PRELIMINARY OBSERVATIONS OF THE COMMISSION ON COMMISSIONER ROBINSON'S DISSENT

MAY 1, 1987

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The Commission, having just received today a fully detailed draft of Commissioner Robinson's dissent, but aware of his general views, makes the following preliminary observations.[1]

1. Professor Robinson has strongly urged the Commission to adopt a highly detailed, mechanical guideline system that would aggravate punishments for each and every harm an offender causes and presumably lessen punishment for each and every relevant mitigating background factor. The Commission spent several months following the professor's lead in an effort to turn that approach into a set of workable guidelines. Professor Robinson embodied his approach in a "July 10" (1986) draft, which the Commission circulated widely within the criminal law community.

Despite the many valuable insights that his draft contained, the reaction was strongly and uniformly negative. The comments received ranged from "overly ambitious" and "ill advised" to "totally impractical" and "fraught with danger." Judge Jon O. Newman, a longtime advocate of sentencing guidelines, wrote the Commission that the Robinson approach

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

Judge Harold Tyler, who as Deputy Attorney General (under President Ford) directed the government's efforts to create sentencing reform legislation, wrote that he "doubt[ed] the necessity or wisdom of a complicated scoring system, at least initially." He said that the July 10, 1986, draft would be "politically unacceptable to Congress"; that it would create "real resistance on the part of . . . many sentencing judges"; that it would create "substantial practical problems" for the courts; and that its many gradations were "overly refined" and "not . . . necessary." Judge Marvin Frankel, whose initial studies of sentencing disparity helped to launch the guideline movement, wrote that however splendid in their conception and execution the July 10 draft may be, it is "too far ahead of the times for the goal of acceptance by the legislative and judicial people who will be considering" it.

In brief, the Commission found no significant support for the July 10, 1986, approach. The Commission then decided not to promulgate the draft; it concluded that its descriptions bore little or no relation to the actual statutory elements of an offense and that it was excessively impractical, a kind of academic fantasy. The Commission will publish the draft, however, among its working papers; those interested in the views that Professor Robinson states in his dissent should study it with care.

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[1]The six Commissioners who formed the majority concur in this observation. They are William W. Wilkins, Jr., Michael K. Block, Stephen G. Breyer, Helen G. Corrothers, George E. MacKinnon, and Ilene H. Nagel.

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2. The reason that Professor Robinson's approach drew so little support from any quarter (academics included) is that it did not provide a practical solution to the problems viewed as important by the different segments of the criminal justice community. Those particularly concerned with lessening disparity in sentencing saw in the complexity of the July 10, 1986, draft, in its need for elaborate new factfinding, and in its use of complex mathematical formulae involving multiplication of quartic roots, the likelihood that different judges would apply the system differently to similar cases, thereby aggravating the disparity problem. Those professionally concerned with crime control saw in its factfinding demands the need for lengthy new hearings, complex arguments and appeals, all of which would significantly lessen the likelihood that convicted criminals would, in fact, receive appropriate punishment. Those particularly sensitive to the need for special treatment of unusual cases saw in its rigid, mechanical rules and near total absence of discretion, the elimination of a court's ability to deviate when, for example, unusual facts in a specific case cried out for special treatment.

Of course, it may be that there is a practical method of responding to Professor Robinson's present criticisms by taking the approach he advocates and, within a reasonable period of time, translating it into a practical set of guidelines. But nothing in the July 10, 1986, draft, nor in his work that we have seen since that time, convinces us that this is so.

3. What Professor Robinson means by a "rational and coherent sentencing system" is a system (preferably his system) that would radically revise what he calls the "archaic, fragmented" criminal code of the United States. He urges a "visionary" approach that would base guidelines upon "modern American criminal code" descriptions of conduct, many of which descriptions are found in recently revised state codes. The problem with this view, however, is that Congress, which has considered reform of the Criminal Code for more than a decade, has not enacted that reform into law. Thus, the Commission must apply federal statutory law as it now stands, whether or not visionaries believe that the existing statutes ought to be repealed or replaced. To put the matter bluntly, the Commission does not have the political mandate or the institutional authority to rewrite the United States Criminal Code under the guise of writing sentencing guidelines. The job of revising the Criminal Code belongs to Congress, not the Commission.

