AN OVERVIEW OF THE UNITED STATES SENTENCING GUIDELINES*

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I. INTRODUCTION

In the United States, sentencing rules have historically been influenced by four objectives: punishment, incapacitation, rehabilitation, and deterrence. Over time, one or another of these objectives has gained or diminished in importance. The Sentencing Reform Act of 1984 created the United States Sentencing Commission and authorized it to promulgate sentencing guidelines for the federal courts. With one stroke, the U.S. Congress replaced an indeterminate sentencing system - based on the goal of rehabilitation and implemented through parole release - with a determinate system emphasizing deterrence and just deserts. This new guidelines system was the result of more than a decade of reform efforts, and the unlikely coalition of liberals and conservatives in the United States Congress. When he introduced the legislation in 1983 that ultimately resulted in the 1984 Sentencing Reform Act, Senator Edward Kennedy stated:

> "Federal criminal sentencing is in desperate need of reform. ...The current system is actually a non-system. It is unfair to the defendant, the victim, and society. It defeats the reasonable expectation of the public that a reasonable penalty will be imposed at the time of the defendant's conviction, and that a reasonable sentence actually will be served.[1]"

This was not the first time that Congress had turned its attention to federal sentencing, nor would it be the last. The legislation introduced by Senator Kennedy in 1983 was substantially the same as the legislation that the Senate had agreed to in 1979, which in turn was based on earlier Senate bills, one introduced in 1974 and another by Senator Kennedy in 1975, to create a judicial commission to promulgate sentencing guidelines. This round of federal sentencing reform can be traced back to 1966 when, upon the recommendation of President Johnson, Congress created the National Commission on Reform of Federal Criminal Laws. This commission, commonly known as the Brown Commission, after its chair, Edmund G. Brown Sr., former governor of California, issued its final report in 1968 and Congress began hearings on the report in early 1971.[2] Legislation based upon the Brown Commission's recommendations for a model criminal code was introduced in 1973, but was not passed by Congress.

Not long after Congress began its hearings on the Brown Commission report, Judge Marvin E. Frankel[3] gave a series of

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1 129 Congressional Record p. S2090 (Mar. 3, 1983) (daily ed.).

2 National Commission on Reform of Federal Criminal Law, Final Report (1968).

3 U.S. District Judge for the Southern District of New York (since retired).

lectures, later published, in which he proposed the creation of a sentencing commission to develop rules for sentencing.[4] In Judge Frankel's proposal, these sentencing rules would be presumptively applied, but could be appealed to higher courts. This proposal became arguably the most influential concept in sentencing reform for the next decade or more. In the 1970's, Minnesota and Pennsylvania created sentencing commissions and several other states, California for example, replaced their indeterminate sentencing systems with statutorily specified sentencing rules. By 1996, 20 states had sentencing guidelines and new sentencing commissions were at work in three more.

Judge Frankel's proposals, following soon after the Brown Commission and the Congressional hearings on its report, helped form the basis for the legislation introduced in Congress during the mid-1970s that would eventually result in the Sentencing Reform Act of 1984. Along the way, this idea of a sentencing commission gained adherents, each with different goals who viewed the concept of an administrative sentencing agency as a solution to the problems each saw in federal sentencing. Early proponents, such as Senator Kennedy, were concerned about sentencing from a civil rights perspective. They were troubled by the potential for discrimination and disparity in sentencing within an indeterminate sentencing system. Sentencing guidelines would eliminate the possibility of discrimination in sentencing by the application of sentencing rules. Later proponents were concerned about rising crime rates and what they viewed as the leniency of the federal courts. A sentencing commission could address this problem by crafting sentences designed specifically to deter crime and deliver punishment with certainty. By 1979, liberals and conservatives in the Senate, led by Senators Kennedy and Thurmond respectively, had agreed to the reform package, but it was not until 1984 that the House of Representatives passed the legislation and President Reagan signed it into law.

The remainder of this paper will discuss federal sentencing before and after the federal sentencing guidelines that went into effect on November 1, 1987. The next section will examine pre-guidelines sentencing and how it became an impetus for reform. Following that will be a section that examines how the federal sentencing guidelines operate in practice. The next section will discuss some real and potential impacts of the federal sentencing guidelines. The final section will look toward the future and what might be in store for federal sentencing.

II. FEDERAL SENTENCING PRIOR TO THE GUIDELINES

Before the introduction of the sentencing guidelines in 1987, sentencing in federal district courts was based on an indeterminate sentencing system. Federal judges had the discretion to sentence within, sometimes very broad, statutory ranges. An offence such as bank robbery had a statutory maximum sentence of 20 years, with no minimum sentence.[5] If the offender assaulted someone in the course of the robbery, or jeopardized someone's life by the use of a dangerous weapon, the maximum sentence was increased to 25 years.[6] The judge thus had the discretion to impose on the bank robbery defendants

[4] Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cinn, L. Rev. 1 (1972). *See also*: Marvin E. Frankel, *Criminal Sentences*: *Law Without Order* (1972).

[5] 18 USC § 2113(a) (1984).

[6] 18 USC § 2113(d) (1984).

any sentence from straight probation to 20 and 25 years incarceration, respectively. Very few offences carried minimum sentences, and those that did were often specified as "any term of years." The sentence imposed by the court could not be appealed, nor did the court have to specify the reasons for the sentence.

The heart of this indeterminate system was parole release, created in the federal system in 1910. Offenders sentenced to prison could be released on parole supervision before the expiration of their term. The parole release date was set by the U.S. Parole Commission according to the imposed sentence and the Parole Commission's assessment of the offender's readiness for release. By statute, an offender sentenced to prison for a fixed term greater than one year would be eligible for release on parole after serving either one-third of the sentence, or ten years of a life sentence or a sentence greater than 30 years.[7] However, at sentencing, the court could also specify a minimum sentence to be served before parole eligibility, if that minimum was one-third or less of the maximum also specified by the court.[8] The court could also specify a maximum term and leave the determination of parole release entirely to the Parole Commission.[9] In 1974, the Parole Commission began to use its own parole decision-making guidelines for release decisions, and the Parole Commission and Reorganization Act of 1976 required that parole guidelines be used for all parole release decisions.[10]

It is in this context that the Congress began to consider an alternate system of determinate sentencing. The report of the Senate Judiciary Committee on the original 1983 legislation described the prevailing view in Congress of federal sentencing:

> "In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really determine whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.[11] "

Although rehabilitation would remain a stated goal of federal sentencing after the introduction of sentencing guidelines and the abolition of parole,[12] the view remained that the rehabilitative model underlying American criminal justice efforts, since the early part of this century, was wrong. By the late 1970's, many criminal justice experts in the United States had come to the conclusion that the rehabilitation of offenders was uncertain at best. An influential review of the research on rehabilitation programs in the federal and state criminal justice systems, published in 1975, concluded that "nothing works."[13] The authors of this review found no

[7] 18 USC § 4205(a) (1984).

