰ The parties can also agree that a specific sentence is the appropriate disposition of the case.⁵¹ Additionally, this rule provides that the parties may negotiate the dismissal of other pending charges, and that an agreement must be disclosed by the judge in open court at the time the plea is offered, although in exceptional cases and upon showing of good cause, disclosure may take place *in camera*.⁵² The Commission's policy statements encompass these same safeguards.⁵³

The policy statements go further than a reaffirmation of existing law and practices. Under the policy statements, the court in accepting an agreement involving the dismissal of charges or an agreement not to pursue additional charges, may accept the agreement if it first determines on the record that the remaining charges adequately reflect the seriousness of the defendant's criminal conduct.⁵⁴ It must also determine on the record that acceptance of the agreement will not undermine the statutory purposes of sentencing.⁵⁵ The court may accept a nonbinding recommendation if it determines that the recommendation is within the applicable guideline range, or the recommendation departs from the guidelines for justifiable reasons.⁵⁶ The court may accept a recommendation of a specific sentence subject to the same requirements.⁵⁷ A defendant may withdraw the plea pursuant only to Rule 11(e)(2).⁵⁸ If the court follows these policy statements, sentences which would undermine the guidelines and the recognized purposes of sentencing should not occur. This will result in significant steps toward realizing the goals identified in the Sentencing Reform Act of 1984, as amended, and the Sentencing Act of 1987.

Further, the policy statements allow the parties to a plea agreement to provide a written stipulation of facts relevant to sentencing.⁵⁹ However, such a stipulation may not contain misleading facts and must identify the disputed facts relevant to sentencing.⁶⁰ The court is not bound by

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49. *Id.* §§ 6B1.1-6B1.4.
 50. FED. R. CRIM. P. 11(e)(1)(B).
 51. *Id.* Rule 11(e)(1)(C).
 52. *Id.* Rule 11(e)(2).
 53. Guidelines Manual, § 6B1.1.
 54. *Id.* § 6B1.2(a).
 55. *Id.*
 56. *Id.* § 6B1.2(b).
 57. *Id.* § 6B1.2(c).
 58. *Id.* § 6B1.3.
 59. *Id.* § 6B1.4(a).
 60. *Id.*

pleas.⁶³ Analysis of past practices showed that defendants who pled guilty received a sentence that averaged between thirty to forty percent lower than the sentence which would have been imposed had the defendant pled not guilty and been subsequently convicted.⁶⁴ The Commission also concluded that it could apply such a discount in a fashion that would withstand constitutional scrutiny.⁶⁵ However, in the Commission's view, these reasons were not sufficient to justify the award of an automatic discount for a plea of guilty.

As a practical matter, the uncertainty of the outcome, in conjunction with the hope of leniency, has been a subtle impetus to plead guilty. A concern for injecting absolute certainty into the process was therefore a consideration. Further, sentence reductions for guilty pleas under past practices were not automatically given in every case. Providing an automatic fixed discount would reward every defendant who pled guilty regardless of the circumstances of the offense or the defendant's post-offense conduct. While it would continue the practice of encouraging guilty pleas, it would result in unjustified windfalls in many cases. Finally, many commentators expressed concern, which the Commission shared, that such a fixed reduction would not be in keeping with the public's perception of justice.

Although the Commission rejected the concept of an automatic discount for guilty pleas, it concluded that a defendant's acceptance of responsibility for his conduct has provided a potential basis for mitigation under existing practices, and that it should continue to be encouraged.

63. Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 48 (June 18, 1987).

64. *Id.*

65. The Commission received the following testimony concerning the constitutionality of awarding discounts for guilty pleas:

Investing the Court with discretion to mitigate the sentence by a specified amount or amounts, rather than directing specified "guilty plea credit" in all cases, would very much undercut any Constitutional objection to the plan. As the Commission is aware, the Constitution has been held to forbid imposition of a penalty for a "defendant's unsuccessful choice to stand trial." *Smith v. Wainwright*, 664 F.2d 1194, 1196 (5th Cir. 1981). Of course, the Supreme Court has held that this does not forbid extending a "proper degree of leniency in return for guilty pleas." *Corbitt v. New Jersey*, 439 U.S. 212, 223 (1978). The line that distinguishes a sentencing scheme which simply provides leniency to those who plead from that which impermissibly punishes those who go to trial, however, may not always be a clear one. One key factor appears to be [sic] whether the sentencing scheme at least allows the same punishment to be imposed upon those who plead and those who go to trial. Compare *United States v. Jackson*, 390 U.S. 570 (1968) (invalidating a statute that allowed death penalty only if defendant elected to go to trial) with *Corbitt, supra* (upholding a statute that required life imprisonment upon conviction by a jury but allowed the court to impose either life imprisonment or a lesser sentence if there was a plea).

United States Sentencing Commission Public Hearing on Plea Agreements in Washington, D.C. 3-4 (Sept. 23, 1986) (testimony of William F. Weld, Assistant Attorney General, Criminal Division, U.S. Department of Justice). See also, Letter from Matthew T. Heartney to Rep. Elizabeth Holtzman (May 6, 1978); Letter from Daniel J. Freed, Yale Law School, to Rep. James R. Mann, Chairman of Subcommittee on Criminal Justice (July 20, 1978).

in the offense.⁷⁰ The legislative history suggests that the Commission address the significance of whether the offender initiated the criminal activity or followed the direction of others, and whether he was a major or minor participant in the crime.⁷¹ It further indicates that such considerations reasonably might be seen as important in determining the nature, length, and conditions of the sentence.⁷²

A defendant's role in the offense is a concept rooted in principles of criminal liability and punishment. An offender who aids, abets, counsels, commands, induces or procures the commission of an offense, or causes another to do an act for which he would be guilty had he personally committed the act, is as guilty as an actual participant in the crime.⁷³ However, one who has knowledge that a crime has been committed, and only afterward "receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment" generally has been subject to not more than one-half the potential punishment prescribed for the principal.⁷⁴

In the law of conspiracy, the broad rule of liability is that a conspirator in a continuing conspiracy is responsible for substantive offenses committed by a co-conspirator in furtherance of the conspiracy, even though he does not participate or have knowledge of them.⁷⁵ This rule is founded on the same concept that holds an accessory before the fact responsible as a principal in the commission of a crime.⁷⁶ These general rules of accom-

supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

- (1) age;
- (2) education;
- (3) vocational skills;
- (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
- (5) physical condition, including drug dependence;
- (6) previous employment record;
- (7) family ties and responsibilities;
- (8) community ties;
- (9) role in the offense;
- (10) criminal history; and
- (11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

Id. (footnote omitted).

70. *Id.* § 994(d)(9).

71. S. REP. No. 225, 98th Cong., 1st Sess. 174 (1983), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3357.

72. *Id.*

73. 18 U.S.C. § 2 (1982).

74. *Id.* § 3 (1982 & Supp. IV 1986).

75. *Pinkerton v. United States*, 328 U.S. 640, 646 (1946).

76. *Id.* at 647.

thority, the degree of participation in the offense, recruitment of accomplices, a claim to a larger share of the profits from the enterprise, the nature and seriousness of the activity, and the degree of control exercised over others.⁸³

In addition, guideline 3B1.3 provides an increase of two offense levels for abuse of a position of public or private trust or use of a special skill, provided the abuse or the use significantly facilitated the commission or concealment of the offense. The commentary states that "[s]pecial skill" refers to a skill not possessed by members of the general public and one usually requiring substantial education, training or licensing."⁸⁴ An attorney who is custodian of a fund from which he embezzled, or an airplane pilot who flies narcotics from South America to this country is subject to this increase.⁸⁵

VI. GUIDELINE DEPARTURES

As with plea agreements, the Commission received a wide variety of opinions on the issue of permitting departures from the guidelines. Some suggested the use of a rigid mathematical formula; others advocated an inflexible system which left little or no room for departure; and still others urged the Commission to adopt a presumptive sentence approach with great latitude for departure. In the final analysis, the guidelines submitted to Congress followed none of these approaches. Congress required the Commission to promulgate guidelines which structured discretion and reduced sentencing disparity, yet left the system flexible enough to accommodate the unusual case. Therefore, the Commission focused its efforts on drafting guidelines for the typical case, and adopted a policy of limited departures to address cases which present unusual circumstances.

Prior to the end of the public comment period on the preliminary draft which was published in September 1986, the Commission reached the conclusion that it had taken a significant step toward its goal of reform and made an important decision in defining the initial guideline writing task. Various Commission efforts had been submitted for comment within a span of several months. These efforts had received responses that expressed reservations about practical application and, more importantly, about the degree of restrictions on a judge's discretion intended by Congress. One commentator suggested outright that the Commission might return to Congress and explain that congressional intent in sentencing reform simply could not be satisfied within the conflicting legislative imperatives that logically followed from years of bipartisan compromise.⁸⁶ The Commission rejected the suggestion. Rather, it focused its

83. *Id.*

84. *Id.* § 3B1.3, Commentary.

85. Commentary 2 to § 3B1.3 provides that examples of persons who possess "special skill" include pilots, lawyers, doctors, accountants, chemists and demolition experts. *Id.* § 3B1.3, Commentary 2.

86. United States Sentencing Commission Public Hearing in New York, N.Y. 33 (Oct. 21, 1986) (testimony of Chief Judge Jack Weinstein, United States District Judge for the

tence that is lower than that established by statute as minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.⁹³

Thus, Congress expressly intended that substantial assistance to the government should be a mitigating factor.

The only practical and workable approach to sentencing a defendant who provided substantial assistance is by a departure from the guidelines. Just as substantial assistance by a defendant may remove the application of a statutory mandatory minimum sentence,⁹⁴ it may also remove the

93. 28 U.S.C.A. § 994(n) (West Supp. 1987).

94. For a comparison of approaches to sentencing defendants who provide assistance, see 28 U.S.C.A. § 994(n), 18 U.S.C.A. § 3553(e) (West Supp. 1987), and Guidelines Manual, § 5K1.1.

ADDENDUM

133 CONG. REC. S16644-48 (daily ed. Nov. 20, 1987) (colloquy between Senators Biden, Hatch, Thurmond and Kennedy on criminal fines and sentencing amendments):

MR. BIDEN. Mr. President, I join my colleagues, Senators THURMOND, HATCH, and KENNEDY today in concurring in the House amendments to the Senate bill, S. 1822, which makes minor and technical amendments to the Sentencing Reform Act of 1984. This bipartisan bill, along with H.R. 3483, makes changes needed to ensure the smooth implementation of the Sentencing Reform Act with regard to the application of the new sentencing guidelines and the collection of criminal fines. These amendments represent a reasonable compromise of some of the provisions of S. 1822, which unanimously passed the Senate on October 28, 1987.

The House has placed some comments and section-by-section analysis of S. 1822 in the CONGRESSIONAL RECORD. I want to point out that that analysis was not presented to the Senate for review in advance and was not part of the compromise regarding either this bill or H.R. 3483. Senators KENNEDY, THURMOND, HATCH, and I have joined in an explanation that responds to some aspects of the House comments that are inconsistent with the Senate's understanding of S. 1822.

Mr. President, I ask unanimous consent that the text of this joint explanation be entered at this point in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

JOINT EXPLANATION BY SENATORS BIDEN, THURMOND, KENNEDY, AND HATCH ON S. 1822

On October 28, 1987, the Senate unanimously passed S. 1822, a bill designed to make technical and clarifying changes to the Sentencing Reform Act of 1984, to ensure the smooth and effective implementation of the new sentencing guidelines and related provisions of law. S. 1822 was drafted by the chairman and ranking members of the Senate Judiciary Committee following detailed consultations with other members of the committee, the Department of Justice, the Sentencing Commission and the Administrative Office of the United States Courts.

Because the guidelines were to take effect shortly thereafter on November 1st, it was important that the bill be enacted as quickly as possible. Members of the House Judiciary Committee, however, initially took the view that they would oppose any effort in the House to consider S.

and a finding by the court that a defendant is entitled to consideration

Commission that, "in principle, the Commission, by specifying that it has adequately considered a particular factor, could prevent a court from using it as grounds for departure." The House contends that a statement by the Commission that it had adequately considered a factor in formulating the guidelines would not necessarily bar a sentencing court from considering that factor. While it is doubtless true that a sentencing court should assess the scope and meaning of this kind of statement by the Commission, the Senate sponsors believe it is indisputable that the court would be precluded from departing unless, as a threshold matter, the court reasonably determined that the factor was *not* meant to be covered by the commission's statement. Any contrary view would be fundamentally at odds with the Sentencing Reform Act of 1984 and its goal of ensuring consistent sentencing decisions.

Finally, the Senate sponsors also do not agree with the House's suggestion that the United States Sentencing Commission has an "obligation to promulgate guidelines for petty offenses." The Senate sponsors of S. 1822 believe the commission is under no such obligation.

Mr. HATCH. Mr. President, I would like to expand upon the analysis contained in the joint statement submitted by my colleagues and me. I took great interest in the Sentencing Reform Act when it passed in 1984 and it is of great concern to me that in its comments, the House has introduced some unnecessary confusion to the standard for departure from the guidelines. Specifically, as mentioned in the joint statement, the House cites 18 U.S.C. Sec. 3553(a) as possibly having some relationship to departure. In fact, this suggestion is contradicted by the legislative history accompanying that provision.

When the language stating that a court "shall impose a sentence sufficient but no greater than necessary, to comply with the purposes" of sentencing was added as an amendment in 1984, I explained that the amendment was of a clarifying nature. At the time the amendment was added, I stated: "Sentences must be designed so that they fully meet the various purposes of sentencing. Those purposes cannot be met by sentences that are plainly excessive or by sentences that are plainly insufficient."

In short, the phrase merely clarified the purposes of sentencing and did not provide an additional basis for departure. Frankly, I would not have agreed to this amendment offered in 1984, and I do not believe the managers of the bill or the Senate would have accepted this amendment, had it been interpreted in the manner now being urged by the House. The suggestion promoted by the House in this statement would be a radical change in the Sentencing Reform Act and does not have the concurrence of the Senate.

In fact, it is section 3553(b), not section 3553(a), that provides the basis for departure. Section 3 of S. 1822 amends section 3553(b) and clarifies the standard for departure, but it does not broaden the departure standard in any way. Section 3 adds the words "of a kind or to a degree" to the existing standard for departure. The standard for departure is vital to the proper functioning of the guidelines system. It tells judges when, under the law, they are permitted to impose a sentence outside the guidelines promulgated by the Sentencing Commission. If the standard is relaxed, there is a danger that trial judges will be able to depart from the guidelines too freely, and such unwarranted departures would undermine the core function of the guidelines and the underlying statute, which is to reduce disparity in sentencing and restore fairness

may depart from the guidelines in imposing a sentence. As with all depar-

sideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission," was added for the protection of the Sentencing Commission. There was some concern that failure to specifically designate the materials that may be used in determining the appropriateness of departure could result in members of the Commission, or their notes and other internal work products, being subpoenaed. This was never intended by Congress, and section 3 clarifies that only those items listed may be used in a departure determination.

Mr. HATCH. I also wonder whether my colleague from Massachusetts, Senator KENNEDY, who was the principal sponsor of the sentencing reform legislation that Congress enacted in 1984, agrees that the proposed amendment to section 3 is merely clarifying in nature?

Mr. KENNEDY. I do agree. Congress gave the Sentencing Commission authority to determine what level of detail the guidelines should contain. An introductory policy statement to the guidelines indicates that the Commission chose to draft guidelines, based on an empirical study of actual sentencing decisions, that it expects will govern the great majority of cases. In the words of the policy statement, "[t]he Commission intends the sentencing courts to treat each guideline as carving out a heartland, a set of typical cases embodying the conduct that each guideline describes." Consistent with this approach, the policy statement further notes that there will also be factors, aggravating and mitigating, that the Commission has not covered—or, using the statutory departure language, has not "adequately considered"—in its guidelines. Some factors may not have been considered, as the policy statement notes, because of "the difficulty of foreseeing and capturing [in] a single set of guidelines . . . the vast range of human conduct potentially relevant to a sentencing decision." Other factors were not included in the guidelines because the data indicated they occur infrequently, and therefore did not justify a specific guideline directive. The commission cites as an example physical injury to the victim in a fraud case.

Where a factor that was not adequately considered is present in a particular case, the current statutory departure language, 18 U.S.C. Sec. 3553(b), directs the judge to depart if that factor or circumstance "should result in a sentence different from that described" in the guidelines. The proposed amendment in section 3 of the bill merely clarifies the present approach. The addition of the words "of a kind or to a degree" is intended to make clear what is already implicit in current law, that a factor can be found not to have been adequately considered either first, because it is not reflected in the applicable guidelines at all, or second, because it is not reflected to the unusual extent that it is present in a particular case. The bill further makes clear that the ultimate test of whether a factor was adequately taken into consideration by the Sentencing Commission in formulating the guidelines rests on a fair reading of what the guidelines, policy statements and official commentary of the Commission actually say. These are the official pronouncements of the Commission, and departure will not be appropriate if these pronouncements indicate that the factor was included in the guidelines by the Commission.

I want to join the remarks made by my colleague from South Carolina with respect to the subpoena protection language in section 3. Clearly, Congress never intended that the sentencing courts would look to items other than the guidelines, policy statements and the Commis-

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Plea Agreements Under the Federal Sentencing Guidelines

By Donald A. Purdy, Jr.,* and
Jeffrey Lawrence**

The Federal Sentencing Guidelines structure the sentencing discretion of the trial judge and change the way practitioners must look at sentencing consequences in general and their plea bargaining discretion and options in particular. The authors provide an overview of the workings of the Guidelines and discuss in detail the use of defendant's "relevant conduct" in determining offense level in sentencing. They also consider the informed plea of guilty (i.e., the information the defendant must have on the impact of the Guidelines on his plea). The article notes two areas, acceptance of responsibility and providing of substantial assistance to the authorities, where counsel may urge a reduced sentence for a defendant.

The Sentencing Reform Act of 1984¹ was enacted to correct two major flaws in the sentencing process of the criminal justice system. First, defendants who had committed the same crimes were receiving widely disparate sentences, depending on the sentencing judge, the district within which the crime was committed, and a wide variety of factors that Congress deemed no longer appropriate considerations in sentencing.² Second, the sentences that had been imposed did not accurately reflect the actual time the offender would serve, the so-called truth-in-sentencing issue. The statute provided that the then-existing system of completely individualized sentencing would be replaced with a guideline system to be promulgated by a Sentencing Commission, created by the Act. The Commission was directed to establish Federal Sentencing Guidelines for federal offenses to identify the factors that were to be used in determining individual sentences while

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The comments of the authors are their own and do not necessarily represent the policies or opinions of the U.S. Sentencing Commission.

¹ Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1837 (1987). See "Symposium: Federal Sentencing Guidelines," 26 C.L.B., No. 1 (Jan.-Feb. 1990).

² See 28 U.S.C. § 994(l).

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pants in the federal criminal justice system learn not only the mechanics of the new sentencing guidelines but also the ways in which the Guidelines affect their work, particularly with respect to their effect on plea bargaining. Guideline sentencing will affect counsel's role throughout the criminal justice process, beginning with the preindictment negotiations. Counsel must be especially cognizant of the fact that the defendant's actual criminal conduct and criminal history have major significance under guideline sentencing. Both the Guidelines and the Sentencing Reform Act provide that personal characteristics of the defendant are far less important than under preguideline sentencing.⁴ Counsel must learn the new system well, or it will be at the peril of both their clients and potentially themselves.

The U.S. Sentencing Commission has stated that the initial set of Guidelines "will not, in general, make significant changes in current plea agreement practices."⁵ Pursuant to the statutory directive, the Commission will review the overall effect of the Guidelines and may regulate the plea-bargaining process through Guideline amendments. It is clear that the important differences under guideline sentencing call for a greater expertise of counsel on sentencing issues.

Under guideline sentencing, the defendant's actual offense conduct, and criminal history can have a predictable and quantifiable effect on the determination of the sentence, sometimes far beyond the narrower statutory elements of the offenses of conviction.⁶ In short, each factual determination may contribute to an increase or a decrease in the potential punishment.