4. In our view, the actual effect of any major change upon a human institution inevitably involves uncertainty and the risk of unforeseen consequences. Professor Robinson may be certain about what changes will actually come about as a result of the guidelines we propose; we are not. We, therefore, strongly believe that our proposed changes should evolve from, not represent a sharp break with, existing practice. What we do, after all, will significantly affect the entire criminal justice system of the United States. And, lacking a crystal ball capable of telling us with precision what will actually occur, we act now perhaps less aggressively or ambitiously than Professor Robinson would like. We believe it more responsible to proceed with caution, monitoring through data gathering and analysis the actual effects of our changes at each step, then revising, modifying, and advancing our work in light of what we learn.

5. We have read Professor Robinson's dissent with an awareness that our primary task is not to produce a perfect document, but rather to create a practical document in an area where every approach suffers some drawbacks. Thus, we have primarily been interested in the alternatives that Professor Robinson has been proposing. Viewing his dissent not in this light, however, but simply as a series of criticisms, our initial reaction is that the criticisms are wide of the mark. The dissent does not accurately characterize what the guidelines are

trying to do; how, for example, they make use of the empirical data,[2] or how and why they create some distinctions but not others.[3] The dissent's use of guideline examples is misleading or mistaken.[4]

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[2]The Commission, as the dissent points out, used past practice as a starting point in its guideline drafting process. But the "averages" were neither as simplistic nor their use as mathematical as the dissent strongly implies. Empirical data were used to estimate averages of time served. The "averages," however, were not based on data relevant merely to the offense. By using advanced statistical techniques, we were able to estimate the average time served for offense/offender combinations. To illustrate, the average time served was estimated for typically occurring variations of burglary offenses, including the value of the property taken, the degree of planning, the possession of a weapon, and whether the case was adjudicated through a plea of guilty or by a trial. The results of these analyses were then used as a starting point for the guidelines.

[3]The Commission is fully aware of the problems inherent in writing simple guidelines that might omit relevant factors -- a problem that permeates the discussion in the dissent. Given the vast number of factors potentially relevant to a sentencing decision, ever greater detail is always possible. Guidelines might not only separately consider "knives," but then go on to consider whether or not a knife is a switchblade, drawn or concealed, opened or closed, large or small, used in connection with a car theft (where victim confrontation is rare), a burglary (where confrontation is unintended) or a robbery (where confrontation is intentional). There is no inherently "correct" level of detail. There are no empirical studies that tell us whether the administrative costs of making the system complex are offset by advantages of, say, increased certainty, fairness, or deterrence.

The Commission's approach to the problem of "level of detail" (as Professor Robinson is fully aware) was to use its review of 10,000 actual cases in order to identify the major factors that courts have in fact taken into account in sentencing. These 10,000 cases in the Commission's database include, for example, 1,110 instances of robbery; 40 of those 1,110 involved physical injury to a victim; 3 involved death. The Commission guideline for robbery, therefore, includes, as a specific aggravating factor, "injury to a victim". It does not include "death" because death occurs only rarely in connection with a prosecuted robbery charge. In the Commission's view, a guideline should not give specific and direct instruction in respect to a factor that occurs only 3 times in 1,110 instances. Rather that factor, when it does occur, provides grounds for departure or a separate charge. It is these factors which empirically speaking rarely occur, and which the guidelines urge as grounds for departure, that the dissent characterizes as "free harms".

[4]The dissent provides numerous examples of instances designed to show that the guidelines treat in a similar way different crimes that (in the dissent's view) "obviously" should be treated differently. These examples are, at best, misleading; that becomes apparent once one looks beyond the general descriptions of the crimes at issue to the specific instances to which the cited guideline provisions apply. The dissent to the contrary notwithstanding, there is nothing odd, anomalous, or "obviously wrong", for example, about treating a minor drug offense, such as the possession of three marijuana plants, the same as an environmental offense that threatens the safety of, say, wild horses. Nor is there any inherent anomaly in assigning the same offense level to a regulatory violation of an explosive statute (an offense which typically does not pose any immediate safety risk but is characterized by the dissent as "trafficking in explosives") and altering a single motor vehicle identification number.