[8] 18 USC § 4205(b) (1984).

[9] *Ibid.*

[10] Pub. L. No. 94-233, 90 Stat. 219 (May 14, 1976).

[11] Senate Commission on the Judiciary, Sentencing Reform Act of 1983, S. Rep. No. 98-223, at 34.

[12] 18 USC § 3553(a)(2) (1998).

systematic evidence that specific types of correctional treatments reduced recidivism.

An equal or greater skepticism existed about the indeterminate sentence practices that typically were used to implement this model. Indeterminate sentencing decisions and parole release decisions were, many experts felt, too often abused or were too often poorly made. Judges and parole boards had wide latitude to make decisions about imprisonment. The end result, many felt, was a tremendous potential for discrimination and disparity in sentencing practices, and uncertainty for all concerned, including prosecution and defence attorneys, judges, and offenders. As Senator Kennedy stated, there could be no reasonable expectations about the certainty and length of punishments.

How serious was the problem of sentencing disparity? A Special Panel on Sentencing Research, created in 1980 at the request of the National Institute of Justice and the National Academy of Sciences, assessed the quality of existing sentencing research. With regard to sentencing disparity and discrimination, the Panel found that the research findings on discrimination in sentencing were mixed.[14] Some studies showed evidence of racial, socio-economic, and/or gender discrimination, although most studies to that point had one or more methodological problems that cast doubt on their conclusions. In contrast, the research on disparity in sentencing decisions could systematically account for only a small amount of the variation in judicial decisions. This result is not surprising, since an indeterminate system addresses unique aspects of each offender's situation. The Panel noted that, stripped of its justification for rehabilitative purposes, this variation in sentencing had become a rationale for reform efforts.

III. THE SENTENCING REFORM ACT OF 1984

A. The Structure of the United States Sentencing Commission

The Sentencing Reform Act of 1984 established the United States Sentencing Commission, a panel of sentencing experts appointed by the President of the United States. Judge Frankel's original proposal called for a judicial commission to set sentencing rules. The Sentencing Reform Act specified that the Commission would have seven voting members, one of whom would be the chair of the Commission. The Attorney General of the United States, or his/her designee would be an *ex officio*, non-voting member of the Commission. The voting members would be appointed for six-year terms. At least three of the voting members had to be federal judges recommended to the President by the Judicial Conference of the United States. No more than four of the voting members could be members of the same political party.

The original set of Commissioners consisted of one district court judge, also designated as the chair; two circuit court judges, a former member of the United States Parole Commission; and three academics. The original Commissioners were appointed for staggered terms of two, four, and six years, in order to promote continuity by preventing complete turnover in membership every six years. As the original Commissioners left or their terms expired, the number of judges on the panel has been maintained.

[13] Douglas Lipton, Robert Martinson, & Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975).

[14] Alfred Blumstein, Jacqueline Cohen, Susan E. Martin, and Michael H. Tonry (eds.), *Research on Sentencing: The Search for Reform* (1983) at 64.

B. Directives to the Sentencing Commission

When the Sentencing Commission began its work in 1985, its task was to promulgate guidelines that meet the purposes of sentencing outlined in 18 USC § 3553(a)(2): just punishment, deterrence, incapacitation, and rehabilitation. In outlining the tasks of the Commission, Congress had three goals: honesty, uniformity, and proportionality. Honesty in sentencing would be achieved by the specification of the sentence at the time of sentencing. The indeterminate sentencing system that guidelines had replaced gave the authority for determining the time served in prison to the United States Parole Commission. An offender sentenced to prison would not know the exact length of his/her incarceration until after a parole hearing, and that hearing might not occur until the offender had served a third of the sentencing imposed by the court. The Sentencing Reform Act specified that the full term of imprisonment imposed by the court would be served, minus up to 15 percent of the sentence that could be subtracted for good behavior, in prison.[15]

Uniformity would be achieved by the avoidance of unwarranted sentencing disparity among offenders with similar criminal records convicted of similar criminal offences.[16] Although there was scant empirical evidence on which to base it, there was a widespread belief that federal sentencing practices varied widely between judges and that these practices were sometimes based on illegitimate factors such as gender and race.[17] To achieve this goal of uniformity, Congress gave the Sentencing Commission a number of directives. For one, Congress directed the Commission to ensure that the guidelines and their policy statements be entirely neutral with regard to race, gender, national origin, creed, and socio-economic status.[18] Further, the Commission was instructed to at least consider whether certain offences and offender characteristics are relevant to sentencing. The Commission's response to this directive is discussed in a later section. Congress specified, however, that the guidelines should reflect the "general inappropriateness" of considering an offender's education, vocational skills, employment record, family ties and responsibilities, and community ties when recommending a prison term or its length.[19]

Proportionality would be achieved by a system of guideline sentences that recognized and incorporated differences in both an offender's criminal behavior and his/her criminal background. In other words, punishment should be proportional to the real or potential harm of an offence and to the offender's history of criminal behavior. Congress gave no detailed instructions as to types of sentences nor their lengths, but did give the Commission guidance as to what it should consider during the development of the guidelines. Consistent with the goal of proportionality, Congress directed that the guidelines should: (1) specify "substantial" terms of

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[15] 18 USC § 3624(b) (1998).

[16] 28 USC § 991(b)(1) (1998).

