HOFSTRA LAW REVIEW

Volume 17, No. 1 Fall 1988

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

*Stephen Breyer**

Since November 1987, the new Federal Sentencing Guidelines[1] have been law.[2] Now that they have survived constitutional attack,[3]

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

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

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

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

the Guidelines are likely to remain law for many years to come. It is therefore worth explaining some of the key compromises that led to their creation. This discussion is intended to focus the attention of the academic community on the fact that most of these compromises did not involve trade-offs among commissioners with competing points of view. The spirit of compromise that permeates the Guidelines arose out of the practical needs of administration, institutional considerations, and the competing goals of a criminal justice system, all of which combined to bring about a final product quite different from the idealized versions of the Guidelines which were initially envisioned.[4] It is critical to understand the different institutional reasons for compromise, and to comprehend that, in guideline writing, "the best is the enemy of the good." Only after reflection upon these threshold considerations can meaningful academic discussion, criticism, and eventual improvement take place.

The first section of this Article provides the background necessary to understand the Guidelines and the task the United States Sentencing Commission faced when they drafted the Guidelines.[5] The second part of the Article describes six different, important kinds of compromise that are embodied in the final version of the Guidelines.[6] Only one of these six involved the kind of "trade-off" among the Commissioners that one typically has in mind when using the term "compromise."[7]

I. BACKGROUND

To understand the federal guideline writing process, it is necessary to consider the fundamental differences between state and federal guideline systems, Congress' objectives in mandating federal guidelines, the rudiments of how the Guidelines work, and the two

4. *See Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Comm'n, reprinted in* 52 Fed. Reg. 18, 121 (1987) (stating that the final Sentencing Guidelines adopted by the Commission subverted its "ultimate goal" of drafting "a rational sentencing system"); Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 4 (1987) (stating that the Guidelines adopted by the Sentencing Commission are "unlikely to bring rationality and uniformity to federal criminal sentencing."). *See generally* A. VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1985); von Hirsch, *Federal Sentencing Guidelines: The United States and Canadian Schemes Compared*, in 4 OCCASIONAL PAPERS FROM THE CENTER FOR RESEARCH IN CRIME AND JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW (1988).

5. *See infra* notes 8-51 and accompanying text.

6. *See infra* notes 56-146 and accompanying text.

7. *See infra* notes 95-124 and accompanying text.

basic principles upon which they rest.

A. *Comparing State and Federal Guidelines*

When the federal Commission began to write the Guidelines in 1985, both Minnesota[8] and Washington[9] had somewhat similar guidelines systems in place. The federal task differed from that of the state commissions, however, in two important ways. First, the federal criminal code had many more crimes than most state codes. Minnesota and Washington state commissions wrote guidelines for 251 and 108 statutory crimes, respectively, such as murder, theft, robbery, and rape.[10] The federal Commission had to deal with 688 statutes,[11] including such complex criminal laws as the Hobbs Act,[12] the Travel Act,[13] and the Racketeer Influenced and Corrupt Organizations Act.[14] Second, the political homogeneity in individual states may have made it easier to achieve consensus. At the federal level before 1985, scholars and practitioners in the criminal justice community almost unanimously favored the concept of guidelines.[15] Once the Commission reduced that concept to a detailed reality, however, serious political differences began to emerge.[16] Minnesotans

---

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

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

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

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

12. 18 U.S.C. § 1951 (1982).

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

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

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

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

may agree, for example, that building new prisons is undesirable or impractical; they may be willing to tailor prison sentences to create a total prison population of roughly constant size.[17] There is no such consensus, however, throughout the nation as a whole.[18]

B. *Purposes*

Congress had two primary purposes when it enacted the new federal sentencing statute in October of 1984.[19] The first was "honesty in sentencing."[20] By "honesty," Congress meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four.[21] Since release by the Parole Commission in such circumstances was likely, but not inevitable, this system sometimes fooled the judges, sometimes disappointed the offender, and often misled the public. Congress responded by abolishing parole.[22] Under the new law, the sentence the judge gives is the sentence the offender will serve; for example, the judge will impose a four-year sentence (not twelve), and the offender (with the exception of fifty-four days of "good time" per year after the first year) must serve those four years.[23]

Congress' second purpose was to reduce "unjustifiably wide" sentencing disparity.[24] It relied upon statistical studies showing, for

---

168-70 (testimony of Hon. Edward R. Becker, United States Court of Appeals, 3d Cir.) (criticizing the disparity of sentencing scores tallied by different judges and experts on identical, hypothetical cases); AD HOC SENTENCING STUDY GROUP, ASSESSING THE GUIDELINES OF THE UNITED STATES SENTENCING COMMISSION 1-4 (1987) (criticizing aspects of the proposed Sentencing Guidelines which limit the use of noncustodial sanctions and restrict sentencing judges' discretion to sentence outside a narrow range without stating grounds for departure).

17. *See* D. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 24-25, 40-41 (1988); Frankel & Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 239 (1984).

18. *Compare Hearings Before the Subcomm. on Criminal Justice*, *supra* note 16, at 160-74 (testimony of Maygene Giari) (arguing against construction of additional prisons) *with id.* at 909 (testimony of Congressman George W. Gekas) (arguing in favor of "building bigger and better jails.").

19. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

20. S. REP. No. 225, 98th Cong., 2d Sess. 54, 56, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3237, 3239.

21. S. REP. No. 225, 98th Cong., 2d Sess. 56, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3239.

22. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 212(a), 98 Stat. 1837, 1987, 2008-09 (codified as amended at 18 U.S.C. § 3624 (Supp. IV 1986)).

23. *See* 18 U.S.C. § 3624(b) (Supp. IV 1986).

24. *See* S. REP. No. 225, 98th Cong., 2d Sess. 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3221; *see also* 18 U.S.C. § 3553(a)(6) (Supp. IV 1986) (describing the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.").

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

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

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

---

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

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

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

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

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

30. *Id.* § 994(b).

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

or she does so, he or she must explain why,[32] and the imposed sentence is subject to appellate review for "reasonableness."[33]

C. *The Guidelines*

The Commission worked from the time of its appointment on October 29, 1985, until April 13, 1987, to create a set of guidelines that would fulfill its congressional mandate. To fully comprehend the comments and criticisms regarding the Guidelines, at least a rudimentary understanding of how they work is required.