The dissent, in our view, misunderstands both the statute and the guidelines.[5] Regardless, the issue is not whether the Commission's present draft has some anomalies or disparities; some will be found. Nor is it whether the Commission has created the theoretically or academically "best" set of guidelines. The issue is whether we wish to perpetuate the current system, a system that creates anomalies and disparities daily by allowing each of hundreds of federal judges to sentence entirely on the basis of his or her own views. It is whether, with these initial guidelines, the Commission has laid a solid groundwork for further improvement and reform. The Commission is a permanent body that need not (and should not) try to complete its entire task in a single year. These initial guidelines begin a process that will create gradually but inevitably an ever fairer and more effective criminal justice system.

These matters are all explained in guideline commentary, which also makes clear that even such supposedly horrific examples, as similar offense levels for "abusive sexual contact" and "unlawfully remaining or entering in the United States" are mistaken. That example loses its probative force once one reads the commentary and finds that "abusive sexual contact" refers to a specific statutory offense (involving neither force nor threat of force) that the statute classifies as a misdemeanor and for violations of which the statute imposes a maximum penalty of six months in prison.

In fact, the Commission spent considerable time and effort developing ways to treat property and other crimes consistently. An explanation of its treatment of regulatory offenses is contained in the guidelines. See Chapter One, (Introduction and Overview). Our preliminary examination of the dissent's use of examples convinces us that our methods were reasonable.

[5]Compare, for example, the dissent's discussion of the use of past averages, with 28 U.S.C. § 994(m), sentence 2. To determine the accuracy of the dissent's use of legislative history, one must read through the relevant statutes and reports. The Commission's view is closer to that of Judge Harold Tyler, who wrote that "the original intent of Congress was not to eradicate all disparity in federal sentencing but rather to 'smooth out' those disparities which are gross or distorted."

SUPPLEMENTAL STATEMENT OF COMMISSIONERS ILENE H. NAGEL AND MICHAEL K. BLOCK

May 1, 1987

We join in the preceding Commission response to the dissent. As Chair and Co-Chair of the Commission's Research Committee, we submit this statement to elaborate on the views expressed therein.

1. A Rational and Coherent Approach.

The dissent attacks the Commission for not adopting a single, coherent rationale for all sentences -- i.e., a complete theory of sentencing. Despite years, indeed centuries of study, however, scholars have been unable to agree upon such a single rationale. Moreover, the Sentencing Reform Act expressly rejected the notion that the Commission should follow a single rationale. Instead, the Act instructed the Commission to devise a system that would further all of the statutorily-enumerated purposes of sentencing -- just punishment, deterrence, incapacitation and, to a lesser extent, rehabilitation. Such a system inevitably involves compromises and some degree of conflict.[1]

In view of the statute's mixed and at times conflicting directions, the Commission began where the statute instructed us to begin -- with an analysis of current sentencing practices. See 28 U.S.C. § 994(m). Using the results of those analyses as a guide, but without blindly following them, we developed a structure under which the resulting sentences are more rational, consistent and uniform, and, we believe, better serve the purposes of sentencing set forth in the Act.

To start, we did not, as the dissent asserts, "simply mimic the mathematical averages of past sentences." First, the Commission did not begin with mere "averages." The Commission analyzed 10,000 detailed reports of actual cases using sophisticated, multivariate statistical techniques that enabled us to discern the significance of numerous sentencing factors in varying contexts. These analyses were supplemented through reading presentence investigation reports to determine what the cases prosecuted actually involved and to assess which factors appeared to be important. The Commission also collected and utilized, albeit to a lesser extent, less detailed data on over 40,000 actual convictions. As a result, we did not simply estimate an average sentence for robbery. Rather, we estimated how long a term of imprisonment would be served depending upon a number of factors -- amount of money, weapon use, careful planning, taking of hostages, infliction of injury, degree of participation in the crime, and whether there was a trial or a guilty plea. These empirical analyses, eschewed by the dissent, ensured that the guidelines would be based upon reality and would "cover[ ] in one

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[1] For example, some views of just punishment (primarily Professor Robinson's) require an extremely detailed ranking of seriousness, including an incremental punishment for each harm caused by the offense. Incapacitation, on the other hand, calls for incarcerating offenders primarily on the basis of predictions of the likelihood that they will commit future crimes. To the extent that a sentencing system seeks to protect the public from future crimes by the defendant -- indeed, a very real and important objective -- the sentences that would result purely from harm rankings might not be appropriate. The same may be true when deterrence is the primary rationale for sentencing; some crimes that are less harmful may require greater sentences to provide adequate deterrence.

manner or another all important variations that commonly may be expected in criminal cases."[2] S. Rep. No. 98-225, at 168 (1983).

