
Prosecutorial Discretion and Federal Sentencing Reform

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PROSECUTORIAL DISCRETION
AND
FEDERAL SENTENCING REFORM

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This publication is a product of a study undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

TABLE OF CONTENTS

I.	ISSUES UNRESOLVED BY S. 1437	1
	Issues Not Central to the Allocation of Discretion	1
	Format	1
	Severity	3
	Other issues	6
	Issues Central to Determining the Allocation of Discretion	7
	The "in-out" decision	7
	Prison sentences for nonviolent first offenders	11
	Increased prison terms for certain offenders	14
	Single-number guidelines; width of range	16
	Early release	18
	Range of offense and offender information	20
	Aggravating and mitigating factors not used to establish offense- offender categories	22
	Inter-district variation	26
	Relevance of guilty pleas	28
	Multiple counts and charges	30
II.	FIVE GUIDELINE MODELS	35
	Guidelines Preserving Judicial Discretion	37
	Model A: Maximum judicial discretion	37
	Model B: Partial judicial discretion	38
	Guidelines Restricting Judicial Discretion	39
	Model C: Minimum judicial dis- cretion; maximum prose- cutorial discretion	39

Model D: Minimum judicial and prosecutorial discretion	40
Model E: Minimum judicial and prosecutorial discretion; guilty plea discounts authorized	41
III. IMPLICATIONS OF THE GUIDELINE MODELS	43
Guidelines Preserving Judicial Discretion	49
Model A	49
Model B	53
Guidelines Restricting Judicial Discretion	57
Model C	57
Model D	59
Model E	61
Conclusion	64
IV. SUGGESTIONS FOR FURTHER RESEARCH	66
APPENDIXES	69
APPENDIX A: MODEL A	71
APPENDIX B: MODEL B	80
APPENDIX C: MODEL C	89
APPENDIX D: MODEL D	98
APPENDIX E: MODEL E	103
APPENDIX F: PAROLE RELEASE GUIDELINES	108
APPENDIX G: CALIFORNIA RULES OF COURT	111

ISSUES UNRESOLVED BY S. 1437

Within the detailed statutory framework established by S. 1437, the array of issues left unresolved by the bill is vast. This section identifies these open issues and explains how the bill would in effect delegate their resolution to the new Sentencing Commission. A brief discussion of several issues that apparently will not affect the allocation of discretion is followed by a more detailed examination of the issues that are likely to have a substantial impact upon the distribution of sentencing authority.

Issues Not Central to the Allocation of Discretion

Some of the most important and controversial decisions to be made by the commission apparently will not have a substantial impact upon prosecutorial discretion, plea bargaining, and the ultimate allocation of sentencing authority.

Format

The choice of format for the guidelines will have important implications for their usefulness and comprehensibility, their ability to capture the significance of relevant variables suggested by the data, and their ability to generate a new data base useful for future

refinement of the guidelines and for other research. Principle alternatives appear to be either a matrix presentation, such as that now used by the United States Parole Commission,¹ a detailed, descriptive presentation for each offense,² or an algebraic formula allowing more complex interactions among various offense and offender variables. Even with respect to the matrix presentation, which perhaps enjoys the best combination of acceptability to statisticians and the public alike, important choices among alternative structures will remain open.³

It is apparent that the guideline format could be rendered so complex that prosecutors and defense counsel would find it difficult to determine in advance the precise sentencing implications of charge reduction or of an agreement not to allege a particular aggravating circumstance. It cannot be assumed that such uncer-

1. 28 C.F.R. § 2.20 (1977); see appendix F infra.

2. See, e.g., Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 37-53, 55-61 (1976).

3. See Wilkins, Kress, Gottfredson, Caplin, & Gelman, Sentencing Guidelines: Structuring Judicial Discretion 44-62 (Law Enforcement Assistance Administration 1976).

tainties, if they existed, would necessarily be as great for the prosecution as for the defense. Uncertainties for either of the parties would plainly have the greatest significance for the nature of the charging and plea bargaining process. It seems plausible to assume, however, that guideline computations will inevitably have to be relatively accessible and comprehensible, that any unavoidable complexities and uncertainties would not be defended as desirable, and that the probation service or some comparable agency would routinely provide counsel with reliable information concerning the sentencing guideline implications of any contemplated disposition. While danger remains that guideline complexity could effectively force counsel to operate in the dark, for present purposes it seems most useful to assume that prosecutors and defense counsel will "know the score."

Severity

Establishing the severity of sentence for defendants sentenced to prison may well represent the commission's single most important and most difficult task. The decision must be made in light of the average sentences now imposed, but the current average

is only a guide, and it must in any event be rejected if the commission determines that present practice is inconsistent with the objectives of the penal code.⁴ Beyond this, the commission must also assure that the available capacities of penal institutions will not be exceeded.⁵

Whatever the severity levels adopted, however, it does not appear that they will by themselves have a direct impact on the charging and bargaining process. One can, of course, imagine a situation in which an offense in one seriousness category would carry an eighteen-to-twenty-year term, while in the next lower category the sentence (given the same offender characteristics) would be only four to five years. In such circumstances the pressure to plead guilty in exchange for charge reduction would be intense. But it seems plausible to assume that such discontinuities are not likely to be adopted.

A drastic increase in severity levels over those of current practice would greatly increase pressure on

4. S. 1437, 95th Cong., 1st Sess., at § 124 (1978) (proposed 28 U.S.C. § 994(1)).

5. Id. (proposed 28 U.S.C. § 994(h)).

defendants to plead guilty in exchange for sentencing concessions. A severity increase of substantial proportions, however, seems foreclosed by the "available capacity" constraint, except under one condition. The condition is that the longer sentences be served by many fewer defendants. This result could be achieved by authorizing very substantial plea discounts, so that the nominal sentence--a very severe one--is in fact imposed only in the relatively few contested cases.⁶ For present purposes it is assumed that the Sentencing Commission would not deem it wise to pursue such a policy.

Since S. 1437 allows the upper end of the sentencing range to exceed the lower by 25 percent, the breadth of the sentencing range, in absolute terms, will be greater to the extent that more severe sentences are adopted. Guidelines could allow a spread of four to five years or sixteen to twenty years. It is by no means obvious, however, that uncertainty over the four-year range from sixteen to twenty would be of

6. See generally Foote, Deceptive Determinate Sentencing, in Determinate Sentencing: Reform or Regression? 133, 138-40 (Law Enforcement Assistance Administration 1978).

greater concern to bargaining parties than uncertainty over the one-year range from four to five. In fact, since the statute allows at least a twelve-month spread, the least severe sentences could involve a range of, say, six to eighteen months. Uncertainty over this range could conceivably be of far greater concern to prosecution and defense than uncertainty over the four-year range from sixteen to twenty. Plainly this is a question that warrants further study. For present purposes, I assume that the severity level alone will not have a significant impact on bargaining practices. The influence of broader or narrower sentencing ranges, at any severity level, is considered specifically below.⁷

Other Issues

Other commission decisions can for similar reasons be assumed less central to bargaining decisions. Guidelines must be formulated for determining the amount of fine and length of term of probation,⁸ whether to grant early release for the limited group

7. See pp. 16-18 infra.

8. S. 1437, supra note 4 (proposed 28 U.S.C. § 994(a)(1)(B)).

of prisoners who will be eligible, and the period released prisoners must spend on parole.⁹ General policy statements must include recommendations concerning orders for forfeiture and restitution.¹⁰ The commission may also choose to formulate policy statements or guidelines concerning the use of other nonincarcerative sanctions. All of these matters could have a significant impact on bargaining in individual cases. Current information suggests, however, that their overall importance is likely to be relatively limited. Other commission decisions will have a far more direct and substantial impact on charging and bargaining decisions.

Issues Central to Determining
the Allocation of Discretion

The "In-Out" Decision

The commission is directed to promulgate guidelines for determining whether to impose imprisonment or some nonincarcerative sanction.¹¹ In fact, the Senate Judiciary Committee report on S. 1437 (which I will

9. Id. (proposed 28 U.S.C. § 994(e)(1)).

10. Id. (proposed 28 U.S.C. § 994(a)(2)).

11. Id. (proposed 28 U.S.C. § 994(a)(1)(A)).

refer to as the Senate report) makes plain that this is viewed as "one of the most important parts of the guideline process,"¹² both because of apparently great disparities in the granting of probation¹³ and the current absence of any corrective mechanism comparable to the Parole Commission's power to alleviate disparity among sentences to terms of imprisonment.

Guidelines for the in-out decision may, however, prove difficult to formulate. The existing Parole Commission guidelines apply only to offenders sentenced to prison and, in any event, were designed only to reflect prior practice rather than to embody normative judgments. The process of measuring actual practice, let alone establishing its consistency with statutory goals, becomes vastly more complex when applied to the

12. Senate Comm. on the Judiciary, Criminal Code Reform Act of 1977, S. Rep. No. 95-605, 95th Cong., 1st Sess. 1163 (1977) [hereinafter cited as S. Rep. 95-605].

13. For example, in 1972, the percentage of defendants convicted for auto theft who were granted probation varied from 89% in the Eastern District of New York to zero in Maine. See O'Donnell, Churgin, & Curtis, *Toward a Just and Effective Sentencing System* 6 (1977). Although these figures do not control for possible differences with respect to prior record or other relevant variables, it is difficult to believe that the observed discrepancies could be explained solely on that basis.

larger and far more diverse universe of all convicted defendants. Although research in several states suggests that guidelines for the in-out decision can be developed,¹⁴ it is not yet known whether the process of developing in-out guidelines can be equally successful when applied to federal offenses. It therefore cannot be said with assurance that definitive guidelines for the in-out decision can be promulgated for any offenses, even the most serious.¹⁵ And under the best assumptions, it seems likely that the propriety of imprisonment (either in terms of current practice or theoretical norms) will simply be uncertain for a large number of offense-offender combinations.

The commission could respond to these conditions in several ways. It might decide that an adequate basis for in-out guidelines does not exist for most offense-offender categories. Guidelines would dictate imprisonment (or nonimprisonment) only for the most

14. Wilkins et al., supra note 3, at 81-82 (90% of in-out decisions conformed to the model guidelines).

15. Even for robbery and homicide, probation was granted respectively to 13% and 36% of convicted offenders in 1972. O'Donnell et al., supra note 13, at 6.

severe (or least severe) offense-offender combinations, and would leave the in-out decision for most situations in the hands of the sentencing judge.

At the other extreme, the commission might perceive itself as having an obligation to resolve the in-out question one way or the other for every offense-offender category. The statutory language and the tone of the Senate report could lend themselves to this reading, and the commission could plausibly decide that the elimination of disparity in this sensitive area was more important than theoretical perfection--that it was more important to decide the matter than to decide it "correctly."

Between these two extremes lies a wide variety of possible compromises. Nothing in S. 1437 or the Senate report establishes the extent of Congress's preference for definite resolution of the in-out question in the likely event of inconclusive indications from the empirical and normative analyses.

It need hardly be added that the commission's choice for or against definite resolution of the in-out question will have an extraordinary impact on charging and bargaining. Some observers have reported that no

single factor is as important in plea bargaining as the hope of avoiding prison. Even if such findings prove exaggerated, it seems clear that the likelihood of imprisonment or probation will always loom large in a defendant's decision about plea. Thus, where guidelines definitely resolve the incarceration issue, the judge's discretion will be sharply limited, but the significance of the prosecutor's charging decision will be greatly enhanced. If, instead, the guidelines leave the in-out decision mostly to the judge's discretion, the bargaining environment would remain essentially like today's, with the result that plea negotiation (and unwarranted disparities in the incidence of incarceration) could be left virtually unaffected by the elaborate sentencing reform process.

Prison Sentences For Nonviolent First Offenders

S. 1437 directs the commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise

serious offense."¹⁶ Added on the Senate floor,¹⁷ this provision could prove to be extraordinarily important. In current practice, prison sentences for first offenders appear to be common over a wide range of non-violent offenses--from counterfeiting and forgery through interstate transportation of stolen securities, embezzlement, bribery, perjury, and income tax evasion. Under current Parole Commission guidelines, for offenders with the best possible offender characteristics, the guidelines call for imprisonment of six to ten months even for the least serious property offenses (theft or simple possession). The time to be served increases to eight to twelve months for nonviolent crimes of "low to moderate" severity and to twelve to sixteen months even for crimes of only "moderate" severity--e.g., bribery, counterfeiting (under \$20,000), or income tax evasion (under \$50,000).¹⁸ Must the guidelines now foreclose imprisonment in

16. § 994(i).

17. As reported out of committee, the provision was limited to offenders under 26 years of age. See S. Rep. 95-605, supra note 12, at 1168.

18. 28 C.F.R. § 2.20 (1977).

such cases? Or can offenses of this nature be considered "serious" within the meaning of section 994(i), so that imprisonment would be justified?