The Guidelines require counsel to know the facts of the defendant's participation in uncharged as well as charged criminal conduct and make the finding of facts far more important. This does not necessarily mean, however, that sentencing proceedings will result in lengthy minitrials on fact issues for several reasons:

- The majority of facts will not be in dispute;
- Hearsay and summarization will still be permitted;
- The time-saving device of factual stipulations will still be

⁴ See U.S. Sentencing Commission, *Guidelines Manual* ch. 5, pt. H (Nov. 1989); 28 U.S.C. § 994(e) (hereinafter *Guidelines Manual*).

⁵ Guidelines ch. 1.

⁶ Guidelines § 1B1.3; ch. 1.

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sentencing, counsel are given an opportunity to estimate the potential sentence at a far earlier stage in the criminal proceedings. Defendants are in a better position, for the purpose of plea bargaining, to evaluate their sentencing consequences prior to trial or even before indictment. Therefore, in order to advise a defendant effectively as to their choices, counsel must become very knowledgeable in the application of the Guidelines.

The Guideline Structure: An Overview

The Sentencing Commission adopted a modified charge offense/real offense model in fashioning its Guidelines.¹¹ Under the Guidelines, the initial task is the determination of the appropriate Guideline based on the defendant's count of conviction (the "charge offense element") from the offenses listed in the Statutory Index.¹² Once this determination is made, the guideline range is obtained by determining the offense level and the criminal history category. The offense level is determined by considering the base offense level, applying the defendant's relevant conduct,¹³ any specific offense characteristics, and any applicable adjustments from chapter 3 of the Guidelines (the "real offense" element) and any special provisions from chapter 4, such as the career offender¹⁴ or the armed career criminal provision.¹⁵

The Sentencing Table

The resulting determination will yield an offense level, from 1 to 43 on the Sentencing Table (vertical axis),¹⁶ which, in turn, when combined with the criminal history category determined in chapter 4, provides a sentencing range for the court. The ranges set out in the Sentencing Table are the greater of six months or a maximum that is 25 percent greater than the minimum. Each change of one offense level results in approximately a 12½ percent change in punishment, thus rendering every such change material to the ultimate sentence the judge can impose without

¹¹ See Guidelines ch. 1, at 1.5-1.6.

¹² Guidelines, App. A. See also § 1B1.2, Stipulation to More Serious Offenses, *infra* at 405.

¹³ Guidelines § 1B1.3.

¹⁴ Guidelines § 4B1.1.

¹⁵ Guidelines § 4B1.4 (effective Nov. 1, 1990).

¹⁶ See Guidelines ch. 5, pt. A.

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appropriate guideline range that factors normally relevant to sentencing that are not specifically and adequately factored in by the Commission during the application of the Guidelines to the cases that are not explicitly excluded from consideration by the Guidelines may be considered by the judge in determining where to sentence within the determined range and whether or not to depart from the range. Traditional advocacy skills of practitioners can be employed both in determining the applicable guideline and in the selection of the specific sentence.

What Counsel Must Know

It will thus be extremely important for counsel to know what the defendant actually did in connection with the commission of the offense because of the potential quantifiable impact of real offense conduct. Defense counsel will want to put the government to its proof about disputed facts and to challenge the legal conclusions and sentencing significance of undisputed facts when appropriate. Counsel will want to ascertain as early as possible the defendant's real offense conduct to determine the guideline range maximum exposure and the leverage or incentive faced in the plea agreement stage given the facts as known to or discoverable by the government. Counsel must be sensitive to the special dangers to their clients under guideline sentencing because facts the defendant provides to the government or that others provide subsequently can directly and substantially increase the guideline sentencing range applicable to the defendant. While this potential detriment exists by virtue of the real offense element of the Guidelines, Section 1B1.8 provides the means of avoiding these problems in the plea-bargaining context where the defendant attempts to give substantial assistance to the authorities.

In addition, the incentives for and potential terms of plea agreements as well as their structure will be affected by guideline sentencing as judges as well as the parties have as a basis for evaluating the plea agreement the applicable guideline ranges for the real offense conduct that becomes known prior to the sentencing. Under the Guidelines, the parties will be able to determine far more information about sentencing than ever before. This knowledge must be obtained prior to the entry and acceptance of the defendant's plea since the failure to do so may result in unforeseen and unwanted consequences. Section 1B1.3,

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Section 1B1.3(a)(2) (“relevant conduct”) requires that, for certain offenses, the sentencing court should consider “with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction.”²³ The commentary to Section 1B1.3(a)(2) explains that this provision

[P]rovides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity . . . not specified in the count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction.

If the conviction offense is of the type for which the Guidelines’ offense level is largely based on quantity or amount (primarily drugs, theft, fraud, and embezzlement, most offenses covered in Section 3D1.2(d)) and the conduct in question is part of the same common scheme or plan as is the offense of conviction, then such conduct is considered “relevant conduct” and is to be used to determine the applicable range.²⁴ Otherwise, the conduct may be considered by the judge in determining where to sentence within the range and in whether or not to depart.²⁵

Thus, as in the example above, if a defendant is charged with three counts of distributing one kilogram of cocaine on three separate occasions and pleads guilty to one count, all three kilograms will be used to determine the sentencing range if each was part of a common scheme or plan with the count of conviction. Dismissal of the remaining two counts would have no effect on the applicable guideline range, except in the rare instance when the statutory maximum for the one count is lower than the top end of the applicable guideline range.²⁶ The sentencing judge should consider such conduct, notwithstanding any agreement by the prosecutor and the defendant that it should be excluded in the guideline computation.

However, in cases involving offenses that the Guidelines treat as separate and distinct criminal acts, such as robbery and assault,

²³ *Id.*

²⁴ Guidelines § 1B1.3.

²⁵ Guidelines § 1B1.4.

²⁶ See, e.g., *United States v. Scroggins*, 880 F.2d 1204 (11th Cir. 1989).

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Guidelines in order to advise their clients effectively concerning their exposure in sentencing, whether it be by trial or guilty plea.

Appellate courts have looked at the impact of relevant conduct in the plea bargain context. In one,³³ the Court of Appeals for the Sixth Circuit warned that the government "scrupulously avoid any behavior that would constitute trickery."³⁴ In the other case, *Scroggins*,³⁵ the Eleventh Circuit noted a perceived lack of benefit from plea bargaining.

In *Ykema*,³⁶ the appellant pled guilty to a two-count information-charging possession with intent to distribute approximately two kilograms of cocaine (21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)) and possession with intent to distribute approximately ten ounces of cocaine (21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)) in lieu of a five-count superseding indictment.

The appellant claimed a violation of the plea agreement because the information used in sentencing resulted in a range that "he would have received if there had been no plea agreement."³⁷ He asserted that (1) the plea agreement intentionally envisioned use of "approximately" to describe the "2 kilograms" to permit argument that less was possessed; (2) an element of the agreement was that the statutory mandatory minimum sentence would be reduced from ten years to five years because of the dismissal of the count charging 21 U.S.C. § 841(b)(1)(A); and (3) the government promised that "no additional charges [would] be issued against the Defendant . . . with regard to drug trafficking described in the indictment, the information and the Defendant's statements."³⁸

Regarding appellant's contention that the agreement language concerning "no additional charges" supported his contention, the court said that the issue is "whether this represented a promise to appellant beyond the literal words, to include avoiding any use of information concerning cocaine trafficking beyond 'approximately 2 kilograms.'"³⁹ The court concluded that the

³³ *United States v. Ykema*, 887 F.2d 697 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 878 (1989).

³⁴ *Id.* at 699.

³⁵ 880 F.2d at 1213.

³⁶ 887 F.2d at 698.

³⁷ *Id.* at 699.

³⁸ *Id.*

³⁹ *Id.*

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16 theft,"⁴⁴ and properly aggregated them in applying the theft guideline in Section 2B1.1(b)(1). (The court stated that if the conduct had been included in a count resulting in an acquittal, it could not be used.⁴⁵)

The court also rejected appellant's argument that consideration of the additional facts that he did not plead to was unfair or inequitable:

The evidence of these prior thefts eliminates any argument that some concatenation of fortuitous circumstances provoked appellant into committing his offense of conviction on the spur of the moment: appellant's prior thefts establish that he acted purposely on December 16, having had the opportunity to consider the criminality of his act and its consequences. Such purposeful criminal conduct demands greater punishment, both to reflect society's desire for retribution and to ensure specific deterrence against future criminal conduct by appellant. In aggregating the loss occasioned by all of appellant's thefts, therefore, the guidelines reflect the full magnitude of appellant's culpability.⁴⁶

Regarding appellant's unfairness contention that his plea bargain was an empty bargain, the court "agree[d] with appellant's characterization of his plea agreement" but found no error in the application of the Guidelines.⁴⁷ The court stated that the "appellant had nothing to gain from this agreement because whether or not he accepted it, his guideline sentence range would have been the same."⁴⁸

This was true in this case because the district court did not give the appellant credit for the two-level reduction for acceptance of responsibility under Section 3E1.1. The court affirmed the district court's rejection of the probation officer's recommendation that the appellant be given the two-level reduction for acceptance of responsibility under Section 3E1.1, even though he voluntarily provided authorities with information concerning his other thefts, because he "continued to use cocaine after his arrest, and . . . the court therefore felt that appellant had not turned away from the lifestyle that had motivated his offense of conviction."⁴⁹ The court held:

⁴⁴ *Id.* at 1211. *But see* United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989).

⁴⁵ *Id.* at 1211 n.18.

⁴⁶ *Id.* at 1213.

⁴⁷ *Id.* at 1213.

⁴⁸ *Id.* at 1213.

⁴⁹ *Id.* at 1215.

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maximum possible penalty provided by law.' Fed. R. Crim. P. 11(c)(1).'⁵³ The court further stated:

While it might be desirable if each defendant, at the time of tendering a guilty plea, were fully cognizant of his likely sentence under the Sentencing Guidelines, we decline to read such a requirement into Rule 11(c)(1). Instead, we simply note that, "in the interest of fairness, it may be good practice for the [district] court to assure itself that the defendant has discussed the guidelines with defense counsel and has been advised about their applicability [citations omitted]." . . . In those cases where the applicable Guidelines sentence is easily ascertainable at the time the plea is offered, the district court has full discretion to—and, where feasible, should—explain the likely Guidelines sentence to the defendant before accepting the plea.⁵⁴

Similarly, the Second Circuit, in *United States v. Sweeney*,⁵⁵ affirmed the district court's refusal to let a defendant withdraw his guilty plea, rejecting the assertion that the erroneous calculation of the applicable guideline-sentencing range by his previous counsel rendered his assistance ineffective. In that case, the appellant claimed to the district court that he was told the range would be twenty-one to twenty-seven months, when the correct determination was fifty-one to sixty-three months; the district court then sentenced the defendant to fifty-seven months.

The court found the following evidence determinative:

The record reveals . . . that when appellant pled guilty, he was aware that he faced a maximum prison term of ten years on the conspiracy count and a maximum term of five years on the false statement count. He also understood that the sentence to be imposed was "within the sole discretion of the sentencing judge," and he was told by the judge that even "if the sentence is more severe than you expected, you will still be bound by your plea and you will have no right to withdraw it." Moreover, defendant's attorney stated in open court that he had advised the defendant of his "best guess" as to the sentencing range. . . . Now that we have the Guidelines, we do not believe that appellant may avoid the effect of our precedents by characterizing a mistaken prediction as ineffective assistance of counsel. . . . Under the Guidelines there will be many more detailed hearings regarding imposition of sentence, as in this case. A sentencing judge will now frequently indicate, as a result of such hearing, what the sentence may be. In those circumstances, allowing defendants to use the presentence prong of Rule 32(d) to withdraw their pleas would pervert the rule and threaten the integrity of the sentencing process.

⁵³ *Id.* at 1142-1143.

⁵⁴ *Id.* at 1143-1144.

⁵⁵ 878 F.2d 68 (2d Cir. 1989).

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However, in *United States v. Bennett*,⁶¹ the district court allowed two of three defendants to withdraw their pleas of guilty when the applicable sentencing ranges showed great disparity between the plea bargain expectation and the reality as based on their presentence report. Based on detailed stipulations, defense counsel had concluded that the applicable ranges of the two defendants allowed to withdraw their pleas would be twenty-seven to thirty-three months (compared to forty-one to fifty-one months determined in the presentence report) and twenty-one to twenty-seven months (compared to forty-one to fifty-one months), respectively. The court stated of the defendant with the anticipated range of twenty-seven to thirty-three months:

Bennett clearly had a legitimate expectancy in not only the anticipated range of 27–33 months, but also in ranges of 30–37 months and 33–41 months. *The actual range of 41–51 months is simply beyond the scope of expectancy created by the plea agreement.* It would be unfair and unjust to enforce the contract between the defendant and the government where the defendant was induced by a promise which could not be kept.⁶²

The court found similarly with respect to the second defendant who expected a range of twenty-one to twenty-seven months compared to an actual range of forty-one to fifty-one months.

In the case of the third defendant who expected a range of fifteen to twenty-one months but received one of ten to sixteen months, the court said that “this is clearly within the expectation created by the plea agreement and there is not fair and just reason for allowing [the defendant] to withdraw his guilty plea.”⁶³

Plea Bargaining “Rules”

The types of plea agreements authorized by Federal Rule of Criminal Procedure 11 include charge bargains (Rule 11(e)(1)(A)), nonbinding sentence recommendations (Rule 11(e)(1)(B)), and binding sentence agreements (Rule 11(e)(1)(C)).

Plea bargaining under the guidelines is governed by the Commission Policy Statements, Sections 6B1.1–6B1.4, and Federal Rule of Criminal Procedure 11. Section 6B1.1(a) requires the disclosure of a plea agreement in open court “or, on a

⁶¹ 716 F. Supp. 1137 (N.D. Ind. 1989).

⁶² *Id.* at 1146 (emphasis added).

⁶³ *Id.* at 1146. See also *United States v. Loman*, 1 Fed. Sent. Rep. 290, 1988 WL 112538 (W.D. Mo. 1988).

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part of the plea bargain.⁶⁷ Subject to the exercise of this discretion, the rules appear to permit the parties to recommend or make specific binding agreements as to what sentencing range is appropriate, whether a specific guideline is applicable, how disputed facts should be resolved, and even what sentence should be imposed.⁶⁸ This process does not appear to impair a judge's discretion to decide whether to accept or reject such agreements or to select the specific sentence within the range or to depart from the range. The parties may, however, be somewhat more inclined to propose binding sentence agreements so that a defendant may reduce sentencing uncertainty or have the option of withdrawing the plea if the agreement is rejected.

Factual Stipulations

Section 6B1.4 governs the use of stipulations of "facts relevant to sentencing" that will often be made as part of a plea agreement.⁶⁹ Such stipulations are in sharp contrast to a stipulation to a more serious offense that is permitted under Section 1B1.2 as part of a plea agreement, which mandates the use of the offense guideline section in chapter 2 applicable to the stipulated offense, rather than the offense of conviction. Factual stipulations envisioned by Section 6B1.4 are not binding on the court and are but a part of the relevant information the court will consider in imposing sentence.⁷⁰

Factual stipulations shall set forth the facts of the offense conduct and offender characteristics, shall "not contain misleading facts," and shall "set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate."⁷¹ Stipulations should also identify any facts that remain in dispute.⁷² According to the commentary to Section 6B1.4, stipulations should ordinarily be in writing. The Commentary admonishes:

Similarly, it is not appropriate for the parties to stipulate to misleading or non-existent facts, even when both parties are willing to assume the

⁶⁷ 18 U.S.C. § 3553(c).

⁶⁸ Fed. R. Crim. P. 11(e)(1)(C).

⁶⁹ Guidelines § 6B1.4(a).

⁷⁰ See Bennett, 716 F. Supp. at 1137, 1143.

⁷¹ Guidelines §§ 6B1.4(e)(1), 6B1.4(e)(2), 6B1.4(e)(3).

⁷² Guidelines § 6B1.4.

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policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt about the government's ability to prove a charge for legal or evidentiary reasons.⁷⁶ Not surprisingly, prosecutors can agree to the dismissal of any charges that do not change the guideline sentence.⁷⁷ In addition, if circumstances change (e.g., if new evidence is discovered, the need to protect a witness's identity arises, or the like) the prosecutor may agree to change the plea agreement accordingly.

Regarding sentencing bargains, the Justice Department instructs prosecutors, absent substantial assistance under Section 5K1.1, to only make agreements pursuant to Federal Rules of Criminal Procedure 11(e)(1)(B) and 11(e)(1)(C) if the terms conform to the appropriate guideline range or depart for a legitimate reason consistent with the Sentencing Reform Act. The incentives for the standard plea agreement permitted by departmental policy total a 35 percent reduction in sentencing exposure. This consists of the two-offense level reduction for acceptance of responsibility and a recommendation for the lower end of the guideline range for sentence and fine and the least restrictive sentencing option permitted by the applicable guideline range (whether it be probation, home detention, or community confinement).

The policy also states that plea-bargaining departures must be clearly revealed to the court:

It violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the departure and afford an opportunity for the court to reject it.⁷⁸

Prosecutors are required by Justice Department policy to pursue all relevant information for sentencing purposes except that not "readily provable."⁷⁹

The fact that charge bargaining will rarely affect the sentence in these types of cases requires that the incentive for the plea

⁷⁶ Memorandum to Federal Prosecutors for U.S. Attorney General Richard Thornburgh 3 (March 13, 1989).

⁷⁷ *Id.*

⁷⁸ *Id.* at 4.

⁷⁹ *Id.* at 3.

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personal responsibility for the offense is appropriately given a lesser sentence than a defendant who has not demonstrated sincere remorse.

A judge may grant this reduction, regardless of whether the conviction results from a guilty plea or trial. In other words, a guilty plea does *not*, by itself, automatically entitle the defendant to this reduction as a matter of right although it may provide some evidence of the defendant's acceptance of responsibility. On the other hand, the fact that a defendant exercises his constitutional right to trial does not necessarily preclude a judge from granting this reduction under appropriate circumstances. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. According to examples included in the commentary to the Guidelines, this can occur when the defendant goes to trial to assert and preserve issues that do not relate to factual guilt.⁸³

The applicability of the acceptance of responsibility adjustment resides exclusively with the court. When presented with a specific agreement under Federal Rule of Criminal Procedure 11(e)(1)(C), the court may choose to accept a specific binding agreement that could include a resolution of the applicability of the acceptance of responsibility reduction. In the most common type of nonbinding plea agreements as envisioned by Federal Rule of Criminal Procedure 11(e)(1)(B), neither the parties nor the probation officer may eliminate or circumscribe the judicial discretion pertaining to acceptance of responsibility by an agreement or stipulation that the reduction is or is not applicable. The court must make its own determination as to whether the defendant clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. Once satisfied, the court appropriately reduces the applicable offense level by two levels.

Qualifications for the Adjustment

The commentary to chapter 3, part E, includes a list of some of the appropriate considerations in determining whether a defendant qualifies for this provision:

- (a) [V]oluntary termination or withdrawal from criminal conduct;

⁸³ Guidelines § 3E1.1, commentary at note 1. See amendments to commentary effective November 1, 1990.

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under the new system. On motion of the government, substantial assistance can justify a downward departure from the guideline range, even below statutorily required minimums.⁸⁵

The revision to Rule 35 of the Federal Rule of Criminal Procedure eliminating defense motions to reduce a sentence within 120 days represents a major change. The revised rule gives the government the right to move for a reduction within a year of the sentence for substantial assistance to authorities in the investigation or prosecution of another person who has committed an offense.⁸⁶

It is clear that once a defendant enters into a cooperation-driven plea agreement, the incentives for complete cooperation will be very real. Attorneys must be aware, however, that a defendant who admits incriminating information not yet known to the government prior to the imposition of sentence may face a potential increase in the offense level at sentencing based on that information. The one significant exception is that a witness who enters into an agreement with the government pursuant to Section 1B1.8 to provide substantial assistance and that additional incriminating information provided that is unknown to the government will not result in an increase in the applicable guideline range based on the additional inculcating information he provided pursuant to the agreement.⁸⁷ A defendant who incriminates himself as part of such an agreement, but later backs out or is unable to deliver, faces the danger of a correspondingly significant increase in sentencing exposure. Such a defendant is in a situation similar to that of the defendant who has no one to cooperate against but who participated in additional criminal conduct not known to the government at the plea agreement stage.