Imagine the case of a bank robber, with one serious prior conviction (i.e. a sentence of imprisonment exceeding thirteen months), who robs a bank of $40,000, while pointing a gun at the teller. The sentencing judge (and probation officer) would proceed through the following steps.[34]

1. Look up the statute of conviction in the statutory index. The index will lead the judge to Guideline § 2B3.1 ("Robbery").[35]

2. Find the "base offense level" for "Robbery" (Level "18").[36]

3. Add "specific offense characteristics." In this example, add two levels for the money taken[37] and three more levels for the gun.[38]

4. Determine if any "adjustments" from chapter 3 of the Guidelines apply. They include adjustments for a vulnerable victim or an official victim, abduction of the victim, role in the offense, efforts to obstruct justice, acceptance of responsibility, and rules for multiple counts.[39]

5. Calculate a criminal history score on the basis of the offender's past conviction record. Here, § 4A1.1 assigns three points for one prior serious conviction.[40]

---

different from that described.").

32. *See id.* § 3553(c) (stating that a court must provide a statement of reasons when imposing sentence outside of guidelines range).

33. *See id.* § 3742(d) (stating that a court of appeals reviewing the imposed sentence shall determine whether it (1) was imposed in violation of law, (2) was imposed as a result of an incorrect application of the Guidelines, or (3) unreasonably departs from the prescribed Guidelines sentencing range).

34. *See* SENTENCING GUIDELINES, *supra* note 1, § 1B1.1, *reprinted infra* app. A at 34-35.

35. *See* SENTENCING GUIDELINES, *supra* note 1, § 2B3.1, *reprinted infra* app. A at 39-40.

36. *See id.* § 2B3.1(a).

37. *See id.* § 2B3.1(b)(1).

38. *See id.* § 2B3.1(b)(2).

39. *See id.* §§ 3A1.1-3E1.1.

40. *See id.* § 4A1.1(a), *reprinted infra* app. A at 42-43.

6. Look at the table on page 5.2 of the Guidelines[41] to determine the sentence. Here, an offense level of "23," with three points for the prior conviction, yields a range of fifty-one to sixty-three months in prison for this armed robbery by a previously convicted felon.[42]

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

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

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

D. *The Two Basic Principles*

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

---

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

42. *See id.*

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

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

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

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

47. *See id.* § 5D3.1-3.

48. *See id.* § 5E4.1.

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

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

drafting process that Congress intended it to be a permanent body that would continuously revise the Guidelines over the years.[51] Thus, the system is "evolutionary"—the Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time. The terms "past practice" and "evolutionary" are merely slogans, but they may offer guidance to the user in understanding how the Commission approached its task.

This very brief sketch of the differences between state and federal guideline systems,[52] the purposes behind the law,[53] the rudiments of Guidelines operation,[54] and the two underlying principles of the Guidelines[55] should provide sufficient background for a discussion of the compromises that the Commission had to make in order to write the Guidelines.

II. THE COMPROMISES

The object of this Article is not so much to show that there *were* compromises made in the drafting process, but to explain their nature. Some compromises were forced upon the Commission by the fundamental features of the criminal justice system, others by the character of the task, and still others by the fact that the Commission was appointed by politically responsible officials and is therefore, at least to some degree, a "political" body. These factors led to six different kinds of compromise.

A. *"Procedural" vs. "Substantive" Justice*

The first inevitable compromise which faced the Commission concerned the competing rationales behind a "real offense" sentenc-

---

case, and the sentence imposed. The FPSSIS tape lacked, however, such important information as the actual amount of time served by each defendant. As a result, the Commission obtained a smaller, more detailed data base of 10,500 dispositions during a given period of time. For this smaller set of cases, the Commission obtained from Bureau of Prison officials more detailed information including the actual amount of time served (or to be served) by the defendant. The Commission then broke this data into categories, such as the crime committed ("baseline offense"); the average time served, i.e. the actual sentence adjusted for "good time" ("sentence level"); whether defendant was a "first time offender;" whether the defendant was convicted at trial; whether the defendant was sentenced to prison; and so forth. For a more detailed description of the Commission's model, see UNITED STATES SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 21-26 (1987) [hereinafter SUPPLEMENTARY REPORT].

51. *See* 28 U.S.C. § 994(o), (p) (Supp. IV 1986).
52. *See supra* notes 8-18 and accompanying text.
53. *See supra* notes 19-33 and accompanying text.
54. *See supra* notes 34-48 and accompanying text.
55. *See supra* notes 49-51 and accompanying text.

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

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

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

---

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

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

58. *See* sources cited *infra* note 59.

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

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

especially vulnerable as a result of their age, or whether the defendant, though guilty, acted under duress.[61] Thus, unless the statutes are rewritten to make such distinctions,[62] the sentencing court is asked to look, at least in part, at what *really* happened under the particular factual situation before it.[63]

A "real offense" system, in contrast, bases punishment on the elements of the specific circumstances of the case. Some experts have argued for guidelines close to a pure "real offense" system, where each added harm that the offender brought about would lead to an increase in the sentence.[64] The proponents of such a system, however, minimize the importance of the *procedures* that courts must use to determine the existence of the additional harms, since the relevant procedural elements are not contained in the typical criminal statute. A drug crime defendant, for example, cannot be expected to argue at trial to the jury that, even though he never possessed any drugs, if he did so, he possessed only one hundred grams and not five hundred, as the government claimed. There must be a post-trial procedure for determining such facts. Making such post-trial procedures administratively manageable is difficult. Typically, courts have found post-trial sentencing facts without a jury and without the use of such

---

61. *See id.*

62. *See, e.g.*, H.R. 5690, 98th Cong., 2d Sess., 130 CONG. REC. 10,690 (1984).

63. Washington's statutes for first degree (armed) robbery, WASH. REV. CODE ANN. § 9A.56.200 (1988), and second degree robbery, *id.* § 9A.56.210, do not make distinctions as to the amount of money involved. Under Washington's sentencing guidelines, however, the amount of money involved in a crime can, if excessive, constitute an "aggravating circumstance" justifying departure from the presumptive sentencing range. *Id.* § 9.94A.390(2)(c)(ii) (West Supp. 1989). Similarly, Minnesota's welfare fraud statute, MINN. STAT. ANN. § 256.98 (West Supp. 1988) does not distinguish as to the amount of fraud, although the sentencing guidelines do. *See id.* ch. 244 app. at V (West Supp. 1989) (assigning severity level of "2" to fraud of $2,500 or less, and a level of "3" to fraud over $2,500).