The commission could choose to define the "seriousness" of nonviolent offenses under section 994(i) by comparing the statutory offense classifications of violent and nonviolent offenses, by comparing Parole Commission rankings of offense seriousness, or by some independent test. These approaches would not necessarily generate consistent conclusions and each presents its own problems. In any event, two points seem clear. First, a wide range of important and recurring offenses will inevitably be classified as "nonserious"; with the prospect of imprisonment essentially foreclosed for first offenders in these cases, the incidence of plea bargaining may drop sharply.¹⁹ Second, another large group of offenses will be subject to treatment as either "serious" or "nonserious" in the commission's discretion. To the extent that the commission chooses to treat borderline offenses as "serious," it will then have further discretion to determine whether the in-out decision will be definitely resolved in the guidelines

19. See pp. 10-11 supra.

or left for resolution by the trial judge on a case-by-case basis.

Increased Prison Terms for Certain Offenders

Section 994(h) requires that the guidelines specify a substantial term of imprisonment for defendants who:

1. have a history of prior felony convictions
2. committed the offense as part of a pattern of criminal conduct from which they derived a substantial portion of their income
3. had a managerial role in racketeering activity related to the offense, or
4. committed a violent felony while on release awaiting disposition of a prior felony.

These provisions are derived from the "dangerous special offender" provisions of 18 U.S.C. § 3575(e), but differ significantly from them, in that increased sentences above the maximum normally provided for the offense are no longer authorized. The substantial term required in these cases must be "within the range generally available for the offense."²⁰

Within the available range, the commission will have discretion to determine the increase in sentence that will be triggered by any one of the four provi-

20. S. Rep. 95-605, supra note 12, at 1168.

sions. In some instances, its discretion will be relatively limited. Auto theft, perjury, and tax evasion (under \$10,000) are Class D felonies; in the absence of consecutive sentences for separate counts,²¹ the penalty could not exceed five years for these offenses even if racketeering were established. For more serious offenses, however, the commission's discretion will be broader, and in any event the four provisions could be made the basis for triggering consecutive rather than concurrent sentences. Thus, in most instances the commission will have discretion to decide whether section 994(h) cases will be subject to moderate or very substantial increases in sentences.

Increased penalties under the first and fourth paragraphs of section 994(h) seem unlikely to affect the charging and bargaining process, because the facts triggering them--prior offenses--will be brought to the sentencing judge's attention through the presentence report. Prosecutor and defense counsel thus cannot arrange to avoid the increased penalty; at most they could limit its extent by submitting a plea to a less serious offense, for which both the basic sentence and

21. See pp. 30-34 infra.

the maximum possible increase would normally be lower.

Increased penalties under the second and third paragraphs of section 994(h)--criminal livelihood and racketeering--will have a much more dramatic impact, at least if the commission chooses to make the increased penalty a substantial one. Some facts suggesting criminal livelihood or racketeering might emerge from the presentence report, but it seems unlikely that the necessary findings could be made without a formal presentation by the prosecutor. The decision whether to trigger an increased penalty will thus lie entirely in the hands of the prosecutor. In the absence of controls over the exercise of this discretion, the prosecutor will hold a very potent weapon for inducing a guilty plea, and there will be little basis for assuring consistency in the imposition of an increased penalty.²²

Single-Number Guidelines; Width of the Range

While S. 1437 specifies the maximum width of the

22. Existing law goes even further: increased penalties for "dangerous special offenders" can be triggered only when the government expressly invokes them. See 18 U.S.C. § 3575(a).

guideline range for terms of imprisonment,²³ it does not require any minimum amount of flexibility, and the Senate report explicitly contemplates that the "range may be very narrow where the purposes of sentencing can be served by a single sentence or a narrow range" ²⁴ In an analogous context, and with even less support in the legislative history, the Supreme Court has upheld the validity of agency action promulgating "guidelines" consisting only of a single number.²⁵

If the commission chooses to adopt single-number guidelines, judicial discretion will of course be extremely constricted, and prosecutorial power correspondingly enhanced. A commission decision to eliminate judicial discretion in this area would have somewhat less impact than a decision eliminating discretion on many other issues, since the extent of the authorized range cannot exceed rather limited bounds in any event.

23. § 994(b)(1) provides that the maximum of the range shall not exceed the minimum by more than 12 months or 25%, whichever is greater.

24. S. Rep. 95-605, supra note 12, at 1166.

25. E.I. DuPont De Nemours & Co. v. Train, 430 U.S. 112 (1977).

The decision whether to adopt single-number (or very narrow) guidelines may nevertheless be of great consequence in one area--sentences to very short terms of imprisonment. Section 994(b)(1) would allow a guideline range of, say, three to fifteen months. By choosing to preserve judicial discretion over this range, the commission could in effect decide to leave the mix of prosecutorial and judicial power, together with the resulting uncertainty for the defendant, little different in practice from what it is today for certain offenses of low or moderate seriousness.

Early Release

Although section 2003(a) requires the trial judge to consider the need for a sentence to provide the defendant with rehabilitative treatment, section 994(j) appears to negate most of the force of that provision by requiring that guidelines

reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of providing the defendant with needed . . . [rehabilitative] treatment, other than in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact.

The possibility of early release from a term of imprisonment is in turn expressly confined to the excep-

tional cases recognized by section 994(j).²⁶

To what extent will these provisions actually restrict the trial judge's discretion to authorize early release? If commission guidelines do no more than repeat the language of the statutory prohibition, it seems apparent that the sentencing court could make the "specific findings" required by section 994(j) with little effective constraint. Prosecution appeals would be infrequent, and in fact would be barred if the authorization of early release were consistent with a plea agreement.²⁷ The prospect of winning eligibility for early release might therefore provide a powerful inducement for some defendants to plead guilty. As under current practice, the inducement would be essentially under judicial control, with prosecutors partially sharing this power through their ability to make sentence recommendations and plea agreements, subject to judicial approval.

The commission could, however, take concrete steps to enforce respect for the presumption against early

26. § 994(b)(2).

27. See § 3725(b).

release. It could, for example, identify explicitly the types of situations not to be regarded as "exceptional." Or, for more certain results, it could draft early-release guidelines that would require offenders granted eligibility for early release nevertheless to serve their full terms, except in narrowly defined situations. The latter approach could largely eliminate prosecutorial, judicial, and Parole Commission discretion in this area.

Range of Offense and Offender Information

Sections 994(c) and (d) direct the commission to establish categories of offenses and categories of offenders. The commission is required to base the categories on consideration of at least seven specified offense factors and eleven specified offender factors. Some of the listed factors are quite open-ended, subsuming a number of distinct elements,²⁸ and the commission is in any event warned "not [to] limit its consideration" to the listed factors.²⁹ Thus, the commis-

28. One listed factor, for example, is "the circumstances under which the offense was committed. . . ." § 994 (c)(2). Moreover, "criminal history," § 994(d)(10), is not limited to prior convictions. See S. Rep. 95-605, supra note 12, at 1166 n.11.

29. §§ 994(c),(d).

sion may choose to give dozens of separate elements a role in determining the seriousness category for the offense and for the offender. At the other extreme, the commission may choose to make only two or three factors relevant; its statutory obligation is discharged as long as it "considers" the additional factors and determines that they are not relevant or useful.³⁰

Most of the listed factors are ones that ordinarily could be ascertained by the probation service in its presentence investigation. If the commission decided to make such factors the sole basis for determining offense and offender categories, the potential for prosecutorial influence could be sharply restricted.

Some of the offense factors, however, involve facts that often could be established only with the cooperation of the prosecution (e.g., "scope of the criminal enterprise") and the same is true of at least two of the offender factors--"role in the offense" (at least when the role is central and thus aggravating) and "dependence on criminal activity for a livelihood."

30. See S. Rep. 95-605, supra note 12, at 1166 n.11.

To the extent that the commission attributed to these factors a major role in determining the offense and offender categories, prosecutorial influence over the ultimate sentence would be enhanced. Beyond this, the commission might decide that all offense and offender characteristics deemed aggravating must be alleged and proved by the prosecution. Such a rule would magnify prosecutorial power immensely, but this approach might nonetheless be considered, out of concern for procedural safeguards to control the otherwise substantial power of the probation service.

Aggravating and Mitigating Factors Not Used to Establish Offense-Offender Categories

S. 1437 appears to contemplate that nearly all conceivable offense and offender variables will be considered in establishing the offense and offender categories. Factors found relevant will be incorporated in the guidelines; factors determined not relevant will be given no weight in the guidelines and will provide no legitimate basis for departures from the guidelines. As stated in the Senate report, "[t]he Committee expects the Commission to issue guidelines sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category

of offense and each category of offender, give appropriate weight to each factor, and deal with various combinations of factors."³¹

Unfortunately, the complexity of the task and the possible inadequacy of the available information³² suggest that the Senate committee's expectations may prove unattainable in practice. It seems likely that many important factors will be found to arise quite frequently, but not often enough to establish a valid statistical or normative basis for determining their precise relevance in every offense and offender situation.

For factors not incorporated directly into the computation of the guideline categories, two important decisions are left to the commission's discretion. First, the commission must determine whether the factor should be given weight when it is present in particular cases. Even for a factor of some relevance, the commission could rule that presence of the factor in a particular case will not justify departure from the

31. S. Rep. 95-605, supra note 12, at 1167 (emphasis added).

32. See pp. 8-9 supra.

guideline.³³ Second, for factors that will be entitled to weight in particular cases, the commission must determine whether to regulate how they will be weighed. At least three possibilities are suggested:

1. Variation within guideline range. The commission could specify that certain aggravating or mitigating factors provide a proper basis for sentencing at the high or low end of the authorized guideline range. This system would resemble the present California statute, in which sentence must be at the midpoint of the range, with movement to the specified maximum or minimum authorized when aggravating or mitigating factors are found.³⁴

2. Specified departure from guideline range. The commission could indicate (by general policy statement or, arguably, in the guidelines themselves) that identified factors will justify adding (or subtracting) up

33. The rationale for such a decision would be that the relevance of the factor--in terms of the culpability, deterrability, or dangerousness of the offender--was outweighed by the danger that divergent responses to the factor in individual cases would generate unwarranted disparities.

34. Cal. Penal Code § 1170(b) (West).

to x months from the maximum (or minimum) established by the guideline.³⁵

3. Unspecified departure from guideline range.

If the commission did not explicitly adopt either of the preceding solutions, the statute would appear to authorize the trial judge to determine the extent of the appropriate departure from the guideline,³⁶ subject only to limited appellate review.

Where the commission decided not to use a particular factor to establish guideline categories, a further decision to exclude any consideration of the factor plainly would impose tight restrictions on judicial discretion, thus enhancing the importance of charge bargaining and magnifying prosecutorial power. In contrast, where the commission decided to permit consideration of a particular factor on a case-by-case basis, the three approaches outlined would allow a progres-

35. It could be argued that the x-month adjustment is itself a part of the "guideline" range and thus subject to the § 994(b)(1) limit on the total spread between maximums and minimums. The courts should, however, reject such a reading since its consequence would be to foreclose any limit at all on the extent of departures from the guideline, once a case presented a factor of the kind under consideration.

36. S. 1437, supra note 4, at § 101 (proposed 28 U.S.C. § 2003(a)(2)).

sively greater exercise of judicial discretion. In the third approach, judicial flexibility under the highly structured guideline system might in practice approximate that which exists in the totally unstructured framework of existing law.

Inter-District Variation

The Senate report on S. 1437 stresses at several points the importance of eradicating sentencing disparities among the various federal districts.³⁷ Several provisions, however, appear to authorize or even invite districts to differ in their treatment of identical offenses. Section 994(c) provides that in establishing categories of offense seriousness, the commission must consider "the current incidence of the offense in the community and in the nation as a whole." Does this clause contemplate establishing a separate set of seriousness rankings for each of the federal districts? Or must the commission attempt some other method of identifying "communities," perhaps grouping them according to region, population, urbanization, and so on? The Senate report is silent on this point, but

37. See, e.g., S. Rep. 95-605, supra note 12, at 1163, 1169.

it seems that within the foreseeable future the commission would do well enough to generate a single satisfactory set of guidelines for the nation as a whole. Inevitably, then, if "incidence of the offense in the community" is to be considered at all, it will be through decisions reached by individual judges on a case-by-case basis. The same must be said of the section 994(c) requirements that offense categories be based on consideration of the "community" view of the gravity of the offense, and on "the public concern generated by the offense."³⁸

To insure controls over judicial discretion, the commission could, after consideration, forbid departures from national guidelines for any but the most unusual local circumstances. Under the terms of S. 1437, the decision whether to adopt this approach or authorize greater local variations is left to the commission's discretion.

