DISSENTING VIEW OF COMMISSIONER PAUL H. ROBINSON ON THE PROMULGATION OF SENTENCING GUIDELINES BY THE UNITED STATES SENTENCING COMMISSION

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[Note: A Summary of Commissioner Robinson's points appears on the last three pages.]

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DISSENTING VIEW Of Commissioner Paul H. Robinson:

When it passed the Sentencing Reform Act of 1984, by a vote of 91 to 1 in the Senate and 316 to 91 in the House, the United States Congress committed the federal system to rationality and consistency in criminal sentencing. The Act built upon a decade of state experience in sentencing reform, but devoted resources on a greater scale and called for sentencing guidelines of a higher order of sophistication than any existing system. With that Act, Congress announced its inspired vision for modern American sentencing.

The vision was rationality in criminal sentencing. Rather than simply continuing past practices, the newly-created United States Sentencing Commission was directed to devise and articulate a sentencing policy. That sentencing policy was, in turn, to direct the decisions necessary for guidelines that would further the statutorily-defined purposes of sentencing--the imposition of just punishment, the deterrence of potential offenders, the incapacitation of dangerous offenders, and, where possible, rehabilitation. The ultimate goal was a rational sentencing system and a system that would be perceived as rational.

The vision was consistency in criminal sentencing. Instead of 1,042 federal judges and magistrates imposing discretionary sentences in more than 102,000 cases annually,[1] the new Commission was to devise comprehensive and binding sentencing guidelines. Judges were to be bound by the guidelines unless there existed in a case an unusual factor that "was not adequately taken into consideration" by the Commission in drafting the guidelines.[2] This would be a rare case because the guidelines were to take account of "every important factor relevant to sentencing."[3] The guideline imprisonment range for each combination of offense and offender characteristic was to be narrow--not more than 25%.

The Congressional vision of sentencing reform also showed wisdom and self-restraint; Congress chose to forego the opportunities for posturing that come with crime and punishment issues. It took the high road, delegating the task of rational sentencing reform to what was to be an independent, nonpolitical Commission of experts, giving the Commission the power to promulgate the new sentencing system without further action by Congress.

Such invitations to visionary reform are the sort of rare events that inspire men and women to their greatest accomplishments. With the guidelines promulgated today, however, the vision dims.

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[1] Last year, federal district court judges (575 authorized) sentenced 40,740 offenders; 467 active magistrates sentenced 61,839, for a total of 102,579. Administrative Office of the United States Courts, 1986 Annual Report of the Director, Appendix I at 56-57, 102-103 (1986) [hereinafter cited as 1986 Annual Report].

[2] 18 U.S.C. 3553(b).

[3] S. Rep. No. 225, 98th Cong., 1st Sess. 169 (1983) [hereinafter cited as S. Rep. No. 225].

1. The Failure to Provide a Rational and Coherent Sentencing System

Of all of the goals of the Sentencing Reform Act, it is most unfortunate that the goal of rationality has been abandoned and even frustrated by these guidelines.

The Failure to Define a Rational and Coherent Policy and to Provide Sentences Calculated to Achieve the Statutory Purposes of Sentencing. The Act requires the Commission to establish guidelines designed to "assure the meeting of the purposes of sentencing [i.e., just punishment, deterrence, incapacitation of the dangerous, and rehabilitation]."[4] Instead of calculating sentences to achieve such statutory purposes, however, the guidelines simply mimic the mathematical averages of past sentences.[5]

To improve its ability to further the statutory purposes, the Commission was expected to "develo[p] and coordinat[e] research studies (including, for example, basic research on sentencing theories as well as applied research on the effectiveness of certain policies)."[6] In contrast, the Commission neither undertook studies nor gave serious consideration to existing studies on the means of achieving deterrence and incapacitation. Nor did the Commission undertake studies or systematically consider existing studies on public perceptions of relevant sentencing factors and their appropriate weight for punitive purposes. While the guidelines' commentary sometimes gives reasons for the adoption of a particular policy, neither the guidelines nor the commentary cite a single empirical research study.

Rather than being guided by the statutory purposes of sentencing, the guideline drafting reflected simply a haphazard "fiddling with the numbers" that established the

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[4] 28 U.S.C. 991(b)(1)(A).

[5] See Final Draft at 1.4 [hereinafter "F.D."]:

> For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point. . . . The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. . . .

The Revised Draft [hereinafter "R.D."] collected all known sentencing platitudes and called them the "Principles of Sentencing" of the guidelines. R.D. at 2. Admirably, the final guidelines drop this pretense, but such honesty is no substitute for the Act's requirement that the guidelines "assure the meeting of the [statutory] purposes of sentencing."

[6] S. Rep. No. 225 at 160. 28 U.S.C. 995(a)(12)-(16) outlines the extensive research and data collection and dissemination authority of the Commission. "These functions are essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the [statutory purposes of sentencing] [28 U.S.C. 991(b)(2)] and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. [28 U.S.C. 991(b)(1)(C)]." S. Rep. No. 225 at 182.

guideline sentences. The lack of a credible basis for the numbers became painfully obvious, however, and in the last few weeks, the intuitive approach was abandoned in favor of "past sentencing averages" as the primary basis for establishing guideline sentences. Because they simply continue what judges do, some will argue, the effects of these guidelines need not be explained or defended.

In addition to the criticisms that are detailed below, the guideline's claimed past-practice "principle" of drafting may be challenged on the grounds that it is not followed. Offenders under current practice receive sanctions other than imprisonment (e.g., fines, conditions of probation) in approximately 50% of the cases,[7] yet the guidelines provide for imprisonment in all but the most minor cases. If the "theory" of the guidelines is that they simply follow past practices, how can the effect of the guidelines so dramatically deviate from past practice? My own view is that, in many cases, reducing the availability of probation or, at very least, making probation more punitive, would further the statutory purposes of sentencing. But the guideline drafters have rejected this sort of principled approach--i.e., devising sentences to meet the statutory goals.

The Impropriety of Basing Guidelines on Mathematical Averages of Past Sentences. Attempting to use mathematical averages of past sentences as a means of drafting guidelines is, in my view, unacceptable for four reasons. The first and most serious is that a sentence based on a mathematical average of past sentences is likely to be an irrational sentence. Two judges may each follow a rational sentencing philosophy designed to achieve legitimate sentencing purposes yet, because their philosophies differ, as they commonly do, the sentences that they impose may differ. (As shall be discussed later, this is a major source of sentencing disparity.[8]) Because each of the two sentences rationally serves its purpose, however, it does not follow that a mathematical average of the judges' sentences will be rational. Consider, for example, the case of a young addict who sells drugs to acquaintances to support his own habit. One judge may impose a long term of imprisonment in order to send a strong deterrent message to drug sellers. Another judge may impose a very short term of incarceration followed by supervised release conditioned upon the offender's participation in a community drug treatment program in the belief that curing the offender's addiction is more likely to remove him from the roll of drug dealers.

The guidelines might rationally embody either of such alternative policies. But by adopting no policy, and relying upon a mathematical average of sentences, the guidelines provide "bastardized" sentences that will serve neither of the two purposes. For the young addict, the "averaged" sentence will be too short to send the strong deterrent message, and will not provide the treatment necessary for rehabilitation.

A second reason to avoid sentences based on past sentencing averages is that Congress, in the Sentencing Reform Act, disapproved that method. The Commission is to ascertain past sentencing averages, but, in the language of the statute, "[t]he Commission shall not be bound by such average sentences, and shall independently

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[7] 1986 Annual Report at 58-61.

[8] See notes 71-72 and accompanying text infra.

develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code."[9]

The elusive contours of past practice provide a third reason to avoid reliance on such past practice. Precise time-served information is often unavailable until many years after an offender is sentenced (because it is the Parole Commission that determines his actual release date). Estimates of time-served may be developed by projecting the probable effects of parole guidelines and good-time accrual, but these projections are ultimately "time-served speculations." In addition, there is little available data on many of the factors that are clearly relevant to sentencing. Thus, gross averages of sentences for a given offense may have limited relevance to the particular circumstances of the offense before the judge. For example, the average sentence for armed bank robberies generally would be an inappropriate basis for setting the sentence for armed bank robbery involving gratuitous violence against a vulnerable victim.

The consultant hired by the Commission to review its current sentencing data and analysis methods concluded as follows:

> To summarize, the Commission will be guilty of misusing [the Research Director's] results if the "typical" sentences produced by his models are taken literally as accurately characterizing the past. His results provide a picture of the past in very broad brush strokes; they should be used to stimulate thought and discussion and could be very useful if put to these ends.[10]

Yet this warning was ignored when guideline sentences were set according to the data's mathematical averages of past sentences for the offense.

Even if precise and reliable time-served speculations could be attained, it is inaccurate to treat the averages of time-served as representative of past sentencing practice generally, as the guidelines do.[11] The time-served data reflects only the sentences for those offenders sent to prison, presumably the worst cases. By eliminating all past non-incarcerative sentences from the "averages" calculations, the guidelines seriously distort their claimed replication of past practice.

My own view is that there are very frequently good reasons to impose longer terms of imprisonment than have been imposed in the past. But guidelines for such longer sentences, as with guidelines for all sentences, ought to be based on a rational policy decision that the particular sentence will achieve the statutory purposes of sentencing.

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[9] 28 U.S.C. 994(m) (emphasis added). The statutory purposes of sentencing are set out in the text accompanying note 4 supra.

[10] Letter from Dr. Richard Berk, Professor of Sociology and Director, Social Process Institute, University of California--Santa Barbara, to Suzanne Conlon, Executive Director of the Commission (January 14, 1987).

[11] The Research Director tells me that he believes that the average-sentence figures were sometimes discounted in situations in which the percentage of probation cases was high. How and when this was done is unclear. But one may ask, if averages of past sentences are to be the theory of the guidelines, why were probation cases not calculated into that average? If past practice is not to be followed, what are the principles that the guidelines have followed?