64. *See, e.g.*, Preliminary Observations of the Comm'n on Comm'r Robinson's Dissent, 52 Fed. Reg. 18,133, 18,133 (1987) (stating that "Professor Robinson has strongly urged the Commission to adopt a highly detailed, mechanical guideline system that would aggravate punishments for each and every harm an offender causes and presumably lessen punishment for each and every relevant mitigating background factor . . . ."); *see also Washington, D.C., Public Hearing*, *supra* note 16, at 61-68 (testimony of Stephen Trott, Assoc. Attorney General, U.S. Dep't of Justice) (arguing that judges should consider the unique circumstances of each case when determining the length of a criminal sentence); Robinson, *supra* note 4, at 17-18 (proposing that a comprehensive sentencing system must recognize that within broad categories of crimes there are a large number of narrow categories which distinguish the severity of criminal acts by the degrees of harm they inflict); Dissenting View of Comm'r Paul H. Robinson on the Promulgation of Sentencing Guidelines by the U.S. Sentencing Comm'n, 52 Fed. Reg. 18,121, 18,123 (1987) (concluding that the goal of the Guidelines, adopting a more rational sentencing system, has not been met by the Guidelines as they now exist).

rules of evidence as the hearsay[65] or best evidence rules,[66] or the requirement of proof of facts beyond a reasonable doubt.[67]

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

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

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

---

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

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

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

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

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

the "base offense level."[70] It then modifies that level in light of several "real" aggravating or mitigating factors, (listed under each separate crime),[71] several "real" general adjustments ("role in the offense," for example)[72] and several "real" characteristics of the offender, related to past record.[73] One can, of course, criticize the Commission for having compromised at the wrong point. Some might believe there should be more real elements,[74] while others argue that there should be fewer.[75] Any valid criticism, however, must first specify which elements should be added or subtracted, and then explain how the factoring of these elements into sentencing considerations affects the workability of the system without compromising either procedural or substantive fairness. It is difficult to contend, therefore, that either a pure unmixed "charge" or "real offense" system would achieve the Commission's objectives.

---

70. *See* SENTENCING GUIDELINES, *supra* note 1, § 1B1.1(b) (providing the general requirement of application of Chapter Two offense characteristics).

71. *See, e.g., id.* § 2B3.1(b)(1)-(5), *reprinted infra* app. A at 39 (listing "specific offense characteristics" for crime of bank robbery).

72. *See id.* § 3B1.1.

73. *See id.* § 4A1.1.

74. *See, e.g., Washington, D.C., Public Hearing, supra* note 16, at 64 (testimony of Stephen S. Trott, Assoc. Attorney General, U.S. Dep't of Justice) (urging that "the definition of conduct that is relevant to sentencing under the [initial draft of the] guidelines be enlarged to include any conduct that is related to the offense of conviction, even if it is not . . . in furtherance of that offense and any harms resulting from that conduct . . . ."); *id.* at 414 (testimony of John M. Greacen, ABA Criminal Justice Section) (testifying that the ABA "believes that a fair sentence has got to take into account all of the behavior of the offender and the offender's characteristics, and all aspects of the offense."); Dissenting View of Comm'r Paul H. Robinson on the Promulgation of Sentencing Guidelines by the U.S. Sentencing Comm'n, 52 Fed. Reg. 18,121, 18,123 (1987) (arguing that the adopted Guidelines "systematically promote 'free' harms and ignore relevant mitigations" since the sentencing judge can only consider factors that are specifically enumerated in the relevant Guidelines section); Robinson, *supra* note 4, at 17-20 (describing the policies, categories, and process behind an "ideal" sentencing system that takes into account all significant factors to administer punishment).

75. *See, e.g., Washington, D.C., Public Hearing, supra* note 16, at 259 (testimony of Dr. Edward J. Burger, Jr., Council of Court Excellence) (favoring fewer real elements, such as offender characteristics, in sentencing considerations, as their inclusion results in sentencing disparity); *Public Hearing Before the U.S. Sentencing Comm'n* 19-20 (New York, N.Y., Oct. 21, 1986) [hereinafter *New York City Public Hearing*] (transcript on file at Hofstra Law Review) (testimony of Hon. Jack Weinstein, United States District Court, E.D.N.Y.) (stating that the initial Guidelines draft was "much too detailed and rigid" in listing probative factors on sentencing); *id.* at 155-56 (testimony of Hon. Jon O. Newman, United States Court of Appeals, 2d Cir.) (arguing against the complexity of numerous factors, because in a system where "everything counts, . . . there must be a determination of whether each of those things happen[ed].").

B. *Administrative Needs*

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

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

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

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

---

76. Consider the following hypothetical posed by the Commission to expose the unmanageability of a sentencing system which adopts numerous factors in setting punishment:

> A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller, or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

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

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

robber does *X*, he is deserving of more punishment. There is no need to distinguish so finely in terms of punishment given how little is known about the effects of punishment and considering the many other arbitrary characteristics of the criminal justice system. Punishment, as the Commission came to see, is more of a blunderbuss than a laser beam. An effort to make fine distinctions among criminal behaviors is like a statistician running out crude statistics to ten decimal places, giving an impression of precision that is false.

Consequently, in later versions, the Commission, often over objections of the Justice Department,[78] limited the number of offense categories incorporated into the Guidelines. As a result, the number of distinctions *within* each category of offenders increased in comparison to previous versions of the Guidelines. This allowed greater flexibility in recognizing such differences and adjusting for them, where necessary, through a departure from the Guidelines.[79]

The following questions might be asked regarding this compromise to maintain an easily administered sentencing system while safeguarding substantive fairness: Do the Guidelines make too many distinctions or too few? If too many, which should be eliminated? If too few, which should be added? With respect to each additional distinction that is proposed, one should also ask, given the administrative problems inevitably added, whether the game is worth the candle.

---

78. *See, e.g., Washington, D.C., Public Hearing, supra* note 16, at 61-68 (testimony of Stephen S. Trott, Assoc. Attorney General, U.S. Dep't of Justice).

79. Departures from the Guidelines are explained in the Introduction to the *Federal Sentencing Guidelines Manual* as follows:

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

SENTENCING GUIDELINES, *supra* note 1, at 1.6-.7.

C. *The Nature of a Commission*

A third important compromise is reflected in the philosophical premises upon which the Commission rested its concept of the Guidelines. It is a compromise forced upon the Commission by the institutional nature of the group guidelines writing process. Those individuals disappointed by the compromise[80] may have failed to adequately consider the way in which governmental processes must inevitably work.

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

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

---

80. *See supra* note 4.