[17] One of the studies most frequently cited as evidence for sentencing disparity is a study done by the Federal Judicial Center: Anthony Partridge and William B. Eldridge, *The Second Circuit Sentencing Study, A Report to the Judges* (1974). Fifty judges in the second circuit were given the same 20 offence/offender scenarios and asked to impose a sentence for each. The study showed quite a bit of variation, particularly for the most serious offences. For example, the range for bank robbery was 5 years to 18 years in prison, with a median sentence of 10 years. The study did not examine the possible role of illegitimate factors in these judges' sentencing decisions.

[18] 28 USC § 994(d) (1998).

[19] 28 USC § 994(e) (1998).

imprisonment for certain offenders, such as those with prior convictions or who committed the offence while on pretrial release[20]; (2) reflect the "appropriateness" of imposing incremental penalties for multiple offences, whether committed at different times or as part of the same course of conduct[21]; and (3) reflect the "inappropriateness" of imposing consecutive penalties for conspiracy to commit an offence and the actual offence.[22] At the same, the Commission was instructed to take into account the capacity of the penal facilities and other services in the federal system and make recommendations, if necessary, for changes or expansion needed as a result of the guidelines. Congress tempered this somewhat by also directing that the guidelines be formulated to minimize the possibility that the federal prison population will exceed the capacity of the federal prison system.[23]

C. The Development of Empirical Guidelines

In the absence of any prior sentencing rules, the development of a sentencing guideline system is a daunting task, particularly for a criminal code as diverse as the Federal Code. Congress stated that the starting point for guidelines development should be the average sentences imposed before the creation of the Commission, including the average time served for offenders sentenced to prison.[24] Congress prefaced this instruction with the directive that the Commission should ensure that the guidelines reflect the fact that, in many cases, these sentences do not accurately reflect the seriousness of the offender's crime.[25] As a result, the Commission's starting point was an assessment of then-current sentencing practices in the federal courts, including release decisions by the United States Parole Commission. As part of this assessment, the Commission collected data on a sample of 10,500 cases sentenced in the federal courts between October 1, 1984 and September 30, 1985. From the Administrative Office of the U.S. Courts, the Commission obtained automated data that included offence descriptions, information about each offender's background and criminal history, the method of disposition (i.e., guilty plea, conviction after trial), and the sentenced imposed. To augment this data with more complete offence and offender information, the Commission requested and received information from the Probation Division of the U.S. Courts that included the presentence investigation reports prepared for judges by U.S. Probation Officers.[26] Finally, the Commission obtained this information from the Bureau of Prisons on offenders in the sample who had been sentenced to a term of imprisonment:

(1) Time actually served in prison, or
(2) Time scheduled to be served in prison if a parole date had been set, or
(3) An estimate of the time to be served in prison if no parole date had been set.

In order to have an empirical basis for developing the guidelines, the Commission analyzed this data to answer these questions:

(1) How much time is served on average

[20] 28 USC § 994(i) (1998).

[21] 28 USC § 994(l)(1) (1998).

[22] 28 USC § 994(l)(2) (1998).

[23] 28 USC § 994(g) (1998).

[24] 28 USC § 994(m) (1998).

[25] *Ibid.*

[26] U.S. Probation Officers are employees of the federal courts. Their duties include the supervision of offenders on probation and the preparation of investigative reports for use by judges at sentencing.

by convicted federal offenders?
(2) How does this average vary with characteristics of the offence, the offender's background and criminal history, and method of disposition?
(3) How much of this variation cannot be attributed to the offence and the offender's background (i.e., how much disparity exists)?

The goal of this analysis was not to replicate judicial decision-making, but to obtain information about the range of judges' sentencing practices, on an offence-by-offence basis. In particular, the Commission would have information about the relationship between offence, offender characteristics and sentences imposed on one hand, and time served on the other. At the very least, it was expected that this analysis would provide material for policy deliberations.

At the same time the Commission was analyzing the sentencing data, it collected information and input from a wide variety of other sources. During the guidelines development period, the Commission conducted public hearings in Washington D.C. and in other regions of the United States, solicited written comments from hundreds of criminal justice practitioners and other interested parties, and established advisory groups of federal judges, U.S. attorneys, federal public defenders, U.S. probation officers, state district attorneys, private defence attorneys, and academics. The Commission's goal was to involve as many interested parties as possible, so as to better inform its policy deliberations.

D. The Commission's Policy Decisions

1. The Relevance of Offence and Offender Characteristics

Congress gave the Sentencing Commission broad authority to develop a guideline system, although, as noted earlier, it also gave a good many instructions as to how those guidelines should function. Among other considerations, the Commission was to decide the relevance of certain offences and offender characteristics for sentencing:

Offence Characteristics[27]
(1) Grade of the offence (e.g., misdemeanor or felony);
(2) Aggravating and mitigating circumstances;
(3) The nature and degree of harm caused by the offence;
(4) The community view of the gravity of the offence;
(5) The public concern generated by the offence;
(6) The potential deterrent effect of a particular sentence for the offence; and
(7) The current incidence of the offence in the community and in the nation as a whole.

Offender Characteristics[28]
(1) Age;
(2) Education;
(3) Vocational skills;
(4) Mental and emotional condition as a mitigating factor or as otherwise relevant;
(5) Physical condition, including drug dependence;
(6) Employment record;
(7) Family ties and responsibilities;
(8) Community ties;
(9) Role in the offence;
(10) Criminal history; and
(11) Dependence upon criminal activity for a livelihood.

The Sentencing Commission decided that, with the exception of the role in the offence, criminal history, and dependence

[27] 28 USC § 994(c) (1998).
[28] 28 USC § 994(d) (1998).

upon criminal activity for a livelihood, none of the offender characteristics listed above are relevant to the purposes of sentencing. The offence characteristics were, however, incorporated in various ways into the structure and substance of the sentencing guidelines ultimately issued by the Commission.

2. Real vs. Charged Offence Sentencing

The guidelines issued by the Commission in 1987 are described as a modified real-offence sentencing system, modified by incorporating some elements of a charge-based sentencing system. A pure charge-based system would tie the sentence directly to the charges on which the offender was convicted. To the extent that these charges captured features of the offence (e.g., assault with a deadly weapon), these features would be reflected in gradations in the sentence. In contrast, a pure real-offence system would catalog the harms caused by the offence conduct, and the offender's sentence would be based on those harms and aspects of the offence conduct regardless of the specific conviction charges.[29] One benefit of such a system, compared to a charge-based system, would be its potential effect on prosecutorial discretion. Prosecutors would not be able to shape sentences directly through their charging practices. Rather, the court would base the sentence on the offence as it occurred.