It ought not be the accidental (or intentional) result of manipulation of past-practices data.

A fourth reason to disagree with the guideline's claimed reliance on past practice is that it would be difficult if not impossible to embody past practice in a sentencing system as ambiguous and discretionary as this one. With such broad discretion, judges will give the sentences they feel are appropriate. If told to exercise their discretion, they have no reason to adhere to the mathematical averages of past practices of other judges.

I believe that the real value of past-practice data is as a point of comparison after guidelines are, as the statute requires, "independently developed" to further the statutory purposes of sentencing. Significant differences between guideline and past-practice sentences can then identify points of potential controversy, which may merit closer analysis to assure the soundness of the underlying rationale. Such comparisons might also be utilized to project changes in needed prison capacity and probation services. Past practice cannot be properly or legally used, as the guidelines use it, as a "theory" or "principle" for guideline drafting.

For many of these reasons, several Commissions, including Minnesota and Washington, have rejected such a "descriptive" past-practices approach in favor of a "prescriptive" approach in which sentences are calculated to achieve one or more specified sentencing purposes.[12]

The Failure to Rank Systematically Offenses According to Seriousness. Perhaps the most basic and the most obvious initial step in constructing rational guidelines is to systematically rank offenses according to their relative seriousness. Deterrence and just punishment both call for more serious offenses to be sanctioned more seriously, as does the Sentencing Reform Act.[13] Unfortunately, the guidelines do not reflect a systematic ranking of offenses determined after analysis of existing research studies on relative societal harm and on public perceptions of relative seriousness.

As one might predict, the guidelines create significant anomalies. Under the guidelines, the judge could give the same sentence for abusive sexual contact that puts the child in fear[14] as for unlawfully entering or remaining in the United States.[15] Similarly, the guidelines permit equivalent sentences for the following pairs of offenses: drug trafficking[16] and a violation of the Wild Free-Roaming Horses and

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[12] See, e.g., M. Tonry, Sentencing Reform Impacts (1987).

[13] See, e.g., 28 U.S.C. 991(b)(1)(A) (the Commission shall promulgate guidelines that assure the meeting of the statutory purposes of sentencing, including the need for an offender's sentence "to reflect the seriousness of his offense").

[14] See F.D. 2A3.4 (base offense level 6), 2A3.4(b)(2) (+4 levels) (Total = offense level 10, 6-12 months).

[15] See F.D. 2L1.2 (base offense level 6), 2L1.2(b)(1) (+2 levels) (Total = offense level 8, 2-8 months).

[16] See F.D. 2D1.1(a)(3) (base offense level 6, 0-6 months).

Burros Act;[17] arson with a destructive device[18] and failure to surrender a cancelled naturalization certificate;[19] operation of a common carrier under the influence of drugs that causes injury[20] and alteration of one motor vehicle identification number;[21] illegal trafficking in explosives[22] and trespass;[23] interference with a flight attendant[24] and unlawful conduct relating to contraband cigarettes;[25] aggravated assault[26] and smuggling $11,000 worth of fish.[27]

The Failure to Provide Different Sentences for Cases that are Very Different in Seriousness: Promoting "Free" Harms and Ignoring Relevant Mitigations. The most basic function of any rational sentencing system is to provide appropriately different sentences for cases that are meaningfully different. Taking account of relevant

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[17] See F.D. 2Q2.1 (base offense level 6, 0-6 months).

[18] See F.D. 2K1.4 (base offense level 6), 2K1.4(b)(F) (+2 levels) (Total = offense level 8, 2-8 months).

[19] See F.D. 2L2.5 (base offense level 6, 0-6 months).

[20] See F.D. 2D2.3 (base offense level 8, 2-8 months).

[21] See F.D. 2B6.1 (base offense level 8, 2-8 months).

[22] See F.D. 2K1.3 (base offense level 6, 0-6 months).

[23] See F.D. 2B2.3 (base offense level 4, 0-4 months).

[24] See F.D. 2A5.2(4) (base offense level 9, 4-10 months).

[25] See F.D. 2E4.1(a)(1) (base offense level 9, 4-10 months).

[26] See F.D. 2A2.2 (base offense level 15, 18-24 months).

[27] See F.D. 2Q2.2(a)(1) (base offense level 6), 2Q2.2(b)(1) (+2 levels), 2Q2.2(b)(2) (+2 levels), 2Q2.2(b)(3)(A) (+3 levels) (Total = offense level 13, 12-18 months).

Similarly, the guidelines provide equivalent punishments for the following: shipping 50 weapons to a prohibited person (see F.D. 2K2.1, base offense level 9, 4-10 months) and embezzling $150 from an employee pension plan (see F.D. 2E5.2, base offense level 4), 2E5.2(b)(2) (+2 levels), 2E5.2(b)(3) (+1 level) (Total = offense level 7, 1-7 months); involving a minor in drug trafficking (see F.D. 2D1.2(a)(1), base offense level 13, 12-18 months) and attempting to break into a warehouse (see F.D. 2B2.2, base offense level 12, 10-16 months); reckless homicide (see F.D. 2A1.4(a)(2), base offense level 14, 15-21 months) and transmitting wagering information (see F.D. 2E3.2, base offense level 12, 10-16 months); firebombing a residence (see F.D. 2K1.4, base offense level 6), 2K1.4(b)(1)(A) (+18 levels) (Total = offense level 24, 51-63 months) and threatening to tamper with consumer products (see F.D. 2N1.1, base offense level 25, 57-71 months); forcibly extorting $50,000 by causing bodily injury (see F.D. 2B3.2, base offense level 18), 2B3.2(b)(1) (+2 levels), 2B3.2(b)(3) (+2 levels) (Total = offense level 22, 41-51 months) and spray-painting a house in retaliation for testimony (see F.D. 2J1.2, base offense level 12), 2J1.2(b)(1) (+8 levels) (Total = offense level 20, 33-41 months).

aggravating and mitigating factors assures that additional harms will not go unpunished--that there are no "free" harms--and that significant mitigations will be reflected in an appropriately reduced sanction. These guidelines, however, systematically promote "free" harms and ignore relevant mitigations.

First, despite a "Relevant Conduct" provision that seems to suggest that the guidelines take account of most aspects of the offender's conduct,[28] the only conduct or factors that the judge is permitted to take into account under the guidelines are those specifically listed in the applicable guideline section.[29] For example, because the burglary guideline does not specifically aggravate the guideline sentence where the offender causes physical injury, the burglar who beats a homeowner will be treated the same as the burglar who does not. That is, the beating of the homeowner is "free" in burglary, as it is in a host of other offenses.[30] Section 2, below, gives many other examples of highly relevant factors that are omitted from the guidelines,[31] thus treating very different cases the same.

The guidelines routinely ignore the difference between a completed offense and an

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[28] F.D. 1B1.3(a), entitled "Relevant Conduct," provides:

> Unless otherwise specified under the guidelines, conduct and circumstances relevant to the offense of conviction means: acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that (1) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction, or (2) are relevant to the defendant's state of mind or motive in committing the offense of conviction, or (3) indicate the defendant's degree of dependence upon criminal activity for a livelihood.

[29] See F.D. at 1.12 ("Application Instructions," steps 1-3).

[30] See text accompanying note 48 infra.

[31] For many offenses, the guidelines ignore most of the relevant factors, thus inviting possibilities for cumulative irrationality. Consider the cases of offender A who slips something into his girlfriend's drink and attempts to have sexual intercourse with her, but is stopped, and offender B who stalks his intended rape victim for two weeks, rapes her at knifepoint in her apartment, knocks her unconscious, and sets fire to her apartment before leaving (but she is rescued unharmed). Because none of the aggravating factors in the second case are recognized by the rape guideline, both offenders could receive the same guideline sentence. See F.D. 2A3.1 (criminal sexual abuse, base offense level 27), 2A3.1(b)(1) (+4 levels) (Total = offense level 31, 108-135 months).

Similarly, the father who returns from a hunting trip and sees his child run over and killed by a drunk driver and who immediately shoots and kills the driver with his hunting gun, will be punished the same as the offender who repeatedly stabs and kills a person who punched him in a barroom brawl. For both offenders, see F.D. 2A1.3 (voluntary manslaughter, base offense level 25, 57-71 months). The offender who routinely employs scores of aliens on his tomato farm will receive the same sentence as one of the illegal aliens he employs. See F.D. 2L1.2 (unlawfully entering or remaining in the United States) and F.D. 2L1.3 (engaging in a pattern of employment of aliens) (both have base offense level 6, 0-6 months).

unsuccessful attempt or a mere threat.[32] Thus, the offender who telephones a witness in a trial and threatens to throw eggs at her car is treated the same as he would be if he had firebombed her car, seriously burning her.[33] Indeed, under the guidelines, one judge can frequently give a higher sentence to an offender who unsuccessfully attempts or threatens an offense than another judge gives to an offender who successfully completes the same offense under the same circumstances.[34]

The guidelines' treatment of multiple offenses is yet another source of systematically ignoring additional factors and additional offenses. The guidelines provide no additional sanction for additional offenses against the same victim during

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[32] For example, the Final Draft provides the same sentence for rape and attempted rape (2A3.1), tampering with a public water system and an attempt to tamper (2Q1.4), and inciting a prison riot and attempting to incite a prison riot (2P1.3). See also F.D. 2X1.1(a) (the general attempt provision).

[33] See F.D. 2J1.2 (obstruction of justice, base offense level 12), 2J1.2(b)(1) (+8 levels) (Total = offense level 20, 33-41 months). Similarly, the offender who injects halloween candy with LSD and thereby injures many children, is treated the same as he would be if he had abandoned his attempt before he injected the drug. See F.D. 2N1.1 (tampering or attempting to tamper with consumer products, base offense level 25, 57-71 months).