38. §§ 994(c)(4), (5). The commission could mitigate this problem by authorizing guideline departures only when the district in question has promulgated a local rule adjusting the guideline on the basis of "community incidence" or "community view of the gravity." Even this step, however, would not eliminate the loophole created by the "public concern" provision, which in context appears clearly to refer to factors unique to an individual case.

Relevance of Guilty Pleas

S. 1437 nowhere explicitly addresses the question whether a defendant's decision to plead guilty may be treated as a mitigating circumstance. The commission plainly could decide to treat entry of a guilty plea as irrelevant to the determination of sentence. A commission decision to authorize leniency for guilty pleas, in contrast, would be somewhat difficult to justify in terms of the sentencing criteria established by the bill--the "remorse" rationale appears unavailable,³⁹

39. Section 994(d) lists factors that must be considered in establishing categories of offenders, but neither the fact of a guilty plea nor the presence of "remorse" is mentioned. The only listed factor arguably related to the remorse rationale would be the defendant's "mental and emotional condition to the extent that such condition mitigates the defendant's culpability or . . . is otherwise plainly relevant." § 994(d)(4). The Supreme Court, in upholding the constitutionality of leniency for guilty pleas in Brady v. United States, accepted as permissible the assumption that the defendant pleading guilty "demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind which affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." 397 U.S. 742, 753 (1970).

It seems doubtful, however, that the commission could defend guilty plea discounts on this basis. The Brady rationale justifies longer sentences following trial by the need for a longer period for rehabilitation, but S. 1437 explicitly forbids imposition of a prison term for the purpose of rehabilitation, except under unusual circumstances. § 994(j). And even if

and none of the specific textual provisions would provide the necessary support.⁴⁰ However, because the offense and offender factors specified in the bill are not intended to be exclusive,⁴¹ the commission could treat a guilty plea as an additional relevant circumstance. The bill requires that any such additional circumstances be justified in terms of the general

the statute permitted prospects for rehabilitation to be considered, the theory that a guilty plea with any frequency indicates "remorse" or amenability to rehabilitation has its own problems. Whatever one may think of Brady and the Supreme Court's deference to the legislative judgment considered to be at issue in that case, it is an altogether different matter for an administrative agency with expertise in sentencing to endorse a rationale so widely rejected and even ridiculed by informed observers.

40. It does not seem tenable to argue that guilty plea discounts could be justified by the "available capacity" requirement of § 994(g), since in context this provision seems to refer only to correctional facilities rather than courts. See S. Rep. 95-605, supra note 12, at 1167-68. The provisions exempting bargained sentences from the right of appeal, §§ 3725 (a),(b), also cannot plausibly be invoked to justify plea discounts; the considerations prompting restrictions on appeal are of course entirely different from those determining what the trial court's judgment should be on the merits. The § 101(c) objective of fair and "expeditious" procedures appears relevant only to the procedural sections of the code and should not serve as a valid predicate for manipulating the appropriate sanction; goals for the latter are specified only in § 101(b).

41. See S. Rep. 95-605, supra note 12, at 1169.

purposes of punishment enumerated in section 101(b), but the section 101(b) goal of establishing sanctions adequate for deterrence could provide a plausible, though not uncontroversial, basis for discounting the sentence following fast and sure disposition by plea.⁴²

If the commission chooses to treat a guilty plea as a legitimate mitigating factor, it would have to decide upon the precise way in which the sentencing decision would be affected. As already indicated,⁴³ the commission could permit progressively greater degrees of judicial discretion by authorizing mitigation in the form of:

reduction of sentence to the lower end of the authorized range

reduction of sentence to a specified term below the authorized minimum, or

reduction of sentence by an unspecified amount, to be determined in the trial judge's discretion.

Multiple Counts and Charges

The commission will have considerable discretion in determining whether to authorize or even require

42. ABA Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty § 1.8(a)(i) (Mar. 1968) (approved draft).

43. See pp. 24-26 supra.

incremental penalties (including consecutive sentences) following conviction on multiple counts or charges. Section 994(p) requires that general policy statements promulgated by the commission include a policy limiting consecutive terms for both a general offense and "a specific prohibition encompassed within the general prohibition." The effect of this requirement is exceedingly limited since it applies only to lesser included offenses,⁴⁴ since it will appear only in the advisory policy statements, and since the nonbinding limitation "need not be a complete prohibition."⁴⁵

Section 994(k) has the potential for broader effect. It requires that both sentencing and parole guidelines "reflect the appropriateness of imposing an incremental penalty for each offense in a case . . . of multiple offenses committed at different times." The commission remains free, however, to make the incremental penalty either very modest or quite severe. The commission will also have to decide when offenses

44. This term is to be understood in a broad rather than a technical sense. See. S. Rep. 95-605, supra note 12, at 1169.

45. Id.

should be deemed committed at "different times." Suppose, for example, that a taxpayer conceals illicit income from a particular source during three consecutive tax years. Are these offenses committed "at different times," or are they part of the same transaction? How should section 994(k) apply in the case of a public official convicted of receiving, say, 100 separate bribes all paid (perhaps by unrelated sources) for a similar purpose? Will the answer in either case depend on whether a single conspiracy over the period is alleged or proved? The statutory language, as well as the policy of assuring some deterrence for subsequent offenses, would suggest that each count in such cases requires an additional penalty. The commission could, however, reasonably reject this approach on the ground that it may artificially split a single course of conduct or require inappropriately severe penalties in certain cases.

Over the range of issues to be faced under sections 994(k) and (p)--as well as in areas not directly governed by either provision--commission decisions may require substantial incremental penalties in most circumstances, or foreclose significant incremental penal-

ties in most circumstances. Between these extremes, the commission could choose a more even balance between situations requiring and those foreclosing additional penalties, or it could decide not to decide, leaving the choice within the discretion of the sentencing judge.

The impact of commission decisions in this area upon the allocation of sentencing discretion will be momentous. To the extent that the commission forbids incremental penalties in recurring multi-count situations, it could substantially restrict the significance of the prosecutor's charging decision and sharply limit the available areas for plea negotiation. On the other hand, if incremental penalties were required, the prosecutor's control over the ultimate sentence would be greatly enhanced. Finally, to the extent that the commission leaves the matter for decision at the time of sentencing, existing judicial discretion would be largely preserved or even extended--guidelines would limit the judge to a sentence within, say, a twelve-month range for each count, but the choice between consecutive and concurrent sentences could in effect enable the judge to choose between a sentence of per-

haps one year at the minimum and twenty years at the maximum.⁴⁶ Since the bill also would permit the sentencing judge to foreclose early release on parole, the judge's unrestricted power to determine the prison term served would actually be greater than it is in a comparable situation under current law.

46. Bribery, for example, is a Class C felony ordinarily subject to a maximum of ten years' imprisonment. But where consecutive sentences on separate counts are imposed, the total penalty is limited only by the maximum provided for the next highest offense class (see § 2304(c)), in this case the twenty-year maximum prescribed for Class B felonies.

II. FIVE GUIDELINE MODELS

The preceding section identified a multitude of important issues to be faced in formulating the guidelines. Of these, ten were singled out as particularly significant for determining the mix of prosecutorial and judicial discretion. Most of these issues offered not just two alternative solutions, but a continuum of possibilities. In some cases, there are at least three or four essentially different approaches. The number of distinct guideline combinations available, in terms of just these ten variables, is astronomical.

Over the range of diverse solutions discussed, however, certain tendencies recur. Many of the available solutions seem likely to leave very wide latitude to sentencing judges; others tend to confine judicial discretion narrowly while leaving critical decisions to the discretion of the prosecutor; a third group seems likely to impose significant constraints upon both prosecutors and judges.

This section postulates guideline models in which the open issues are resolved either by consistently preserving or by consistently restricting judicial dis-

cretion. In the latter category, some of the models also restrict prosecutorial discretion, while one model does not. In designing each model so that a particular allocation of discretion is systematically favored, I do not intend to suggest that the commission should or would resolve every open issue in terms of a single objective, to the exclusion of all other relevant considerations. The criteria determining the proper solution for the various issues, discussed fully in the preceding sections, differ from issue to issue and in some cases are wholly unrelated to one another. On the other hand, the allocation of discretion, since it is critical to the elimination of disparity, is itself a legitimate criterion of decision, one indeed to which the Senate bill requires the commission to pay "particular attention."⁴⁷ The commission's conclusions concerning the appropriate allocation of discretion could thus become the governing factor in its choices--not only when other guides to decision are inconclusive, but in virtually all contexts. Thus, the models should be regarded not as hypothetical "extremes" chosen solely for vivid illustration but as realistic

47. § 994(f).

options that a responsible commission might choose to adopt.

The principal features of each model are briefly described here, and the next section traces the likely patterns of plea bargaining and sentencing disparity under each model. Complete guideline tables for the models, covering most of the important federal offenses, are set forth in detail in the appendices.

Guidelines Preserving Judicial Discretion

Model A: Maximum Judicial Discretion

In Model A, guidelines dictate the in-out decision only for the relatively small group of cases clearly requiring either imprisonment or release. Many non-violent offenses are treated as "serious," so that even first offenders are subject to the judge's discretionary in-out decision. Relatively few factors determine the appropriate offense and offender categories, but an extensive list of additional aggravating and mitigating circumstances is available, and it includes both community factors and--in mitigation--the entry of a guilty plea. Where any such factor is found applicable, departure from the guidelines is authorized to an extent determined by the sentencing judge. Guideline

ranges for imprisonment provide maximums at least twelve months greater than the minimums, even for the shortest authorized terms. The decision whether to impose consecutive sentences on multiple counts is left to the judge's discretion. There is a presumption against eligibility for early release, but its application is entrusted to the sentencing judge.

Model B: Partial Judicial Discretion

Model B is identical to Model A, except for three important modifications. The in-out decision is withdrawn from judicial discretion in most instances, and both community factors and entry of a guilty plea are withdrawn from the list of circumstances justifying departure from the guidelines.

The rationale for these modifications can be briefly stated. Preservation of judicial discretion in each of the three areas, as contemplated by Model A, was defensible under the statute but perhaps only barely so. Definitive resolution of the in-out question was perhaps the single most important goal of the sentencing provisions of S. 1437.⁴⁸ An allowance for community factors, although contemplated in one

48. See S. Rep. 95-605, supra note 12, at 116².

portion of the bill, poses such an obvious threat to the goal of uniformity that commission approval for this particular form of discretion seems less likely than for some others. Mitigation for guilty pleas is controversial under any circumstances and, in the absence of controls over its extent, would almost certainly defeat hopes for significantly reducing disparity. (A guilty plea discount that is authorized but regulated in its extent is included in Model E.)

While Model A remains sufficiently plausible to require consideration, Model B deserves exploration as a somewhat more likely solution. Model B is also important as a vehicle for determining whether such a "compromise" approach to preserving judicial discretion would in fact moderate any of the extremes that might emerge under Model A, or whether the significant areas of discretion remaining under Model B would simply provide a different process through which virtually the same results could be generated.

Guidelines Restricting Judicial Discretion

Model C: Minimum Judicial Discretion; Maximum Prosecutorial Discretion

In Model C, guidelines definitively resolve the in-out decision, and in many instances a small shift in

offense or offender seriousness shifts the recommended sentence from probation to imprisonment. Many non-violent offenses are considered serious, and thus may trigger sentences to imprisonment. Substantially increased penalties are required upon proof of criminal livelihood or racketeering. Both offense and offender seriousness categories are determined by an extensive list of criteria, many of them requiring allegation and proof by the government. Recurring types of additional aggravating or mitigating circumstances, including community factors and entry of a guilty plea, are explicitly excluded as a basis for departure from the guidelines. Guideline ranges for imprisonment are very narrow, in most cases authorizing only a single term of months. Incremental penalties are required on multiple counts under most circumstances. Early release is generally foreclosed by parole release guidelines, even for offenders granted eligibility for early release by the sentencing court.

Model D: Minimum Judicial and Prosecutorial Discretion

In Model D, most in-out decisions are again resolved definitively in the guidelines, but unlike the Model C solutions, here broad groups of offense cate-

gories are treated similarly, with either imprisonment or probation required in all cases. Thus, the in-out choice is no longer determined by the fine grading of decisions that are dependent, for example, upon the precise value of the property stolen. Most nonviolent offenses are treated as nonserious, so that probation is mandated for first offenders. Both offense and offender categories are determined only by factors readily ascertainable by the probation service, and increased penalties are limited to small incremental ones in cases of criminal livelihood or racketeering. Recurring types of aggravating and mitigating circumstances, including community factors and entry of a guilty plea, are explicitly excluded as a basis for departure from the guidelines. Guideline ranges for imprisonment are very narrow, often authorizing only a single number. Incremental penalties after conviction on multiple counts are generally barred, and early release is generally foreclosed by the parole release guidelines.