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

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

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

Considering the inherent subjectivity of such a trade-off process, the Commission soon realized that only a crude ranking of behavior in terms of just deserts, based on objective and practical criteria, could be developed. Although guidelines motivated by a just deserts rationale would be cloaked in language and form that evoke rationality, using terms such as "rank order of seriousness," the rankings would not, in substantive terms, be wholly objective. Furthermore, the Commissioners did not abandon their own subjective values by relying on academic methods, such as public opinion polls, which purport to rank crimes objectively in terms of their relative seriousness. The Commissioners believed that public polling was not sufficiently advanced or detailed to warrant its use as accurate sources in ranking criminal behaviors.[84]

An alternative school of thought recommended that the Guidelines be based on models of deterrence. These advocates urged that punishment for each criminal act should reflect the ability of that punishment to deter commission of the crime.[85] This approach, lay-

---

LINES REPORT] (on file at Hofstra Law Review). Perhaps this ranking reflects the strong views of a few members of the District of Columbia Sentencing Commission. If so, it would be an example of the type of compromise that must take place when different crimes are ranked by a body of different people.

84. *Cf.* Monahan, *The Case for Prediction in the Modified Desert Model of Criminal Sentencing*, 5 INT'L J.L. & PSYCHIATRY 103, 104-05 (1982) (noting the impossibility of precise "just deserts" rank ordering of crimes). One example of such a poll was the National Survey of Crime Severity conducted by the United States Department of Justice. *See* U.S. DEP'T OF JUSTICE, THE NATIONAL SURVEY OF CRIME SEVERITY (1985). Sixty-thousand Americans were asked a series of questions about the relative severity of a list of crimes. The results yielded a number of anomalies. For various reasons, the authors suggest it is not appropriate to compare absolute ratings of severity from one demographic group to the next, but the relative rankings (and the corresponding proportions) of crime are instructive. Consider the relative severity attributed to the crimes of murder and rape by people in the "Northeast" region of the country (as designated by the Census). For all of the groups below, the values have been normalized so that murder is assigned 100 points of "severity." The following table shows the "severity" attributed to the crime of rape by individuals of various age groups, given that murder equals 100 "points." (The tables were organized by race as well—the one reproduced below is limited to white persons. Responses among different racial groups were also significantly different.)

	18-19	20-24	25-34	35-49	50-64	65 +
Men	89	80	55	61	71	62
Women	136	77	82	84	75	62

Id. at 82-83.

85. *See, e.g.*, R. POSNER, AN ECONOMIC ANALYSIS OF LAW 201-26 (3d ed. 1986) (advocating the "optimal criminal sanctions" theory where fines are imposed instead of incarceration in order to deter criminal acts by increasing their economic cost to the criminal while yielding punishment at the lowest cost to society); Ehrlich, *The Deterrent Effect of Criminal*

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

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

---

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

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

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

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

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

past practice, it would consciously articulate its reasons for not doing so.[90] The Commission was able to determine which past factors were important in pre-Guideline sentencing by asking probation officers to analyze 10,500 actual past cases in detail, and then compiling this information, along with almost 100,000 other less detailed case histories, in its computers.[91] When the Commission decided which "specific offense characteristics" to use in cases of robbery, for example, the Commission learned from its data base of 1,100 actual robbery cases that forty robbery convictions involved injury to others, while only three involved death. It therefore included "physical injury" as a specific offense characteristic while excluding "death."[92] The Commission assumed that a sentencing judge would depart from the Guidelines and impose a longer sentence if he or she were actually faced with a robbery conviction where a victim had been killed. The Commission's intent was to allow the judge to depart from the Sentencing Guidelines in unusual cases.[93]

It is important to realize that the Commission's "past practice" compromise does not reflect an effort simply to reconcile two conflicting philosophical positions. It reflects a lack of adequate, detailed deterrence data, and it reflects the irrational results of any effort to apply "just deserts" principles to detailed behavior through a group process. The result of this compromise is that the Commission's results will reflect irrationality in past practice, but only to a degree. Since the Commission employed *typical* past practices, the Guidelines tend to avoid unjustifiably wide variations in sentencing. This, after all, was part of the Commission's basic statutory mission.[94]

Moreover, the Commission's system is evolutionary. The Commission can continually revise its Guidelines in the direction of an even more rational sentencing system through the analysis of information that is obtained while the Guidelines are actually in effect.

D. *Traditional Trade-Offs*

A fourth kind of compromise embodied in the Guidelines is

---

90. UNITED STATES SENTENCING COMM'N, PRINCIPLES GOVERNING THE REDRAFTING OF THE PRELIMINARY GUIDELINES principle 6 (Dec. 16, 1986), *reprinted infra* app. B at 47-50; *see also* Nagel, *supra* note 26, at 42.

91. *See supra* note 50.

92. *Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 8 (Oct. 22, 1987) (testimony of Commissioner Stephen Breyer) [hereinafter *Breyer Testimony*] (transcript on file at Hofstra Law Review).

93. *See supra* notes 78-79 and accompanying text.

94. *See supra* notes 24-26 and accompanying text.

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

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

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

---

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

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

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

teristics rules look primarily to past records of convictions. They examine the frequency, recency, and seriousness of past crimes, as well as age, treating youth as a mitigating factor. The rules do not take formal account of past arrest records or drug use, or the other offender characteristics which Congress suggested that the Commission should, but was not required to, consider.[98] In a word, the offender characteristics rules reflect traditional compromise.

A second area of traditional compromise involves the Commission's decision to increase the severity of punishment for white-collar crime. The Commission found in its data significant discrepancies between pre-Guideline punishment of certain white-collar crimes, such as fraud, and other similar common law crimes, such as theft.[99] The Commission's statistics indicated that where white-collar fraud was involved, courts granted probation to offenders more frequently than in situations involving analogous common law crimes;[100] furthermore, prison terms were less severe for white-collar criminals who did not receive probation.[101] To mitigate the inequities of these discrepancies, the Commission decided to require short but certain terms of confinement for many white-collar offenders, including tax,

---

prison sentences of at least sixty days but not more than thirteen months; (3) prior prison sentences of less than sixty days; (4) parole, probation, imprisonment, or escape status; and (5) date of most recent release from prison. SENTENCING GUIDELINES, *supra* note 1, § 4A1.1. Unlike the Parole Guidelines' "salient factor score," the "criminal history score" assigns points for characteristics that *increase* the likelihood of recidivism; for example, the convict is assigned three points for each prior imprisonment greater than thirteen months. *Id.* § 4A1.1(a). Also, unlike the "salient factor score," the "criminal history score," reflecting the statute, does not account explicitly for the convict's age or for prior drug use. Since the "criminal history score" does not count prior convictions that are more than 5 years old in some circumstances, and 10 years old in others, it implicitly screens for the age of convicts in ways similar to the "salient factor score." Finally, the "criminal history score," reflecting the statute, makes special allowances for "career offenders," *see id.* § 4B1.1, not made in the "salient factor score." *See* SUPPLEMENTARY REPORT, *supra* note 50, at 42-44.

