

United States Sentencing Commission

Reprint Series



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UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529



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Dear Reader:

The purpose of the Commission's reprint series is to provide a central repository for selected articles about the federal sentencing guidelines authored by Commissioners and staff. This is the second volume in the series, which was instituted in furtherance of the Commission's statutorily mandated clearinghouse function. The first volume was issued June 1992.

In issuing this current volume, we hope to stimulate discussion on an informed basis regarding the foundational issues underlying the guideline system. These articles highlight the thoughts of the initial members of the Commission and staff and discuss the philosophies behind the current guideline structure.

As always, we invite your comments regarding this series and other Commission products.

Sincerely,

A handwritten signature in cursive script that reads "Richard P. Conaboy". The signature is written in black ink and is positioned above the printed name and title.

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**THE ROLE OF SENTENCING GUIDELINE
AMENDMENTS IN REDUCING
UNWARRANTED SENTENCING DISPARITY**

William W. Wilkins, Jr.

John R. Steer

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ARTICLES

THE ROLE OF SENTENCING GUIDELINE AMENDMENTS IN REDUCING UNWARRANTED SENTENCING DISPARITY

WILLIAM W. WILKINS, JR.*

JOHN R. STEER**

In *United States v. Dunnigan*, 113 S. Ct. 1111 (1993) the United States Supreme Court unanimously ruled that an obstruction enhancement under the federal sentencing guidelines for a defendant's perjurious trial testimony does not contravene the constitutional privilege of an accused to testify in her own behalf, provided the sentencing judge makes a proper, independent finding that the defendant in fact committed perjury at trial. The Court's decision reverses an earlier decision by the Fourth Circuit, *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), in which that appellate court had differed from other circuits regarding the constitutionality of the guidelines' enhancement for trial perjury. *Dunnigan* provides a classic illustration of the United States Supreme Court exercising its authority to resolve intercircuit conflicts and restore uniformity in the interpretation of applicable constitutional law. In contrast, when an intercircuit conflict entirely concerns differences in the interpretation of federal sentencing guidelines provisions, the Court has indicated it will look first to the United States Sentencing Commission to address such conflicts through the exercise of the Commission's amendment authority. *Braxton v. United States*, 111 S. Ct. 1854 (1991). In this article, the Chairman and General Counsel of the Commission describe how the Commission has exercised its amendment responsibility to achieve greater consistency among courts in sentencing under the guidelines.

I. INTRODUCTION

The transition from indeterminate sentencing to determinate, guideline-based sentencing, which began in November 1987 under the landmark Sentencing Reform Act (SRA),¹ was as dramatic a change for the federal

* Judge, United States Court of Appeals for the Fourth Circuit, and Chairman, United States Sentencing Commission.

** General Counsel, United States Sentencing Commission. 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, 98 Stat. 1838, 1987 (1984) (codified at 18 U.S.C. §§ 3551-3559 (1988); 28 U.S.C. §§ 991-998 (1988)).

Commission's yearly amendment process. As a permanent agency, the Commission has authority to send amendments to the guidelines or policy statements to Congress on or before each May first. After an 180-day review period, the proposed amendments—if not rejected by passage of legislation—take effect on a date specified by the Commission.¹³

The information that fuels this evolutionary process is rich and diverse. The Commission codes up to 262 pieces of information about each guideline sentencing that occurs in federal court. The resulting, steadily expanding data base is an invaluable source of information for the Commission as it monitors guideline application and refines the *Guidelines Manual*.¹⁴ In addition, each year the Commission convenes interdisciplinary staff working groups to prepare detailed reports about priority issues it has previously identified. These reports cover various topics such as violent crime, money laundering, acceptance of responsibility, and sentencing of drug offenses. Federal judges, prosecutors, defense attorneys, probation officers, and other interested parties provide helpful input for the Commission's decision-making process through the submission of letters, position papers, and testimony at public hearings. Additionally, the Commission receives comment and amendment suggestions from a number of organizations, including the Judicial Conference of the United States, the Department of Justice, the American Bar Association, and ad hoc standing committees of defense attorneys and federal probation officers.

Two other important sources of information regularly considered by the Commission in its amendment process are district court statements of reasons for imposing sentence¹⁵ and appellate court decisions on constitutional, statutory, and guideline application issues. While the Commission is not a party to individual sentencing proceedings, it closely monitors court decisions. As the evolving process of guideline application renders it necessary, the Commission exercises its statutory responsibility to amend the guidelines in response to court determinations of guideline issues.

This article explores a number of facets of the amendment process, placing particular emphasis on the manner in which the Commission uses appellate court opinions interpreting the guidelines¹⁶ to formulate amend-

13. 28 U.S.C. § 994(p) (1988).

14. U.S. SENTENCING COMM'N, *GUIDELINES MANUAL* (1992) [hereinafter *GUIDELINES MANUAL*].

15. District court statements of reasons for sentence, required by 18 U.S.C. § 3553(c), may be formal published opinions or informal oral statements from the bench during the course of sentencing proceedings. The latter are sent to the Commission as transcripts of court proceedings or, more commonly, are summarized by the court or probation officer on a form jointly developed by the Commission, the Administrative Office of the U.S. Courts, and the Judicial Conference's Criminal Law Committee.

16. The emphasis in this article on appellate court opinions is not to suggest that guideline application decisions of district courts and magistrate judges are less important in the amendment process developed by the Commission. To the contrary, under the authority of 28 U.S.C. §§ 994(w) and 995(a), the Commission, as heretofore explained, regularly receives and assimilates into a growing data base information relating to case-specific application of the guidelines

a dynamic, progressive sentencing policy centered around guideline application experience.

B. Frequency of Amendments as a Policy Issue

As the SRA approaches the point in its history when members of the Sentencing Commission are slated to become part-time,²² a recurrent topic of policy debate is the relative frequency with which further changes in the *Guidelines Manual* should be made, in response to both court decisions and other factors. Perhaps reality has furnished considerations different from, and more weighty than, those Congress anticipated.²³ Nonetheless, the congressional view of guideline amendment frequency, as evidenced by relevant statutory provisions and accompanying history, must be considered because of its particular relevance to this article's focus on Commission-court interaction through the amendment process. Pertinent statutory provisions and legislative history suggest that to the extent Congress had expectations about the relative frequency of amendments, it envisioned an active, vigorous amendment process, especially in the early years of guideline implementation. One structural indication in the statutory scheme supporting this view is the provision permitting multiple submissions of guideline amendments to Congress each year, albeit within the limited time frame following the opening of a session of Congress and ending May 1 of each year.²⁴ The SRA's limitation on submission of guideline amendments to the roughly four-month period at the beginning of each year, and the required 180-day wait prior to the amendments taking effect, appear to have been designed more for the congressional purpose of maintaining oversight of evolving Commission sentencing policies than as a check on the frequency of amendments.

Another structural indication of Congress' expectation that the guidelines would be subject to frequent change in their early implementation is

22. See 28 U.S.C. § 992(c) (1988) (providing that voting members of Commission, except Chairman, shall hold part-time positions beginning November 1, 1993 (six years after initial implementation of guidelines)).

23. One eventuality not anticipated by Congress was that courts would interpret the ex post facto clause of the Constitution as constraining use of the most current set of sentencing guidelines, as Congress intended under 18 U.S.C. § 3553(a)(4) and (5). The courts of appeals have held uniformly that the guidelines in effect at the time of sentencing may not be used if they punish more severely than those in effect at the time of the defendant's offense. See, e.g., *United States v. Young*, 932 F.2d 1035 (2d Cir. 1991); *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991); *United States v. Morrow*, 925 F.2d 779 (4th Cir. 1991); *United States v. Nagi*, 947 F.2d 211 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2309 (1992); *United States v. Sweeten*, 933 F.2d 765 (9th Cir. 1991); *United States v. Smith*, 930 F.2d 1450 (10th Cir.), *cert. denied*, 112 S. Ct. 225 (1991); *United States v. Lam Kwong-Wah*, 924 F.2d 298 (D.C. Cir. 1991); *United States v. Harotunian*, 920 F.2d 1040 (1st Cir. 1990); *United States v. Suarez*, 911 F.2d 1016 (5th Cir. 1990); *United States v. Swanger*, 919 F.2d 94 (8th Cir. 1990) (*per curiam*); *United States v. Worthy*, 915 F.2d 1514 (11th Cir. 1990). This departure from congressional intent has created numerous guideline application difficulties that no doubt account for much of the concern over the frequency of guideline amendments.

24. 28 U.S.C. § 994(p) (1988).

number of important continuing research and education duties, in one fashion or another most of these responsibilities related to the fundamental congressional goal of achieving and perfecting a workable, effective guidelines system.

C. Basic Goals to Be Furthered by Amendments

Broadly speaking, the SRA envisions active use of the Commission's guideline amendment authority to further two basic goals, one idealistic and long term, the other more pragmatic and immediate. The longer term, ambitious hope was that sentencing policies prescribed by the Commission would evolve to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."³² The more immediate, pragmatic task—and one clearly of high priority—was that of reducing unwarranted sentencing disparity. Although court experience in applying and construing the guidelines is valuable in developing appropriate guideline amendments that further both goals, it is especially relevant with respect to the latter disparity-reduction goal. In its discussion of the SRA requirement that the Commission continually revise the guidelines, the Senate Judiciary Committee Report explained:

Perhaps most importantly, this provision mandates that the Commission constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with. In a very substantial way, this subsection complements the appellate review section by providing effective oversight as to how well the guidelines are working.³³

Therefore, putting aside for another day a discussion of the interactive Commission-court relationship as it relates to the longer term SRA goals, the balance of this article will focus on the relevance of the Commission's amendment authority in reducing unwarranted sentencing disparity.

1. Avoidance of Unwarranted Disparity—A Continuous Objective of the Courts and the Commission

The SRA places the avoidance of unwarranted disparity at the forefront of its directives to both the courts and the Commission. Among the factors courts must consider in the imposition of sentence is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."³⁴ While the statute expressly directs that courts "shall" consider this objective in their sentencing decisions, the accompanying directives to sentence within the applicable guideline range or depart from the range based on reasons stated on the record,³⁵

32. 28 U.S.C. § 991(b)(1)(C) (1988).

33. S. REP. NO. 225, *supra* note 5, at 178, *reprinted in* 1984 U.S.C.C.A.N. at 3361.

34. 18 U.S.C. § 3553(a)(6) (1988).

35. 18 U.S.C. § 3553(b)-(c) (1988).

range "for each category of offense involving each category of defendant,"⁴³ and that the width of the guidelines' imprisonment ranges not exceed "the greater of 25 percent or 6 months."⁴⁴ The Commission implemented these directives by making all imprisonment ranges as broad as statutorily permitted. This design decision maximizes within-guideline sentencing discretion in furtherance of the goal of individualized sentences. It also makes it unnecessary that guidelines include every conceivably significant offense and offender characteristic.

Yet, a guidelines system that uses a moderate number of important offense and offender characteristics to prescribe an applicable guideline range as broad as the statute will permit cannot successfully achieve the congressional goal of reasonable sentence uniformity unless the guidelines themselves are read and applied in a reasonably consistent manner. The foundation upon which the system was constructed was that defendants of similar characteristics who commit the same offense in a similar manner would be sentenced within the same guideline range, regardless of whether the defendants appeared before different sentencing judges in the same district or in districts geographically distant. This goal may not be met, however, when courts fail to apply guideline provisions consistently to like offenders convicted of like offenses. When measured against the SRA objective of guideline application uniformity for similar cases, one effect of differences in court interpretations of guideline provisions may be to enlarge the effective guideline imprisonment range applicable to defendants having like offense and offender characteristics significantly beyond the twenty-five percent or six-month maximum differential Congress intended. Consider, for example, the disparity resulting from a guideline interpretation by the courts in one judicial circuit that bank tellers routinely are to be considered vulnerable victims⁴⁵ in bank robbery offenses, thereby resulting in a two-level enhancement of the defendant's sentence. In contrast, consider that the courts in another circuit do not routinely characterize bank tellers as vulnerable victims. The net effect of such an intercircuit inconsistency is to enlarge the "within-guideline" potential difference in imprisonment sentences between defendants sentenced in one circuit, and similar defendants sentenced in the other circuit, from twenty-five to approximately fifty percent.⁴⁶

43. 28 U.S.C. § 994(b)(1).

44. 28 U.S.C. § 994(b)(2).

45. See U.S.S.G. § 3A1.1 (Vulnerable Victim). In *United States v. Jones*, 899 F.2d 1097, 1100 (11th Cir.), *cert. denied*, 111 S. Ct. 275 (1990), the court of appeals upheld a district court's finding that a bank teller was a vulnerable victim within the meaning of § 3A1.1. Subsequently, the Commission amended the application notes accompanying the guideline to state Commission intent that a bank teller was not to be considered an unusually vulnerable victim solely by virtue of performing a teller's job in a bank. See U.S.S.G. app. C, amend. 454. Thereafter, *Jones* was overruled. See *United States v. Morrill*, No. 91-8386 (11th Cir. Feb. 16, 1993) (en banc).

46. Suppose, for example, a bank robbery defendant without the § 3A1.1 vulnerable

how carefully the Commission chooses the words that appear in the *Guidelines Manual*, that courts will differ sometimes in their reading of guideline provisions and in their application of those provisions to the facts of varying cases. Consequently, "pockets" of disparity in guideline sentencing law will appear. Thus, the task of amending the guidelines to reduce unwarranted disparity is a continuing one.⁵⁶

Turning to the manner in which guideline amendments address disparity concerns, it can be said that, broadly speaking, amendments that have a disparity reduction purpose fall into one of two categories: (1) amendments that relate to determination of the applicable guideline range and (2) amendments that relate to sentencing outside the guideline range. Both types have figured prominently in Commission amendment actions. While the latter departure-related category tends to garner more attention, amendments in the former category have been far more numerous.⁵⁷

B. Use of Amendments to Promote More Consistent Guideline Application

In applying the federal sentencing guidelines, courts sometimes have differed both in their interpretations of guideline language and in their application of the guidelines to varying, often complex, sets of facts. While both can lead to sentencing disparity under a guideline system, it is the former disparate construction of guideline language that must be of primary concern to the Commission for several reasons. Fundamentally, as a matter of institutional and statutory responsibility, the Commission, as the originator of guideline language, has an obligation to address instances in which the words it writes to guide court discretion lead to pronounced differences in court interpretation of the intended meaning of those words. Additionally, when appellate courts construe specific passages of the guideline system,

Table B-1 (1992); STATISTICS DIVISION, ADMIN. OFFICE OF THE U.S. COURTS, SUMMARY STATISTICS (1992) (unpublished, on file with the United States Sentencing Commission, Washington, D.C.). According to these unpublished statistics, during the 12 months ending September 30, 1992, appeals were filed in 9,597 guideline cases. Of these appeals, 1,566 involved an appeal of the conviction only. The balance were appeals of conviction and sentence (5,098 cases), sentence only (2,534 cases), or type unknown (399 cases).

56. A number of other factors contribute to the need for amendments. Among these are the creation of new criminal offenses, changes in statutory penalties, or enactment of directives to the Commission from Congress. The Commission also periodically reassesses and may amend guidelines to reflect more appropriately the seriousness of conduct, as determined by the Commission. Illustrative of the latter are amendments that adjusted the offense levels for robbery offenses (U.S.S.G. app. C, amend. 110, 365) and fraud offenses (*id.* at amend. 154).

57. Precise categorization of amendments is not possible because many have multiple parts and further more than one objective. In general, about one-half of the Commission's 473 amendments to date have been motivated by an intent to clarify guideline language, often in response to court decisions, and ease application problems. Another approximately 15% of the amendments have been precipitated directly by legislation; approximately 10% relate to departure issues; about 5% were Commission initiatives to adjust offense levels; and the balance involved a variety of technical or conforming changes.

recognized and applied,⁶⁴ are designed to make clear Commission intent that the 18 U.S.C. section 922(g) offense is not to be considered a crime of violence, although a defendant convicted of that offense will be subject to an enhanced punishment under the firearms offense guideline⁶⁵ and may be subject to further enhancement under the guideline applicable to armed career criminals.⁶⁶

In contrast to disparate court construction of guideline language, differences in court application of guideline provisions with an agreed-upon meaning are of less immediate concern to the Commission. The SRA was neither intended nor could realistically hope to remove from the criminal justice system all disparities of this nature. The SRA scheme of appellate review is evidence of this greater tolerance of variations in sentencing court factual determinations that form the basis for applying the guidelines, as well as variations in judgment resulting from application of the guidelines to the facts of a case. Specifically, the statute instructs courts of appeals reviewing guideline sentences to "give due regard to the opportunity of the district court to judge the credibility of the witnesses, . . . [to] accept the findings of fact of the district court unless they are clearly erroneous and [to] give due deference to the district court's application of the guidelines to the facts."⁶⁷ Most appellate courts have interpreted the "due deference" standard as functionally equivalent to a "clearly erroneous" level of scrutiny of district court factual determinations, thereby engendering a greater tolerance of variations in guideline application by sentencing judges.⁶⁸

Analogizing to the greater deference generally exhibited by the appellate courts in reviewing findings of fact made by district courts, the Commission's amendment authority can be exercised, consistent with the Sentencing

64. See *United States v. Bell*, 966 F.2d 703 (1st Cir. (1992)); *United States v. Fitzhugh*, 954 F.2d 253 (5th Cir. 1992); *United States v. Sahakian*, 965 F.2d 740 (9th Cir. 1992), *overruling* *United States v. O'Neal*, 910 F.2d 663 (1990), *amd. reh'g en banc denied*, 937 F.2d 1369 (1991). *But see* *United States v. Stinson*, 957 F.2d 813 (11th Cir. 1992).

65. U.S.S.G. § 2K2.1 provides an enhancement of at least two levels (approximately 25%) if the defendant is a "prohibited person," defined to include those convicted under 18 U.S.C. § 922(g).

66. U.S.S.G. § 4B1.4 provides for the offense level to be enhanced to a minimum of 33 and the criminal history category to be increased to a minimum of category IV for a defendant convicted of being a felon-in-possession who is subject to the enhanced penalty under 18 U.S.C. § 924(e) as an armed career criminal (generally defined as one who has three previous convictions for violent felonies or serious drug offenses).

67. 18 U.S.C. § 3742(e) (1988).

68. See, e.g., *United States v. Quan-Guerra*, 929 F.2d 1425 (9th Cir. 1991); *United States v. Medina-Saldana*, 911 F.2d 1023 (5th Cir. 1990); *United States v. Howard*, 894 F.2d 1085 (9th Cir. 1990); *United States v. Burns*, 893 F.2d 1343 (D.C. Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 2182 (1991); *United States v. McDowell*, 888 F.2d 285 (3d Cir. 1989); *United States v. Mejia-Orosco*, 868 F.2d 807 (5th Cir. 1989); *United States v. Barrett (Dolan)*, 890 F.2d 855 (6th Cir. 1989); *cf.* *United States v. Anderson*, 942 F.2d 606 (9th Cir. 1991), *vacating* 895 F.2d 641 (1990) (holding that due deference standard not new standard of review, but requires court to determine degree of factual inquiry involved and apply corresponding standard—clearly erroneous standard for purely factual inquiries, de novo for those closer to legal questions); see also William W. Wilkins, Jr., *Sentencing Reform and Appellate Review*, 46 WASH. & LEE L. REV. 429, 434-35 (1989).

the Ninth Circuit saw language inconsistencies between section 1B1.3 and the guidelines in Chapter Three, Part D, pertaining to the determination of a combined offense level in cases involving multiple counts of conviction.⁷¹ The court resolved this "ambiguity" in the defendant's favor by not including conduct in counts of which the defendant was not convicted.⁷² Although this ruling was later withdrawn and replaced with a decision that interpreted the guideline in a manner consistent with Commission intent and the decisions of other circuits,⁷³ the Commission reinforced its view in the interim by adopting clarifying amendments to the commentary of section 1B1.3 and section 3D1.2.⁷⁴

More significantly, the Commission added language and illustrations to the relevant conduct guideline and its commentary in 1989⁷⁵ and 1992.⁷⁶ The principal objective of each effort was to clarify the scope of conduct covered by this key guideline. These amendments each followed a comprehensive examination of district and appellate court applications of the guideline and were motivated by Commission conclusions that amendments were needed to make its application more uniform.⁷⁷

The Commission also has amended other guidelines to clarify that determinations under those guidelines are based on the scope of conduct found "relevant" under section 1B1.3. For example, after a series of appellate decisions that based role in the offense determinations under section 3B1.1 and section 3B1.2 solely upon conduct in the count of conviction,⁷⁸ the Commission revised the commentary introducing Chapter Three, Part B, to reinforce its intent that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of section 1B1.3 (Relevant Conduct), i.e., all conduct within the scope of section 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction."⁷⁹

71. *United States v. Restrepo*, 883 F.2d 781 (9th Cir. 1989).

72. *Id.* at 786.

73. *United States v. Restrepo*, 946 F.2d 654 (9th Cir. 1991).

74. U.S.S.G. app. C, amend. 309.

75. *Id.* at amends. 76-78.

76. *Id.* at amend. 439.

77. For a discussion of application inconsistencies found by researchers outside the Commission, see Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of Relevant Conduct Guideline § 1B1.3*, 4 Fed. Sent. R. 330 (1992).

78. See, e.g., *United States v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990) (limiting "role in the offense" determination to offense of conviction); *United States v. Rodriguez-Nuez*, 919 F.2d 461 (7th Cir. 1990) (same); *United States v. Williams*, 891 F.2d 921 (D.C. Cir. 1989) (same); *United States v. Lanese*, 890 F.2d 1284 (2d Cir. 1989) (same). *But see* *United States v. Fells*, 920 F.2d 1179 (4th Cir. 1990) (allowing evidence of activity outside offense of conviction in "role in the offense" determination).

79. U.S.S.G. ch. 3, pt. B, intro. cmt., as amended by app. C, amend. 345, 456. The amended commentary emphasizes the application principle in § 1B1.3(a) stating that unless otherwise specified, adjustments in Chapter Three, of which role in the offense is one, are based upon the scope of conduct included within § 1B1.3.

portance of Commission policy statements that inform courts about the kind and degree of circumstances considered by the Commission in formulating applicable guidelines. Specifically, the Court stated that such policy statements constitute "an authoritative guide to the meaning of the applicable guideline," and "an error in interpreting such a policy statement could lead to an incorrect determination that a departure was appropriate."⁸⁶

Williams complements the Court's earlier *Braxton* message by recognizing the central role of the Commission in regulating court departure decisions. In other words, it logically follows from *Braxton* and *Williams* that the Court expects the Commission to use its amendment authority appropriately to address inter-circuit conflicts in departure law to the extent such conflicts stem from differences in interpretation of *Guidelines Manual* language.⁸⁷

The Commission to date has issued a modest number of amendments responding to court departure decisions. Among the approaches employed by the Commission after considering departure cases are: (1) incorporating departure factors into relevant guidelines, (2) expressly inviting future departures in certain circumstances, while on occasion also providing guidance as to the appropriate extent of such departures, (3) precluding departures based on particular factors except when such factors occur to an extraordinary degree, and (4) precluding departures based on stated factors absolutely. To this list of affirmative amendment actions, which will be further discussed below, should be added another alternative course: that of further studying an issue but taking no amendment action. In fact, although some have criticized the Commission for acting too hastily to constrain departure decisions,⁸⁸ in reality the Commission to date has taken no action—other than to continue gathering and analyzing data—with regard to most district court departure sentences and appellate decisions affirming departures.⁸⁹

1. Incorporation of Departure Factors into Relevant Guidelines

As generally discussed above, Congress intended that the Commission use information gleaned from district court statements of reasons and

86. *Id.* at 1119.

87. *Williams* presented a situation involving both a circuit conflict in interpretation of the sentence appellate review statute (regarding when remand is necessary in a case in which a departure was based on both proper and improper factors) and a conflict in the interpretation of provisions in the *Manual* (regarding whether a departure properly could be based on dated prior convictions not similar to the instant offense). The Court addressed the statutory issue but not the guideline dispute. Subsequently, the Commission clarified the latter by issuing amendment 472, effective November 1, 1992. This amendment states that dissimilar, serious prior offenses that occurred too long ago to be counted in the guidelines' criminal history score may be considered in determining whether an upward departure is warranted under U.S.S.G. § 4A1.3 (Adequacy of Criminal History Category).

88. See, e.g., Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

89. Currently, a Commission working group is engaged in a comprehensive two-year analysis of departures that could result in recommendations to the Commission, including possible amendments, in the latter part of 1993.

departures above the most serious criminal history category applicable to defendants,⁹⁹ the Commission amended the section 4A1.3 commentary to outline an incremental approach tied to the sentencing table.¹⁰⁰

Departure guidance is sometimes provided by Commission amendments that have other objectives as well. In fact, as the Commission reviews the application of offense conduct guidelines through its working group process of analysis, amendment revisions frequently reflect multiple purposes. For example, in a comprehensive amendment revision, the Commission may clarify guideline language to promote more uniform application, add provisions that more fully describe the "heartland" of conduct covered by the guideline,¹⁰¹ and describe circumstances outside the heartland of the revised guideline that could warrant departure. The Commission's 1991 revisions of the extortion guideline¹⁰² and the firearms offense guideline¹⁰³ illustrate this comprehensive revision approach. In both instances, the rewriting clarified terminology, adjusted punishment levels by taking into account additional offense characteristics, and added commentary inviting upward departures in certain circumstances.¹⁰⁴

3. Limiting Departures to Extraordinary Cases

On a very few occasions, the Commission has issued new or amended policy statements that seek to limit, but not absolutely preclude, departures. These amendments have addressed departure use of the following offender characteristics: (1) youth,¹⁰⁵ (2) physical condition or appearance, including physique,¹⁰⁶ and (3) military, civic, charitable, or public service; employment-

99. Compare *United States v. Schmude*, 901 F.2d 555, 559-60 (7th Cir. 1990) (prescribing procedure for extrapolating by analogy to Sentencing Table to reach sentence that more appropriately reflects seriousness of defendant's prior record) and *United States v. Ferra*, 900 F.2d 1057, 1062 (7th Cir. 1990) (same), *cert. denied*, 112 S. Ct. 1939 (1992) with *United States v. Jackson*, 921 F.2d 985, 993 (10th Cir. 1990) (approving *Schmude* approach as appropriate in some cases while not strictly mandating it) and *United States v. Molina*, 952 F.2d 514, 521-22 (D.C. Cir. 1992) (same), and with *United States v. Ocasio*, 914 F.2d 330, 336 (1st Cir. 1990) (rejecting bright-line, extrapolation-by-analogy rule because "reasonableness is a concept, not a constant").

100. U.S.S.G. app. C, amend. 460.

101. See U.S.S.G. ch. 1, pt. A4(b) (explaining Commission's general intent that courts "treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes").

102. U.S.S.G. app. C, amend. 366.

103. *Id.* at amend. 374.

104. See U.S.S.G. § 2B3.2, cmt. nn. 7, 8; *id.* § 2K2.1, cmt. nn. 10, 11.

105. U.S.S.G. app. C, amend. 386. A number of appellate decisions, construing policy statement § 5H1.6, had disapproved of basing a downward departure on a defendant's young age. See, e.g., *United States v. Shoupe*, 929 F.2d 116 (3d Cir.), *cert. denied*, 112 S. Ct. 382 (1991); *United States v. White*, 945 F.2d 100 (5th Cir. 1991); *United States v. Summers*, 893 F.2d 63 (4th Cir. 1990).

106. U.S.S.G. app. C, amend. 386. This portion of the amendment can be said to express the Commission's view that a below-guideline sentence would not ordinarily be appropriate based on circumstances similar to those at issue in *United States v. Lara-Morales*, 905 F.2d 599 (2d Cir. 1990) (in which that court approved a downward departure for male defendant of effeminate appearance who allegedly had suffered abuse in jail prior to sentencing).

socioeconomic background and other personal characteristics that Congress clearly intended the guidelines to place off limits.¹¹²

5. Grounds for Amendment Restraint with Respect to Court Departure Decisions

Although the Commission on several occasions has used its amendment authority to address departure circumstances discussed in court decisions, its overall posture in this respect has been one of restraint.¹¹³ Viewed in the context of SRA goals, at least two good reasons exist for a deliberate course of Commission amendment action in this area. One is that the SRA obviously contemplates some reasonable degree of sentencing outside guideline boundaries.¹¹⁴ The other key structural consideration is that, under the SRA, departures are authorized but never mandated.

The appellate courts uniformly have held that as long as the sentencing judge properly understands the authority to depart, the informed exercise of discretion to impose a sentence within the applicable guideline range is not reviewable.¹¹⁵ The fact that judges are not compelled to depart for circumstances that a particular court of appeals may have endorsed as departure-appropriate, and therefore may well decide to sentence within the guideline range, generally means that the Commission has less need for immediate concern about unwarranted disparity resulting from appellate departure decisions at variance with Commission intent. As previously indicated, the Commission has not elected to forbear in all such cases. Nevertheless, in general it can be said that appellate departure decisions, even if inconsistent, on the whole produce less need for amendment action than do inter-circuit conflicts over the interpretation of guideline language that removes discretion from the sentencing court to elect a different course.

112. See 28 U.S.C. § 994(d) (1988) (mandating Commission to assure absolute neutrality under guidelines with respect to race, sex, national origin, creed, and socioeconomic status of offenders).

113. Through fiscal year 1991, courts sentenced below the guideline range for reasons other than a defendant's substantial assistance to law enforcement authorities in almost 5,000 cases. In comparison, the total number of amendments that relate to departures in some fashion is less than 50, and few of these were specifically designed to constrain downward departures. While these rough comparative numbers cannot be said to show definitively the number of actual departure cases that might have been affected by the amendments, they do not support the view that the Commission has been "quick on the draw" with amendments to constrain downward departures.

114. S. REP. NO. 225, *supra* note 5, at 51-52, reprinted in 1984 U.S.C.C.A.N. at 3234-35.

115. See, e.g., *United States v. Ortez*, 902 F.2d 61 (D.C. Cir. 1990); *United States v. Ocasio*, 914 F.2d 330 (1st Cir. 1990); *United States v. Bayerle*, 898 F.2d 28 (4th Cir.), *cert. denied*, 111 S. Ct. 65 (1990); *United States v. Evidente*, 894 F.2d 1000 (8th Cir.), *cert. denied*, 495 U.S. 922 (1990); *United States v. Morales*, 898 F.2d 99 (9th Cir. 1990); *United States v. Davis*, 900 F.2d 1524 (10th Cir.), *cert. denied*, 111 S. Ct. 155 (1990); *United States v. Colon*, 884 F.2d 1550 (2d Cir.), *cert. denied*, 493 U.S. 998 (1989).

Moreover, although applying the guidelines consistently with constantly evolving case law admittedly can be difficult, Commission clarifying amendments can ameliorate this difficulty by restoring greater uniformity of guideline law.

Problems inherent in applying amended guidelines consistent with ex post facto constraints are a matter of considerable concern to the Commission.¹¹⁹ Congress anticipated this legal issue and stated its strong policy view that courts should apply the guidelines and policy statements in effect at the time of sentencing.¹²⁰ Were that uniformly the case, application of amended guidelines would be substantially less problematic. However, because of the near-unanimous view of the appellate courts that the Ex Post Facto Clause precludes application of postoffense amendments that increase punishment,¹²¹ relief may be possible only if the United States Supreme Court has occasion to consider the issue of whether, given the unique features of the federal guidelines system,¹²² amendments that alter a defendant's guideline exposure within unchanged statutory parameters can be fully applied as Congress intended under the SRA.¹²³

V. CONCLUDING THOUGHTS

No purpose was more important to Congress and the several Administrations that worked for years to enact the Sentencing Reform Act of 1984 than the avoidance of unwarranted disparity and resulting unfairness in the sentencing of similarly situated defendants. This noble goal, about which there is virtually unanimous agreement in principle, was one that Congress recognized would be constantly in tension with a changing body of sentencing law. The SRA therefore provided that the Sentencing Commission would function as a permanent, auxiliary agency in the Judicial Branch, and it mandated the Commission to amend the sentencing guidelines as necessary to promote the goal of reasonable sentencing uniformity. The

119. See U.S.S.G. § 1B1.11 (providing guidance on application of amended guidelines when constrained by ex post facto clause); see also 57 Fed. Reg. 62, 832-33 (1992) (discussing proposed expansion of this policy statement to address multiple count cases).