A drawback of the real-offence system is the level of complexity and detail it can require to represent a set of offences with an inventory of generic harms, particularly in the federal system's very diverse criminal code. Before issuing guidelines in 1987, the Sentencing Commission considered a real-offence system but concluded that it was too complex; that it risked reintroducing the sentencing disparity Congress sought to eliminate; that it jeopardized the certainty of punishment; and that it might mute the guidelines' deterrent effects. The modified real-offence system that the Commission did adopt is organized around statutorily-defined offences, just as a charge-based system would be, but catalogs on an offence-by-offence basis the harms that are the most common for each offence. This guideline system goes on to address a set of more generic features of criminal offences, such as the offender's role in the offence, the nature of the victim, obstruction of justice, and multiple counts of conviction. For example, robbery is a category in the sentencing guidelines, as defined by statute, and the robbery guidelines enable the sentencing judge to take account of the most common features of robbery. A more detailed example will be described later, including the more generic features, such as the role in the offence, but here are some of the characteristics of a robbery that are incorporated into the robbery guideline:

(1) Did the offender have a weapon?
(2) How was that weapon used?
(3) Was a victim injured?
(4) Was a victim taken hostage or abducted?
(5) What was the value of the property taken in the robbery?

One of the more controversial aspects of this modified real-offence system is the concept of relevant conduct. Relevant conduct is what makes this a real-offence rather than a charge-based system. Here

[29] Offence conduct may be incorporated into a real-offence system in several ways. For example, a fraud of $1,000 could be treated as a more serious offence if the victim was considered especially vulnerable because of age or infirmity. Alternatively, the offence conduct could increase the potential harm, such as in a sophisticated scheme that, before it was detected, was intended to defraud large numbers of victims.

is the definition of relevant conduct in the 1998 Sentencing Guideline Manual:[30]

(1) (a) all acts and omissions committed, aided, abetted, counselled, commanded, induced, procured, or willfully caused by the defendant; and
(b) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offence of conviction, in preparation for that offence, or in the course of attempting to avoid detection or responsibility for that offence;
(2) solely with respect to offences of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(a) and (1)(b) above that were part of the same course of conduct or common scheme or plan as the offence of conviction;
(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
(4) any other information specified in the applicable guideline.

Relevant conduct, as defined in the sentencing guidelines, takes the offender's accountable behavior beyond that represented by the conviction charges, to include for example, the behavior of others in jointly undertaken criminal activity and the criminal behavior for which the offender was neither charged nor convicted. For example, an offender could be charged with multiple counts of larceny, totalling several thousand dollars but plead guilty to a single count of larceny involving less than $500. At sentencing, the relevant conduct standard would have the judge total all of the losses, including those for dropped counts, and use that total amount to determine the sentence. The guidelines for other offences such as drug trafficking also total the harm for convicted, dropped and uncharged counts, to arrive at a total harm.

3. Uniformity and Proportionality

The tension between the goals of uniformity and proportionality is one of the keys to understanding the choices made by the United States Sentencing Commission concerning the structure and content of the sentencing guidelines. Too much of either uniformity or proportionality would be at the expense of the other. In a system of uniform sentences where, all offenders convicted of bank robbery receive a five-year sentence and all offenders convicted of fraud receive a three-year sentence, could avoid sentencing disparity and eliminate many or most differences between judges. But that uniformity could undermine proportionality by, for example, ignoring gradations in the harm caused by the offence, the offender's criminal history, or aggravating and mitigating factors such the offender's role in the offence. While a system of proportional sentences would be important for the purposes of deterring more serious criminal behavior and repetitive criminal behavior, too much variation could undermine the effort to reduce disparity in sentencing.

The analysis of the 10,500 cases provided one basis for negotiating between these two goals. The Commission used the empirical data to: (1) set narrow sentence ranges that centered on the average current sentencing

[30] USSG §1B1.3 (1998).

practices for individual offences; and (2) identify relevant aggravating factors, such as monetary loss or injuries to victims, and their relationship to the sentence. Where the data for individual offences was inconclusive, the Commission read presentence investigation reports and consulted with practitioners and U.S. probation officers to develop a rationale for setting sentencing ranges. In some other instances, such as for white-collar and drug offences, the Commission had received directives from Congress to increase penalties over current practice, but the Commission still used data analyses to identify relevant aggravating factors for these offences.

4. Probation and Supervised Release

Before the guidelines, judges had broad authority to sentence offenders to probation as a means of controlling and supervising their conduct, without confinement. The Sentencing Commission, through the guidelines, curtailed the use of probation. This was a response by the Commission to the Congressional directive to ensure that the guidelines reflect the fact that pre-guideline sentences do not always accurately reflect the seriousness of the offence. The Commission accomplished this through the structure of the guideline sentencing table, which will be described in more detail in a later section. The result was that fewer offenders would be eligible for probation. During the statistical year 1987,[31] just prior to the effective date of the guidelines, 36.5 percent of the 43,942 offenders convicted in federal courts received probation as part of their sentence.[32] A decade later, during fiscal year 1997, 21.2 percent of the 55,648 convicted offenders received a probation sentence.[33]

The Sentencing Reform Act of 1984 abolished parole release from prison, and therefore parole supervision after release, but Congress directed the Sentencing Commission to consider whether a term of imprisonment should include a term of supervised release.[34] The Commission decided that a term of supervised release should be imposed in all cases with a sentence of one or more years of imprisonment and in all other cases at the court's discretion.[35] The length of the term of supervised release can vary from one to five years, depending on the seriousness of the conviction offence.[36] Unlike parole release, the term of supervised release is served after the completion of the full term of imprisonment, less good time credits. The released offender is subject to a number of mandatory conditions[37] and is supervised by a U.S. Probation Officer who reports to the sentencing judge.