98. *Compare* 28 U.S.C. § 994(d)(1), (5), (10) (Supp. IV 1986) (providing that the Sentencing Commission should, in setting guideline sentences based on criminal history, take account of age, physical condition (including drug dependence), and criminal history "only to the extent that they do have relevance") *with id.* § 994(d) (requiring neutrality as to factors such as race, sex, national origin, creed, and socio-economic status of offenders) *and id.* § 994(k) (requiring Commission to construct guidelines which reflect the "inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.").

99. Fraud, after all, is a form of theft; common law "larceny by trick" was larceny with the consent of the owner induced by fraud. *See* 3 WHARTON'S CRIMINAL LAW § 355 (C. Torcia 14th ed. 1980).

100. *See* SUPPLEMENTARY REPORT, *supra* note 50, at 18.

101. *Breyer Testimony*, *supra* note 92, at 9.

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

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

To understand how these rules work in practice, consider three

---

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

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

104. *Id.* § 5B1.1(a)(2).

105. *Id.* § 5C2.1(e)(1).

106. *Id.* § 5B1.4(b)(19).

107. *Id.* § 5C2.1(d).

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

types of white-collar property crimes—an area where the Commission intended the probation rules to have significant impact. First, consider a simple embezzlement. A court is free under the Guidelines to grant probation with no confinement term if the embezzlement is $2,000 or less, a level "6" offense.[109] The court may impose probation with some form of confinement condition, with a minimum of one to six months, if the embezzlement is $50,000 or less, a level "10" offense.[110] The court may impose a split sentence if the embezzlement is $200,000 or less, in accordance with a level "12" offense.[111]

The comparable curve for tax evasion rises somewhat more quickly. Level "6" involves evasions of $2,000 or less, level "10" involves evasions of $40,000 or less, and a level "12" evasion constitutes $150,000 or less.[112] An antitrust violation involving less than $1,000,000 of commerce amounts to a level "8" offense.[113] Level "10" antitrust violations concern commerce greater than $4,000,000 and less than $15,000,000, and all offenses involving more than $50,000,000 are base level "12" offenses.[114]

Before the Sentencing Guidelines were promulgated, a sentencing judge in all cases of embezzlement, tax evasion, or antitrust violations could impose probation without any term of confinement. However, the Commission deliberately chose, except in the least serious cases of these white-collar crimes (level "6" or less), to require some minimum form of confinement of one to six months—either intermittent confinement, community confinement, or imprisonment.[115]

The Commission took this course for two reasons. First, the Commission considered present sentencing practices, where white-collar criminals receive probation more often than other offenders who committed crimes of comparable severity, to be unfair. Second, the Commission believed that a short but definite period of confinement might deter future crime more effectively than sentences with no confinement condition. Since the Commission deliberately defined "community confinement" broadly,[116] the Bureau of Prisons will

109. *See* SENTENCING GUIDELINES, *supra* note 1, § 2B1.1.
110. *Id.*
111. *Id.*
112. *Id.* § 2T4.1.
113. *Id.* § 2R1.1.
114. *Id.*
115. *See id.* § 5C2.1.
116. *See id.* § 5F5.1 commentary, application note 1. The Guidelines define "community

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

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

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

---

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

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

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

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

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

required the construction of many new prisons or that would have significantly reduced typical prison sentences might have jeopardized the Congressional consensus. Accordingly, the Commission propounded Guidelines that, by themselves, do not deviate enormously from average prior practice. The Commission's prison impact study, using twenty different sets of assumptions, predicts that the effect of the Guidelines on prison population is somewhere between -2 percent and 10 percent in comparison to what would have occurred had they not been put into effect.[121] It is important to remember that the Guidelines consider only *past* sentencing practices, and that some federal legislation contains stricter minimum sentences that will increase the federal prison population significantly.[122]

A "career offender" provision in the Sentencing statute, requiring sentences for those convicted of three violent or drug related crimes "at or near the maximum authorized" by statute, would also automatically require additional prison space for those who fall

---

CONG. & ADMIN. NEWS 3182, 3220-21.

121. In order to project the impact the Guidelines would have on prison populations, the Commission began with its model of current sentencing practice, described *supra* note 50. From this model, the Commission first constructed a "baseline" describing the possible size of prison populations in the absence of the Guidelines. Such a model had to account for several changes in the law independent of the Guidelines, such as the stiff mandatory sentences contained in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3207, 3207-2 to -4 (codified at 21 U.S.C. § 841(b)(1) (Supp. IV 1986)) and the career offender provision of the Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017, 2021 (codified at 28 U.S.C. § 994(h) (Supp. IV 1986)). These statutory changes, over which the Commission had no control, were shown to significantly increase projected prison populations. *See infra* note 124 and accompanying text.

In projecting how the implementation of the Guidelines would alter "baseline" prison populations, the Commission looked to, among other things, three changes in individual sentences under the Guidelines. First, the number of straight probation sentences would decrease. Second, under the Guidelines, certain average sentences (for example, for drug law violators) would increase. Finally, parole would be replaced by supervised release. In turn, all three of these factors could alter the calculations made by prosecutors and defendants when negotiating plea bargains.

With this model of a "baseline" and the possible changes that the Guidelines would bring, the Commission made two projections about prosecutorial activity. Under the "low growth" model, prosecutions would not increase as rapidly over the next fifteen years as under the "high growth" model.

From this model, the Commission was able to project not only how much the prison population would increase over the next 15 years, but how much of the increase was due to each of three factors: the new drug law, the career offender provision, and the Sentencing Guidelines themselves. For a more detailed description of this model, see SUPPLEMENTARY REPORT, *supra* note 50, at 53-75.

122. *See, e.g.*, Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841(b) (Supp. IV 1986) (requiring a minimum sentence of five years); Comprehensive Crime Control Act of 1984, *id.* § 960(b) (requiring a minimum sentence of ten years).

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

E. *Special Problems*

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

To illustrate the problem, consider the following examples:

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

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

1. The behavior in Column *B* warrants more severe punishment

---

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

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

with respect to each example than the behavior in the Column *A*.

2. The punishment for behavior in Column *B*, however, should not be six times as severe as that in Column *A*. The corresponding punishment should not increase proportionately. Otherwise, the defendant in a brawl (example one) or the reckless driver (example four) would soon find himself in prison for life.