120. 18 U.S.C. §§ 3553(a)(4), (5) (1988).

121. See *supra* note 23.

122. See *Miller v. Florida*, 482 U.S. 423 (1987).

123. It also has been suggested that Congress should amend 18 U.S.C. § 3553(a)(4) and (5) to direct courts to use guidelines and policy statements in effect at the time a defendant's offense was committed. While such a change might lessen somewhat the difficulties of applying amended guidelines vis-à-vis the Ex Post Facto Clause, it would not eliminate them. Courts would still need to address the issue of how amendments are to be applied in cases in which a defendant is convicted of multiple counts (in which amendments take effect between offenses). Courts also would still have to determine whether amendments taking effect after the date of an offense were clarifying changes that should be given effect. Moreover, from a policy standpoint, such a change would involve an about-face from the strongly stated congressional goal of structuring court discretion through the use of the most current, "sophisticated statements [of sentencing policy] available." See S. REP. NO. 225, *supra* note 5, at 77-78, reprinted in 1984 U.S.C.C.A.N. at 3260-61.

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FOR CORPORATIONS:
THEIR DEVELOPMENT, THEORETICAL UNDERPINNINGS,
AND SOME THOUGHTS ABOUT THEIR FUTURE**

Ilene H. Nagel

Winthrop M. Swenson

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ILENE H. NAGEL*
WINTHROP M. SWENSON

I. INTRODUCTION

Historically, the executive, legislative, and judicial branches have shared responsibility for setting sentences for offenders convicted of federal crimes.¹ The executive branch traditionally influences sentencing primarily through its authority to initiate prosecution, select appropriate charges, and enter into plea agreements.² Congress influences sentencing by defining criminal conduct and by establishing the range of possible penalties for violations of criminal law.³ The judiciary influences sentencing by selecting sentences for convicted offenders from within the congressionally prescribed statutory ranges.⁴ Over the years, the relative degree of sentencing authority exercised by each of the three branches has varied, due in part to changes in the prevailing goals and purposes of sentencing.⁵

In 1984, in the most dramatic criminal justice reform of this century,

* Ilene H. Nagel is a member of the United States Sentencing Commission and Professor of Law at the Indiana University (Bloomington) School of Law. Winthrop M. Swenson is Deputy General Counsel and Legislative Counsel of the United States Sentencing Commission. The views expressed here are those of the individual authors and are not meant to represent the views of the United States Sentencing Commission. Special thanks are extended to Barry L. Johnson and Karen E. Kelly for their research assistance.

1. See *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (federal sentencing "never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of government"). See also Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892-95 (1990) (discussing delegation of legislative sentencing authority to the judiciary between 1880 and the 1960s).

2. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (prosecutor has broad authority to determine whether to prosecute, and what charges to file); *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (prosecutor has wide discretion in plea bargaining).

3. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) (Congress has power to fix sentences for federal crimes).

4. See *Ex parte United States*, 242 U.S. 27, 41-42 (1916) (scope of judicial sentencing discretion subject to congressional control).

5. See Nagel, *supra* note 1, at 894, 899 (describing legislative delegation of sentencing author-

Commission—and assigned it the responsibility for developing and implementing a consistent, just and rational sentencing policy.¹⁰ The Act requires the Commission to promulgate guidelines and policy statements for federal district court judges to use in determining the type and duration of sentences to be imposed on offenders convicted of federal crimes.¹¹ The statute provides that these sentences must be responsive to the goals of just punishment for the offense, deterrence, incapacitation and rehabilitation.¹² This commitment to multiple goals represents a substantial shift in sentencing policy away from the overwhelming emphasis on rehabilitation which governed federal sentencing in the decades preceding 1984.¹³ Moreover, by stressing the importance of the just punishment and deterrence rationales of sentencing, the statute also prompted a shift in the focus of sentencing by requiring greater attention to the characteristics of the offense, and less attention to the offender's personal characteristics.¹⁴

The Sentencing Reform Act clearly reflects Congress' decision to take back from individual judges much of the sentencing discretion it previously had delegated to them, and to vest that discretion instead in the Commission, a single administrative body. Congress created the Commission specifically to devote its full attention to developing a uniform sentencing policy, based on research and reflection, and to implement that policy through a system of guidelines and policy statements.¹⁵

Appointed in 1985, the United States Sentencing Commission, consistent with its statutory mandate, submitted its first set of proposed guide-

10. See 28 U.S.C. §§ 991, 994, 995.

11. See 28 U.S.C. § 994.

12. See 18 U.S.C. § 3553(a)(2) (requiring judges to consider the four basic purposes of sentencing before imposing a particular sentence).

13. See S. REP. NO. 225, *supra* note 7, at 38-40, 50 (rejecting the "outmoded" model of "coercive rehabilitation" in favor of congressional recognition of just punishment, deterrence and incapacitation, as well as rehabilitation).

14. See Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293 (1986). This shift away from emphasis on offender characteristics was, in part, the natural consequence of rejection of the rehabilitative model of incarceration and its focus on the personal background and characteristics of the offender. It was also a result of Congress' explicit instructions that the Commission draft guidelines "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders," and that the Commission's guidelines "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(d)-(e).

15. See generally 28 U.S.C. §§ 994, 995.

nizations typically take years to ripen.²² Nevertheless, the mere publication of these new rules appears to have spurred some sweeping changes in the corporate world.

There is increasing evidence in recent months that many American businesses are revisiting—or considering seriously for the first time—their in-house policies toward employee noncompliance with the law and related misconduct.²³ According to one distinguished federal prosecutor, “[f]or the first time, corporations have been conscripted into the fight against crimes.”²⁴ If this assertion is true, the question one may ask is how did private companies come to be “drafted” into a war against corporate crime? Although other forces are surely at work,²⁵ the new corporate²⁶ Sentencing Guidelines promulgated by the United States

United States v. Swanger, 919 F.2d 94 (8th Cir. 1990) (per curiam); United States v. Worthy, 915 F.2d 1514 (11th Cir. 1990). In light of the concerns raised by these decisions, practitioners appear to be taking the approach that the organizational guidelines should be applied only to conduct occurring on or after the November 1, 1991 effective date.

22. See Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts*, 1988-1990, 71 B.U. L. REV. 247 (1991).

23. See generally Margaret Cronin Fisk, *Helping Corporations Comply with Rules is New Legal Business*, NAT'L L.J., Dec. 14, 1992, at S4; Barbara Franklin, *Get Ready for Guidelines: Clients are Urged to Take Compliance Seriously*, N.Y. L.J., Oct. 17, 1991, at 5; David S. Machlowitz, *Making a Compliance Program Work: A Practical Guide*, AM. LAW., Mar. 1992, at 16 (special supplement highlighting preventive law for corporate counsel to comply with the organizational sentencing guidelines); Barnaby J. Feder, *Helping Corporate America Hew to the Straight and Narrow*, N.Y. TIMES, Nov. 3, 1991, at F5 (companies fighting the high cost of misconduct with ethics programs).

In December 1990, the Ethics Resource Center and the Behavior Research Center published a survey of corporate compliance policies. The detailed survey leads to the conclusion that substantial numbers of American corporations had, at best, marginal compliance policies. See ETHICS RESEARCH CENTER & BEHAVIOR RESEARCH CENTER, *ETHICS POLICIES AND PROGRAMS IN AMERICAN BUSINESS* (1990).

24. Otto G. Obermaier, *Drafting Companies to Fight Crime*, N.Y. TIMES, May 24, 1992, at F11.

25. For example, contractors in the defense industry have voluntarily agreed to principles requiring self-policing with regard to potential violations of the law. The agreement, known as the Defense Industry Initiative on Business Ethics and Conduct (“DII”) was described in DEFENSE INDUSTRY INITIATIVE ON BUSINESS ETHICS AND CONDUCT, 1991 ANNUAL REPORT TO THE PUBLIC AND THE DEFENSE INDUSTRY (Feb. 1992) [hereinafter 1991 ANNUAL REPORT]. The Department of Defense Inspector General Voluntary Disclosure Program supplements the DII by providing incentives, in the form of a reduced risk of prosecution and other sanctions, to companies to voluntarily disclose violations. See *id.* at A-35 to A-38. The Environmental Protection Agency recently adopted criteria closely tracking the Sentencing Guidelines’ definition of “an effective program to prevent and detect violations of law” as the criteria it will use in determining whether a company debarred from federal contracting for an environmental violation will be permitted to renew contracting. See 56 Fed. Reg. 64,785, 64,787 (1991).

26. Strictly construed, the Guidelines apply to all convicted “organizations,” see U.S.S.G., *supra* note 8, § 8A1.1, although almost all federal organizational defendants are for-profit corpora-

ting it to a more lenient sentence, are actions that, at least theoretically,³¹ should discourage employees from committing offenses.

The process by which the Commission reached consensus on what should be the philosophical underpinnings of the organizational guidelines and how to draft guidelines to serve these principles was complicated and protracted. This Article traces the Sentencing Commission's path in completing that task³² and considers what work lies ahead. The Article addresses four specific questions: (1) Given that the Commission's primary mandate is to facilitate greater certainty, uniformity, effectiveness and rationality in the sentencing of *individuals*, why did the Commission tackle the area of *corporate* sentencing at all? (2) How did the Commission arrive at the philosophical bases that underlie the fine provisions of the corporate sentencing guidelines? (3) How did the principles of deterrence and just punishment for the offense shape the Commission's decisionmaking with respect to the key structural issues involved in creating the corporate fine guidelines, and what other factors played a role in the construction of these guidelines? and (4) Are the corporate Sentencing Guidelines cast in stone, or can organizations and attorneys expect changes in the future?

II. QUESTION ONE: WHY DID THE COMMISSION VENTURE INTO THE THORNY AREA OF CORPORATE SENTENCING?

As early as 1986, one year after the appointment of the first members to the Commission and one year before the promulgation of the first³³

L. REV. 409 (1980); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973).

31. The Sentencing Guidelines for organizations are unprecedented for many reasons. Not only do they embody the first comprehensive system of *sentencing* laws for corporations, but they also codify an incentive-based approach to corporate sanctions that has never been utilized before, at least not in this detailed and comprehensive a form. Cf. U.S. DEP'T OF DEFENSE INSPECTOR GENERAL VOLUNTARY DISCLOSURE PROGRAM (DODIG), see 1991 ANNUAL REPORT, *supra* note 25, at A-35 to A-36 (containing similar self-policing incentives as those in the Guidelines, but the Guidelines are more far-reaching in conduct considered, and are more definite in the penalties prescribed).

Because the Guidelines are relatively new, time and experience may eventually demonstrate ways they can become more effective. Thus, one can expect the Guidelines to evolve.

32. Seven voting members comprise the Sentencing Commission. See 28 U.S.C. § 991(a). Because it is a collegial decisionmaking body, whose members have personal perspectives that will not necessarily be fully expressed through formal votes or the discourse of public meetings, definitive characterizations of its decisions are impossible. This Article will therefore offer interpretations of the more important decisions the Commission made regarding the Sentencing Guidelines for organizations.

33. The Sentencing Commission's enabling statute contemplates that "[t]he Commission peri-

nity urging the Commission to refrain from entering this highly complex area³⁹ and alleging that no statutory *requirement* for the Commission to promulgate corporate guidelines existed, why, then, did the Commission venture ahead?

A. *Statutory Guidance*

Although the Commission never formally determined that its enabling statute *required* the promulgation of organizational sentencing guidelines, certain individual Commissioners clearly held this view. To support his belief that organizational guidelines were statutorily *mandated*, one Commissioner cited Congress' pronouncement in the enabling legislation that an organization must be sentenced to a term of probation or a fine;⁴⁰ he cited as well a seemingly straightforward directive in another section that the Commission "shall promulgate . . . guidelines . . . for use of a sentencing court in determining . . . whether to impose a sentence to [sic] probation, [or] a fine . . . [and] the appropriate amount of a fine or the appropriate length of a term of probation."⁴¹ Since these congressional directives to the Commission failed to mention an explicit exception for organizations, and since the sanctions involved clearly pertained to organizations, this Commissioner believed that the Commission was

ate for the Sentencing Commission, by means of policy statements, to provide guidance to sentencing judges concerning such matters as: (1) considerations relevant to the coordination of criminal sanctions imposed with any civil remedies that may be available under the circumstances; (2) considerations relevant to the imposition of sanctions involving forfeiture, notice to victims, and restitution; and (3) considerations relevant to the selection of conditions of probation involving such judicial monitoring of the activities of a convicted organization as may be appropriate under the circumstances of the case.

S. REP. NO. 225, *supra* note 7, at 166.

Because the Senate Report used the words "might wish to issue" and referred to "general policy statements," some argued that Congress intended the Commission to act cautiously in this area. Those who believed that Congress created a statutory duty for the Commission to issue binding guidelines for corporate sentencing, *see infra* notes 40-42 and accompanying text, noted that the topics the report identified for possible treatment through policy statements did *not* include the key issues of fine amount and whether to impose probation.

39. *See, e.g.*, Comments of the American Corporate Counsel Association on Proposed Organizational Sentencing Guidelines (on file with the authors). The Association stated:

In light of these factors, one must wonder why the Commission is going through this exercise For the Commission to proceed to address a problem that may only exist in theory without a solid fact base does not seem to be the best use of Commission or Congressional resources and may well inflict real harm on the business entities subject to the guidelines.

Id. at 2.

40. 18 U.S.C. § 3551(c)(1), (2).

41. 28 U.S.C. § 994(a)(1)(A), (B).

For example, this research, limited only to a review of sentences imposed upon corporations that had the ability to pay a fine, found that the median fine courts imposed on organizations convicted of criminal offenses was substantially *less than* the actual dollar loss caused by the offense.⁴⁷ Since the profit from an economic crime is often the same as the loss the offense caused, this finding raised the specter that prevailing federal sentencing practices for convicted corporations were, in essence, ensuring that crime pays.⁴⁸

This same research effort revealed evidence of an additional problem of particular relevance to the Sentencing Commission's mission:

[T]he most obvious pattern [in the study] is the large amount of disparity in the system. There are many instances where virtually identical crimes and losses result in different sanctions, both absolutely and in terms of the calculated sanction/loss and fine/loss multiples.

For example, the sample contained two similar cases of odometer tampering with very different sentencing outcomes. In one case, the total sanction was over three times the loss, as the firm was ordered to pay full restitution and given a fine over twice the loss. In the other case, the firm was fined about 1/3 the loss and no restitution was ordered. A second example of disparity concerns two virtually identical instances of mislabeling beef. In one case, the fine was 2 1/2 times the loss; in the other it was only [four percent] of the loss. Solvency did not appear to be an issue in any of these cases.⁴⁹

While the Commission's own research focused on unwarranted disparity among corporations convicted of similar offenses, it also recognized that some members of Congress, and a majority of the public, perceived an unwarranted disparity in the severity of sentences meted out to white collar offenders when compared to the severity of sentences meted out to non-white collar offenders.⁵⁰ This perception is consistent with the long-

1987, in UNITED STATES SENTENCING COMMISSION, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS (1988) [hereinafter DISCUSSION MATERIALS].

47. See *id.* at 7-11.

48. Criminal fines may comprise only a portion of the monetary sanctions imposed on a corporation. Overall, the study found that the total monetary sanctions imposed approximately equaled the loss in the median case. *Id.* at 21 (tbl. 9). Given that not all offenses are detected, this figure lends further credence to the theory that the federal sentencing system was making crime profitable for some organizational offenders.

49. *Id.* at 10-11.

50. See, e.g., *Confirmation Hearings on Federal Appointments, Hearings Before the Senate Comm. on the Judiciary*, pt.6, 101st Cong., 2d Sess. 647 (1990) (statements by Sen. Kennedy and Sentencing Commission nominee Julie E. Carnes) [hereinafter *Hearings on Appointments*]. See also *infra* text accompanying notes 94-97.

sistent with the goals of sentencing articulated in the enabling legislation. The revelation of these *ad hoc* sentencing schemes provided further support that the Commission needed to formulate systematic corporate sentencing rules.⁵⁵ The Commission determined that a consistent, rational policy for organizational sanctions was necessary. Given the enormous complexity of the undertaking, the question was whether the Commission could settle on an approach to developing such rules.

III. QUESTION TWO: HOW DID THE COMMISSION ARRIVE AT THE JUST PUNISHMENT AND DETERRENCE-RELATED PHILOSOPHIES THAT UNDERLIE THE CORPORATE SANCTIONS PROMULGATED TO CONGRESS?

A. *The Search for "Optimal Penalties"*

While the Commission was not able to commence sustained work on organizational sanctions until after the initial set of guidelines for individual offenders was in place, the 1986 "Preliminary Draft" of sentencing guidelines for individuals laid the groundwork for later deliberations.⁵⁶ In addition to setting forth draft guidelines for *individual* offenders designed to elicit public comment, the Preliminary Draft contained a general discussion of issues specifically related to organizational sentencing.⁵⁷ Reflecting the two predominant schools of thought, the Preliminary Draft posited that organizational "[f]ines may accomplish the purposes of just punishment and deterrence, but those two purposes have different implications for the structure of fines."⁵⁸ At the time of the Preliminary Draft the primary Commissioner proponents of these two schools of sentencing had strict and conflicting notions of how guidelines

part of probation), *cert. denied*, 444 U.S. 992 (1979); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389 (10th Cir. 1976) (vacating sentence of probation which included financial contribution to county alcoholism council); *United States v. Nu-Triumph, Inc.*, 500 F.2d 594 (9th Cir. 1974) (upholding condition of probation requiring company not to engage in the distribution of pornographic material); *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159 (S.D.N.Y. 1983) (requiring bakery companies to donate fresh baked goods to specified charitable organizations).

55. The courts lacked a coherent approach to corporate sentencing. These cases are not only complex, but individual judges must address them only occasionally. See *infra* text accompanying notes 86-87.

56. UNITED STATES SENTENCING COMMISSION, PRELIMINARY DRAFT SENTENCING GUIDELINES (Sept. 1986) [hereinafter PRELIMINARY DRAFT].

57. *Id.* at 161-66.

58. *Id.* at 162.

tions: "the value, converted into money, of all harm caused [by the offense] and the probability of conviction."⁶⁴ While the challenge of reducing harms to monetary terms proved formidable, the Commission was willing to undertake these challenges, as demonstrated by the approach it ultimately adopted in the corporate fine guidelines.⁶⁵ However, the Commission received what later proved to be insurmountable objections to other aspects of the optimal penalties approach in the form in which it was advanced.

The first of these objections related to the implementation of the requirement that fines be based, in part, on the likelihood of conviction. In a set of draft guidelines the Commission circulated for public comment in 1988,⁶⁶ the likelihood of conviction was to be measured by estimates of the probability of detection; these estimates were derived from survey responses as to likely detection rates for each individual offense.⁶⁷ After an exhaustive but frustrating effort, the strict optimal penalties proponents on the Commission and Commission staff conceded that "[a]ny estimates of multiples [reflecting the probability of detection], however they are derived, are likely to be fairly rough approximations."⁶⁸ They believed, however, that rough estimates in the cause of a pure theory were better than any next best alternative.⁶⁹

In the end, the majority of Commissioners could not support this method of determining what are the optimal penalties for each category of offense. Estimates about the probability of detection based on non-random survey responses were judged to be too "rough," bordering on mere assumptions; empirical verification of these rough estimates was impossible. Furthermore, the optimal penalties draft guidelines contemplated that judges would make subsequent independent judgments as to whether any of ten specified factors had "materially increased [or de-

64. PRELIMINARY DRAFT, *supra* note 56, at 164.

65. Part C of the Guidelines governs the imposition of fines and requires judges to make two principal calculations, one assessing the seriousness of the offense, *see* U.S.S.G., *supra* note 8, § 8C2.4, the other assessing an organization's "culpability." *See id.* § 8C2.5. The former calculation generally uses three alternative measures to gauge offense seriousness, including the "loss" the offense caused. *See id.* § 8C2.4(a)(3). In some instances, the Guidelines provide special rules that serve as proxies for measuring loss. *See id.* §§ 8C2.4(b), 8C2.4 (comment. (n.5)).

66. *See Proposed Chapter Eight for the Guidelines Manual*, in DISCUSSION MATERIALS, *supra* note 46.

67. *See* U.S.S.G., *supra* note 8, §§ 8B3.1, 8B3.2.

68. Parker, *supra* note 30, at 55.

69. *Id.*

review. Furthermore, a majority of the Commission rejected the optimal penalties adherents' strong belief that loss alone, and not the profit or "gain" from an offense, should establish the base amount of the fine,⁷⁴ because this view directly conflicted with the congressional policy set forth in the general fine statute.⁷⁵ The idea also evoked concern that organizations would have an incentive to break the law if the potential loss was uncertain or speculative, but the potential profit from the offense was significant.⁷⁶

A final concern with the strict optimal penalties approach related to the tension between theoretical ideals and the real world. For example, the concept of deriving an "optimal" penalty for an offense assumes that precisely the right fine will induce the corporation to expend precisely the right quantity of resources to "control" its agents and prevent them from breaking the particular law in question.⁷⁷ Suppose, however, that a firm responded to the threatened sanction by exerting its best efforts to achieve compliance—diligent efforts by any objective measure—and, despite these efforts, one of its employees violated the law. It is well settled in legal scholarship that the interests of employees and the corporation often diverge.⁷⁸ The question for the Commission was whether to treat at sentencing a company that clearly demonstrated good faith and diligent efforts to achieve compliance the same as a company that made no compliance-related effort at all. This question arose because, under federal law, an organization's compliance efforts generally will not insulate it from criminal liability.⁷⁹ Under the strict optimal penalties approach advanced to the Commission, the fine imposed on a company that had rigorously attempted to achieve compliance generally would be the same

74. See Parker, *supra* note 30, at 35-42.

75. See 18 U.S.C. § 3571(d) (providing for an alternative fine maximum based on twice the pecuniary gain or loss from the offense). See also 15 U.S.C. § 78u-1(a)(2) (1988) (establishing maximum civil penalties for insider trading of up to three times the profit gained or loss avoided).

76. Proponents of the optimal penalties approach conceded this flaw, but argued that only in rare circumstances would gain significantly exceed loss. Parker, *supra* note 30, at 40. The Commission's later research verified that gain would exceed loss in only about two percent of the cases. See SUPPLEMENTARY REPORT, *supra* note 26, at 22. However, since ignoring gain in these cases could result in profitable crime, and since Congress had provided for the use of gain in setting fines, see *supra* note 75, the Commission was extremely reluctant to ignore this measure of offense seriousness. As adopted, the fine guidelines for organizations establish the measure of offense seriousness by requiring a sentencing court to use the highest of three alternative methods, including gain. See U.S.S.G., *supra* note 8, § 8C2.4.

77. See Parker, *supra* note 30, at 4.

78. See Coffee, *supra* note 62, at 393-400.

79. See *infra* note 157.

starting point or "anchor" for its analysis.⁸⁵ In contrast to the guidelines for sentencing individual offenders, past practice played a considerably less pronounced role in the development of the corporate guidelines, especially with respect to setting penalty levels. There are essentially five reasons why past practice data were less significant in the corporate context.

First, as with any empirical analysis, a sufficient quantity of data is necessary if generalizations based on these data are to be robust, valid, and reliable. The Commission's review of data on sentencing for the years 1984 through 1990 demonstrated that the federal courts sentenced approximately 300 to 400 convicted organizations each year.⁸⁶ In comparison, the federal courts sentenced approximately 40,000 to 45,000 convicted individuals each year.⁸⁷ Furthermore, significant variations among past organizational defendants, in terms of net worth, gross annual revenue, and other factors, existed within the relatively small universe of organizational sentencing cases.⁸⁸ Thus, from the outset, it was clear that it would be difficult to draw supportable generalizations from this small population of heterogeneous cases.

Second, as described above,⁸⁹ the Commission's empirical research strongly suggested that past organizational sentencing practices were suspect from a normative perspective. Profits derived from many past offenses apparently exceeded the monetary sanctions imposed. Furthermore, courts sometimes relied on questionable "penalties" such as compulsory contributions to court-designated charities. Requiring the corporation to give to charity prompted some critics to argue that the courts, while well meaning, were devising sanctions that ultimately conferred honor on the offending corporation.

Third, in the era of the "Ill Wind" defense procurement fraud scan-

85. *Id.* at 930. *See id.* at 927-32 (discussing the role that past sentencing data played in devising the first federal sentencing guidelines for individuals). *See also* Breyer, *supra* note 7, at 17-25.

86. *See* SUPPLEMENTARY REPORT, *supra* note 26, at D-1 (app. D).

87. According to the Reports of the Administrative Office, based on a fiscal year which runs July through June, 46,725 defendants were sentenced in 1990. There were 44,524 sentenced in 1989, and 42,902 in 1988. Comparatively, in 1984, 36,104 defendants were sentenced in the federal courts. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1990).

88. *See generally* SUPPLEMENTARY REPORT, *supra* note 26 (tbls. following p. 24). The data showed, for example, that approximately equal numbers of organizational defendants in the period 1988 through June 30, 1990 were insolvent, had net worths of \$100,000 to \$499,000, and had net worths of over \$1 million. *See id.* (tbl. 10).

89. *See supra* notes 46-48 and accompanying text.

that the penalties imposed were sometimes too low.⁹⁹ It also meant that the fines imposed in past cases would necessarily be poor indicators of fine levels that would (or should) have been imposed had the higher statutory maximums been in force at the time the courts imposed the past sentences.

Finally, evidence existed that prosecution policies were changing in the years immediately preceding promulgation of the organizational guidelines. Specifically, it appeared that prosecutors increasingly targeted larger, publicly traded companies during this period.¹⁰⁰ Thus, at a minimum, the Commission would have to scrutinize the data carefully before it could assume that past penalties were germane to current organizational cases.

Notwithstanding the foregoing discussion, empirical analyses of past sentencing practices were useful to the Commission for the insight they provided into federal organizational crimes and sentencing patterns. The Commission ultimately collected the most extensive data base ever compiled¹⁰¹ on sentences imposed by the federal courts upon convicted organizations, spanning the years 1984 through mid-1990.¹⁰² These data revealed the kinds of organizations sanctioned, the offenses for which convictions were obtained, the penalties imposed, and key factors that affected the nature of the sanction and the size of the fine.¹⁰³ The data

Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18 to 3207-39 (codified in scattered sections of 12, 18, & 31 U.S.C.); Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134 (codified as amended in scattered sections of 18 U.S.C.). More recently Congress raised the maximum statutory penalty from \$1 million to \$10 million per count for antitrust offenses. See Sherman Act, Pub. L. No. 101-588, § 4, 104 Stat. 2880 (1990).

99. The House Report to the Criminal Fine Enforcement Act of 1984 stated, for example, "The maximum fine levels are currently too low and should be increased to the point where they can no longer be considered a cost of doing business." H.R. REP. NO. 906, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 5433, 5434.

100. See Cohen, *supra* note 22, at 252; SUPPLEMENTARY REPORT, *supra* note 26, tbl. 8 (showing increase in number of publicly traded corporations sentenced from 1988 to 1989, and an increased rate of such sentences in the first half of 1990).

101. One significant earlier study of illegal organizational conduct looked at cases from 1975 and 1976. See MARSHALL B. CLINARD, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, ILLEGAL CORPORATE BEHAVIOR (1979). This study analyzed fewer total cases than the Sentencing Commission's study, focused only on larger cases, and did not attempt to distinguish between criminal and civil enforcement.

102. For a description of the empirical analyses conducted by the Commission, see SUPPLEMENTARY REPORT, *supra* note 26, at 1, D-1 to D-3 (app. D).

103. See generally *id.* at 17-21 (and corresponding tables). Among the more salient conclusions, the Commission found that past fine amounts tended to increase as loss amounts increased, although fine/loss multiples were higher with smaller loss amounts. *Id.* at 18. The Commission also found

arate written comments submitted from the public.¹⁰⁷

It was during this lengthy deliberative process that a consensus slowly began to emerge with regard to how best to establish fines—the necessary centerpiece of any set of organizational sentencing guidelines. This consensus view took shape early from a Commission-appointed “Corporate Defense Attorney Working Group.” The Commission convened this advisory group to determine whether a consensus approach could be devised that would take account of the multiple underlying complexities involved in corporate sentencing.¹⁰⁸ While this advisory group ultimately declined to suggest specific guideline proposals, leaving the details to the Commission, the group submitted a set of general recommendations, urging “a system for sentencing of organizations . . . that provide[s] proper incentives for organizational managers to prevent crime, and that punish[es] on the basis of harm and culpability.”¹⁰⁹

The principles recommended by the advisory group embodied twin premises: (1) that organizational fine guidelines should provide incentives to companies that will reduce the likelihood of crime; and (2) that organizational punishment should vary according to principles of institutional “culpability.” In 1990, as the Commission approached a new amendment cycle,¹¹⁰ United States Sentencing Commission Chairman William W. Wilkins, Jr., working together with the full Commission, distributed a memorandum proposing fifteen principles; these principles were intended to guide drafting in what many hoped would be the final deliberative phase before promulgation. After consultation and review, the Commission unanimously adopted these principles¹¹¹ and relied on them, subject to important refinements over the succeeding months, to produce the package of organizational sanctions ultimately adopted. While the fifteen principles provided structural and substantive direction in many respects,¹¹² the sixth principle, which provided that the guide-

107. Many of the submissions are lengthy, detailed and similar to legal briefs. These submissions are on file with the United States Sentencing Commission, Office of the Communications Director.

108. Joseph E. diGenova chaired the group. Robert Bennett, Samuel Buffone, Ernest Gellhorn, Robert E. Jordan, Carl Rauh, Bert Rein, Earl Silbert, Winthrop M. Swenson, Justin Thornton, and Victoria Toensing also participated.

109. Letter from Joseph E. diGenova to Chairman William W. Wilkins, Jr., 1-2 (May 19, 1989) (on file with the United States Sentencing Commission) (emphasis added).

110. See *supra* note 33.

111. SUPPLEMENTARY REPORT, *supra* note 26, app. A (setting forth the principles adopted).

112. A number of key principles directly influenced the guidelines actually promulgated. These include: Principle No. (1), providing that restitution be required “regardless of any other sanctions . . . imposed,” *id.* (Principle No. (1)); *cf.* U.S.S.G., *supra* note 8, § 8B1.1; Principle No. (3), provid-

compromise—influenced the determination of how other factors would affect any fine calculus. As previously noted,¹¹⁶ by statutory design, the Commission is a collegial body. Congress anticipated that Commissioners would reflect “a diversity of backgrounds”¹¹⁷ and therefore, necessarily, that the Commission “should be a body which can cooperate”¹¹⁸ as it developed sentencing policy.

Congress’ statutory requirements that the Commission be bipartisan, comprised of judges and non-judges, and represent a wide array of background and experience, guaranteed a diversity of views.¹¹⁹ Congress generally assumed that the Commission’s development of any sentencing guidelines would necessitate sensible, action-oriented compromise. Because of the way in which the terms of the initial appointees to the Commission were staggered, the Commission’s composition changed during the time the Guidelines were under study.¹²⁰ Unexpectedly, however, those Commissioners who subscribed either to the orthodox application of just desert principles, or deterrence principles, no longer served when the Commission prepared the final structure of the organizational Guidelines.¹²¹ When the Commission finally voted on the Guidelines promulgated to Congress, the vote was unanimous. Several Commissioners, however, made individual statements to prevent an interpretation that they agreed with all of the provisions of the Guidelines merely because they voted in support of the package of sanctions. The final product does not reflect the view of any one Commissioner, but rather a consensus view of what many hoped would represent a workable beginning¹²²

116. See *supra* note 10 and accompanying text.

117. S. REP. NO. 225, *supra* note 7, at 160.

118. In determining what size fines are appropriate for each offense, some Commissioners worried about fines that would be inadequate to deter or punish. In contrast, others worried about fines that might over-deter and force legitimate corporations out of business or lead to an unwarranted decrease in competitiveness. The fine structure ultimately adopted reflects these countervailing concerns.