5. Mandatory Minimum Sentences

While the Sentencing Commission was creating the sentencing guidelines, Congress passed the Firearm Owner's Protection Act[38] and the Anti-Drug Abuse Act of 1986.[39] The former instituted a new, mandatory 5-year penalty for the use of a firearm during the commission of a drug felony; the latter added mandatory

[31] Until 1991, the Administrative Office of the U.S. Courts compiled data on a statistical year basis, from July 1 to June 30 of the following year. Statistical year 1987 refers to the period July 1, 1986 to June 30, 1987. In 1992, the Administrative Office switched to fiscal year reporting. Fiscal year 1997 refers to the period October 1, 1996 to September 30, 1997.

[32] Administrative Office of the United States Courts, *Annual Report of the Director* (1987) at 282.

[33] Administrative Office of the United States Courts, *Annual Report of the Director* (1997) at 217.

[34] 28 USC § 994(a)(1)(C) (1998).

[35] USSG §5D1.1 (1998).

[36] USSC §5D1.2 (1998).

[37] USSG §5D1.3.

[38] Pub. L. No. 99-308, 100 Stat. 449 (1986).

[39] Pub. L. No. 99-570, 100 Stat. 3207 (1986).

minimum penalties that tied the minimum penalty for certain drug offences to the amount of drugs involved in the offence. Two years later, in the Omnibus Anti-Drug Abuse Act of 1988, Congress enacted additional penalties for drug offences, including a five-mandatory minimum sentence for possession of 5 grams of crack cocaine.[40]

This was not the first time that mandatory minimum penalties for drug offences had existed in the federal system. The Narcotic Control Act of 1956[41] created mandatory ranges for most drug importation and distribution offences. Judges were required to select a specific sentence within the range, and parole release was prohibited for the covered offences. Congress repealed most of these mandatory minimum sentences after finding that the sentence increases had not been shown to reduce the number of drug law violations.[42]

The creation of mandatory minimum sentences so soon after the Sentencing Reform Act clearly conflicts with the goal of the guidelines created by a panel of experts. The Commission's response during the guideline development process was to incorporate the mandatory minimum penalties as baselines in the drug guidelines. The drug guidelines tie penalties to drug amounts as a measure of harm, and the drug amounts that trigger mandatory minimum penalties (e.g., 5 grams of crack cocaine) result in an identical or greater guideline sentence.

6. Just Deserts vs. Crime Control

As noted earlier, the 1984 Sentencing Reform Act elevated the notion of punishment over the then prevalent objective of rehabilitation. Still, one philosophical dispute the Sentencing Commission had to address involved the purposes of punishment. Some observers argue that punishment should follow a "just deserts" model, in which punishment is keyed to the harm caused by the offence and the offender's culpability. Others argue that the goals of deterrence and incapacitation should take precedence in sentencing, that the primary purpose of punishment is the control of crime and sentences should be designed to achieve this purpose. The Commission's solution to this debate was to declare that the application of either model would achieve the same results in most sentencing decisions.

IV. THE FEDERAL SENTENCING GUIDELINES

A. Structure

The guidelines are structured according to broad offence categories such as offences against the person, property offences, drug offences, fraud, and a variety of other offences that are unique to the federal system (e.g., immigration and national defence). Most of these categories are broken down further into major subcategories such as homicide, robbery, and drug trafficking. These sub-categories are linked to specific criminal statutes and utilize a scoring system for determining the harm caused by the offence and, ultimately, the sentence the convicted offender will receive. Under this scoring system, offences are assigned levels based on specific offence characteristics such bodily harm to victims, financial loss, and the methods used to commit the offence.

B. An Example: Bank Robbery

1. The Adjusted Offence Level

Consider this example: an offender convicted of one count of bank robbery (18

[40] Pub. L. No. 100-690, 102 Stat. 4377 (1988).

[41] Pub. L. No. 84-728, Title I, Sec. 103. 70 Stat. 651, 653-55 (1956).

[42] S. Rep. No. 613, 91st Cong., 1st Sess. 2 (1969).

USC § 2113) would be sentenced under the robbery guidelines (USSG §2B3.1). The guideline calculation begins with a base offence level of 20. An unarmed robbery of a person, with no harm to the victim and a loss of no more than $10,000, is assigned an adjusted offence level of 20. No enhancements are made to the base offence level. Because the example is a bank robbery, 2 levels are added for robbery of a financial institution. If the offender had a weapon, 3 to 7 levels are added depending on the nature of the weapon and its use during the robbery. Three levels are added if a dangerous weapon (e.g., a firearm or a knife) was possessed, displayed, or brandished. More levels are added to represent greater levels of threat, up to 7 levels if the weapon was a firearm and it was discharged during the robbery. Bodily harm to victims adds 2 to 6 levels depending on the degree of harm, but the combined adjustment for weapon use and harm to victims is capped at 11 levels in the robbery guideline. Financial loss adds 0 to 7 levels, again depending on the amount of loss. If a victim was taken hostage to facilitate escape, another 4 levels are added to the total. Thus, a bank robbery in which the offender fired a gun, wounded a victim, stole $500,000 and took a hostage will have an adjusted offence level of 41.

Other categories of offences are structured similarly, with a base offence level and adjustments to that level according to specific offence behaviors. Most of these adjustments are increases, because the base offence level is intended to describe a basic or unsophisticated form of an offence, with minimal harm. Occasionally, an adjustment will be statutory and not related directly to the offence behavior, or the base offence level will itself be scaled. The drug trafficking guideline assigns a base offence level according to the amount of drugs involved in the offence. Multiple counts of convictions are handled by "grouping" related counts, selecting the group with the greatest adjusted offence level, and making adjustments to that level based on the additional groups of counts.

Once the conviction offence has been scored according to its specific features, further adjustments are made for more general offence features. These adjustments, which may result in increases or decreases in the adjusted offence level, and which may be applied to any offence, are for the nature of the victim (e.g., was the victim vulnerable?), the offender's role in the offence (e.g., organizer as opposed to a minimal participant), obstruction of justice, and the offender's acceptance of responsibility for the criminal behavior. Further adjustments are made to the offence level for offenders defined by statute as career offenders[43] or whose livelihood is derived from criminal conduct. For example, an offender with two prior felony convictions for drug offences or crimes of violence may have his or her adjusted offence level increased if that level is below levels specified in the guidelines.[44]

2. The Criminal History Score

The next step is the scoring of the offender's criminal history. The calculation of the criminal history score is done on the basis of the length of prior sentences of imprisonment (not the amount of time actually served) in any jurisdiction, local, state or federal. For example, 3 points are added for each prior sentence exceeding one year and one month; 2 points are added for each shorter sentence of imprisonment that is of at least 60 days; and 1 point is added for each sentence of imprisonment that did not receive 2 or 3 points. A sentence is

[43] 21 USC § 841 (1998). See also 28 USC § 994(h) for directives to the Commission regarding the sentencing of career offenders.