These two widely held principles, or perceptions, make it difficult to write rules that properly treat "multiple counts."

Some state commissions have dealt with this problem by giving the trial judge considerable discretion as to whether to sentence defendants convicted of several counts consecutively or concurrently.[125] A moment's thought suggests, however, that this approach leaves the prosecutor and the judge free to construct almost any sentence whatsoever.[126] Such an approach would severely undercut the Commission's effort to bring about greater sentencing uniformity.

Other guidelines have distinguished among types of crimes, requiring, for example, concurrent sentences for multiple counts charg-

---

125. As a general rule, Minnesota presumptively prescribes concurrent sentencing on a conviction of multiple current offenses, based on the most serious charge on which the defendant is convicted, MINN. STAT. ANN. ch. 244 app. at II.F (West Supp. 1989), with any departure therefrom explained and justified by the sentencing judge, *see id.* § 244.10(2). The three exceptions are in certain cases when there has been both a prior and a current conviction for an offense against the person, *id.* at II.F.1, certain cases involving multiple current felony convictions for crimes against different persons, *id.* at II.F.2, or certain cases involving escapes from lawful custody, *id.* at II.F.3. In these cases the court may, in its discretion, impose a consecutive sentence.

In most cases, Washington calls for multiple counts to be served concurrently, with each count being added into the "offender" score. *See* WASH. REV. CODE ANN. § 9.94A.400(1)(a) (West Supp. 1989). Separate crimes arising out of the "same criminal conduct" count as one crime for criminal history. *See id.* There are exceptions to this rule. A court *must* impose consecutive sentences whenever a person is convicted of "three or more serious violent offenses . . . arising from separate and distinct criminal conduct," *id.* § 9.94A.400(1)(b), and whenever a person who is under sentence of felony commits another felony for which he is sentenced to prison, *id.* § 9.94A.400(2). A court *may* impose consecutive sentences in three instances: (1) when the nature of the offense falls within the Code's "exceptional sentence provisions," *id.* § 9.94A.400(1)(a); (2) when a person is being sentenced for a crime and that person has also been sentenced for another crime committed *subsequent* to the commission of the crime for which he is being sentenced, *id.* § 9.94A.400(3); or (3) when a person is convicted while on probation with a suspended sentence, *id.* § 9.94A.400(4).

126. The Sentencing Guidelines for the State of Washington provide that the sentencing judge retains considerable discretion over whether to accept "plea bargains." *See* WASH. REV. CODE ANN. § 9.94A.090(1) (West Supp. 1989). The judge can accept any agreement which "is consistent with the interests of justice and with the prosecuting standards," even though the recommended sentence is outside the range prescribed by the guidelines. *Id.* Prosecutorial discretion is bolstered by § 9.94A.080-.110, which provides that the "plea bargain" arrangement be negotiated by the prosecutor, with the judge's role limited to approving the agreement in court. *Id.* § 9.94A.080-.110.

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

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

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

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

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

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

added and measured against a punishment scale that assigns more, but declining, additional amounts of punishment. The upshot is that a bank robber who robs *six* banks will receive roughly *twice* as much (not *six* times as much) punishment as the robber who robs one bank.[130]

It should be apparent from this brief description of this complex problem that the Commission's rules produce a highly approximate solution. The rules will sometimes seem arbitrary and departures may often prove necessary. Yet, the rules represent a compromise preferable to the alternatives—doing nothing or adopting yet more arbitrary rules.

F. *Endemic Problems*

The Guidelines create a final set of compromises concerning the problems endemic to the criminal justice system. Since no one has yet solved these problems, it is not surprising that the Commission has not solved them either. Take, for example, the defendant who pleads guilty. The Commission's data reveals that a defendant who pleads guilty will typically receive a sentence reduced by thirty to forty percent.[131] A Guideline system that reflects actual past practice should provide such a reduction. Yet, to explicitly write a reduction into the Guidelines based on a guilty plea is to explicitly tell a defendant that a guilty plea means a lower sentence and that insistence upon a jury trial means a higher sentence.[132]

For this reason, some courts have discouraged explicit discussion of this practice by judges.[133] The Guidelines' solution to this

---

130. Assume that the defendant is convicted in a six-count indictment of robbing six different banks on six different days. None of the six robberies can be grouped together under the Guidelines. *See id.* § 3D1.2 (requiring unity of victim and/or transaction). Because each group contains exactly one count, the group-counting rules in § 3D1.3 are inapplicable. Under § 3D1.4(a), each robbery counts as one unit in calculating the "combined offense level." As a result, the offense level will increase by "5" levels which, according to the sentencing table, roughly doubles the sentence in most cases. *See id.* at 5.2, *reprinted infra* app. A at 44.

131. SUPPLEMENTARY REPORT, *supra* note 50, at 48.

132. *Cf.* United States v. Crocker, 788 F.2d 802, 809 (1st Cir. 1986) (finding that although the defendant "runs the risk" of a harsher sentence by choosing to go to trial rather than pleading guilty, it does not follow that "a court may impose a harsher sentence because a defendant chooses to stand trial . . . ." (construing United States v. Quejada-Zurique, 708 F.2d 857 (1st Cir. 1983), *cert. denied*, Morejon-Ortega v. United States, 464 U.S. 855 (1983))).

133. *See, e.g., id.* (remanding for sentencing by a different judge, finding "a reasonable likelihood of vindictiveness in the imposition of a harsher sentence" on the part of a sentencing judge who remarked to defendant's lawyer that the case was frivolous and a waste of the court's resources).

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

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

---

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

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

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

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

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

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

sion involved some form of plea bargaining,[138] either with respect to charges,[139] recommended sentences,[140] or specific sentences,[141] and it has been argued that the initial Guidelines should not radically alter this important present practice.[142]

The Guidelines seek to change existing plea bargaining practices only slightly. In a policy statement, the Guidelines maintain that the prosecutor and defense counsel should accurately state the facts.[143] The probation officer will then prepare a report describing the offense accurately on the basis of what counsel have told him. When the parties enter into a plea agreement, the judge will have before him (1) the proposed plea agreement, (2) the parties' explanation of why the agreement should be accepted, (3) the Guidelines providing the judge with the sentence to be imposed if he or she does not accept the agreement under Rule 11 of the Federal Rules of Criminal Procedure, and (4) if he or she chooses, the probation officer's report.[144] The Guidelines provide that a judge may accept a plea agreement that would depart from a Guideline-specified range if he or she finds "justifiable reasons" for doing so.[145] Thus, in comparison with pre-Guidelines practice, the judge is likely to be more aware of the true facts, to have a better understanding of the reasons for the agreement, and to have a standard for comparison of recom-

---

138. SUPPLEMENTARY REPORT, *supra* note 50, at 48 n.80.

139. Rule 11(e)(1) of the Federal Rules of Criminal Procedure authorizes the government to "plea bargain" with defendant or his or her counsel. FED. R. CRIM. P. 11(e)(1). Rule 11(e)(1)(A) empowers the government to move for dismissal of other charges to which the defendant does not plead guilty. FED. R. CRIM. P. 11(e)(1)(A).