119. See generally 28 U.S.C. § 991(a); S. REP. NO. 225, *supra* note 7, at 159-60.

120. The seven members first appointed in 1985 were confirmed for terms varying from two to six years. See 28 U.S.C. § 992(a).

121. The following Commissioners served on April 26, 1991, when the Commission voted to promulgate the organizational guidelines: William W. Wilkins, Jr., Chairman; Julie E. Carnes; Helen G. Corrothers; Michael S. Gelacak; George E. MacKinnon; A. David Mazzone; Ilene H. Nagel; Paul L. Maloney, who was at the time the ex-officio, non-voting representative of the Attorney General; and Benjamin F. Baer, who served as the ex-officio representative of the Parole Commission until his death on April 9, 1991.

122. As has been the case with the individual guidelines, the corporate guidelines can be expected to evolve. See generally *infra* part V.

(2) various institutional constraints;¹²⁶ and (3) other constraints, such as the import of laws the Commission did not make¹²⁷ and public perception of its work.¹²⁸ In these practical and necessary ways, compromise played a vital role in allowing the Commission to resolve most of the key issues it had before it.

Finally, the Commission deemed some problems intractable or insoluble without further experience and experimentation. The necessity of compromise required deferral of these issues despite recognition of their ultimate importance.¹²⁹

126. For example, experience informed the Commission that a desire to achieve uniformity through overly-detailed and overly-complex guidelines can backfire, with complexity actually fostering inconsistent results. Consequently, the Commission devoted much attention to the reports of a working group of probation officers. Assembling the group to review draft corporate guidelines, the Commission recognized that probation officers play a prominent role in the sentencing process. See FED. R. CRIM. P. 32(c)(2)(B) (requiring probation officer to prepare a presentence report containing a proposed application of the Sentencing Guidelines to the defendant's case).

127. The Commission was required to acknowledge the well-settled federal law of vicarious criminal liability, and the possible applicability of non-criminal sanctions for the same conduct giving rise to the federal criminal sentence. See *infra* parts IIIC & IIIF.

128. Public perception affected at least one structural feature of the Guidelines. The staff used 15 drafting principles in the final effort to produce the corporate Guidelines. These principles directed them to consider a scheme that *presumed* highly culpable conduct (and therefore high fines), but would allow a corporate defendant to "mitigate down" by showing less culpability. See SUPPLEMENTARY REPORT, *supra* note 26, at A-2 (app. A) (Principle No. (4)).

Although the Commission initially believed this approach might be desirable by forcing the convicted corporation to bear the burden of *demonstrating* reduced culpability, many commentators believed this approach was unbalanced because it provided for only mitigating factors and not aggravating factors. Although either approach would lead to essentially the same result, the Commission ultimately adopted a culpability measuring scheme that presumed average culpability but which varied as a court considered aggravating or mitigating factors. See U.S.S.G., *supra* note 8, § 8C2.5. The Commission wanted to prevent perceptions of a lack of balance to skew proper application and understanding.

Yet another example of the influence of public perception centered on the determination that the Guidelines would not permit a fine to go to zero dollars other than by way of departure. While the Commission could identify the rare case in which restitution alone would serve the purposes of deterrence and just punishment, it feared that a fine of zero dollars would be misinterpreted as a repudiation of the government's decision to prosecute or of Congress' decision to proscribe some behavior as unlawful. Many responded during the public commentary that the zero fine was subject to this misinterpretation. Thus, the Commission directly prescribed no zero dollar fines in the Guidelines.

129. The Commission discussed at length the question of whether and how to coordinate criminal and civil sanctions within each case. It was unable to resolve the issue, however, because no one could identify workable solutions to the array of problems attendant to such coordination. See *infra* part IIIF.

the company had no legitimate means of disposing of the waste.¹³⁷ For these relatively uncommon organizational defendants,¹³⁸ the Commission determined that the sentencing purpose of incapacitation¹³⁹ is most apt. Accordingly, the Sentencing Guidelines direct sentencing courts to set the fine for a criminal purpose organization sufficiently high to divest the organization of its assets, if possible.¹⁴⁰

All other organizations are subject to a different set of fine provisions.¹⁴¹ These provisions mandate two basic calculations in determining the applicable fine. The first calculation seeks to assess the seriousness of the offense the corporation has committed. Under the Guidelines, the court generally¹⁴² determines the seriousness of the offense by choosing the highest of (1) an amount from a table (corresponding to an "offense level" calculation made under the individual guidelines); (2) the gain from the offense; or (3) the pecuniary loss caused by the offense, to the extent that the loss was intentionally, knowingly, or recklessly caused.¹⁴³

Once the sentencing court makes this initial "base fine" calculation, the actual fine level may vary substantially, according to the court's determination of the organization's "culpability score."¹⁴⁴ As explained below,¹⁴⁵ by crediting such corporate actions as whether the company had a rigorous compliance program at the time of the offense¹⁴⁶ or voluntarily reported the crime to the authorities,¹⁴⁷ the culpability score is the means by which the fine provisions of the Guidelines implement the sentencing purposes of just punishment and deterrence. The "culpability score" establishes the applicable minimum and maximum multiple by which the base fine dollar loss or gain is multiplied to produce the fine range.

The third major substantive portion of the Guidelines governs proba-

137. *Id.* (comment. (backg'd.)).

138. From 1988 through June 30, 1990, the Commission found that in cases in which sufficient information existed to make the determination, criminal purpose organizations comprised only about three percent of all federal organizational defendants. See SUPPLEMENTARY REPORT, *supra* note 26, tbl. 7.

139. See 18 U.S.C. § 3553(a)(2)(C).

140. See U.S.S.G., *supra* note 8, § 8C1.1.

141. See generally *id.* §§ 8C2.2 to 8C4.11 (Policy Statement).

142. Exceptions to this general approach exist. See *id.* §§ 8C2.4(b), 8C2.4 (comment. (n.5)).

143. See U.S.S.G., *supra* note 8, § 8C2.4(a).

144. See *id.* § 8C2.5.

145. See *infra* notes 157-87 and accompanying text.

146. See U.S.S.G., *supra* note 8, § 8C2.5(f).

147. See *id.* § 8C2.5(g).

their employees.¹⁵⁴ Under the common law, a corporation's criminal liability is derivative; the acts and intent of corporate officers and agents are imputed to the corporate entity. Courts generally impute criminal liability to the corporation when an employee acts within the scope of his or her employment and for the benefit of the corporation. Courts apply these standards broadly,¹⁵⁵ with some automatically imputing liability even when an employee operates in direct opposition to express corporate policy.¹⁵⁶ The fundamental question for the Commission was whether courts should make distinctions at the sentencing stage to reflect varying levels of culpability, where the doctrine of vicarious liability requires the courts to reject the same distinctions for the purpose of determining guilt at the adjudicative stage.

The doctrine of vicarious liability presented an additional dilemma for the Commission because it meant that very different kinds of corporations would be presented at sentencing, ranging from a company that took reasonable measures to prevent offenses, but whose employees broke the law despite its efforts, to a company whose senior management directed, or tacitly approved of the criminal offense. In order to facilitate drawing reasonable distinctions among the many types of convicted organizations, the Commission formulated a "culpability score."¹⁵⁷

154. See *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494 (1909) (upholding vicarious liability of a corporation for the acts or omissions of its employees). The Court stated:

Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him . . . may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

Id.

See also *Developments in the Law: Corporate Crime Regulating Corporate Behavior through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 (1979) ("[A] corporation may be held criminally liable for the acts of any of its agents if an agent (1) commits a crime (2) within the scope of employment (3) with the intent to benefit the corporation.").

155. *Standard Oil Co. v. United States*, 307 F.2d 120, 128-29 (5th Cir. 1962) ("The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is indiscernible, or . . . the result turns out to be adverse."); *Continental Baking Co. v. United States*, 281 F.2d 137, 149-51 (6th Cir. 1960) (holding apparent authority sufficient to impose criminal liability on a corporation).

156. *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1369 (9th Cir.) ("Even if an employee is violating express corporate policy, the corporation might still be responsible."), *cert. denied*, 113 S. Ct. 305 (1992); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (imposing vicarious liability where the employee committed an act against company policy), *cert. denied*, 409 U.S. 1125 (1973).

157. See U.S.S.G., *supra* note 8, § 8C2.5.

for a compliance program be blocked for several reasons, including if a senior official "participated in, condoned or was willfully ignorant of the offense,"¹⁶⁴ or if the company discovered the offense but failed to voluntarily disclose it to authorities.¹⁶⁵

The "carrot and stick" incentives to establish a qualifying compliance program are fairly clear. If the court finds that an organization had an effective program, a very substantial mitigating impact on the fine will result.¹⁶⁶ Conversely, if the court finds that a company (with fifty or more employees) failed to establish an effective program at the time of sentencing, the court must place the company on probation¹⁶⁷ and may require that it satisfy potentially restrictive and demanding probationary conditions.¹⁶⁸

The Guidelines reward post-offense "good citizenship" by examining the corporation's post-offense conduct. On the one hand, if the corporation in essence ratified the criminal conduct by obstructing justice, the corporation will face a stiffer sanction.¹⁶⁹ If, on the other hand, the organization strongly signaled its intolerance of lawbreaking by voluntarily disclosing the offense,¹⁷⁰ fully cooperating with enforcement officials in the investigation,¹⁷¹ and/or demonstrating acceptance of responsibility for the offense, it will receive a lesser penalty.¹⁷² Thus, the fluctuating penalty levels established by the Guidelines provide substantial incentives for companies to take post-offense "good citizenship" actions as well.¹⁷³

Two culpability score factors do not fit neatly into either the pre-of-

164. *Id.* § 8C2.5(f).

165. *Id.*

166. For example, assume a company's fraudulent failure to test a component of some military hardware it was supplying to the government caused a \$10 million loss. If no other aggravating or mitigating factors applied, the typical fine range in this case would be \$10 to \$20 million, *see* U.S.S.G., *supra* note 8, §§ 8C2.5, 8C2.6, plus full restitution. *See id.* § 8B1.1. If the court found that the company had a qualifying compliance program when the offense occurred, its fine range would drop to \$4 to \$8 million. The company possibly could lower the fine even further if it fully cooperated and accepted responsibility for the offense. *See id.* § 8C2.5(g)(2).

167. *Id.* § 8D1.1(a)(3).

168. *See id.* § 8D1.4(c)(4) (allowing for "unannounced examinations" of corporate books and "interrogation" of key officials).

169. *See id.* § 8C2.5(e). A corporation may obstruct justice within the meaning of the Guidelines not only by directing activities that have the effect of impeding some aspect of the criminal justice process but also by "fail[ing] to take reasonable steps to prevent such obstruction" if it had knowledge of the activities. *Id.*

170. U.S.S.G., *supra* note 8, § 8C2.5(g)(1).

171. *Id.* § 8C2.5(g)(1)-(2).

172. *Id.* § 8C2.5(g)(1)-(3).

173. *See generally id.* §§ 8C2.5(e), 8C2.5(g), 8C2.6.

corporate officials who exercise a high degree of the organization's discretionary authority deserves more punishment—for this higher level of "organizational culpability"—than an offense in which such officials were in no way implicated.

For these reasons, the culpability score provides for higher fines when those with significant degrees of discretionary authority are involved. Yet, the company is not exonerated from a penalty standpoint merely because high level officials do not participate in the offense. When management has gone *further* than merely not being involved in the offense, by taking affirmative pre-offense steps to reduce the prospect of crime¹⁸¹ and post-offense steps to help ensure that those individuals who have broken the law are held accountable,¹⁸² then fines can drop to a relatively nominal level.¹⁸³

Since recidivism can indicate an ambivalent corporate attitude toward violations of the law under certain circumstances, the Guidelines treat the organization's prior history of misconduct as an indicator of higher culpability.¹⁸⁴ The Commission appreciated that in large corporations a violation of a state wage and hour reporting requirement in one sector of the business might reveal little about corporate attitudes toward law-breaking simply because an offense involving the unauthorized use of public lands has occurred in another major division. Laws are numerous and complex, and some companies are sufficiently large and diverse that prior misconduct may not *necessarily* signal a higher degree of company culpability deserving of an increase in the fine for the instant offense. Thus, corporate recidivism counts in the culpability score only when prior misconduct is "similar" to the instant offense and when it has occurred within the same "separately-managed line of business," if the company is large enough to operate separate lines of business.¹⁸⁵ In other instances, the court may in its discretion decide to treat prior history as an indicator of increased culpability by choosing a higher fine

181. See U.S.S.G., *supra* note 8, § 8C2.5(f) (credit for an effective program to prevent and detect violations of law).

182. See *id.* § 8C2.5(g)(1)(2) (credit for self-reporting and cooperation).

183. When an organization's management was not involved in the offense, it had a qualifying compliance program, it fully cooperated with authorities and it accepted responsibility, the sentencing court will assign a culpability score of 0 and a fine range of 0.05 to 0.20 of the "base fine." See U.S.S.G., *supra* note 8, §§ 8C2.5(f), (g)(2), 8C2.6. In addition, in instances involving low organizational culpability, the Commission suggests that the courts depart from the Guidelines to consider an even lower sentence. See *id.* § 8C4.11 (Policy Statement).

184. *Id.* § 8C2.5(c).

185. *Id.*

past sentencing practice data to guide guideline drafting, and the small number of cases of organizational offenders relative to individual offenders on which the courts must impose a sentence. The business community argued that if a problem of unwarranted disparity or excessive leniency later arose, then perhaps the Commission could convert a set of amended policy statements into mandatory guidelines.¹⁸⁹

United States Department of Justice representatives, along with those in the community who strongly believed that history demonstrated a pattern of too much tolerance for corporate crime and excessive leniency at sentencing for those few corporations convicted, urged the Commission not to waiver on this critical decision by issuing non-binding policy statements which by law the courts could all but ignore. They emphasized that the Commission had implemented mandatory guidelines for individual offenders, and argued that corporate offenders were no more entitled to the benefits of lenity presumed to ensue from unfettered judicial discretion. In addition, they argued that the Commission's own review of pre-1988 corporate sentences revealed that the fines imposed were often less than the loss caused. They observed that this practice served neither deterrence nor just punishment objectives and contributed to the public perception that white collar crime was harming the country without an appropriate response from the judiciary. Proponents of both positions expressed their arguments regarding the question of guidelines versus policy statements in strong terms.¹⁹⁰

The Commission's enabling statute was less than clear on this point.¹⁹¹ Yet even those who believed that the Commission had a statutory obligation to issue guidelines conceded that the duty did not require fulfillment within any set time period. Some believed that the Commission could follow the counsel of the business groups and issue discretionary policy statements initially, followed at a later time by mandatory guidelines.

After a protracted debate, the Commission elected to promulgate

189. See Comments of American Corporate Counsel Association, *supra* note 39, at 1-2; Comments of the Business Roundtable, *supra* note 179, at 1-2.

190. See, e.g., Letter from the Associations Council, National Association of Manufacturers, to the United States Sentencing Commission (Feb. 9, 1990) (on file with the Commission) (characterizing mandatory guidelines as a "death penalty," and "cruel and unusual punishment" for many small corporate entities and employees); Amitai Etzioni, Professor, George Washington University, Remarks submitted to the United States Sentencing Commission (Feb. 17, 1990) (on file with the Commission) (entitled "No Valentine's Day for Corrupt Corporations," urging the Commission to "ignore the self-serving cries of outrage by business interests").

191. See *supra* notes 40-44 and accompanying text.

sometimes unique issues, and frequently complex facts, raised by corporate defendants.²⁰¹

Consistent with this approach, the Commission framed many key definitions in the Guidelines in terms of both specific and general principles.²⁰² With respect to fines, the applicable range from which the court selects the precise fine amount is generally four times broader than the range governing the terms of imprisonment for individuals.²⁰³ With respect to corporate probation, this combination of structure and flexibility provided for certain mandatory grounds for probation,²⁰⁴ while in other instances leaving the courts with the same level of discretion to impose probation that they would have had if guidelines had not been promulgated.²⁰⁵

The third reason is related. The Commission felt reasonably comfortable with the specific mandatory provisions and degree of binding structure adopted because, by the end of the promulgation process, a reasonable degree of consensus existed that the provisions formed a workable basis upon which to *begin* to reform corporate sentencing practice. The Commission's open process of continually allowing members of the public (including the corporate and law-enforcement communities) to comment on guideline drafts allowed it to gauge this consensus.

Finally, with the emergence of the "carrot and stick" philosophy of modulating fines to foster crime-detering actions by organizations, it became clear that mandatory guidelines would better serve the statutory goals set for the Commission. Asking a company, for example, to voluntarily disclose that it committed an offense leaves it vulnerable to a range of potential sanctions including, but not limited to,²⁰⁶ the criminal penalty. If companies cannot determine with a high degree of certainty that their self-reporting will result in a substantial reduction in the criminal fine ultimately meted out, the "carrot" for taking this action may appear too indefinite to induce companies to self-report. Because non-binding,

201. *Id.*

202. For a discussion of how the definition of "an effective program to prevent and detect violations of law" comports with this approach, *see id.* at 2-3.

203. By statute, imprisonment ranges for individuals generally must be no greater than 25%. 28 U.S.C. § 994(b)(2). No similar provision was enacted to apply to organizational fines; the Guidelines typically provide for ranges of 100%. *See U.S.S.G., supra* note 8, §§ 8C2.6-8C2.7.

204. *See id.* § 8D1.1(a)(1)-(7). *But see id.* § 8D.1(a)(6) (quite discretionary).

205. *See id.* § 8D1.1(a)(8).

206. For example, collateral civil consequences may result, including civil fines, shareholder derivative actions, and in some instances debarment. *See supra* part IIIF.

to "detect" lawbreaking,²¹² that it subject responsible individuals to appropriate "discipline,"²¹³ and, if the company has detected the violation, that the company disclose it to authorities.²¹⁴ The Guidelines also provide for mitigation for disclosure of the offense to authorities,²¹⁵ and for full cooperation.²¹⁶ For cooperation credit to apply, the company must provide, *inter alia*, "information . . . sufficient for law enforcement personnel to identify . . . the individual(s) responsible for the criminal conduct."²¹⁷

Each of the steps by which a corporation may reduce its own fine exposure is intended to have the ancillary effect of helping to ensure that employees who have broken the law will be held accountable by the criminal justice system. By fostering individual accountability, the Guidelines should generally²¹⁸ and specifically deter criminal conduct, just as they coordinate the penalties for the corporation according to the steps it has taken to bring about individual accountability.

F. The Coordination of Collateral Sanctions

In addition to criminal penalties, corporations that violate a federal criminal law may be subject to substantial non-criminal penalties such as debarment,²¹⁹ treble civil damages,²²⁰ and shareholder derivative actions.²²¹ Because these penalties can be significant, some argued that the Guidelines should address these collateral consequences, preferably as an offset against any potential criminal fine.²²² Others argued that the crim-

212. U.S.S.G., *supra* note 8, §§ 8C2.5(f), 8A1.2 (comment. (n.3(k))).

213. *Id.* § 8A1.2 (comment. (n.3(k)(6))).

214. *See id.* § 8C2.5(f).

215. *See id.* § 8C2.5(g)(1).

216. *See id.* § 8C2.5(g)(2).

217. *Id.* § 8C2.5 (comment. (n.12)).

218. It seems logical that if employees in companies are on notice that their employers can and will detect, report, and fully cooperate in the investigation of offenses employees commit, then they will be far less likely to commit such violations.

219. *See, e.g.*, Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.406 (1991).

220. *See* Clayton Act, 15 U.S.C. §§ 4, 15 (1982).

221. *See, e.g.*, *Mosez v. Welch*, 638 F. Supp. 215 (D. Conn. 1986) (shareholder derivative action against General Electric for allegedly submitting false claims in connection with government contracts and for subjecting the corporation to criminal charges). For surveys of such potential collateral penalties, see AMERICAN BAR ASSOCIATION, WHITE COLLAR CRIME COMMITTEE, COLLATERAL CONSEQUENCES OF CONVICTIONS OF ORGANIZATIONS, FINAL REPORT (Feb. 1991) [hereinafter ABA REPORT]; Parker, *supra* note 30, at 13, tbl. 3.

222. As discussed below, practical difficulties prevented the Commission from following this approach. Public comment urging coordination of criminal and collateral sanctions was typically

consistency concerns if they apply to federal civil and administrative sanctions but do not apply to state and local sanctions.

In the technical context, coordination is difficult at best. Timing is the most obvious problem of coordinating criminal and other sanctions. Because of the backlog of cases in the federal courts and the priority they assign to the criminal calendar over the civil calendar, federal courts simply would not know at the time of sentencing what collateral sanctions, if any, the corporation eventually will suffer.

The Commission resolved this dilemma by providing no *direct* offset for collateral sanctions but by providing means by which they *may* be taken into account. The Commission designed the Guidelines' fine ranges to accommodate a "permissive offset." In general, the ranges are broad; typically, the maximum of the range is twice the minimum.²²⁶ Thus, the court can take collateral consequences into account in selecting the precise fine to impose. Moreover, the Guidelines explicitly direct that "the court, in setting the fine within the guideline range, should consider any collateral consequences of conviction, including civil obligations arising from the organization's conduct. . . . [P]unitive collateral sanctions [that] have been or will be imposed on the organization . . . may provide a basis for a lower fine within the guideline fine range."²²⁷ The Commission designed this compromise approach to leave courts (which are best able to assess this particular factor) with sufficient flexibility to weigh collateral consequences appropriately.

It should be observed that if steep collateral sanctions are imposed on an organization despite its having taken the kind of "good citizenship" actions the Sentencing Guidelines recognize the collateral sanctions may dilute the Guidelines' incentives for taking these actions, perhaps to the point of rendering the Guidelines' "carrot and stick" approach ineffective. If the Guidelines' incentives contribute to controlling corporate crime, this turn of events would be unfortunate. The Commission is committed to monitoring and continuing to analyze this issue. For now, because Congress has quite deliberately devised multiple enforcement schemes, and given dual federal and state sovereignty issues, resolution of this problem is beyond the Commission's direct control. The potentiality of this problem may, however, weigh in favor of greater coordination among the various enforcement authorities to consider adherence to the

226. See U.S.S.G., *supra* note 8, § 8C1.6.

227. *Id.* § 8C3.8 (Policy Statement, comment. (n.2)).

“mom and pop” dry cleaner. The way in which the seriousness of the offense is computed²³¹ is not fundamentally influenced by size. Indeed, the Commission ultimately saw no logical way of proceeding other than by measuring offense seriousness consistently. Any other approach would “capriciously overdeter[] and underdeter[] offenses by giving the less wealthy [organizations] incentives to commit more harmful offenses, and vice versa.”²³²

After establishing the theoretical foundation of consistency, the Commission permitted several practical exceptions relating to size. First, in contrast to the proposals of the orthodox optimal penalty advocates,²³³ the Guidelines do not require a company to seek bankruptcy if a fine is beyond a company’s means. In this context, then, structured flexibility²³⁴ entailed giving courts the discretion to reduce a fine to the extent necessary to allow the company to remain viable,²³⁵ but also requiring that courts consider whether supervision, by placing the corporation on probation, is necessary.²³⁶

A second means in which size indirectly may become important involves the culpability score factor that assesses the role of management or other senior officials in the offense.²³⁷ As noted earlier, the culpability score determines the number by which the sentencing court multiplies the loss or gain or an approximation for the harm. When “high level personnel”²³⁸ are involved or when tolerance of the offense by those with “substantial [discretionary] authority”²³⁹ is pervasive, the culpability score is increased.²⁴⁰ The amount of the increase, however, itself rises with an organization’s size.²⁴¹ Thus, if a top executive of a 200-person firm was involved, the culpability score increases three points, but if a top executive of a company with 5000 or more employees was involved, the culpability score increases by five points.

Probably more than any other compromise, no one was entirely satis-

231. See *supra* notes 142-43 and accompanying text.

232. See Parker, *supra* note 30, at 555 n.172.

233. *Id.* at 585-91.

234. See *supra* notes 200-05 and accompanying text.

235. See U.S.S.G., *supra* note 8, § 8C3.3(b).

236. See *id.* §§ 8D1.1(2), (7).

237. See *id.* § 8C2.5(b).

238. See *id.* § 8A1.2 (comment. (n.3(b))).

239. See *id.* (comment. (n.3(c))).

240. See *id.* § 8C2.5(b).

241. See *id.*

of the program's "implementation" of questionable necessity. The Commission's research indicated that indeed, small corporations will not frequently be able to qualify for compliance credit; this is not, however, because they cannot meet the definition's criteria, but because top management will typically be involved in the offenses smaller companies commit,²⁴⁸ a factual occurrence that negates any credit for the compliance program.²⁴⁹

Recognizing this provided the rationale for a fourth way in which the court may take account of size. The Guidelines permit courts to reduce, on a *pro rata* basis determined by a percentage of ownership, the fine of a closely held corporation if its owners have been fined. Since most closely held corporations are small, this should primarily benefit smaller companies.

The question of whether and how to consider size was a particularly difficult issue. It remains to be seen whether in striking a compromise, the Commission found the right balance of considerations.

V. QUESTION FOUR: ARE THE SENTENCING GUIDELINES FOR ORGANIZATIONS CAST IN STONE, OR CAN CHANGES BE EXPECTED?

A. *The Corporate Guidelines as Evolutionary Law*

Because the Sentencing Commission has now promulgated a set of guidelines to govern the sentencing of both individuals and organizations, the Commission is sometimes asked what work is left to be done. This question reflects a common misunderstanding of Congress' basic vision for sentencing reform.

First, Congress created the Sentencing Commission to be a permanent agency—there is no sunset provision limiting the Commission's tenure. Congress made the Commission a permanent agency because it expected the Commission's work to be ongoing. Specifically, Congress mandated that the Commission "shall review and revise [the guidelines], in consideration of comments and data coming to its attention."²⁵⁰ Toward this end, Congress directed the courts to submit to the Commission relevant

248. Reported data partially illuminate this fact. See SUPPLEMENTARY REPORT, *supra* note 26, tbls. 8, 11 (showing that most federal organizational cases involve closely held corporations and most involve cases in which owners were aware of or involved in the offense).

249. See U.S.S.G., *supra* note 8, § 8C2.5(f).

250. 28 U.S.C. § 994(o).

Guidelines are neither possible nor particularly useful, it can be predicted that the Commission will employ the overall *approach* of making revisions in light of experience and research, which will almost certainly lead to modifications. There are a number of reasons why this is so.

First, the Commission has learned first-hand that case data reflecting actual court experience with the guidelines is extremely useful in assessing whether a guideline is being applied as intended, and whether, even if it is being applied correctly, it is fully capturing the most important factors of a given category of case. As noted, Congress expected that the review of actual cases would be instructive; there is no reason to believe that this process would be any less so with the corporate Guidelines. Indeed, since the corporate Guidelines contain a number of groundbreaking measures,²⁶¹ one might expect case experience to be especially helpful in revising the initial guideline structure and in pointing to ways in which it can be improved.

The Commission's decision to ground the corporate Guidelines in an approach of "structured flexibility"²⁶² will virtually require close scrutiny of guideline application in specific cases. The structured flexibility approach means that courts and practitioners have a considerable measure of freedom in interpreting the intent of the corporate Guidelines. While the Commission believed that this measure of flexibility made sense, especially for an initial set of corporate guidelines, greater discretion increases the risk that the key goals of sentencing reform—such as the promotion of certainty, uniformity and fairness in sentencing, and the reduction of unwarranted sentencing disparity²⁶³—could be thwarted. Accordingly, the Commission's structural approach to the initial corporate guidelines will, of necessity, require careful monitoring. This process, in turn, will likely lead to guideline refinements.

Recent history suggests that other forces may foster modifications in the corporate Guidelines as well. As noted, changes in prosecution poli-

261. See *supra* note 31.

262. See *supra* notes 200-05 and accompanying text.

263. See 28 U.S.C. § 991(b)(1)(B).

to co-chair an advisory group of outside experts to consider issues relevant to the development of environmental sanctions for convicted organizations. Unlike some other advisory groups convened by the Commission, the environmental advisory group's members were selected specifically to capture the full spectrum of perspectives; its membership deliberately maximizes diversity of views on the normative question of what sanctions are appropriate for organizations convicted of environmental crimes. Its sixteen members come from the defense bar, corporate management, the enforcement community, academia, and public interest groups.²⁶⁹ Its mandate has been to produce a detailed set of proposals for the Commission to consider, through a process somewhat analogous to a negotiated rulemaking. Members have been asked to think openly and critically, to "check their institutional agendas at the door," and to act as a group of responsible citizen experts.

Since its initial meeting, the advisory group has labored for almost a year to draft a detailed set of proposed guidelines for consideration by the Commission. In March 1993, the advisory group agreed to make public its first draft, and solicit comments from all interested parties and affected constituent groups. After a reasonable period of public comment, the advisory group will review the comments generated by the publication of their draft, and thereafter present a refined and revised set of proposed guidelines to the Commission thereafter. The Commission will then consider the advisory group's proposed guidelines in the course of its normal deliberative process and will adopt in whole, in part, or none of the advisory group's proposed package of sanctions.

Because the environmental guidelines pinpoint an area in which the organizational Guidelines quite clearly will evolve, and because the subject of environmental guidelines for corporations has generated substantial interest, it may prove fruitful to summarize briefly the Commission's reasoning for deferring coverage in this area.

269. Members of the advisory group are: Frederick R. Anderson, Cadwalader, Wickersham & Taft; Stephen M. Axinn, Skadden, Arps, Slate, Meagher & Flom; Jim Banks, Chemical Waste Management, Inc.; Meredith Hemphill, Jr., Bethlehem Steel; Jane Barrett, U.S. Attorney's Office; John C. Coffee, Jr., Columbia University School of Law; Douglas I. Foy, Conservation Law Foundation; Michael S. Gelacak, U.S. Sentencing Commission; Lloyd Guerci, Mayer, Brown & Platt; David Hawkins, Natural Resource Defense Council; Andrew E. Lauterback, U.S. Environmental Protection Agency; Ray Mushal, U.S. Department of Justice, Environmental Crimes Section; Ilene H. Nagel, U.S. Sentencing Commission; Judson W. Starr, Venable, Baetjer, Howard & Civiletti; John T. Subak, Rohm & Haas Company; Jonathan R. Turley, George Washington University; Larry Wallace, Vinson & Elkins; and J. Bryan Whitworth, Phillips Petroleum Company.

absence of a showing of intent because environmental offenses are likened to public welfare offenses, long held by the courts as appropriate for strict liability provisions. The question at sentencing is whether sanctions should vary with culpability, even when the conviction has been obtained under a strict liability statute.

In addition to the strict liability issue, there is the further question about the nature of the offense. Under the Clean Water Act,²⁷² criminal liability may be imposed upon a person who knowingly or negligently discharges a pollutant from a point source into waters of the United States without an appropriate permit or in violation of a permit condition.²⁷³ The question at sentencing is whether the nature and the amount of the pollutant should affect the severity of the sanctions; and if so, in what ways and by how much.

Environmental statutes with a knowledge requirement may require knowledge only with respect to the action, and not with respect to the action's unlawfulness or consequences, or to the existence of any regulation or permit requirements. For example, under the Resource Conservation and Recovery Act (RCRA),²⁷⁴ it is a violation to knowingly transport hazardous waste to an unpermitted treatment facility.²⁷⁵ Liability attaches when the transporter knowingly transports hazardous waste regardless of the transporter's mental state with respect to the treatment facility's permit status. Thus, a transporter from whom the treatment facility has actively concealed the revocation of its permit has violated the Act just as completely as a transporter who negligently fails to inquire about a treatment facility's permit or one who knows the treatment facility has no permit.