[44] USSG §4B1.1 (1998).

counted only if that sentence was imposed no more than fifteen years prior to the beginning of the offence of conviction. Points are also added if :(1) the offence was committed while the offender was under any type of criminal justice sentence, including not only imprisonment but also any form of community supervision; (2) if the offence was committed within two years after release from imprisonment on a sentence worth 2 or 3 points; or (3) if the offender was convicted of a crime of violence whose sentence did not receive any points as described above.

C. The Sentencing Table

The calculation of the adjusted offence level and of the criminal history score are outlined in a presentence report prepared for the sentencing judge by a U.S. probation officer. This report is typically shared with the U.S. Attorney's Office and defense counsel, both of whom may dispute the probation officer's recitation of facts and application of the guidelines. These objections, if not resolved prior to sentencing, are included as appendices to the report. The sentencing judge will, either in a separate hearing or during the sentencing hearing, rule on any disputes. After determining in court the final offence level and criminal history score, the judge uses the sentencing table in Annexure 1 to determine the type of sentence possible and its length.

The sentencing table has two dimensions: offence levels are listed on the vertical axis and criminal history categories (i.e., groupings of criminal history scores) are listed across the horizontal axis. Within each of the table's cell is a range of months of imprisonment. When formulating the table, the Sentencing Commission followed three principles. First, the ranges in adjacent cells overlap. The goal was to reduce the potential for litigation over the exact guideline application. If the same sentence could be have been imposed whether the offender received one or two fewer (or additional) levels, there is no ready basis for appealing the sentence. Second, the lower ends (and the upper ends) of the sentencing ranges were designed to increase at an increasing rate.[45] This feature produces wider ranges as offence levels and/or criminal history categories increase. However, the width of these ranges is bound by the third, statutory principle: the maximum of a sentencing range cannot exceed the minimum of that range by more than 25 percent of the minimum range or six months, whichever is greater.[46] The exception is that ranges with minimum sentences of 30 years or more may have a maximum sentence of life imprisonment.[47]

The sentencing table specifies months of imprisonment, but depending on the region of table, some form of probation may be a possible sentence. The table is divided into four zones, A to D. Zone A consists of all ranges for which zero is the minimum sentence, allowing the sentencing judge to impose a sentence of probation rather than imprisonment for offenders whose combined offence level and criminal history score places them in one of these ranges. Offenders in Zone B (minimum sentence of 1 - 6 months) or Zone C (minimum sentence of 8 - 10 months) may, with certain restrictions, be sentenced to some combination of imprisonment and supervision, referred to as a "split sentence." Offenders in Zone D have a minimum sentence of 12 months and must receive a sentence of imprisonment.

[45] With some exceptions, the lower and upper ends of the ranges increase logarithmically.

[46] 28 USC § 994(b)(2) (1998).

[47] *Ibid.*

At sentencing, after determining the applicable sentencing range, defined by the intersection of the adjusted offence level and the criminal history score, the judge must impose a specific sentence within that range. If the sentence is probation, or includes a term of probation, the judge can impose a term of 1 to 5 years, depending upon the adjusted offence level.[48] A defendant serving a sentence of 12 months or greater is entitled to a credit of up to 15 percent of the sentence for good behavior in prison.[49]

D. Departures from the Sentencing Range

One of the features of this sentencing system that sets it apart from the previous, indeterminate system is the ability of both offenders and the government to appeal sentences that do not fall within the applicable sentencing range or which the appellant claims are based on an erroneous interpretation of the guidelines. Presupposing sentences outside the prescribed range is the power of the judges to depart from that range. Judges may depart from that range under either of two circumstances: (1) if the offender has provided assistance to the government,[50] or (2) if there are characteristics of the offender or the offence that were not, in the opinion of the judge, adequately considered by the Sentencing Commission in the creation of the guidelines.[51] In the case of assistance to the government, this type of departure can only be made after a motion by the government (i.e., the U.S. Attorney). Once the motion is made, the judge may sentence anywhere below the specified sentencing range, even below statutory minimum sentences. If the judge determines that there is some characteristic of the offender or the offence that was not adequately considered by the Sentencing Commission, the judge may sentence above or below the applicable range, although not below the statutory minimum. A judge may never exceed the statutory maximum sentence.

As noted above, the Commission decided that most of the factors Congress asked it to consider are not relevant to sentencing, and therefore, there may not be very many characteristics the Commission has not considered. However, the guidelines do include instructions that describe circumstances in which judges may consider a departure. For example, the guidelines include a policy statement that if an offender's criminal history score does not adequately represent the seriousness offender's criminal history, the judge may consider departing from the specified sentencing range.[52] The theft guideline includes an instruction that if the monetary loss to victims underrepresents the harmfulness of the crime, particularly the nonmonetary loss, the sentencing judge may consider an upward departure.[53] Case law developed since 1987 has further broadened the discretion of sentencing judges. During fiscal year 1997, 19.2 percent of guideline sentences were departures for substantial assistance, 12.1 percent were downward departures for reasons other than substantial assistance, and 0.8 percent were upward departures.[54]

V. THE IMPACT OF THE FEDERAL SENTENCING GUIDELINES

After more than ten years of sentencing guidelines in the federal courts, their impact can be seen in a number of changes

[48] USSG §5B1.2 (1998).

[49] 18 USC §3624(b) (1998).

[50] USSG §5K1.1 (1998).

[51] USSG §5K2.0 (1998).

[52] USSG §4A1.2 (1998).

[53] USSG §2B1.1, comment (n. 15) (1998).