Model E: Minimum Judicial and Prosecutorial Discretion; Guilty Plea Discounts Authorized

Model E is identical to Model D, with one exception. In Model E a guilty plea is treated as a miti-

gating circumstance with a controlled effect. A variety of techniques could be used for stating the precise extent of the guilty plea discount. The approach selected here is to treat a guilty plea as a factor contributing a defined number of points to the offender's "salient factor score." (The salient factor score is the total that is obtained by adding all points awarded for favorable offender characteristics; it is used to determine the guideline offender category.)

III. IMPLICATIONS OF THE GUIDELINE MODELS

This section explores the impact of S. 1437 on the behavior of prosecutors, defense counsel, and judges. We are interested in determining for each of the five proposed models how much discretion will exist, where that discretion will lie, and how well it is likely to be exercised.

It is apparent that even speculative answers to these questions are dependent upon the particular criminal episode under consideration; generalization--even in the context of a relatively specific model--seems hazardous at best. The range of possibilities may, however, be illustrated by a selection of typical federal offenses. For this purpose, I consider here five hypothetical crimes--three white-collar cases involving first offenders, and two robbery cases with offenders of different backgrounds.

Bribery A involves a single count charging a private citizen with paying \$15,000 to a government contract officer. Under S. 1437, the charge constitutes a Class C felony but it can be reduced to graft, a Class E felony. Under current law the offense carries a

fifteen-year maximum, but it can be reduced to one carrying a two-year maximum.⁴⁹ The defendant has no prior record or other unfavorable offender characteristics.

Bribery B involves a legislative aide charged in ten counts with receiving ten separate payments of \$2,000 each, from unrelated individuals. As in bribery A, each count constitutes a Class C felony under S. 1437 and carries a fifteen-year maximum under current law. Here the maximum likely charge reduction includes not only downgrading the charges to graft, but also dismissal of up to nine of the counts. The defendant has no prior record or other unfavorable offender characteristics.

The income tax case involves three counts charging that the taxpayer evaded \$20,000 of taxes in each of three consecutive tax years. Each count constitutes a Class D felony. The prosecutor can adjust the charges by dismissing two counts, but no downgrading of the charged offenses appears available.⁵⁰ Under current

49. 18 U.S.C. §§ 201(b),(f).

50. See S. Rep. 95-605, supra note 12, at 425, noting the intention that the tax evasion felony provision of

law, each count would be punishable by up to five years in prison,⁵¹ and in addition to dismissing two of the counts, the charges could be reduced to filing a fraudulent return, an offense punishable by up to one year's imprisonment.⁵² Again, the defendant has no prior record or other unfavorable offender characteristics.

The two robbery cases are straightforward--X and Y allegedly entered a bank, carrying firearms, and made off with \$15,000 in cash. Each is charged with robbery, a Class C felony; theft under \$100,000, a Class D felony; possession of a firearm, a Class C felony; use of a weapon, a Class D felony carrying a mandatory minimum; and conspiracy, here a Class C felony. Under current law, the armed robbery charge alone would carry a potential twenty-five-year sentence.⁵³ The prosecu-

S. 1437 (§ 1401) replace a number of the criminal provisions of title 26, including the two principal lesser included offenses, 26 U.S.C. §§ 7206(1), 7207.

51. 26 U.S.C. § 7201.

52. 26 U.S.C. § 7207.

53. 18 U.S.C. § 2113(d). In addition Y would be subject to additional penalties as a "dangerous special offender," under 18 U.S.C. § 3575.

tor could conceivably dismiss all but the theft charge, thus downgrading the case to one Class D felony count under S. 1437 or a ten-year maximum under current law. X has no prior record; Y has two convictions with one incarceration when he was twenty-two years old, and a history of drug dependence.

In analyzing these cases, our first objective is to examine the sentences available for the initial charges under current law and under each of the five models. This analysis will indicate the range of choices available to the trial judge upon conviction on all counts, and the range of bargaining outcomes available to opposing counsel in courts willing to accept definitive agreements or recommended dispositions. Our second objective is to determine for each case the sentences available when prosecutors use their charge-reduction power to influence the range of dispositions available to the judge.

Table 1 displays the results of this analysis. For current law and for each of the five models, two vertical columns are provided; the left-hand column indicates the sentencing range available after conviction on all counts, the right-hand column indicates the sen-

AVAILABLE SENTENCE RANGES (in months)												
	CURRENT LAW		MODEL A		MODEL B		MODEL C		MODEL D		MODEL E	
	All Counts	Charge Reduction	All Counts	Charge Reduction	All Counts	Charge Reduction	All Counts	Charge Reduction ^a	All Counts	Charge Reduction	All Counts	Charge Reduction ^b
<u>Bribery A</u>												
Max. possible	0-180	0-24	0-120	0-24	0-120	0-24	16	0	0	0	11	0
Likely			0-22	0-15	0	0	16	0	0	0	11	0
Guideline			0-17	0	0	0	16	0	0	0	11	0
<u>Bribery B</u>												
Max. possible	0-1800	0-24	0-240	0-24	0-240	0-24	16	0	12 ^c	0	15	0
Likely			0-22	0-15	0-22	0	16	0	12 ^c	0	15	0
Guideline			0-17	0	0	0	16	0	J	0	15	0
<u>Income Tax</u>												
Max. possible	0-180	0-12	0-51	0-17	0-51	0	19	0	12	0	16 ^d	0
Likely			0-22	0-17	0-22	0	19	0	12	0	16 ^d	0
Guideline			0-22	0-17	0-22	0	16 ^d	0	12	0	15	0
<u>Robbery X</u>												
Max. possible	0-300	0-120	24-240	0-60	42-240	0-60	64	11	48	0	56	0
Likely			24-82	0-22	42-82	0-22	64	11	48	0	56	0
Guideline			24-54	0-17	42-54	0-17	64	11	48	0	56	0
<u>Robbery Y</u>												
Max. possible	0-600	0-120	24-240	12-60	54-240	12-60	100-110	34	76	28	88-92	23
Likely			24-169	12-60	54-169	12-60	100-110	34	76	28	88-92	23
Guideline			24-66	12-34	54-66	12-34	100-110	34	76	28	88-92	23

^a Includes defendant's cooperation as a mitigating factor.

^b Includes plea of guilty in the salient factor computation.

^c Since the guidelines require cumulative penalties without addressing the situation in which the most serious offense calls only for probation, the judge can choose to implement the requirement by raising the offense seriousness to the next highest category.

^d Treating the case as a \$60,000 tax evasion transaction rather than three \$20,000 counts with cumulative penalties.

tencing range available after the maximum likely charge reduction.

The determination of the available sentencing range requires making many assumptions, even within the context of a relatively specific model. For this reason, the table includes not one but three possibly relevant sentencing ranges--a "guideline" range, a "likely" range, and a "maximum possible" range. The "guideline" figure is that resulting from the assumption that the judge will stay within the applicable guideline range, applying only increments and adjustments required by the accompanying instructions. The "likely" figure is produced by the assumption that the judge will adhere to the spirit of the guideline system but utilize discretionary power, where granted by guideline instructions, to make reasonable departures from the indicated guideline range. The "maximum possible" figure results from the assumption that the judge may utilize discretionary power, where granted by the guidelines, to make the greatest authorized departure from the guideline range. Even the maximum possible figure, however, assumes only the exercise of discretion when specifically authorized by guideline instruc-

tions; it does not indicate the additional possibilities available if the judge invokes factors allegedly not considered in the guidelines, in order to go beyond the adjustments authorized by the guidelines themselves.

The following sections summarize the conclusions to be drawn from each of the five models.

Guidelines Preserving Judicial Discretion

Model A

The Model A guidelines are designed to preserve judicial discretion to the greatest extent allowed by S. 1437. Table 1 provides a basis for determining whether a Model A sentencing system would, in fact, differ at all from the sentencing system of present law.

Even on the assumption that judges may make the "maximum possible" departures from the guidelines, the sentencing range available would be uniformly narrower than it is under existing law. On paper, the impact of S. 1437 on reducing judicial discretion thus appears far from negligible even under Model A. This appearance is misleading, however, in several respects. First, it seems doubtful that the extremely long sen-

tences foreclosed by the model are in fact imposed with any frequency in the current system. The model therefore probably does not significantly narrow the range of sentences likely to be imposed in practice. In addition, because S. 1437 permits the judge to foreclose early release on parole, Model A would actually enhance judicial discretion in several instances. For bribery A and robberies X and Y, the judge can require that the defendant actually serve a longer sentence than he could effectively impose under current law (assuming that in the current system the Parole Commission would grant release after service of one-third of the maximum term). In the other instances, judicial discretion under existing law is somewhat broader than under Model A, even after the current possibilities for early release are considered. On balance, Model A does not appear to reduce, in any concrete way, the range of possible sentencing outcomes or the potential for disparity in sentencing.

In two ways, however, Model A may offer some prospect for significant change in current practice. First, by reducing the availability of extremely long sentences, Model A removes a threat that, although es-

entially "theoretical," may currently play an important role in inducing many guilty pleas. A test of practice under Model A might provide a measure of the extent to which the model would significantly change both defense perceptions of the relevant risks and actual defense behavior.

Second, the "maximum possible" discretion allowed by Model A could prove less important in practice than the "likely" figure. To the extent that judges chose to or felt constrained to conform to the spirit of the guidelines system, and thus operate within the "likely" limits, the range of available sentencing possibilities would be significantly reduced. Within the available range, moreover, the choice of sentence would be made essentially by the court--the judge could accept a definitive plea agreement if he or she chose, but otherwise, even after charge reduction, the range of available sentencing options would remain wide. In fact, the "likely" range is nearly as wide after charge reduction as before, except for the two robbery cases, where the importance of charge reduction results largely from factors extraneous to Model A.⁵⁴

54. The weapons count in the two robbery cases carries a mandatory minimum and must run consecutively with any

From the defendant's perspective, a reasonably solid expectation of "likely" judicial behavior would substantially reduce potential exposure in the event of conviction on all counts and would thus appear to reduce pressures to plead guilty. Of course, prosecutors could still offer agreements for definitive or recommended sentences, but the alternative of rejecting any prosecution proposal would be far less dangerous than under current law. The result might be a decrease in the proportion of guilty pleas, some increase in the concessions offered by the prosecution to maintain the flow of pleas, or some combination of the two.

Although Model A fails to provide guidance for the in-out decision, and in other respects preserves a good deal of judicial discretion, this model could substantially narrow the potential boundaries of that discretion. Nevertheless, Model A's success in eliminating unwarranted disparities would be incomplete at best, and in the event of judicial attitudes less receptive to the spirit of the guidelines system, Model A might in fact yield no improvements at all.

other sentences imposed. See § 1823(b). The elimination of judicial discretion and concomitant expansion of prosecutorial power here flow directly from S. 1437, regardless of the form of the implementing guidelines. See also § 1811 (comparable provision for serious drug offenses).

Model B

Model B closely follows Model A, and much of what has been said about the latter is equally applicable here. To the extent that judges would be willing to sentence in the "maximum possible" range, Model B would bring little significant reduction in the discretion available under current law. If, however, judges felt constrained to stay within "likely" limits, a significant reduction in judicial discretion would be achieved.

Model B seeks to improve upon the prospects for uniformity in Model A by three devices. Community factors and guilty pleas are removed from the list of approved aggravating and mitigating circumstances, and the in-out decision is resolved over a very wide range of cases.

The difference with respect to community factors is not well tested by the five sample cases, or perhaps by any "typical" offenses. The restriction on use of community factors might make "maximum possible" sentences less likely under Model B than under Model A, but this point seems wholly speculative. The difference between Model A and Model B in this respect would have to be ascertained by experience.

The difference with respect to guilty pleas seems inconsequential since Model B authorizes so many other legitimate grounds for sentence concessions, even in the absence of charge reduction by the prosecutor.⁵⁵ As a result, plea bargaining could take the form of definitive agreements, nonbinding recommendations, tacit judicial concessions, or charge-reduction agreements. This represents, of course, no change from the options available under current law, but at least the absence of a guilty plea concession does not (as in some reform proposals) have the paradoxical effect of forcing all bargaining to occur through charge-reduction concessions controlled by the prosecutor. In fact, the prosecutor's leverage in practice could actually be reduced by the diminished danger of a very high sentence after conviction at trial.⁵⁶

55. A more significant difference between the models could, however, be observed for offense-offender combinations in which Model B requires some imprisonment even after maximum charge reduction (e.g., a case where the offender's salient factor score is "poor"). Here the withdrawal of "guilty plea" from the list of mitigating factors could prevent the prosecutor or judge from reducing the sentence to probation in exchange for a plea.

56. See p. 52 supra.

The greater specificity with respect to the in-out decision generates more significant differences. In bribery A, the model forecloses imprisonment even after conviction on the original charge (at least under the "likely" assumption). Such a result raises an obvious question concerning the possible inappropriate leniency of the sanction and suggests that the tendency for judges to move to "maximum possible" behavior could increase, particularly after conviction in contested cases. The guideline mandate for an "out" decision might therefore simply increase the incidence of guideline departures, force tacit penalties for refusal to plead guilty, or perhaps both. If these possibilities failed to arise (or could be prevented) the incidence of not-guilty pleas in such cases might be expected to increase.