[34] For example, under F.D. 2N1.1, note 33 supra, the latter offender could get 5 years, 11 months; the former could get 4 years, 9 months.

Even where a factor is included in the guidelines, one or another structural device may well cause it to be ignored. For example, the guidelines' common cross-references, which refer the judge from one offense guideline to another, instruct that only the more serious of the multiple offenses be taken into account. Thus, if the defendant assaults a passenger while interfering with a flight crew, the cross-reference to assault makes the endangerment of the aircraft and the passengers free, and the offender is treated the same as an assaulter who does not endanger an aircraft and its passengers. See F.D. 2A5.2(a)(3). If the defendant causes death or intends to cause physical injury while committing arson, the reference to the homicide guideline makes the arson free. See F.D. 2K1.4(c)(1). If the defendant wiretaps to facilitate another offense, the reference to the other offense makes the wiretapping free. See F.D. 2H3.1(a)(2). Similarly, if the defendant interferes with interstate commerce by robbery or extortion, the reference to those offenses makes the disruption of commerce free. See F.D. 2E1.5.

The guideline direction to "use the greatest" aggravator when multiple aggravators apply is another structural mechanism that systematically creates "free" harms and ignores important differences between cases. All aggravtors but the most serious are consequently ignored. Consider the case of two Ku Klux Klan members who attempt to murder a black family by burining their $100,000 home at 3 a.m., but the family escapes unharmed. If convicted of arson, only the greatest aggravator--creating a substantial risk of death or serious bodily injury--applies. Aggravators for destruction of a residence, deprivation of civil rights, and $100,000 of property damage are ignored. See F.D. 2K1.4(b)(1)(C) (12 levels), (b)(1)(D) (7 levels), and (c)(2) (7 levels lost by the cross-referencing technique).

the same "transaction."[35] Thus, upon convictions for transportation for the purposes of prostitution and for aggravated assault of one of the prostitutes, the court can only sanction the offender for the more serious offense; the other is "free." Nor is there additional sanction where multiple offenses are part of the same "common scheme or plan" against the same victim.[36] Thus, after robbing the local postmaster once, all subsequent robberies of the postmaster as part of the same scheme are "free."

Even where offenses are unrelated and against different victims, frequently only the most serious offense is punished; the others are "free."[37] Thus, if one assault victim suffers serious bodily injury, the wounding of two other victims on two other occasions will go unsanctioned under the guidelines. Still further, because amounts are often accumulated, multiple offenses of a similar nature are often treated as a single offense. Thus, an offender who defrauds two widows of $100,000 is treated the same as he would be if he had defrauded 40 widows of $5,000 each.[38]

The guidelines' multiple-offenses provision appears to be in direct violation of the Sentencing Reform Act's requirement that the guidelines provide "an incremental penalty for each offense in a case in which a defendant is convicted of (A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and (B) multiple offenses committed at different times . . . ."[39]

The Failure to Address the Problems of Fragmented and Overlapping Offenses. A serious structural flaw of the guidelines is their reliance upon the specific code provisions of federal law, which Congress itself has described as being archaic, fragmented, and overlapping.[40] Arson, for example, may be punished under a host of

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[35] See F.D. 3D1.2(a).

[36] See F.D. 3D1.2(b).

[37] See F.D. 3D1.2(c).

[38] See F.D. 2F1.1(b)(2)(B). Likewise, theft of one $10,000 ring is sanctioned the same as ten thefts, on different occasions, each of a $1,000 ring (see F.D. 2B1.1). A defendant who evades $10,000 in taxes for five years is treated similarly to the defendant who evades $50,000 in taxes in one year. The pattern of evasion would be ignored (see F.D. 2T1.1). Similarly, since the number of victims is irrelevant under the guidelines, the drug dealer who sells ten grams of heroin drugs to five different people is treated the same as the dealer who sells fifty grams of heroin to one person (see F.D. 2D1.1). For each example, see also F.D. 3D1.2(d).

[39] 28 U.S.C. 994(l). "If no such incremental penalty were provided . . . an offender who commits one offense would be faced with no deterrent to the commission of another during the interval before he is called to account for the first." S. Rep. No. 225 at 176-177.

[40] The Senate Report for S.1437, the Criminal Code Reform Act of 1977, which passed the Senate 72 to 15 in the 95th Congress, describes it as follows:

Present statutory criminal law on the Federal level is often a hodgepodge of

Errata Sheet

The following footnote was omitted from page 1 of Commissioner Robinson's dissent:

* Commissioner Ronald L. Gainer, the ex-officio Commissioner from the United States Department of Justice, has argued strongly for the principles advanced here, particularly those noted in Sections 1 and 2. Because, in his view, the Commission's guidelines reject these principles, he asked the Commission to note in its publication of the guidelines that "if he were a voting Commissioner, as a personal matter, he would not have voted to support the guidelines in their current form." Transmittal Letter to Congress from the United States Sentencing Commission, April 13, 1987.

different code sections. Because the guidelines correspond to these sections, the same fragmentation is reproduced in the guidelines. The identical arson conduct might fall under any number of guideline sections, each with different values of seriousness and different aggravating factors.[41] What is needed is a consolidation of offenses and reliance upon generic offense categories.

Overlapping sections are also common. Because of the overlap, consecutive sentences for multiple offenses by an offender are likely to punish an offender twice

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> conflicting, contradictory, and imprecise laws with little relevance to each other or to the state of the criminal law as a whole. . . . Unlike several of the States, and unlike most of the other countries of the world, the United States has never enacted a true "criminal code." . . . As a result, the Federal criminal law has always remained a consolidation--a body of law drafted by different groups to deal with diverse problems on an ad hoc basis--rather than a uniformly drafted, consistently organized code.
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> Like a prism, present law . . . diffracts one offense into a spectrum of offenses, one distinguished from another only by different jurisdictional qualities, and then scatters them throughout the various provisions of Federal law. Thus, theft is currently split into theft of government property, theft of the mails, theft from interstate commerce, etc. The interpretation and application of multiple statutes inevitably result in inconsistencies, loopholes, and hypertechnicalities.
>
> Not surprisingly, the absence of a general substantive reform has left us with complex, confusing and even conflicting laws and procedures that, all too frequently, have aggravated problems associated with rendering justice to the individual as well as to society. . . . Because of its lack of clarity, consistency, and comprehensiveness, [federal penal law] tends to undermine the very system of justice of which it is the foundation.

S. Rep. No. 605, 95th Cong., 1st Sess. 3, 4, 5, 6 (1977) (footnotes omitted). A similar criminal code reform bill was submitted by the current Administration, see Criminal Code Reform Act of 1981, S. 1630, 97th Cong., 1st Sess. (1981), and was favorably reported by the Senate Judiciary Committee with much the same introductory language. See S. Rep. No. 307, 97th Cong., 1st Sess. (1981).

[41] If the arson is to intimidate a witness, for example, 2J1.2(b)(1) applies (base offense level 12 + 8 levels for property destruction); if the same arson is to defraud an insurer, 2F1.1 applies (base offense level 6, with several specific aggravators); if the same arson is simply to destroy a building, 2K1.4 applies (base offense level 6, with several specific aggravators, all of which are different from the aggravators in 2F1.1).

Kidnapping, which is also punished under many different United States Code sections, is likewise covered under a number of different guidelines. If the kidnapping was for ransom, F.D. 2A4.1 applies (base offense level 24 with several specific aggravators); if the kidnapping occurred during a robbery, F.D. 2B3.1(b)(4) applies (base offense level 18 + 4 levels for kidnapping); if the kidnapping occurred during the transportation of prostitutes, F.D. 2G1.1(b)(1) (base offense level 14) or F.D. 2G1.2(b)(1) applies (base offense level 16) (+4 levels for use of physical force or coercion by drugs); if the kidnapping occurs during a seamen riot, no guideline applies.

for some aspects of the criminal conduct, while concurrent sentences for the offender are likely to let some aspects--i.e., the unique portion of each overlapping offense--go unpunished. As long as the archaic federal criminal code provides the structural foundation for the guidelines, the problem of sentencing for multiple offenses will remain insoluble.[42]

2. The Failure to Reduce (and the Potential for Increasing) Unwarranted Sentencing Disparity

The Act seeks to promote greater consistency in sentencing by requiring comprehensive and binding guidelines. These guidelines, in contrast, are neither comprehensive nor binding. The guidelines ignore many factors important to sentencing, fail to provide a guideline for many offenses (including all offenses committed by organizations), frequently fail to provide definitions of terms and criteria for sentencing factors, and provide extensive invitations--indeed, directions--to judges to depart from the guidelines.[43] As a result, there may be as much disparity under these guidelines as there was without guidelines.[44]

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[42] One solution to the multiple offense problem is to base guidelines on the American Law Institute's Model Penal Code. Three weeks from today the country will celebrate the first quarter of a century of the Code, which generally consolidates and organizes offenses into generic, non-overlapping definitions. The Code represents a decade of work by the country's most distinguished judges, lawyers, and professors, as well as professionals from related criminal justice fields. Since its completion in 1962, the Code has been the basis for recodification of the criminal codes in over two-thirds of the states, yet these guidelines ignore the Code and the last twenty-five years of state experience in defining, refining, debating, and revising definitions of criminal conduct.

[43] Commissioner/Judge Stephen Breyer has championed what he calls the "minimalist" approach to guideline development. "You have to start slowly. One has to see how judges react to a system that doesn't limit discretion too closely but that gives guidance." Washington Post, Jan. 26, 1987, Section A, at 4, col. 1.

[44] Judge Gerald Heaney of the Eighth Circuit Court of Appeals had four of his chief probation officers test the Commission's previous draft. Based on their results, he concluded that "there will be as much disparity under the proposed guidelines as under the present [system]." Letter from Judge Heaney to Mike Murphy of the General Accounting Office (March 19, 1987) (encouraging the GAO to undertake extensive field-testing). The Probation Office in the Central District of California conducted a similar field-test on the Revised Guidelines. They concluded that:

> [A]pplication of the guideline rules by different scorers result in markedly different sentencing ranges. Many key variables affecting the final offense level are open to subjective assessments that inevitably create this disparity. While the Courts need some room for discretion, the purpose of the guidelines are defeated when they allow for such wide interpretive differences.