The results of these detailed analyses provided the starting point for the guidelines that ultimately were adopted. The Commission did not, however, blindly adopt or "simply mimic" the none-too-simple mathematical averages, although we did use them to provide guidance as to judges' perceptions of the seriousness of the various offenses, and which factors they considered important as a basis for distinguishing sentences in different cases. We reviewed the results of these analyses to determine whether the structure and degree of significance were logical and reasonable, and made changes where they were not.[3] We compared empirically-derived results for similar offenses and incorporated the significant factors into the guidelines for those offenses.[4] When compelling arguments could be made for the inclusion of factors where little data were available, we included them, albeit cautiously.[5] Heeding the instructions in the legislative history,[6] we raised sentences for white-collar offenses, treating them essentially the same as non-white-collar offenses of equal seriousness.[7] Similarly, we were careful to ensure that sentences for violent crimes at least equaled current averages, and raised them when they were clearly inadequate.[8] And, of course, in areas such as drug offenses, where the Congress recently has given clear direction, we followed and implemented that direction, regardless of current sentencing practice.[9]

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[2] This language, which Professor Robinson quotes, implicitly recognizes that, especially initially, Congress expected uncommon cases to be dealt with through departure. This is made explicit elsewhere in the Senate report. See Part 2, infra.

[3] For example, our results showed that the average sentences for robbery of an individual were considerably lower than those for the much more common (in the federal system) offense of bank robbery, even adjusting for other relevant factors. Since we could find no rationale for this, we treated the offenses essentially the same.

[4] Compare §2B3.1 (Robbery) with §2B3.2 (Extortion) and §2E2.1 (Extortionate Extension of Credit).

[5] See §2A4.1(b)(4) (adjustment for duration of kidnapping offense); §2B1.1(b)(2) (adjustment for theft of firearm).

[6] See S. Rep. No. 98-225, at 177-78.

[7] Thus, embezzlement was combined with theft into §2B1.1, and §2F1.1 (Fraud and Deceit) is quite similar to §2B1.1.

[8] Sentences for murder (§§2A1.1, 2A1.2), assault (§§2A2.1, 2A2.2), and rape (§2A3.1) were raised substantially.

[9] Professor Robinson apparently is of the view that we should ignore Congressional directives. Thus, he criticizes the Commission's decision to ignore drug purity, even though this was the approach adopted by Congress only last year. Similarly, he implies that the Commission should have set a higher sentencing range for engaging in a practice of hiring illegal aliens than for illegally entering the United States, even though Congress only last year prescribed a lower statutory maximum for the former than for the latter.

Even had the Commission "simply mimic[ked] the mathematical averages of past sentences," however, a substantial step toward achieving both fairer and more effective sentences would have been made. Clearly, averaging out the extremes and irregularities of past sentences promotes more equal treatment for offenders.[10] Perhaps more importantly, it furthers the crime-control goal of deterrence. Rational individuals consider the likelihood as well as the severity of punishment. Merely setting the guideline sentences at the average current sentence levels would increase the certainty of imprisonment while decreasing the length of the term--more offenders would go to prison, although some would go for a shorter time. Few experts would deny that this change in the manner of distributing punishment would increase the level of deterrence, thus enhancing one of the most important purposes of the institution of punishment.[11]

The dissent provides numerous examples of instances where the approach we have followed produced supposedly anomalous or irrational results. Because these examples were provided to us only recently[12] and are subject to constant change, it is pointless to attempt to address each of them directly.[13] Rather, we ask the reader to examine carefully each example along with the relevant guidelines and commentary, and then pose certain questions. Is the example provided one which is actually likely to occur in the federal system, or is it more appropriate for a law-school classroom?[14] Does the language employed in the dissent fairly represent the conduct and the provisions of the guidelines involved, or is it calculated to mislead as to the nature or scope of the supposed flaw?[15] Is it clear that the factor cited should result in a

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[10] This smoothing or leveling process necessarily results in a reduction of the amount of probation. Just as there must be fewer extremely long sentences, there must be fewer extremely short ones, i.e., less probation.