Role of the Probation Officer

Counsel should be aware that in guideline sentencing, the role of the probation officer is dramatically changed. The probation officer is required to bring the facts of the real offense conduct to the attention of the court so that neither the charge nor any factual stipulation should be able to misrepresent to the court or

⁸⁵ Guidelines § 5K.1. n.1.

⁸⁶ Guidelines § 5K1.1; 18 U.S.C. § 3553(e); Fed. R. Crim. P. 35(b).

⁸⁷ Guidelines § 1B1.8.

**STRUCTURING SENTENCING
DISCRETION: THE NEW FEDERAL
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FOREWORD

STRUCTURING SENTENCING DISCRETION: THE NEW FEDERAL SENTENCING GUIDELINES

ILENE H. NAGEL*

PREFACE

On October 12, 1984, the most broad reaching reform of federal sentencing in this century became law with the passage of the Sentencing Reform Act.¹ The purpose of the Act was to attack the tripartite problems of disparity, dishonesty, and for some offenses, excessive leniency, all seemingly made worse by a system of near unfettered judicial discretion.²

For decades, empirical studies repeatedly showed that similarly situated offenders were sentenced, and did actually serve, widely disparate sentences.³ Furthermore, the disparity found to characterize federal sentencing was thought to sometimes mask, and be

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¹ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified in 18 U.S.C. ch. 227, 229, 232; 28 U.S.C. ch. 58).

² See S. REP. NO. 225, 98th Cong., 1st Sess. 38-39 (1983).

³ See *Sentencing Guidelines: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 100th Cong., 1st Sess. 661-731 (1987) [hereinafter *Sentencing Guidelines Hearings*] (testimony of Commissioner Nagel); S. REP. NO. 225, *supra* note 2, at 41-50; M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); Clancy, Bartolomeo, Richardson & Wellford, *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524 (1981); Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163 (1973); Address by Commissioner Ilene H. Nagel, The Federalist Society Second Annual Lawyers Convention, Washington, D.C., (Sept. 10, 1988) (This speech is to be published in 26 AM. CRIM. L. REV. (Spring 1989)).

tion of federal sentencing guidelines is put in historical context, and explained against the backdrop of key decisions and policy choices.

As a sweeping and dramatic reform, it was expected that the federal sentencing guidelines would be controversial and as such, be subject to considerable resistance.¹⁰ Despite the fact that they became law in November, 1987, it was not actually until January, 1989, that the Supreme Court upheld the guidelines,¹¹ thereby removing the major constitutional impediment to their full implementation. Now that they are nationally in effect, it is timely to elaborate on the structure upon which they are founded, and the history of attempts that came before them to structure and unstructure judicial discretion.

Part I provides a brief introduction, defining discretion and underscoring the terms of the recent call for reform. Part II is a review of the historical shifts in sentencing goals and the concomitant shifts in the degree of discretion allocated to the court in determining and meting out penal sanctions. Part III presents an overview of the enabling legislation, The Sentencing Reform Act of 1984, including the key specific directives given to the Commission to carry out its mandate. Part IV provides a brief discussion of *Mistretta v. United States*—the constitutional challenge to the Commission and its guidelines. Part V presents an elaboration of the bases for the major decisions reflected in the first iteration of guidelines. Part VI presents concluding comments and explicates the commitment to future monitoring, evaluation, and revision.¹²

I. INTRODUCTION

Discretion in its most simple terms is defined as the power of free decision or latitude of choice within certain legal bounds.¹³ The need for discretion in sentencing purportedly developed from the application of the "traditional twin goals of the correctional pro-

¹⁰ In October, 1987, Congressman Conyers introduced a bill to delay the implementation of the guidelines. H.R. 3307, 100th Cong., 1st Sess., 133 CONG. REC. H8107 (1987). The bill did not pass the House. Many federal judges registered opposition to the implementation of the guidelines. See MIAMI HERALD, Oct. 13, 1987, at 1B; K. Murphy, *U.S. Sentencing Rules to Stress Punishment*, LOS ANGELES TIMES, Nov. 1, 1987, part I, at 1, col. 4 (final Sunday ed.).

¹¹ *Mistretta v. United States*, 109 S. Ct. 647 (1989).

¹² Congress provided that the Commission members would serve on a full time basis for the first six years after the implementation of the initial guidelines in order to monitor the guidelines' effectiveness and make appropriate adjustments and revisions. S. REP. NO. 225, *supra* note 2, at 63-64.

¹³ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 362 (9th ed. 1983) [hereinafter WEBSTER'S].

Consistent with this theme, a movement to reform the federal sentencing process was begun, culminating in the Sentencing Reform Act of 1984 and the establishment of the United States Sentencing Commission.²¹ Under the first set of sentencing guidelines promulgated by the Commission, judicial discretion has not entirely been eliminated. Rather, consistent with the statutory mandate, and the view of experts,²² it has been highly structured and defined. This Article traces this restructuring process by first explaining why it was necessary, and second, how it was accomplished, focusing in particular on some of the key policy choices reflected in the initial set of guidelines ultimately promulgated.

II. HISTORICAL BACKGROUND

A. FROM MOSES TO BECCARIA

Generally, four purposes of sentencing have found widespread acceptance: punishment, deterrence, incapacitation, and rehabilitation.²³ Throughout history, societies have assigned differing priorities to these four goals in accordance with the prevailing philosophies and beliefs of their day. In addition, the means employed to implement these purposes have varied widely, from death to the mere imposition of monetary fines. In large measure, the degree of judicial discretion in sentencing has depended on which goal was dominant, and which methods were thought most consistent with the stated goal(s).

Under Mosaic law, for example, the primary focus was on retributive punishment. The criminal justice system was founded on canon law, a system embodying a strict code of behavior. In this setting, judicial discretion at sentencing was severely limited: the of-

²¹ The Sentencing Reform Act was passed as Chapter II of the Comprehensive Crime Control Act (Pub. L. No. 98-473, 98 Stat. 1987 (1984)), and is published at 18 U.S.C. §§ 3551-3673 (1987) and 28 U.S.C. §§ 991-998 (1987).

²² The discretion of the sentencer is not the only discretion with which the designer of a criminal statute should be concerned. The structure of his legislation must also be related to the scope of the prosecutor's discretion, the allocation of cases between different modes of trial, and the extent to which the tribunal determining guilt or innocence should be allowed a quasi-legislative discretion. His object should be not the elimination of discretion, but the management of discretion. He should define and distinguish between offenses in such a way as to avoid conferring an excessive degree of discretion on any particular organ of criminal justice, and to ensure that the determination of particular issues is allocated to the most appropriate segment of the process.

D.A. Thomas, *Form and Function in Criminal Law*, in *RESHAPING THE CRIMINAL LAW* 29 (Glazebook ed. 1978).

²³ See, e.g., McKay, *It's Time to Rehabilitate the Sentencing Process*, 60 *JUDICATURE* 223, 225-26 (1976).

a debate over whether Roman legal procedures should be abandoned,³² and whether new and quicker methods of prosecution should be employed. In the end, the efficiency-oriented reformists prevailed. Roman procedure was retained for a handful of offenses recognized by church canons as *crimina*, while a new, inquisitorial procedure was instituted for all other offenses, known as *maleficia*. The *maleficia* were created by statutes which gave judges broad discretionary power (*arbitrium*) to punish defendants without meeting the strict Roman rules of proof.³³ As these grants of discretion increased, abuses multiplied: the innocent were often condemned while the guilty were set free.³⁴

After the thirteenth century, the due process rights of individuals were reduced sharply. Although trial by ordeal had been abandoned, it was replaced by torture and other *ex officio* inquisitorial procedures.³⁵ Justification for punishment was at times based on social utility, while at other times it was based on religious doctrines of sin and salvation. Punishment was sometimes specified by statute, but more often than not its depth and scope were left to the whims of the judge. Whatever the justification given, or the procedures employed, punishment was most often vindictive and brutally harsh.³⁶

The rise of centralized governments in Europe marked the intervention of the sovereign into criminal matters. A conqueror used his armies to double as police; fines were developed as a way to fill the king's coffers. Nonetheless, corporal punishment remained the norm, with sentences still spoken of as "God's will."³⁷ Under this system, judicial discretion varied greatly: some crimes mandated death by order of the sovereign, while others allowed the judge to choose both the type and severity of the sentence. Punishments continued to be barbarous and inherently arbitrary by virtue of their vastly unequal application.³⁸ The fact that nobility and clergy were

³² For example, the Roman standard of proof required that the evidence to convict an accused had to be "as clear as the light of day." Fraher, *Conviction According to Conscience: The Medieval Jurist's Debate Concerning Judicial Discretion and the Law of Proof*, 7 *LAW & HIST. REV.* 23, 24 (1989). Only two forms of evidence met this standard: uncontradicted testimony from two eyewitnesses, or a confession by the defendant. *Id.*

³³ *Id.* at 28.

³⁴ *Id.* at 60.

³⁵ *Id.* at 25.

³⁶ Fraher, *supra* note 25, at 587-88.

³⁷ Fraher, *supra* note 32.

³⁸ The concept of incarceration as an alternative to physical sanction was slow to develop. The earliest known jail was established in Italy in 1553. The church was again at the center of this development. Prisons arose from the monastic concepts of solitude and penitence. The American colonies built two early prisons in 1681 and 1682, but the

and a presumption of innocence should be used.⁴⁴ Fifth, corporal punishment should be replaced by imprisonment, and the death penalty should be banned.⁴⁵

Beccaria's ideas were not well received by the established rulers of his day. The Roman Catholic Church denounced him as a heretic and a socialist, placing his book on an index of condemned works.⁴⁶ Notwithstanding this public demonstration of rejection, his ideas eventually took root, being explored and refined by the likes of John Howard and Jeremy Bentham. The very distinguished Samuel Romilly, in particular, later embraced Beccaria's concerns for the dangers of allowing judges too much discretion in interpreting and applying laws.⁴⁷ For Sir Romilly, it was the arbitrary decisions made possible by unfettered discretion that gave rise to the pejorative yet oft-heard characterization of justice as no more than a lottery.

Collectively, these eighteenth and nineteenth century philosophers and writers laid the theoretical groundwork for what is today known as "classical criminology." This school of thought stresses deterrence as its primary goal, emphasizing equality and certainty of punishment as the means to achieving this end.⁴⁸ Consistent with this theoretical paradigm, punishments were prescribed for crimes according to their perceived seriousness; in England this became known as the "tariff."⁴⁹ Tariffs and similar sentencing structures were set by the legislature rather than by the sovereign or the church. Consequently, judicial discretion was once again reduced. With the enactment of the 1791 Penal Code, France became the first country to formally adopt this system. Other civil and common law

⁴⁴ *Id.* at 24-25, 56-60.

⁴⁵ *Id.* at 48-55.

⁴⁶ Despite his controversial place in history, many of Beccaria's ideals found ultimate expression in the United States Constitution and helped to establish the fundamental premises upon which the early criminal justice system in America was founded. Beccaria, for example, advocated such ideas as the right to a speedy trial, *id.* at 36, the right to confront one's accusers, *id.* at 27, equal justice under law, *id.* at 38-39, and the presumption of innocence, *id.* at 24-25.

⁴⁷ Romilly noted in 1810:

[T]he very same circumstance which is considered by one judge as a matter of extenuation, is deemed by another a high aggravation of the crime [I]f every judge be left to follow the light of his own understanding and to act upon the principles and the system which he has derived partly from his own observations, and his reading, and partly from his natural temper and his early impressions, the law invariably only in theory, must in practice be continually shifting with the temper, and habits, and opinions of those by whom it is administered.

S. ROMILLY, OBSERVATIONS ON THE CRIMINAL LAW OF ENGLAND (1810).

⁴⁸ Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROBS. 528, 529 (1958).

⁴⁹ D. THOMAS, PRINCIPLES OF SENTENCING: THE SENTENCING POLICY OF THE COURT OF APPEAL CRIMINAL DIVISION 5 (2d ed. 1979).

sentencing structures. New statutes allowed judges to consider aggravating and mitigating circumstances which further characterized the context of the offense, and then select a term of years from a sentence range defined by the legislature.⁵⁷ Thus, while Congress clearly retained the *power* to fix the sentence for federal crimes,⁵⁸ and Congress controlled the scope of judicial discretion,⁵⁹ the rigidity characteristic of the original fixed statutory penalty structure was abandoned in favor of increased judicial discretion.⁶⁰

Until 1870, the primary purposes of incarceration in the United States were retribution and punishment.⁶¹ In 1870, however, the rehabilitative theory of prisons and punishment was brought to the forefront of the nation's attention by the National Congress of Prisons. The Congress voted for a Declaration of Principles wherein it stated the following:

[Crime is] a moral disease, of which punishment is the remedy. The efficiency of the remedy is a question of social therapeutics, a question of the fitness and the measure of the dose [P]unishment is directed not to the crime but to the criminal The supreme aim of prison discipline is the reformation of criminals and not the infliction of vindictive suffering.⁶²

Concomitant with the theories of prison as a rehabilitative institution, and justice as aimed at individual restoration, was the development of the then innovative indeterminate sentence. So long as reformation was the principal goal of imprisonment, it was reasoned

⁵⁷ Tappan, *supra* note 48, at 529.

⁵⁸ See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820).

⁵⁹ *Ex parte United States*, 242 U.S. 27 (1916).

⁶⁰ Brief for the United States Sentencing Commission as Amicus Curiae at 4-5, *United States v. Mistretta*, 109 S. Ct. 647 (1989) (No. 87-7028).

⁶¹ *United States v. Grayson*, 438 U.S. 41, 46 (1978).

⁶² AMERICAN CORRECTIONAL ASSOCIATION, *TRANSACTIONS OF THE NATIONAL CONGRESS OF PRISONS AND REFORMATORY DISCIPLINE* (1870). This theory of reform later took on the title of "positivist criminology." It was popular to speak of crime in medical terms—crime was no more or less than a treatable disease, as the 1931 Wickersham Commission explained:

Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No more can judges intelligently set the day of release from prison at the time of trial. . . .

. . . Boards of parole [on the other hand] can study the prisoner during his confinement Within their discretion they can grant a comparatively early release to youths, to first offenders, to particularly worthy cases who give high promise of leading a new life. . . . [And they can] keep vicious criminals in confinement as long as the law allows.

NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (WICKERSHAM COMMISSION), *REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE* 142-43 (1931).

Others saw the rehabilitative model as a vehicle by which the state acted out a parental role ("parens patriae"): society sought not to punish, but to change the offender through treatment and therapy. See, e.g., *Kittrie*, *supra* note 30.

determined the actual length of imprisonment.⁶⁹ In 1949, the United States Supreme Court put its imprimatur of approval on rehabilitative imprisonment.⁷⁰ Indeterminate sentencing and rehabilitative goals continued to enjoy immense popularity and support up through the 1960s.⁷¹

C. THE FALL OF INDETERMINATE SENTENCING

In 1975, Alan Dershowitz wrote:

[I]t seems that the day of the indeterminate sentence is passing—and with few regrets. While law-and-order conservatives remain persuaded that indeterminate sentencing is just one more form of coddling criminals, prisoners and their defenders outside the walls are complaining that it has resulted in too much power for parole boards and longer stays in prison. Prison officials blame the system for overcrowding In short, a surprising consensus is emerging around the idea that it is time to return to uniformity in sentencing.⁷²

The fall of the indeterminate sentencing movement proved to be almost as swift as its meteoric rise. This time, however, empirical research rather than theory lay at the core of the change.

As early as 1933, studies of the exercise of judicial discretion in sentencing revealed striking differences and wide disparity in sentence type and length.⁷³ Furthermore, the offender's race, sex, religion, income, education, occupation and other status characteristics were found to influence judicial outcomes.⁷⁴ Discretion seemed inextricably linked with discrimination.

By the 1970s, public interest in the criminal justice system prompted what Professor Leslie Wilkins termed a "crime research

⁶⁹ See *United States v. Addonizio*, 442 U.S. 178, 188-89 (1979); *Williams v. New York*, 337 U.S. 241, 248 (1949) (execution of parole system depends upon parole commission's discretion).

⁷⁰ In *Williams*, 337 U.S. at 247-48 (footnotes omitted), the Court wrote:

A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment

. . . Indeterminate sentences . . . have to a large extent taken the place of old rigidly fixed punishments. . . . Retribution is no longer the dominant objective of criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

⁷¹ Dershowitz, *supra* note 51, at 126-28.

⁷² Dershowitz, *Let the Punishment Fit the Crime*, N.Y. TIMES, Dec. 28, 1975, Magazine Section, at 7.

⁷³ Gaudet, Harris & St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L. & CRIMINOLOGY 811 (1933).

⁷⁴ See *id.*; R. MARTIN, THE DEFENDANT AND CRIMINAL JUSTICE, U. OF TEXAS BULL. NO. 3437 (Bureau of Research in the Social Sciences No. 9, 1934).

reduce recidivism."⁸⁰

If there were any who clung to indeterminate sentencing for reasons other than its alleged tie to rehabilitation, now shown to be devoid of any empirical support, the outpouring of research on the other theme—disparity—paved the way for the emergent commitment to restructuring discretion. Justice Potter Stewart, writing as early as 1958, noted: "It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this most important dimension of fundamental justice." This dimension was "equal justice under the law."⁸¹

Disparity studies multiplied; consistently, the results revealed gross variations that could neither be explained by rational categorization of criminals, nor justified by referring to treatment goals.⁸² Judge Frankel lamented: "The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the differences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes."⁸³ The fears of Sir Romilly expressed 162 years earlier could no longer be ignored.⁸⁴ Justice as a lottery could not be defended.

Having established the fact that the system was characterized by disparity, three primary sources for the unwarranted sentencing disparity were identified: "(1) lack of clearly defined and accepted sentencing goals, priorities, and criteria; (2) substantial discretion exercised by sentencing judges and paroling authorities in the absence of such goals and criteria; and (3) the procedures under which this discretion was customarily exercised."⁸⁵

With respect to sentencing goals, two major theoretical para-

⁸⁰ Martinson, *What Works?—Questions and Answers About Prison Reform*, 1974 PUB. INTEREST, Spring 1984, at 22.

⁸¹ *Shepard v. United States*, 257 F.2d 293, 294 (6th Cir. 1958).

⁸² See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971); FAIR AND CERTAIN PUNISHMENT REPORT, *supra* note 55; Seymour, *supra* note 3, at 163; Clancy, Bartolomeo, Richardson & Wellford, *supra* note 3, at 553-54; Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 U. CIN. L. REV. 597 (1973); 1972 *Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163 (1973); Nagel & Hagan, *The Sentencing of White-Collar Crime in the Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427 (1982).

⁸³ Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 54 (1973).

⁸⁴ S. ROMILLY, *supra* note 47.

⁸⁵ Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 96 (1978).

careful review of the extant legal scholarship on this issue, the 98th Congress of the United States chose to structure judicial discretion in *federal* sentencing by creating in the judicial branch an independent, bipartisan agency known as the United States Sentencing Commission.⁹² The primary purpose of the Commission would be the attack on the tripartite problems of disparity, dishonesty, and for some offenses, excessive leniency. On reflection, it appears that Congress chose to heed the calls of Judge Marvin Frankel and the cadre of other distinguished legal scholars joining him to combat head on the unacceptable consequences of unfettered discretion.

III. THE SENTENCING REFORM ACT OF 1984

A. LEGISLATIVE HISTORY

In 1966, the Brown Commission drew national attention to the need for sentencing reform.⁹³ Hearings on the Brown Commission's Final Report began in 1971;⁹⁴ the first specific legislative proposals affecting federal sentencing were introduced in 1973.⁹⁵ Contemporaneous with the hearings on the Brown Commission's Final Report, Judge Frankel delivered a series of key lectures at the University of Cincinnati Law School. His critique of federal sentencing procedures culminated in the proposal to create a national sentencing commission, to be charged with establishing laws and rules in sentencing.⁹⁶ Judge Frankel's remarks received considerable attention and study,⁹⁷ prompting a group at Yale Law School to coordinate a series of sentencing policy workshops. The substance of these workshops was published in 1977, providing strong argu-

⁹² 28 U.S.C. § 991(a) (1984).

⁹³ The National Commission on Reform of Federal Criminal Laws (Brown Commission) was created in 1966 upon the recommendation of President Lyndon Johnson. The 12 member commission was chaired by California Governor Edmund G. Brown. The Commission published its Final Report in 1971. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971).