Public comment letter on the Revised Draft from Nancy Reims, U.S. Probation Officer (March 16, 1987). (Copies of all public comment letters are available for inspection at the United States Sentencing Commission offices.) A similar conclusion was reached by probation officers in the Eastern District of Pennsylvania after their field-testing:

Perhaps the most sobering fact is that even if sentencing disparity under the guidelines is no worse than the unacceptable level of the past, the result will be a net increase in actual disparity. The United States Parole Commission--the one source of consistency in the system today, albeit an inadequate one--will no longer be available to review and adjust the disparate sentences of the 1,042 judges and magistrates.

Requiring Departures, and Thus Inviting Disparity, by Adopting Skeletal Rather than Comprehensive Guidelines. The Sentencing Reform Act permits judges to depart from the guidelines only if the case contains a factor that was not adequately considered in drafting the guidelines. Thus, where a relevant factor is omitted, it creates the opportunity (indeed, the need) to depart from the guidelines. In other words, the less comprehensive the guidelines are, the less binding they are. For this reason, Congress mandated comprehensive guidelines.[45] It specifically provided that the

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> [T]he [Revised] guidelines are extremely flexible, and I could easily have come up with other sentence ranges by simply changing my subjective interpretation of certain key variables.
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> . . .
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> [We] are concerned that [the Revised Draft] is not really a guideline system at all . . . . [I]t appears to be a format we will henceforth apply to justify whatever sentence Judges wish to impose.

Letter from Thomas Maher, Program Development Coordinator, to The Honorable Edward Becker, Third Circuit Court of Appeals (March 2, 1987).

The structure of the guidelines has changed significantly since the Revised Draft, but the sources of disparity have not. Since that draft, the wide ranges have been taken out, which avoids some disparity, but, in addition, many sentencing factors have been deleted, guidelines for many offenses have been deleted, the lack of definitions and criteria continues, the ambiguous provisions continue, and more frequent directions that departure is appropriate have been added (and departures are worse than wide ranges because they provide no limit on how far a judge can deviate from the guidelines).

[45] The guidelines are to "cove[r] in one manner or another all important variations that commonly may be expected in criminal cases." S. Rep. No. 225 at 168. To accomplish this end, the Act specifically directs the Commission to consider the relevancy of an extensive but non-exclusive list of characteristics. Offense characteristics to be considered include: (1) the grade of the offense; (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense; (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust; (4) the community view of the gravity of the offense; (5) the public concern generated by the offense; (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and (7) the current incidence of the offense in the community and in the Nation as a whole. 28 U.S.C. 994(c). Offender characteristics to be considered include: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition,

Sentencing Commission guidelines were to be more detailed than the existing Parole Commission guidelines,[46] yet they are not.[47] Skeletal guidelines that omit many relevant and commonplace factors violate the direction for binding guidelines as effectively as would the illegal 600% guideline ranges used in the Revised Draft.

Physical injury caused during the offense and the use of a weapon are just two examples of the many highly relevant and commonplace factors that are omitted from a majority of the offenses in which they occur, even though such factors were specifically recognized as relevant in earlier guideline drafts. Thus, where a burglar beats a homeowner or uses a gun during the burglary, for example, the court must depart from the guidelines to take account of these commonplace factors.[48]

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including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood. 28 U.S.C. 994(d).

One federal judge observed that the above-listed factors gave the Commission "what appeared to me to be an exhaustive list of things to consider. I couldn't think of anything, myself, that wasn't on that list." Judge Mark Wolf, Testimony before the United States Sentencing Commission, Public Hearing, New York, New York, p. 45 (Oct. 21, 1986) (transcript available for inspection at the United States Sentencing Commission offices).

[46] The Senate Report directs that the guidelines "should contain recommendations of appropriate sentences for more detailed combinations of offense and offender characteristics than do the [United States Parole Commission] guidelines." S. Rep. No. 225 at 52 note 71. "[T]he result [of the Commission's work] will be sets of guidelines considerably more detailed than the existing parole guidelines." S. Rep. No. 225 at 168.

[47] In burglary offenses, for example, the Parole Commission's guidelines account for bodily injury caused; these guidelines do not. (Cf. 28 C.F.R. 2.20, section 211 to F.D. 2B2.1, 2B2.2.) In property damage offenses, the Parole Commission's guidelines consider injury to a victim and any significant interruption of a governmental function or public utility; these guidelines do not. (Cf. 28 C.F.R. 2.20, sections 303(a) and (g) to F.D. 2B1.3.) In government bribery offenses, the Parole Commission's guidelines will reflect whether there is a pattern of corruption and whether there is injury beyond that describable by monetary gain; these guidelines do not. (Cf. 28 C.F.R. 2.20, sections 621(b) and (d)(2) to F.D. 2C1.1.) In environmental offenses, the Parole Commission's guidelines take account of physical injury and death that result; these guidelines do not. (Cf. 28 C.F.R. 2.20, sections 1171(a) and (b), 1172(a)-(c) to F.D. Part Q.)

[48] The court must depart from the guidelines to take account of physical injury caused during such offenses as burglary, see F.D. 2B2.1 (burglary of a residence), F.D. 2B2.2 (burglary of other structures), escape (see F.D. 2P1.1), prison riot (see F.D. 2P1.3), tampering with consumer products (see F.D. 2N1.1), aircraft piracy (see F.D. 2A5.1), transportation of a minor for purposes of prostitution (see F.D. 2G1.2), sexual exploitation of a minor (see F.D. 2G2.1), mishandling of toxic substances (see F.D. 2Q1.2), abusive sexual contact (see F.D. 2A3.4), and operation of a common carrier under the influence of drugs (see F.D. 2D2.3). Similarly, the court must depart from the guidelines if the use of a weapon is to be taken into account when used in the

Also commonly ignored is an offender's level of culpable state of mind--e.g., intentional, reckless, or negligent. The statutory definition of an offense generally requires a minimum level of culpability--recklessness (or negligence), for example--and the guidelines generally assume this level of culpability. Because the guidelines do not adjust for a higher level of culpability, the court must depart from the guidelines to account for an offender who intentionally commits the offense. Thus, the offender who intentionally burns a lumber-producing forest is treated the same as the camper who negligently fails to extinguish his campfire,[49] unless the court departs. An offender who knowingly sells misbranded poultry is treated the same as a brand manufacturer who negligently breaches a label regulation,[50] unless the court departs.

Besides general factors that are relevant to many offenses--e.g., physical injury, use of a weapon, or level of culpable state of mind--the judge must depart from the guidelines to take account of scores of more specific factors that are both highly relevant and commonplace, many of which were specifically recognized in earlier guideline drafts[51] or were recognized by Congress in the definition of the offense.[52]

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course of interference with a flight crew (see F.D. 2A5.2), obstruction of justice (see F.D. 2J1.2), inciting a prison riot (see F.D. 2P1.3), burglary (see F.D. 2B2.1(b)(4) (burglary of a residence), F.D. 2B2.2(b)(4) (burglary of other structures) (Possession of a weapon will aggravate the burglary in both guidelines by two levels, but use of the weapon is given no greater aggravation than the simple possession), smuggling an alien (see F.D. 2L1.1), or conspiracy to interfere with civil rights (see F.D. 2H1.2) (no aggravation unless the guideline for the underlying offense contained a specific aggravation for use of a weapon).

[49] For both offenders, see F.D. 2K1.4 (arson, base offense level 6, 0-6 months).

[50] For both offenders, see F.D. 2N2.1 (violations of statutes and regulations dealing with any food product, base offense level 6, 0-6 months).

[51] The guidelines fail to aggravate a kidnapping when the offender risks his victim's death (cf. F.D. 2A4.1 to Tentative Draft Chapter 3, Section (1) (July 10, 1987) (unpublished) [hereinafter cited at "T.D."]); fail to aggravate a fraud offense when it endangers public health or safety (e.g., kickbacks for approving faulty bridge construction) (cf. F.D. 2F1.1 to Preliminary Draft F211a.6 [hereinafter cited as "P.D."]); fail to consistently adjust the seriousness of drug offenses according to the level of purity (cf. F.D. 2D1.1 to T.D. Chapter 2, Section (4), Subsection D); and fail to aggravate a sentence for child pornography when violence is depicted, when force or a drug is employed to exploit the child, when the child is sexually abused (cf. F.D. 2G2.1 to P.D. E261b.4); or when committed for a commercial purpose (cf. F.D.2G2.1 to P.D. E241a.1). Each of these factors was recognized as relevant in a previous draft.

Similarly, the guidelines fail to aggravate a rape committed in the victim's home, committed by multiple perpetrators (cf. F.D. 2A3.1 to R.D. A231(4)), involving acts of perversion (cf. F.D. 2A3.1 to R.D. A231(5)), or causing extreme psychological injury (cf. F.D. 5K2.3 to R.D. Y222); fail to aggravate property offenses when the significance of the property is other than its monetary value (cf. F.D. 2B1.1 to T.D. Chapter 2, Section (3), Subsection (H) (e.g., minor damage to telephone lines that cause an extended loss of service); fail to aggravate a loansharking offense when the property of the victim is destroyed or damaged (cf. F.D. 2E2.1 to P.D. E221b.3); fail to aggravate the sentence for possession of a serious drug when the offender possesses a weapon (cf. F.D. 5K2.6 to R.D. Y226).