[11] We suspect that more uniform sentences may also further the goal of protecting the public from dangerous offenders, because an individual's propensity to commit crime decreases with age. Thus, incarceration tends to prevent more crimes in the earlier years than in later years.

[12] Had the examples been presented sooner, the Commission could have made use of them to the extent appropriate to revise guidelines that produced unintended results or to clarify language that was subject to misinterpretation.

[13] Indeed, as a result of their constant change, even this limited discussion of the dissent's examples may be inapt.

[14] For example, would someone really be charged with and convicted of obstruction of justice for merely threatening to "throw eggs" at a witness' car? How many of such cases are there?

[15] For example, by referring solely to the short title of "abusive sexual contact," the dissent suggests that consensual touching of a ward (statutory maximum 6 months) must receive a much higher sentence than illegal immigration (statutory maximum 6 months to 2 years). By characterizing an offense as "aggravated assault" although it involves no use of a weapon and no injury, the dissent suggests that such conduct is much more serious than smuggling $21,000 of unquarantined and possibly infected fish of a type for which importation is prohibited.

The dissent's discussion of plea agreements appears equally disingenuous. The guidelines do not tell judges "that they need not follow the guidelines whenever the sentence is pursuant

different guideline range?[16] Can the conduct adequately be dealt with within the guideline range?[17] Should the offense of which the defendant is convicted be irrelevant?[18] Is the guideline sentence per se unreasonable?[19] Can the sentencing judge not be expected to deal with a truly anomalous result through departure?[20] And, finally, if the problem is real, how can the guidelines be modified to deal with it? Suggested improvements will be welcomed.

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to a plea bargain." Rather, policy statements accept the inevitable fact that there is no way to prevent a judge from sentencing pursuant to a sentence agreement, but asks him to accept such an agreement only if there is a justifiable reason for departure. Currently, explicit sentencing agreements are rare. In view of the immunity of agreed-upon sentences from appeal, the Commission could not adopt any policy that was meaningfully different in effect, even if doing so were advisable at this early stage.

[16] Should the fact, for example, that a robbery or extortion "interfered with interstate commerce" (e.g., a shipment of tomatoes across state lines) rather than local commerce (e.g., a shipment of tomatoes elsewhere in the state) significantly affect the sentence? Is the six-month or 25% guideline range inadequate to deal with the distinction between two defendants, one of whom defrauds each of two widows of $100,000 and the other of whom defrauds each of 40 widows of $5,000? Which sentence should be larger, and by how much?

[17] For example, is not the sentencing range in a rape with serious bodily injury -- 135 to 168 months -- adequate to deal with the fact that the defendant also took property from (i.e., robbed) the victim during the course of the offense?

The dissent also may mislead the reader as to the effect of the guidelines for dealing with multiple offenses, asserting that "where offenses are unrelated and against different victims, only the most serious offense is punished; the others are 'free'." Yet the guideline cited provides that an additional offense does not increase the guideline offense level only in the unusual case where it is much less serious than the primary offense. In such instances, there is ordinarily a wide guideline range within which the judge is expected to consider the additional offense. The dissent's discussion of multiple property offenses ignores the fact that the property guidelines themselves contain aggravators for repeated misconduct that is part of a pattern. See, e.g., commentary to §2B1.1.

[18] For example, if the defendant is convicted solely of arson, should he be punished as for an attempted civil-rights murder of which he was acquitted or which was uncharged? In many of the "free" harm examples posited by Professor Robinson, the guidelines will result in a higher sentence if the defendant is convicted of the offense that such harm represents.

[19] The bulk of the dissent's criticisms go not to the absolute sentences, but to the relative rankings of different factual patterns. While not unconcerned about the latter, we believe that the former are more important at this stage.

[20] In fact, because the guidelines have been designed to cover the vast majority of cases that do occur in practice, and incorporate those commonly-occurring factors that were determined to be important to judges, we expect the rate of departure to be low, even initially. Frequent departures will alert the Commission to modify the guidelines.