The income tax and bribery B cases illustrate another facet of the problem. In these cases imprisonment is possible on the original charges but a charge-reduction agreement can essentially guarantee probation. Where prosecutors were willing to make offers of this kind, therefore, pressures to plead guilty would be relatively intense, and judicial control over sen-

tences in guilty plea cases would be vastly reduced from that available in comparable situations both under Model A and under current law. The result is particularly striking in the income tax case, since S. 1437 eliminates two of the lesser included offenses available under current law,⁵⁷ and thus, on its face, appears to restrict the charge-reduction leverage of the prosecution. But even the current misdemeanor charge of filing a fraudulent return leaves the judge free to impose up to a year's imprisonment; under Model B the prosecutor can, without reducing the statutory charge, decrease the seriousness of the offense category and insure probation.

Ironically, the result of greater specificity regarding the in-out decision could be an increase rather than a decrease in unwarranted disparities in the granting of probation. Experience under Model B would be necessary to verify this expectation, but to some extent the difficulty seems inherent. Guidelines requiring imprisonment even after charge reduction seem unlikely for most nonviolent federal offenses, particularly given the statutory mandate of probation for

57. See note 50 supra.

first offenders convicted of "nonserious" offenses. Conversely, guidelines requiring probation even before charge reduction can rarely be expected, at least for cases in which the initial charges are serious. Inevitably, then, the guideline sentences must in most situations move from imprisonment to probation as charges are reduced; the decision whether to grant probation in such situations will lie exclusively with the United States attorney, at least in the absence of controls over the prosecutor's charge-reduction decision.

Guidelines Restricting Judicial Discretion

Model C

Model C posits commission decisions that eliminate, wherever possible, the kinds of discretionary judicial decisions that pose a threat to uniformity in sentencing. As table 1 indicates, judicial discretion is in fact dramatically reduced by comparison both with current law and with Models A and B. As a result, disparity would be sharply reduced or even eliminated with respect to sentences imposed after conviction on all counts, whether or not such convictions resulted from guilty pleas. On the other hand, precisely because the sentence follows almost automatically, given the of-

fense of conviction, concessions for a guilty plea can be achieved only by reduction of the charges. Under current law (and Models A and B) sentencing power in guilty plea cases is shared by prosecutor and judge, with the judge having some influence over the mix. But Model C would make the prosecutor the sole arbiter of sentence in guilty plea cases, at least in the absence of techniques for judicial control over charge-reduction decisions. This feature of Model C suggests that the effort to tightly constrain judicial discretion could in fact reduce the visibility of the relevant sentencing decision, decrease accountability and controls, and greatly increase sentencing disparities.

An important qualification, however, is necessary. The restriction of judicial discretion and elimination of the risk of the unusual severe sentence could greatly reduce the fear of standing trial, at least for some defendants. Conversely, the prosecutor's increased ability to insure a readily measurable sentencing concession could enhance the incentives to plead guilty for other defendants. It cannot, therefore, be assumed that guilty pleas would continue to be tendered at the same rate as under present law. If the

plea rate increased, prosecutorial influence over sentencing would of course be extended even further. But if the plea rate decreased, any harm to the quality and uniformity of sentencing in guilty plea cases (already heavily subject to prosecutorial control) could conceivably be offset by the value of more rigorous guilt determinations and more uniform sentencing decisions in the increased number of contested cases. Under these conditions Model C could generate improvements not attainable under current law or under Models A and B. Nevertheless, in the absence of evidence concerning the ultimate impact of restricted judicial discretion on the guilty plea rate, the dangers associated with Model C greatly outweigh the potential benefits.

Model D

Model D seeks to combine tight restrictions on judicial discretion with a guideline structure that minimizes prosecutorial power--fewer grading categories are authorized, and the distinctions among them are less dependent upon factors within prosecutorial control. Analysis of the five sample cases suggests that this effort can only be partially successful in preventing prosecutorial dominance of the sentencing decision.

In bribery A, imprisonment is not available even after conviction on the initial charge. The leverage that was available to the prosecutor in Model C is thus eliminated for this offense, while the risk of disparities in judicial treatment posed by Model B are also largely eliminated. Thus, Model D could well promise success in achieving uniformity here, though of course at the substantial cost of essentially foreclosing any prospect of imprisonment for first offenders committing this offense.

In all the other offenses, charge-reduction decisions still have a major impact on the applicable sentence. As in Model C, sentencing in these cases will become almost entirely a prosecutorial function, at least in uncontested cases. Model D does, however, differ from Model C in offering fewer significant charge-reduction options.⁵⁸ The absence of a smoothly integrated set of potential bargaining outcomes in

58. In the income tax case, for example, the only options appear to be a 12-month sentence on all counts, or probation if even one count is dropped. Robbery X offers four possibilities but there are substantial gaps between them: 48 months on all counts, 24 months if either the robbery or weapons count is dropped, 12 months on firearms possession and theft, or probation on firearms possession or theft alone.

Model D might change the guilty plea rate in some rather clear way, or it might simply create an unstable situation in which the extent of concessions offered (and the willingness of defendants to plead guilty) fluctuated sharply from offense to offense and from time to time.

For this reason it seems far from clear that Model D, with its effort to limit the impact of charge-reduction decisions, is in fact preferable to Model C, in which these decisions have enormous influence. The effort to dampen the effect of charge-reduction decisions seems to complicate bargaining without really controlling the prosecution or diminishing its power. If techniques cannot be developed to control charge-reduction decisions directly, it might prove preferable simply to accept substantial discretion lodged either with the court (Models A and B) or with the prosecutor (Model C).

Model E

Model E is identical to Model D, except that a concrete sentencing concession is granted to defendants who plead guilty. Because of the particular construction of Model E, the potential exposure for defendants

who do not plead guilty is actually higher than for the comparable Model D cases, and in one case the guidelines require eleven months' imprisonment for a case that would draw probation in Model D. These are not inescapable results, but if the sentence for guilty plea cases is set at an "adequate" level and if the discount itself is not inconsequential, the prescribed sentence for the relatively few contested cases must in one way or another become a severe one.

Model E reduces to some extent the importance of charge-reduction bargaining by enabling the defendant to obtain a predetermined concession after pleading guilty on all counts. The sentence reductions (not shown in table 1) would be from 11 months to probation in bribery A, from 15 to 12 months in bribery B, from 16 to 12 months for the income tax case, from 56 to 48 months in robbery X, and from between 89 and 92 months to 68 months in robbery Y. Where these concessions did not suffice to induce a guilty plea, however, the prosecutor would remain free to offer additional incentives by reducing the charges; the potential range of inducements to plead guilty remains essentially the same as in Model D. Under these conditions it is dif-

difficult to see what the plea discount can accomplish, apart from offering an additional set of potential sentencing outcomes and thus smoothing out some of the discontinuities in the range of agreements available under Model D. Although the formal plea discount is in a sense taken out of the hands of the prosecutor, this device appears unable to contribute to the restriction of prosecutorial discretion, in the absence of techniques for limiting the scope of the charge-reduction power.

If Model E were combined with charge-reduction guidelines such as those proposed in the body of this report,⁵⁹ the sentence reductions associated with a guilty plea would then be subjected to effective control in the vast majority of cases. The premises of that proposal require that the extent of the sentence reduction be relatively modest.⁶⁰ This condition is satisfied for each of the sample offenses studied here, except for bribery A, which presents the troublesome issue of reductions from imprisonment to probation.⁶¹

59. See Volume 1 at 115-19.

60. Id. at 120-21.

61. See generally id. at 90-93.

Further refinement of the plea concession mechanism will undoubtedly be necessary, however. Under Model E, as tentatively constituted, the guilty plea concession could prove unacceptably large in some sentencing situations not explicitly examined in the present study. To preclude such results, the application of Model E in a large number of concrete cases will have to be considered, and more refined techniques for computing the appropriate sentence reductions will have to be explored.

Conclusion

The preliminary analysis of the implications of the five models does not lend itself to convenient or concise summary. In most instances the estimated impact of each model on disparity depends on a variety of qualifications and assumptions. Further refinement of models of this kind, followed by an empirical test, seems an essential prerequisite to any solid conclusions.

Within these limitations, however, it seems useful to underscore two difficulties observed repeatedly in the models--the tendency of nearly all restrictions on judicial discretion to enhance the likely extent of

disparities in sentencing, and the relative inability of the commission to ameliorate this situation, even by specifically structuring the guidelines to reduce wherever possible the impact of prosecutorial decisions on the sentencing computation. Under these conditions, only the very loose guidelines of Model A appear capable of improving the fairness and uniformity of federal sentencing, and the likely improvement would be modest indeed. Further restrictions upon judicial discretion apparently should be contemplated only if they are accompanied by limitations on the charge-reduction power of the prosecutor.

IV. SUGGESTIONS FOR FURTHER RESEARCH

Model Development

Refinement of Model A

An attempt should be made to introduce some further restrictions on discretion, with the goal of eliminating the likelihood of "maximum possible" behavior.⁶² Model A, thus refined, might offer a means to eliminate at least some troublesome disparities, without raising the practical and political difficulties associated with the more ambitious models.

Attention to Prosecutorial Discretion in Guideline Research

The Study for Formulation of Sentencing Guidelines for Federal Offenses: Research Design,⁶³ prepared for the Justice Department, indicates full awareness of the implications of prosecutorial discretion and plea bargaining for sentencing reform.⁶⁴ Nevertheless, the research methodology contemplated could divert atten-

62. See pp. 48-49, 51 supra.

63. Institute for Law and Social Research, 1978.

64. See id. at II-27, IV-22.

tion from the issues that the present study has identified as critical.⁶⁵ A continuous focus on the details of issues affecting the allocation of discretion seems essential to the formulation of successful guidelines.

Experimental Tests

Both Model A and Model E (with and without the model charge-reduction guidelines)⁶⁶ should be introduced on a trial basis in selected federal districts, to gauge their impact on severity and disparity of sentences, the guilty plea rate, and the proportion of bench trials to jury trials.⁶⁷

Guilty Plea Concessions

In light of Corbitt v. New Jersey,⁶⁸ the constitutionality of explicit guilty plea discounts requires

65. There is a heavy focus on analysis of public and professional perceptions, and it is not clear whether perceptions relating to the expected consequences for plea bargaining will be directed toward the relevant guideline options.

66. See Volume 1 at 115-19.

67. On the feasibility and propriety of conducting such an "experiment," see M. Frankel, *Criminal Sentences: Law Without Order* 121 (1973).

68. 99 S. Ct. 492 (1978).

further study.⁶⁹ In addition, the possibility of refining the concessions offered under various factual and legal circumstances⁷⁰ and refining the mechanism for computing concessions⁷¹ should be explored.

Jury-Waiver Concessions

The constitutionality of concessions for electing a bench trial and possible ways of structuring them should be examined;⁷² an empirical study to determine the relative efficiency of bench and jury trials would be valuable.⁷³

69. See generally Volume 1 at 93-106.

70. See id. at 123-24.

71. See pp. 63-64 supra.

72. See Volume 1 at 128.

73. See id at 130-32.

APPENDIXES

The preceding discussion makes clear that the guideline models specified here are proposed solely to permit their implications to be traced in a concrete way. None of the models can yet be advocated as a vehicle for improving the allocation of sentencing discretion. None is "model" in the sense of being ideal.

This caveat must be put even more strongly with respect to the many substantive sentencing judgments reflected in the models--judgments, for example, with respect to specific terms to be served or specific factors relevant in aggravation. To be useful for present purposes, the models must be concrete and detailed, but it was not a goal of this small study to evaluate each detailed judgment on its merits.⁷⁴ Rather, it was essential only that the details of each model be reasonably realistic, and for this reason I have drawn heavily on the parameters already in use by

74. The Department of Justice has recently funded a major research undertaking to address these issues. See Institute for Law and Social Research, Study for Formulation of Sentencing Guidelines for Federal Offenses: Research Design (1978).

the United States Parole Commission in its guideline tables. For convenience, the Parole Commission guidelines are reproduced in appendix F. Similarly, I have used the list of aggravating and mitigating factors promulgated by the California judicial council as the base on which some of the guideline lists were built. The California list is set out for comparison in appendix G. This report does not in any sense advocate the substance of any of these provisions; it claims only that such judgments or ones like them might well be made by the Sentencing Commission.