Also contrary to the legislative direction[53] and also likely to breed disparity is the guidelines' failure to provide a sentence for many significant offenses.[54] With no applicable guidelines, judges are free to give any sentence that they feel is appropriate, with no limitation on their exercise of discretion other than the statutory maximum.[55]

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[52] From the Final Draft, cf. 2N1.1 (tampering or attempting to tamper with consumer products) to 18 U.S.C. 1365(a); 2B2.1 (burglary of a residence) and 2B2.2 (burglary of other structures) to 18 U.S.C. 2118(b); 2B1.3 (property damage or destruction other than by arson or explosives) to 18 U.S.C. 1362, 1363; 2A5.2 (interference with flight crew member or attendant) to 49 U.S.C. 1472(j); 2M6.1 (unlawful acquisition, alteration, use, transfer, or possession of nuclear material, weapons or facilities) to 18 U.S.C. 831(b)(1)(B)(i); and 2P1.1 (instigating or assisting escape) to 18 U.S.C. 755.

[53] The legislative history specifically notes the two instances in which there might not be a guideline for an offense: "where there is a new law for which no guideline has yet been developed and where an appellate court had invalidated the established guideline and no replacement had yet been determined." S. Rep. No. 225 at 153. Thus, except for these two instances, the Sentencing Reform Act appears to contemplate guidelines for all federal offenses.

[54] The final guidelines dropped many offenses from the previous Revised Draft, including, for example, such offenses as unsafe consumer products (N232); violent rebellion or insurrection (M213); failure to register as an agent of a foreign principal or government (M262); engaging in prostitution (G212); unlawfully possessing an explosive in a government building (K215); prohibited financial transactions with foreign governments during a national emergency (M252); misbranding or mislabeling consumer products (N231); and interference with the recapture of special nuclear material, entry, or operation orders during time of war or national emergency (M273).

Other examples of offenses found in the Revised Draft that have been omitted from the guidelines include: interstate transportation of strikebreakers (E260); failure to register of a person who has knowledge of or has received instruction or assignment in espionage, counter-espionage, or sabotage services or tactics of a foreign government (M265); interfering with a federal benefit for a political purpose (H222); neglect or refusal to answer subpoena for naturalization hearing (L226); conduct impairing military effectiveness (M241); prohibited financial transactions with foreign governments (M251); United States government officers and employees acting as agents of foreign principals (M261); possession of property in aid of a foreign government (M263); failure to register of an organization subject to foreign control and engaged in political activity or civilian military activity (M264); and failure to file political propaganda (M266).

[55] It has been suggested that guidelines for these and other offenses are not now necessary because such offenses are infrequently prosecuted. But the less-frequent offenses may be the offenses for which judges have the greatest need for sentencing guidance. The less frequently an offense occurs, the less likely it is that the judge will be familiar with any special sentencing considerations of the offense, and the less likely it is that the judge will know what sentence other judges commonly give. The potential for the disparity may increase dramatically with decrease in frequency.

Fostering Departures, and Thereby Disparity, by Using Vague and Ambiguous Standards. Even where a guideline is provided and relevant factors are included, criteria for application of the factor is frequently missing, key terms are commonly left undefined, and ambiguous provisions frequently leave judges to guess at their meaning. This fosters disparity. For example, where there is no guideline for an offense the court is told to apply the "most analogous" guideline;[56] and "[i]f no sufficiently analogous guideline exists, the court may impose any sentence that is reasonable . . . ."[57] The court may accept a plea-bargained sentence that is outside of the guidelines if it has "justifiable reasons."[58] Multiple offenses are treated as a single offense, with a sanction equal to that for the most serious of the offenses, if they constitute part of a "common scheme or plan."[59] Each instance creates the opportunity for different judges to supply their own criteria, definitions, and interpretations of key provisions, and thus generate different sentences for similar cases.[60]

This systemic vagueness is particularly troublesome in the absence of a sentencing policy. Without an articulated policy, each judge is left to use his or her own

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Further, many of the omitted offenses have not been prosecuted because the prosecutor has not been assured that upon conviction the resulting sanction would justify the costs and time needed for the prosecution. See, e.g., Letter from Henry Habicht, Department of Justice, to Commission Chairman William Wilkins (April 7, 1987) (urging the Commission not to delete guidelines for two offenses in the environmental section). Promulgating a guideline for an offense frequently may provide the certainty of sanction that will justify increased prosecution of the offense.

Still further, the failure to provide a guideline for offenses--thereby creating "guideline-free" offenses--provides another ready mechanism by which parties can avoid the guidelines' sentences, i.e., by pleading to one of the guideline-free offenses. For example, offenders charged with tampering with consumer products can avoid the guidelines by pleading to misbranding consumer products; those charged with transporting for purposes of prostitution can avoid the guidelines by pleading to engaging in prostitution; a corrections official charged with instigating or assisting escape can plead to negligently permitting escape; and so on. "Statute shopping" may replace "judge shopping."

[56] See F.D. 2X5.1.

[57] See commentary to F.D. 2X5.1.

[58] See F.D. 6B1.2(b)(2).

[59] See F.D. 3D1.2(b).

[60] Other examples of ambiguous and undefined terms and phrases in the Final Draft include: "more than minimal planning" (2A2.2(b)(1), 2B2.1(b)(1), 2B2.2(b)(1), 2E5.2(b)(1), 2E5.4(b)(1), 2F1.1(b)(2)(A)); "actual or planned harm to the government" (2C1.3(b)(1)); "substantial expenditure" (2Q1.2(b)(3)); "sophisticated means" (2T1.1(b)(2)); "commercial" vs. "non-commercial gambling offenses" (commentary to 2E3.3(b)(1)); "intentionally" and "recklessly endangered" (2A5.2(a)(1) and (a)(2)); "victim's unusual vulnerability" (3A1.1); "mere negligence" (2K1.5(b)(1)(C)); and "'booby trap'" (commentary to 2D1.9).

personal sentencing philosophy in interpreting and applying these vague terms. The effects of differing philosophies are a major source of disparity today;[61] there seems little reason to think that disparity will not continue.

Fostering Disparity by Inviting (and Directing) Extensive Departures Without Providing the Guidance of an Articulated Sentencing Policy. As if the skeletal and vague nature of the system were not enough, in over a hundred instances the guidelines specifically invite (and in some cases direct) the court to depart.[62] This not only invites disparity but also contravenes the Act. The conditions triggering each departure were obviously foreseen and fully "considered" by the Commission, thus the only lawful ground for departure--that the factor was <u>not</u> adequately considered by the Commission--is inapplicable.

For some offenses, the conditions for departure are so numerous and broad that one is hard-pressed to think of a case that would not fall under at least one of the conditions described in the commentary.[63] In other instances, the guidelines describe entire classes of cases where departure is invited, including cases where the offense involves, but the guideline for the offense does not specifically address, for example, the disruption of a governmental function,[64] the endangering of public welfare,[65] the commission of the offense to facilitate another offense,[66] extreme psychological injury,[67] or property damage or loss.[68] A judge is similarly invited to depart when, after calculating an offender's criminal history category, he concludes that the category does not "adequately reflect" the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes.[69]

Once a judge is invited or directed to depart from the guidelines, there is no legal limit, other than the statutory maximum, to the sentence the judge may give. Thus, in each of the departure instances described above, one judge may choose not to

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[61] See notes 71-72 and accompanying text infra.

[62] A complete list of departures is available upon request.

[63] See, e.g., commentary to F.D. 2Q1.2(b)(1) and F.D. 2Q1.3(b)(1): "Because of the wide range of potential conduct arising out of the handling of different quantities of materials with widely differing propensities, a departure either upward or downward may be warranted. Depending upon the resulting harm from the emission, release or discharge, the quality and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction . . . may be appropriate."

[64] See F.D. 5K2.7.

[65] See F.D. 5K2.14.

[66] See F.D. 5K2.9.

[67] See F.D. 5K2.3.

[68] See F.D. 5K2.5.

[69] See F.D. 4A1.3.

depart, another may choose to exceed the guideline slightly, and another may choose to exceed it dramatically. A sentencing system premised upon such broad departure conditions was never contemplated by the Sentencing Reform Act.[70] Departure from the guidelines was intended only for rare or unforeseeable cases. Instead, these guidelines invite departure for the predictable and the commonplace.

The likelihood of unwarranted disparity under such a "departure system" of sentencing is dramatically increased by the guidelines' lack of a coherent sentencing policy. As Senator Edward Kennedy has noted, one of the major sources of unwarranted sentencing disparity is that, "[o]ne judge may sentence in order to rehabilitate, another to deter the offender or the potential offender from committing a similar crime, a third to incapacitate, while a fourth may sentence simply to 'punish.'"[71] By refusing to resolve the issue of competing sentencing policies, and yet providing broad judicial discretion to depart, the guidelines continue and enhance the existing conditions that lead to the unwarranted disparity that Senator Kennedy and others have warned against.[72]

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[70] The legislative history notes, for example, that "[t]he United States Parole Commission currently sets prison release dates outside its guidelines in about 20 percent of the cases in its jurisdiction. It is anticipated that judges will impose sentences outside the sentencing guidelines at about the same rate or possibly at a somewhat lower rate since the sentencing guidelines should contain recommendations of appropriate sentences for more detailed combinations of offense and offender characteristics than do the parole guidelines." S. Rep. No. 225 at 52 note 71 (citation omitted).

[71] Kennedy, Foreword to P. O'Donnell, M. Churgin, D. Curtis, Toward a Just and Effective Sentencing System at viii (1977). The Canadian Sentencing Commission makes the same point:

> [J]udges approach similar cases in different ways. These different approaches to cases--based on different views of what [sentencing] principles should be paramount--lead to different sentences being handed down for similar offences committed by similar offenders in similar circumstances.

Report of the Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach xxiii (February 1987) [hereinafter cited as Report of the Canadian Sentencing Commission].