While the Commission was not convinced at the time it promulgated the corporate Guidelines that prosecutors would frequently pursue charges for some of the relatively less serious kinds of environmental violations, the fact that the environmental statutes *could* reach such conduct had to be considered. The Commission's position was that guidelines for environmental offenses should be able to account for the full array of varied offense conduct which falls under the environmental crimes rubric and that important variation in the nature of the offense conduct should be reflected in any package of sanctions.

272. 33 U.S.C. §§ 1251-1387 (1988).

273. 33 U.S.C. §§ 1311(a), 1319(c).

274. 42 U.S.C. §§ 6901-6992 (1988).

275. 42 U.S.C. § 6928(d)(1).

CONCLUSION

The Commission did not, we believe, intend to focus on corporate offenders when it began its task of promulgating sentencing guidelines. Yet, for all the reasons herein articulated, a consensus emerged that corporate offenders were neither exempt nor should be exempted from Congress' scheme for sentencing reform. And so it was that corporate Sentencing Guidelines came to pass.

It is far too early to tell whether in responding to the myriad concerns, and the competing agendas, the right balance has been struck. The hope is that the corporate Guidelines will increase deterrence and if not, will at least provide a structure for the imposition of just punishment for those organizations convicted of these offenses. As with all sentencing guidelines, the goal is to increase uniformity, fairness, and certainty, and to reduce the commission of crime; the hope is to achieve these goals without compromising the courts' ability to mete out appropriate sanctions for convicted offenders and to have a system of sentencing responsive to the societal need to reduce the impact of crime.

**A TALE OF THREE CITIES:
AN EMPIRICAL STUDY OF CHARGING AND
BARGAINING PRACTICES UNDER THE
FEDERAL SENTENCING GUIDELINES.**

Ilène H. Nagel
Stephen J. Schulhofer

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ARTICLE

A TALE OF THREE CITIES: AN EMPIRICAL STUDY OF CHARGING AND BARGAINING PRACTICES UNDER THE FEDERAL SENTENCING GUIDELINES

ILENE H. NAGEL* & STEPHEN J. SCHULHOFER**

I. INTRODUCTION

The principal goal of the Sentencing Reform Act of 1984¹ and the U.S. sentencing guidelines is the structuring of judicial discretion so as to reduce unwarranted disparity in the federal sentencing process. Yet, students of sentencing now recognize that prosecutorial discretion, in charging and in the plea negotiation process, poses obstacles to achieving this goal.

Under the federal sentencing guidelines system, judicial discretion in selecting sentences is tightly structured: Sentences are determined by the combined consideration of the offender's criminal history, the offense or offenses for which the offender is convicted, and characteristics of the

* Member, U.S. Sentencing Commission; Professor of Law, Indiana University (Bloomington) School of Law. B.A. 1968, Hunter College; M.A. 1973, Ph.D. 1974, New York University; M.L.S. 1985, Stanford. The views expressed here are those of the individual authors and are not meant to represent the views of the U.S. Sentencing Commission.

** Frank & Bernice J. Greenburg Professor and Director of the Center for Studies in Criminal Justice, University of Chicago School of Law. A.B. 1964, Princeton; LL.B. 1967, Harvard Law School.

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1. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3586 (1988) and 28 U.S.C. §§ 991-998 (1988)).

order to determine whether, the extent to which, and under what circumstances its preliminary and largely experimental solutions had successfully addressed the anticipated difficulties.

Over the past three years, as part of that monitoring effort, we have been engaged in an independent study of charging and bargaining practices under the guidelines. The first phase of our research, carried out from September 1988 to January 1989, covered the fifteen-month period prior to the Supreme Court's decision in *United States v. Mistretta*,⁵ which upheld the constitutionality of the Sentencing Reform Act.

In our report on that preliminary research, we described our findings in detail and presented several conclusions.⁶ At the general level, we found that the guidelines had brought considerable order and consistency to the sentencing process in cases resolved by guilty pleas. We stressed, however, that sentencing reform had left the prosecutor with substantial discretion, which, "[i]f abused and unchecked . . . has the potential to create the disparities that sentencing reform was intended to prevent."⁷ We noted that pre-*Mistretta*, the guidelines had been circumvented in an identifiable minority of the cases resolved by guilty pleas. We cautioned, however, that estimates of the frequency and extent of this problem were premature: Because our preliminary database was small and our research methods necessarily informal, our study could not support precise statistical conclusions. Moreover, behavior in "the field" was evolving rapidly during the pre-*Mistretta* period, and we doubted the validity of generalizations based on a study of that early experience.

Subsequent to *Mistretta* we undertook a more comprehensive project, drawing on a wider sample of research sites and data sources. This Article presents one aspect of the results of this more comprehensive study.⁸ Part II summarizes the existing regime relevant to guilty-plea sentencing and the array of mechanisms adopted by Congress, the Sentencing Commission, and the Department of Justice to address the problem of prosecutorial charging and bargaining power. Part III discusses our research methodology. Part IV describes the dynamics of bargaining at each of three research sites, selected from the nine we have visited since *Mistretta*. Part V analyzes similarities among the three sites, while

5. 488 U.S. 361 (1989).

6. Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 271-86 (1989).

7. *Id.* at 232.

8. A report summarizing our findings in nine districts is in draft form. A 10th site visit is planned.

controlled the sentence. Inevitably, under a guidelines system, either the prosecutor must give up some control over facts and charges or the judge must give up some control over the sentence. Notwithstanding the introductory assertion that significant changes would not be required, the guidelines and policy statements governing plea agreements actually adopted in chapter 6 of the *Guidelines Manual* do require significant changes in the plea process for both prosecutors and judges. Understanding this system requires a discussion of the guidelines' treatment of facts, charges, and guilty-plea incentives.

With respect to facts, the guidelines system specifies those facts relevant to determining the sentence for each kind of offense. Victim injury, use of a weapon, drug quantity, or amount of dollar loss, for example, may be deemed relevant to the sentence, depending on the offense. The guidelines require the judge to consider such facts, when present, regardless of whether they are charged and whether the parties have made stipulations to the contrary. Although consideration of uncharged facts is sometimes criticized on due process grounds, this approach mirrors preguidelines sentencing practice, and it is an essential element of the Commission's effort to ensure that arbitrary differences in prosecutorial charging practices do not produce disparate sentences. The guidelines prohibit inaccurate factual stipulations and require that judges base sentencing determinations on the actual facts.¹³

The guidelines take a similar approach with respect to the charging decision. The policy statements on plea agreements in chapter 6 permit the sentencing judge to accept a charge-reduction plea agreement if the remaining charges "adequately reflect the seriousness of the actual offense behavior."¹⁴ Thus, if a defendant committed an armed bank robbery but both sides are willing to resolve the case through a plea to simple theft, chapter 6 of the *Guidelines Manual* requires the judge to reject this plea because it would result in a substantial (and presumably disparate) guilty-plea discount for this defendant. The guidelines' charge-bargaining provision is not completely airtight, however, as it does not require that reduced charges fully reflect the seriousness of the defendant's actual behavior. Thus, the provision leaves the judge flexibility in determining whether the relationship between reduced charges and the actual offense behavior is "adequate."¹⁵

13. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 6B (1992) [hereinafter 1992 U.S.S.G.].

14. *Id.* § 6B1.2(a).

15. For a full discussion, see Schulhofer & Nagel, *supra* note 6.

The Redbook's treatment of charge bargaining differs from its uncompromising treatment of sentence bargaining. The discussion of charge bargaining begins by emphasizing: "Congress' concern that plea bargaining not undermine the purposes of sentencing applies to charge bargains as well as to sentence bargains."²² The Department indicates that "*moderately greater flexibility . . . attach[es] to charge bargains than to sentence bargains,*"²³ but concludes that "*readily provable serious charges should not be bargained away. The sole legitimate ground for agreeing not to pursue a charge . . . is the existence of real doubt as to the ultimate provability of the charge.*"²⁴

The Department correctly underscores the impropriety of dismissing provable charges and excludes charge bargains based on factors other than the weakness of the case, such as caseload pressure. A difficulty arises, however, because considerable prosecutorial discretion is involved in deciding whether charges are "readily" provable. While the precise breadth of this discretion is an empirical question, the Redbook does not seek to place boundaries on it. On the contrary, the Redbook stresses: "[T]he prosecutor is in the best position to assess the strength of the government's case and enjoys broad discretion in making judgments as to which charges are most likely to result in conviction on the basis of the available evidence."²⁵

The contrast between the Department's charge-bargaining policy and its position on sentence recommendations is striking. For sentence recommendations, the Department stresses the necessity for "treating sentences which are the subject of a sentence bargain in the same manner as sentences which result from conviction after trial," because "any other result could seriously thwart the purpose of the [statute] to reduce unwarranted disparity."²⁶

The reasons for the Department's more permissive approach to charge bargaining are something of a mystery. The Department could not have failed to appreciate that the same policy concerns apply with at least as much force to charge bargains as to sentence bargains. In fact, those concerns may apply even more strongly to charge bargains. The sentence recommendations that the Department so strongly deplored

22. *Id.* at 45.

23. *Id.* at 46 (emphasis added).

24. *Id.* at 46-47 (emphasis added).

25. *Id.* at 47.

26. *Id.* at 44.

defendant's conduct. If prosecutors wish to support a downward departure from the guidelines, they should do so candidly and not stipulate to facts that are untrue to achieve the desired result covertly.²⁹

The section on departures reiterates the policy that covert downward departures violate both the spirit of the guidelines and the policy of the Department of Justice.³⁰ Although negotiated recommendations that the judge depart from the guidelines are not prohibited, the memorandum suggests that they are inappropriate in most cases. The memorandum stipulates that a recommendation to depart on grounds not specifically approved in chapter 5, part K, of the guidelines must be authorized by the U.S. Attorney or the Attorney's designee.

This seemingly restrictive approach to departures contains a large loophole, however. The memorandum does not require line prosecutors to obtain supervisory approval when recommending a departure on the basis of any of the factors set forth in chapter 5, part K; some of these factors are quite subjective and malleable. Indeed, the most important ground for departure under chapter 5, part K—substantial assistance in other prosecutions—is especially open to interpretation. Against the background of its rhetorical emphasis on guidelines compliance and its apparent desire to block avenues for guidelines circumvention used by prosecutors pre-*Mistretta*, the memorandum's treatment of substantial-assistance departures is somewhat surprising. The memorandum omits any requirement of supervisory approval for substantial-assistance departure recommendations. It could thus be argued that the language on this topic almost invites prosecutors to treat substantial assistance as a vehicle for discretionary plea negotiation benefits. Although this departure, like all others, requires court approval, prosecutors are likely to find judges receptive to their recommendations when sentencing in other prosecutions is at issue.

The memorandum's treatment of formal oversight requirements also reflects ambivalence about restricting the discretion of line prosecutors. The memorandum expresses a preference for written agreements and indicates that written agreements can facilitate efforts by the Justice Department and the Sentencing Commission to monitor compliance. But the memorandum seems to permit unwritten plea agreements that are simply stated on the record, a procedure that adds nothing to existing law and has almost no value as a vehicle for monitoring and review.

29. *Id.* at 5.

30. *Id.* at 5.

office resources should affect declination policy and the decision whether to bring a particular case in the first place. Once brought, the case should be dismissed or downgraded if charges are not readily provable; otherwise, it should be sentenced at the level appropriate to the actual offense behavior. Ironically, the Thornburgh memorandum, though intended as a signal for U.S. Attorneys to "get tough" and "take guidelines seriously," unintentionally introduces a loophole of potentially massive proportions. Since case pressure is a universal problem, the Thornburgh policy could be read to grant the U.S. Attorneys unfettered discretion to approve charge bargaining.

3. *The Terwilliger Memorandum*

Most recently, Acting Deputy Attorney General George J. Terwilliger, III, issued a memorandum dated February 7, 1992,³² reaffirming the Department of Justice's strong commitment to honest application of the sentencing guidelines. Substantively, the Terwilliger memorandum clarifies certain charging and plea bargaining procedures outlined in Attorney General Thornburgh's prior memorandums. However, the Terwilliger memorandum imposes additional procedural and record-keeping requirements on prosecutors negotiating plea agreements. The Terwilliger memorandum also addresses certain sentencing enhancements not specifically mentioned in the Thornburgh memorandum, enhancements that must be charged if readily provable.

The Terwilliger memorandum's most significant new procedures concern the approval process for negotiated plea agreements and departure motions made pursuant to section 5K1.1 of the *Guidelines Manual*. According to the memorandum, all plea agreements must be in writing and, except for frequently arising fact situations governed by written office policy, must be approved by supervisory personnel. Likewise, section 5K1.1 motions based on "substantial assistance" must be approved by the U.S. Attorney, a supervisory staff attorney, or a committee including at least one supervisor.

The memorandum additionally mandates that a written record be maintained of the circumstances justifying motions filed under section 5K1.1. As a signal of the Department's interest in plea procedures, the memorandum specifies that, for the first time, the plea approval process will be included in routine office evaluations.

32. Memorandum from George J. Terwilliger, III, Acting Deputy Attorney General, to Federal Prosecutors (Feb. 7, 1992) (on file at the Commission).

of the benefits of negotiated charge or count bargains.³⁷ By not adopting a pure offense-of-conviction-charge system, the guidelines protect the system from the unintended transfer of discretion from courts to prosecutors.

Third, adequate provisions have been made in the guidelines for cases in which the prosecutor wishes to reward a defendant who has assisted the government. The section 5K1.1 provision expressly provides for departures under these circumstances. Charge bargains to ensure the same outcome were assumed to be unnecessary.³⁸

Fourth, the guidelines assume that judges, wanting to preserve their discretion, will not transfer it to prosecutors by accepting charge bargains if they deem the resulting sentences inapt.³⁹

As a study of plea negotiation practices, our research necessarily focuses on the practices of the Assistant U.S. Attorneys (AUSAs) who have principal responsibility for charging decisions and the negotiation of pleas. Interview data about charging and plea practices were collected from judges, AUSAs, probation officers, and private and public defense attorneys, in recognition of the fact that AUSAs do not negotiate pleas in a vacuum.

Like our pre-*Mistretta* study, the present research is designed to identify guideline circumvention, not guideline compliance or guideline success. We did not investigate whether the guidelines are making progress toward meeting the overall goals of the Sentencing Reform Act.

37. Nagel, *supra* note 2, at 883; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 *HOFSTRA L. REV.* 1 (1988); 1987 U.S.S.G., *supra* note 12, §§ 1.5-6.

38. 18 U.S.C. § 3553(e) (1988). This section of the organic legislation laid the groundwork for courts to sentence below a mandatory minimum if the defendant provided substantial assistance in the investigation or prosecution of another person who had committed an offense. The authority to impose a sentence below a statutory minimum was conditioned upon a motion of the government. Consistent with the directive in 28 U.S.C. § 994(n) (1988), the Sentencing Commission expanded this provision to apply not only to sentences carrying a mandatory minimum, but to all cases in which the defendant provides substantial assistance in the investigation or prosecution of another person. Tracking the language of § 3553(e), the authority to depart from the guidelines for a defendant who provides substantial assistance is conditioned upon a motion by the government. 1992 U.S.S.G., *supra* note 13, § 5K.1.1.

39. See 1992 U.S.S.G., *supra* note 13, § 6B1.2(a).

valid estimates of any number of important phenomena, such as disparity, it can obscure policies and produce misleading inferences about plea practices unless a qualitative evaluation of the process is undertaken as well.⁴⁴

Appendix II summarizes the focus of our interviews and the manner in which interviewees were selected. The primary data sources were individual case files and interviews with judges, prosecutors, probation officers, and public and private defense counsel in each jurisdiction. To prepare for each site visit we reviewed between fifty and 150 of the most recent guideline cases for which complete files had been submitted to the Sentencing Commission. The interviews conducted during the site visits often focused on cases we had reviewed. After studying the individual case files, we prepared a memorandum summarizing cases in which the record suggested the possibility that the guidelines may have been circumvented or that the case had developed in a way that was not readily understandable. Cases resolved by trial were excluded as irrelevant to a study of plea negotiation practices. Our research inquiry focused on various types of guideline circumvention, including, but not limited to: (1) factual stipulation to an amount of drugs less than the amount reported in the presentence report or the investigative agent's report; (2) an agreement by the AUSA to recommend a role reduction for a defendant when such a reduction was not supported by the available record; (3) a dismissal of a 18 U.S.C. § 924(c) count when the offense description included reference to the use of the weapon; (4) a dismissal of drug distribution charges in exchange for a plea to misprision or the improper use of a communication facility (that is, a telephone count) when the record suggested that the defendant was distributing drugs.

IV. JURISDICTIONAL ANALYSES

A. DISTRICT D: BY THE BOOK

1. *Process*

a. *Organization of the U.S. Attorney's Office:* In District D, the U.S. Attorney's Office is divided into criminal and civil divisions. Because District D is comparatively small, at least for a large metropolitan area, both the U.S. Attorney and the First Assistant U.S. Attorney make themselves available for handling overflow cases.

44. Robin Stryker et al., *Methodological Issues in Court Outcome Research: Pretrial Release Decisions for Federal Criminal Defendants*, SOC. METHODS & RES. 4 (1983).

Three events reportedly produced a major change in the level of autonomy afforded AUSAs in this district and in their willingness to drop charges. First, the combination of the Supreme Court's decision in *Mistretta* and the issuance of the Thornburgh memorandum made clear that guidelines were the law and that the U.S. Department of Justice leadership expected them to be implemented nationwide. Prior to *Mistretta*, the majority of judges in this district had held the guidelines unconstitutional; the Office of the U.S. Attorney was, therefore, not committed to implementing the guidelines.

Second, the U.S. Attorney repeatedly expressed his commitment to the Thornburgh memorandum and to compliance with the letter and spirit of the guidelines.⁴⁵ Moreover, according to those interviewed, the U.S. Attorney, in contrast to his predecessor, exhibits a strong "get tough" attitude. U.S. Attorneys we interviewed in other jurisdictions were sometimes more critical of, and less committed to, strict and literal guideline application.

Third, AUSAs here repeatedly referred to the Washington "gun policy" and its implications for not dismissing § 924(c) counts. This may explain why dropping § 924(c) counts was accepted practice in this district before 1989. In 1989 that practice came to a dramatic halt.

The U.S. Attorney acknowledged that despite his commitment to full guideline implementation, § 924(c) charges or other counts that significantly affect the guideline sentence are sometimes dropped. His explanation for these aberrational cases was that some AUSAs who have been in the office for more than a decade resist any trammeling of their discretion, whether by a new supervisor or a new law.⁴⁶

45. The U.S. Attorney said,

Basically the bottom line, that's the Department of Justice's policy and I'm not saying that we succeed in all of its policies but that's the general claim that we were talking about in staff meeting. And if they're [AUSAs] going to give a plea bargain which will get less than what they'll get if they don't get a plea bargain, we're supposed to talk about it.

Unless otherwise indicated, all quotes in the text and in the text of footnotes were recorded by the authors during the course of their interviews. Transcripts are on file with the authors. See *infra* app. II.

46. Now I have the natural bureaucratic problems that you have when you have assistants that have been in the office longer than I have and think they're smarter than I am, and they all are, even the new ones are, but I mean sometimes one slips through. I'm not saying that I am perfect in the administration, but that's the theory.

In our interviews, for example, we met one veteran AUSA who said: "I don't need my mother to tell me how to prosecute a case."

lawyer for not negotiating effectively. In some ways, this is the best outcome for which the defendant can hope: If the defense points out the appropriate guideline level to the AUSA, the AUSA is unlikely to stipulate to an incorrect lower guideline level. By counting on the probation officer to miss the "error" or to lack the zeal to confront the AUSA, or on the court to ignore the probation officer, the defendant has a reasonable chance of obtaining a better bargain.

The tensions between probation officers and attorneys are heightened in that probation officers command the court's respect because they have no reason to raise or lower the defendant's sentence exposure beyond the range required by the guidelines. According to the judges, probation officers simply report the facts detailed in the record and apply the guidelines as written. In contrast, AUSAs and defense counsel have multiple incentives to negotiate a sentence below the guidelines. The alleged adversaries are both unhappy when their agreement is undone by an officious probation office intermeddler.⁴⁷ What this pattern reveals is that, in a sense, the adversarial conflict has shifted under the guidelines structure from one between the prosecution and the defense to one between the defense and the probation officer.

47. One AUSA offered a candid and insightful anecdote about fact manipulation and the probation office:

I myself have stepped on my toes a few times trying to tailor a bargain that everybody could live with and trying to bury this fact or bury that fact, and you really can't do it And what I've learned from that is, I think it's just part of a learning process of working with the guidelines. It makes no sense to play that game. Because if you've got an honorable probation office, as we have here, they're only going to compute it in anyway. They are not going to bury it for you. So, why screw around with it. I can think of one example that shows how old people have trouble learning new tricks. I was tailoring a bargain in a case that was, and I was tailoring it kind of the way we used to before we had guidelines, where I'm kind of, we had cocaine and crack.

The kid that was coming to buy some of the guy's cocaine would have been at 63 to 78 or something like that, and he goes up to a 180, something like that [due to presence of crack]. There was no justification for that kind of sentence, given that guy's background and given the circumstances.

I try to bargain, kind of on the same concept as the old way would have been, and I charge it out as a cocaine conspiracy. And I don't say anything about the crack. And I bargain the guidelines range based on that

The probation office is doing, and I am not saying this facetiously, doing a fine job in carefully going through the reports [H]e [the PO] is going to do his job right come hell or high water. He calls me up and says, hey, [name deleted], some of this cocaine was crack, wasn't it? . . . So we go around and I explain my reasons in more detail and . . . ultimately they decide that they can't bury it. So they report it and they report out the ranges way up at the top. And so we wind up doing what I should have done in the first place—the guidelines provide me perfect opportunity to do—I go for a 5K departure on the guy and we get down to the ranges that we bargained for but doing it the right way instead of the wrong way. So I learned from that.

greater command of guideline rules than AUSAs at the time of our interviews.

Guideline knowledge among judges was very mixed. Moreover, there seemed to be an inverse correlation between guideline knowledge and vehement, vocal criticism of the guidelines. The judges in this district who were most familiar with the guidelines seemed to have found a way to work within them, or perhaps around them. In contrast, those who were less familiar with the guidelines railed against them, often failing to recognize that by mastering specific guideline provisions they would have the latitude to reach results they deemed proper in particular cases.⁵⁰

While the U.S. Attorney articulated genuine commitment to the guidelines, he recognized that he lacked personal knowledge and experience in applying them. He was, however, committed to a program of "on the job training"⁵¹ and expressed hope that the office practice of requiring AUSAs to fill out a guideline work sheet for every guideline case would increase their familiarity with the guidelines.

The federal defenders were extremely well versed in the guidelines and in all aspects of sentencing. In contrast, those members of the private defense bar with whom we met were clearly behind in terms of their knowledge of the guidelines. Some cited the lack of an organized defense bar as the reason for their unfamiliarity with the guidelines. The current practice of using a federal defense panel of forty or fifty private attorneys reduces the likelihood that a cadre of experts who handle a large number of guideline cases will emerge.

2. *Substantive Policies and Practices*

a. *Plea agreements:* In principle, local office policy requires AUSAs to charge offenders at the level that will produce maximum sentencing exposure on all readily provable counts. Each AUSA is required

50. See, e.g., Edward R. Becker, *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, FED. PROBATION, Dec. 1991, at 10; Andrew J. Kleinfeld & G. Thomas Eisele, *The Sentencing Guidelines: Two Views from the Bench*, FED. PROBATION, Dec. 1991, at 16; Gerald Bard Tjoflat, *The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel*, FED. PROBATION, Dec. 1991, at 4.

51. One AUSA said,

I think everybody today is in much better shape than they were a year ago, and give us another year, it could be better, simply because the defense bar, the prosecution, the judges are all getting more familiar with it. And, I don't think that it is really necessarily a lack of training. Sure, training is always helpful, but just like anything else, the best school is the school of hard knocks and you've got to be in that school for a while.

according to the extent to which the AUSA considers the defendant sympathetic. The more sympathetic the defendant, the lower the standard required for the AUSA to file a substantial-assistance motion.⁵³ This qualitative finding is consistent with the quantitative finding that in this district there is an unusually high rate of departures based on the section 5K1.1 provision. Perhaps the explanation is that this district's U.S. Attorney wanted to be thought of as "tough"—in full compliance with the sentencing guidelines and the Thornburgh memorandum. As a consequence, AUSAs and the defense bar were informed that guideline circumvention through plea agreements would not be tolerated. The only avenues left for prosecutorial sentencing discretion were preindictment pleas and the substantial-assistance motion. The latter was particularly viable because such motions are not reviewed with the same degree of scrutiny as plea agreements.

b. *Acceptance of responsibility:* We noted earlier that the trial rate in District D is considerably higher than the national average and that this rate increased between 1989 and 1990.⁵⁴ According to the First Assistant U.S. Attorney, one possible explanation for this phenomenon is that office policy restricts AUSAs negotiating plea agreements to recommending a two-level discount for acceptance of responsibility⁵⁵ and to standing silent while defense counsel argue for a sentence at the bottom of the range. However, once it becomes clear that a significant number of judges routinely go to the bottom of the range and award the two-level discount for acceptance of responsibility *after* defendants go to trial, the incentive held out by AUSAs for defendants to plead guilty is diminished

53. One AUSA described his use of § 5K1.1 for a defendant with very little information: I was taking into account two things: the cooperation and the fact that the guidelines were out of whack for this guy. It just didn't fit him. . . . He's a first offender, he's a college kid, he's got steady employment, he just decided to get a little greedy and wanted to make a little money selling coke.

The AUSA reasoned:

What purpose is served for society with ten years as opposed to three or five years when we have probably accomplished as much as we are going to accomplish? . . . Cause you take a guy like that who comes from a background and is similar to the criminal community, when you think of yourself or myself, if I were looking at three years in jail, it doesn't matter if it was three years or ten years, the thought would be boggling to me. I just, I would be contemplating a razor blade about the time they would call for an arraignment.

54. See *supra* part IV.B.

55. Everyone recognizes the need for the acceptance reduction to induce a plea. The First Assistant observed:

This is the psychology of it. Thornburgh basically has said if you follow . . . well, first of all, defense counsel aren't going to plead guilty as a practical matter in this district unless they get acceptance of responsibility. It's just a given, it's just that it's kinda, they expect it and the pressure you're under, to me it is a very difficult thing. Furthermore, Thornburgh has said that's about the only thing you can give away.

AUSAs cannot drop readily provable § 924(c) counts. In fact, when the U.S. Attorney or the First Assistant decides that a case does not warrant the consecutive five-year sentence required by § 924(c), the preferred method of disposing of the charge is reportedly to use a section 5K1.1 motion and request a departure. On its face, this pattern lends credence to the conclusion that in a district where guideline compliance is the norm, circumvention, when it occurs, is driven further underground through use of the substantially unreviewable section 5K1.1 provision.

According to the public defenders, prior to the issuance of the Thornburgh memorandum and the "get tough" policy of the new U.S. Attorney, a § 924(c) charge was negotiable. Under the new regime, AUSAs are not able to obtain approval to dismiss this count; § 924(c) dismissals must be approved by the U.S. Attorney himself. His policy is that a gun count will be dismissed only for true litigation risk. He told us:

The reason for dismissing a gun count in all of the cases that I've been able to talk to anybody about has been because there is a litigation risk that we are really not sure the evidence will show that it was the instrumentality and on that theory, we don't want to convict somebody for something they did not do.

3. Outcomes

a. *Changes from preguideline practice:* Sentence levels for drug cases in District D are perceived to be higher than they were prior to the implementation of the guidelines. These results are viewed as a function of mandatory minimums and guidelines anchored by mandatory minimums. However, AUSAs reported that sentences for white-collar offenses and bank robbery are lower under the guidelines than they had been before the guidelines.⁶² The claim about white-collar offenses is at least partially inconsistent with the perception of District D defense counsel and judges that there were more nonimprisonment sentences for economic crimes before the guidelines.

There has been an increase in the number of cases proceeding to trial and a change in the focus of plea negotiations. Whereas the

62. In every one of the districts we visited, both pre- and post-*Mistretta* interviewees reported that offenders sentenced for bank robberies receive lower sentences under the guidelines than they did before the guidelines were implemented.

These cases almost always involved defendants indicted for drug trafficking.

Judges expressed a willingness *not* to comply with the guidelines for first-time offenders and for offenders subject to sentences driven by mandatory minimums, particularly those required for drug offenses. Similarly, one judge suggested that a separate set of guidelines, perhaps with lower sentences, would be more appropriate for crimes committed on Indian reservations.

District D was unique in its lack of justifications for guideline circumvention. The lack of such justification may be related to the infrequency of circumvention in this district or to the fact that when circumvention does occur, the AUSAs do not feel comfortable justifying it because it is inconsistent with clearly enforced office policy established by the U.S. Attorney for the district.

Before proceeding to summarize the data for District E, it should be underscored that District D illustrates the potential for the guidelines system to work as intended in achieving the desired goals of sentencing reform without being thwarted by prosecutorial discretion. Importantly, prosecutorial discretion in this district is *not* unfettered.

B. DISTRICT E: JUDICIAL TRUCULENCE SPILLS OVER

In marked contrast to District D and its low rate of guideline circumvention, District E is permeated by resistance to change, starting with the bench and working its way down.

1. *Process*

a. *Organization of the U.S. Attorney's Office:* Two units in this district were of principal relevance to our study: the Criminal Division and the Drug Task Force, the latter of which handles the more complex drug cases. The supervisor of each unit reports directly to the U.S. Attorney. In both units AUSAs had substantial experience (seven to eight years) as prosecutors before joining the U.S. Attorney's Office.

b. *Review procedures:* Under a written policy directive issued by the U.S. Attorney, supervisory approval is required for failure to charge or dismissal of a "readily provable" count that would affect the sentence; and for any recommendation to depart from the guideline range, whether upward or downward, based on "substantial assistance" (section 5K1.1) or any other ground.

Defense attorneys expressed concern that probation officers "toss in" claims from a DEA report as if they were gospel, without regard to the potential for exaggeration in such reports. The defense's preoccupation with this question is understandable, because a probation officer's report puts the defendant at great risk. Again, however, our data suggest that in practice, judges seldom override the fact stipulations of the parties.

Ironically, some judges in this district complained vehemently about their loss of discretion. Yet according to the AUSAs and probation officers, the judges refuse to exercise the considerable discretion that the guidelines afford them. Before the advent of the guidelines, judicial discretion with respect to sentencing was unbounded, and therefore easier to assert. Because that discretion now exists within a tightly structured framework, judges no longer feel free or comfortable invoking it.

d. *Familiarity with the guidelines:* In this district, judges were not interviewed. Despite repeated requests to the Chief Judge that he invite his colleagues for our traditional interview, the Chief Judge's schedule could not accommodate such a meeting, nor was any meeting arranged for the other judges. Our inability to meet with the judges was particularly unfortunate because at least one judge on this court publicly directs his probation officers to prepare presentence reports that accept factual stipulations and ignore other relevant conduct, a practice that directly violates the guidelines and established law.

Based on reports of others, judges in this district are moderately knowledgeable about the guidelines; probation officers are more so. AUSAs are rather knowledgeable, but probation officers asserted that AUSAs have little commitment to sentencing and therefore have no interest in mastering the finer points of guideline application.