⁹⁴ *The National Commission on Reform of Federal Criminal Laws (Brown Commission): Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Judiciary Comm.*, 92d Cong., 1st Sess. 129-514 (1971).

⁹⁵ "The Criminal Justice Codification, Revision and Reform Act of 1973" was introduced by Senators McClellan, Ervin, and Hruska. S. 1, 93d Cong., 1st Sess. §§ 1-4A1-A5 (1973), reprinted in *Reform of the Federal Criminal Laws: Hearings Before the Senate Judiciary Comm.*, 96th Cong., 1st Sess. 4247-4260 (1973). "The Criminal Code Reform Act of 1973" was introduced by Senators Hruska and McClellan on behalf of the Nixon Administration. S. 1400, 93d Cong., 1st Sess. §§ 2001-2402 (1973), reprinted in *Reform of the Federal Criminal Laws: Hearings Before the Senate Judiciary Comm.*, 96th Cong., 1st Sess. 5004-5017 (1973).

⁹⁶ Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 50-54 (1972).

⁹⁷ Senator Kennedy has referred to Judge Frankel as "the father of sentencing reform."

for imposing and implementing the sentence."¹⁰⁵ In the minds of many, the sweeping unfettered discretion and its unfortunate consequences resulted from the lack of any statutory guidelines or review procedures to which courts and parole boards might look.

Pursuant to its exhaustive review of the literature and the available data, and after extensive hearings, the Judiciary Committee set forth five goals for sentencing reform legislation.¹⁰⁶ First, there was a need for a comprehensive and consistent statement of the federal law of sentencing. Second, sentences should be fair to both the offender and society. Third, there should be certainty regarding both the sentence and the reasons for it. Fourth, there should be a full range of sentencing options. Fifth, the sentencing process should be geared to achieving the same goals for both the offender and society.¹⁰⁷ There is little doubt that the goals set forth meant to convey the congressional desire to redress the balance between sentences responsive to offender needs, and sentences responsive to the needs of society for protection from criminal predation.

Consistent with and responsive to the Judiciary Committee's aforementioned goals, Title II of S. 1762¹⁰⁸ contained the long awaited statement of the goals of sentencing in the federal system. These included the following:

(1) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (2) the need to afford adequate deterrence to criminal conduct; (3) the need to protect the public from further crimes of the defendant; and (4) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner.¹⁰⁹

¹⁰⁵ *Id.* at 38.

¹⁰⁶ *Id.* at 39.

¹⁰⁷ *Id.*

¹⁰⁸ S. 1762, 98th Cong., 1st Sess., 129 CONG. REC. S11,712 (daily ed. Aug. 4, 1983).

¹⁰⁹ S. REP. NO. 225, *supra* note 2, at 50. These goals are a restatement of the basic purposes of sentencing—deterrence, incapacitation, punishment, and rehabilitation. The Committee believed that each of the four purposes should be considered when imposing sentence except where the offender was to be incarcerated. In such cases "the sentencing judges should recognize that 'imprisonment is not an appropriate means of promoting correction and rehabilitation.'" *Id.* at 67-78. By this, the Committee did not intend to abandon efforts at rehabilitating prisoners; rather, it intended to make clear that imprisonment should not be the sentence of choice if the primary purpose for the sanction is rehabilitation of the offenders. Programs which enhanced the possibility of rehabilitation, however, should be continued. *Id.* at 76. Also, rehabilitation was to be a particularly important consideration for persons placed on probation. *Id.* See generally Memorandum of September 4, 1986, from Sen. Markham to Commissioner Ronald Gainer, The Crime Control Mandate of the U.S. Sentencing Commission (copy on file at the Commission) [hereinafter Markham Memorandum].

the sentencing judge in adhering to these same goals of criminal punishment. Under this system, the judge's discretion would be structured,¹¹⁴ allowing for some flexibility in imposing individual sentences but only to the extent that the judge's decision did not conflict with the overriding purposes of punishment as set forth in the enabling legislation. Congress thus set the parameters within which the Sentencing Commission would work to promulgate specific guidelines.¹¹⁵

Congress further identified the three modes of sanctions which could be used: probation, fines, and imprisonment.¹¹⁶ Furthermore, fines, forfeiture, restitution, and notice to victims were prescribed as possible additions to other sentences.¹¹⁷ The court was instructed to impose one of these three sentences within the ranges set by the guidelines unless there are aggravating or mitigating circumstances of a kind or to a degree which were not adequately considered by the Commission, *and* which justify a non-guideline sentence.¹¹⁸ After setting forth the general purposes of sentencing and the types of sentences permitted, Congress vested in the Commission the power to promulgate specific sentencing guidelines,¹¹⁹ giving the Commission a number of specific directives. These directives set the boundaries within which the Commission was to create the new guidelines. The boundaries, in the order in which they appear in the statute, include the following:

1) The guidelines were to determine whether, after conviction, the court should impose a fine, a sentence of probation, or a term of imprisonment. The amount of fine and term of probation or imprisonment were to be established, as well as a determination of whether multiple prison terms should run concurrently or consecutively.¹²⁰

2) Sentencing ranges in the guidelines were to be consistent with all of the pertinent provisions of Title 18 of the United States

¹¹⁴ For example, prior to the enactment of the federal sentencing guidelines, judges could sentence a defendant convicted of bank robbery from anywhere between zero and 20 years in prison. 18 U.S.C. § 2113(a) (1984). Under the guidelines, judges must choose a sentence for such a defendant from a range of 27 to 33 months (assuming a first-time offender with no aggravating or mitigating factors). UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL 2.24 (Nov. 1989) [hereinafter GUIDELINES].

¹¹⁵ See 28 U.S.C. § 994.

¹¹⁶ 8 U.S.C. § 3551(b) (1988). Organizations were subject only to fines and probation. 8 U.S.C. § 3551(c).

¹¹⁷ 8 U.S.C. § 3551(b).

¹¹⁸ 8 U.S.C. § 3553(b).

¹¹⁹ 28 U.S.C. §§ 991-993.

¹²⁰ 28 U.S.C. § 994(a)(1).

merated drug offense.¹²⁹

11) The guidelines were to assure a substantial term of imprisonment where the defendant: has two or more prior felony convictions for offenses committed on separate occasions; committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income; committed the offense as part of a conspiracy of three or more where he was a leader; committed a crime of violence while on release pending trial, sentence, or appeal of a felony for which he was ultimately convicted, or committed an enumerated drug felony.¹³⁰

12) The guidelines were to reflect the general appropriateness of avoiding a sentence of imprisonment for first time offenders, and the general appropriateness of imposing a sentence of imprisonment on a person convicted of a crime of violence which resulted in serious bodily injury.¹³¹

13) The guidelines were to reflect the inappropriateness of imposing imprisonment for the purpose of rehabilitation, providing educational or vocational training, or providing medical care or other correctional treatment.¹³²

14) The guidelines were to reflect the appropriateness of incremental penalties in cases of multiple offenses committed during the same course of conduct. They were also to reflect the inappropriateness of consecutive terms for conspiracy or solicitation and the underlying offense.¹³³

15) The guidelines were to correct the fact that current federal sentences often did not accurately reflect the seriousness of the offense.¹³⁴

16) The guidelines were to reflect the general appropriateness of imposing a lower sentence in cases where the defendant substantially assisted in the investigation or prosecution of another.¹³⁵

Congress thus gave the Commission a specific mandate to determine what combination of offense and offender characteristics should result in what sentence. This determination included the decision of whether to impose incarceration at all, and if so, for how long. Elements of this task included a determination of which factors to consider and the weight to be accorded to each. Congress

¹²⁹ 28 U.S.C. § 994(h).

¹³⁰ 28 U.S.C. § 994(i).

¹³¹ 28 U.S.C. § 994(j).

¹³² 28 U.S.C. § 994(k).

¹³³ 28 U.S.C. § 994(l).

¹³⁴ 28 U.S.C. § 994(m).

¹³⁵ 28 U.S.C. § 994(n).

cocaine).¹⁴⁰ The court sentenced Mistretta under the guidelines to eighteen months' imprisonment.¹⁴¹

Mistretta filed a notice of appeal to the Eighth Circuit while concurrently petitioning the Supreme Court for certiorari before judgment (as did the United States).¹⁴² The Court granted these petitions pursuant to Rule 18, noting the "imperative public importance" of the issue and the disarray among the lower courts.¹⁴³

B. HISTORY OF SENTENCING

Writing for an eight to one majority, Justice Blackmun prefaced his opinion with a short history of sentencing in the United States. Noting that Congress clearly has the power to determine the appropriate punishment for crimes, Blackmun wrote that federal lawmakers had decided years ago to delegate "almost unfettered [sentencing] discretion" to judges.¹⁴⁴ Furthermore, this delegation was justified by the then extant theories of rehabilitation and indeterminate sentencing.¹⁴⁵ History proved these theories to be erroneous; their practical application led to widespread disparity and uncertainty.¹⁴⁶

C. DELEGATION OF POWER

Seeking to correct these problems, Congress passed the Sentencing Reform Act of 1984. In this Act, Congress delegated to the future Sentencing Commission the authority to create sentencing guidelines as a means to structure judicial discretion. It was this delegation of power that petitioner Mistretta addressed first in his multi-issue challenge of the Sentencing Reform Act.¹⁴⁷ Mistretta asserted that Congress had delegated excessive legislative power to the Commission.¹⁴⁸ The Supreme Court disagreed.

The established rule governing delegation of power issues is found in the case of *J.W. Hampton, Jr. & Co. v. United States*,¹⁴⁹ wherein Justice Taft wrote: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform,

¹⁴⁰ In violation of 21 U.S.C. §§ 846, 841(b)(1)(B) (1970).

¹⁴¹ *Mistretta*, 109 S. Ct. at 654.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 650.

¹⁴⁵ *Id.* at 650-51. See *supra* notes 61-71 and accompanying text.

¹⁴⁶ See *supra* notes 72-85 and accompanying text.

¹⁴⁷ *Mistretta*, 109 S. Ct. at 654.

¹⁴⁸ *Id.*

¹⁴⁹ 276 U.S. 394 (1928).

signed nor allowed 'tasks that are more appropriately accomplished by [other] branches' . . . and second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.'¹⁵⁸

The Court noted the following, however:

[W]hile our Constitution mandates that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others, . . ." the Framers did not require—and indeed rejected—the notion that the three branches must be entirely separate and distinct.¹⁵⁹

The Court continued: "Madison recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence, the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'¹⁶⁰

Mistretta's first argument, that the Commission was inappropriately placed in the Judicial Branch, prompted the Court to respond that while the Commission "unquestionably is a peculiar institution in our Government," separation of power principles are not violated by mere anomaly or innovation.¹⁶¹ Moreover, while the Constitution states that the judicial power of the United States is limited to cases or controversies, significant exceptions to this general rule have been recognized.¹⁶² Specifically, judicial rulemaking is an area which has expanded the strict language of Article III.¹⁶³ The Supreme Court has recognized that the power to write rules is necessary and proper "for carrying into execution all the judgments which the judicial department has the power to pronounce. . ."¹⁶⁴

For instance, in years past the Supreme Court has rejected challenges to certain of the Rules of Civil Procedure.¹⁶⁵ By "established practice" the Court has also approved of the Judicial Conference of the United States, the Rules Advisory Committees, and the Administrative Office of the United States Courts: "Because of their close relation to the central mission of the Judicial Branch, such extrajudicial activities are consonant with the integrity of the Branch and are

¹⁵⁸ *Id.* at 660 (citations omitted).

¹⁵⁹ *Id.* at 659 (citations omitted).

¹⁶⁰ *Id.* (citation omitted).

¹⁶¹ *Id.* at 661.

¹⁶² *Id.*

¹⁶³ *Id.* at 661-62.

¹⁶⁴ *Id.* at 663 (citations omitted).

¹⁶⁵ See *Hanna v. Plumer*, 380 U.S. 460 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

The third prong of Mistretta's separation-of-powers argument was that the power of the President to appoint and remove judges from the Commission "prevents the Judicial Branch from performing its constitutionally assigned functions."¹⁷⁴ The Court was not persuaded that the President's appointment and removal power over the Commission would influence the Judicial Branch in any material way. As Justice Blackmun opined, "We simply cannot imagine that federal judges will comport their actions to the wishes of the President for the purpose of receiving an appointment to the Sentencing Commission," and further, there exists "no risk that the Act's removal provision will prevent the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies."¹⁷⁵

Having responded to the arguments advanced on behalf of Mistretta, the Court re-iterated that while the Sentencing Commission was "an unusual hybrid of structure and authority," it was nonetheless constitutional in both structure and effect.¹⁷⁶

E. SCALIA'S DISSENT

Justice Scalia began his dissent by agreeing with the majority that the Sentencing Reform Act properly articulated standards for the Sentencing Commission to follow in applying the authority which Congress had delegated to it. For Justice Scalia, however, the Act was unconstitutional because the delegated power was legislative, rather than judicial or executive. "In the present case," wrote Scalia, "a pure delegation of legislative power is precisely what we have before us. It is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation."¹⁷⁷

Essentially, Justice Scalia concurred in the petitioner's argu-

cial participation is peculiarly appropriate. Judicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges does not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law. Rather, judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business—that of passing sentence on every criminal defendant. To this end, Congress has provided, not inappropriately, for a significant judicial voice on the Commission.

Id. at 673.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 674, 675.

¹⁷⁶ *Id.* at 675.

¹⁷⁷ *Id.* at 679 (Scalia, J., dissenting).

vanced in *Morrison v. Olson*.¹⁸⁵ By establishing the constitutionality of the Sentencing Commission, however, *Mistretta* also had an immediate impact on the administration of federal criminal justice. After *Mistretta*, only the due process issue was left open by the Court, and the circuit courts almost uniformly have rejected this challenge.¹⁸⁶

V. THE UNITED STATES SENTENCING COMMISSION GUIDELINES

While Congress was quite specific in setting forth the duties of the Commission, it left several policy issues unresolved with regard to executing the tasks set forth in the agenda. First, a governing rationale had to be developed and agreed to, including a set of premises for drafting. Second, agreement had to be reached on whether the guidelines promulgated would flow from a real offense based system, a conviction charge system, or some compromise of the two. Third, the Commission would have to resolve the degree to which past sentencing practices would influence the precise types and lengths of sentences prescribed in the ultimate guidelines. Finally, the Commission would need to find a mechanism for balancing the goals of uniformity and proportionality such that the reduction of disparity of one kind did not stimulate an increase of disparity of another kind.

Clearly, the above list highlights only the key unresolved questions left to the Commission's discretion. Numerous other policy questions remained open for debate.¹⁸⁷ The manner in which they were resolved can best be inferred from a reading of the first iteration of guidelines and accompanying commentary.¹⁸⁸

¹⁸⁵ 108 S. Ct. 2597 (1988).

¹⁸⁶ Since *Mistretta*, defendants have challenged the guidelines by arguing that they effect a violation of the due process clause in that defendants are not given "individualized" sentences. Every circuit court has rejected this challenge. See, e.g., *United States v. Henry*, No. 88-3129 (D.C. Cir. Jan. 11, 1990); *United States v. Seluk*, 873 F.2d 15 (1st Cir. 1989); *United States v. Allen*, 873 F.2d 963 (6th Cir. 1989); *United States v. Pinto*, 875 F.2d 143 (7th Cir. 1989).

¹⁸⁷ More specific questions, for example, included the following: 1) whether an offense involving six victims should be sanctioned six times the amount as the same offense involving one victim; 2) whether prior arrests should count in the criminal history score; 3) whether drug abuse should be a mitigator or an aggravator; 4) whether the increment for the monetary loss should be the same for fraud offenses as for tax or robbery offenses; 5) whether correlational, but not necessarily causal, relations of certain offender characteristics and likely recidivism should be incorporated into the guidelines; and 6) whether home detention should be equated to community or intermittent confinement. The first resolution of these issues is reflected in the initial guidelines. These issues are, however, continuously revisited.

¹⁸⁸ UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (June 15, 1988). For example, to determine the degree to which data estimating past sentences served were dispositive in the setting of sentencing guidelines, one can compare the past prac-

Furthermore, when Congress created the Commission, it did so in such a way as to nearly insure that theoretical orthodoxy, the kind of which Professor von Hirsch and others advocate, would not be the guiding force.¹⁹² In spite of strong urging by Professor von Hirsch when the sentencing reform legislation was being drafted, the Senate specifically chose not to articulate a single purpose, such as just desert, nor to assign priorities to the four purposes ultimately delimited. Section 3553 (a)(2) of Title 18 sets forth four purposes of sentencing: 1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; 2) to afford adequate deterrence to criminal conduct; 3) to protect the public from further crimes of the defendant; and 4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

As further evidence of its avoidance of theoretical orthodoxy, the Senate chose not to use the common term "just deserts": substituted instead were the words "just punishment for the offense." No substantial leap of faith is required to interpret the congressional decision to substitute the words "punishment for the offense" for the word "deserts" as a showing that the statutory intent was to carve out a goal broader in meaning than the traditional just deserts emphasis on blameworthiness.¹⁹³ Furthermore, the Committee Report stated clearly that requiring the judge to consider "just punishment for the offense" meant it should consider justice for the public as well as justice for the offender. By introducing the goal of justice for the public, Congress was juxtaposing crime control (utilitarian) concerns with just deserts concerns, further underscoring its intent to meld multiple purposes, eschewing simultaneously single purpose orthodoxy. With multiple goals in mind, the judge was to consider the public's interest in preventing a recurrence of the offense

¹⁹² Theoretical orthodoxy might be appropriate if the United States Sentencing Commission were engaged in an academic exercise. If such were the case, then Professor von Hirsch's comments might be more appropriate. But the Commission was charged with creating a practical and workable set of sentencing guidelines based on a very specific set of instructions from Congress. To try to persuade seven persons from diverse backgrounds to set normative sentencing policy on the grounds of a single theoretical paradigm would not be possible. Compromise and theoretical orthodoxy do not go hand in hand.

¹⁹³ For a more elaborate explanation of the inappropriateness of using a pure just desert rationale to guide the drafting of sentencing guidelines in accordance with the terms of the Sentencing Reform Act, see Markham Memorandum, *supra* note 109. See also S. REP. 225, *supra* note 2, at 75 n.162 (noting and explicitly rejecting Professor von Hirsch's testimony that "just deserts" should be the sole purpose of sentencing).

The above notwithstanding, to state, as some do in their public critiques of the federal sentencing guidelines,¹⁹⁸ that the Commission expressly "abjured" the choice of a particular rationale, invites the assumption of betrayal of a commitment.¹⁹⁹ It should be clear that the Commission never made a commitment to choose a particular rationale, because such a commitment would be inconsistent with the statutory mandate of multiple purposes.

Furthermore, while the Commission rejected theoretical orthodoxy, it did not draft its guidelines in the slipshod manner described by some academics.²⁰⁰ Lest this erroneous depiction of the process continue in the literature and lore—where drafts by Commissioners are characterized as having been "jettisoned" only to be replaced by

future crime, either by deterring others or incapacitating the defendant. The relationship that such sentences bear to those prescribed for other crimes committed by other offenders is of lesser importance.

Adherents of each of these points of view urged the Commission to choose between them, to accord one primacy over the other. After much reflection, however, the Commission concluded that such a decision would not further the objectives that had been set for it. The relevant literature is vast, the arguments deep, and each point of view has its merits. A clear-cut Commission decision in favor of either of these approaches would have been inconsistent with the Sentencing Reform Act, which refused to accord primacy to any single purpose of sentencing. It also likely would have diminished the chance that the guidelines would find the widespread acceptance they need for effective implementation.

Choosing a single or even a predominant approach was unnecessary because the issue is more symbolic than pragmatic. In practice, the differing philosophies are generally consistent with the same result. Moreover, few theorists actually advocate either a pure just deserts or a pure crime-control approach. Crime-control limited by desert, and desert modified for crime-control considerations, are far more commonly advocated. The Commission saw little practical difference in result between these two hybrid approaches: the debate is to a large extent academic.