[72] The literature on sentencing reform is replete with references to the relationship between sentencing purposes and disparity. For example, in discussing the development of its guidelines, the Minnesota Sentencing Commission describes the effects of having no articulated sentencing policy:

> [T]he same case, heard in two different courts, could receive very different sentences simply because each court emphasized different sentencing goals. The pursuit of multiple goals contributed significantly to the problem of sentencing variation. The outcome of the sentencing system often appeared irrational, in that an emphasis on one goal, such as rehabilitation, might lead to a sentence that was indefensible on retributive grounds, and with limited standards to determine which goal to emphasize, sentences appeared to be highly inequitable.

Minnesota Sentencing Guidelines Commission, The Impact of the Minnesota Sentencing

3. The Failure to Prevent Plea-Bargaining from Subverting the Goals of the Guideline System

In addition to the guidelines' numerous directions to depart and the broad categories of departures, the judges are told that they need not follow the guidelines whenever the sentence is pursuant to a plea bargain, not an uncommon occurrence. This single invitation to depart, as a practical matter, may swallow the entire guidelines. It gives the judge and the counsel a ready means to routinely avoid the guideline sentences. Because 87% of all criminal cases in the federal system last year were disposed of through a plea bargain,[73] it is likely that this provision will be the only "guideline" applicable to the overwhelming majority of sentences.

But this departure provision, like many of the invitations to depart in the guidelines, may be illegal. The statute simply does not permit judges to depart from the guidelines for "justifiable reasons" if the sentence is pursuant to a plea-bargain. The Act is explicit on this point:

> The court shall impose a sentence of the kind, and within the range, referred to in [the 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 . . . .[74]

It is not enough that the court feels that there are "justifiable reasons" to depart.

4. Impeding Future Refinement

These skeletal non-binding guidelines will not provide a basis for future refinement. In fact, in most respects, the guidelines seem calculated to frustrate any meaningful improvement over time.

The Failure to Provide an Adequate Foundation for Refinement. I have described above the lack of sentencing policy and principled rationales, the unwieldy and illogical structure of the guidelines, and the reliance on the fragmented and overlapping offense definitions of the antiquated federal code. Each of these fundamental flaws will remain, no matter how long the current guidelines are in effect. They each render the current guidelines inadequate as a foundation for future refinement.

The Impropriety of Relying on the Courts to Develop the Guidelines. These guidelines leave to the courts the task of providing the substance and direction that the guidelines lack. The courts will be called upon to provide the missing criteria, the missing definitions, the guidelines for missing offenses, and the standards for

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Guidelines: Three Year Evaluation 11 (September, 1984).

[73] See note 1 supra. If the parties can avoid the guideline sentence by a plea bargain that includes a specific sentence recommendation, there will be great pressure to bargain for just such recommendations.

[74] 18 U.S.C. 3553(b) (emphasis added).

determining when and how much of a departure from the guidelines is appropriate.[75] Many of the judges who appeared before the Commission, as well as judges on the Commission, appear to prefer just such a process, in which the courts would effectively be left to write the sentencing guidelines.[76]

Why do I oppose having the courts write the guidelines? It is certainly not because I doubt the abilities of federal judges. On the contrary, the judges who sit on the Commission, appeared before the Commission, or otherwise offered comments on the problems of criminal sentencing, have been knowledgeable and sincere. Most have a certain sentencing "wisdom" that comes with experience. I remain opposed to judicial guideline development, however, for three primary reasons.

First, the judiciary as an institution has a limited ability to properly perform the task. The nature of the judicial process would necessarily compel a piece-meal approach; a court can create or alter the sentencing system only through deciding the case immediately before it. An effective and rational system requires a systemic perspective. Different parts of the system necessarily interact: a change here has implications there and there, and may require an adjustment there and elsewhere. A proper ranking of offense seriousness, for example, must necessarily be done by a single body and requires a comparison to all offenses. Delegating guideline decision-making to judges, who operate of necessity on a case-by-case basis, precludes systematic ranking. Nor can policy decision-making by courts be guided by empirical studies and analysis, for these are not within the authority or means of a judge in deciding the individual case before the court.[77]

As a recent Canadian report notes:

> Courts are primarily a reactive institution. They cannot initiate policy and must solve problems as they arise. Other policy-making bodies like Commissions are not hampered by this inherent constraint. They can make policy with a view to the future, not only in response to the past.

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[75] On the other hand, some people argue that the lack of criteria in the guidelines makes it difficult for an appellate court to review (and overturn) the sentence of a lower court. Similarly, this same lack of standards will make it difficult to monitor the application of the guidelines. Both of these considerations, if true, increase the likelihood that the current guidelines will not be improved.

[76] As one judge envisions:

> The courts of appeals are going to pass on these guidelines, and they're going to write them and rewrite them, just as they've done [in] every state, and we're not going to have to correct all the problems. They can work out a lot of the constitutional problems, or anything else.

Meeting of the United States Sentencing Commission of April 28, 1987, transcript of tape 1, side B.

[77] The drafting of the final guidelines may well manifest the normal "judicial method" decision-making in which other parties have the responsibility for developing the relevant information and arguments. The court's role is to make decisions, not to organize the decision-making process.

The Report adds:

> To expect that a uniform approach to sentencing can be developed with clarity and consistency by ten different courts is to over-simplify the complexity of the task of sentencing.[78]

A second reason to oppose judicial development of guidelines is that the judiciary as an institution does not appear to have the desire to reduce the sentencing discretion of judges; yet, reducing discretion is the linchpin upon which greater sentencing consistency hinges. The history of federal sentencing shows a strong judicial tendency to maximize judicial discretion. It was not the Judicial Conference but Congress that finally stepped in to address the problem of unwarranted disparity among judges; indeed, the judiciary generally opposed the Sentencing Reform Act.[79] And, as was apparent from testimony before the Commission, many judges continue to oppose the Act today.[80]

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[78] Report of the Canadian Sentencing Commission at 85.

[79] See, e.g., Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 638, 640 (1983) (testimony of the Honorable Gerald Tjoflat, U.S. Circuit Judge, Eleventh Circuit, and Chairman, Committee on the Administration of the Probation System, Judicial Conference of the United States), id. at 1151, 1155 (statement of the Honorable Jean Dwyer, United States Magistrate, and Chairman, Standing Committee on Sentencing, National Council of the United States Magistrates); Bazelon, Missed Opportunities in Sentencing Reform, 7 Hofstra L. Rev. 57 (1978) (U.S. Circuit Judge, District of Columbia). There were and are, however, some notable exceptions to the judicial opposition to sentencing guidelines that reduce judicial discretion. See, e.g., Frankel, Criminal Sentences (1973) (former district judge, Southern District of New York); Lasker, Presumption Against Incarceration, 7 Hofstra L. Rev. 407 (1979) (district judge, Southern District of New York); Tyler, Sentencing Guidelines: Control of Discretion in Federal Sentencing, 7 Hofstra L. Rev. 11 (1978) (former district judge, Southern District of New York); Newman, A Better Way to Sentence Criminals, 63 A.B.A.J. 1562 (1977) (U.S. Circuit Judge, Second Circuit).

[80] See, e.g., Judge Jack Weinstein, Testimony before the United States Sentencing Commission, Public Hearing, New York, New York, pp. 34-35 (Oct. 21, 1986) (transcript available for inspection at the United States Sentencing Commission offices):

> I see no objection to telling Congress in a preliminary report: "Ladies and gentleman, we [the Sentencing Commission] cannot [draft sentencing guidelines] until we have a rational scheme of statutes and until you give us a certain degree of play. Congress may well have made a mistake, and [our attempting the task gives] us the wisdom to make a suggestion for the modification of the statute."
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> You know, I found that in World War II that when a soldier is ordered to shoot somebody that should not be shot, there is the possibility, in extreme circumstances, of turning around and saying, "Don't you think you ought to think about it, Lieutenant, before you order me in there to shoot?" I think maybe you ought to do that to Congress.

See also Testimony of Judge Mark Wolf, id. at 62 ("I think Congress had goals and

A final reason to oppose judicial development of guidelines is that Congress has provided that the task is to be performed by this Commission. It could have provided for judicial guideline-development but did not.[81] Congress may have recognized that the judiciary does not possess the resources to address successfully the problem of disparity, that its decentralized structure makes concerted reform difficult, or that the natural tendency to preserve judicial discretion is particularly strong in an area with such a history of unfettered discretion. Whatever the reasons, the courts cannot and should not be allowed to do what Congress has directed this Commission to do.

The Failure to Permit Adequate Appellate Review. The guideline drafters assume that appellate review of departures will, over time, permit the courts to develop a "common law" of sentencing that will provide the substance and direction that the guidelines currently lack. Even if this were desirable, which I argue above it is not, it is not practical. The commentary rarely describes with sufficient detail the factors that have been assumed when a base offense seriousness level was set. Thus, judges have little basis for judging whether the case at hand was intended to come within the guideline or whether it was intended as an appropriate case for departure. Does the base offense level for kidnapping assume that some bodily injury was caused? What size of operation is assumed in the base offense level for engaging in a gambling business? What size operation is assumed for loansharking? Because the commentary gives no answers to these questions,[82] and most other questions like them,[83] neither the sentencing judge nor an appellate court can divine what was intended to be inside the guidelines and what outside.

More importantly, because the guidelines fail to articulate a coherent sentencing policy on how the statutory purposes of sentencing are to be achieved, the appellate courts have no touchstone from which they can rationally and consistently interpret vague guideline provisions, provide missing criteria for application, or review whether a sentencing judge's departure was appropriate.

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they thought this [the Sentencing Reform Act of 1984] would be a means to achieve those goals. But if the intense scrutiny, and really in many respects, I think, brilliant analysis, indicates that in effect mandatory sentencing is not the right way, the best way, to approach those goals, but an effective presumptive sentencing would be, I myself would think that the sponsors of the original legislation would be quite responsive to you [the Commission] and that their colleagues, too, would be responsive.")