[54] United States Sentencing Commission, *1997 Sourcebook of Federal Sentencing Statistics* (1997) at 53.

throughout the federal criminal justice system. The federal prison population has more than doubled since the guidelines' introduction. Under the guidelines, offenders are being sent to prison more often and to serve longer sentences. Criminal appeals have also doubled. As offenders sentenced to terms of supervised release are released from prison, particularly after long sentences, the number of supervised released revocation hearings has increased.

A. The Federal Prison Population

During the period from 1986 to 1997, the federal prison population grew from 40,505 to 101,845.[55] In 1986, drug offenders accounted for 38.1 percent of newly sentenced offenders. By 1997 this figure had grown to 59.5 percent. The majority of these drug offender are first-time offenders who have been sentenced to prison under the mandatory minimum statutes.[56]

As noted earlier, the use of probation has declined from 36.5 percent of all sentences in 1987 to 21.2 percent in 1997. This means that a greater proportion of convicted offenders are going to prison under the guideline system, some of them for considerably longer periods of time. The average time served in prison increase from 15.6 months in 1986[57] to 26.5 months in 1995[58]. Drug offenders released from federal prison in 1986 had served an average of 19.5 months. Time served by drug offenders increased to an average of 37.6 months by 1995. The effect of mandatory minimum sentences and the guidelines has been to double the average time served by drug offenders. This is the most dramatic increase in average time served, but average time served may mask the equally important change in the proportion of offenders sentenced to prison. Offenders who once received probation may now be serving short prison terms. For example, the average time served for fraud increased only slightly from 13.6 months in 1986 to 15.6 months in 1995, but the percentage of fraud offenders sentenced to prison during this period increased from less than 50 percent to about 60 percent.

B. Appeals

During statistical year 1987, there were a total of 5,260 criminal appeals commenced in the U.S. Courts of Appeals.[59] During this same year, 41,087 criminal cases were terminated in the U.S. District Courts.[60] During fiscal year 1997, the number of criminal appeals commenced had increase to a total of 10.521.[61] During this year, 46,887 criminal cases were terminated.[62] Thus, while there was a 100 percent in criminal appeals commenced from 1987 to 1997, the number of criminal cases terminated increased by only 14 percent. Although we have no data showing the nature of these appeals, the bulk of this increase is almost certainly attributable to appeals of guideline sentences.[63]

C. Supervised Release Revocations

An impact of the sentencing guidelines that is only now beginning to show is the increase in the numbers of persons under supervised release and the concomitant revocations of supervised release. On

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[55] *Ibid.* at 506.

[56] Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes*? 7 Fed. Sent. Rep.22 (1994).

[57] Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics-1988* (1988) at 647.

[58] Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics-1997* (1997) at 507.

[59] Administrative Office of the United States Courts, *supra* note 32 at 142.

[60] *Ibid.* at 234.

[61] Administrative Office of the United States Courts, *supra* note 33 at 81.

[62] *Ibid.* at 178.

September 30, 1997, 51,036 persons were serving a supervised release term, compared to 33,006 persons on probation.[64] Supervised release is now the largest supervision category, but it did not even exist prior to the guidelines. Persons under supervised release are subject to mandatory conditions such as reporting and maintaining employment, and may be subject to additional, court-imposed conditions such as drug testing and treatment. Violations of those conditions could result in a return to prison, much as violations of probation conditions can result in a prison sentence. During fiscal year 1997, 5,455 persons were removed from supervised release for violations of conditions.[65] This figure represents approximately one-third of all individuals removed from supervised release during that period (e.g., their term expired). In contrast, only about one-sixth of persons removed from probation supervision were removed for violations of probation.

An examination of violations of supervised release and of probation shows that the proportion of major violations was 2-3 times higher among the supervised release population compared to the probation population. Defendants released after lengthy terms of confinement often emerge from prison to a hostile environment without support of family and the ability to maintain employment and navigate a greatly changed social environment.

Supervised release is intended to keep offenders who have committed serious offences under some type of control after release from prison. But this is also a population with, on average, more extensive and more serious criminal histories than offenders serving a term of probation. As a result, supervised release gives additional responsibilities to both probation officers and to the courts. These responsibilities are certain to increase because an ever-growing prison population has to result in an ever-growing population on supervised release.

D. The Purposes of Punishment

What has been the impact of the sentencing guidelines in terms of the purposes of sentencing - just punishment, deterrence, incapacitation, rehabilitation? Certainly, the sentencing guidelines achieve incapacitation. The use of probation has been reduced and prison terms have been increased for many or most of the offences under federal jurisdiction. Deterrent effects are difficult to measure and will probably remain so. Offences prosecuted in federal courts represent a very small and, in some instances, a unique portion of all offences prosecuted in the courts of the United States. Deterrent effects of the guidelines are likely to be masked by the much large state criminal justice systems. Rehabilitation, although a stated purpose of sentencing, is not vigorously pursued at either the state or the federal level.

Just punishment has been, from the start, a major goal of the reform efforts that led to the Sentencing Reform Act of 1984. If one defines just punishment narrowly in terms of the process by which sentences are imposed, the guideline system is closer, in general, to fulfilling this purpose of sentencing than was the indeterminate system it replaced. Convicted offenders can

[63] The Sentencing Commission's 1997 Annual Report contains data on 3,691 sentencing appeals during 1997. This is almost certainly an undercount because the Commission collects only opinions and orders issued by the courts of appeal. United States Sentencing Commission, *1997 Sourcebook of Federal Sentencing Statistics* (1997) at 103, A-1.

[64] Administrative Office of the United States Courts, *supra* note 33 at 243.

[65] *Ibid.* at 256.

know before sentencing the type of sentence they will receive and will have some idea of its approximate length. If a term of imprisonment is imposed, the offender can expect to serve at least 85 percent of it. However, a broader view of just punishment might lead to questions about other factors outside the narrow scope of guideline application.

For one, many observers argue that the mandatory minimum sentences for drug trafficking, specifically those for crack cocaine, have a disproportionate impact on Black offenders. For example, the five-year mandatory minimum sentence for cocaine trafficking is triggered by 500 grams of powder cocaine but only by 5 grams of crack cocaine. Since Blacks are more likely to be charged with trafficking crack cocaine than are Whites, they receive a mandatory sentence for much smaller amounts of cocaine.[66] Even the Sentencing Commission has found that Blacks are disproportionately affected by this mandatory minimum sentence.[67] Nevertheless, Congress rejected the Commission's recommendation for greater parity between crack and powder cocaine for triggering a mandatory minimum penalty. If the statutory penalties that the Sentencing Commission is required to implement are perceived as unjust, no amount of procedural fairness in the application of the guidelines can compensate.