The Commission sought guidelines that would do justice for victims and the public, as well as offenders. The guidelines embody aspects of both just desert and crime-control philosophies of sentencing. Sentences imposed may give effect to both considerations. The Commission simply chose not to accord one theory apparent superiority by preferring one label over another. The Commission's decision is consistent with the legislation's rejection of a single, doctrinal approach in favor of one that would attempt to balance all the objectives of sentencing. See 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 991(b)(1); S. REP. NO. 225, *supra* note 2, at 161; SUPPLEMENTARY REPORT, *supra* note 188, at 15-16.

¹⁹⁸ von Hirsch, *supra* note 195, at 3.

¹⁹⁹ "Abjure" is defined as to renounce upon oath, to reject solemnly, implying an abandoning after made under oath. WEBSTER'S, *supra* note 13.

²⁰⁰ See, e.g., von Hirsch, *supra* note 195, at 2.

Shortly after the commissioners were appointed, however, problems began to be apparent. A first draft of the guidelines was written in the spring of 1986 by one of the commissioners, and then jettisoned. The next two drafts emanated from the Chairman's office, were circulated for public comment, and then abandoned after an unfavorable response. It was only in the winter of 1987 that other commissioners were drawn actively into the process. The final draft was written at a late date in some haste to meet the submission deadline.

effective for violations of over 1000 criminal statutes. Since the drafters in this group were neither willing to make up sentence lengths arbitrarily nor to assume that the translation into real types (prison or non-prison) and lengths of sentences could follow at a later point, the effort was stymied.

With only one draft then in hand—the just desert based model—the Commission proceeded in April, 1986 to distribute the just desert draft for public comment and internal testing.²⁰¹ Simultaneously, internal Commission efforts were made to juxtapose principles of crime control on the desert based draft. For a variety of reasons, that four month effort from April to July, 1986 was an abysmal failure. Whether this was because the two models were incompatible when forced to confront practical dictates, or because the process of merging itself was faulty is unclear. What is clear is that the effort to reach theoretical consensus failed.

At the same time, the four months of intensive testing and evaluation made it increasingly clear that the just desert based draft was neither acceptable to the full Commission, the affected groups—judges, prosecutors, defense attorneys—nor to the experts and lay persons in the community asked to assess its viability. Illustrative of the general response to the just desert model draft were the views expressed by the distinguished judicial expert, Judge Jon Newman,²⁰² when he summarized the draft as follows:

I believe that the proposal will likely fail to survive a Congressional veto and, even if allowed to become effective, will lead to a generation of needless litigation, a series of invalidated sentences, opportunities for manipulation by prosecutors and defense counsel, and a source of such confusion among judges as to make likely a clamor for return to the old system.²⁰³

Judge Newman, among others, took issue with the fundamental

²⁰¹ UNITED STATES SENTENCING COMMISSION, IN-HOUSE DRAFT GUIDELINES (Apr. 1986) (available on file at the Commission) (revised and redistributed for comment in July 1986); UNITED STATES SENTENCING COMMISSION, IN-HOUSE DRAFT GUIDELINES (July 1986) (available on file at the Commission). The July draft, like its April predecessor, was a just desert based model.

²⁰² Letter from Judge Jon Newman to Judge William Wilkins (Sept. 3, 1986) [hereinafter Newman].

²⁰³ Judge Newman went on to advance a number of important objections to the draft:

My first point challenges a basic assumption that underlies the entire proposal—the idea that every increment of harm that can possibly be measured should be reflected in an increment of additional punishment. I seriously doubt that there is moral validity to this idea. . . .

. . . . The proposed system requires a precise determination of every factual aspect of the criminal conduct because every factual aspect plays a part in determining the precise numerical score to be used ultimately in determining sanction units.

In July, 1986, the Commission proceeded to give greater attention to the statutory directive to consider past sentencing practice. This provided a basis for starting anew the debate as to what type and length (if imprisonment) of sentence would be appropriate for each offense. Again, contrary to the description by some,²⁰⁸ the new drafts did not emanate from the Chairman's office, but were in fact generated by the Commissioners and staff together, including the Chairman, all of whom had faced squarely the problems inherent in the now rejected July, 1986 just desert based draft.²⁰⁹ In fact, the draft circulated for public comment in September, 1986²¹⁰ was first and foremost an attempt to rid the desert based draft of July, 1986 of its most unacceptable aspects—such as the cumulative rather than interactive theory of harms, and impractical provisions—such as elaborate fact hearings for scores of guideline factors—while preserving its basic tenets and format—such as grouping similar crimes into broad like categories. Not surprisingly, many of the public criticisms of that September draft echoed the same criticisms that were made of the earlier desert based draft.²¹¹

Three months of intensive, full time analysis of the public comment on the September, 1986 draft, as well as lengthy formal and informal Commission and staff debate followed. This led to publication of a subsequent draft intended to cure the perceived rigidities in the September, 1986 draft, especially the perceived drastic curtailment of judicial discretion. This subsequent draft was published in January, 1987.²¹² Public comment, coupled with staff and Commission testing of the more loosely formulated January draft, sug-

each of the myriad bank robbery scenarios from varying sentencing perspectives. The more the system recognizes the tendency to treat different cases differently, however, the less manageable the sentencing system becomes.

Breyer, *supra* note 191, at 13.

²⁰⁸ See von Hirsch, *supra* note 195, at 2.

²⁰⁹ See *supra* note 201.

²¹⁰ DRAFT GUIDELINES, *supra* note 188.

²¹¹ The comments of the Honorable Marvin Frankel, former United States District Court Judge, are typical:

I have an initial reaction that is negative, because I find this draft incredibly complex for an initial cut at a problem of such enormous difficulty as initiating the guidelines on the road to rational sentencing.

I would have thought that you'd have started from the opposite end of the telescope, that you'd have started with a very simple document and a very simple set of guidelines that judges, brand new to this and wholly unaccustomed to it, and their probation officers as well, would not view with a kind of fright that I think this preliminary set will engender.

M. Frankel, Remarks at the Hearings before the United States Sentencing Commission, New York, New York (Oct. 21, 1986) (available on file at the Commission).

²¹² UNITED STATES SENTENCING COMMISSION, REVISED DRAFT SENTENCING GUIDELINES (Jan. 1987).

fraud, robbery, or drugs;

2) the *base sentence* for each offense would be determined as a result of a discussion process *anchored, but not bound by*, an examination of estimates of the average time served in past years for offenders convicted of that same offense, and the percentage given a non-incarceration sentence;²¹⁸

3) for articulated policy reasons, sentences could be raised or lowered with respect to past practice—for example, sentences for tax evasion or anti-trust might be raised for deterrence purposes;

4) base sentences would be modified by a set of *specific offense characteristics*²¹⁹ as determined by one of the following standards:

a) empirical analyses of past sentencing practice showed that judges routinely distinguished one offender convicted of the base offense from another on the basis of such a characteristic—for example, the amount of, or type of drugs in drug offenses, the amount of monetary loss in a fraud, the degree of planning in a fraud, the degree of physical injury in a robbery, or the possession of a firearm in a burglary; or

b) the relevant statute makes such a distinction—for example, the use of a weapon in a bank robbery, trafficking in controlled substances involving an individual fourteen years of age or less, or distributing specific controlled substances within 1000 feet of a schoolyard; or

c) some special compelling reason was articulated to justify including the specific offense characteristic—for example, a specific offense characteristic was included in an analogous or comparable offense category (to illustrate, assume the degree of planning had been included for fraud; it would therefore be included for theft since frauds and thefts often involve similar conduct);

5) conspiracies and attempts would generally be treated the same as the object offense, with only a modest downward

²¹⁸ See GUIDELINES, *supra* note 114, at 1.3-1.4.

²¹⁹ For example, the fraud guideline allows for an increase of one to 11 levels depending on the amount of the loss (a one level increase for a loss greater than \$2,000 and an 11 level increase for a loss over \$5,000,000, with intermediate gradations). In addition, if the offense involved 1) more than minimal planning; 2) a scheme to defraud more than one victim; 3) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or 4) a violation of any judicial or administrative order, injunction, decree or process, the offense level is increased by two levels (or to level 10 if the result is less than level 10). Finally, if the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, the offense level is increased to level 12. SENTENCING GUIDELINES AND POLICY STATEMENTS, *supra* note 216, at § 2F1.1(b).

an a priori assumption, as advocated by many just deserts proponents, that less rather than more punishment is an appropriate overarching goal.²²⁶ Finally, it was agreed that the primary goal would be to issue sentencing guidelines that would provide justice for the victim, society, and the defendant.

While the above premises and principles formed the governing rationale, there remained unresolved several key related issues. An elaboration of some of these issues is provided to reveal the manner in which the Commission decided how to structure discretion in its first guideline iteration.

B. REAL OFFENSE CONDUCT VERSUS THE OFFENSE OF CONVICTION AS THE BASIS FOR SENTENCING GUIDELINES

A fundamental decision that shapes both the form and content of any sentencing guideline system is the decision whether to base guidelines on the alleged real conduct, similar to sentencing decisions pre-guidelines (based for example on the conduct charged in the indictment, or in the government's version, or in the pre-sentence report as prepared by the probation officer), or to base the guideline sentence exclusively on the offense(s) for which the offender was convicted.

The Commission began with a real offense system in the just desert based model first considered in July, 1986.²²⁷ The September, 1986 draft called attention to the relative advantages and disadvantages of a real offense versus offense of conviction based system, noting that in that draft, the Commission was experimenting with a *modified* real offense system.²²⁸

ever, to limit the Sentencing Commission in recommending guidelines that it believes will best serve the purposes of sentencing.

S. REP. NO. 225, *supra* note 2, at 175 (emphasis added); *see also id.* at 424 (discussing consideration and rejection, by vote of 15-1, of Mathias amendment to direct the Commission to ensure that the guidelines would not be likely to result in an increase in aggregate terms of imprisonment, or in the Federal prison population).

²²⁶ *See* A. VON HIRSCH, *supra* note 79, at 136.

²²⁷ *See supra* note 201.

²²⁸ DRAFT GUIDELINES, *supra* note 188, at 11-15 (The September draft includes an extensive discussion of the relative merits of real offense and charge offense sentencing systems.).

The drafters noted that the present federal sentencing system is a real offense system. The principal merit of this approach is that it allows a judge to differentiate between seemingly alike offenders whose offense behavior is actually quite different but who are nonetheless convicted under the same statute. The drawbacks of such a system relate to both fairness and administrative concerns. The defendant is convicted on the elements of the charged offense, not on the other elements of real conduct that the sentence takes into account. This appearance of injustice is amplified in the context of a negotiated plea if the judge considers factors the defendant thought mooted by the plea.

In the end, the choice to prefer one system over another represents some compromise. It remains to be seen whether the Commission has compromised at the right point.

C. THE RELEVANCE OF PAST SENTENCING PRACTICE

The Sentencing Reform Act directs the Commission to consider past sentencing decisions,²³¹ albeit with the substantial, expressed qualification that recognition be given to the fact that many past sentences have *not* adequately reflected the seriousness of the offense.²³² The statute leaves little doubt that the intent of the congressional directive to ascertain the average sentences imposed and served in the past was never meant to bind the Commission to these averages; rather, it was that they serve as a "starting point in [the] development of the initial sets of guidelines for particular categories of cases."²³³

The issue for the Commission was not *whether* to consider past practice, but rather, the degree to which it should be dispositive. This issue remains today at the core of many Commission debates on proposed amendments and guideline modifications.

The strongest argument presented for setting guidelines in accordance with estimates of the average sentence served in the past was that it would meet simultaneously the need to consider the extant capacity of penal, correctional, and other facilities.²³⁴ Furthermore, it was argued by some that binding the new guidelines to the average time served under past practice would reduce disparity while maintaining respect for past judicial decisions; the reform in sentencing created by the new guidelines would be less dramatic, the change less drastic, and acceptance by judges, prosecutors, and the defense bar more likely. Finally, for those who feared a wholesale increase in sentence severity by the newly appointed Commission, the link with past practice would serve as a protection against such an outcome.

The arguments advanced against developing guidelines inextricably linked to past practice were equally compelling. First, it would contravene the statutory intent by failing to address the fact that "in many cases, current sentences do not accurately reflect the seriousness of the offense."²³⁵ Taking the average time served in the past would provide no remedy for those cases in which past sentences

²³¹ 28 U.S.C. § 994(m); S. REP. NO. 225, *supra* note 2, at 177-78.

²³² S. REP. NO. 225, *supra* note 2, at 177.

²³³ 28 U.S.C. § 994(m); *see also* S. REP. 225, *supra* note 2, at 177-78.

²³⁴ 28 U.S.C. § 994(g).

²³⁵ 28 U.S.C. § 994(m).

ing these decisions.²⁴³ If the Commission chose merely to copy past practice and then re-name the product "the new guidelines," it would have been forced to ignore these directives and flout the statutory mandate.

Fifth, to tie guidelines precisely to averages of past sentences served would be to ignore the statutory command to the Commission to consider "the community view of the gravity of the offense"²⁴⁴ and "the public concern generated by the offense."²⁴⁵ At the very least this dictate alone would seem to require that ample consideration be given to public perceptions of crime seriousness and appropriate sentences. Given the general public view that sentences meted out and served in the past were excessively lenient, and particularly so for certain categories of offenses,²⁴⁶ a decision to base the newly promulgated guideline sentences solely on past practice would flatly disregard the statutory directive to give due concern to public perceptions.²⁴⁷

Finally, while past sentencing practice reflects a kind of wisdom and judgment, the average of this practice, as an aggregate measure, grossly obscures the varying purposes for which those sentences were meted out, the reason why some offenders convicted of the same offense were given sentences above or below the average, the impact of a plea agreement, the degree to which judges were responding to political pressure or to their own internal judgment about what the sentence should be, public opinion, or perceived problems of prison capacity. Furthermore, estimates of the average time served are limited by the fact that they are only that—estimates; perfectly reliable and valid measures of time actually served, and the way in which judges in the past differentiated one offender convicted of the same offense from another, are simply not available. Thus, only very limited weight should be given to extant data estimating the average of past sentencing practices.²⁴⁸

²⁴³ 28 U.S.C. § 994(c),(d).

²⁴⁴ 28 U.S.C. § 994(c)(4).

²⁴⁵ 28 U.S.C. § 994(c)(5).

²⁴⁶ See BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1985 148-225 (T. Flanagan & E. McGarrell eds. 1986); see also S. REP. NO. 225, *supra* note 2, at 91-92, 177-78.

²⁴⁷ To illustrate, if the public consistently registers in opinion surveys its view that sentences meted out for white collar crimes fail to adequately reflect the seriousness of the crime, then promulgating guidelines that merely mimic the average sentence served by persons in the past stands in direct contradiction to the statutory dictate to consider public opinion. Indeed, a 1985 survey indicated that 65% of Americans viewed the punishment given to white collar criminals as too lenient. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 246, at 162.

²⁴⁸ The difficulty in treating estimates of the average of *time served* in the past as if

on real offense judgments and the offender's record of past criminal history.

The major projected departures from the estimates of past sentencing practice in the first iteration of federal sentencing guidelines involve dramatically higher sentences for career offenders;²⁵⁰ the statute mandates that their sentences be at or near the maximums prescribed by law.²⁵¹ The first iteration of guidelines also project, consistent with a statutory mandate, somewhat higher sentences for those who support themselves through criminal means.²⁵² Sentences higher than past practice estimates are also prescribed for those convicted of violent and drug offenses, partly in response to new mandatory minimums for drug offenses and the career offender provision.²⁵³ For those convicted of economic crimes, the shift in the first set of guidelines was meant to move from an historical pattern of predominately non-incarcerative sentences to more certain imprisonment, albeit not generally for long terms nor necessarily or wholly in traditional prison facilities.²⁵⁴

These changes evidence the fact that despite the use of past practice data to anchor the Commission's debates on normative sentencing guidelines, these data were by no means dispositive, nor is there a perfect correlation between the past practice data reviewed and guideline ranges promulgated in the first iteration.²⁵⁵ While some members of the Commission clearly would have preferred that

²⁵⁰ For the purposes of the Sentencing Reform Act, a career offender is a defendant (18 years old or older) convicted of a felony that is either a crime of violence or a controlled substance offense, who has at least two prior felony convictions of either a crime of violence or a controlled substance offense. See 18 U.S.C. 994(h) (Supp. V 1983-1988).

²⁵¹ 18 U.S.C. § 994(h).

²⁵² 18 U.S.C. § 994(i)(2).

²⁵³ See 21 U.S.C. § 841(b) (1982); 28 U.S.C. § 994(h).

²⁵⁴ Internal Commission data provided by the Research Director in October, 1987, projected, for example, that for persons convicted of fraud, the percent of non-imprisonment sentences would drop from 59% to 24%. For those convicted of tax violations, the percent of non-imprisonment sentences is projected to drop from 57% to 3%. However, the projections for the prison time that will be served, relative to the estimates of time served in the past, are far less dramatic. For fraud offenses, the projected change in time served will be from an average of 7 months to an average of 8 months. For tax offenses, the projected change in time served will be from an average of 5.5 months to an average of 11.9 months. Internal Commission Data (Oct. 1987) (available on file at the Commission).

²⁵⁵ Contrary to the views of former Commissioner Robinson, past practice was not used as an exclusive tool in drafting the guidelines. New and more rational sentences were set in a number of areas where past practice was judged by a majority of the Commission as having been disparate, discriminatory, too lenient, or otherwise unjust. See Dissenting View, *supra* note 196; see also Preliminary Observations of the Commission on Commissioner Robinson's Dissent, 52 Fed. Reg. 18133, 18137 (May 1, 1987) [hereinafter Preliminary Observations].

The term disparity, in the sentencing context, is generally used to refer to a pattern of unlike sentences for like offenders.²⁶⁰ A review of the studies cited to buttress the claim of disparity in the legislative history and elsewhere is consistent with this conclusion.²⁶¹ The traditional response to this problem is to group offenders into like categories according to the offense for which they were convicted and their criminal history, and to prescribe like sentences for these allegedly like groups. The statutory dictate—that if the sentence included a term of imprisonment, the maximum of the guideline range shall not exceed the minimum by more than twenty-five percent²⁶²—defined for the Commission the tolerable level of disparity acceptable to Congress. Thus, the chosen mode to structure discretion and to reduce disparity was to enact sentencing guidelines with ranges of no more than twenty-five percent for offenders classified as having similar records convicted of similar criminal conduct.

The Commission complied with this directive in several ways. First, like offenses are grouped together into generic categories, such as fraud.²⁶³ Second, for the first time in the twentieth century, all offenders convicted of the same criminal offense category will begin with the identical base offense sentence, regardless of the judge before whom they appear or the jurisdiction in which they are prosecuted. Third, to refine the definition of “similar,” whenever the specific offense characteristics for an offense category are found present the base offense is modified in precisely the same manner; for example, defendants convicted of robbery who discharge a firearm during the crime will have their base offense of level twenty increased by five levels.²⁶⁴ Fourth, the same general modifiers, when found present, will alter the base offense in precisely the same manner: for example, if the defendant was an organizer or leader of a criminal activity, the base offense will be increased by four

²⁶⁰ See *supra* note 3.

²⁶¹ See, e.g., 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (A. Blumstein, J. Cohen, S. Martin & M. Tonry eds. 1983); Nagel & Hagan, *supra* note 82; Wheeler, Weisburd & Bode, *Sentencing the White-Collar Offender: Rhetoric and Reality*, 47 AM. SOC. REV. 641 (1982).

²⁶² 28 U.S.C. § 994(b)(2) (Supp. V 1983-1988) (“If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.”).

²⁶³ GUIDELINES, *supra* note 114, at 2.71-2.74.