APPENDIX A: MODEL A

In-Out GuidelinesOffense Characteristics: Severity of Offense Behavior
(examples)Offender Characteristics
(Salient Factor Score)

	Very Good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Escape (open institution or program (e.g., CTC, work release)--absent less than 7 d). Property offenses (theft or simple possession of stolen property) less than \$1,000.	OUT	No Rec	No Rec	No Rec
LOW MODERATE				
Alcohol law violations. Counterfeit currency (passing/possession less than \$1,000). Immigration law violations. Income tax evasion (less than \$10,000). Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell (less than \$1,000).	No Rec	No Rec	No Rec	No Rec
MODERATE				
Bribery of a public official (offering or accepting). Counterfeit currency (passing/possession \$1,000 to \$19,999). Escape (secure program or institution, or absent 7 d or more--no fear or threat used). Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun). Income tax evasion (\$10,000 to \$50,000). Mailing threatening communication(s). Misprision of felony. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$1,000 to \$19,999. Smuggling/transporting of alien(s). Theft of motor vehicle (not multiple theft or for resale).	No Rec	No Rec	No Rec	No Rec
HIGH				
Counterfeit currency (passing/possession \$20,000 to \$100,000). Counterfeiting (manufacturing). Income tax evasion (\$50,000 to \$100,000). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$20,000 to \$100,000.	No Rec	No Rec	IN	IN
VERY HIGH				
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry to vault). Income tax evasion (over \$100,000). Use of weapon in crime. Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.	No Rec	No Rec	IN	IN
GREATEST				
Aggravated felony (e.g., robbery)--weapon fired or personal injury. Explosives (detonation).	No Rec	IN	IN	IN

Time-To-Be-Served Guidelines

Offense Characteristics: Severity of Offense Behavior (examples)	Offender Characteristics (Salient Factor Score)			
	Very Good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Escape (open institution or program (e.g., CTC, work release)---absent less than 7 d). Property offenses (theft or simple possession of stolen property) less than \$1,000.	OUT	3-15 months	5-17 months	8-20 months
LOW MODERATE				
Alcohol law violations. Counterfeit currency (passing/possession less than \$1,000). Immigration law violations. Income tax evasion (less than \$10,000). Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$1,000.	3-15 months	5-17 months	10-22 months	16-28 months
MODERATE				
Bribery of a public official (offering or accepting). Counterfeit currency (passing/possession \$1,000 to \$19,999). Escape (secure program or institution, or absent 7 d or more--no fear or threat used). Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun). Income tax evasion (\$10,000 to \$50,000). Mailing threatening communication(s). Misdemeanor of felony. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$1,000 to \$19,999. Smuggling/transporting of alien(s). Theft of motor vehicle (not multiple theft or for resale).	5-17 months	10-22 months	16-28 months	20-32 months
HIGH				
Counterfeit currency (passing/possession \$20,000 to \$100,000). Counterfeiting (manufacturing). Income tax evasion (\$50,000 to \$100,000). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$20,000 to \$100,000.	10-22 months	16-28 months	22-34 months	32-44 months
VERY HIGH				
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry to vault). Income tax evasion (over \$100,000). Use of weapon in crime. Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.	18-30 months	30-42 months	48-60 months	60-72 months
GREATEST				
Aggravated felony (e.g., robbery)--weapon fired or personal injury. Explosives (detonation).	40-52 months	55-67 months	68-85 months	84-105 months

Computation of Salient Factor Score

Item A _____
 No prior convictions (adult or juvenile) = 3
 1 prior conviction = 2
 2 or 3 prior convictions = 1
 3 or more prior convictions = 1

Item B _____
 No prior incarcerations (adult or juvenile) = 2
 1 or 2 prior incarcerations = 1
 3 or more prior incarcerations = 0

Item C _____
 Age at first commitment (adult or juvenile)
 (26 or older) = 2
 (18 to 25) = 1
 (17 or younger) = 0

Item D _____
 Commitment offense did not involve auto
 theft or check(s) = 1
 Otherwise = 0

Item E _____
 Never had parole revoked or been committed
 for a new offense while on parole, and
 not a probation violator this time = 1
 Otherwise = 0

Item F _____
 No history of heroin or opiate dependence = 1
 Other = 0

Item G _____
 Verified employment (or full-time school
 attendance) for a total of at least 6
 months during the last 2 years in the
 community = 1
 Otherwise = 0

Total score _____

Aggravating and Mitigating Factors

Circumstances in Aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The crime involved multiple victims.

(5) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes

for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The planning, sophistication or professionalism with which the crime was carried out, or other facts, indicate premeditation.

(9) The defendant used or involved minors in the commission of the crime.

(10) The crime generated unusual concern in the community, or the incidence of offenses of similar character in the community has been exceptionally high.

(11) The crime involved a large quantity of contraband.

(12) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) He has engaged in a pattern of violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or adjudications of commission of crimes as a juvenile are numerous or of increasing seriousness.

(3) The defendant has served prior prison terms.

(4) The defendant was on probation or parole when he committed the crime.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

Circumstances in Mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator, willing participant, aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or his conduct was partially excusable for some other reason not amounting to a defense.

(5) A defendant with no apparent predisposition to do so was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no

harm was done or threatened against the victim.

(7) The defendant believed he had a claim or right to the property taken, or for other reasons mistakenly believed his conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his family or himself.

(9) The community viewed the offense as a minor one under the circumstances; or the incidence of offenses of similar character in the community has been exceptionally low.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant was suffering from a mental or physical condition that significantly reduced his culpability for the crime.

(2) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(3) The defendant made restitution to the victim.

(4) The defendant's prior performance on probation or parole was good.

(5) The defendant pleaded guilty.

Notes

1. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
2. Conspiracy shall be rated for guideline purposes according to the underlying offense behavior, if such behavior was consummated. If the offense is un consummated, the conspiracy will be rated one step below the consummated offense.
3. In cases described in § 994(h) a sentence of imprisonment shall be imposed, and the term otherwise prescribed by these guidelines shall be increased by not less than 12 nor more than 60 months, provided, however, that in no event shall the sentence imposed exceed that authorized by law.
4. Where the court finds present any of the aggravating and/or mitigating factors specified herein, the sentence specified by the guidelines may be increased or decreased to the extent appropriate under the circumstances.
5. In the case of a defendant convicted of multiple offenses committed at different times, an incremental penalty shall ordinarily be imposed; the

court may increase the severity level for the offense behavior while imposing concurrent sentences, or the court may impose consecutive sentences on some or all of the offenses.

6. A sentence of imprisonment shall not be imposed for the purpose of providing the defendant with needed educational or vocational training, medical care, or other correctional treatment, other than in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact.
7. In the case of a defendant convicted of multiple offenses committed at the same time, the court may in its discretion:
 - (a) impose concurrent sentences on all offenses;
 - (b) increase the severity level for the most severe offense committed, while imposing concurrent sentences on all offenses; or
 - (c) impose consecutive sentences on some or all of the offenses.

APPENDIX B: MODEL B

In-Out Guidelines

Offense Characteristics: Severity of Offense Behavior (examples)	Offender Characteristics (Salient Factor Score)			
	Very Good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Escape (open institution or program (e.g., CTC, work release)--absent less than 7 d). Property offenses (theft or simple possession of stolen property) less than \$1,000.	OUT	OUT	No Rec	IN
LOW MODERATE				
Alcohol law violations. Counterfeit currency (passing/possession less than \$1,000). Immigration law violations. Income tax evasion (less than \$10,000). Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/ receiving stolen property with intent to resell) less than \$1,000.	OUT	No Rec	IN	IN
MODERATE				
Bribery of a public official (offering or accepting). Counterfeit currency (passing/possession \$1,000 to \$19,999). Escape (secure program or institution, or absent 7 d or more--no fear or threat used). Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun). Income tax evasion (\$10,000 to \$50,000). Mailing threatening communication(s). Misprision of felony. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$1,000 to \$19,999. Smuggling/transporting of alien(s). Theft of motor vehicle (not multiple theft or for resale).	OUT	No Rec	IN	IN
HIGH				
Counterfeit currency (passing/possession \$20,000 to \$100,000). Counterfeiting (manufacturing). Income tax evasion (\$50,000 to \$100,000). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$20,000 to \$100,000.	No Rec	IN	IN	IN
VERY HIGH				
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry to vault). Income tax evasion (over \$100,000). Use of weapon in crime. Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.	IN	IN	IN	IN
GREATEST				
Aggravated felony (e.g., robbery)--weapon fired or personal injury. Explosives (detonation).	IN	IN	IN	IN

Time-To-Be-Served Guidelines

Offense Characteristics: Severity of Offense Behavior (examples)	Offender Characteristics (Salient Factor Score)			
	Very Good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Escape (open institution or program (e.g., CTC, work release)--absent less than 7 d). Property offenses (theft or simple possession of stolen property) less than \$1,000.	OUT	OUT	5-17 months	8-20 months
LOW MODERATE				
Alcohol law violations. Counterfeit currency (passing/possession less than \$1,000). Immigration law violations. Income tax evasion (less than \$10,000). Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$1,000.	OUT	5-17 months	10-22 months	16-28 months
MODERATE				
Bribery of a public official (offering or accepting). Counterfeit currency (passing/possession \$1,000 to \$19,999). Escape (secure program or institution, or absent 7 d or more--no fear or threat used). Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun). Income tax evasion (\$10,000 to \$50,000). Mailing threatening communication(s). Misprision of felony. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$1,000 to \$19,999. Smuggling/transporting of alien(s). Theft of motor vehicle (not multiple theft or for resale).	OUT	10-22 months	16-28 months	20-32 months
HIGH				
Counterfeit currency (passing/possession \$20,000 to \$100,000). Counterfeiting (manufacturing). Income tax evasion (\$50,000 to \$100,000). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$20,000 to \$100,000.	10-22 months	16-28 months	22-34 months	32-44 months
VERY HIGH				
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry to vault). Income tax evasion (over \$100,000). Use of weapon in crime. Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.	18-30 months	30-42 months	48-60 months	60-72 months
GREATEST				
Aggravated felony (e.g., robbery)--weapon fired or personal injury. Explosives (detonation).	40-52 months	55-67 months	68-85 months	84-105 months

Computation of Salient Factor Score

Item A —
 No prior convictions (adult or juvenile) = 3
 1 prior conviction = 2
 2 or 3 prior convictions = 1
 4 or more prior convictions = 0

Item B —
 No prior incarcerations (adult or juvenile) = 2
 1 or 2 prior incarcerations = 1
 3 or more prior incarcerations = 0

Item C —
 Age at first commitment (adult or juvenile)
 (26 or older) = 2
 (18 to 25) = 1
 (17 or younger) = 0

Item D —
 Commitment offense did not involve auto
 theft or check(s) = 1
 Otherwise = 0

Item E —
 Never had parole revoked or been committed
 for a new offense while on parole, and not
 a probation violator this time = 1
 Otherwise = 0

Item F —
 No history of heroin or opiate dependence = 1
 Other = 0

Item G —
 Verified employment (or full-time school
 attendance) for a total of at least 6
 months during the last 2 years in the
 community = 1
 Otherwise = 0

Total score —

Aggravating and Mitigating Factors

Circumstances in Aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, including the fact that:

(1) The crime involved great violence, great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The crime involved multiple victims.

(5) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The planning, sophistication or professionalism with which the crime was carried out, or other facts, indicate premeditation.

(9) The defendant used or involved minors in the commission of the crime.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) He has engaged in a pattern of violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or adjudications of commission of crimes as a juvenile are numerous or of increasing seriousness.

(3) The defendant has served prior prison terms.

(4) The defendant was on probation or parole when he committed the crime.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

Circumstances in Mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator, willing participant, aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or his conduct was partially excusable for some other reason not amounting to a defense.

(5) A defendant with no apparent predisposition to do so was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed he had a claim or right

to the property taken, or for other reasons mistakenly believed his conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his family or himself.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant was suffering from a mental or physical condition that significantly reduced his culpability for the crime.

(2) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(3) The defendant made restitution to the victim.

(4) The defendant's prior performance on probation or parole was good.

Notes

1. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
2. Conspiracy shall be rated for guideline purposes according to the underlying offense behavior, if such behavior was consummated. If the offense is unconsummated, the conspiracy will be rated one step below the consummated offense.
3. In cases described in § 994(h) a sentence of imprisonment shall be imposed, and the term otherwise prescribed by these guidelines shall be increased by not less than 12 nor more than 60 months, provided, however, that in no event shall the sentence imposed exceed that authorized by law.
4. Where the court finds present any of the aggravating and/or mitigating factors specified herein, the sentence specified by the guidelines may be increased or decreased to the extent appropriate under the circumstances.
5. In the case of a defendant convicted of multiple offenses committed at different times, an incremental penalty shall ordinarily be imposed; the

court may increase the severity level for the offense behavior while imposing concurrent sentences, or the court may impose consecutive sentences on some or all of the offenses.