2. A Comprehensive Approach That Will Reduce Disparity.

Although the dissent incorrectly describes the use the Commission made of past practice data, it is correct that the guidelines leave the cases that are unusual in the federal system for departure, sometimes expressly inviting the judge to depart in accordance with commentary or a separate policy statement. That is precisely what Congress expected. See S. Rep. No. 98-225, at 166 ("policy statements could also address . . . the appropriateness of sentences outside the guidelines where there exists a particular aggravating or mitigating factor which does not occur often enough to be incorporated in the sentencing guidelines themselves"). Not only is this approach sufficiently comprehensive as a starting point, but it readily can be expanded.[21]

The dissent indicts the Commission for promulgating guidelines which, it is asserted, will fail to reduce and will perhaps increase disparity. Unlike Professor Robinson, however, we have worked at modeling and testing the guidelines that were adopted. While the results are necessarily preliminary, the analyses thus far show that the guidelines will indeed make a substantial stride toward reducing the disparity inherent in current sentencing practices.

On the other hand, the Commission's experience with the system that Professor Robinson advocated showed that his system would in fact increase disparity. Disparity would be rampant under his approach because of the innumerable opportunities for variation, and insistence on including in every sentencing decision every conceivable unproved "harm" (actual, risked or threatened) as an aggravator and every imaginable failed defense as a mitigator. Each was assigned a precise numerical value. Consistent with his views, Professor Robinson presented a proposed guideline system containing an endless array of factors by which to distinguish offenses. Many of these would have required a subjective decision by the judge with an uncertain outcome.[22] The cumulative effect of such decisions would have been to destroy any uniformity: different judges would have treated identical cases quite differently.[23] The

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[21] Through its empirical work, the Commission ensured that its guidelines would be sufficiently comprehensive to satisfy the legislative mandate. All offenses that are prosecuted with any significant degree of frequency, and many that are not, are covered. We estimate that the guidelines cover about 95% of all federal convictions. The Commission chose to delay issuance of guidelines for uncommon offenses and factual patterns about which it had limited information.

[22] For example, the judge would have to assess whether the conduct risked any number of harms that might have been presented, and take a percentage of the corresponding "harm value" that depended on the degree of risk. The same was true for threats. Thus, for example, the precise nature of the threat to injure the victim of a robbery would govern the sentence. Not only are the results of such an approach problematic even when the nature of the threat is clear, but any number of results is possible when there is any ambiguity. Furthermore, many of the adjustments represented attempts to place precise numerical values on factors such as provocation and cooperation, which are necessarily matters of degree and therefore must involve flexibility.

[23] A major difficulty with Professor Robinson's approach is that simply by making subjective factual determinations that are virtually insulated from review on appeal, different judges may treat like cases differently within the guidelines. Any appearance that such guidelines would be binding and reduce disparity is illusory. By limiting the number of factors and concentrating on those that are most important in actual practice, the system adopted by

impact on the criminal justice system would have been drastic and intolerable. See Preliminary Observations of the Commission on the Dissent, Part 1.

At the opposite extreme of a Robinson-like approach is a system of extreme simplicity. Such an approach also had its advocates, primarily those who thought the Commission could meet its responsibilities by slight modification of existing state guideline models. Like the approach advocated by Professor Robinson, those systems also produce disparity, but of a different sort. Whereas his approach gives rise to potential disparity primarily because like cases may be treated in dissimilar fashion, an approach with extremely few distinctions gives rise to potential disparity primarily because very unlike cases may be treated alike.[24]

After months of deliberation, the Commission opted for a more balanced intermediate approach. It is far more comprehensive and detailed than existing state systems,[25] but not as rigid and intrusive as the system advocated by Professor Robinson.[26] No guideline system can totally eliminate disparity, but the one that the Commission adopted will significantly improve upon current practice and can be improved upon as experience is gained.[27]

3. The Vision of Reform.

With the guidelines promulgated by the Commission comes not the death of the vision of reform embodied in the Sentencing Reform Act, but its first breath. While not all that potentially may be achieved through the guideline process will have been achieved by this first set of guidelines, much has been accomplished, and more will follow.

We disagree with the dissent regarding the scope of the statutory mandate and the speed with which reform was expected to progress. That Congress intended an iterative, evolutionary process is clear from the fact that one and one-half years were allotted for promulgation of

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the Commission ensures that judges will be forced to depart from the guidelines when they believe that the sentence specified by the guidelines is inappropriate. The consequence is more stringent appellate review with a likelihood of greater uniformity.

[24] Systems such as those now in effect in Minnesota and Washington suffer from this flaw, resulting in frequent departures.