²⁶⁴ *Id.* at § 2B3.1(b)(2). The range for level 18 is 27 to 33 months (assuming no prior criminal history). An increase of five levels (level 23) yields a range of 46 to 57 months. *Id.* at 5.2 (Sentencing Table).

some bank robbers may have used a gun, a knife, a club, or a simulated weapon; some may have taken hostages who they restrained and beat, others may have taken hostages without violence, while still others may not have taken any hostages; some robberies may have involved the use of masks, getaway cars, maps, or lookouts, while others may have been committed by lone offenders in a rather spontaneous, unplanned manner; some robbers may have taken \$10,000, some \$50,000, and some \$5,000,000. The need to create a workable system left us to prefer fewer rather than more distinctions.²⁷¹ Thus, a set of standards were adopted²⁷² to differentiate one offender from another when both were convicted of the same offense.²⁷³ However, those distinctions *not* ultimately included in the guidelines—for example, whether the defendant robbed other banks during the recent period—could create a source of disparity if the failure to recognize them resulted in unlike offenders receiving like sentences. It is this strand of disparity that lies at the heart of the dissent,²⁷⁴ for proportionality could be compromised by over-reaching uniformity.²⁷⁵

B. PROSECUTORIAL DISCRETION

Yet a second and much more likely potential source for this alternative strand of disparity may result from the Commission's decision to begin guideline calculations with the offense(s) for which the defendant was convicted. So long as eighty-five to ninety percent of all defendants plead guilty, and some substantial portion, albeit not all, couple that plea of guilt with negotiations for charge reductions or fact bargains or negotiated agreements not to apply the guideline adjustments as prescribed, then those grouped together on the basis of the offense for which they were convicted may not in fact be similar at all. Again, to the extent that they are not similar, unlike offenders will receive like sentences; uniformity will clash with proportionality and disparity will re-emerge.²⁷⁶ The fact that the

²⁷¹ Since every distinction could lead to a dispute, a system which allowed for an endless number of aggravators and mitigators would create a nightmarish sentencing hearing potentially longer than the actual trial. Moreover, because the preponderance standard is in effect, there is little to constrain the judge. *See id.*

²⁷² *See* GUIDELINES, *supra* note 114.

²⁷³ SENTENCING GUIDELINES AND POLICY STATEMENTS, *supra* note 216.

²⁷⁴ Dissenting View, *supra* note 196.

²⁷⁵ *See* Preliminary Observations, *supra* note 255 at 18133; Supplemental Statement of Commissioners Ilene H. Nagel and Michael K. Block, *in* Preliminary Observations, *supra* note 255, at 18135; Supplemental Statement of Commissioner George E. MacKinnon, *in* Preliminary Observations, *supra* note 255, at 18137.

²⁷⁶ This was not an unforeseen problem. The Senate Judiciary Committee received testimony from Professor Stephen Schulhofer, who expressed concern that prosecutors

the amount of drugs specified or the amount of loss in the fraud becomes an element of plea negotiations.²⁸¹

Guideline factor bargaining, pre-*Mistretta*,²⁸² is said to occur when the government attorney agrees not to include specific offense characteristics, or perhaps other aggravating adjustments, in his or her guideline calculation. This is so despite the government's admission that were they to proceed to trial, evidence to support a factual finding of those same specific offense characteristics or adjustments would be presented. The "more than minimal planning" adjustment for fraud offenses, the upward adjustments for a defendant's "role in the offense," the adjustment for a "weapon" in a drug case, are examples of the kind of guideline factors which we observed were treated as negotiable in a minority of plea agreements.

Finally, charge bargaining to circumvent the guidelines was observed in some cases during this pre-*Mistretta* period. For example, in one case reviewed by the author and Professor Schulhofer, a drug distribution count which carried a mandatory minimum sentence of five years²⁸³ was bargained down to a telephone count²⁸⁴ which carried a guideline sentence of six to twelve months.²⁸⁵

In March, 1989, partly in response to the suggestion that such circumvention, if and when it occurs, serves to undercut the key purposes of the guidelines—to reduce disparity, increase certainty, and in some cases, severity—Attorney General Thornburgh issued a strong directive to all government attorneys to comport their plea practices so as to support the full implementation of the sentencing guidelines.²⁸⁶ The combination of the issuance of this memo, the resolution of *Mistretta*, the strong support of the United States Attorneys and the Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee,²⁸⁷ and the extensive training

²⁸¹ For example, in one drug case involving six kilograms of cocaine, the prosecutor agreed to stipulate that the transaction involved only six pounds of cocaine. While the defendants insisted that they intended only to deal six pounds, the Assistant U.S. Attorney admitted that if the case had gone to trial, she would have had no problem establishing the six kilogram quantity.

In a stock fraud case, the prosecution agreed to stipulate to a loss of \$60,000 while admitting that if the case had gone to trial, the loss of \$300,000 would likely have been proven.

²⁸² See *supra* note 137.

²⁸³ 21 U.S.C. § 841(b)(1)(B) (Supp. V 1983-1988).

²⁸⁴ 21 U.S.C. § 843.

²⁸⁵ The Pre-Sentence Investigation Reports received at the Commission are confidential; thus, the name of this case will not be cited.

²⁸⁶ Memorandum from Attorney General Thornburgh to all Federal Prosecutors (Mar. 13, 1989).

²⁸⁷ The Honorable Joe Brown, U.S. Attorney for the Middle District of Tennessee,

disparity issue is that to the extent that the departure provision is abused, disparity—of either or both strands—may reappear; in this manifestation, both uniformity and proportionality would be compromised. As with the potential disparity introduced by prosecutorial discretion, the potential disparity introduced by excessive judicial “departures” from the guidelines will closely be monitored. Revisions will be made to correct intolerable levels of *inappropriate* departures.

The Commission viewed the potential evils of trying to reduce prosecutorial and judicial discretion versus leaving maximum flexibility as two endpoints of a continuum, trying to strike a balance in its first iteration; only the empirical evidence from the Commission’s monitoring efforts as to how the guidelines promulgated are ultimately implemented and the degree of disparity will tell whether the right balance has been struck, or whether corrective action is required.

VII. CONCLUSION

In April, 1987, the United States Sentencing Commission delivered to Congress a proposed set of sentencing guidelines.²⁹¹ In accordance with 28 U.S.C. § 994(q),²⁹² Congress had six months to review these guidelines. Absent a bill to reject their implementation, the guidelines would automatically become law.

No bills to reject the guidelines were introduced either in the Senate or in the House. The House Judiciary Committee did, however, sponsor a bill to delay their implementation.²⁹³ The vote in

in a compromise which was necessary to avoid a delay in guideline implementation. In their reluctance and acceptance of this new language, several Senators made clear that the new provision merely clarified the standard for departure, and “it [did] not broaden the departure standard in any way.” S. 1822, 100th Cong., 1st Sess., 133 CONG. REC. S16,646-48 (1987) (statements by Senators Biden, Thurmond, Kennedy, and Hatch). As Senator Hatch noted:

If the (departure) standard is relaxed, there is a danger that trial judges will be able to depart from the guidelines too freely, and such unwarranted departures would undermine the core function of the guidelines and the underlying statute, which is to reduce disparity in sentencing and restore fairness and predictability to the sentencing process.

Id. at S16,647.

A recent memorandum sent by a parole officer to a district court judge which advises the judge to use this new language “of a kind or to a degree” to justify a departure in every possible case demonstrates the continued resistance by some to any system of structured sentencing. (available on file at the Commission.)

An abuse of the departure provision will only result in a continuation of the unwarranted disparity which existed prior to the Sentencing Guidelines.

²⁹¹ SENTENCING GUIDELINES AND POLICY STATEMENTS, *supra* note 216.

²⁹² 28 U.S.C. § 994(q) (Supp. V 1983-1988).

²⁹³ H.R. 3307, 100th Cong., 1st Sess. (1987).

just as the Sentencing Reform Act represented a compromise that took nearly ten years to pass, so the first iteration of federal guidelines promulgated reflect that same mix of values.

Some criticisms compare the federal guidelines to an idealized view,³⁰² without regard to the difference between academic precision or theoretical orthodoxy and the real world of reform in which such guidelines have to be reviewed, accepted, and implemented.³⁰³ Those of us who come from the academic world are used to appealing to logic, reason, theory, empirical data, law, precedent, and principle as ways of justifying the positions we take and arguing for their adoption. But in the final analysis, we operate independently; consensus is unnecessary. Those who come from the trial courts similarly are used to the same appeals; as well, they enjoy the power of position to ensure acceptance of their views. But an independent, multi-member federal commission cannot operate successfully borrowing only or even mainly from these traditions. A majority must agree, Congress must approve, and the constituent groups affected must not revolt; otherwise the reform, however brilliant its conception, will ultimately fail. The Sentencing Reform Act and the establishment and appointment of a federal commission were political acts; the evolution of the guidelines promulgated in that context can only be measured by the standard of the politically possible. It is this reality that prompts some to proclaim the quest for perfection the enemy of the good.

The Commission publicly proclaimed its initial guidelines as

³⁰² See Robinson, *supra* note 295.

³⁰³ In a letter to Judge Wilkins dated July 23, 1986, (available on file with author), Anthony Partridge, Research Director of the Federal Judicial Center, critiqued the initial "just deserts" draft of the guidelines prepared by and advocated to the Commission by Commissioner Paul Robinson. Although praising the draft as "a brilliant and imaginative effort to rationalize the allocation of criminal punishments," Partridge noted:

Unlike geometry, the mathematical model used here does not begin with axioms and proceed to its conclusions through deductive logic. There is no axiom that states that a harm caused negligently should carry three-tenths as much punishment as the same harm caused intentionally. There is no axiom that says that punishments for offenses involving different amounts of property should be proportionate to the fourth root of the value of the property. Nor can these propositions be derived from axiomatic statements. They are valid, it seems to me, only to the extent that they reflect policies whose basic justification lies outside the mathematical system. To put it another way, the correctness of the answers produced by the mathematical model depends on whether those answers are socially acceptable. There will be no point, as there is in geometry, at which you can say that the answer is correct *because* it is the answer produced by the mathematical manipulations called for by the draft.

And he concluded by stating:

In summary, while I have a lot of admiration for the quality of the thought that has gone into the draft guidelines, I think you will ultimately conclude that the model doesn't work.

in accordance with its congressional mandate, to devote full time effort for six years to revise and refine the sentencing guidelines. By so doing, we hope to comply with the statutory prescription to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."³⁰⁶

³⁰⁶ 28 U.S.C. § 991(b)(1)(C) (Supp. V 1983-1988) (effective Oct. 12, 1984).

EQUALITY VERSUS DISCRETION IN SENTENCING

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PANEL V

EQUALITY VERSUS DISCRETION IN SENTENCING

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INTRODUCTION BY THE HONORABLE FRANK H. EASTERBROOK*

Ever since the beginning of the republic, both state and federal judges have had wide discretion in imposing sentences. They have had discretion in the sources of information they used in imposing sentences within a range, based on their own mix of considerations of desert, deterrence, rehabilitation, and incapacitation, and in deciding how to weigh each of these factors. For example, some judges believe that violent offenses are more serious than property offenses, and others hate stealth offenses more than violent offenses. In addition to the discretion implicit in the range for each statute, judges have had the discretion to choose between consecutive and concurrent sentences.

The result is a great deal of variation: judge-to-judge, urban versus rural, and region-to-region. In a northern city such as Chicago, a crime involving a small transaction of drugs might lead to an award of probation. In a rural southern city, on the other hand, the identical crime might lead to a twenty-year sentence. A national consensus developed that this variation is inappropriate.

In 1984, without opposition, Congress passed a determinate sentencing law. Several states have passed parallel laws. The Sentencing Guidelines became effective for crimes committed after November 1, 1987. The package has several components: more elaborate fact-finding; statements of reasons; appellate review; and ranges based on the seriousness of the main offense with aggravating and mitigating circumstances. Proponents of this package hoped that it would end judge-to-judge and region-to-region disparities, promote candor in sentencing, and provide judges with relative values in sentences.

It is appropriate to ask: What are the Sentencing Guidelines and will they work? The panel today will address these questions. Some people believe that even though the system is designed to reduce discretion, it is very difficult to implement in practice. Although there was a national consensus in 1984 that reducing discretion is a great idea, this consensus has evaporated.

This evaporation reflects a traditional pattern in the regulation of conduct by the government that has carried over to the regulation of sentences. Some

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PRESENTATION BY COMMISSIONER ILENE H. NAGEL*

For ten years, the United States Congress wrestled with the tripartite problems of federal sentencing: unwarranted disparity and its sometime corollary discrimination, dishonesty, and excessive leniency.¹

Disparity left us with cohorts of defenders who, despite conviction for the same offense and similar criminal histories, served, for example, a range of time in prison spread across fifteen years for bank robbery, or nineteen years for heroin distribution, with some serving no time at all.² Moreover, unfettered judicial discretion provided a shield for discrimination: some district court judges systematically treated blacks and hispanics more harshly, while others used the court to promote a system of alleged justice, where minorities were given light sentences as an accommodation to past societal wrongs, the latter pattern without regard for the dire consequences this practice holds for minority and other victims.³

Female codefendants routinely received lesser sanctions in accordance with paternalistic assumptions;⁴ this, in spite of the increase in the absolute number of crimes committed by women, and with almost total disregard for the inequities caused by such a practice.

While many judges gave excessively light sentences for economic crimes, thereby compromising deterrence, and precluding the potential for sentences to promote crime control, others treated white collar offenders as deserving of extremely harsh sentences, not only for the crimes they had committed, but for the alleged sin of having led or been born to a more privileged life. Race, sex, and social class of the offender,⁵ rather than being neutral and irrelevant

* United States Sentencing Commission. The following remarks were prepared by the author.

1. The National Commission on Reform of Federal Criminal Laws (Brown Commission) was created in 1966 upon the recommendation of President Johnson. The twelve member commission published its Final Report in 1971. Hearings on this Final Report began during the 92nd Congress. The first specific legislative proposals on federal sentencing were introduced in 1973. In 1976 during the 94th Congress, Senator Kennedy introduced the first bill calling for sentencing guidelines. Similar bills were introduced and debated during the 95th, 96th and 97th Congresses. During the 98th Congress as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, the Sentencing Reform Act was passed. Sentencing Reform Act, Pub. L. No. 98-473, tit. II, ch. II, secs. 211-239, 98 Stat. 1837, 1987-2040 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3571-3574 (1982 & Supp. V 1987), and at 28 U.S.C. §§ 991-998 (Supp. V 1987). For the legislative history of the Sentencing Act, see 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3220.

2. *Sentencing Guidelines: Hearings on the Sentencing Reform Act of 1984 Before the Subcomm. of Criminal Justice of the House Judiciary Committee*, 100th Cong., 1st Sess. 661, 685 (1987) (statement of Ilene H. Nagel, Commissioner of United States Sentencing Commission).

3. *Id.*

4. I. NAGEL & J. HAGAN, GENDER AND CRIME: OFFENSE PATTERNS AND CRIMINAL COURT SANCTIONS IN CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 91-144 (Tonry & Morris, eds. 1983).

5. See, e.g., Bullock, *Significance of the Racial Factor in the Length of Prison Sentences*, 52 J. CRIM. L. & CRIMINOLOGY 411 (1961); Parisi, *Are Females Treated Differently?*, in JUDGE, LAWYER, VICTIM, THIEF 205 (Rafter & Sanko, eds. 1982).

tem calling for the continuation of unfettered discretion; and B) one with excessive rigidity, giving only the appearance of equality; but, rather, to compromise. The vehicle was to be mandatory sentencing guidelines, binding on the court, but from which the court could depart for unusual, atypical, extraordinary cases.¹⁰

In 1985, President Reagan appointed, with the advice and consent of the Senate, three federal judges, three former law professors, and one former prison warden to serve two, four, or six-year terms on a bipartisan, full-time commission, whose primary task it was to promulgate sentencing guidelines for all federal offenses.

The enabling legislation specified four purposes: just punishment for the offense; deterrence; incapacitation; and effective correctional treatment. All four statutory objectives were to be maximized by the Guidelines. No single purpose was to predominate.¹¹

After a year's experimentation in drafting and testing of three different approaches to sentencing guidelines, each incorporating varying formats, structures, degrees of judicial discretion, principles, and theoretical bases, six Commissioners forged a coalition and agreed to the following principles of drafting.

First: Similar offense categories defined by varying statutes would be grouped together under a single generic heading. For example, all of the fraud statutes were grouped together under the generic heading of "fraud."¹²

Second: The base sentence for each offense category would be determined as a result of the Commission's discussion, a process that would be anchored, but not bound by, an examination of the average time served in past years for offenders convicted of that same offense and the percentage given a non-incarceration sentence.

Third: For articulated policy reasons, the Commission would adjust base sentences for some offense categories up or down, relative to past practice. For example, for the sake of deterrence, sentences for tax evasion might be raised. For the sake of public protection, sentences for violent offenders would be lengthened.

Fourth: Base sentences for each offense category would be modified by a set of what we called "specific offense characteristics." The standard for the Commission's decision for inclusion as a specific offense characteristic would be either: A) that empirical analyses of past sentencing practice showed that

10. See S. REP. NO. 225, 98th Cong., 1st Sess. at 50-60 (1983). "The sentencing guidelines system will not remove all the judges' sentencing discretion. Instead, it will guide the judge in making his decision . . ." *Id.* at 51.

11. 18 U.S.C. § 3553(a)(2) (Supp. V 1987); S. REP. NO. 225, 98th Cong., 1st Sess. at 76-79 (1983).

12. See, e.g., United States Sentencing Commission Guidelines Manual 2.67. The heading "fraud" groups together the following crimes: 7 U.S.C. §§ 6, 6(b), 6(c), 6(h), 6(o), 13, 23 (1982 & Supp. V 1987); 15 U.S.C. §§ 50, 77(e), 77(q), 77(x), 78(d), 78(j), 78(ff), 80(b)(6), 1644; 18 U.S.C. §§ 285-91, 65(g), 1001-08, 1010-14, 1016-22, 1025-26, 1028-29, 1341-44 (1982 & Supp. V 1987).

appropriate sentence on this basis.¹³ Moreover, it would neither subscribe nor agree to an *a priori* assumption, as advocated by many just deserts proponents, that less, rather than more, punishment is appropriate.¹⁴ Finally, it was agreed that the overriding goal would be to issue sentencing guidelines that would provide justice for the victim, for society, and for the defendant, guidelines which, hopefully, would contribute to a more effective and fair system of criminal justice for all.

Contrary to the characterization by some, often repeated in the press, that the new federal Sentencing Guidelines eliminate judicial discretion, substituting in its place a mechanistic computer program where judges have no role, the Guidelines, in fact, strike a balance between the prior system of unfettered discretion, on the one hand, and rigid presumptive sentences tied to the offense of conviction without regard to variation in the offense or the offender's criminal history, on the other. To be sure, judicial discretion in federal sentencing has been curtailed greatly, but we believe that it has been done so on the basis of logic and rationality, pursuant to the statutory purposes as specified, clearly by Congress.

Unbounded judicial discretion, however theoretically laudable a goal, however great its potential for justice, did not, in fact, produce a system of sentences of which this nation could be proud, in which our citizenry could take comfort, or to which our public could look for protection from criminal predation. It was not only equality among and between defendants that Congress was seeking, but equity within the society. The former focusing on the rights of defendants, the latter on the rights of victims, society, and defendants taken together.

Thank you very much.

13. In its discussion of the provisions that would be codified at 28 U.S.C § 994(a), the Senate Report states that "[t]he purpose of [requiring the Commission to take into account the nature and capacity of the penal, correctional, and other facilities and services available] is to assure the most appropriate use of the facilities and services to carry out the purposes of sentencing, and to assure that the available capacity of the facilities and services is kept in mind when the guidelines are promulgated. *It is not intended, however, to limit the Sentencing Commission in recommending guidelines that it believes will best serve the purposes of sentencing.*" S. REP. NO. 225, 98th Cong., 1st Sess. at 175 (1983) (emphasis added). See also *id.* at 424 (discussing consideration and rejection, by vote of 15-1, of Mathias amendment to direct the Commission to insure that the guidelines would not be likely to result in an increase in aggregate terms of imprisonment, or in the federal prison population).

14. See, e.g., VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION* 136 (1976).

Step Two: Look for the "base offense level." For robbery, that is number twenty. All robberies start with a base offense level of twenty.

Step Three: Determine whether the six "specific offense characteristics" listed for robbery apply to this case. These specific offense characteristics are ways in which the robbery might be committed. For example, it is necessary to determine whether the robbery involved a bank or a post office, whether during the robbery the robber carried a gun, injured someone, abducted another person, obtained money, or whether the robbery involved drugs. These are the six characteristics for robbery. Most offenses involve one to three specific offense characteristics.

In this case, it is necessary to apply the specific offense characteristic related to the amount of money taken. The robber robbed a bank and took \$50,000, so add two offense levels for the bank and one level for the money. Twenty plus three is twenty-three. Also, in this case, the robber pointed a gun at the teller. Another specific offense characteristic adds three for the gun. Twenty-three plus three is twenty-six. That is Step Three: add the specific offense characteristics.