At the other end of the process, judges are able to depart from the guidelines under circumstances described in the guidelines and noted earlier. One of those circumstances is substantial assistance to the government in the prosecution of others. If an offender has provided such assistance, and the government makes a motion for a departure, the court may depart downward, even below mandatory minimum penalties. A potential for sentencing disparity clear exists is these instances, and it is of two sorts. For one, the guidelines do not define what constitutes substantial assistance, and a study by Sentencing Commission staff shows that definitions of substantial assistance and prosecutorial practices vary across U.S. Attorney offices.[68] Two offenders convicted in different districts of the same offence, with similar backgrounds, who provided the same assistance to the government, can receive very different sentences depending on how the U.S. Attorney's office in each district defines assistance. Once the motion for a substantial assistance departure is made, no guidelines define for judges the limits of a reasonable departure, nor are judges required to explain their reasons in this context. Although the limits on other departures are also undefined, except by statutory minima and maxima, they do require justification by the sentencing judge. In these instances, as required by statute, the judge will have a rationale for the departure that can form the basis for the degree of departure. No such rationale is needed for substantial assistance departures. This again raises the question whether the process invariably leads to a just punishment. Since substantial assistance departures were made in approximately 19 percent of cases sentenced during fiscal year 1997, this is not an issue limited to a few cases.

Finally, the issue of variation across U.S. Attorney Offices, with respect to substantial assistance, raises a larger

[66] United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (1995) at 156.

[67] *Ibid* at xii.

[68] Linda Drazga Maxfield and John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* (1997).

issue: how variation in definitions, procedures, and practices across federal court districts, as well as the courts of appeals, may produce sentencing disparity. At present, the extent of such variation and how it interacts with the application of the guideline system is unknown. The guideline system is designed to accept a certain amount of disparity, hence the overlapping and increasingly wider sentencing ranges in the sentencing table. The extent of disparity due to inter-district or inter-circuit differences in guideline application, the precursor to the sentencing table, is unmeasured. Even if it were known, the Sentencing Commission has limited authority to make adjustments to reduce disparity of this sort. For example, the Commission can amend the guidelines, perhaps to resolve conflicts in case law between circuits over guideline application. When the amendment results in a reduction in a term of imprisonment and it deems it necessary, the Commission can apply the result retroactively to reduce the terms of imprisonment of offenders already sentenced.[69]

VI. THE FUTURE OF FEDERAL SENTENCING

What does the future hold for federal sentencing? Reform efforts tend to be cyclical, as problems with the current system are recognized and there emerges a consensus that something must be done. These cycles seem to take 15-20 years to complete. The federal sentencing guidelines may be in the middle of their cycle. Issues concerning the growing prison population, the increased number of appeals, and the increasing numbers of persons on supervised release have apparently not reached a crisis point, at least not in the U.S. Congress. One aspect of the picture that has changed in the last decade is the increasing politicization of the reform process. The politicization of crime probably began 30 years ago when national political campaigns began to emphasize rising crime rates and the dangers they posed to the average citizen. The politics of crime have become increasingly sophisticated, to the point of focusing on much narrower issues such as school uniforms as a means to combat juvenile gang violence.

Another change is the greater hands-on nature of Congress' efforts at reform. Congress now typically issues directives to the Sentencing Commission to study or adjust specific offence levels. Congress has also considered federalizing offences that have traditionally been prosecuted in state courts, and the prospect of more rather than fewer mandatory minimum sentences for drug offences is a real one.

Whatever the future may hold, judges have clearly found ways to work with the guidelines. One measure of comfort might be the departure rate. During fiscal year 1997, 12.1 percent of imposed sentences were downward departures for reasons other than substantial assistance and 0.8 percent were upward departures.[70] During fiscal year 1991, these figures were 5.8 percent and 1.7 percent, respectively.[71] The downward departure rate has doubled in six years, indicating that judges are finding ways to craft sentences they feel are appropriate but are not provided by the sentencing guidelines. To put this result in a slightly different context, the 12.1 percent downward departure rate for 1997 represents 5,574 cases. With slightly less than 900 active and senior district court judges in the federal system, the odds are high that all or most district court judges

[69] USSG §1B1.10 (1998).

[70] United States Sentencing Commission, *supra* note 63 at 53.

[71] United States Sentencing Commission, *Annual Report* (1991) at 139.

who sentenced criminal cases that year departed downward in at least one case.

The departure rate may indicate some dissatisfaction with mandatory sentencing rules if not with the idea of guidelines generally. A 1996 survey of federal judges and others by the Federal Judicial Center yielded this result: 73% of district judges who responded to the survey said that they thought mandatory guidelines were not necessary.[72] When asked what they would prefer in their place, two-thirds preferred advisory guidelines.[73]

While the Congress has shown no inclination to abolish the sentencing guidelines, or make them advisory, the Sentencing Commission has shown interest in guideline reform. In 1995, Commission staff began a study of the guidelines, aimed at considering how they might be refined and simplified. To focus staff attention and facilitate this review, the Commission declared a one-year moratorium on guideline amendments. Hearings were held in Washington, D.C. and Denver, Colorado, and Commission staff prepared a series of working papers to examine relevant conduct, the level of detail in specific offence guidelines, sentencing options, departures, and the Sentencing Reform Act itself. Due to turnover in Sentencing Commissioners, this review effort has stalled. But its initiation suggests that the most likely source of incremental sentencing reform is the Sentencing Commission. Refinement and simplification do not constitute revolutionary change, but they may help deal with critical issues such as the prison population, until the next round of sentencing reform.

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[72] Molly Treadwell Johnson and Scott A. Gilbert, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 196 Survey* (1997) at 3.

[73] *Ibid* at 4.

ANNEXURE I

UNITED STATES SENTENCING COMMISSION

SENTENCING TABLE

Offence Level	Criminal History Category (Criminal History Points) 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	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	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	120-150	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