[25] One of the most striking misrepresentations in the dissent is the allegation that the Commission failed to comply with the statutory directive that the guidelines be more comprehensive and detailed than the current parole guidelines. The parole guidelines are much shorter than the sentencing guidelines; even a cursory review of the parole guidelines shows that they omit hundreds of offenses and numerous factors -- such as weapon possession and injury in many crimes -- that are expressly incorporated into the sentencing guidelines.

[26] Contrary to the discussion in the dissent, the guidelines adopted by the Commission do group offenses into generic categories; they simply do not, as would Professor Robinson, totally ignore the offense of which the defendant is convicted.

[27] By way of contrast, because of its extremely rigid structure and its insistence that every harm or factor must count the same, either additively or multiplicatively, in every factual context, the system advocated by Professor Robinson proved virtually impossible to modify without producing unanticipated and unwanted results.

the initial guidelines, but at least six subsequent years of full-time Commission effort were allotted to revise, refine and modify the guidelines.

As scientists who have studied sentencing issues empirically as well as theoretically, we agree with the dissent that empirical studies, for example, of deterrence, recidivism and incapacitation should be conducted. Consistent with the dictates of the Sentencing Reform Act, we intend to make every effort to ensure that such empirical research is conducted and that its results influence future modifications of the guidelines. We hope that in the future we will have Commissioner Robinson's support in this endeavor.[28]

The Commission's eighteen months of deliberation on the numerous complicated issues surrounding sentencing has indeed led us to proceed with some degree of caution. Revamping the entire system of federal criminal sentencing is an herculean task, and the changes wrought by the new system can have an enormous impact on the federal criminal justice system. In this first of many iterations, the Commission rightfully rejected the wholly revolutionary stance that Professor Robinson advocates. Absent perfect knowledge and the confidence that we possess Solomonic wisdom, we are unwilling to unleash summarily a radical overhaul of the manner in which decisions are made that will affect both the public safety of the American people and individual liberty. If caution in such matters be our sin, then let the President and the Congress be the ones to tell us to throw caution to the wind.

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[28] The role of empirical research is critical to the work of the Commission. For example, empirical research has shown that the revolutionary guideline structure espoused by Professor Robinson's July 10, 1986, draft is flawed even from a just deserts perspective: the seriousness of an offense cannot be derived by adding the seriousness of its component "harms"; two or three offenses are not twice or three times as serious as a single offense; and the seriousness rankings do not necessarily correspond with imprisonment rankings. See, e.g., S. Gottfredson, K. Young & W. Laufer, Additivity and Interactions in Seriousness Scales, 17 J. Research in Crime & Delinquency 26 (1980); A. Blumstein & J. Cohen, Sentencing of Convicted Offenders: An Analysis of the Public View, 14 Law & Society Rev. 224, 236-37 (1980); H. Wagner & K. Pease, On Adding Up Scores of Offence Seriousness, 18 Brit. J. Criminology 175 (1978).

SUPPLEMENTAL STATEMENT OF COMMISSIONER GEORGE E. MACKINNON

My colleague's overly critical dissenting views are based on a plethora of highly stated principles which are allegedly ignored in the Guidelines. In the same breath that he alleges a lack of "rationality" he deplores the Commission's reliance on "experience." Yet as Justice Holmes wrote, "the life of the law. . . has been experience."

One of my colleague's most critical comments has to do with the alleged relationship of "average sentences" to the Commission's deliberations. He ignores that our statute does "require the Commission to ascertain the average sentences imposed." 28 U.S.C. § 994(m). That we did - 10,000 recent sentences. And we followed the Congressional direction "not to be bound by such average sentences. . . [but to] independently develop a sentencing range that is consistent with the "statutory purposes." Id. We complied with this direction to the best of our ability. We provided ranges, not always based on the "averages." The proof of this is implicit in the actual guideline for each offense -- and in the conflicting comments we receive that the guidelines are at the same time too severe and too lenient. The Commission has in accordance with its collective judgment increased some sentences and reduced others. White collar crime and drug offenses are dealt with more severely and probation is tightened.

My colleague, while generally ignoring the completely new statutory jurisdiction of the United States Courts of Appeal to review all sentences, does refer to my comment with respect to the obligation that will be cast upon them by these Guidelines but does not consider how this will work in actual practice. No analysis of the Guidelines can ignore the fact that the statute authorizes both the defendant and the government to appeal every sentence. This is a revolutionary innovation in federal criminal jurisprudence of overwhelming magnitude.