The district's Federal Public Defender is, by all accounts, extremely well versed in the guidelines and all other aspects of sentencing. In District E, public defenders reportedly draft the plea agreements and present them to the AUSAs. The Federal Public Defender explained that there are numerous opportunities for a creative defense lawyer to find paths to

Standards for Acceptance of Plea Agreements (Policy Statement)

(a) In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges [rule 11(e)(1)(A)], the court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing.

b. *Acceptance of responsibility:* There appear to be no judicial standards for awarding acceptance-of-responsibility reductions in District E. In 1989 and 1990 the national rates for awarding the acceptance-of-responsibility discount in guilty-plea cases were eighty-five percent and ninety percent, respectively. In this district, the rate was considerably higher in both years. Much more relevant is that whereas nationally the rate for judges awarding the acceptance discount *after* trial was twenty percent in 1989 and twenty-one percent in 1990, in this district the rate was almost twice as high each year. That is, between one third and one half of defendants who proceeded to trial nonetheless received the two-level reduction for acceptance of responsibility from the judges in this district.

c. *Substantial assistance:* According to section 5K1.1 of the sentencing guidelines and the stated local policies of the U.S. Attorney's Office, the good intentions of a defendant who wants to cooperate are not sufficient to warrant a reduction. The U.S. Attorney's policy directive states that cooperation must be completed and fruitful before a section 5K1.1 motion may be submitted. The directive explicitly requires that "assistance result[] in additional charges or convictions." However, another section of the directive seems to contradict this requirement by stating that "once the defendant does everything he is called up to do . . . we should make the [section 5K1.1] motion." The memo adds that a section 5K1.1 motion "should not be totally dependent on the 'results.'" As written, the local policy contradicts the more restrictive Department of Justice rules.

Because of the flexibility introduced by permitting a 5K1.1 motion for effort regardless of effect, this particular policy can be used to reward sympathetic defendants who have not provided truly substantial help. Furthermore, probation officers report that they sometimes learn from the case agent that a defendant benefiting from a section 5K1.1 motion has not really done anything to assist the government. This report is consistent with our finding that twice as many defendants receive the section 5K1.1 motion in this district as do defendants nationwide, even though relative to other jurisdictions around the country, District E is not a major drug-traffic center.

Our research also reveals that AUSAs dismiss charges when they think a guideline sentence exceeds the level that the AUSA considers appropriate. Review procedures in the office of the U.S. Attorney apparently do not completely deter this kind of guideline circumvention. This might be explained by a comment made by the supervisor of the Criminal

sentencing levels are now higher) and bank robbery cases (in which levels are now lower).

Before the guidelines were instituted there were minimal incentives for defendants to plead guilty. Unlike other districts, defendants here would not "get hit for going to trial" unless bad facts came out at trial. However, defendants would typically plead guilty, we were told, because the sentences were reasonable.

This situation has changed, not primarily because of the overall severity of the guidelines but because of the perceived rigidity of the guidelines system. Defense counsel particularly pressed this point, but other interviewees concurred. Before the guidelines were in place, judges and attorneys all reportedly responded in the same way to what they called "human factors," especially whether the defendant was thought to be "salvageable." Now, tough sentences are required in cases in which AUSAs and defense counsel agree that the defendant is sympathetic. This perception is largely confined to defendants prosecuted as career offenders or for drug distribution. According to the reported data, however, there has not been an increase in the trial rate, primarily because "there is manipulation." Also, a retained defense attorney sometimes bluffs about refusing to plead but then folds on the day of trial.

b. *Guideline compliance:* Before visiting District E, we reviewed all the post-*Mistretta* cases for which the Commission had complete files, a total of 111 cases. Of these, the data for eighteen cases, all from one judge, were suspect because this judge prohibits probation officers from conducting independent investigations and from including any information derived from the offender's relevant conduct in the presentence report. This judge also prohibits probation officers from applying guidelines to any facts or guideline factors not specifically stipulated by the parties in the plea agreement and from having any contact whatsoever with AUSAs in order to obtain information about a case. For defendants appearing before this judge, the presentence report simply repeats verbatim the stipulations to which the parties agreed in the plea agreement. Although it might be unfair to suspect guideline evasion in every one of these eighteen cases, there was no way to determine the extent of factual or guideline-factor manipulation.

As to the remaining ninety-three cases, we identified potential circumvention in nineteen cases (twenty percent of the total). Of these, one case of circumvention did not have major sentencing consequences; in two cases the attempted guideline manipulation was offset by the judge.

even putting aside the likely additional cases of covert downward departure condoned by the one judge who deliberately flouts the guideline system.

c. *Reasons for noncompliance:* Some charge reduction is motivated solely by a desire to obtain a plea. Supervisors said that despite the Thornburgh memorandum, some AUSAs overcharge, using indictments for unprovable counts they know they will have to drop as a means to induce defendants to plead guilty. While this explanation may have been valid in a few cases, our case reviews suggest that it serves as a convenient rationale for the much more common practice of charging counts that *are* readily provable and later dropping them for other reasons.

For most AUSAs the driving force behind charge reduction to circumvent guideline sentences is their personal sense of the value of the case and the sentence the AUSA believes is deserved. Again, we must underscore that this pattern is particularly pronounced in drug cases in which guideline sentences are anchored by mandatory minimum sentence levels. One AUSA said that he agreed to below-guideline plea bargains to avoid "a result that's not fair." Another indicated that he usually concluded that there were "problems of proof" only after a long discussion with the public defender about the defendant's sympathetic personal circumstances. In some instances the AUSA claimed that massive discounts were simply a mistake, such as when the prosecution agreed to reduce bank robbery to larceny, erroneously thinking that the sentencing exposure was essentially the same for both crimes. If true, such beliefs betray a degree of ignorance that may be as troubling as conscious guideline manipulation. However, some of these claims of "mistake" do not seem entirely credible. AUSAs may simply be less interested in sentencing than in conviction and may be particularly inclined to review guideline issues casually when they consider the defendant sympathetic.

Among the defendants AUSAs regarded as "salvageable" or not deserving of long guideline sentences were a "college kid" caught up in a crack deal, a bank teller (described as a "pathetic creature") charged with embezzlement, and a woman charged with helping her husband complete a drug deal. In another case, in referring to the defendant, the AUSA stated, "I personally thought he could be saved." The problem with such equity judgments is that they are made by individual prosecutors without regard to the nationally set sentencing rules, thereby introducing sentencing disparity and compromising the uniformity and certainty goals of the guidelines. Further, such individually made equity

AUSAs, there are loopholes. For example, AUSAs have broad discretion with respect to role adjustments, which can vary the guideline sentence by eight levels.⁶⁵ Any agreement *not* to seek an aggravating factor or to agree to a mitigating factor can easily evade the review committee's oversight process.

A small but important minority of AUSAs openly defy the review system. This problem is probably becoming less pervasive because written approval memos are increasingly replacing the prior oral system, and because more and more of the AUSAs are new to the office and therefore more compliant. Nonetheless, one career AUSA told us that he avoids the review committee at all costs, preferring to reach agreements on his own and to take responsibility for them. He stated, "To hell with my supervisor." This AUSA believed he was "probably alone" in holding this attitude, but we heard about and encountered several others who seemed to share his perspective. One AUSA stated that the review system was "B.S." and an unenforceable nuisance that would undercut his position with defense counsel if he tried to comply with it; he also criticized the review committee for being out of touch with the realities of trial work. Another AUSA acknowledged having agreed to a substantial concession—dropping a two-kilogram cocaine distribution charge to a telephone count and thereby converting the sentence from sixty-three months to twelve months—without approval. This AUSA stated, "If they don't trust me by now, they should put me to sleep." Probation officers confirmed that there are several "flippant" AUSAs who thumb their noses at the review committee; one AUSA got chewed out for this once but was openly unrepentant. In a district with more than 100 AUSAs, it should be underscored that these AUSAs were a distinct minority.

In practice, District G AUSAs appear to enjoy considerable autonomy. Many believe that most plea agreements are submitted to the review committee simply because they comply with office policy anyway. We were told that when agreements do not comply, some AUSAs do not submit them for review.

c. *Relationships among probation officers, judges, and attorneys:* Prosecutors and defense attorneys perceive that judges rely heavily on the probation officers and usually defer to them, even on legal issues,

65. *Id.* §§ 3B1.1 (maximum increase of four levels for role as leader or organizer), 3B1.2 (maximum decrease of four levels if defendant was a minimal participant).

were very strong, and the leading lights of the bench were guideline supporters.

2. *Substantive Policies and Practices*

a. *Plea agreements:* In bank robbery cases the usual "deal" is for the defendant to accept responsibility and plead to half the counts; in exchange, the defendant receives the acceptance-of-responsibility discount with a sentence at the low end of the guideline range. In District G, bank robbery sentences are much higher for offenders convicted in state court than under the federal guidelines. However, agents prefer to bring cases in federal court to avoid the discovery required under state rules of criminal procedure. Defendants are willing to plead to the guideline sentence in order to receive a shorter sentence than they would in state court and avoid the state prison system. While AUSAs lament the unduly lenient federal guideline sentences for convicted bank robbers, some continue to offer dismissal of half the counts, as well as § 924(c) counts for armed robbery, in violation of specific guideline policy in order to induce pleas. Additionally, even for cases they plead out by permitting the defendant to plead to only half the bank robbery counts, they recommend the acceptance discount with a sentence at the bottom of the range, thereby providing a double benefit in exchange for the plea. Ironically, most AUSAs failed to see the connection between their plea negotiation practices and the very sentencing consequences they lament.

In marked contrast to other districts we visited, drug couriers, or mules, as they are more commonly known, receive no role reduction in District G. (Under office declination policies, cases involving fewer than five kilograms of cocaine are normally referred to state court.) In some other districts, couriers are given an automatic four-level discount for their minimal role regardless of the amount of drugs involved, plus other guideline discounts offered under office "bump down" policies.

The standard agreement in other cases involves a two-level reduction for acceptance of responsibility with a sentence at the bottom of the guideline range. Fact bargaining and agreements to recommend an offense level below the otherwise applicable guideline are unusual, but supervisors acknowledged that they will recommend subguideline sentences when defense attorneys "really want it." Defendants press for downward role adjustments but rarely get them because probation officers have aggressively challenged improper agreements on this issue.

c. *Substantial assistance:* District G has no formal criteria specifying what qualifies as substantial assistance, but the standard in this district is relatively strict. Defendants must provide more than just intelligence. Usually the defendant must help make an arrest and be prepared to testify. Good intentions are definitely insufficient.

The size of the substantial-assistance reduction is uneven. One AUSA estimated that the assistance reduction yielded one year off the sentence for minor assistance and fifty percent off for major assistance. In principle, substantial-assistance offers must be approved by the review committee on the basis of a written memo. However, compliance with this requirement is reportedly uneven. Office policy dictates that a defendant's reward for cooperation should normally take the form of a section 5K1.1 motion, but we were told that the requirement is not strictly enforced. The review committee apparently sometimes defers to an AUSA's preference for some other vehicle to reward cooperation, such as reducing a drug distribution charge to a phone count. Defense attorneys, aggrieved by some AUSAs' refusal to submit section 5K1.1 motions after cooperation was allegedly rendered, prefer the charge-reduction route. In some cases AUSAs also prefer this approach in order to lock in the defendant's sentence exposure. Judges understand and accept that charge reductions are sometimes used for this purpose. One judge stated that this "has always been true and always will be." Probation officers estimated that at least fifty percent of defendants who cooperate benefit from some form of "paring down" of charges. They felt that, in contrast, the section 5K1.1 motion is seldom used.

d. *Section 924(c):* Only rarely do AUSAs in District G drop a § 924(c) count to induce a plea. However, they sometimes decide not to charge § 924(c) initially—especially in cases that appear headed for a quick plea. Such discretionary withholding of § 924(c) is difficult for the review committee, probation officers, and judges to detect. The individual offender case files we reviewed contained several striking instances of this practice. In one case, the defendant was allowed to plead to two of four armed bank robbery counts and received a forty-six-month sentence. None of the four possible § 924(c) counts—two of them clear-cut—were charged. Ironically, the AUSA who negotiated the agreement complained that the resulting sentence was too low.

that the most extreme manipulations—pleas to telephone counts—appear in only about five percent of drug cases, but that more subtle manipulations are common. Further, they alleged that robbery counts are often “thrown away.” According to probation officers, when disagreements arise, AUSAs justify such charge reductions on grounds of insufficient evidence; the probation officers are often skeptical and sometimes incredulous with respect to this justification.

We can only speculate as to the reasons for these differing perceptions. Perhaps probation officers are less sensitive to the vagaries of evidentiary concerns and therefore exaggerate the extent to which charges are readily provable, thus overestimating the extent of evasion. The eight-percent figure that emerges from our own case-file review is certainly a valid minimum, but it probably misses cases in which concessions took the form of “paring down” charges before indictment. We know that reducing charges before indictment is a common technique and that presentence reports often report such pleas as having “no impact” on the sentence. Moreover, the fact that we shared the probation officers’ assessments of several actual cases tends to corroborate their skepticism. On balance, the twenty-five-percent figure suggested by probation officers and acknowledged by supervising prosecutors may be a credible upper estimate.

c. *Reasons for noncompliance:* Desires to save time and avoid trial seem to be the principal reasons for extraguideline concessions in this high case volume district. In this district, empathy for sympathetic defendants plays a lesser—though significant—role than elsewhere. Charges may be pared down in cases likely to plead out, because, as one AUSA put it, “there is no need to bury this guy [the defendant].” In one case, charge reduction was clearly motivated by a young offender’s sympathetic situation. (The AUSA complained that the bank robbery guideline was too low, but she dropped provable counts anyway to produce a low sentence.) For a “mope” who has no information to give or a defendant whose cooperation is insufficient to meet the section 5K1.1 standard, charge reduction may provide a means to produce a sentence more consistent with the AUSA’s estimate of the case’s worth.

While judges believe that some AUSAs simply want to avoid trial, more often they assume that AUSAs seek pleas because of case pressure or a desire to ameliorate scheduling conflicts. In one instance, a major charge reduction to induce a plea was allegedly needed to avoid a trial that would disrupt an ongoing investigation.

There exists considerable resistance to imposing strict procedures for the review of plea agreements. The resistance stems from (1) the tradition that prosecutors enjoy substantial discretion in both charging and plea negotiation decisions; (2) the perception that prosecutors are entitled to the benefit of autonomy in regard to such matters; and (3) the fact that careful review takes time.

In several jurisdictions the U.S. Attorney and AUSAs reported that upon issuance of the Thornburgh memorandum, the U.S. Attorney either implemented more extensive review procedures or established plans to implement such procedures in the future.

In our judgment, it is not the absence of review procedures that is notable, but that such procedures are not rigorously implemented.

2. *Relationships Among Probation Officers, Judges, and Attorneys*

Tension between defense counsel and probation officers runs high. Probation officers shoulder the blame for either thwarting plea agreements that circumvent the guidelines or "spooking" the AUSAs, with the result that AUSAs are reluctant to circumvent the guidelines in as many cases as defense counsel believe appropriate. The most common allegation is that probation officers are not lawyers and thus fail to appreciate problems of proof. Defense attorneys also express considerable antagonism toward AUSAs because they believe AUSAs often fail to submit the substantial-assistance motion for cooperating defendants. Curiously, defense counsel are more antagonistic toward probation officers than they are toward AUSAs. The general perception among defense counsel is that AUSAs would agree to plea concessions if not for the threat of being found out by probation officers.

Probation officers articulate frustration with judges, viewing them as being unfamiliar with the guidelines, manipulating the guidelines, or unjustifiably siding with the government on disputed facts. In contrast, judges report confidence in and admiration for the excellent job done by probation officers.

Many judges report frustration with prosecutors for usurping judicial sentencing power through charge bargaining. With few exceptions, however, these same judges concede that they never reject a plea pursuant to the chapter 6 policy statements, even when the remaining charges fail to adequately reflect the seriousness of the offense behavior.⁶⁶ This seeming contradiction, encountered at all our sites, presents a puzzle. It

66. *See id.* § 6B1.2.

diminishing their discretion are often the least familiar with actual guideline provisions. One might draw the inference that with increased mastery of the guidelines comes a recognition of how to make them work and a resulting decrease in frustration and criticism.

The judges who are the most critical of the guidelines are from districts where preguideline sentencing was more lenient than the national average. Judges are less critical in districts where preguideline sentencing was at or above the national average in terms of severity. Familiarity with guideline provisions has dramatically increased for all groups since *Mistretta*.

B. SUBSTANTIVE POLICIES AND PRACTICES

1. *Plea Agreements*

In our pre-*Mistretta* study we discovered that three new plea negotiation practices had emerged under the guideline structure: date bargaining, fact bargaining, and guideline-factor bargaining.⁶⁷ Since *Mistretta*, there has been a diminution in date bargaining. However, fact bargaining, charge bargaining, and guideline-factor bargaining continue unabated.

Plea agreements are also negotiated through *horizontal* and *vertical* charge bargaining. A pattern that we did not observe before *Mistretta* but did observe after it is more extensive use of section 5K1.1 substantial-assistance motions for cases that do not genuinely qualify for the benefit as legally defined.

Fact bargaining occurs most often with respect to the amount of drugs or the particular drug involved, such as substituting cocaine for crack, or in the dollar amount involved in economic crimes.

Guideline-factor bargaining continues during the post-*Mistretta* period. It occurs most frequently in the context of the role-in-the-offense adjustment. Typically, in instances when this pattern is noted, the presentence report and the offense description suggest that the defendant should be subject to an aggravating role adjustment as an organizer, leader, manager, or supervisor of the criminal activity. In such cases, however, the plea agreement includes an agreement that the prosecution will not recommend the aggravating role adjustment. In other cases, in which the presentence report and the offense description provide no evidence that the defendant played a mitigating role, the plea agreement

67. Schulhofer & Nagel, *supra* note 6, at 271-72.

defendants to plead to a drug distribution or drug possession count in exchange for the dismissal of a § 924(c) count. Section 924(c) counts are also dismissed in bank robbery cases.

One distinction between the results of our pre- and our post-*Mistretta* research is that since *Mistretta*, U.S. Attorneys, AUSAs, and supervisors have been particularly sensitive to the dismissal of § 924(c) counts. Defense counsel reported that whereas before the issuance of the Thornburgh memorandum § 924(c) counts were routinely dismissed, after the issuance of the memorandum AUSAs were reluctant to dismiss such counts.

The primary vehicle for legitimating horizontal and vertical charge bargaining is the determination by either a line AUSA or a supervisor that charges are not "readily provable." In some instances we concluded that this conclusion was correct, or at least defensible. In other instances, however, it was plainly neither. Even if AUSAs are given the benefit of the doubt, this practice suggests that something is drastically wrong: Charges are either too frequently determined to be provable prior to indictment, or they are too readily judged not provable after indictment. The frequency with which AUSAs resort to phone counts—which represented more than twenty percent of all drug convictions at one of our sites—confirms the lack of good faith on the part of some of those making the elusive judgment as to what is "readily provable."

At site D another new pattern emerged: relaxing the standard for the section 5K1.1 substantial-assistance motion. This pattern may be in response to U.S. Attorneys and supervisory AUSAs recognizing that, post-*Mistretta*, pleas to phone counts and the dismissal of § 924(c) counts leave a paper trail subject to review by the Sentencing Commission and the Department of Justice.

2. *Acceptance of Responsibility*

The acceptance-of-responsibility reduction is routinely granted to defendants who plead guilty. Only rarely is a defendant who pleads guilty denied the two-level discount. Probation officers reported that the denial of a discount occurs in cases in which defendants (1) deliberately withheld information or provided misleading information to the probation officer or (2) withheld information out of fear that full disclosure

AUSA files the appropriate motion, there is no guarantee that the court will sustain the motion by departing downward from the guideline sentence. Defendants likewise have no guarantee. The government may choose not to file the section 5K1.1 motion, and even if it does and the court departs, there is no certainty as to the *amount* of the sentence reduction. Thus, defendants often prefer a charge bargain, with its predictable effect, to the uncertainty of the section 5K1.1 departure provision. This observation is a key conclusion of our research: *Guideline circumvention is often more procedural than substantive*. Manipulation may reflect the parties' preference for certainty. The actual sentence may not be undeserved and may not differ from the one the judge would have imposed absent the plea. However, it is clear that under these circumstances, the sentencing decision is not being made by the judge, as the guidelines contemplated. It is being made exclusively by the parties.

The second criticism concerning the substantial-assistance provision was voiced by federal defenders, who often claim that AUSAs refuse to file the 5K1.1 substantial-assistance motion even after a defendant has fully cooperated. AUSAs responded by noting that defense attorneys want a section 5K1.1 motion filed for every defendant regardless of whether there has been anything remotely approaching substantial assistance. Clearly, tension surrounding this provision continues.

4. *Section 924(c)*

Our case reviews suggest that the dismissal of § 924(c) counts remains a common form of charge bargaining. When asked directly about the dismissal of a § 924(c) count in a particular case, some AUSAs do not answer forthrightly. This is uncharacteristic in view of their candid responses to other questions. The frequency with which such counts are dismissed, on grounds that the guns used in the course of violent crimes were broken, were only for sport, or were not readily provable, suggests that AUSAs may be employing such dismissals to circumvent the statute. While our qualitative study precludes any definitive judgment, the data suggest that AUSAs simply drop § 924(c) counts to avoid the mandatory minimum consecutive five-year sentence in cases in which they think dismissal will prompt a guilty plea, or when they consider the additional mandatory consecutive sentence too harsh. However, notwithstanding the form of circumvention, there are a significant

District D the departure rate was dramatically higher than the national average in 1989, but it was comparable to the national average in 1990.

TABLE 1
BACKGROUND DATA⁷³

1989					
District	Trials	Guilty Pleas	Departures	Downward Departure for 5K1.1	Downward Departures Excluding 5K1.1
D	20%	80%	25%	15%	10%
E	10%	90%	15%	15%	5%
G	20%	80%	20%	5%	10%
National Rates	12%	88%	18%	6%	9%
1990					
D	20%	80%	15%	10%	5%
E	10%	90%	25%	15%	5%
G	15%	85%	15%	5%	5%
National Rates	12%	88%	17%	7.5%	7%

The rate of downward departures for substantial assistance is of particular interest, because negotiated plea agreements designed to circumvent the guidelines are often accompanied by the use of substantial-assistance motions and their rate of occurrence may be inversely related to the frequency of overt downward departures. In 1989 six percent of cases nationwide involved a substantial-assistance motion for downward departure. District G reported a rate of five percent, whereas districts D and E reported rates of fifteen percent—more than twice the national average. In 1990 the pattern changed. Whereas District E again reported a rate of downward departures for substantial assistance that was twice the national average, District D moved closer to the national average.

Turning to the rate of downward departures, other than those based on section 5K1.1 motions, the nationwide rate was nine percent in 1989 and seven percent in 1990. Whereas in 1989 Districts D and G had rates

73. District data are rounded to the nearest five percent to preserve the confidentiality of our research sites.

While *judicial attitudes* toward the guidelines and the Sentencing Reform Act were rarely enthusiastic in those districts we visited, they were less hostile in District G, where some judges stated openly that the guidelines were accomplishing their intended purposes. In District D the judges, with few exceptions, are extremely hostile to the guidelines and are outraged by Congress' adoption of and the proliferation of mandatory minimum sentences. In District E one judge publicly flouts the guidelines, forcing probation officers to do the same. And in that district the other judges could find no time to meet with us.

With respect to the *role of the U.S. Attorney*, in District G the U.S. Attorney plays no personal role in guideline implementation; he is invisible in this area of law enforcement. He has, however, delegated guideline oversight responsibility to a committed and effective review committee. This delegation of oversight responsibility seems to work well. In District D, the U.S. Attorney is strongly committed to full guideline implementation and compliance with the Thornburgh memorandum; he takes every opportunity to state this position. By contrast, in District E, our subjective impression was that guideline compliance is motivated more by fear of an audit than by commitment to full guideline implementation.

Federal Public Defenders play a key role in sentencing. Perhaps one reason there is so little guideline circumvention in District G is that District G's Federal Public Defender is the weakest of those interviewed. He is unfamiliar with the guidelines and is reportedly ineffective. In contrast, in District E, where guideline circumvention is highest, not only is the Federal Public Defender viewed as enormously effective, he and his line defenders initiate the negotiation and drafting of plea agreements. By controlling the document, they seem to control the outcome.

In District G the *probation office* works closely with the AUSA supervisors who administer the review procedures; the probation officers regularly alert supervisory AUSAs to possible guideline circumvention so that they can take action if they desire to do so. In District D, although there is not quite the same partnership between the probation office and the prosecutors, the prosecutors reportedly accept the probation office's role in policing inappropriate plea agreements. In marked contrast, in District E, where circumvention is highest, the probation office and the prosecutors are reportedly adversaries. The tension between probation and prosecution is higher in this district than in any other.

Of the three districts, District G has the tightest policy with respect to *what is required in order for the government to make the section 5K1.1*

occurs; when it does, it can be explained by the truculence of a few veteran AUSAs or by the occasional AUSA who empathizes with a particular defendant. In District E guideline circumvention seems to result from several factors: (1) pressure from judges; (2) the effectiveness of the federal defender; (3) the lax implementation of review procedures in the U.S. Attorney's Office; and (4) the preference of AUSAs for sentences they deem appropriate as opposed to those indicated by the legally applicable guideline.

VII. CONCLUSION

Contrary to often-heard claims that the guideline system has transferred to prosecutors *all* discretion previously exercised by the courts, the empirical data suggest that this occurs in only a minority of cases. Moreover, because circumvention is particularly pronounced in cases involving a mandatory minimum sentence, one must take care to distinguish between circumvention prompted by a desire to evade the guidelines and that prompted by a desire to avoid mandatory minimums.

These caveats notwithstanding, we believe that the circumvention we have described is an important obstacle to the success of the guidelines effort. Both the frequency and the extent of circumvention suggest significant divergence from the statutory purpose, as evidenced by large guilty-plea discounts and substantial pockets of uncontrolled discretion.

We do not mean to imply that all circumvention is necessarily bad. On the contrary, our own impression, based on the situations we have seen, is that the Department of Justice and the Sentencing Commission should not automatically assume that sentences resulting from guideline evasion are necessarily "wrong." Sometimes they are. But sometimes guideline circumvention produces arguably just results.

The principal problem with guideline circumvention is that circumvention, unlike overt downward departure, is hidden and unsystematic. It occurs in a context that forecloses oversight and obscures accountability. These are ample reasons for bringing circumvention into the open, so that its justifications and consequences can be fully understood.

Substantively, the kind of circumvention we have studied and identified is simply a covert vehicle for downward departure. As with other departures, the resulting sentence may be appropriate or inappropriate, justified or unjustified. The Sentencing Commission analyzes overt departures to learn about the real-world situations to which the guideline categories apply so that it can adjust the guidelines. This process is

We believe the first priority should be to develop a broader understanding of the pressures that lead to circumvention and the circumstances under which it occurs in a wider sample of regions and districts. At the same time, the Commission might initiate a study of ways to introduce greater flexibility into the guidelines system. Several areas may be ripe for such change. For example, the Commission could rethink *harm-based and quantity-driven specific offense characteristics*. This is perhaps the most far-reaching and difficult reform suggested by our findings. However, a closer fit between guideline sentences and practitioners' conceptions of appropriate sentences will remain elusive until the guidelines soften the dominant effect of drug quantity on determinations of the seriousness of offenses.

The scope for legitimate consideration of *individual offender characteristics* is also ripe for reexamination.⁷⁵ And greater use of *overt downward departures on the record* for appropriate reasons might reasonably be encouraged.⁷⁶ We do not by any means propose a return to the days when sentences could be mitigated on the basis of social standing, reputation, good deeds, or the sense that a pillar of the community has "suffered enough." However, the scope of what is "not ordinarily relevant" could be narrowed to some extent, and some individual case circumstances might usefully be flagged as potentially valid bases for a departure in a circumscribed set of cases.

Guideline severity levels also warrant further study. This issue is both technically and politically complex. The Sentencing Commission must show appropriate respect for congressional preferences and must not produce guidelines that will deter Congress from granting the Commission more control over issues now preempted by mandatory minimums. Within such constraints, one viable option is to explore ways that guideline levels could be adjusted in a manner consistent with statutory requirements and mandatory minimums.

One example of an area for such study is the method by which guideline ranges are linked to mandatory minimums. For example, the guideline ranges for 500 grams and five kilograms of cocaine are currently pegged to the corresponding mandatory minimums, five years and ten years, respectively. Guideline ranges for quantities that are between 500 grams and five kilograms are interpolated along a strictly proportional continuum. Although understandable, this is not the only conceivable approach. Possible alternatives might include some break with the

75. See *id.* at 858-61.

76. See *id.* at 861-70.

Our research strongly suggests that in most cases, the exercise of prosecutorial discretion does not thwart the benefits of structuring judicial discretion at sentencing. But these benefits do not ensue for a minority of cases, most of which involve the distribution of drugs. So long as mandatory minimum sentences, and guidelines anchored by mandatory minimums, are tied to the charges for which the defendant is convicted and prosecutors exercise unfettered discretion in charging decisions, the goals of certainty, uniformity, and the reduction of unwarranted disparity are at risk. At a time when the federal caseload is increasingly dominated by drug cases, the problem cannot be ignored. The problem can be managed and circumscribed through a guideline system; it appears insoluble in a system governed by mandatory minimums tied to the charges for which defendants are convicted.

APPENDIX II METHODOLOGICAL PROCEDURES

In our pre-*Mistretta* study, the U.S. Attorney designated the AUSAs whom we interviewed. That procedure presented two problems that we sought to avoid in our post-*Mistretta* research. First, the interviews were dominated by supervisory AUSAs; they tended to demonstrate more familiarity with the guidelines, more commitment to their full implementation, and less inclination to candidly answer our questions regarding guideline circumvention and the efficacy of review procedures. Second, the line AUSAs whom we interviewed often had little or no actual guideline case experience. By basing interviews on specific cases we had reviewed, we could better ask specific questions, judge the candor of the responses, and balance the interviews between supervisory and line AUSAs.

For the present study we modified our research strategy to reflect our desire for candid and specific answers. Before visiting each site, we reviewed between fifty and 150 case files for individual defendants to identify cases that might have involved circumvention of the guidelines as a result of the negotiated plea agreement. Once a list of possible problem cases had been prepared, we telephoned the U.S. Attorney's Office to request permission to interview, among others, the attorneys who handled the cases we identified. To minimize the risk that the office might perceive our study as an audit, which it was not, we gave no reason for requesting interviews with particular AUSAs, nor did we mention our review of specific cases.⁷⁹ While this process proved superior to the process used in the pre-*Mistretta* study, it was nonetheless limited in some instances because the AUSA who had handled the case we identified as potentially problematic was no longer with the office. In other instances, the AUSA who had handled the case was out of town or recalled little of

qualitative study could reasonably discern and for what we learned in our research experience. For example, in the pre-*Mistretta* study we used the following questions: How often, under what circumstances, and with what impact do plea agreements recommend, or result in, sentences different from those required by the applicable sentencing guidelines? How often and for what reasons do judges accept such recommendations to depart? In this study, we asked related questions about frequency and methods of guideline circumvention, but sought to examine differences in the ways various offices of U.S. Attorneys are organized. This rearrangement of questions was necessary because the earlier questions assumed more precision than was possible from qualitative data and were inattentive to the importance of organizational factors made apparent by the pre-*Mistretta* study.

79. Despite our efforts, some AUSAs may have incorrectly inferred that we were checking on them. If so, their responses may have been defensive, or they may have obscured some of the evasion that had actually occurred.

We taped and transcribed all interviews unless the U.S. Attorney or the AUSA objected. We promised and maintained strict confidentiality. Because our questions explored not only compliance with the Commission's guidelines but also adherence to Justice Department directives and internal office policies, preserving confidentiality throughout our project was particularly important.

All interviews were conducted jointly by the two coauthors of this Article and a law clerk.

In a few instances the U.S. Attorney invited AUSAs to sit in on his interview. In other instances we interviewed two AUSAs at once because of scheduling problems. However, most AUSAs were interviewed one at a time, thereby emphasizing privacy and confidentiality.

In addition to the interviews with federal prosecutors, we interviewed the Chief Federal Defender in each district. In most instances line federal defenders were invited to the interview. We focused our questions to federal defenders on the same topics as those discussed with federal prosecutors. Whenever possible, we discussed individual cases rather than general policies.

During the first contact with the Chief Federal Defender, we requested a list of private defense attorneys who had experience in guideline cases. At each site visited, we met with a group of private defense attorneys for a single interview. The contact person suggested by the Federal Defender determined the size of the group and the individuals who participated.