6. A sentence of imprisonment shall not be imposed for the purpose of providing the defendant with needed educational or vocational training, medical care, or other correctional treatment, other than in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact.
7. In the case of a defendant convicted of multiple offenses committed at the same time, the court may in its discretion:
 - (a) impose concurrent sentences on all offenses;
 - (b) increase the severity level for the most severe offense committed, while imposing concurrent sentences on all offenses; or
 - (c) impose consecutive sentences on some or all of the offenses.

APPENDIX C: MODEL C

In-Out Guidelines

Offense Characteristics: Severity of Offense Behavior (examples)	Offender Characteristics (Salient Factor Score)				
	Very Good (11 to 9)	Good (8 to 7)	Fair (6 to 5)	Poor (4 to 3)	Very Poor (2 to 0)
LOW					
Escape (open institution or program (e.g., CTC, work release)--absent less than 7 d). Property offenses (theft or simple possession of stolen property) less than \$1,000.	OUT	OUT	OUT	IN	IN
LOW MODERATE					
Alcohol law violations. Bribery (minor official and payment less than \$5,000). Counterfeit currency (passing/possession less than \$1,000). Immigration law violations. Income tax evasion (less than \$10,000). Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$1,000.	OUT	OUT	IN	IN	IN
MODERATE					
Bribery (minor official and payment less than \$10,000). Counterfeit currency (passing/possession \$1,000 to \$19,999). Escape (secure program or institution, or absent 7 d or more--no fear or threat used). Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun). Income tax evasion (\$10,000 to \$50,000). Mailing threatening communication(s). Misprision of felony. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$1,000 to \$19,999. Smuggling/transporting of alien(s). Theft of motor vehicle (not multiple theft or for resale).	OUT	IN	IN	IN	IN
HIGH					
Bribery (elected or other high official or payment over \$10,000). Counterfeit currency (passing/possession \$20,000 to \$100,000). Counterfeiting (manufacturing). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Income tax evasion (\$50,000 to \$100,000). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$20,000 to \$100,000.	IN	IN	IN	IN	IN
VERY HIGH					
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry to vault). Income tax evasion (over \$100,000). Use of weapon in crime. Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.	IN	IN	IN	IN	IN
GREATEST					
Aggravated felony (e.g., robbery)--weapon fired or personal injury. Drugs: "Hard drugs", possession with intent to distribute/sale (in excess of \$100,000). Explosives (detonation).	IN	IN	IN	IN	IN

Time-To-Be-Served Guidelines

Offense Characteristics: Severity of Offense Behavior (examples)	Offender Characteristics (Salient Factor Score)				
	Very Good (11 to 9)	Good (8 to 7)	Fair (6 to 5)	Poor (4 to 3)	Very Poor (2 to 0)
LOW					
Escape (open institution or program (e.g., CTC, work release)--absent less than 7 d). Property offenses (theft or simple possession of stolen property) less than \$1,000.	OUT	OUT	OUT	11 months	12-16 months
LOW MODERATE					
Alcohol law violations. Bribery (minor official and payment less than \$5,000). Counterfeit currency (passing/possession less than \$1,000). Immigration law violations. Income tax evasion (less than \$10,000). Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$1,000.	OUT	OUT	11 months	16 months	20-24 months
MODERATE					
Bribery (minor official and payment less than \$10,000). Counterfeit currency (passing/possession \$1,000 to \$19,999). Escape (secure program or institution, or absent 7 d or more--no fear or threat used). Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun). Income tax evasion (\$10,000 to \$50,000). Mailing threatening communication(s). Misprision of felony. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$1,000 to \$19,999. Smuggling/transporting of alien(s). Theft of motor vehicle (not multiple theft or for resale).	OUT	11 months	16 months	22 months	24-28 months
HIGH					
Bribery (elected or other high official or payment over \$10,000). Counterfeit currency (passing/possession \$20,000 to \$100,000). Counterfeiting (manufacturing). Explosive, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Income tax evasion (\$50,000 to \$100,000). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$20,000 to \$100,000.	12 months	16 months	22 months	28 months	36-40 months
VERY HIGH					
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry to vault). Income tax evasion (over \$100,000). Use of weapon in crime. Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.	24 months	32 months	40 months	52-56 months	62-70 months
GREATEST					
Aggravated felony (e.g., robbery)--weapon fired or personal injury. Aircraft hijacking. Drugs: "Hard drugs", possession with intent to distribute/sale (in excess of \$100,000). Explosives (detonation).	46 months	57 months	65 months	74-78 months	90-98 months

CONTINUED

1 OF 2

Computation of Salient Factor Score

Item A —
 No prior convictions (adult or juvenile) = 3
 1 prior conviction = 2
 2 or 3 prior convictions = 1
 4 or more prior convictions = 0

Item B —
 No prior incarcerations (adult or juvenile) = 1
 1 or more prior incarcerations = 0

Item C —
 Never had parole revoked or been committed
 for a new offense while on parole, and
 not a probation violator this time = 1
 Otherwise = 0

Item D —
 No history of heroin or opiate dependence = 1
 Other = 0

Item E: Aggravating offense factors —
 No aggravating factors = 2
 1 aggravating factor = 1
 2 or more aggravating factors = 0

Item F: Mitigating offense factors —
 2 or more mitigating factors = 2
 1 mitigating factor = 1
 No mitigating factors = 0

Item G: Mitigating offender factors —
 1 or more mitigating factors = 1
 No mitigating factors = 0

Total score —

Aggravating and Mitigating FactorsCircumstances in Aggravation

Circumstances in aggravation include the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The crime involved multiple victims.

(5) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The planning, sophistication or professionalism with which the crime was carried out, or other facts, indicate premeditation.

(8) The defendant used or involved minors in the commission of the crime.

(9) The crime involved a large quantity of contraband.

(10) The defendant took advantage of a position of trust or confidence to commit the offense.

Circumstances in Mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator, willing participant, aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or his conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant believed he had a claim or right to the property taken, or for other reasons mistakenly believed his conduct was legal.

(6) The defendant was motivated by a desire to provide necessities for his family or himself.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant was suffering from a mental or physical condition that significantly reduced his culpability for the crime.

(2) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(3) The defendant made restitution to the victim.

(4) The defendant's prior performance on probation or parole was good.

Notes

1. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
2. Conspiracy shall be rated for guideline purposes according to the underlying offense behavior, if such behavior was consummated. If the offense is unconsummated, the conspiracy will be rated one step below the consummated offense.
3. In cases described in § 994(h) a sentence of imprisonment shall be imposed, and the term otherwise prescribed by these guidelines shall be increased as follows:
 - (a) in cases described in § 994(h)(1), by 12 months
 - (b) in cases described in § 994(h)(2), by 36 months
 - (c) in cases described in § 994(h)(3), by 60 months
 - (d) in cases described in § 994(h)(4), by 6 monthsprovided, however, that in no event shall the sentence imposed exceed that authorized by law.
4. Where the court finds present any of the aggravating and/or mitigating factors specified herein, the salient factor score shall be adjusted accordingly. Aggravating and mitigating factors not specified

herein may not be relied upon as a basis for departure from the guidelines unless the court finds that the factor is one that rarely arises and that was not adequately taken into consideration in the formulation of these guidelines.

5. In the case of a defendant convicted of multiple offenses (other than offenses involving the violation of both a general prohibition and a specific prohibition included in the general prohibition) an incremental penalty shall be imposed as follows:
 - (a) the base penalty shall be that prescribed for the most serious offense committed
 - (b) the base penalty shall be increased by 50% of the penalty prescribed for the 2nd most serious offense committed
 - (c) the penalty indicated by ¶ (b) shall be increased by 25% of the penalty prescribed for the 3rd most serious offense committed
 - (d) the penalty indicated by ¶ (c) shall be increased by 10% of the penalty prescribed for every other offense committed,provided, however, that in no event shall the sentence imposed exceed that authorized by law.

6. A sentence of imprisonment shall not be imposed for the purpose of providing the defendant with needed educational or vocational training, medical care, or other correctional treatment, other than in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact.

APPENDIX D: MODEL D

In-Out Guidelines

Offense Characteristics: Severity of Offense Behavior (examples)	Offender Characteristics (Salient Factor Score)				
	Very Good (11 to 9)	Good (8 to 7)	Fair (6 to 5)	Poor (4 to 3)	Very Poor (2 to 0)
LOW					
Escape (open institution or program (e.g., CTC, work release)--absent less than 7 d). Property offenses (theft or simple possession of stolen property) less than \$1,000. Alcohol law violations. Counterfeit currency (passing/possession less than \$10,000). Immigration law violations. Income tax evasion (less than \$10,000). Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$10,000.	OUT	OUT	IN	IN	IN
MODERATE					
Bribery of a public official (offering or accepting). Counterfeit currency (passing/possession \$10,000 to \$50,000). Escape (secure program or institution, or absent 7 d or more--no fear or threat used). Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun) Income tax evasion (\$10,000 to \$50,000). Mailing threatening communication(s). Misprision of felony. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$10,000 to \$50,000. Smuggling/transporting of alien(s). Theft of motor vehicle (not multiple theft or for resale).	OUT	IN	IN	IN	IN
HIGH					
Counterfeit currency (passing/possession \$50,000 to \$100,000). Counterfeiting (manufacturing). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Income tax evasion (\$50,000 to \$100,000). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$50,000 to \$100,000.	IN	IN	IN	IN	IN
VERY HIGH					
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry to vault). Income tax evasion (over \$100,000). Use of weapon in crime. Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.	IN	IN	IN	IN	IN
GREATEST					
Aggravated felony (e.g., robbery)--weapon fired or personal injury. Explosives (detonation).	IN	IN	IN	IN	IN

Time-To-Be-Served Guidelines

Offense Characteristics: Severity of Offense Behavior
(examples)

Offender Characteristics
(Salient Factor Score)

	Very Good (12 to 10)	Good (9 to 7)	Fair (6 to 5)	Poor (4 to 3)	Very Poor (2 to 0)
LOW					
Escape (open institution or program (e.g., CTC, work release)--absent less than 7 d). Property offenses (theft or simple possession of stolen property) less than \$1,000. Alcohol law violations. Counterfeit currency (passing/possession less than \$10,000). Immigration law violations. Income tax evasion (less than \$10,000). Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$10,000.	OUT	OUT	11 months	16 months	20-24 months
MODERATE					
Bribery of a public official (offering or accepting). Counterfeit currency (passing/possession \$10,000 to \$50,000). Escape (secure program or institution, or absent 7 d or more--no fear or threat used). Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun). Income tax evasion (\$10,000 to \$50,000). Mailing threatening communication(s). Misprision of felony. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$10,000 to \$50,000. Smuggling/transporting of alien(s). Theft of motor vehicle (not multiple theft or for resale).	OUT	11 months	16 months	22 months	24-28 months
HIGH					
Counterfeit currency (passing/possession \$50,000 to \$100,000). Counterfeiting (manufacturing). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Income tax evasion (\$50,000 to \$100,000). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$50,000 to \$100,000.	12 months	16 months	22 months	28 months	36-40 months
VERY HIGH					
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry to vault). Income tax evasion (over \$100,000). Use of weapon in crime. Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.	24 months	32 months	40 months	52-56 months	62-70 months
GREATEST					
Aggravated felony (e.g., robbery)--weapon fired or personal injury. Explosives (detonation).	46 months	57 months	65 months	74-78 months	90-98 months

Computation of Salient Factor Score

Item A —
 No prior convictions (adult or juvenile) = 3
 1 prior conviction = 2
 2 or 3 prior convictions = 1
 4 or more prior convictions = 0

Item B —
 No prior incarcerations (adult or juvenile) = 2
 1 or 2 prior incarcerations = 1
 3 or more prior incarcerations = 0

Item C —
 Age at first commitment (adult or juvenile)
 (26 or older) = 2
 (18 to 25) = 1
 (17 or younger) = 0

Item D —
 Commitment offense did not involve auto
 theft or check(s) = 1
 Otherwise = 0

Item E —
 Never had parole revoked or been committed
 for a new offense while on parole, and
 not a probation violator this time = 1
 Otherwise = 0

Item F —
 No history of heroin or opiate dependence = 1
 Other = 1

Item G —
 Verified employment (or full-time school
 attendance) for a total of at least 6
 months during the last 2 years in the
 community = 1
 Otherwise = 0

Total score —

Notes

1. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
2. Conspiracy shall be rated for guideline purposes according to the underlying offense behavior, if such behavior was consummated. If the offense is un consummated, the conspiracy will be rated one step below the consummated offense.
3. In cases described in § 994(h) a sentence of imprisonment shall be imposed, and the term otherwise prescribed by these guidelines shall be increased as follows:
 - (a) in cases described in § 994(h)(1), by 12 months
 - (b) in cases described in § 994(h)(2), by 6 months
 - (c) in cases described in § 994(h)(3), by 12 months
 - (d) in cases described in § 994(h)(4), by 6 monthsprovided, however, that in no event shall the sentence imposed exceed that authorized by law.
4. Aggravating and mitigating factors not specified herein may not be relied upon as a basis for departure from the guidelines, unless the court finds that the factor is one that rarely arises and that

was not adequately taken into consideration in the formulation of these guidelines.