[81] As the legislative history notes:

> It is clearly intended that judges will confine their exercise of discretion to choosing a point within the range (if any) specified in the applicable guideline. Thus, the Sentencing Reform Act really vests most of the sentencing discretion in the United States Sentencing Commission, the body responsible for drafting the sentencing guidelines.

H.R. Rep. No. 614, 99th Cong., 2d Sess. 2-3 (1986) (footnotes omitted).

[82] See commentary to F.D. 2A4.1 (kidnapping), 2E3.1 (engaging in a gambling business), and 2E2.1 (loansharking).

[83] One need only skim the commentary to see that there is rarely guidance to what <u>is</u> included in the base offense levels.

A further serious limitation on the effectiveness of appellate review arises from these guidelines' treatment of plea-bargained sentences. Because there is typically no appeal in plea-bargain cases,[84] there will be no appellate review of what may represent the vast majority of departures--sentences pursuant to a plea-bargain.

The sixty years of Canadian experience with appellate review of criminal sentences is instructive. The recent official Canadian report concludes that the appellate courts have had little impact in reducing unwarranted sentencing disparity:

> Since appellate review of the fairness of sentences began in 1921, volumes have been filled with case law on sentencing, but by and large the principles that have been established are general in nature and have neither served as a structure for, nor limit upon, the vast discretion bestowed upon the sentencing judge. . . .
>
> It is not that Courts of Appeal, or trial courts, never state the principles underlying their approach to sentencing, it is that they do it infrequently and when they state these aims, the practice of blending and balancing results more in obscuring their approach than in developing a uniform approach to sentencing aims. . . .
>
> The individual judge's approach to the aims of sentencing thus has far-reaching implications for the sentence he or she will impose. To date, the Courts of Appeal have not issued judgments resulting in any kind of uniformity of approach to the general principles of sentencing in Canada. . . .[85]

5. The Failure to Provide an Impact Assessment

Responsible decision-making requires that, before the guidelines are promulgated, one should consider reliable projections as to the most significant aspects of the operation and effects of the guidelines. Unfortunately, these guidelines were drafted and promulgated with little knowledge of their likely operation and effect.

What percentage of cases are appropriately departures from these guidelines? At what rate will judges depart? How often will judges fail to depart (i.e., will they follow the guidelines) when the guidelines invite, direct, or expect them to depart?

How often will sentencing hearings be required? How time-consuming is a sentencing hearing likely to be? What additional investigative resources will be required? How much more time for application of the guidelines will be required of probation officers, of judges, of prosecutors and defense counsel? What will be the effect on the rate of plea bargains and thus the rate of jury trials? What will be the effect on requirements for prison capacity and probation services?

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[84] A defendant generally will agree to a plea-bargain that contains a specific sentence or sentence recommendation only if the sentence is below the guideline range--in which case, the government has waived its right to appeal the sentence by entering into the plea-bargain--or within the guideline range--where neither party has a right to appeal.

[85] Report of the Canadian Sentencing Commission at 79-81.

Will the guideline sentences correspond to the community's views of the relative seriousness of offenses? Will the guidelines provide greater, or as much, deterrence of potential offenders as current practice? Will they be more effective, or as effective, in identifying dangerous offenders?

Will similar offenders committing similar offenses receive similar sentences regardless of the identity of the judge or counsel? How much disparity will continue to exist under the guidelines because of differences in judges' sentencing philosophy, because of differences in the interpretation of guideline provisions, because of the lack of guidelines for some offenses, because of the lack of definitions or criteria in the guidelines?

Careful decision-making and field-testing could have provided an informed estimate on each of these important issues.

To add to the uncertainties, and the potentially damaging consequences, is the likelihood that one or another aspect of the guidelines will be held illegal. For example, are the frequent "invited" departures appearing throughout the guidelines lawful under the Sentencing Reform Act? Are "directed" departures permitted?[86] If a judge follows an invitation or direction to depart, is the sentence subject to appellate review because it is a deviation from the guidelines? Or, is the sentence free from appellate review because the sentence is precisely what the guidelines invite or direct?

The status of the "guidelines to go outside the guidelines" is further complicated by the attempt to regulate judges after they accept the invitation to depart. The extent of the permissible "departure" may be limited, for example, to "not more than four levels."[87] One may wonder how such a "departure range" is different from a "guideline range" of four levels, which is illegal.[88] By calling a guideline directive a "departure" (a term that does not appear in the Sentencing Reform Act), can the guidelines escape the 25% statutory limitation on the permissible width of their ranges?

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[86] Examples of "directed" departures in the Final Draft are found in the commentary to 2B1.3 (property damage or destruction other than by arson or explosives), 2D1.1 (drug trafficking), and 2C1.1 (offering, giving, soliciting, or receiving a bribe). Indeed, there is some suggestion that all specific invitations to depart are in fact "directed" departures. Judges are told, as one of the steps in applying the guidelines in each case, that "[t]he court shall determine any applicable . . . departure from the guidelines." F.D. 1B1.2(b).

[87] Examples of "limited" departures in the Final Draft are found in the commentary to 2A1.1 (-10 levels), 2G1.1 (-8 levels), 2Q1.2(b)(2) and 2Q1.3(b)(2) (+ or -3 levels), 2Q1.2(b)(3) and 2Q1.3(b)(3) (+ or -2 levels), 2Q1.2(b)(4) and 2Q1.3(b)(4) (+ or -2 levels), 4A1.3 (+ or - one criminal history category); 4B1.3 (increase to level 13 if not already greater); 3E1.1(a)(2) (-2 levels).

[88] See 28 U.S.C. 994(b)(2). Subsequent legislation amended 28 U.S.C. 994(b) to allow for a range of "the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." Sentencing Guidelines Act of 1986, Pub. L. No. 99-363, section 2, 100 Stat. 770 (1986).

Other potential illegalities already discussed include, for example, the multiple-offenses provision, which fails to provide the incremental penalty that the Sentencing Reform Act requires, and the attempt to authorize guideline departures for sentences pursuant to a plea-bargain if the judge feels there is a "justifiable reason."

Whether or not the guidelines are ultimately upheld against most challenges, consider the consequences if any one of these illegalities is found to exist. Will the sentences under the guidelines to date be held invalid? Will those offenders sentenced to date have to be released pending resentencing? Will the resentencing have to await Commission revision of the guidelines in light of the illegality? Will this revision require the normal delay for "public-notice and comment"? Will the effective date of the revision be subject to the normal six month delay period to allow Congressional review? Will the Parole Commission have to be judicially reinstated to cover the offenders for which the guidelines are held invalid? If invalidated in one court, will the guidelines remain applicable in another court in the same district? If invalidated in one district, will they remain applicable to other districts in the same circuit?

Even if the likelihood of invalidation of the sentences under the guidelines were small (which I do not believe it is), the potential consequences of such a finding, even by a single judge, should be sufficiently troublesome that it would seem prudent to avoid the provisions of most questionable validity, such as those providing broad invitations to depart. Letting these guidelines go into effect is a jump into the unknown, where what we do not know can hurt us.

6. The Fundamental Failure of the Process

Many of the policy and drafting difficulties noted here stem from a flawed policy-making process. A process of informed policy-making and thoughtful drafting might have taken the following course: isolation of the significant issues, staff preparation of background research papers on each of the issues, discussion and debate of each background paper to identify the most likely resolutions of each issue, staff preparation of option papers on the advantages and disadvantages of each possible resolution, discussion and debate of each option, a vote and tentative resolution of each issue, drafting a guideline system that embodies each of the options tentatively selected, re-evaluation of the tentative resolutions after their integration into a single guideline system, clinical testing of the revised document, revision in light of the clinical testing, limited field-testing of the revised document, revision in light of the limited field-testing, full field-testing during a period when the guidelines would be only advisory (including orientation and training programs for judges, probation officers, prosecutors, and defense counsel), and final revision in light of the full field-testing. Except for the field-testing, which can be time-consuming, each of these steps could have been feasibly accomplished in a month or two.

Unfortunately, neither this nor any other long-range working agenda was adopted. Early attempts to isolate critical issues, to prepare issue background papers, to draw from the available empirical literature on deterrence and incapacitation, to assess public perceptions of offense seriousness, and to rank offense seriousness, were quickly abandoned. In their place was substituted what many like to call an "evolutionary" process of guideline drafting. Too often, this process meant that a draft section would be produced by a staff member with little information about what other staff members were drafting and without policy guidance. These sections would then be collected, pressed into a common format, and called "draft guidelines." Then,

without a background briefing or memorandum on the relevant issues, and without hearing from and frequently without knowing the identity of the author, the Commissioners would be asked if they wanted to suggest specific changes to the "draft guidelines." The process was thus a purely reactive one--reacting to a proposed draft, or to criticisms of another Commissioner or to criticisms made by individuals or organizations during a "public comment period." Unfortunately, there was never a "guideline planning period" or a "policy development period."

It was to avoid this sort of reactive drafting--which is sometimes more sensitive to the political influence of complaining parties than to the merits of their objections--that Congress chose to have the guidelines drafted by an independent commission in the Judicial Branch rather than by one of its own committees. If the process were to have been purely reactive and political, it would not have required an independent Commission.

With regard to field-testing, the record is equally troubling. Despite general agreement that field-testing is necessary,[89] these guidelines have never been tested in the field or elsewhere.

The result of the flawed policy-making process became painfully obvious to those who followed the stages of guideline drafting. Without defensible bases for a particular structure, approach, or position, the successive drafts lurched from one extreme to another as each was criticized for its obvious shortcomings. The Preliminary Draft provided great detail within each specific offense guideline and little discretion; the Revised Draft represented the other extreme by providing general principles to adjust the seriousness value of an offense and extremely broad discretion. Within the last few weeks, the guidelines were redrafted along yet another approach--using narrow guidelines without general principles of adjustment but with broad invitations to depart.