140. *See* FED. R. CRIM. P. 11(e)(1)(B). Alternatively, the government can agree not to oppose the defendant's request for a particular sentence. *Id.* In either case, such a recommendation or request is not binding on the court. *Id.*

141. *See* FED. R. CRIM. P. 11(e)(1)(C).

142. *See supra* note 137 and accompanying text.

143. *See* SENTENCING GUIDELINES, *supra* note 1, at 6.5.

144. Rule 11(c)(2) of the Federal Rules of Criminal Procedure requires disclosure of the proposed plea agreement, FED. R. CRIM. P. 11(c)(2); Rule 11(d) requires that the court ensure that the defendant accepted the agreement voluntarily, FED. R. CRIM. P. 11(d); Rule 11(c)(1) requires the judge to inform the defendant of the minimum mandatory penalty and maximum possible penalty that can be imposed under the law, FED. R. CRIM. P. 11(c)(1). Rule 32(c)(2), which requires the submission of the probation officer's report in most cases, in effect requires that the probation officer's report be completed and reviewed by the parties and the court before sentencing. *See* FED. R. CRIM. P. 32(c)(2). In a policy statement, the Commission has suggested that a court can, in its discretion, defer consideration of the plea agreement until it has read the probation officer's report. *See* SENTENCING GUIDELINES, *supra* note 1, § 6B1.1(c). Such a deferral may be necessary in order for the court to inform the defendant of the sentencing consequences of the plea, as required by Rule 11(c)(1). *See* FED. R. CRIM. P. 11(c)(1).

145. *See* SENTENCING GUIDELINES, *supra* note 1, § 6B1.2(b)(2), (c)(2).

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

III. CONCLUSION

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

Second, commentary, discussion, and criticism regarding the Commission's work must begin with a recognition of these same six sources of compromise (as well as a seventh—fidelity to contradictory expressions of Congressional intent[147]) which underlie many, if not all, of the Guidelines. As a result, while it may be possible to imagine another world where another set of sentencing guidelines would be superior to the Sentencing Commission's efforts, such an enterprise may shed little light on how to construct a better set of guidelines for our own world.

---

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

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

As a variation on this theme, one should note that the six compromises discussed are interrelated in several important respects. For example, the possible resolution of the issue of how to punish white-collar criminals is constrained not only by the issue of choice of rationale and the difficulty of defining congressional intent, but also by the constraints of both penal and judicial resources. Accordingly, while it may be possible to focus on a single aspect of the current Sentencing Guidelines and suggest ways to improve upon them, such an enterprise may be unproductive unless it properly accounts for the changes that would result elsewhere in the system. This fact leads to the conclusion that the Guidelines, and each succeeding version, must be evaluated in terms of the overall changes they make in the pre- (or pre-revised) Guidelines state of affairs. The baseline must always be the *status quo ante*, not an idealized theoretical future.

Third, given the pragmatism embodied in the Commission's "go slow" approach and the added judicial resources that will be needed to administer the Guidelines in the courts, some have questioned whether the hoped-for result—increased sentencing uniformity—is worth the effort. The concern is understandable, particularly when some judges believe the "disparity" problem was overstated in the first instance. Even those judges, however, may find several benefits in the Guidelines.

For example, as a result of the efforts needed to administer, monitor, and improve the Guidelines, the focus of the federal criminal justice system may shift from its almost exclusive concern with the question, "Is the defendant guilty?" to the question, "What are we to do with this offender?" The marshalling of judicial and executive resources that the Guidelines necessitate means that this question is likely to come under closer scrutiny than in the past. Additionally, considering the fact that more offenders will be sent to community treatment centers, the nature of which the Guidelines leaves unspecified, it becomes more likely that there will be increased study of somewhat less traditional and perhaps more cost-effective methods of punishment.

Finally, the Guidelines should begin to show their intended effect—the rationalization and lessening of disparity among criminal sentences. Continued study by the Commission will not only provide considerable information about whether these goals have been achieved and whether the Guidelines work in practice, but will also lead to changes that will increase their effectiveness.

APPENDIX A

CONTENTS

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

PART B - GENERAL APPLICATION PRINCIPLES

§1B1.1. *Application Instructions*

(a) Determine the guideline section in Chapter Two most applicable to the statute of conviction. *See* §1B1.2 (Applicable Guidelines). The statutory index (Appendix A) provides a listing to assist in this determination. If more than one guideline is referenced for the particular statute, select the guideline most appropriate for the conduct of which the defendant was convicted.

(b) Determine the base offense level and apply any appropriate specific offense characteristics contained in the particular guideline in Chapter Two in the order listed.

(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three. The resulting offense level is the total offense level.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the total offense level and criminal history category.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific

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

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section,

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

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

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

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

Statute	*Guideline*
18 U.S.C. § 1793	2P1.4
18 U.S.C. § 1851	2B1.1
18 U.S.C. § 1852	2B1.1, 2B1.2, 2B1.3
18 U.S.C. § 1853	2B1.1, 2B1.3
18 U.S.C. § 1854	2B1.1, 2B1.2, 2B1.3, 2B2.3
18 U.S.C. § 1855	2K1.4
18 U.S.C. § 1856	2B1.3
18 U.S.C. § 1857	2B1.3, 2B2.3
18 U.S.C. § 1863	2B2.3
18 U.S.C. § 1901	2C1.3
18 U.S.C. § 1902	2F1.2
18 U.S.C. § 1903	2C1.3
18 U.S.C. § 1905	2H3.1
18 U.S.C. § 1909	2C1.4
18 U.S.C. § 1915	2T3.1
18 U.S.C. § 1919	2F1.1
18 U.S.C. § 1920	2F1.1
18 U.S.C. § 1923	2F1.1
18 U.S.C. § 1951	2B3.1, 2B3.2, 2C1.1, 2E1.5
18 U.S.C. § 1952	2E1.2
18 U.S.C. § 1952A	2A2.1, 2E1.4
18 U.S.C. § 1952B	2E1.3
18 U.S.C. § 1953	2E3.3
18 U.S.C. § 1954	2E3.1
18 U.S.C. § 1955	2E3.1
18 U.S.C. § 1956	2S1.1
18 U.S.C. § 1957	2S1.2
18 U.S.C. § 1962	2E1.1
18 U.S.C. § 1963	2E1.1
18 U.S.C. § 2073	2F1.1
18 U.S.C. § 2111	2B3.1
18 U.S.C. § 2112	2B3.1
18 U.S.C. § 2113(a)	2B1.1, 2B2.2, 2B3.1, 2B3.2
18 U.S.C. § 2113(b)	2B1.1
18 U.S.C. § 2113(c)	2B1.1, 2B1.2
18 U.S.C. § 2113(d)	2B3.1