At each site visited, we met with the Chief Probation Officer and with supervisory or line probation officers chosen to be included in the meeting. Generally, these were group interviews. Because the probation officers had had so many cases and often had a wealth of information about specific situations, we scheduled these interviews for two hours rather than the one hour we spent with others. When probation officers told us of a particular instance of guideline circumvention through a negotiated plea agreement, we obtained the name of the case and often the file number so that we could review the case, either as part of the site visit or upon our return. These follow-up case reviews helped us learn more about the facts of the particular cases involved.

Finally, in all but one jurisdiction, we interviewed groups of judges who accepted our invitation to meet. The interviews with the judges were more general than the meetings with U.S. Attorneys, AUSAs, federal defenders, private defense attorneys, and probation officers, which

**COMPETING SENTENCING POLICIES IN
A "WAR ON DRUGS" ERA**

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COMPETING SENTENCING POLICIES IN A "WAR ON DRUGS" ERA*

*The Honorable William W. Wilkins, Jr.***

*Phyllis J. Newton****

*John R. Steer*****

INTRODUCTION¹

In the 1970's, members of the public and Congress denounced the ineffectiveness of the "revolving-door" criminal justice system. Offenders often were incarcerated, deemed rehabilitated, and released only to start the cycle anew. At the same time, the combination of unwarranted disparity in the sentencing of similarly situated offenders and deficiencies in the parole process caused many to question the system's certainty and fairness. Still other critics argued that the disparity problem had an even uglier side, with some defendants being treated by the criminal justice system in a discriminatory manner for reasons unrelated to their offense or offender characteristics properly bearing upon punishment.²

In response to these concerns and after more than a decade of study and debate, a bipartisan Congress enacted the most far-reaching reform of federal sentencing in this country's history—the Sentencing Reform Act of 1984 (SRA).³ This legislation directed the creation of a permanent, bipartisan commission to develop and, over time, refine sentencing guidelines to further the basic purposes of criminal sentencing. In response to concerns that similar defendants convicted of similar offenses were being sentenced dissimilarly, the sentencing guidelines were to provide certainty and fairness at sentencing and reduce the unwarranted disparity in

* *Editor's Note:* At the request of the authors, the text of this article has been published as submitted. The footnotes have been edited by the *Wake Forest Law Review*.

** Judge, United States Court of Appeals for the Fourth Circuit, Greenville, South Carolina, and Chairman, United States Sentencing Commission, Washington, D.C.; B.A., Davidson College 1964; J.D., University of South Carolina School of Law 1967.

*** Staff Director, United States Sentencing Commission, Washington, D.C.; B.A., Ohio State University 1974; M.S., Arizona State University 1980; M.A., University of California, Santa Barbara 1983.

**** General Counsel, United States Sentencing Commission, Washington D.C.; B.S., Clemson University 1971; M.S., Clemson University 1975; J.D., University of South Carolina School of Law 1978.

1. The views expressed in this article are those of the authors and do not necessarily represent the official position of the United States Sentencing Commission.

2. See generally S. REP. No. 225, 98th Cong., 1st Sess. 37-190 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3220-3373 [hereinafter S. REP. No. 225].

3. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

responded with a series of crime bills enacted in 1986¹² and 1988¹³ that instituted more and tougher statutory minimum penalties. Yet, during the same period, congressional awareness of the guideline system and the inherent incompatibilities between the guideline and statutory minimum approaches was growing. By decade's end, this enhanced awareness resulted in a greater use by Congress of directives to the Sentencing Commission in lieu of additional statutory minimum penalties.¹⁴ This approach, advocated by the Commission,¹⁵ offered Congress a vehicle to express its will with respect to sentencing policy in a manner more compatible with the guidelines' structure and operation.

With this recent historical background providing the context, this article explores the significant changes in federal sentencing law enacted during the last decade and asks whether the statutory mandatory minimum approach is compatible with, or necessary under, the guidelines system presently operating in the federal courts. The authors suggest that the guidelines approach provides the preferable means of effecting desired sentencing policy.

I. A BRIEF HISTORY OF SENTENCING REFORM

Allegations of discrimination and unfairness at sentencing have prompted numerous attempts at sentencing reform in the United States. During the late 1700's, critics pointed to rising crime rates to illustrate their concern that individuals convicted of criminal offenses were not being sanctioned appropriately.¹⁶ They argued that deterrence was clearly not working and that a change in approach was necessary to ensure public safety.¹⁷ Capital punishment was their sanction of choice. However, because the death penalty frequently was not imposed by juries, this punishment was criticized as an ineffective deterrent.¹⁸ In an effort to achieve greater certainty of punishment, later reforms moved sentencing policy away from capital punishment toward fixed terms of imprisonment.¹⁹

By the early 1800's, most states had adopted criminal statutes with fixed, generally lengthy terms of imprisonment designed to provide public safety and more effective deterrence.²⁰ This move to an imprisonment form of punishment marked the beginning of reformers' shift in sentenc-

12. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

13. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

14. See, e.g., *id.*, §§ 6453, 6454, 6468(c), (d), 6482(c); Crime Control Act of 1990, §§ 321, 401, 2507, 2701.

15. UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM iv, 3, 118-24 (1991) [hereinafter MANDATORY MINIMUM STUDY].

16. DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 52-53, 61-62 (1971); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 7-23 (Alan Sheridan, trans. 1977).

17. FOUCAULT, *supra* note 16, at 7-23.

18. *Id.*

19. *Id.*

20. *Id.*

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ideal of equal justice.²⁷

Still others faulted the system of drug, violent, and serious that sentencing decisions of judges and parole authorities (or perhaps both) failed to adequately reflect the seriousness of certain offenses, thereby undermining crime control goals.²⁸

for what they saw as lenient punishment for white collar offenses. Their concern was for release determinations of parole authorities to adequately reflect the seriousness of certain offenses, thereby undermining crime control goals.²⁸

SENTENCING REFORM Act of 1984

A. History of the Sentencing Reform Act of 1984

By the mid-1970's, Congress began to express broad concern about unwarranted disparity in sentencing. Although not yet ready to abandon the rehabilitation-based, indeterminate sentencing model, Congress was sufficiently concerned with unwarranted sentencing variations that it charged the United States Parole Commission²⁹ with issuing and applying parole guidelines to "reduce [e] the opportunity for sentencing disparity."³⁰ Subsequently, Congress concluded that the parole system was an inadequate vehicle for addressing disparity concerns because of: (1) limitations in the scope of defendants subject to parole, and (2) the split in sentence determination authority between judges and the Parole Commission. That is, the parole guidelines did not apply to offenders receiving sentences other than imprisonment, and judges frequently engaged in the "guessing game" of imposing sentences in anticipation of potential release dates authorized by the Parole Commission.³¹ There also were concerns that the parole guidelines insufficiently distinguished defendants with substantially different offense and offender characteristics; that they were inconsistently applied by parole examiners; and that parole decisions were made in private rather than public proceedings.³²

In 1975, Senator Edward M. Kennedy introduced a bill calling for a judicial commission to promulgate guidelines for federal courts as "the

27. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 6-7 (1972).
28. See, e.g., 128 CONG. REC. S12,808-09 (daily ed. Sept. 30, 1982) (statement of Senator Denton explaining a provision of his amendment that would instruct the Sentencing Commission to consider but not be bound by current sentencing practices) and S12,848-49 (statement of Senator Biden regarding sentencing of armed career criminals); S. REP. NO. 225, supra note 2, at 61, 76, 91, 177-78.
29. See Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976).
30. S. REP. NO. 369, 94th Cong., 1st Sess. 18 (1975).
31. After the creation of the parole system but before the legislative authorization of parole guidelines, Congress had authorized the Judicial Conference of the United States to convene sentencing institutes periodically for the sharing of sentencing information among judges and others in the federal criminal justice system. See Act of Aug. 25, 1958, Pub. L. No. 85-752, § 1, 72 Stat. 845 (codified at 28 U.S.C. § 344(a) (1988)). After only a short time, however, a number of jurists and researchers declared the sentencing institutes to be an inadequate solution to the problem. See Symposium, Appellate Review of Sentences, 32 F.R.D. 257, 270 (1962); Shari S. Diamond & Hans Zeisel, Sentencing Councils: A Study of Sentence Disparity and its Reduction, 43 U. CHI. L. REV. 109, 137 (1975); FRANKEL, supra note 27, at 66.
32. S. REP. NO. 225, supra note 2, at 46-49, 53-56.

ated defendants. For example, first-time offenders convicted of similar offenses under similar circumstances would receive similar sentences; recidivists who committed similar offenses would be sentenced more severely than first-time offenders, but similarly to other offenders with comparable criminal histories.

Finally, Congress hoped to achieve a sense of proportionality in sentencing through a system that recognized differences in defendants and their offenses and that provided appropriate sentences with those differences in mind. A sentencing system sensitive to proportionality, for example, would provide different sentences for co-defendants in a drug conspiracy, one of whom was a courier and the other an organizer.

C. General Law of Sentencing under the Sentencing Reform Act

With these objectives in mind, the landmark Sentencing Reform Act of 1984 introduced a new structure for judicial sentencing discretion that dramatically changed sentencing law and practice in the federal criminal justice system. Concerned principally with the elimination of unwarranted sentencing disparity, the key components of the new sentencing system included:

(1) a concise statement of the federal law of sentencing, including the kinds and lengths of sentences authorized for individual and organizational defendants *and* a statement of permissible sentencing purposes;

(2) a provision for the development of a comprehensive set of sentencing guidelines to structure and limit the exercise of judicial sentencing discretion within permissible sentencing ranges, consistent with authorized statutory limits and objectives;

(3) an allowance for departure from the sentencing guideline ranges in atypical cases to ensure fairness;

(4) a requirement that the sentencing judge state on the record the reasons for the sentence imposed and, if the judge sentenced outside the guideline range, the reason(s) for the departure;

(5) a provision for appellate review of sentences to ensure correct guideline application and reasonableness of departures from guideline ranges;

(6) the abolition of parole and its replacement with a determinate sentencing system under which a sentence to imprisonment would be served without benefit of parole, reduced by a "good-time" allowance of a maximum of fifty-four days per year for satisfactory prison behavior.³⁹

In addition to the key components of this new sentencing system, Congress clearly enunciated what it viewed as the principal purposes of sentencing: just punishment, deterrence, protection of the public (incapacitation), and rehabilitation.⁴⁰ And, in establishing and setting forth

39. William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 364-65 (1991).

40. 18 U.S.C. § 3553(a)(2) (1988).

them into account" in the guidelines system "only to the extent that they do have relevance."⁴⁶

The SRA was much more specific as to characteristics that *should not* affect the sentence under the guidelines, requiring the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."⁴⁷

To allow individualized sentencing in cases in which unusual or atypical circumstances are present, the SRA provides that courts may sentence outside the applicable guideline range.⁴⁸ Under this provision, the court may depart from the guideline range if it determines that a particular case presents a circumstance that the guidelines did not consider adequately, and the circumstance justifies a sentence different from the one called for by the guidelines. Departure may not occur without explanation, however, for the SRA requires that, in every case, the court state on the record its reasons for the sentence imposed.⁴⁹

The SRA further revolutionized federal sentencing policy by authorizing appellate review of sentences upon the initiative of either the government or the defendant.⁵⁰ While review of sentencing errors of law continues under the SRA, appellate courts are further authorized to review the correctness of guideline application and the reasonableness of departure sentences.⁵¹ This feature of the law provides an effective check on the use of improper factors in sentencing considerations and on the use of proper factors to achieve a sentence that varies too far from the prescribed guideline range. It also serves to emphasize that under the SRA, sentencing within the applicable guideline range is *mandatory*, except in atypical cases that warrant departure. In these cases, departure decisions and ensuing sentences are reviewable.⁵²

Finally, the SRA abolished the indeterminate sentencing system under which the Parole Commission, in effect, "resentenced" and ultimately determined release dates for defendants the court had ordered incarcerated. In replacing this system, the SRA returned complete control over sentence length to the judiciary (subject to statutory limits) and empowered courts to impose determinate sentences in accordance with the guidelines and policy statements issued by the Sentencing Commission.⁵³

46. *Id.*

47. *Id.*

48. 18 U.S.C. § 3553(b) (1988).

49. *Id.* § 3553(c).

50. *Id.* § 3742.

51. *Id.* § 3742(e)(2)-(4).

52. See generally *Williams v. United States*, 112 S. Ct. 1112 (1992) (construing the provisions of 18 U.S.C. § 3742 (1988) as applicable to appellate review of sentences outside the guideline range).

53. 18 U.S.C. § 3553(e) (1988).

II. HISTORICAL OVERVIEW OF THE ANTI-DRUG ABUSE ACT OF 1986

As Congress put its finishing touches on the sentencing reform package that abolished parole and mandated sentencing guidelines, problems associated with drug abuse took on increasing national prominence. Opinion polls showed that drug abuse far surpassed economic problems as the number one public concern. Glaring headlines, dramatic footage on nightly news programs, and regular reports in all forms of mass media chronicled various battles in the war on drugs.⁶⁴

Heightened public concern raised congressional awareness of the devastating effects of illicit drugs. Frustrated by the alarming, apparently increasing, flow of drugs into the country, Congress sought a broad solution that involved curbing both the supply and demand for drugs. Moreover, because Congress believed that too often major drug traffickers were arrested, prosecuted, and convicted only to reappear quickly on the streets as a result of unduly lenient sentencing practices by the judiciary, Congress turned to statutorily mandated sentencing provisions for drug offenses in an effort to stop this "revolving door process" in the federal criminal justice system. More than simply a message to the federal judiciary, these swift and certain mandatory provisions were viewed as a statement that society would no longer tolerate the illegal drug epidemic. By enacting mandatory penalty provisions, Congress believed serious drug offenders would have no escape from lengthy terms of imprisonment.

defendants have failed to reform despite previous encounters with the criminal justice system).

64. See generally John Barnes, *A Crowded Bandwagon: Lining Up to Join the War Against Drugs*, U.S. NEWS & WORLD REP., Sept. 22, 1986, at 6 (reporting on House bill to combat drug problem); Brian Duffy et al., *War on Drugs: More Than a "Short-term High"?*, U.S. NEWS & WORLD REP., Sept. 29, 1986, at 28 (leveling off of drug use and media attention to drug problem); Ted Gest, *The Latest Antidrug War: Better Luck This Time?*, U.S. NEWS & WORLD REP., Aug. 25, 1986, at 18 (gearing up for new phase in war on drugs); Jacob V. Lamar, Jr., *Rolling Out the Big Guns: The First Couple and Congress Press the Attack on Drugs*, TIME, Sept. 22, 1986, at 25 (results of opinion poll on seriousness of drug problem); John S. Lang & Ronald A. Taylor, *America on Drugs*, U.S. NEWS & WORLD REP., July 28, 1986, at 48 (presenting death toll in metropolitan areas and police arrests of suspected drug violators); Tom Morganthau et al., *A Question of Privacy*, NEWSWEEK, Sept. 29, 1986, at 18 (raising constitutional issues about drug testing); Tom Morganthau et al., *Drug Fever in Washington: A Pre-election Scramble Over a Red-hot Issue*, NEWSWEEK, Sept. 22, 1986, at 39 (reporting joint television address by President Reagan and the First Lady, along with passage of omnibus crime bill in the House); Carla Anne Robbins, *U.S. Mission: Cut Off Drugs at the Source*, U.S. NEWS & WORLD REP., July 28, 1986, at 55 (destroying Bolivian laboratories which process coca leaves); Roger Rosenblatt, *The Enemy Within: A Nation Wrestles with the Dark and Dangerous Recesses of Its Soul*, TIME, Sept. 15, 1986, at 59 (outlining parameters of civil war on drugs); Ronald A. Taylor et al., *Uncovering New Truths About the Country's No. 1 Menace*, U.S. NEWS & WORLD REP., July 28, 1986, at 50 (outlining perceptions and realities of drug crisis); Evan Thomas, *America's Crusade: What Is Behind the Latest War on Drugs*, TIME, Sept. 15, 1986, at 60 (looking into current drug policy and analyzing effects of some drugs on community).

By the time congressional debate began on the 1988 Anti-Drug Abuse Act, however, a number of congressional members had begun to question the wisdom of the mandatory minimum penalty structures, especially in light of the Sentencing Reform Act of 1984. The record of Senate debate regarding the omnibus drug bill reflects the following statement of Senator Kennedy, pointing to the apparent inconsistencies between mandatory minimum penalties and the SRA:

As the principal author of the Sentencing Reform Act of 1984, . . . I am concerned about the effect these mandatory sentencing provisions and others in existing law will have on the Sentencing Commission concept and its central role in formulating the details of sentencing policy.

For example, mandatory minimum penalty statutes appear to be inconsistent with the guidelines system. Such statutes mandate sentences without regard for either the particular circumstances of the offense or important offender characteristics. As a result, similarly situated defendants may receive different sentences and dissimilarly situated defendants may receive the same sentence. This is precisely the injustice we sought to eliminate in 1984.⁷⁴

In the House, Congressman John Conyers—one who had earlier opposed the legislation creating the Sentencing Commission—made a similar argument against the imposition of additional mandatory minimum provisions:

The mandatory minimums in this bill are ill-advised and ought not to have been included. In 1984, after many years of study and hard work, Congress enacted the Sentencing Reform Act . . . to bring "truth in sentencing" and a more equitable and effective Federal sentencing system. To that end, parole was abolished and good time reduced substantially.

Now that the Commission is in place, Congress must begin to reassess the manner in which it sets sentencing policy. Mandatory minimum penalty statutes are inconsistent with the guidelines system. Such statutes mandate sentences without regard for either the particular circumstances of the offense or important offender characteristics. As a result, defendants with similar backgrounds who commit similar offenses may receive different sentences, while defendants with different backgrounds or who commit dissimilar offenses may receive the same sentence. This is precisely the injustice Congress sought to eliminate with the Sentencing Reform Act.⁷⁵

Nevertheless, Congress ultimately did include several mandatory minimum provisions in the Anti-Drug Abuse Act of 1988.⁷⁶ Perhaps the most far-reaching was a provision making the mandatory minimum sentences for drug distribution and importation/exportation offenses also

74. 134 CONG. REC. S17,354 (daily ed. Nov. 10, 1988) (statement of Sen. Kennedy).

75. 134 CONG. REC. H11,251-52 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers).

76. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

not shown the expected overall reduction in drug law violations."⁸⁴ Moreover, there was general concern that "severe drug laws, specifically as applied to marihuana, have helped create a serious clash between segments of the youth generation and the Government" and have "contributed to the broader problem of alienation of youth from the general society."⁸⁵

Review of the Act's legislative history suggests that a number of reasons beyond the concern for alienation of youth precipitated the repeal of the mandatory sentence provisions. Some argued that mandatory sentencing provisions hampered the process of rehabilitation of offenders and infringed on the judicial function by not allowing the judge to exercise discretion in individual cases.⁸⁶ Others argued that the then existing statutory mandatory minimum sentences reduced the deterrent effect of the law by increasing the difficulty of prosecution:

The severity of existing penalties, frequently involving minimum mandatory sentences, have led, in many instances, to reluctance on the part of prosecutors to prosecute some violations where the penalties seem to be out of line with the seriousness of the offenses. In addition, severe penalties, which do not take into account individual circumstances and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain.⁸⁷

III. COMPETING SENTENCING POLICIES: THE SENTENCING REFORM ACT AND STATUTORILY MANDATED MINIMUM SENTENCING PROVISIONS

Both the Sentencing Reform Act of 1984 and the Anti-Drug Abuse Acts of 1986 and 1988 represented major congressional statements of federal sentencing policy. While Congress enacted the SRA primarily in response to concerns about unwarranted sentence disparity, it enacted the Anti-Drug Abuse Acts primarily in reaction to criticisms of "revolving-door" criminal justice and in an effort to send a strong message of deterrence.

The SRA directed the creation of a sentencing commission with authority to promulgate guidelines for federal offenses that would take into account offense seriousness and offender characteristics. The Commission was to examine past sentencing practice, the federal criminal code, and relevant policy concerns in determining sentencing ranges from which courts would select an appropriate sentence. However, because the Anti-Drug Abuse Act of 1986 took effect prior to the issuance of the initial guidelines and generally required penalties substantially exceeding those previously meted out, the Commission determined that past practice would be of little use in determining appropriate guideline sentences for drug offenses. Instead, the drug guidelines were based principally upon

84. S. REP. NO. 613, 91st Cong., 1st Sess. 2 (1969).

85. *Id.*

86. *Id.*

87. H. REP. NO. 1444, 91st Cong., 2d Sess. 11 (1970).

both state and federal levels⁹¹ in sanctioning broad categories of dissimilar offenses. This "tariff" approach subsequently was abandoned, primarily because many defendants had important distinctions relevant to sentencing that were obscured by this one-dimensional approach. Statutory minimum sentencing provisions, by typically employing only one measurement of offense seriousness, suffer from the same defect of treating substantially different offenders in the same inflexible manner. In contrast, the sentencing guidelines employ an array of indicators relating to the offense conduct and offender characteristics to determine punishment severity.

The mandatory minimum penalties applicable to defendants convicted of trafficking in the more common street drugs⁹² are illustrative of this contrast. For individuals convicted of drug trafficking under this section, a single, offense-related factor determines whether the mandatory minimum applies—the weight of the drug or drug mixture. Any other sentence-individualizing factor is irrelevant as far as the statute is concerned. Whether the defendant was a peripheral participant or the drug ring's organizer, whether the defendant used a weapon, whether the defendant accepted responsibility or, on the other hand, obstructed justice, all have no bearing on the statutorily mandated minimum sentence to which each defendant is exposed.

Moreover, the mandatory minimum provisions in this controlled substance penalty statute present a functional block to consideration of important sentencing factors recognized by the guidelines—particularly, a defendant's reduced role in the offense and acceptance of responsibility—that might otherwise appropriately reduce the sentence below what the applicable mandatory minimum would impose. By requiring identical sentences for defendants who are markedly dissimilar in their level of participation in the offense and in objective indications of post-offense reform, mandatory minimum provisions short-circuit an important objective of the guidelines' design: the imposition of sentences that are proportional to the defendant's level of culpability.

In 1990 Congress formally directed the Sentencing Commission to respond to a series of questions concerning the compatibility between the guidelines and mandatory minimums, the effect of mandatory minimums, and options for Congress to exercise its power to direct sentencing policy through mechanisms other than mandatory minimums.⁹³ As part of this mandatory minimum study, the Sentencing Commission tracked the processing (i.e., charging, conviction, and sentencing) of a sample of 1,165 defendants who appeared to have committed offenses for which a mandatory minimum sentence was applicable under the drug statutes or under 18 U.S.C. § 924(c), pertaining to use of a firearm in the commission

91. See ROTHMAN, *supra* note 16, at 61.

92. The more common street drugs include heroin, cocaine, cocaine base ("crack"), LSD, PCP, marijuana, and methamphetamine. The mandatory minimum penalties are set forth in 21 U.S.C. § 841(b) (1988).

93. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990).

sentenced using the guidelines¹¹¹ since the United States Supreme Court decision upholding their constitutionality in January 1989.¹¹²

2. The nationwide plea-trial ratio has remained relatively constant before and after implementation of the guidelines, at about eighty-five percent of cases disposed of by guilty pleas.¹¹³ Those predicting that the guidelines would cripple the system by drastically increasing the number of trials have been off the mark. While the absolute number of criminal case filings and trial dispositions has increased, the guidelines have not changed significantly the national plea-trial ratio.¹¹⁴

3. Judges have sentenced within the applicable guideline range in approximately eighty-one percent of the cases.¹¹⁵ Another twelve percent of offenders receive a downward departure based on their substantial assistance to the government in other criminal cases; about six percent are sentenced below the guideline range for other reasons; and less than two percent are sentenced above the guideline range.¹¹⁶ These figures indicate that the congressional objective of having a high percentage of cases sentenced within the applicable guideline range is being met.¹¹⁷

4. Unwarranted sentencing disparity, probably the overriding congressional concern motivating the SRA, is being abated. The recent comprehensive evaluation completed by the Commission pursuant to statutory mandate and the subsequent, statutorily mandated General Accounting Office assessment, confirm that disparity has been markedly reduced for categories of offenders frequently sentenced in federal court.¹¹⁸ In particular, the Commission found significantly more uniform sentencing under the guidelines, relative to pre-guidelines practices, for similarly situated offenders convicted of bank robbery, heroin trafficking, cocaine trafficking, and bank embezzlement.¹¹⁹

5. The system of sentence appellate review initiated by the SRA is working to remedy the most significant instances of incorrect guideline application and departures that are unwarranted or unreasonable in extent. As would be expected, the authorization of sentence appellate re-

Comm., 100th Cong., 1st Sess. 260 (1987) (letter of Chief Judge G. Thomas Eisele); 289-90 (written statement of Chief Judge Thomas A. Wiseman, Jr.); 528-31 (written statement of Scott Wallace, Nat'l Assoc. of Criminal Defense Lawyers).

111. As of January 29, 1993, there were 125,410 cases in the Commission's database sentenced under the guidelines since *Mistretta v. United States*, 488 U.S. 361 (1989). This number grows by 3,000 to 3,500 cases monthly.

112. See *Mistretta v. United States*, 488 U.S. 361 (1989).

113. UNITED STATES SENTENCING COMM'N, ANNUAL REPORT 59 (1991).

114. *Id.*

115. *Id.* at 133.

116. *Id.*

117. For a discussion of anticipated sentences, see S. REP. 225, *supra* note 2, at 52 (indicating that the Senate Judiciary Committee anticipated that judges would sentence outside the sentencing guideline range at about the same or a somewhat lower rate than the Parole Commission had deviated from its guidelines in setting release dates).

118. COMMISSION EVALUATION REPORT, *supra* note 108, at 31-54; GAO REPORT, *supra* note 108, at 11.

119. COMMISSION EVALUATION REPORT, *supra* note 108, at 31-54.

crime control tools to achieve the goal their enactment intended.

Fortunately, Congress adopted a new approach to sentencing contemporaneously with a renewed reliance on mandatory minimums. This approach of sentencing guidelines, as embodied in the Sentencing Reform Act of 1984, provides fairer, more flexible penalty provisions than do mandatory minimums. These finely calibrated guidelines further honesty and fairness in sentencing and have moved federal sentencing significantly in the direction of imposing similar sentences on similar defendants who commit similar offenses. The guidelines inject a high degree of certainty of punishment imposed in a uniform and consistent manner. This presents a greater possibility of achieving the goal of crime control than other approaches previously tried.

In view of the guidelines' successes to date, as well as the structural and operational superiority of guidelines over statutory mandatory minimums, perhaps the time has come for Congress again to reconsider the need for mandatory minimums. Hopefully, Congress will refrain from enacting additional statutorily mandated minimum sentencing provisions and instead use approaches more compatible with the guidelines system. Moreover, as Congress gains confidence in the effectiveness of the guidelines, perhaps statutorily mandated minimum sentencing provisions will once more be relegated to days of the past, thereby allowing the guidelines system to achieve its full potential.

**THE FEDERAL SENTENCING GUIDELINES:
A DIALOGUE**

Stephen G. Breyer

Kenneth R. Feinberg

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The Federal Sentencing Guidelines: A Dialogue

By Judge Stephen G. Breyer and
Kenneth R. Feinberg, Esq.*

Brief Overview

Kenneth R. Feinberg: The Federal Sentencing Guidelines now in effect can be found in 28 U.S.C. § 994. The Guidelines went into effect on November 1, 1987, but apply only to crimes committed after that date. Since most criminal offenders convicted in the federal courts after November 1 were not sentenced until spring/summer of 1988, the Guidelines remain in their infancy and judges, prosecutors, defense lawyers, probation officers, and parole officers still need to familiarize themselves with these Guidelines.

The Guidelines are the culmination of a debate in the U.S. Congress and the Justice Department that has gone on in every administration since the 1960s. This is important because much of the criticism, and, frankly, much of the support expressed for these particular Guidelines must take into account the fact that they are the culmination of extensive debate by Congress. It is not our purpose to debate the wisdom of guidelines restricting judicial sentencing discretion. The Guidelines are the law, they are in place, and it is time to focus on how they will work in practice. That, indeed, is the objective of the Symposium.

It is also important to recognize that the Guidelines are the product of the U.S. Sentencing Commission, a permanent body. The Commission remains in place to suggest mod-

* We are grateful to the Practising Law Institute, 870 Seventh Avenue, New York, New York, for permission to reproduce this edited and revised version of PLI's Videotape on the Guidelines. Kenneth R. Feinberg, an attorney with the firm Kaye, Scholer, Fierman, Hays and Handler in Washington, D.C., was remarkably helpful with this entire project and deserves special recognition for that effort. Kenneth Feinberg was one of the primary authors of the federal legislation creating the U.S. Sentencing Commission and is the former chairman of the New York State Commission on Sentencing Reform.

Judge Stephen G. Breyer's appointment to the Commission expired in November, 1989 and he will soon assume the position of Chief Judge of the U.S. Court of Appeals for the First Circuit.

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Finally, I want to stress that the Guidelines are a challenge to lawyers and to the country as a whole as we seek to improve the quality and effectiveness of our federal criminal justice system. Although at first blush the Guidelines may appear to be a formidable undertaking, in practice, as Judge Breyer will ably demonstrate, they are actually relatively simple to apply and should not pose an undue burden on any practitioner. They are in effect today; they are the law of the land. We have an obligation to master how the Guidelines work in order to promote the legislative goals of "fairness" and "effectiveness."

We will move now to one of the four major issues in this undertaking: the key ingredients and critical issues that you must check off in your mind in applying these Guidelines.

Basic Material for Study

Judge Stephen G. Breyer: Ken Feinberg was very much involved in the enactment of these Guidelines when he worked as a Senate Counsel. He knows them. The question is how to impart similar knowledge to readers in a fairly brief space. Anyone who practices criminal law in the federal system will have to learn this fairly complex set of new federal sentencing Guidelines. To begin with, you must familiarize yourselves with four documents. First you should read the Guidelines themselves. The Guidelines, as Ken Feinberg pointed out, will change from time to time, so you must be certain you have the most recent edition.²

The second thing that I think you should read is the Report, published on June 18, 1987, which you can get from the Government Printing Office and which explains in greater detail what the Commission was up to.³ I'd like you to look at the charts in the Report that will tell you what present practice is. If you then look at the Guidelines you will see how the Guidelines compare with present practice. The third item I'd like you to read is either the Model Rule for Sentencing Procedures, which you

² See U.S. Sentencing Comm'n, *Guidelines Manual*, U.S. Sentencing Comm'n, 1331 Pennsylvania Avenue, Suite 1400, Washington, D.C. 20004, (202) 662-8800.

³ See Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (June 18, 1987), available from the Commission at the above address cited in note 2 *supra*.

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exception, in this statute we achieve honesty in sentencing.

The second basic purpose of the statute is to try to reduce, not eliminate, the enormous sentencing disparity that appears to exist in different parts of the country. A judge in Washington may impose a sentence of five years on the same offender to whom a judge over in Utah gives a sentence of ten years. Defense attorneys think that which judge you get makes a difference. Some judges, for the same offense and with offenders who are indistinguishable, will impose a different sentence to the point where in the Southern District of New York they assign judges by a lottery. People think that's the only way to make it fair. Congress, however, has now stated that it seeks to eliminate, or minimize this widespread disparity. How is that done? It's done by creating a Commission.

The Commission, appointed by the President, confirmed by the Senate, has seven members, three of whom are judges and four of whom are not. They worked for a year and a half to create the Guidelines, a document that is designed to provide for more uniform sentences by type of offense and by type of offender.

The two main purposes, then, that you must keep in mind when you apply this document are: honesty and greater uniformity in sentencing. I will now turn to the six basic steps.

Feinberg: What Judge Breyer terms six basic steps, I call the six key issues. These six basic steps must be followed lockstep, to continue the metaphor, in applying the guidelines.