Step Four: Consider several characteristics that apply to every crime. These appear in a different section of the Guidelines. There are seven of them, and three deal with victims. It is necessary to ask whether the victim was an official, particularly vulnerable or kidnapped by the robber. Then one should examine the offender's role in the offense. Was he a big fish or a little minnow? Did he try to obstruct justice, intimidate a witness or "accept responsibility?" The Guidelines are not clear about whether or when a defendant's guilty plea qualifies him for this reduction. Likewise, the criminal justice system today is unclear about sentence reductions for pleading guilty.

Next, it is important to adjust for multiple counts. Adjustment is the most complex part of the Guidelines. I will not go into that now, as we do not have time.

Step Five: Examine the offender's characteristics. Look at the offender's record of past convictions. How long ago did his prior crimes take place? How many crimes were there? Was he a juvenile when he committed them, or an adult? Was he on bail or probation, or under criminal justice guidance, detention, or control, when the present crime was committed? There are many ways in which we look at the past criminal record. In our example, one serious past conviction means three points.

Step Six: Turn to the chart. We have an offense level of twenty-six. We have three points for one serious past criminal conviction. This brings our offender to the intersection of row twenty-six and the second column: seventy to eighty-seven months. With good time, this is about five to six years. If the Commission did its job the way we said we did, you will find judges saying that five to six years real time is about what that offender typically would serve now.

Step Seven: If you have an unusual case, the judge may depart from the Guidelines' sentencing range. He must, however, state his reasons for departing, and his sentence is reviewed by a court of appeals for "reasonableness."

line sentencing to permit plea bargaining, and why prosecutors want to make those bargains, we will be in a better position to understand and, if necessary, to change the present practice.

Related to the question of plea bargaining is the problem of how to handle cooperation with the authorities. For example, if a defendant wishes to cooperate, he may fear that if, in the course of cooperating, he makes clear that he was importing a ton of marijuana, instead of just a few kilos, the judge will be compelled to increase his sentence since the Guidelines base the sentence upon the amount of drugs actually involved. The defendant may therefore refuse to cooperate. We have recently amended the Guidelines so that the prosecution may agree to not use any information revealed in the course of cooperation in applying the Guidelines. But this does not fully resolve the problem. If an offender wants the benefit of a two-level reduction for cooperating, it seems fair to require him to be candid. Why should he receive the benefit of these two levels and, in addition, avoid a sentence enhancement, if the judge later finds out that he concealed important facts about his offense? The Guidelines, therefore, do not fully solve this problem.

One might also ask whether the Guidelines are a "charge offense" system, that bases sentences on the elements of the crime charged, or a "real offense" system, that bases sentences on what, in fact, the individual defendant did. Essentially, one cannot create a sensible pure "real offense" system, or pure "charge offense" system. The system must be a hybrid. A pure real offense system asks "What did this person 'really' do?" There are obvious problems in asking, after conviction, what the person "really" did. Doing so would turn the sentencing process into another trial — a trial without the procedural protections that the constitution promises, and a trial that second-guesses the jury's verdict. An offender, in all fairness, should basically be punished for what a jury found that he did, not for what the judge thinks he "really" did. But, of course, the jury's verdict will not answer all relevant factual questions, such as: How much money was taken? How many kilos of drugs were involved? A defendant cannot be expected to tell the jury at trial, "I didn't have any drugs, but by the way, if I did, it was two kilos." Hence, such factual questions must be answered by the judge at the time of sentencing.

The Guidelines are a compromise between a real offense and a charge offense system. They assume that, by and large, the elements of the crime of which the offender was convicted are what he really did. They then tell the judge also to consider certain important facts that are not elements of the crime, such as how much money or drugs was involved. The Guidelines may contain too many additional factors. Time will tell whether they are too complex and we should eliminate some, or whether we should add more.

The Guidelines' real offense/charge offense compromise works as follows. The base offense level is set by the conduct that constitutes the crime that the offender was charged with and convicted of. The specific offense characteristics and the adjustments apply in respect to what really happened.

If, in a particular case, the facts reveal that something more serious was going on than in the typical offense of that kind, there may be grounds for

law brings about one of the most significant changes in the criminal law in this century. I think it will, in fact, bring about greater uniformity. Whether this result is worth the candle is a question we can begin to answer five or ten years from now. I think the answer will be yes, in part because the new law will force a change in the focus of the criminal justice system. Instead of asking almost exclusively, "Did this person commit the crime?" judges and courts will begin to ask, more systematically, "What should we be doing with this offender, this human being?" The answer will not, in every instance, be to send the offender to a maximum security federal penitentiary. The answer will often be to explore other forms of punishment that may prove both more cost-effective and more humane.

Thank you very much.

from the criteria for making the second determination: the criteria a judge uses in determining the length of a sentence. The Guidelines do not take this into consideration.

Second, in this attempt to "quantify" the various crimes, the Commission created an exceptionally complex set of Guidelines. For example, probation officers in one of our Circuits, after being trained in the Guidelines, returned to their circuit and were given a test with a set of facts. They worked on those facts, and they came up with the sentence. The sentences ranged from probation to twenty years in prison under these Guidelines. This occurred after they were trained in the Guidelines. Because the Guidelines are so complex, we are finding a variety of interpretations. Obviously, any system so subject to subjectivity and disparity will not accomplish what was intended.

Thirdly, the Guidelines take away discretion from the judges. Logic dictates that if you take away discretion from judges, you must give it to somebody else. The Commission gave it to two "bodies." First, they took it for themselves. I do not believe, respectfully, that three federal judges and four non-judges should assume for themselves the discretion of a district court judge. These people really know nothing about the individual defendant who is going to be before the court or the circumstances of the particular crime.

The Commission also gave discretion to the prosecutor. Although many of you may feel very comfortable now with the prosecutor sentencing, rather than the district court judges, I do not like this arrangement. Frankly, if you are honest with yourself, you can not like it either because of what it does. It invades the traditional separation of powers concept. The prosecutors now have far more discretion, in my opinion, in sentencing than, indeed, the district court judges.

Fourth and finally, the Commission limited attempts to quantify the defendant in regard to his past criminal history. The problem is that the Commission has now quantified and incorporated into its work product the very prior disparities in sentencing it objected to by using these prior disparate sentences. The fellow who had marijuana down in Texas is compared with the fellow who had marijuana up in Alaska. The former received fifteen years, and the latter got probation. The Guidelines would use those same fifteen years and probation as the only source of defendant quantification.

In this regard, the matter of defendant quantification, I have my most significant problem with the Guidelines. The Commission has literally written out of the Guidelines the traditional humanistic aspects of sentencing. These traditional aspects of sentencing include the defendant's age, emotional condition, good character, ties to the community, employment record, family, responsibilities, and other problems she might have had. All of these factors should go into sentencing. It is a mistake to eliminate, as the Commission explicitly has, these factors from the Guidelines.

There is another reason or purpose for the sentencing Guidelines. If we are honest with ourselves, this other "justification" is the public's request for more severe sentences, to put more people in jail and to put them there longer. I think the other side of the aisle in Congress was more concerned

DISCUSSION

Judge Easterbook: I am going to ask the panelists whether they have some brief thoughts in response to each other's comments. Then I will exercise my prerogative as moderator and ask one immoderate question. After this, I will allow questions from the audience.

Commissioner Nagel: I would begin with a few comments in reference to Terence MacCarthy's remarks. First, I want to say that I am delighted that he now has to present his paper to this group. The last few times we have shared the podium, I have presented my position to a group of 150 criminal defense attorneys and a few not so sympathetic trial court judges; he got "hurrahs," while I got tomatoes; this is a nice turn of the tables.

On a more serious note, first, Terry makes the point that it is very difficult to quantify offense characteristics and offender characteristics; I think that is true. The one comment I would, however, make in response is that this quantification process is precisely what judges have been doing for 200 years. What we did was really no different, except to make those quantified judgments uniform.

To illustrate, people ask the Commission all the time: How can you assign a sentence of some numerical value to a particular offense-offender combination? The answer is: You do so the same way judges do every day in the cases that come before them. Recall, you cannot give a sentence without ultimately coming up with an actual number. In the end, a sentence is always a pronouncement of a precise number of months or years to be served.

Second, he makes the point about the threshold question that determines whether an individual is sentenced to incarceration, or given a non-incarceration sentence, such as probation — the In/Out decision. He notes that the bases upon which judges determine "In or Out" are different from the bases upon which one determines the length of sentence. I couldn't agree more. In fact, I have published some of my best work on that very subject. At the same time, when it came to writing sentencing guidelines, there was a very real problem for us; that is, it is the very distinction between "In or Out" which has created a "cliff," as I think Judge Breyer was the first to term it, in sentencing. Similarly situated offenders serve anything from zero time (probation) to twenty years for conviction of the same offense.

The American Bar Association's representatives urged us to interpret the part of our statute that mandates, "If the sentence includes a term of imprisonment, there shall be no more than a twenty-five percent difference between the maximum and the minimum of the guideline range" as not including probation. If you exclude the In/out decision from that mandate, as the American Bar Association's representatives wanted us to do, that is, to specify that if the minimum guideline range was four years and the maximum was five, then you couldn't give a sentence of three, two, one, six, seven, or eight years. However, according to the ABA, you could give zero years. This policy would, however, re-create the cliff in sentencing, and the problem would be precisely as it had been in the past. It is for this reason that we decided to merge these two distinctions.

Judge Easterbrook: There is a very large source of disparity that the Guidelines do not address, and that is the disparity reflected in the charging discretion of the prosecutor. The prosecutor can choose what crimes to charge. The prosecutor can drop charges as part of plea bargains, and if those plea bargains take place before the charges are formally filed in court, that will be invisible. The authors of the Guidelines made a fundamental choice to have everything based on the charge of which the defendant was convicted. This is a conviction-based system.

There is an alternative system, which could be called a "real offense" system, in which the Guidelines would look through the conviction to a complete description of what happened. So if the facts were to show, for example, murder by poison, that would be treated as if it were first-degree murder, and the fact that the defendant had been charged with reckless endangerment would not be preclusive, although it would set a maximum.

The question I want to put to the two members of the Sentencing Commission, and which I hope Mr. MacCarthy will also address is: Why was the decision made to have the base be the conviction, rather than real offense or, in the case of the first circulated draft of the Commission, what the Commission called "modified real offense" sentencing?

Commissioner Nagel: I am going to give you an illustration that perhaps will make the problem you raise, as well as the answer, more complex. Then I will ask Judge Breyer to address the second part of the question. Let me point out parenthetically that the system adopted really is not precisely a conviction charge system. It is closer to the modified system with which we began, but it is not as close to that real offense system to which you refer as published in the September draft.

To use an illustration, if an individual is indicted on five counts of fraud, and there is a \$10,000 loss alleged in each fraud count, and the plea agreement is to one count of fraud, it is true that the maximum guideline sentence is defined by the sentence for the one count; it is, however, also true that the one count of fraud determines only the base sentence with which you begin. In applying the Guidelines, you add up the money (\$50,000) from the dismissed four counts (plus the one count of conviction) and use it to aggravate/raise the base offense level. In effect, once you define the base sentence, you begin to take into account real offense behavior. The Guidelines work this way for about ninety percent of the offense categories. There are some exceptions. One of the most noteworthy is bank robbery; another is arson. In my judgment, the fact that these are exceptions to the general principle is a fluke.

I think Terence MacCarthy was waiting for Judge Breyer and I to disagree, and he may now have identified an area of disagreement. I consider it to be a fluke that the way the Guidelines work, if an individual is indicted for five counts of bank robbery, but a plea agreement is negotiated to one count, the other four disappear, having zero impact on the ultimate sentence. Perhaps, Judge Breyer will explain why he prefers this outcome.

Let me just reiterate, for most of the offense categories, you start with the offense of conviction; the adjustments for specific offense characteristics, vic-

increase the power of the prosecutor. I would think to the contrary. After all, the prosecutor can control the total penalty by choosing his charge. A judge cannot today give a sentence which exceeds the maximum in the statute. He still has that power under the Guidelines, but I don't see any additional power that he has. The power of the prosecutor is limited because he has to explain everything to the judge, and the judge has to find out what is really going on. Also, the judge is then bound by Guidelines, unless he departs in light of what he finds out is going on.

I have heard this sort of hydraulic argument where you compare the system to water in pipes, and then you say, "Well, the pipe is shut off here, so it must go up there." Aside from the power of the hydraulic metaphor, I don't understand the basis for saying that the prosecutors' power is really increased.

Terence MacCarthy: First, Judge Breyer has mentioned the charge power of a prosecutor. Indeed, the prosecutors in their handbook talk about the things they can do at the charge stage which they can not do after they bring the indictment. They obviously feel they have more power at the charge stage. Parenthetically, this seems to do violence to the "uniformity" goal of the Guidelines.

However, this is not the worst problem. The worst problem is that the prosecutor can totally avoid these Guidelines if the defendant was fortunate enough to commit his crime with somebody else. If he or she committed the crime alone, the judges can not avoid the Guidelines. But if he or she was fortunate enough to be a coconspirator, then you know what the prosecutor can do under the Guidelines? The prosecutor can decide that, notwithstanding the fact that the sentence in this case was to be fifteen years, the prosecutor likes this person, he is a substantial cooperator, and they can decide that he does not have to go to jail.

Still another real and practical problem arises. Under this system, do I tell my defendant, "Go in there and tell him you had a gun in your pocket?" No. I can not do that, because if I do that, we are adding automatically "X" number of points. So now we have a problem. Maybe I have been too long in this system, and I am used to it, but now we have a system where I can no longer tell my client to go in there and be totally candid and open with the probation officer.

Judge Breyer: This is quite an important point, and it was a point that was bothering us in the context of cooperation, particularly because suppose the prosecutor says, "I want you to cooperate," and now you say to your client, "Yes, yes." If in the course of cooperating you tell them, in fact, it was a ton of marijuana instead of just a pound, whether he likes it or not, under the Guidelines the judge will increase that sentence. The Commission, however, amended cooperation so that it is possible for the prosecution to work out an agreement with you so that anything that is revealed in the course of this cooperation will not be used as an adjustment to the Guidelines.

Mr. MacCarthy has then taken that example and moved it into a different context, where, in fact, the person will have to choose with his probation officer whether or not to tell him the whole thing. I agree that is a dilemma. I

victim is gone because he was a drifter and so on, you will get the same difference, and it will have been sort of legitimated and made to look more objective by the system.

My problem with this is that it seems society is saying that some human lives are worth more than others and that it is an abandonment of the more modern notion of murder as an offense against the sanctity of human life. It returns to the Anglo-Saxon notion of murder as a tort, where you pay differential wergeld, depending on the societal status of the victim. If all human lives are equally sacred and they are taken equally offensive, what is the relevance? How does the vulnerability of the victim make cases not similarly situated? Why is that a relevant criterion?

Commissioner Nagel: Let me see if I can clarify what we mean when we talk about a "vulnerable victim." For us, an enhancement is appropriate when a defendant targets particularly vulnerable victims—the aged, the infirm, the handicapped, and so on. That is what is meant by "vulnerable victim." We would not make a distinction—and I think you read this correctly in the Guidelines—between the sentences for offenders involved in the two hypothetical examples you give. Much as I consider myself very sympathetic to victims' rights, personally, I could not justify a distinction between the penalty for those two offenders. I can not justify putting a greater or lesser value on two lives where they are both innocent in the context of the crime. Thus, I couldn't justify a policy position that would treat these two differently.

Judge Breyer: I would like to add something because there is a deep aspect to your question which I want to flush out. First, we don't have such kinds of murders in the federal system. There are fifty-four murders per year, so we didn't look at those examples. I would be amazed if, in fact, you find first degree murders in the federal system that really are distinguishable in terms of punishment along the lines you suggest. Maybe there are. I have no evidence that there is such a thing.

But your question is really deeper than that. It was really the one Commissioner Nagel answered. What you are really saying is what the Commission said, "What do we do?" We took it as we found it. We eliminated only those distinctions that don't exist in empirical practice. But then we used the ones that are empirically important. You see, the ones that really do exist today in the federal system and are important for punishment, those are where we based our distinctions. That is why we give people increased penalties for hurting somebody. We took the system where we found it except where we thought it was totally irrational.

The deep part of your question is: why did you do that because history might have built into it all of its own irrationalities? Did anybody ever think through points like you just made and one hundred others of a similar sort? Why didn't the Commission sit down and really go and rationalize this thing and not just take history? The short answer to that is: we couldn't. We couldn't because there are such good arguments all over the place pointing in opposite directions.

been advocated by Andrew von Hirsch, Paul Robinson, Rick Singer and others, should predominate, or, whether a crime control thesis should predominate.

First, the Commission looked to the legislative history. The suggestion had been made by Professor von Hirsch in his testimony before the Senate, when it was drafting the legislation, that the Commission should adopt a just desert based theory or, at the very least, a just desert based theory modified by deterrence. The Senate patently rejected that suggestion. We were guided by the fact that the Senate had rejected that suggestion.

Second, our position was that the Comprehensive Crime Control Act could not in implementation translate the very title of the Act into a secondary purpose.

Congress was very specific in setting forth four purposes and directing us to try to maximize all four. Now admittedly, you can't do that in every sentence. Thus, what we did was spend a good deal of time trying to resolve the differences between just desert based sentences and crime control based sentences; in the end, we decided to follow an empirical approach with the expressed understanding that all sentences in the past reflected concerns for deterrence, concerns for crime control, and concerns for just punishment for the offense. We decided not to follow the lead, for example, of Minnesota, the first state to issue guidelines, by saying that we would adopt a single sentencing purpose. Rather, we opted for an amalgam, a multi-purpose system. Our decision was prompted both by the way our enabling legislation was written, and also partly because classic just desert proponents advocate a limit on punishment — a three-year cap on all sentences with an absolute maximum of five years only for murder. Moreover, they often advocate that sentences be set according to the number of available spaces in prison. As I mentioned earlier, the Senate rejected a similar suggestion by Senator Mathias by a vote of, I think, ninety-three to one that we use prison capacity as a basis for setting sentences. Furthermore, there was no agreement on our Commission to a theory that posited, "Less is better than more punishment." We felt that we had to look at each individual offense.

I think in some ways, had we agreed to some particular overarching theory, it might have helped us to resolve some issues. But in the end, I don't think that the absence of such a commitment inhibited us. I think it actually enhanced the debate, because we were always sensitive to the multiple purposes sentences should serve. There are multiple purposes to sentences; I think it is perfectly appropriate for the Congress, and for us subsequently, to create a multi-purpose approach.

Mr. ____: I have been told that the courts are oftentimes called "Pleas are us." I am wondering how the new Guidelines would impact on plea bargaining. It would seem that a criminal defendant who has a good chance of losing his case and then probably has calculated what kind of sentence he will get under the new sentencing Guidelines would plea bargain for maybe half that sentence, not taking the chance that he might actually win, figuring, "Well, if I lose, I am going up the river for four years. However, I will take the two years now."

**RIGHTS IN CONFLICT:
FAIRNESS ISSUES IN THE
FEDERAL SENTENCING GUIDELINES**

Helen G. Corrothers

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Rights in Conflict: Fairness Issues in the Federal Sentencing Guidelines

By Helen G. Corrothers*

This article discusses the goals and work of the U.S. Sentencing Commission, with particular attention to the issue of fairness. The author briefly describes the goals of the Commission, then proceeds to a short description of its major effort—the initial set of guidelines—and points out some of the tension that may exist between a convicted defendant's interests and those of society as a whole in the sentencing process. Finally, the article predicts some of the tasks and difficulties that lie ahead.

The new federal sentencing guidelines have dramatically changed the federal sentencing process in this country. Representatives of different political perspectives have promoted guideline sentencing, and the Guidelines themselves attempt to further a number of different purposes. But the greatest impetus behind the guideline sentencing movement—and the unifying thread connecting its supporters—was the widespread perception that traditional indeterminate federal sentencing practices were unfair in many respects: unfair to the public because the sentences imposed depended heavily on judges' personal assessments of the dangerousness of the offense and offender, and unfair to judges as well as to the public since defendants commonly served as little as one-third of the announced sentence because of the parole system. Finally, indeterminate sentencing practices were perceived unfair to defendants because sentences often depended far more on which judge was assigned the case than on what crime had been committed, and because judges were not required to articulate what specific characteristics of the offense or offender led them to impose a particular sentence. The Sentencing Commission, through the Sentencing Guidelines, has begun to confront and correct the unfairness and unwarranted disparity of the prior system.