5. In the case of a defendant convicted of multiple offenses committed at different times, an incremental penalty shall be imposed as follows:

- (a) the base penalty shall be that prescribed for the most serious offense committed
- (b) the base penalty shall be increased by 25% of the penalty prescribed for the 2nd most serious offense committed
- (c) the penalty indicated by ¶ (b) shall be increased by 10% of the penalty prescribed for the 3rd most serious offense committed
- (d) any penalties imposed other than for the first three most serious offenses shall run concurrently with the penalty indicated by ¶ (c).

For purposes of this note 5, offenses shall not be deemed committed at "different times" if they are part of the same transaction, even if the transaction extends over several months or years, or if they involve offenses of the same general character committed in separate transactions involving the same offender(s) and the same victim(s).

APPENDIX E: MODEL E

In-Out Guidelines

Offense Characteristics: Severity of Offense Behavior (examples)	Offender Characteristics (Salient Factor Score)				
	Very Good (12 to 10)	Good (9 to 7)	Fair (6 to 5)	Poor (4 to 3)	Very Poor (2 to 0)
LOW					
Escape (open institution or program (e.g., CTC, work release)--absent less than 7 d). Property offenses (theft or simple possession of stolen property) less than \$10,000. Alcohol law violations. Counterfeit currency (passing/possession less than \$10,000). Immigration law violations. Income tax evasion (less than \$10,000). Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$10,000.	OUT	OUT	IN	IN	IN
MODERATE					
Bribery of a public official (offering or accepting). Counterfeit currency (passing/possession \$10,000 to \$50,000). Escape (secure program or institution, or absent 7 d or more--no fear or threat used). Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun). Income tax evasion (\$10,000 to \$50,000). Mailing threatening communication(s). Misprision of felony. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$10,000 to \$50,000. Smuggling/transporting of alien(s). Theft of motor vehicle (not multiple theft or for resale).	OUT	IN	IN	IN	IN
HIGH					
Counterfeit currency (passing/possession \$50,000 to \$100,000). Counterfeiting (manufacturing). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Income tax evasion (\$50,000 to \$100,000). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$50,000 to \$100,000.	IN	IN	IN	IN	IN
VERY HIGH					
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry to vault). Income tax evasion (over \$100,000). Use of weapon in crime. Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.	IN	IN	IN	IN	IN
GREATEST					
Aggravated felony (e.g., robbery)--weapon fired or personal injury. Explosives (detonation).	IN	IN	IN	IN	IN

Time-To-Be-Served Guidelines

Offense Characteristics: Severity of Offense Behavior (examples)	Offender Characteristics (Salient Factor Score)				
	Very Good (12 to 10)	Good (9 to 7)	Fair (6 to 5)	Poor (4 to 3)	Very Poor (2 to 0)
LOW					
Escape (open institution or program (e.g., CTC, work release)--absent less than 7 d). Property offenses (theft or simple possession of stolen property) less than \$1,000. Alcohol law violations. Counterfeit currency (passing/possession less than \$10,000). Immigration law violations. Income tax evasion (less than \$10,000). Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$10,000.	OUT	OUT	11 months	16 months	20-24 months
MODERATE					
Bribery of a public official (offering or accepting). Counterfeit currency (passing/possession \$10,000 to \$50,000). Escape (secure program or institution, or absent 7 d or more--no fear or threat used). Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun). Income tax evasion (\$10,000 to \$50,000). Mailing threatening communication(s). Misprision of felony. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$10,000 to \$50,000. Smuggling/transporting of alien(s). Theft of motor vehicle (not multiple theft or for resale).	OUT	11 months	16 months	22 months	24-28 months
HIGH					
Counterfeit currency (passing/possession \$50,000 to \$100,000). Counterfeiting (manufacturing). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Income tax evasion (\$50,000 to \$100,000). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$50,000 to \$100,000.	12 months	16 months	22 months	28 months	36-40 months
VERY HIGH					
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry to vault). Income tax evasion (over \$100,000). Use of weapon in crime. Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.	24 months	32 months	40 months	52-56 months	62-70 months
GREATEST					
Aggravated felony (e.g., robbery)--weapon fired or personal injury. Explosives (detonation).	46 months	57 months	65 months	74-78 months	90-98 months

Computation of Salient Factor Score

Item A —
 No prior convictions (adult or juvenile) = 2
 1 prior conviction = 1
 2 or more prior convictions = 0

Item B —
 No prior incarcerations (adult or juvenile) = 2
 1 or 2 prior incarcerations = 1
 3 or more prior incarcerations = 0

Item C —
 Age at first commitment (adult or juvenile)
 (26 or older) = 1
 (25 or younger) = 0

Item D —
 Commitment offense did not involve auto
 theft or check(s) = 1
 Otherwise = 0

Item E —
 Never had parole revoked or been committed
 for a new offense while on parole, and not
 a probation violator this time = 1
 Otherwise = 0

Item F —
 No history of heroin or opiate dependence = 1
 Other = 0

Item G —
 Verified employment (or full-time school
 attendance) for a total of at least 6
 months during the last 2 years in the
 community = 1
 Otherwise = 0

Item H —
 Plea of guilty or nolo contendere = 3
 Otherwise = 0

Total score —

Notes

1. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
2. Conspiracy shall be rated for guideline purposes according to the underlying offense behavior, if such behavior was consummated. If the offense is unconsummated, the conspiracy will be rated one step below the consummated offense.
3. In cases described in § 994(h) a sentence of imprisonment shall be imposed, and the term otherwise prescribed by these guidelines shall be increased as follows:
 - (a) in cases described in § 994(h)(1), by 12 months
 - (b) in cases described in § 994(h)(2), by 6 months
 - (c) in cases described in § 994(h)(3), by 12 months
 - (d) in cases described in § 994(h)(4), by 6 monthsprovided, however, that in no event shall the sentence imposed exceed that authorized by law.
4. Aggravating and mitigating factors not specified herein may not be relied upon as a basis for departure from the guidelines, unless the court finds that the factor is one that rarely arises and that

was not adequately taken into consideration in the formulation of these guidelines.

5. In the case of a defendant convicted of multiple offenses committed at different times, an incremental penalty shall be imposed as follows:

- (a) the base penalty shall be that prescribed for the most serious offense committed;
- (b) the base penalty shall be increased by 25% of the penalty prescribed for the 2nd most serious offense committed;
- (c) the penalty indicated by ¶ (b) shall be increased by 10% of the penalty prescribed for the 3rd most serious offense committed;
- (d) any penalties imposed other than for the first three most serious offenses shall run concurrently with the penalty indicated by ¶ (c).

For purposes of this note 5, offenses shall not be deemed committed at "different times" if they are part of the same transaction, even if the transaction extends over several months or years, or if they involve offenses of the same general character committed in separate transactions involving the same offender(s) and the same victim(s).

APPENDIX F:
PAROLE RELEASE GUIDELINES
(28 C.F.R. § 2.20)

ADULT

[Guidelines of decision making, customary total time to be served before release (including jail time)]

Offense Characteristics: Severity of Offense Behavior
(examples)

Offender Characteristics: Parole Prognosis
(Salient Factor Score)

	Very Good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Escape (open institution or program (e.g., CTC, work release)--absent less than 7 d).	6-10 months	8-12 months	10-14 months	12-18 months
Marihuana or soft drugs, simple possession (small quantity, for own use).				
Property offenses (theft or simple possession of stolen property) less than \$1,000.				
LOW MODERATE				
Alcohol law violations.	8-12 months	12-16 months	16-20 months	20-28 months
Counterfeit currency (passing/possession less than \$1,000).				
Immigration law violations.				
Income tax evasion (less than \$10,000).				
Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$1,000.				
Selective Service Act violations.				
MODERATE				
Bribery of a public official (offering or accepting).	12-16 months	16-20 months	20-24 months	24-32 months
Counterfeit currency (passing/possession \$1,000 to \$19,999).				
Drugs:				
Marihuana possession with intent to distribute/sale (small scale (less than 50 lbs.)).				
"Soft drugs", possession with intent to distribute/sale (less than \$500).				
Escape (secure program or institution, or absent 7 d or more--no fear or threat used).				
Firearms Act, possession/purchase/sale (single weapon--not sawed-off shotgun or machine gun).				
Income tax evasion (\$10,000 to \$50,000).				
Mailing threatening communication(s).				
Misprision of felony.				
Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) \$1,000 to \$19,999.				
Smuggling/transporting of alien(s).				
Theft of motor vehicle (not multiple theft or for resale).				

PAROLE RELEASE GUIDELINES (Cont'd)

[Guidelines for decision making, customary total time to be served before release (including jail time);

Offense Characteristics: Severity of Offense Behavior
(examples)Offender Characteristics: Parole Prognosis
(Salient Factor Score)

	Very Good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
HIGH				
Counterfeit currency (passing/possession \$20,000 to \$100,000). Counterfeiting (manufacturing). Drugs: Marihuana, possession with intent to distribute/sale (medium scale) (e.g., 50 to 1,999 lbs.). "Soft drugs", possession with intent to distribute/sale (\$500 to \$5,000). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Mann Act (no force--commercial purposes). Theft of motor vehicle for resale. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) (20,000 to \$100,000).	16-20 months	20-26 months	26-34 months	34-44 months
VERY HIGH				
Robbery (weapon or threat). Breaking and entering (bank or post office--entry or attempted entry of vault). Drugs: Marihuana, possession with intent to distribute/sale (large scale, e.g., 2,000 lbs. or more). "Soft drugs", possession with intent to distribute/sale (over \$5,000). "Hard drugs", possession with intent to distribute/sale (not exceeding \$100,000). Extortion. Mann Act (force). Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000. Sexual act (force).	26-36 months	36-48 months	48-60 months	60-72 months
GREATEST				
Aggravated felony (e.g., robbery, sexual act, aggravated assault)-- weapon fired or personal injury. Aircraft hijacking. Drugs: "Hard drugs", possession with intent to distribute/sale (in excess of \$100,000). Espionage. Explosives (detonation). Kidnapping. Willful homicide.	(Greater than above--however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)			

NOTES

1. The guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 days (1 month) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes; "soft drugs" include, but are not limited to, barbiturates, amphetamines, LSD, and hashish.
7. Conspiracy shall be rated for guideline purposes according to the underlying offense behavior if such behavior was consummated. If the offense is unconsummated, the conspiracy will be rated one step below the consummated offense.

Salient Factor Score

Item A _____
 No prior convictions (adult or juvenile) = 3
 1 prior conviction = 2
 2 or three prior convictions = 1
 4 or more prior convictions = 0

Item B _____
 No prior incarcerations (adult or juvenile) = 2
 1 or two prior incarcerations = 1
 3 or more prior incarcerations = 0

Item C _____
 Age at first commitment (adult or juvenile)
 (26 or older) = 2
 (18 to 25) = 1
 (17 or younger) = 0

Item D _____
 Commitment offense did not involve auto theft or check(s) = 1
 Otherwise = 0

Item E _____
 Never had parole revoked or been committed for a new offense
 while on parole, and not a probation violator this time = 1
 Otherwise = 0

Item F _____
 No history of heroin or opiate dependence = 1
 Other = 0

Item G _____
 Verified employment (or full-time school attendance) for a
 total of at least 6 months during the last 2 years in the
 community = 1
 Otherwise = 0

Total score _____

APPENDIX G:
CALIFORNIA RULES OF COURT

Rule 421. Circumstances in Aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness, whether or not charged or chargeable as an enhancement under section 12022.7.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime, whether or not charged or chargeable as an enhancement under section 12022 or 12022.5.

(3) The victim was particularly vulnerable.

(4) The crime involved multiple victims.

(5) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, sub-

orned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The planning, sophistication or professionalism with which the crime was carried out, or other facts, indicate premeditation.

(9) The defendant used or involved minors in the commission of the crime.

(10) The crime involved an attempted or actual taking or damage of great monetary value, whether or not charged or chargeable as an enhancement under section 12022.6.

(11) The crime involved a large quantity of contraband.

(12) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) He has engaged in a pattern of violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult

or adjudications of commission of crimes as a juvenile are numerous or of increasing seriousness.

(3) The defendant has served prior prison terms whether or not charged or chargeable as an enhancement under section 667.5.

(4) The defendant was on probation or parole when he committed the crime.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

Rule 423. Circumstances in Mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator, willing participant, aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or his conduct was partially excusable for some other reason not amounting to a defense.

(5) A defendant with no apparent predisposition to do so was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed he had a claim or right to the property taken, or for other reasons mistakenly believed his conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his family or himself.

(b) Facts relating to the defendant, including the fact that:

(1) He has no prior record or an insignificant record of criminal conduct considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced his culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for the ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was good.

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