Six Steps in Guideline Application

Breyer: For illustrative purposes let's use a simple case—the case of a bank robber. He has pointed a gun at a teller and taken \$50,000. Suppose he has one prior conviction and that also is for bank robbery. How do you apply the Guidelines to this simple case? Step 1: Turn to the page in the Guidelines Manual for robbery. Should you have trouble finding it, or for other offenses that are a little more difficult to find, all you do is look up the statute under which the person was convicted. You then turn to the index, which will send you to the correct guideline. Now in our case, robbery, we look up the statute and that sends us to page 2.21, entitled robbery. And with that we have completed the first step successfully.

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the robbery, a weapon or drugs? For robbery, there are six specific offense characteristics.

Our robber, in the example, stole \$50,000. Our chart of specific offense characteristics states that if the offender took between \$20 and \$50,000 we must add two levels. So, we started with 18 and now add two and we are at level 20. Our offender had a gun. Did he fire the gun? No. Did he pistol-whip anyone? No. Did he brandish or display the gun? Yes. The Guidelines say add three. So now we have eighteen plus two, which is twenty, plus three, which is level 23. He did not attempt to steal a gun or drugs so, therefore, the other specific offense characteristics don't apply. We have finished Step 3, which is to determine if there are specific offense characteristics present and then to add on to the "base level" those that are present.

Feinberg: How did the Commission decide what should be included as specific offense characteristics, out of the large number of factors that our imagination could think up?

Breyer: Well, basically what we did was to see what offense factors had in the past tended to raise or to lower sentences.

Feinberg: So, again, the decision is reflective. The Commission's product in the robbery guideline is, with some modifications we will get into, reflective of then existing sentencing practices in the Federal courts?

Breyer: Yes, For example, we had in our computer 10,500 actual cases. These are cases where we went back and asked probation officers to tell us the facts of the offense. We also had 25,000 cases that we knew less about. This generated a tremendous amount of data. For example, we had 1,100 cases involving robbery. Of those 1,100 cases, in forty a person was hurt during the robbery. We thought that something that happens even forty times out of 1,100 is frequent enough to include as a specific offense characteristic. In only three of the 1,100 cases was someone killed during the robbery. We thought that three out of 1,100 was so rare that we should not write a specific offense characteristic for it. Under the Guidelines, if you encounter that unusual case where the bank robber kills someone but has been charged and convicted of bank robbery, not murder, do you know what happens?

Feinberg: What?

Breyer: You depart from the guideline, a matter I will deal with shortly.

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My general point, however, is that there are these seven general adjustments that must be made for every crime.

Feinberg: To go back for a moment, when we completed Step 3, the base offense level as adjusted by the specific offense characteristics gave us twenty-three. Step 4 will then somehow adjust twenty-three based on the so-called general considerations?

Breyer: That's right. On the general considerations involving victims, involving the offender's role, and so forth.

Feinberg: I take it that the general considerations are so pervasive that rather than identifying them for each crime, the Commission put them together as a single package.

Breyer: Absolutely right.

Feinberg: I'm beginning to understand. Step 5?

Breyer: Step 5. We have now gotten through the offense and we are going to the offender characteristic chapter, which is Chapter Four of the Guidelines. This chapter looks complicated but the only thing this chapter is interested in is the offender's prior record of convictions.

Feinberg: Just a moment. What about his prior record of arrests?

Breyer: The Commission decided not to count arrests unless they result in convictions. Considerations of fairness dictated this approach.

Feinberg: All right, then, focusing just on convictions, suppose we have one that is, say, twenty-four years old?

Breyer: Many factors are taken into account concerning prior convictions. There are "big," "medium," and "little" convictions. There are convictions that took place when the person was a juvenile and when he was an adult. There are convictions that are old and out of date and convictions that are recent.

Where a conviction is recorded shortly after a prior conviction,⁶ that's worse. Where a conviction occurs while the offender was out on parole, that's also worse. So the chapter manipulates the different kinds, forms, and varieties of prior convictions. When we talk about prior convictions, we talk about points. For example, in our case, there is one prior serious conviction. That's three points. So now what we have is the bank robbery of \$50,000, the pointing of the gun, and one prior serious conviction.

⁶ This should read "... shortly after release from imprisonment." See Afterword at p. 33 *infra*.

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the first year, fifty-four days per year good time may be deducted.

As I have indicated, the general answer to Ken's question is that the Guideline sentences are reflective of prior sentencing practices. But we should also look at some of the exceptions. What I think you should do is to remember two slogans, slogans that the Commission continuously iterates and reiterates and uses as a basis for understanding the Guidelines. The first is that, by and large, these Guidelines reflect an average of present practice. If you think the guideline sentence for your particular case dictates a result that deviates wildly from present practice, reread it. You probably got it wrong. If you haven't got it wrong, you may have an argument for a departure.

Feinberg: Just a moment, Judge. If there is one criticism that I have heard about these Guidelines, it is that they will result in more offenders' going to prison and for longer terms. I take it that is flat-out wrong.

Breyer: It is wrong but also complicated. We went through some detailed prison impact analysis. We hired a professor from MIT, we asked for assistance from the Bureau of Prisons' people, and we consulted our own excellent staff. Actually, our staff had more complete data than anybody else has ever had.

The results of a prison impact statement depend on the assumptions going in. So we had our staff create twenty different scenarios of sentencing assumptions. The results from those twenty different scenarios suggest that the Guidelines will have the following impact: At one extreme, they will lead to sentences that are 2 percent lighter than would otherwise occur, while at the other extreme, they might lead to sentences that are 10 percent heavier than would otherwise occur.

Basically, however, the results converge on an estimate that the prison population will be 6 percent greater than might otherwise occur. So the range is somewhere between -2 and +10 percent, with a 6 percent increase being most likely. Why, then, has there been such controversy?

People tend to confuse the Guidelines' impact with a totally separate phenomenon. The prison population in the federal system is likely to greatly increase, but for reasons having nothing to do directly with the Guidelines. The new mandatory drug law has increased mandatory minimum drug sentences. Our federal prison population is heavily comprised of drug offenders. These

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Feinberg: And the Commission does articulate what might be factors in aggravation or mitigation?

Breyer: Yes.

Feinberg: What if my client, the bank robber, says "Yes, I robbed a bank, but I did it to get money to feed my starving children"?

Breyer: Sounds like a good reason for departing. The Guidelines do not purport to cover in detail every reason for departing. When you read through the reasons for departure you will discover rubrics that would cover the kind of case you proposed. Whether in fact you will win a departure will depend on how well you argue your case to the judge. This is an area where advocacy and careful mustering of facts will be at a premium.

Feinberg: So, clearly, these Guidelines must not be confused with so-called mandatory sentences. The Guidelines are presumptive and the judge is not required to follow them rigorously or without exception.

Breyer: Yes, that's true. But let me point you to one thing that supports what you just said and another thing that conflicts with it. The thing that supports what you just said is contained in the first twelve pages that I said everyone should read before applying these Guidelines. Those first twelve pages include general principles, instructions, and a discussion of philosophy.

In a part, headed "departure," pages 1.6 and 1.7, you will see that the Commission states its belief that it has the power, under the statute, to limit departures. It also states that in this initial set of Guidelines, the Commission did not limit the court's departure powers. The Commission intends that sentencing courts treat each guideline as carving out a heartland, a set of typical cases embodying the conduct that each guideline describes. But the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in Guidelines, that might constitute grounds for departure in an unusual case.

Feinberg: What does that mean?

Breyer: It is going to be very much up to the bar and the bench to arrive at what is unusual. Now let me refer to language that cuts against what I just said.

There are factors that cannot be used as a basis for departure. For example, race, sex, national origin, creed, religion, and socioeconomic status cannot serve as grounds for de-

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Breyer: Well, I would say two things. First, lawyers will make a host of arguments as to why their case is special and cries out for departure. Lawyers will have a lot of material and a fair opportunity to make those arguments.

Second, I expect that judges normally will not depart except in cases they think are really unusual. We have had experience with Guidelines in Minnesota, in the State of Washington, and elsewhere; judges depart in somewhere between 5 and 10 percent—maybe sometimes a little more—of all cases handled. That means, of course, that 80 to 90 percent are not departures. That is also what I would expect to find in the federal system after the system shakes down and people begin to understand it.

Feinberg: So, in other words, Judge, you have a sense that in the end, departure will be the exception rather than the rule?

Breyer: I think so.

Feinberg: Judges will tend to adhere to the Guidelines except in a unique situation?

Breyer: I think so.

I would now like to move to an important area in which the Guidelines are more harsh than prior practice, the area of white-collar crime.

When we looked through our research on sentencing practices we discovered that people who were convicted of fraud, a white-collar crime, were treated less harshly than those convicted of theft, a blue-collar crime. We asked why that should be so. We determined that it should not, so we enhanced the fraud penalties so that they now mirror the theft penalties. We also enhanced penalties somewhat in such areas as tax evasion, antitrust, environmental crimes, and other white-collar crimes. We have done this primarily by insisting that there be less unadulterated probation and more brief terms of confinement in some kind of an institution or jail.

Feinberg: So adherence by the Commission to the principle of actual sentencing practice has not been followed in the white-collar crime area but the deviation has been slight.

Breyer: That's right. If you are representing someone convicted of insider trading, tax evasion, embezzlement, or antitrust, you can expect that the offender will serve a term of confinement—perhaps on weekends, perhaps in a community treatment center—for a month to perhaps four months. That is a change from a situation where many such offenders re-

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Feinberg: Without departure?

Breyer: Without departure. But this is a special kind of probation.

Feinberg: It's not like the probation available at levels one through six?

Breyer: No. It's a special kind of probation. It's so special that some have said, "Why are you calling its probation?" We call it probation because the statute does. What's special is that the Guidelines require the judge to impose a term of confinement but the confinement need not be prison.

Could it be in the offender's house? No. What can it be? It can be nights and weekends in jail. It can mean confinement in a community treatment center, a concept that's left open in the Guidelines. In other words, for level 7, instead of requiring that a one-month minimum be served in a prison, it may be served in a community treatment center, some kind of residential facility so that the offender could go and work in the daytime. This is why this has been controversial. For example, you take a woman who has embezzled \$15,000, who returned the money and is extremely contrite and who the judge believes will never do it again. Prior to the Guidelines, a judge might easily have given pure probation with no confinement. Under the Guidelines, the judge must confine that woman for one month in a community treatment center.

Where does this really have bite? With the tax evaders, the antitrust offenders, and the inside dealers.

Feinberg: Well, now I would like you to comment on two issues. One: How do you respond to the critic who says that when you factor in what the Commission calls probation but what is actually intermittent confinement, then the prison population explodes to maybe 30 or 40 percent higher than under pre-Guideline law?

Breyer: That is not a fair statement. We took all this into account in comparing what would happen with the Guidelines with what happened previously. This is a comparison based on some 35,000 actual cases and much additional information. After taking that into account, we concluded, as I noted earlier, that the prison population would go up by about 6 percent compared with what would happen in the absence of the Guidelines.

Feinberg: So the 6 percent includes Commission discussion of its special use of the term probation.

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Feinberg: That was your Step 1.

Breyer: That's right. Step 1 is based on the crime of conviction, not what supposedly actually happened.

Feinberg: But yet you say that there is some element of actual or real conduct that you still have to consider. How so?

Breyer: Once you are on the page corresponding to the crime charged, you will apply specific offense characteristics and general adjustments concerning victims, et cetera; you will look to what really happened. For example, it may be that the offender wasn't charged with hurting the teller during the robbery. We know that pre-Guidelines robbers who were convicted of robbery and hurt a bank teller received increased sentences.

Feinberg: Now, Judge, here is a critical question. What if there is other relevant conduct that really happened and that is not articulated in the specific offense characteristics? Is the court permitted to consider that other conduct in reaching its base offense level?

Breyer: The answer is no. The court is not permitted to consider that other conduct in applying the Guidelines. If, however, the court is considering a departure, it could consider what really happened. For example, suppose your client was convicted of tax evasion. There is nothing in the tax evasion guideline (and in this respect it is unlike the robbery guideline) that increases the tax evasion penalty if the tax evader punched the tax officer in the nose. If that happened it would perhaps be a ground for a departure. The judge could consider the punch in respect to departure but not in respect to applying the Guidelines.

Feinberg: But then I don't understand why you claim that this is such a controversial issue. Certainly, under the old law, when a judge had the presentence report in front of him or her and was engaged in the traditional function of sentencing, the judge took into account all sorts of activity reflected in the presentence report and that may not have been part of the actual articulated charge. Why, then, is this Guideline approach so controversial?

Breyer: I think your analogy is accurate. However, many people are saying, "Isn't it unfair that the person should be sent to prison because he punched the teller in the nose when he hasn't been charged with or convicted of punching?" And I say to that person: You may be right but we have made an improvement in the prior system.

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single scheme involving the robbery of three banks. He took \$5,000 from bank 1, \$10,000 from bank 2, \$20,000 from bank 3. Remember, there is a specific offense characteristic for money. Should the Judge look only at the \$5,000 from bank one or add in the \$10,000 and \$20,000 from the others so that we have \$35,000? In the case of fraud we take all the money into account while in the case of bank robbery we don't.

Feinberg: Why not?

Breyer: Because pre-Guideline practice simply wouldn't agglomerate the money from a number of different bank robberies where only one was the charged conviction. The practice was reflected in the way the relevant conduct standard was written—and that conduct standard was not easy to write to reach that result. You have to study the language with care. This will lead you to the result of agglomerating all the money in the case of fraud, but not all the money for uncharged, unconvicted prior bank robberies.

One further point here: How much money was taken and whether the teller was hurt or wasn't hurt are matters that may be contested in a sentencing hearing before the judge.

Feinberg: What is your third key issue?

Breyer: Before we get to the third issue, I hope that our lawyer readers now have a nagging question. I hope that the practitioners are worried about the following: "How do I engage in plea bargaining now? What good does it do me in a fraud case to bargain the U.S. Attorney down from ten counts with \$100,000 to one count with \$10,000? What good does that bargain do if punishment is based on the entire \$100,000 regardless of whether one count or ten counts is charged?" That is a question that ought to be on your minds and will be answered soon. Let's now go to issue three: What do the Guidelines do about multiple counts? This is the most difficult conceptual issue in the Guidelines.⁸

Multiple Counts

Feinberg: Judge, the truth is, I don't understand how the Guidelines deal with multiple counts.

Breyer: I hope I do. But—no guarantees!

⁸ For further explanation, see Breyer, "The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest," 17 Hofstra L. Rev. 1 (1988).

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Feinberg: Merge them.

Breyer: Exactly, you merge them. The conspiracy or attempt drops out and you punish for the most serious crime—the completed offense.

Feinberg: That's the approach of the Model Penal Code and most criminal codes.

Breyer: Now let us take the second easiest situation where all the counts involve money or they all involve drugs, fungible items. And, by the way, the Commission treats all drugs as fungible.

Feinberg: Why?

Breyer: We have tables that convert one kind of drug into another so that all are alike for sentencing purposes. The Guidelines take multiple counts of a fungible item like drugs or money, compress them, add up the amounts, and direct you to the regular tables. You punish according to the total amount of money or drugs involved. You see, it doesn't do the U.S. Attorney any good to take an offense and divide it into ten counts because he is going to get the same results as if it were just one.

The third type of case is really the toughest. Suppose that in one count a defendant is charged with punching somebody in the nose and in another count he is charged with robbing somebody else.

Feinberg: You take the more serious of the two.

Breyer: Always. Always take the more serious. But wait. Actually we are not yet at that point. The first thing that we have to do is determine how many separate offenses there really are. What's a separate offense? We have rules for that. If you stab somebody and rob them, for example, that is counted as one offense. If you stab two people that's two offenses.

Feinberg: Do these rules reflect actual sentencing practices before these Guidelines?

Breyer: To a degree. There is an effort to rationalize them. The Guidelines do not correspond perfectly to ordinary intuition so departures may often be necessary. The rules attempt to define the separate real "things" or "events." When you have several separate "things" or "events," like one stabbing and one robbery, you add them up. But you add them up according to a chart that uses the word units. When you have two units, you do not get double punishment. Instead, you get about a 30 percent increase in punishment. When you have five units, you do not get

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Where you don't know what you are doing, it is advisable to do nothing. We received advice from people who said that plea bargaining was a wonderful, or at least necessary, institution. They said that defense attorneys and prosecutors know more about what is going on than judges and that it's a good idea to let them bargain. We received exactly the opposite advice from others who said that it is a terrible institution and should be abolished.

When we looked for nationwide studies to tell us what really happens in plea bargaining we found no such study. We concluded that we didn't know what really happens in plea bargaining, and therefore did the following:

We said that the defense attorney and the prosecutor must talk with the probation officer and that the probation officer must write up a presentence report stating what the officer thinks really happened. The attorneys have an ethical obligation not to mislead the probation officer. The judge sees that report and the probation officer informs the judge of what sentence is called for under the guidelines for what really happened.

The Guidelines next foresee the U.S. Attorney's and the defense lawyer's going to the judge and saying, "Judge, we have reached an agreement that the Guidelines sentence is not what should happen. Something different should happen." The Judge is to say, "Why should something different happen?" The lawyers are supposed to explain why. And the Guidelines say: Judge, if you think there is a reason, a justifiable reason, for accepting the plea agreement, accept it. Of course, that's just what happens under Federal Rule of Criminal Procedure 11 today as to the judge's having power to accept or reject the bargain. The Commission collects these statements of reasons and then, over time, we will be in a better position to do or not do something about the plea agreement process.

Feinberg: But all of that occurs only in a formal Rule 11 plea agreement. How do you respond to the argument that the Guidelines shift the power from the judge at sentencing, under the old system, to the prosecutor? There is little incentive to plead guilty, since the Guidelines reflect, in advance, the sentence for the defendant who pleads guilty. Therefore, what you have really done is merely shift discretion away from the judge to the prosecutor, who will now decide whether or not to go under Rule 11.

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will in fact change. Obviously, it takes two to bargain. So if either the defense attorneys or the Department of Justice decides it doesn't want to bargain, you will find less bargaining. But I note that in Minnesota and in the state of Washington, where we have some experience with guidelines, the amount of plea bargaining has not changed significantly.

Feinberg: Judge, we do want to reach our fifth and final controversial issue and that deals with the issue of procedural concerns. What do you mean by that?

Procedures

Breyer: Well, each district court will have its own procedural rules as to how sentencing is carried out. The Model Rule I mentioned earlier foresees something like the following: There is a conviction or a plea of guilty. The Judge then sets a date for sentencing, thirty to fifty days in the future. The probation officer then develops a presentence report organized according to the Guidelines categories which reflects the probation officer's view of what really happened. The probation officer will interview the U.S. Attorney and the defense attorney as a step in putting together this report.

Feinberg: As he did before the Guidelines were in effect.

Breyer: That's right. However, now this report will perhaps be even more significant.

Feinberg: Why is that?

Breyer: Because it's supposed to reflect what really occurred, and in most districts you may find the judge reading the report and accepting it as an account of what really occurred.

Feinberg: Now let's stop here for one minute. Under pre-Guidelines law, clearly upheld by the Supreme Court, the probation report could reflect everything.¹⁰ That the presentence report may reflect everything either before or after the Guidelines is to me of no moment. What I really want to focus on, Judge, is: Why is this so controversial? What is the impact under the Guidelines of a challenge by the convicted offender to something reflected in the presentence report that is alleged to be a real conduct element?

Breyer: You put your finger on the controversial part and the

¹⁰ See, e.g., *Williams v. New York*, 337 U.S. 241 (1949).

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table there is enormous overlap from one level to the next. The reason for that overlap is that if, say, there is a dispute over whether the amount stolen is \$10,000 or \$20,000—a difference that could lead to an increase by one level—the judge could say that there is no need to resolve that issue because you will get the same sentence whether it's level 15 or level 16.

Feinberg: Because of the overlap?

Breyer: Yes, because of the overlap.

Feinberg: Let me conclude and then ask Judge Breyer also to conclude. There are two issues that I think everybody should consider in their overview and examination of the Guidelines. First, with some exceptions, the Guidelines reflect the sentencing practices that occurred in our federal courts before the Guidelines were put into place. The underlying ideology of these Guidelines is not to be tougher or more lenient on criminals but rather to reflect, although with greater consistency and fairness, what went on in the federal system before the Guidelines. Secondly, we must go slowly. We have an ongoing Commission that will recommend changes. We are not sure how this will work, so let's go slow and monitor what happens in practice. Judge, your final thoughts on these Guidelines.

Breyer: Well I'd like you to remember the basic rule: For the typical case, follow the guideline; for the unusual case, depart. I'd like you to remember that the Guidelines are complicated, particularly some of the areas discussed in the latter part of this dialogue. But these complications are not something we created; they exist today. Every judge has in his mind a drug equivalency table; it just may not be explicit and conscious. And every judge may have a different one, or the same judge may apply a different table at different times. The third thing to remember is that this is a beginning effort, an effort to make the system a bit more fair. We may gradually achieve increasing uniformity over a period of quite a few years.

Afterword

On September 19, 1989, Editor-in-Chief Fred Cohen interviewed Judge Stephen G. Breyer. Their interview follows.

Cohen: Since the original dialogue between you and Ken Feinberg, we have learned that there are some changes in store for the Guidelines, some corrections or explanations that you may

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down precisely but there are no *obvious* mistakes that the Commission made.

We had to work with a statute that requires us to have drastically more severe sentences for three-time losers in an armed robbery. Well, that automatically tends to increase the average level of the guideline sentence. We discovered that for first offenders our armed robbery sentences roughly replicated what first offenders previously had been sentenced to. However, for second offenders or those who might rob several banks closely related in time, it looked as if the Guidelines were in fact somewhat more lenient than what had been the typical sentences in the past.

Cohen: So the basic problem existed when we looked beyond the first-offense robbery?

Breyer: That was the problem the Commission found and then, in my opinion, went overboard in trying to cure it by raising the Guidelines excessively.

I could understand how somebody viewing the same numbers could have argued that our prior guideline was a bit on the lenient side. I felt that there was *no* justification for increasing it four or five levels, which is what some wanted to do. So we worked out a compromise of about three levels which, in my opinion, is at the bounds of reasonable disagreement.

Cohen: Fair enough. Let me see if I can test—if this is a fair question at this point—how that change might work given the example that you took us through [pp. 9–14 *supra*]. Would you agree that in light of the new Guidelines, which will be in effect in November 1989, your conclusions should be something to this effect: So, now we have twenty plus one, which is level 21, plus three, which is level 24, plus two, which is level 26. In other words, we have gone from your earlier conclusion of level 23 to level 26 in light of the new Guidelines.

Breyer: That's exactly right. With one prior conviction the sentence would have been fifty-one to sixty-three and now it would be seventy to eighty-seven months.

Cohen: On [p. 12] you state that cooperation is a way to show remorse in order to gain a reduction for acceptance of responsibility.

Breyer: That is only one way. Cooperation may be shown through a guilty plea and through a variety of other ways.

Cohen: Do you also mean cooperation in the presentence investigation?

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want to add that we haven't touched on or that you wished you had gotten into earlier with Ken Feinberg.

Breyer: Well, so far the good news is that in the first several months of their serious application following *Mistretta*, preliminary figures based on several thousand cases indicate that the Guidelines are being applied in about 82 percent of the cases and that judges are departing in only about 18 percent of the cases.

I would call that result quite good, particularly for the first year, because it suggests that judges knew of their power to depart yet did so infrequently. That fact is some evidence that the Guidelines produced a fair sentence in the vast majority of the cases. They seem to be achieving their objective of creating greater uniformity of sentencing in federal courts and thus eliminating the unfairness of disparity. So, for the first year, I think that figure is better than I would have predicted.

Cohen: Do you have enough information to reflect on whether or not lawyers who are practicing under the Guidelines are becoming more and more familiar and sophisticated with the rules?

Breyer: They are getting there—that's impressionistic. Your question does bring to mind another figure that is quite interesting. About 90 percent of the cases are still being settled through guilty pleas. This is contrary to the dire predictions of many that suddenly, because of the Guidelines, "everyone" is going to insist on a trial. Obviously there are a lot of sentencing issues coming up to the appellate courts and the appellate courts are deciding the issues. In other words, no breakdown in the system has occurred and it doesn't seem likely to occur.

It remains terribly important that the bar and the bench learn how to work with the Guidelines, because they are flexible enough to produce fair results through a sensitive use of departure powers in nearly every case. But lawyers have to understand them and have to know enough about how they were created to be able to work with them and with the Commission so that the work of improvement and refinement will continue.

**THE FEDERAL SENTENCING GUIDELINES:
STRIKING AN APPROPRIATE BALANCE**

William W. Wilkins, Jr.

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ARTICLES

The Federal Sentencing Guidelines: Striking an Appropriate Balance*

*William W. Wilkins, Jr.***

INTRODUCTION

Prior to the new federal sentencing guidelines, federal judges exercised virtually unreviewable discretion when sentencing. Too often, Congress decided, this discretion resulted in unwarranted disparities in sentences imposed on similar defendants convicted of similar crimes.¹

The Sentencing Reform Act of 1984 envisioned the creation of

* Portions of this article were derived from the following United States Sentencing Commission publications: SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (June 18, 1987); ANNUAL REPORT (1989); MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991); and GUIDELINES MANUAL (Nov. 1991).

** Judge, United States Court of Appeals for the Fourth Circuit; Chairman, United States Sentencing Commission.

¹ Commenting on the pre-guidelines sentencing system at a 1983 hearing, one member of Congress stated:

Sentencing is a scandal that permits the courts to play judicial roulette in determining whether defendants convicted of violent crimes go free or go to jail. Almost every day, the press reports the abuses caused by the unfettered discretion of judges in criminal sentencing. Excessively harsh sentences and incredible examples of leniency proliferate side by side, and undermine public confidence in our system of justice.

Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 3 (1983) (statement of Sen. Edward M. Kennedy).

typically involved rather evenly balanced sets of competing considerations. These complex issues required sophisticated solutions.

I. STRIKING AN APPROPRIATE BALANCE

A. *Proportionality Versus Uniformity*

One of the guidelines' major goals was to increase uniformity in sentencing by narrowing the wide disparity among sentences that hundreds of different federal courts were imposing on similar offenders convicted of similar criminal conduct. The increase in uniformity, however, was not to be achieved through sacrificing proportionality. Instead, the guidelines authorize different sentences for crimes of significantly different severity.³

While a very simple system may produce uniformity, it cannot satisfy the requirement of proportionality. For example, the Commission ostensibly could have achieved perfect uniformity simply by specifying that every defendant convicted of robbery would receive a two-year prison sentence. Doing so, however, would have destroyed proportionality. In addition, guidelines of this kind would likely be ineffective because their unreasonableness would ensure that ways would be found to subvert them. Similarly, having a few simple, general categories of crimes might make the guidelines easy to administer, but only at the cost of lumping together offenses that are different in important respects.⁴

On the other hand, a sentencing system tailored to account for every conceivable offense and offender characteristic would quickly become too complex and unworkable. Complexity can seriously compromise the certainty of punishment and its deterrent effect. The larger the number of subcategories in a guidelines system, the greater the complexity and the less workable the

³ See 28 U.S.C. § 991(b)(1)(B) (1988).

⁴ For example, a single robbery category that lumped together armed and unarmed robberies, robberies with and without injuries, and robberies of a few dollars and millions would have been far too simplistic to achieve just and effective sentences, especially given the narrowness of the legislatively required sentencing guidelines ranges. If the guidelines-specified sentence 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% or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment. 28 U.S.C. § 994(b)(2).

even more complex.⁶ Given the impracticality of attempting to include in the guidelines every distinction that might appear relevant in sentencing, it would have been tempting to retreat to the simple, broad-category approach that some states utilize. State guidelines systems that use relatively few categories and narrow imprisonment ranges, however, are ill-suited to the federal criminal law. Indeed, the bulk of serious federal crimes might well be treated as departures from such guidelines.⁷ To permit a court to impose proportional sentences within the guidelines, a simple broad-category approach would require broader guidelines ranges than the six-month or twenty-five percent width that the Sentencing Reform Act allows. The Commission considered, but ultimately rejected, employing specific factors with flexible adjustment ranges (for example, one to six levels depending on the degree of damage or injury). Because of the broad discretion that it entails, such an approach would have risked correspondingly broad disparity in sentencing; different courts would have exercised their discretionary powers in significantly different ways. Either of these approaches would have risked a return to the wide disparity that Congress established the Commission to reduce. In short, either of these approaches would have violated the spirit and letter of the Sentencing Reform Act.

In the end, the Commission had to balance the comparative virtues and vices of broad, simple categorization with detailed, complex subcategorization and devise a system that could most effectively meet the statutory goals of sentencing reform. Any system developed would, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

Hugh Wagner & Kenneth Pease, *On Adding Up Scores of Offence Seriousness*, 18 BRIT. J. CRIMINOLOGY 175 (1978).

⁶ Incapacitation, for example, calls for incarcerating offenders primarily on the basis of predictions of the likelihood that they will commit future crimes. To the extent that a sentencing system seeks to protect the public from the defendant's future crimes, the sentences that would result purely from harm rankings likely would be inappropriate. Similarly, some crimes that are less harmful than others may require greater sentences to provide adequate deterrence.

⁷ Various state guidelines, for example, have recommended departures for "major economic offenses" and "major controlled substance offenses." Both terms are broadly defined and could well encompass a majority of federally-prosecuted fraud and drug offenses.

The Commission recognized that a charge offense system had drawbacks of its own. One of the most important was the potential it afforded prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Several factors, however, served to guard against this count manipulation. First, the defendant's actual conduct imposes a natural limit upon the prosecutor's ability to affect the sentence. Moreover, the Commission wrote its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation.⁸ Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power.⁹ Finally, the Commission closely monitors charging and plea agreement practices and will make appropriate adjustments to the guidelines should they become necessary.

C. Use of a Defendant's Prior Criminal History

Congress directed the Commission to determine the relevance of criminal history in establishing guidelines categories of defendants.¹⁰ The guidelines' criminal history component thus addresses the statutory sentencing purposes of just punishment and the protection of the public from the defendant's future misconduct.¹¹ Enhancing a defendant's sentence on the basis of criminal history furthers the crime control goals of general and specific deterrence as well as incapacitation. It is also consistent with public perceptions of just punishment. The use of criminal history to adjust a defendant's sentence is similarly consistent with historical sentencing practice. Analyses of past practices in different jurisdictions have consistently shown a defendant's prior criminal record to be one of the key determinants of sentence length.¹²

From a just punishment perspective, a defendant with a criminal history is deemed more culpable and deserving of greater

⁸ For example, the guidelines treat a three-count indictment (each count of which charges the sale of 100 grams of heroin or theft of \$10,000) the same as a single-count indictment charging the sale of 300 grams of heroin or theft of \$30,000.

⁹ See discussion *infra* subpart F.

¹⁰ 28 U.S.C. § 994(d)(10).

¹¹ See 18 U.S.C. § 3553(a).

¹² See RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 83-87 (Alfred Blumstein et al. eds., 1983).

D. Use of Past Practice Data

The Commission sought to resolve the practical problems of developing a coherent sentencing system by taking an empirical approach that grounds itself in existing sentencing practices. To determine pre-guidelines sentencing practices, including the distinctions significant in past practice, the Commission analyzed and considered the following: detailed data drawn from more than 10,000 presentence investigation reports; less detailed data from approximately 100,000 federal convictions; distinctions made in substantive criminal statutes; the United States Parole Commission's guidelines and resulting statistics; public commentary; and information from other relevant sources. The Commission accepted, modified, or rationalized the more important of these distinctions in formulating the initial set of guidelines. This approach, while criticized by some as insufficiently radical, clearly appears to be the one Congress contemplated.¹⁵

This empirical approach provided a concrete starting point and identified a list of relevant distinctions that, although considerably lengthy, was sufficiently short to create a manageable set of guidelines. The categories discerned from the analysis were relatively broad, and they omitted distinctions that some may believe important; nevertheless, they included most of the major distinctions that statutes and data suggest tend to make a significant difference in sentencing decisions. Important distinctions that rarely occurred remained to form the basis for a departure from the guidelines. Again, this appears to be the result the drafters of the legislation contemplated.¹⁶

The Commission's pragmatic approach does not imply that it ignored philosophical issues. Rather, the Commission attempted to reach results that were consistent with the differing philosophies. Thus, the Commission reviewed the guidelines' relative ranking of offenses to ensure that they were reasonably consistent with a "just deserts" philosophy. At the same time, the Commission generally viewed specific sentences as acceptable from a crime control perspective. The emphasis on increased certainty of punishment primarily serves the crime control goal of deterrence, but is also compatible with most views of just desert because of the greater consistency it provides. While the criminal

¹⁵ See H.R. REP. NO. 1017, 98th Cong., 2d Sess. 100 (1984).