* Commissioner, U.S. Sentencing Commission. This article is adapted from a speech given at the ABA's Annual Faculty Conference, Jekyll Island, Georgia, March 3, 1989.

Purposes of Sentencing Reform Law

In its introduction to the Guidelines, the Commission discusses the purposes of the sentencing reform law enacted by Congress: (1) achieving more *honesty* in sentencing through the elimination of parole, which typically resulted in a defendant's serving about one third of the sentence announced by the court; (2) achieving more *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts or even by different judges within the same court for similar criminal conduct by similar offenders; and (3) achieving *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.⁵ The Commission's overall goal and our mandate from Congress are to provide a structure and framework for sentencing decisions so that similar offenders who commit similar offenses are sentenced in a similar fashion.⁶

As a starting point for drafting the offense levels and sentencing ranges in our Guidelines, the Commission analyzed the existing practice of sentencing particular offenders who had committed particular crimes, and identified the factual circumstances that most often affected sentencing decisions for those crimes. To determine the typical sentence and typical circumstances surrounding an offense, the Commission reviewed over 10,000 presentence reports in detail and another 40,000 reports in a more summary fashion.⁷ It also examined the sentences and

⁵ See Guidelines at 1.1-1.4.

⁶ As stated in the report of the Senate Judiciary Committee:

The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but will constitute a significant step forward.

The bill, as reported, meets the critical challenge of sentencing reform. The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain. The current effort constitutes an important attempt to reform the manner in which we sentence convicted offenders. The Committee believe that the bill represents a major breakthrough in this area.

S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983).

⁷ See Guidelines 1.4 and the Commission's Supplementary Report on Initial Sentencing Guidelines and Policy Statements, submitted to Congress on June 18, 1987. The Commission was directed by Congress to study past sentencing practices but not to be bound by them. 28 U.S.C. § 994(m).

ficiently important, on balance, to warrant a sentence outside the guideline range.¹³ However, the judge must in all instances provide the reasons for the sentence and is subject to review by the court of appeals for "unreasonable" departures, incorrect guideline application, or a sentence imposed in violation of law.¹⁴

Tension Within Guidelines

Nevertheless, while it is hoped that the Guidelines will bring more order and clarity to the federal sentencing process, they do not eliminate the tensions that exist between a convicted defendant's interests and those of society as a whole in the sentencing process. In the Guidelines there is probably an inherent tension between the goals of *uniformity* and *proportionality* or, to put it differently, between simplicity and complexity. The more uniform (i.e., the simpler) the guidelines are, the more offenses and offenders are grouped together that are quite different in important respects. For example, a uniform sentence or a single category for robbery that lumps together armed and unarmed robberies, robberies with and without injuries, and robberies of a few dollars and a million dollars, is far too broad to be fair to the wide variety of defendants it would encompass. At the same time, however, a sentencing system that was perfectly proportional and tailored to fit the details of each individual case would be unworkable and would seriously compromise society's need for certainty of punishment and its deterrent effect. The larger the number of subcategories, the greater the complexity that is created and the less workable the system.

"Charge Offense" vs. "Real Offense"

Tension also exists between a "charge offense" system, which bases a defendant's sentence on the specific charge of conviction, and a "real offense" system, which considers what the defendant really did, rather than simply what he was convicted of doing. A pure "charge offense" system gives the prosecutor tremendous discretionary power in framing the charges.

¹³ 18 U.S.C. § 3553(b); see also Guidelines 1.6-1.8 and Part K of Chapter Five.

¹⁴ 18 U.S.C. § 3553(c); 18 U.S.C. § 3742(e).

Resolution of Factual Issues

The Guidelines contain a number of other measures designed to improve the fairness and openness of the sentencing process. For instance, the Guidelines direct the judge to resolve certain factual issues relevant to each sentence,¹⁸ and, to the extent these issues are contested by one side or the other, the judge must make a finding and announce on the record the basis for that finding.

Where the guideline range exceeds twenty-four months in breadth, the judge must give reasons for selecting a particular point within the range for a sentence. If a judge imposes a sentence outside the Guidelines (i.e., a departure), the reasons for doing so must be announced on the record.¹⁹ Either side may appeal a guideline sentence imposed in violation of law or as the result of an incorrect application of the Guidelines. In addition, where the sentence is lower than prescribed by the Guidelines (i.e., a downward departure), the government may appeal, and where it is higher than the Guidelines prescribe (i.e., an upward departure), the defendant may appeal.²⁰ These procedural mechanisms, which help contribute to the fairness of the guideline sentencing system, are time-consuming and, at least at the beginning, may slow down the disposition of cases. But our society has historically sacrificed procedural efficiency to safeguard the rights of individuals.

Unfairness of Old Law

Prior to the Guidelines, a defendant's sentence was often determined more by which federal court, or which judge in a federal court, was assigned the case than by the facts in the case. Some judges were notorious for giving especially harsh or lenient sentences in certain kinds of cases or to certain kinds of defendants. Certainly neither society nor individual defendants are well served by a justice system that operates like a roulette wheel. The Commission was told during its public hearings that the judge mattered more in predicting a sentence than the offense committed by the defendant.

¹⁸ Guidelines § 6A1.3.

¹⁹ 18 U.S.C. § 3553(c).

²⁰ 18 U.S.C. § 3742(a) and (b).

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Obviously, this represents an increase in fairness.²³ Previously, an offender who was given the maximum sentence for a crime by a judge had no basis to appeal the severity of his sentence aside from the Eighth Amendment's prohibition against cruel and unusual punishment, even when similar offenders were receiving more lenient sentences from other judges in the same courthouse. For instance, until the effective date of the Guidelines, some judges had routinely imposed stiff prison sentences for low-level drug offenses in order to "send a message to the streets," while other judges routinely imposed probation in such cases in the belief that prison sentences were futile.²⁴

The Commission in the Future

The Guidelines now in effect are not perfect, but rather evolutionary. As the Commission monitors practices under the initial set of Guidelines, receives input, and conducts research, it will be able to increase the fairness of the Guidelines. Sentencing will be more rational, the rules will be clearer, and the process will be out in the open. These significant improvements will contribute to our ability to identify and fix inequities in the system, whether the inequities are new or retained from the past.

²³ S. Rep. No. 225, note 6 *supra*, at 149-159.

²⁴ For years before the Guidelines, different judges have imposed widely disparate sentences on similar defendants convicted of committing similar crimes. As summarized in the Senate Report explaining the rationale for the Sentencing Reform Act of 1984:

This occurs in sentences handed down by judges in the same district and by judges from different districts and circuits in the Federal system. One judge may impose a relatively long prison term to rehabilitate or incapacitate the offender. Another judge, under similar circumstances, may sentence the defendant to a shorter prison term simply to punish him, or the judge may opt for the imposition of a term of probation in order to rehabilitate him. For example, in 1974, the average Federal sentence for bank robbery was eleven years, but in the Northern District of Illinois it was only five and one-half years. Similar discrepancies in Federal sentences for a number of different offenses were found in a landmark study by the United States Attorney's Office for the Southern District of New York. Further probative evidence may be derived from another 1974 study in which fifty Federal district court judges from the Second Circuit were given twenty identical files drawn from actual cases and were asked to indicate what sentence they would impose on each defendant. The variations in the judges' proposed sentences in each case were astounding. . . . [citations omitted]

S. Rep. No. 225, note 6 *supra*, at 41 & nn. 18-21, *reprinted in*, 1984 U.S. Code Congr. & Admin. News 3224.

tion concerning court interpretation and application of the Guidelines. For example, if the Commission receives complaints from practitioners that a given guideline is too lenient or too severe, it is important that its members attempt to determine, before modifying the Guidelines, whether the perceived problem might be due to inexperience with determinate sentencing, or apply to a small number of jurisdictions or atypical cases. Major, substantive amendments ordinarily should not be made on the basis of anecdotal evidence alone.

New Sentencing Options

Advances in knowledge may enable the Commission to develop new sentencing options not incorporated in existing guidelines. For example, experience with programs that provide less costly but equally punitive alternatives to imprisonment may suggest these as sentencing options that should be incorporated into the Guidelines for certain types of defendants.²⁸ This would allow the wisest use of scarce prison resources.²⁹

The Supreme Court's decision in *Mistretta v. United States* made sentencing guidelines the law of the land for federal criminal sentencing.³⁰ Approximately 40 percent of sentencing proceedings were being conducted under the Guidelines at the time of the *Mistretta* decision.³¹ This share will, of course, continue to increase. In order to know whether the Guidelines are being applied in the manner envisioned by the Commission, Congress has authorized the Commissioners to collect information on every defendant sentenced under the Guidelines.³² This informa-

²⁸ This part of § 3551(a) is designed to focus the sentencing process on the objectives to be achieved by the federal criminal justice system and to encourage the use of sentencing options such as probation, fines, imprisonment, or combinations thereof in a fashion tailored to achieve these multiple objectives. S. Rep. No. 225, note 6 *supra*, at 67.

²⁹ See 28 U.S.C. § 994(g).

The Commission has empowered the author to conduct such a project. She has appointed a 16-member Advisory Committee of nationally known criminal justice experts and the project is in progress.

³⁰ *Mistretta v. United States*, — U.S. —, 109 S. Ct. 647 (1989). Much of the documentation for this article was presented in the amicus curiae briefs submitted to the Court by the Commission and the U.S. Senate.

³¹ Based on estimates prepared by the Commission's staff.

³² The monitoring function is one of those emphasized in the statutory delegation of powers to the Commission. 28 U.S.C. § 995(a).

**THE DEVELOPMENT OF THE
FEDERAL SENTENCING GUIDELINE
FOR DRUG TRAFFICKING OFFENSES**

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The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses

By Ronnie M. Scotkin*

Drug trafficking offenses constitute a significant proportion of federal criminal prosecutions.¹ This article focuses on the U.S. Sentencing Commission's development of Section 2D1.1 of the Federal Sentencing Guidelines—Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession With Intent to Commit These Offenses),² the guideline covering most federal drug trafficking offenses committed on or after November 1, 1987.³ In particular, this article examines the development of this offense guideline in relation to the mandatory minimum sentences enacted by Congress for various drug trafficking offenses.

Included in the legislation creating the U.S. Sentencing Commission was a provision directing the Commission to examine past federal sentencing practice as a starting point in developing its initial sentencing guidelines.⁴ For persons sentenced to a term of imprisonment, this direction required the Commission to examine actual time served rather than merely

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¹ According to the U.S. Sentencing Commission's *Annual Report* (1988), 40.7 percent of the reported cases sentenced under the guidelines between Nov. 1, 1987, and Feb. 28, 1989, were for drug distribution and trafficking.

² U.S. Sentencing Commission, *Guidelines Manual* (Nov. 1, 1989) (hereinafter the *Manual*).

³ Nov. 1, 1987 was the date on which the sentencing guideline system became effective. A number of other guidelines in Chapter Two, Part D, Subpart I address specific subcategories of drug trafficking offenses (e.g., § 2D1.2—Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; § 2D1.4—Attempts and Conspiracies; § 2D1.5—Continuing Criminal Enterprise). Most of these guidelines apply the provisions of § 2D1.1 by reference.

⁴ U.S.C. § 944(m) required that "as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentence imposed in such categories of cases prior to the creation of the commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served."

tained.⁹ For example, ten grams of a mixture containing heroin at 50 percent purity and twenty grams of a mixture containing heroin at 25 percent purity were each graded as equivalent to five grams of heroin at 100 percent purity because each of the mixtures contained the same quantity of heroin (five grams).

The Development of Section 2D1.1

Early proposed sentencing guidelines also used the method described above to determine the seriousness of drug trafficking offenses. Although some concern was expressed within the Commission that requiring the courts to establish both the weight and the purity of a mixture containing a controlled substance to apply the sentencing guidelines might unduly complicate the sentencing process, a different, external factor intervened to determine this issue.¹⁰ Midway through the period of the Commission's development of the initial sentencing guidelines, Congress enacted the Anti-Drug Abuse Act of 1986.¹¹ Although it must be assumed that Congress was aware that sentencing guidelines were being developed, it nevertheless enacted a number of mandatory minimum sentencing provisions that effectively restricted the Commission's discretion in establishing guidelines for drug trafficking offenses.¹² Under the Anti-Drug Abuse Act, five- and ten-year mandatory minimum sentences were established for trafficking in specified weights of various controlled substances, including heroin, cocaine, cocaine base, PCP, LSD, fentanyl, hashish, hashish oil, and

⁹ 28 C.F.R. § 2.20 (Chapter Nine, Subchapter A) (1989).

¹⁰ The Commission did not actually vote on a particular structure for the drug trafficking offense guideline until after the enactment of the Anti-Drug Abuse Act of 1986. Thus, whether an approach different than that actually taken would have been adopted had the legislation not been enacted cannot be determined.

¹¹ Pub. L. No. 99-570 (enacted Oct. 27, 1986).

¹² It is noted that three years earlier, the Senate Report accompanying the bill that eventually became the Sentencing Reform Act of 1984 and that established the Sentencing Commission stated: "the Committee generally looks with disfavor on statutory minimum sentences to imprisonment, since their inflexibility occasionally results in too harsh an application of the law and often results in detrimental circumvention of the laws." Senate Comm. on the Judiciary, S. Rep. No. 98-225, 89 n. 194 (1983).

The Ninth Circuit Judicial Conference recently passed a resolution urging the Judicial Conference to submit a resolution to the Congress to reconsider mandatory minimum sentencing statutes. The resolution stated, in part, that "the statutory provisions leave no discretion with the trial courts, forcing the courts in many instances

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history category VI is associated with a serious criminal history).¹⁴ Trafficking in the controlled substances and weights listed in 21 U.S.C. §§ 841(b)(1)(A), offenses that carry a ten-year mandatory minimum term of imprisonment, were assigned offense level 32, an offense level corresponding to a guideline range of 121–151 months for a defendant in criminal history category I. Trafficking in the controlled substances and weights listed in 21 U.S.C. § 841(b)(1)(B), offenses that carry a five-year mandatory minimum term of imprisonment, were assigned offense level 26, an offense level corresponding to a guideline range of sixty-three to seventy-eight months for a defendant in criminal history category I.

Using the above two reference points, the offense guideline was expanded upward and downward in two-level increments to address trafficking in larger and smaller quantities of the controlled substances listed in 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B). For example, marijuana trafficking offenses were assigned offense levels from level 6 (offenses involving 250 grams or less) to level 42 (offenses involving 300,000 kilograms or more).¹⁵ Heroin trafficking offenses were assigned offense levels from level 12 (offenses involving five grams or less) to offense level 42 (offenses involving 300 kilograms or more).¹⁶

Within the above framework, the Commission then assigned offense levels for controlled substances not specifically listed in 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B)—that is, those controlled substances not covered by any mandatory minimum terms. This was accomplished in two steps. First, the Commission determined that certain controlled substances were to be graded by their relationship to controlled substances already listed. Schedule I and Schedule II opiates were to be graded by reference to heroin; Schedule I and Schedule II stimulants were to be graded by reference to cocaine; and Schedule I and Schedule II hallucinogens were to be graded by reference to LSD. To accomplish this, the portion of the offense guideline dealing with heroin was drafted to cover “heroin (or the equivalent amount of other Schedule I and II Opiates),”¹⁷ and conversion

¹⁴ *Manual*, Ch. Five, Part A (Sentencing Table).

¹⁵ *Manual*, § 2D1.1(c) (Drug Quantity Table).

¹⁶ *Id.*

¹⁷ *Id.*

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liquid form).¹⁹ The purity of the mixture containing a controlled substance is considered in the guidelines for two controlled substances, PCP and methamphetamine, because of a specific provision in 21 U.S.C. § 841. This provision sets a mandatory minimum sentence of five years' imprisonment for offenses involving ten grams of PCP or methamphetamine, or 100 grams or more of a mixture or substance containing a detectable amount of PCP or methamphetamine,²⁰ and a mandatory minimum sentence of ten years for 100 grams or more of PCP or methamphetamine or one kilogram or more of a mixture or substance containing a detectable amount of PCP or methamphetamine.²¹ The Sentencing Commission has written its guideline to provide that the court is to use the "offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater."²²

¹⁹ Lysergic acid diethylamide (LSD) has posed a unique problem generated by the manners in which it can be distributed: on a sugar cube, on blotter paper, or in liquid form. Individual doses of LSD have an average weight of .05 mg. If the carrier is weighed as part of the "mixture or substance," the offense level for a person selling 100 doses of LSD would be 36 if they were sold on sugar cubes (average weight 2,270 mg. per dose) (guideline range 188-235 months for a defendant with no prior criminal history), 26 if the doses were sold on blotter paper (average weight 14 mg. per dose) (guideline range sixty-three to seventy-eight months for a defendant with no prior criminal history), and 12 if the doses were sold in liquid form (average weight .05 mg. per dose) (guideline range ten to sixteen months for a defendant with no prior criminal history).

The Commission has not resolved the issue whether the carrier is to be weighed. During Commission deliberations on this issue in April 1989, the Attorney General's designee to the Commission, then Deputy Assistant Attorney General Stephen A. Saltzburg, acknowledged the potential for disparity in weighing the carrier. He opined that a statutory change would be required to exclude the weight of the carrier and said that this issue would be considered for the Department's legislative package (Commission meeting, April 18, 1989). The Commission, uncertain of how 21 U.S.C. § 841 would eventually be interpreted with respect to this issue, adopted an amendment to the guidelines providing that "'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841." (*Manual*, Appendix C, amendment 123, amending § 2D1.1, Commentary, Application Note 1.) The Commission also indicated that it would raise this issue in its report on penalties to the Congress under 28 U.S.C. § 994(r). To date, the developing case law indicates that courts have been including the weight of the carrier (U.S. v. Taylor, 868 F.2d 125 (5th Cir. 1989); U.S. v. Daly, 883 F.2d 313 (4th Cir. 1989); U.S. v. Bishop, 704 F. Supp. 910 (N.D. Iowa 1989); U.S. v. Marshall, 706 F. Supp. 650 (C.D. Ill. 1989)).

²⁰ 21 U.S.C. §§ 841(b)(1)(B)(iv) and 841(b)(1)(B)(viii).

²¹ 21 U.S.C. §§ 841(b)(10)(A)(iv) and 841(b)(10)(A)(vii).

²² *Manual* § 2D1.1(c), note.

Under this guideline, if the mixture or substance is more than 10 percent pure, the amount of pure PCP or methamphetamine will control. For example, each of three

and what have been termed "real offense elements" interact in the guideline system. The Sentencing Commission's guidelines system contains elements of both a "charge" (offense of conviction) and "real" offense system.²⁴ In general, the offense of conviction establishes the applicable offense guideline section under Section 1B1.2 (Applicable Guidelines). The "real offense" elements determine the actual offense level within that guideline under the provisions of Section 1B1.3 (Relevant Conduct). Under Section 1B1.3, the offense level for a drug trafficking offense under offense guideline Section 2D1.1 is to be determined on the basis of "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable,²⁵ that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense"²⁶ and "all such acts or omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction."²⁷ Therefore, once Section 2D1.1 is established as the appropriate offense guideline, conduct beyond that charged in the count of conviction may be used in determining the actual offense level in accordance with guideline Section 1B1.3 (Relevant Conduct).²⁸

Conclusion: An Evolutionary Process

To the extent that this or other issues call for refining the Guidelines with experience, the Commission is a permanent agency with authority to consider and promulgate guideline amendments. As stated in its Introduction to the Guidelines Manual, the Commission "... views the guideline-writing pro-

²⁴ *Manual*, Ch. One Part A, § 4(a).

²⁵ "Otherwise accountable" is defined in the *Manual*, § 1B1.3, Commentary, Application Note 1.

²⁶ *Manual* § 1B1.3(a)(1).

²⁷ *Manual* § 1B1.1(a)(2).

²⁸ This point is reiterated by the Commission in the Background Commentary to § 1B1.3, which states: "Conduct that is not formally charged, or is not an element of the offense, may enter into the determination of the applicable guideline sentencing range" and "... in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or common scheme or plan as the count of conviction."