An "evolutionary" style of drafting can, I fear, be a euphemism for haphazard and unsystematic drafting. In this instance, unfortunately, it has resulted in guidelines of a similar character.[90]

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[89] Many observers have suggested that field-testing its guidelines is one of the most important exercises the Commission could conduct. Most of the public comment letters on the Revised Draft collected at note 91 infra propose a delay in the submission and/or the effective date of the guidelines and also urge field-testing. See also Letter from Judge Jon Newman, Second Circuit Court of Appeals, to Commission Chairman William Wilkins (Oct. 16, 1986); additional public comment letters on the Revised Draft from Judge George Arceneaux, Jr.; Judge Elizabeth Kovachevich; William Graves, Chief Probation Officer, District of Colorado; Professor Daniel Freed; and Tommaso Rendino, President, Federal Probation Officers Association.

[90] One may wonder, for example, why a <u>prior</u> offense should aggravate an offender's current sentence more than if the same offense were committed as part of the <u>current</u> offense. Or, one may wonder why the same use of a weapon should be treated differently in each of the many guidelines in which it appears.

As to the effect of prior vs. current offenses, if a defendant served 14 months for robbery 14 years ago, it can increase his sentence for his present offense (rape causing serious bodily injury) by 34 months. See F.D. 2A3.1 (base offense level 27), 2A3.1(b)(4)(B) (+2 levels) (Total = offense level 29), 4A1.1(a) (+3 points for sentence

Conclusion: What Should We Do Now?

I urge Congress to disapprove these guidelines and to direct the Commission to restart its work.[91] In addition, Congress should resolve the lingering questions of

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exceeding one year and one month = Criminal History Category II, 97-121 months vs. a Criminal History Category I sentence of 87-108 months). If he had committed the robbery during the current offense, however, it would not increase his sentence at all under the guidelines. See F.D. 3D1.2(a) and 3D1.3(a), which provide that the offense level applicable to the most serious of the counts in the group is the applicable offense level. If three years ago, a defendant was sentenced to 14 months for counterfeiting $25,000, it could increase his current sentence (counterfeiting $25,000) by an additional 9 months. See F.D. 2B5.1 (base offense level 9), 2B5.1(b)(1) (+4 levels) (Total = offense level 13), 4A1.1(a) (+3 points for sentence exceeding one year and one month = Criminal History Category II, 15-21 months vs. a Criminal History Category I sentence of 12-18 months). If his present offense includes two counts of counterfeiting $50,000 on two different occasions, his sentence would not be increased at all. See F.D. 3D1.2(d), which provides that the amounts be aggregated.

As to the erratic treatment of use of a weapon, note that, for example, in the two most serious assault offenses, the discharge of a gun will increase the offender's sentence by five levels (see F.D. 2A2.1(b)(2) (assault with intent to commit murder), F.D. 2A2.2(b)(2) (aggravated assault)), while the same discharge of a weapon in a kidnapping offense will increase the offender's sentence by only two levels (see F.D. 2A4.1(b)(3)). In a burglary offense, in contrast, the offender's sentence will be increased by two levels for the mere possession of a gun (see F.D. 2B2.1(b)(4)). Other offenses provide no aggravation for the use of a gun. See text accompanying notes 48-52 supra. Thus, the judge may ignore the use of a weapon, or the judge may depart from the guidelines and aggravate the sentence by any number of levels. Similarly, in a robbery offense, causing permanent bodily injury counts 6 levels (see F.D. 2B3.1(b)(3)(C)), unless caused by discharge of a gun when it counts only 4 levels (see F.D. 2B3.1(b)(2)(B)). Thus, serious bodily injury and permanent bodily injury during a robbery count the same if a gun is used. If a gun is not used, permanent bodily injury counts more.

[91] The Commission has voted unanimously to ask Congress for a nine-month extension. I applaud the Commission for its action, and urge Congress to pay due deference to those in a position to know whether these guidelines are ready to go into effect. I have some concern, however, that the nine months requested by the Commission is not enough time. As noted above, I believe the basic structure of these guidelines is sufficiently flawed that it cannot provide an adequate foundation for future "refinement;" it must be redone. And, I believe that a thoughtful and systematic process of policy development should be undertaken. I urge the Congress to give the Commission more than nine months to reattempt its historic, visionary task.

Many observers, for many different reasons, support the idea of delaying the submission or the effective date of the guidelines. See, e.g., public comment letters from Daniel Van Ness, President, Justice Fellowship; Judge John Sprizzo; Judge Barbara Crabb; John Kramer, Executive Director, Pennsylvania Commission on Sentencing; Judge Alan Nevas; Joint Statement of the District Judges of the Second Circuit; Judge Jack Weinstein; Randolph Stone, Deputy Director, Public Defender Service for the District of Columbia; Judge Gerald Heaney; Professor Stephen

unconstitutionality,[92] even if that means reconstituting the Commission. It should resist the temptation to tinker with the provisions of the Sentencing Reform Act, which, I still believe, are the most effective means of bringing about an enlightened reform of federal criminal sentencing.

When restarting its work, the seven most important matters for the Commission are to:

(1) Adopt and Follow a Long-Range Program of Policy Development Before Drafting Guidelines. The Commission could, for example, follow the outline for serious and informed policy-making described above, including the preparation of issue, background, and option papers, full debate on all relevant issues, and extensive field-testing.

(2) Adopt and Articulate a Governing Sentencing Policy to Further the Statutory Purposes of Sentencing. Thus, when a departure is necessary, when a vague or ambiguous term must be interpreted, or when a judge must otherwise exercise discretion in the sentencing process, all judges would be guided by the same sentencing policy.

Schulhofer; Eugene Thomas, President, American Bar Association; Reverend William Yolton, Executive Director, National Interreligious Service Board for Conscientious Objectors.

[92] Some have argued that the Commission itself is unconstitutional. See, e.g., Morrison, A Fatal Flaw, Nat'l L.J., January 26, 1987 at 15 ("Congress is not respecting separation of powers, it is shifting responsibilities that belong in one branch to another, and it is mixing the branches in carrying out the commission's very complex and very important duties"); Note, The Constitutional Infirmities of the United States Sentencing Commission, 96 Yale L. J. 1363, 1388 (1987) ("The federal Sentencing Commission is constitutionally infirm. The Sentencing Reform Act vests more legislative authority than the separation of powers permits in an administrative agency composed of seven presidential appointees. The confounding of the separate functions of the different branches is aggravated by the requirement that judges be appointed to the Commission and subject to possible removal by the President.") Letter from then Chief Justice Warren Burger to President Ronald Reagan (Dec. 13, 1984) (objecting to the idea of full-time membership of three judges in active service on the Commission); Strasser, Sentencing Panel May Start Soon, Nat'l L.J., July 8, 1985 at 5 (Supreme Court's decision in Bowsher increased doubts about the Commission's constitutionality); Supreme Court Report: Gramm-Rudman Held Invalid, 72 A.B.A. J. 52, 61 (Oct. 1, 1986) (predicting a constitutional challenge to the Commission); Strasser, Is Sentencing Panel on the Rocks?, Nat'l L.J., Dec. 8, 1986, 3, 12; Wermeil, Commission on Criminal Sentencing is Tangled in Controversy About its Makeup and its Mission, Wall Street J., Jan. 27, 1987, at 60, col. 1; Judge Edward Becker, Testimony before the U.S. Sentencing Commission, Public Hearing, Washington, D.C., pp. 21-22 (Dec. 3, 1986) (transcript available from United States Sentencing Commission) (listing possible constitutional challenges). But see Memorandum from the United States Department of Justice to Commission Chairman William Wilkins (Jan. 8, 1987) (concluding that, despite the Sentencing Reform Act's designation of the Commission "as an independent commission in the judicial branch of the United States" (28 U.S.C. 991(a)), the Commission is actually in the Executive Branch, and that the service of individual judges in executive agencies is constitutionally permissible).

(3) Set Sentences to Further the Governing Sentencing Policy and Statutory Purposes Rather than to Mimic Mathematical Averages of Past Sentences. This would bring rationality and would more effectively further the statutory goals of just punishment, deterrence, incapacitation of the dangerous, and rehabilitation.

(4) Hire a Staff of Professionals with National Reputations, Including Guideline Experts with Experience in State Guideline Systems. The current staff has worked extremely hard and will remain invaluable to the Commission. But because the Commission is a national Commission, it also merits professionals with national reputations in criminal law and guideline-policy development.

(5) Add Back Into the Guidelines, as Adjustments of General Application Wherever Possible, the Commonplace Sentencing Factors Now Omitted. At least the most commonplace sentencing factors that were recognized in earlier drafts should be added back into the guidelines. The guidelines can be considerably shortened and made less complex if the most common factors--such as causing injury, use of a weapon, and reduced culpable state of mind--are included as general adjustments applicable to any offense in which they are present. The addition of at least commonplace factors will make the guidelines more comprehensive, and therefore more binding. This, in turn, will reduce unwarranted disparity.

(6) Add Guidelines for All Federal Offenses; (7) Base the Guidelines on Consolidated, Non-Overlapping Offense Categories. Comprehensive and binding guidelines require that all offenses be covered. This can be done with guidelines that are shorter and less complex than the present guidelines by using consolidated, non-overlapping generic offense categories, as are found in most state codes. This will also solve the present guidelines' significant problems in sentencing for multiple offenses.

In sum, the Commission should draft principled and binding guidelines that are structured to further the Sentencing Reform Act's visionary goals of rationality and consistency in criminal sentencing. If Congress accepts anything less, we will lose an historic opportunity for visionary reform that I fear may not come again in our lifetime.

I dissent.

SUMMARY OF CONTENTS

Introduction. The Sentencing Reform Act was intended to implement Congress' inspired vision of modern criminal sentencing. Comprehensive and binding guidelines were to bring rationality and greater consistency to federal sentencing. With the guidelines promulgated today, however, that vision dims. These guidelines may well produce more irrationality and more unwarranted disparity than exists today.