¹⁶ See S. REP. NO. 225, 98th Cong., 1st Sess. 166, 168 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260, 3360.

crimes, such as embezzlement, fraud, and tax evasion, were considerably lower than those for the substantially equivalent crime of larceny. In light of the legislative history supporting higher sentences for white-collar crime,¹⁹ the Commission made a policy decision to adopt a guidelines structure under which all property crimes of similar seriousness would be treated essentially the same.

It is important to note, however, that in some instances, the Commission's examination of past sentencing practices was superseded by Congress's passage of mandatory minimum statutes²⁰ and express legislative directives.²¹ Mandatory minimums' one-dimensional approach to sentencing creates specific anchor points for certain quantities of drugs around which the guidelines must operate. To preserve proportionality in sentencing, the guidelines' more sophisticated calibrated approach takes into account gradations of offense seriousness, criminal record, and level of culpability.

E. Consideration of Individual Offender Characteristics

The Commission's authorizing legislation required it to consider whether a number of offender characteristics have "any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant.²² These characteristics are:

- (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;

¹⁹ See S. REP. NO. 225, 98th Cong., 1st Sess. 77, 177 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3260, 3360.

²⁰ See, e.g., the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

²¹ See S. REP. NO. 225, 98th Cong., 1st Sess. 177, 177-78 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3360-61.

²² 28 U.S.C. § 994(d).

F. Departures

A court is permitted by statute to depart from a guidelines-specified sentence when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."²⁶ Accordingly, the Commission intends 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 should consider whether a departure is warranted.

The Commission adopted this departure policy for several reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to sentencing. The guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in preguidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in preguidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not lead the Commission to conclude that the factor was empirically important in relation to the particular offense. Second, the Commission recognized that the initial set of guidelines need not attempt to specify every possible departure consideration. The Commission is a permanent body, empowered by law to amend the guidelines with progressive changes over many years. Thus, by monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

II. BENEFITS OF THE GUIDELINES

The guidelines are the core of a new federal sentencing system that is more honest, fair, and certain than the system under "old

²⁶ 18 U.S.C. § 3553(b).

matched categories, similar offenders convicted of similar bank robberies receive dramatically more similar sentences under the guidelines than did comparable offenders sentenced under preguidelines practices. For example, for bank robbery offenders with little or no criminal history who committed their offense without a weapon, the spread of sentences imposed for preguidelines offenders is 0 months (probation) to 120 months; meanwhile, the spread of sentences for offenders under the guidelines is 0 to 60 months, a dramatic reduction. The analysis reveals that the middle 80% of preguidelines offenders receive sentences between 4 and 120 months. In comparison, the middle 80% of guidelines offenders receive sentences between 21 and 42 months. The study found that this reduction following guidelines implementation is statistically significant.

The analysis also examined the question of estimated time to be served in recognition of the Parole Commission's major role in determining the actual period of incarceration. An examination of offenders with little or no criminal history who committed bank robberies without a weapon shows that the spread of preguidelines offenders' time to be served is 0 to 40 months, while the spread of guidelines offenders' time to be served is 0 to 52.3 months, an apparent widening of the range under the guidelines. However, the spread of the middle 80% of preguidelines offenders' time to be served is 4 to 40 months. The spread of the middle 80% of guidelines offenders' time is 21 to 38 months. This represents a decrease in the range of time to be served for the middle 80% from a spread of 36 months preguidelines to a spread of 17 months under the guidelines, a substantial reduction in the middle 80% range of time to be served. For the vast majority of cases under the guidelines, there is a dramatic reduction in disparity.

The analysis of offenders convicted of bank embezzlement suggests that there has been a reduction in the spread of sentences imposed and expected time to be served. Small sample sizes prevented most comparisons of heroin offenders sentenced under preguidelines and guidelines. However, in the one group with a sufficiently large sample size, the results for defendants convicted of distributing between 100 and 400 grams of heroin, disparity is reduced under the guidelines for both sentences imposed and time to be served. The cocaine disparity study suggests that, since guidelines implementation, the spread of sentences

**TWENTY YEARS OF OPERATIONAL USE OF
A RISK PREDICTION INSTRUMENT:
THE UNITED STATES PAROLE COMMISSION'S
SALIENT FACTOR SCORE**

Peter B. Hoffman

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TWENTY YEARS OF OPERATIONAL USE OF A RISK PREDICTION INSTRUMENT: THE UNITED STATES PAROLE COMMISSION'S SALIENT FACTOR SCORE

PETER B. HOFFMAN¹

United States Sentencing Commission
Washington, D.C. 20002-8002

ABSTRACT

Although empirically-based recidivism prediction instruments were developed as far back as the 1920s, the adoption of the Salient Factor Score by the federal parole board in 1972—as part of a system of explicit parole decisionmaking guidelines—marked the first time that such an instrument was used in a way that had a definite, measurable impact on paroling decisions. The Salient Factor Score has been used in federal parole decisionmaking continuously for the past twenty years. It is axiomatic that a prediction instrument, particularly an instrument used in actual case decisionmaking, be re-validated periodically to ensure that it has retained predictive accuracy. In this article, the predictive accuracy of the Salient Factor Score over time is examined using data on three, large random samples of federal prisoners released in 1970–1972, 1978, and 1987. In addition, the relationship of the Salient Factor Score to the Criminal History Score of the new federal sentencing guidelines—which apply to defendants convicted of federal offenses committed on or after November 1, 1987—is discussed.

For the past twenty years, the United States Parole Commission has used an empirically-developed recidivism prediction instrument, called the *Salient Factor Score*, as part of a system of explicit parole decisionmaking guidelines. The most recent version of the Salient Factor Score (SFS 81) has been used by the U.S. Parole Commission since August 1981. This instrument, which is composed of six items, is shown in Appendix 1. The parole guidelines and Salient Factor Score were first used by the U.S. Parole Commission in a pilot project that began in September 1972.

By June 1974, their use had been expanded to all federal parole selection decisions on a permanent basis. To date, the parole guidelines and Salient Factor Score have been applied in more than 200,000 cases.

Parole recidivism prediction instruments had been developed as far back as the 1920s (see e.g., Bruce et al., 1928; reviews of the early prediction literature are found in Gottfredson, 1967; Simon, 1971; and Gottfredson, Wilkins, and Hoffman, 1978). Nevertheless, at the time the U.S. Parole Commission began consideration of the operational use of a

category and offender (parole prognosis) category, a guideline range (in months) is set forth on the guidelines grid. This guideline range represents the U.S. Parole Commission's policy as to the appropriate time to be served in prison before release assuming the prisoner has acceptable institutional conduct. For example, the guideline range is twenty to twenty-six months of imprisonment for a defendant with a Category Four offense (e.g., a fraud of \$50,000) and good parole prognosis (e.g., a Salient Factor Score of 7). In contrast, the guideline range is sixty-four to seventy-eight months of imprisonment for a defendant with a Category Six offense severity rating (e.g., a robbery with bodily injury) and fair parole prognosis (e.g., a Salient Factor Score of 5).

The adoption of the parole guidelines was not intended to eliminate the exercise of all discretion. Rather, it was an attempt to steer a path between the evils of completely unstructured and unguided discretion and those of a rigid, fixed, and mechanical approach. The parole decisionmaker retains discretion as to selection of the particular point within the guideline range. In addition, decisions outside the guidelines—either above or below—may be made if there are significant aggravating or mitigating factors in the particular case that are not taken into account in the guidelines themselves, provided that specific written reasons for the departure from the guideline range are provided to the prisoner. Circumstances that might warrant a departure from the guideline range include, for example, particularly aggravating or mitigating offense factors or a determination based upon the decisionmaker's clinical judgment, supported by specifics, that the defendant is a significantly poorer or better risk than indicated by his or her Salient Factor Score. Specific illustrations of circumstances that may warrant a departure from the parole guidelines are set forth in the U.S. Parole Commission's Rules and Procedures Manual (United States Parole Commission, 1991).

The guideline ranges described above are predicated upon good institutional conduct. Disciplinary infractions in the institution may result in a later release date. On the other hand,

sustained superior program achievement in the institution, particularly for prisoners serving longer terms, may result in an earlier release date. Supplementary guidelines for the consideration of disciplinary infractions and superior program achievement are set forth at 28 C.F.R. §§2.36 and 2.61 (Code of Federal Regulations, 1991) and structure determinations with respect to these factors. Conceptually, these supplementary guidelines may be thought of as a third dimension of the parole guidelines grid.

The U.S. Parole Commission provides initial hearings to most prisoners within six months after arrival at a federal prison. At this initial hearing, a presumptive release date is set. Once set, a presumptive release date is subject to modification for disciplinary infractions or sustained superior program achievement. Thus, disciplinary infractions and superior program achievement, where present, are generally taken into account by a modification of the presumptive release date that was set at the initial hearing. For a discussion of the development and rationale of the presumptive release date approach, see Stone-Meierhoefer and Hoffman (1982).

The parole guidelines clearly structure the U.S. Parole Commission's exercise of discretion. For example, during 1981-1990 only approximately 11 percent of the U.S. Parole Commission's decisions at initial parole hearings were discretionary decisions to set a release above or below the applicable guideline range.²

DEVELOPMENT OF THE SALIENT FACTOR SCORE

The most recent version of the Salient Factor Score (SFS 81) has been used by the U.S. Parole Commission since August 1981. This instrument was constructed and validated using a two-year follow-up period and an outcome measure that defined unfavorable outcome as any new sentence of imprisonment of sixty days or more or return to prison as a parole violator. For a description of the development and initial validation of this instrument, see Hoffman (1983). Hoffman and

control raises a substantial question of fairness. For example, employment stability, an item used in previous versions of the Salient Factor Score, is an item that may be beyond an individual's control in a variety of circumstances (e.g., a severe recession). To the extent that the items included in a prediction instrument are compatible with a just deserts approach, the tension between a predictive approach and a just deserts approach will be reduced. The revision of the Salient Factor Score to rely primarily on criminal history items, items that are compatible with both a just deserts and predictive approach, was designed in part to reduce this tension.

The Salient Factor Score is what may be called a *static* prediction instrument. That is, it measures information available at the time the defendant is sentenced. Except in some unusual circumstance, this information will not change during the prisoner's confinement. Since the development of the Salient Factor Score, there have been efforts to develop *dynamic* prediction instruments—instruments that can measure change in the likelihood of recidivism over the duration of the prisoner's sentence (Gendreau, Cullen, and Bonta, 1994; Andrews and Bonta, 1994). Notwithstanding the potential uses of dynamic prediction instruments in a number of contexts, such as in determining the intensity of probation or parole supervision, dynamic prediction instruments have less relevance for determining the length of imprisonment in a system that has substantial determinacy, such as the federal parole system. As noted above, the U.S. Parole Commission operates with a procedure under which most prisoners are heard shortly after commitment and assigned presumptive release dates, subject to modification for disciplinary infractions or superior program achievement. Similarly, in a fully determinate sentencing system—a sentencing system in which a prisoner is given a fixed prison term on the date of sentencing—any advantage of a dynamic prediction instrument would be inapplicable because the decision must be made at a single point in time and is not subject to modification.

VALIDATION OF THE SALIENT FACTOR SCORE—PRIOR RESEARCH

The stability of the predictive accuracy of a prediction instrument over time is an important consideration, particularly for a prediction instrument used in making actual case decisions. Hoffman (1983) reported the predictive accuracy of the Salient Factor Score (SFS 81) using two, large random samples of federal prisoners released six to eight years apart. The prisoners in the first sample (Sample 1; $n = 3,955$), the sample that was used as the construction sample in developing SFS 81, were released in 1970, 1971, and 1972.⁴ The prisoners in the second sample (Sample 2; $n = 2,339$), the sample that was used as the validation sample in developing SFS 81, were released in 1978.⁵ The samples were drawn from the population of federal prisoners serving sentences of more than one year and one day who were released to the community (cases released to deportation or other detainer warrants were excluded). Cases were selected for each sample by the last digit of the prison identification number. As prison identification numbers are assigned sequentially upon admission, this method provides a reasonable approximation of random selection.⁶ All three major forms of release in the federal system—parole, mandatory release (with supervision), and expiration of sentence (without supervision)—were included.

Follow-up information for each case, regardless of the method of release, was obtained from "rap sheet" records provided by the Federal Bureau of Investigation. A uniform, two-year follow-up period calculated from the month of release was used for each case.⁷ Unfavorable outcome was defined as any new sentence of imprisonment of sixty days or more resulting from an arrest during the follow-up period, any return to prison for parole violation during the follow-up period, any parole violation warrant outstanding at the end of the follow-up period, or the death of the subject while committing a criminal act during the follow-up period. To minimize the problems associated with arrests having missing dispositions, one-half of the cases with

TABLE 1(B)

PERCENTAGE (AND NUMBER) OF CASES WITH UNFAVORABLE OUTCOME (NEW SENTENCE OF IMPRISONMENT OF SIXTY DAYS OR MORE OR RETURN TO PRISON AS PAROLE VIOLATOR) BY SALIENT FACTOR SCORE CATEGORY (SFS 81) FOR SAMPLES 1 AND 2 USING A TWO-YEAR FOLLOW-UP PERIOD

Salient Factor Score Category	Sample 1 (Prisoners Released in 1970, 1971, and 1972)	Sample 2 (Prisoners Released in 1978)
Very good risk (scores 10-8)	10 (825)	12 (735)
Good risk (scores 7-6)	23 (830)	25 (502)
Fair risk (scores 5-4)	37 (947)	39 (542)
Poor risk (scores 3-0)	46 (1,353)	49 (560)
All cases	31 (3,955)	30 (2,339)
Point-biserial correlation coefficient	.30	.32
Mean cost rating (MCR)	.35	.39

Note: Unfavorable outcome is defined as any new sentence of imprisonment of sixty days or more resulting from an arrest during the two-year follow-up period, any return to prison for parole violation during the follow-up period, any parole violation warrant outstanding at the end of the follow-up period, or killed while committing a criminal act during the follow-up period.

revalidated periodically to ascertain whether the instrument retains predictive power when applied to current cases (see e.g., Wilkins, 1969: 69-70). This is because the fact that a prediction instrument has demonstrated a particular degree of accuracy with respect to the samples upon which it was constructed and originally validated does not ensure that it will retain predictive accuracy over time.

Information is now available that enables examination of the stability of the predictive accuracy of the Salient Factor Score (SFS 81) for an additional validation sample—a random sample of federal prisoners released in 1987. The prisoners in this sample (Sample 3) were released fifteen to seventeen years after the release of the prisoners in Sample 1 and nine years after the release of prisoners Sample 2. Sample 3 ($n = 1,092$) is a 35 percent random sample of federal prisoners serving sentences of more than one year and one day who were released to the community during the first six months of 1987. The same selection criteria were used for Sample 3 as for Samples 1 and 2. That is, Sample 3 includes all major forms of release to the community: parole, mandatory release, and expiration of sentence. Cases released to detainer or deportation warrants were excluded.

The data for Sample 3 used in this revalidation of the Salient Factor Score were collected by the Office of Research and Evaluation of the U.S. Bureau of Prisons as part

of a larger study of recidivism.⁹ As in previous U.S. Parole Commission/U.S. Bureau of Prisons recidivism studies, information on the background characteristics of each prisoner were coded from the prisoner's case file. The Salient Factor Score determined by the U.S. Parole Commission in actual case decisionmaking was available for the vast majority of prisoners. In contrast, the Salient Factor Score items for Sample 1 had to be coded by research staff from the case files because the Parole Commission was not yet using the Salient Factor Score. For Sample 2, the Salient Factor Score items were also coded by research staff from the case files because the Parole Commission had amended the scoring instructions for certain items between the time the prisoners' cases were heard by the U.S. Parole Commission and the time the research was conducted.

Follow-up information was obtained from rap sheet records provided by the Federal Bureau of Investigation. A uniform three-year follow-up period for each case from date of release was used. Unfavorable outcome was defined as any new arrest during the follow-up period, any return to prison as a parole violator during the follow-up period, or any parole violation warrant outstanding at the end of the follow-up period.

Although the Salient Factor Score (SFS 81) was developed and validated using a two-year follow-up period and a new commitment of

TABLE 2(B)

PERCENTAGE (AND NUMBER) OF CASES WITH UNFAVORABLE OUTCOME (NEW CRIMINAL ARREST OR RETURN TO PRISON AS PAROLE VIOLATOR) BY SALIENT FACTOR SCORE CATEGORY (SFS 81) FOR SAMPLES 2 AND 3 USING A THREE-YEAR FOLLOW-UP PERIOD

<i>Salient Factor Score Category</i>	<i>Sample 2 (Prisoners Released in 1978)</i>	<i>Sample 3 (Prisoners Released in 1987)</i>
Very good risk (scores 10-8)	21 (722)	16 (436)
Good risk (scores 7-6)	39 (476)	29 (161)
Fair risk (scores 5-4)	56 (495)	45 (204)
Poor risk (scores 3-0)	65 (493)	67 (291)
All cases	43 (2,186)	37 (1,092)
Point-biserial correlation coefficient	.35	.43
Mean cost rating (MCR)	.40	.49

Note: Unfavorable outcome is defined as any arrest for a criminal offense during the three-year follow-up period, any return to prison for parole violation during the follow-up period, or a parole violation warrant outstanding at the end of the follow-up period.

sample, of the percentage of cases with unfavorable outcome in each score and score category, the point-biserial correlation coefficient, and the Mean Cost Rating clearly shows the Salient Factor Score has retained predictive accuracy over the seventeen-year period in which the three samples were released. These findings add to the evidence that the Salient Factor Score is able to separate prisoners into categories having significantly different probabilities of recidivism, and that its predictive accuracy has not diminished over time.

THE FUTURE OF RISK PREDICTION IN THE FEDERAL SYSTEM

Defendants convicted of federal offenses committed on or after November 1, 1987, who are sentenced to prison, will not be considered for release by a parole board. Instead, such defendants are sentenced to determinate terms under the new federal sentencing guidelines promulgated by the United States Sentencing Commission. The U.S. Parole Commission continues to have jurisdiction over defendants sentenced to prison for offenses committed prior to November 1, 1987, a diminishing number of cases. Does this mean that recidivism risk prediction, and the Salient Factor Score, will no longer have an impact on the determination of federal prison

terms? The answer to this question lies in the relationship of the Salient Factor Score to its counterpart in the new federal sentencing guidelines—the Criminal History Score.

Before comparing the specifics of the U.S. Parole Commission's Salient Factor Score and the U.S. Sentencing Commission's Criminal History Score, a brief comparison of the structure of the two guideline systems is useful. Both guideline systems use a two dimensional grid. Both guideline systems measure the seriousness of the instant federal offense on the vertical axis of the grid (the sentencing guidelines use a forty-three level offense seriousness scale; the parole guidelines use an eight level offense seriousness scale). Both guideline systems measure the defendant's criminal history on the horizontal axis of the grid (the sentencing guidelines use the Criminal History Score to form six categories; the parole guidelines use the Salient Factor Score to form four categories). Both guideline systems set forth a guideline range (e.g., zero to six months of imprisonment, twelve to eighteen months of imprisonment) at the intersection of each offense level and criminal history category. The sentencing guidelines grid, which contains 258 cells, generally has somewhat narrower ranges than the parole guidelines grid, which contains thirty-two cells. Both guideline systems require the decisionmaker to render a decision within the applicable guideline range unless

possible predictors of recidivism. Such research will enable the Commission to assess the efficacy and desirability of modification of the criminal history score and/or modification of the degree to which it affects the guideline sentences. (U.S. Sentencing Commission, 1987)

This research is underway and, in the tradition of the research that underlay the development and revision of the Salient Factor Score, will provide an empirical basis for assessing the predictive power of the Criminal History Score and the impact of any proposed modifications. In conclusion, although the cases to which the Salient Factor Score applies directly will diminish over time as the Parole Commission is phased out, the concept and essential character of the Salient Factor Score, as well as most of the specific items contained in it, have been incorporated in the Criminal History Score of the federal sentencing guidelines.

NOTES

1. The views expressed in this article are those of the author and do not necessarily represent the official policy or position of the United States Sentencing Commission.
2. By year, the percentage of discretionary departures from the parole guidelines at initial hearings was as follows: 16 percent (1981), 14 percent (1982), 13 percent (1983); 11 percent (1984); 9 percent (1985); 8 percent (1986); 7 percent (1987); 8 percent (1988); 10 percent (1989); and 12 percent (1990) (U.S. Parole Commission, 1985, 1988, 1992).
During 1981-1990, approximately 6.5 percent of the prisoners had their original presumptive release dates modified at subsequent considerations, either for new information, disciplinary infractions, or superior program achievement. By year, the approximate percentage of cases with modified presumptive release dates was as follows: 10.0 percent (1981); 8.8 percent (1982); 4.7 percent (1983); 5.4 percent (1984); 6.6 percent (1985); 6.4 percent (1986); 6.1 percent (1987); 5.9 percent (1988); 5.2 percent (1989), and 5.9 percent (1990) (U.S. Parole Commission, 1985, 1988, 1992).
3. SFS 72, the original, eleven-item instrument that was used in the pilot project that began in September 1972, was replaced by SFS 73, a nine-item instrument, in October 1973. SFS 73 was replaced by SFS 76, a seven-item instrument, in November 1976. SFS 76 was replaced by SFS 81, a six-item instrument, in August 1981.
4. Sample 1 consists of a 50 percent sample of prisoners released during the first six months of 1970, a 20 percent sample of prisoners released during the last six months of 1970, a 30 percent sample of prisoners released during the last six months of 1971, and a 25 percent sample of prisoners released during the first six months of 1972. Approximately 4 percent of the eligible sample was excluded due to missing background or follow-up information.
5. Sample 2 consists of a 50 percent sample of prisoners released during the first six months of 1978. Approximately 4 percent of the eligible sample was excluded due to missing background or follow-up information. As a sizable proportion of prisoners released in 1978 were released to the community after a brief period (generally 60-120 days) of custody in a Community Treatment Center (a halfway house), a type of custody that offers possibilities for misbehavior similar to those available to prisoners on parole, Sample 2 includes 161 prisoners who were previously placed in a Community Treatment Center during the current period of confinement, but were found guilty of misbehavior while in the Community Treatment Center and were returned to a secure facility. In order to provide a representative sample of all released prisoners, these 161 cases are counted twice, as though the prisoners had been released to the community on two separate occasions. For the first release, each case is counted as having an unfavorable outcome; for the second release, the outcome during the two-year follow-up period is used.
6. For example, selection of all cases having an identification number ending in an odd digit approximates a 50 percent random sample. Federal prisoners have an eight-digit identification number. The fifth digit is the last digit of the individual's identification number. The last three digits refer to the institution.
7. One limitation of the use of FBI data is that not all state/local law enforcement agencies submit all arrest and disposition data to the FBI system. Nevertheless, these data provide the best available method for assessing recidivism for federal offenders who are released throughout the United States, and may be released with or without parole supervision, or have different lengths of parole supervision. There is no reason to expect that there is differential recording of arrests by Salient Factor Score. Furthermore, if there is at least one instance of unfavorable outcome during the follow-up period recorded, a failure to record additional instances of unfavorable outcome does not affect the results. Data were collected at least twelve months after the end of the follow-up period for the 1970 and 1972 samples and at least eighteen months after the follow-up period for the 1971 and 1978 samples to provide time for information on dispositions to be transmitted to the FBI and entered on rap sheet records.
An additional limitation of the outcome measure concerns the classification of persons returned to prison for technical parole violations (without a commitment for a new offense) or having outstanding parole violation warrants (absconders from supervision). Only persons released to parole or mandatory release supervision are liable to return to prison for technical violations. Thus, the classification of technical parole violators as having unfavorable outcome means that persons released under supervision have a higher risk of being included in the unfavorable outcome category than persons released without supervision. If, however, persons returned to

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APPENDIX 3: SALIENT FACTOR SCORING MANUAL

The following instructions serve as a guide in computing the salient factor score.

Item A. Prior Convictions/Adjudications (Adult or Juvenile). (None = 3; one = 2; two or three = 1; four or more = 0.)

A.1 In general. Count all convictions/adjudications (adult or juvenile) for criminal offenses (other than the current offense) that were committed prior to the present period of confinement, except as specifically noted. Convictions for prior offenses that are charged or adjudicated together (e.g., three burglaries) are counted as a single prior conviction, except when such offenses are separated by an intervening arrest (e.g., three convictions for larceny and a conviction for an additional larceny committed after the arrest for the first three larcenies would be counted as two prior convictions, even if all four offenses were adjudicated together). Do not count the current federal offense or state/local convictions resulting from the current federal offense (i.e., offenses that are considered in assessing the severity of the current offense). *Exception:* Where the first and last overt acts of the current offense behavior are separated by an intervening federal conviction (e.g., after conviction for the current federal offense, the offender commits another federal offense while on appeal bond), both offenses are counted in assessing offense severity; the earlier offense is also counted as a prior conviction in the salient factor score.

A.2 Convictions. (a) Felony convictions are counted. Non-felony convictions are counted, except as listed under (b) and (c). Convictions for driving while intoxicated/while under the influence/while impaired, or leaving the scene of an accident involving injury or an attended vehicle are counted. For the purpose of scoring Item A of the salient factor score, use the offense of conviction.

(b) Convictions for the following offenses are counted only if the sentence resulting was a commitment of more than thirty days (as defined in Item B) or probation of one year or more (as defined in Item E), or if the record indicates that the offense was classified by the jurisdiction as a felony (regardless of sentence):

1. contempt of court;
2. disorderly conduct/disorderly person/breach of the peace/disturbing the peace/uttering loud and abusive language;
3. driving without a license/with a revoked or suspended license/with a false license;
4. false information to a police officer;
5. fish and game violations;
6. gambling (e.g., betting on dice, sports, cards) (Note: Operation or promotion of or employment in an unlawful gambling business is not included herein);
7. loitering;
8. non-support;
9. prostitution;
10. resisting arrest/evade and elude;
11. trespassing;
12. reckless driving;
13. hindering/failure to obey a police officer;
14. leaving the scene of an accident (except as listed under (a)).

(c) Convictions for certain minor offenses are not counted, regardless of sentence. These include:

1. hitchhiking;
2. local regulatory violations;
3. public intoxication/possession of alcohol by a minor/possession of alcohol in an open container;
4. traffic violations (except as specifically listed);
5. vagrancy/vagabond and rogue;
6. civil contempt.

A.3 Juvenile Conduct. Count juvenile convictions/adjudications except as follows: (a) Do not count any status offense (e.g., runaway, truancy, habitual disobedience) unless the behavior included a criminal offense which would otherwise be counted; (b) Do not count any criminal offense committed at age 15 or less, unless it resulted in a commitment of more than 30 days.

A.4 Military Conduct. Count military convictions by general or special court-martial (not summary court-martial or Article 15 disciplinary proceeding) for acts that are generally prohibited by civilian criminal law (e.g., assault, theft). Do not count convictions for strictly military offenses. *Note:* This does not preclude consideration of serious or repeated military misconduct as a negative indicant of parole prognosis (i.e., a possible reason for overriding the salient factor score in relation to this item).

A.5 Diversion. Conduct resulting in diversion from the judicial process without a finding of guilt (e.g., deferred prosecution, probation without plea) is not to be counted in scoring this item. However, behavior resulting in a judicial determination of guilt or an admission of guilt before a judicial body shall be counted as a conviction even if a conviction is not formally entered.

A.6 Setting Aside of Convictions/Restoration of Civil Rights. Setting aside or removal of juvenile convictions/adjudications is normally for civil purposes (to remove civil penalties and stigma). Such

(c) If a committed sentence of more than thirty days is imposed prior to the current offense but the offender avoids or delays service of the sentence (e.g., by absconding, escaping, bail pending appeal), count as a prior commitment. *Note:* Where the subject unlawfully avoids service of a prior commitment by escaping or failing to appear for service of sentence, this commitment is also to be considered in Items D and E. *Example:* An offender is sentenced to a term of three years confinement, released on appeal bond, and commits the current offense. Count as a previous commitment under Item B, but not under Items D and E. To be considered under Items D and E, the avoidance of sentence must have been unlawful (e.g., escape or failure to report for service of sentence).

Item C. Age At Commencement of the Current Offense/Prior Commitments of More Than Thirty Days (Adult or Juvenile)

C.1 Score 2 if the subject was 26 years of age or more at the commencement of the current offense and has fewer than five prior commitments.

C.2 Score 1 if the subject was 20–25 years of age at the commencement of the current offense and has fewer than five prior commitments.

C.3 Score 0 if the subject was 19 years of age or less at the commencement of the current offense, or if the subject has five or more prior commitments.

C.4 Definitions. (a) Use the age at the commencement of the subject's current federal offense behavior, except as noted under special instructions for federal probation/parole/confinement/escape status violators. (b) Prior commitment is defined under Item B.

Item D. Recent Commitment Free Period (Three Years)

D.1 Score 1 if the subject has no prior commitments; or if the subject was released to the community from his/her last prior commitment at least three years prior to commencement of his/her current offense behavior.

D.2 Score 0 if the subject's last release to the community from a prior commitment occurred less than three years prior to the current offense behavior; or if the subject was in confinement/escape status at the time of the current offense.

D.3 Definitions. (a) Prior commitment is defined under Item B. (b) Confinement/escape status is defined under Item E. (c) Release to the community means release from confinement status (e.g., a person paroled through a CTC is released to the community when released from the CTC, not when placed in the CTC).

Item E. Probation/Parole/Confinement/Escape Status Violator This Time

E.1 Score 1 if the subject was not on probation or parole, nor in confinement or escape status at the time of the current offense behavior; and was not committed as a probation, parole, confinement, or escape status violator this time.

E.2 Score 0 if the subject was on probation or parole or in confinement or escape status at the time of the current offense behavior; or if the subject was committed as a probation, parole, confinement, or escape status violator this time.

E.3 Definitions. (a) The term probation/parole refers to a period of federal, state, or local probation or parole supervision. Occasionally, a court disposition such as 'summary probation' or 'unsupervised probation' will be encountered. If it is clear that this disposition involved no attempt at supervision, it will not be counted for purposes of this item. *Note:* Unsupervised probation/parole due to deportation is counted in scoring this item. (b) The term 'parole' includes parole, mandatory parole, conditional release, or mandatory release supervision (i.e., any form of supervised release). (c) The term 'confinement/escape status' includes institutional custody, work or study release, pass or furlough, community treatment center confinement, or escape from any of the above.

Item F. History of Heroin/Opiate Dependence

F.1 Score 1 if the subject has no history of heroin or opiate dependence.

F.2 Score 0 if the subject has any record of heroin or opiate dependence.

F.3 Ancient Heroin/Opiate Record. If the subject has no record of heroin/opiate dependence within ten years (not counting any time spent in confinement), do not count a previous heroin/opiate record in scoring this item.

F.4 Definition. For calculation of the salient factor score, the term "heroin/opiate dependence" is restricted to dependence on heroin, morphine, or dilaudid. Dependence refers to physical or psychological dependence, or regular or habitual usage. Abuse of other opiate or non-opiate substances is not counted in scoring this item. However, this does not preclude consideration of serious abuse of a drug not listed above as a negative indicant of parole prognosis (i.e., a possible reason for overriding the salient factor score in relation to this item).

Special Instructions—Federal Probation Violators

Item A. Count the original federal offense as a prior conviction. Do not count the conduct leading to probation revocation as a prior conviction.