> The court of appeals on review of the sentence may, after considering the record . . . affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing.

18 U.S.C. § 3576.

To furnish a basis for this review every sentencing court is required to state "in open court the reasons for its imposition of the particular sentence." (Emphasis added). If the sentence is within the range of the Guidelines, the judge must nevertheless give his "reason for imposing a sentence at a particular point within the range. . . [and if the sentence] is outside the range [the judge is required to state] the specific reason for the imposition of a sentence different from that described." 18 U.S.C. § 3553(c). Appellate jurisdiction extends to every sentence -- including sentences on guilty pleas. It is thus apparent that the courts of appeal on review are going to pass on the "reasons" that the sentencing judge gives for his every sentence. These will be reasons that are individual to that particular case and if the sentence was imposed upon a plea of guilty and no trial was held the court may have to pass upon constitutional questions implicit in the court's action. The breadth of this jurisdiction and the nature of the issues that might be reviewed was not fully explained in my colleague's dissent.

I completely disagree with my colleague's comments on plea bargaining. He nowhere mentions the great prosecutorial discretion of the United States Attorney recognized by the decision in United States v. Cox, 342 F.2d 167 (5th Cir.), cert denied, 381 U.S. 935 (1965).

Moreover, sentences imposed pursuant to plea bargains are subject to appeal the same as any sentence and can be set aside the same as any other sentence if the stated reasons given by the judge are inadequate.

In one respect, I am somewhat sympathetic to my colleague's dissent because I recognize there are those who feel that sentencing, like some other things, can be reduced to a science. But in my opinion there is considerable difficulty in placing human conduct in neat pigeonholes. Courts must consider the human factors and a reasonable measure of discretion must be recognized. The statute does so. It authorizes ranges of 25% and departure for aggravating and mitigating circumstances. Courts must sentence both the criminal and the crime. Our direction from the Congress was to produce guidelines that take into account, inter alia, the relevance of

> the community view of the gravity of the offense, . . . the public concern generated by the offense, . . . the deterrent effect a particular sentence may have on the commission of the offense by others; and . . . the current incidence of the offense in the community and in the Nation as a whole.

28 U.S.C. § 994(b).

A sentence following conviction in a criminal case should do "justice" for the victim, the public and the offender. No absolutely fixed standard can be articulated as to what constitutes justice. Justice varies with the individual, with the crime and with the societal effect of the crime. Our governing statute recognizes all these factors. Justice in each case is generally an amalgam of what sentence is necessary to deter future crimes of the same sort, what is necessary to deter the particular individual from the commission of future crimes and what would be considered by reasonable people to be a fair sentence for the transgression by the particular offender. All of these factors vary according to the severity of the crime, the nature of the crime, the frequency of the crime and the individual characteristics of the offender as demonstrated by his participation in the crime and his past social and criminal history. No one factor will predominate in all sentences with respect to the same crime. The most important objective to be sought by a sentence will change with any given crime and with any particular individual. Any sentence can serve multiple objectives -- and in most instances will. True justice is accomplished by a sentence that incorporates all sentencing objectives to the maximum extent possible. Individual judgments may vary on what constitutes a fair mix of objectives for a particular offense by a particular individual. That is the reason that 25% discretionary leeway is allowed, and that is the reason that mitigating and aggravating circumstances under the statute are authorized to justify varying sentences.

Contrary to my colleague's views I believe that the Guidelines will correct the wide unwarranted disparity that has existed in some instances in the past. The guideline sentences will assure this. Moreover, the Guidelines will assure honesty in sentencing, i.e., that the sentence imposed will be the sentence served. And that the sentences imposed will satisfy our objectives and be reasonably fair, uniform and proportional. See Guidelines, Chapter One, (Introduction and Overview), p. 1.2.

In conclusion, it is my opinion that we should not support any sentencing system that fails to consider the statutory elements of the offense of which the accused was charged and convicted and I would not support any Commission action which in the nature of guidelines seeks to rewrite statutory criminal law on the ground that the particular acts of Congress were "archaic, fragmented and overlapping." Dissent at 9,E. We have no such jurisdiction.