3. *ROBBERY, EXTORTION, AND BLACKMAIL*

§2B3.1. *Robbery*

(a) Base Offense Level: 18

(b) Specific Offense Characteristics

(1) If the value of the property taken or destroyed exceeded $2,500, increase the offense level as follows:

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

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

(2) (A) If a firearm was discharged increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels.

(3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

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

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

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

(5) If obtaining a firearm, destructive device, or controlled substance was the object of the offense, increase by 1 level.

CHAPTER THREE: Adjustments 3.1

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

CHAPTER FOUR - CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

PART A - CRIMINAL HISTORY

Introductory Commentary

The Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. § 3553(a)(2).) A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

The specific factors included in § 4A1.1 and § 4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior. While empirical research has shown that other factors are correlated highly with the likelihood of recidivism, e.g., age and drug abuse, for policy reasons they were not included here at this time. The Commission has made no definitive judgment as to the reliability of the existing data. However, the Commission will review additional data insofar as they become available in the future.

§4A1.1. **Criminal History Category**

The total points from items (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not included in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, impris-

onment, work release, or escape status.

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

SENTENCING TABLE

Offense Level	Criminal History Category I 0 or 1	II 2 or 3	III 4, 5, 6	IV 7, 8, 9	V 10, 11, 12	VI 13 or more
1	0-1	0-2	0-3	0-4	0-5	0-6
2	0-2	0-3	0-4	0-5	0-6	1-7
3	0-3	0-4	0-5	0-6	2-8	3-9
4	0-4	0-5	0-6	2-8	4-10	6-12
5	0-5	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	1-7	2-8	4-10	8-14	12-18	15-21
8	2-8	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

(b) *Departures*

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

APPENDIX B

CONTENTS

Principles Governing the Redrafting of the Preliminary Guidelines (as amended and adopted by the United States Sentencing Commission at its December 16, 1986 meeting).

Principles Governing the Redrafting of the Preliminary Guidelines[1]

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

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

fenders. When the principles of commensurability and crime-control conflict, the resolution of the conflict will be based on principles of crime control unless a specific decision to the contrary is made by the Commission. Such conflicts will be called to the Commission's attention.

j. The Guidelines recognize that prison capacity is a scarce resource and that the sentences have been designed to economize on that resource consistent with meeting the purposes of sentencing mandated by Congress.

2. The next draft will maintain the September draft practice of categorizing the behavior punished in terms of current statutory offenses.

   a. Each provision of Chapter II, insofar as possible, will refer to the specific statutory violations that the provision encompasses.

   b. A table will relate specific statutes to the Chapter II provisions that apply them.

   c. While generally referring to the statutory offense of conviction, the Guidelines will provide a method for the judge to take into account all relevant misconduct, either through explicit individualized guidelines or through the exercise of judgment under appropriate Commission policy guidance.

3. The next draft will simplify the September draft considerably.

   a. Chapter II will not make distinctions unless:

      (1) a statute legally requires the Commission to make the distinction in question;

      (2) distinctions are made in the statute itself *and* are not mandated but current practice data show they now constitute a basis for distinguishing in terms of punishment; or

      (3) the distinctions are not made in the statute but are supported by current practice data showing they now constitute a relevant factor for distinguishing levels of punishment; or

      (4) there is nonetheless a persuasive or special reason for making the distinctions, in which case the rationale is to be presented to the Commission.

   b. Chapter III should contain all relevant distinctions that it is

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

c. Cross references will be eliminated. If a relevant element commonly occurs in a specific offense it may be included explicitly in the guidelines for that offense. In addition, the Guidelines will employ a general section containing a list of relevant elements that may aggravate or mitigate punishment in a variety of circumstances, along with guidance to the judges as to how to take account of those elements.

4. The next draft will increase the Guidelines' flexibility. It will also minimize the number and complexity of mathematical computations.

   a. The Guidelines will use an offense level approach that will minimize explicit mathematical computations.

   b. Wherever possible overlapping ranges will be employed.

   c. The width of the range for 'cooperation,' will be increased.

   d. The draft will state that not every factor has been given adequate consideration for every offense. In the Commission's view, the statutory standard for departure from the guidelines when "the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. Sec. 3553(b), does not mean that a sentencing judge must review the administrative record of the Commission to determine the extent of adequacy of consideration the Commission gave to any particular factor. Rather, the standard means that a sentencing judge may depart from the Guidelines when an aggravating or mitigating factor is present to such an unusual degree or in such unusual circumstances as to support a reasonable conclusion that the Guideline is not likely to have contemplated the facts substantially similar to those confronting the sentencing judge. In all cases, departures should be no more than necessary and when the Guidelines require a specific type of sanction (e.g. imprisonment) the judge should impose that type of sanction. All sentences whether within or without the Guidelines should be constrained by the principle that they in no way contradict the purposes of

the institution of punishment. Departures, for purposes of this section, do not include the application of the provisions of 3.c. above.

e. The courts will be permitted to accept plea agreements that reflect the full offense but may depart from the Guidelines' recommended penalties, provided that the parties give adequate reasons for the agreement and the court determines that the reasons given justify the agreed disposition, i.e. it does not improperly undermine any of the legislatively mandated purposes of sentencing.

5. The draft will explain that much of the simplicity and flexibility in the draft are provisional. The Commission will set in place a process that through data collection and refinement over time will produce more refined and accurate Guidelines.

6. Estimates of present practice will be provided for each punishment category insofar as feasible. Present practice will not be treated as dispositive, but when the departures are substantial, the reasons for departure will be specified.

7. At the appropriate time, the staff will prepare an offense by offense impact model, showing the effect of recommended guidelines on prison population.