FIFTEEN YEARS OF GUIDELINES SENTENCING

An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform

UNITED STATES SENTENCING COMMISSION
November 2004

Table of Contents

Executive Summary

The Sentencing Reform Act of 1984 [hereinafter the SRA] ushered in a new era of sentencing in federal courts. Prior to implementation of the SRA, federal crimes carried very broad ranges of penalties, and federal judges had the discretion to choose the sentence they felt would be most appropriate. They were not required to explain their reasons for the sentence imposed, and the sentences were largely immune from appeal. The time actually served by most offenders was determined by the Parole Commission, and offenders, on average, served just 58 percent of the sentences that had been imposed. The sentencing process, a critical element of the criminal justice process, was opaque, undocumented, and largely discretionary. Because of its impenetrability to outside observers, there was a sense that the process was unfair, disparate, and ineffective for controlling crime.

In order to inject transparency, consistency, and fairness into the sentencing process, Congress passed the SRA, which established the United States Sentencing Commission [hereinafter the Commission] and charged it with establishing guidelines for federal sentencing. The guidelines were promulgated in 1987, but district and circuit court rulings prevented their full implementation until the Supreme Court, in *Mistretta v. United States,* 488 U.S. 361 (1989), affirmed the constitutionality of the Commission and its work in crafting guidelines. As a result, in 1991, when the Commission issued its report, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* [hereinafter called the Four-Year Evaluation], there was relatively little data from which the Commission could evaluate the effects of the guidelines. Today the Commission is in a better position to evaluate the success of the guidelines system and identify areas for further refinement. This report focuses on three specific assessments: 1) the guidelines' impact on the transparency, certainty, and severity of punishment, 2) the impact of the guidelines on inter-judge and regional disparity, and 3) research on racial, ethnic, and gender disparities in sentencing today.

Introduction to the Sentencing Reform Act and the Guidelines

Goals and evaluation criteria. The SRA was the result of nine years of bipartisan deliberation and compromise and, as such, reflects the varied and, at times, competing sentencing philosophies of its many sponsors and supporters. It set forward the following goals for sentencing reform:

1. elimination of unwarranted disparity;
2. transparency, certainty, and fairness;
3. proportionate punishment; and
4. crime control through deterrence, incapacitation, and the rehabilitation of offenders.

The goals of the new system identified in the SRA provide the best criteria for judging whether sentencing reform has been successful. These goals can be divided into two groups. The first group, the goals of sentencing reform, include certainty and fairness in punishment and the elimination of unwarranted disparity. Research on the effectiveness of the system at achieving these goals is the subject of this report. The second group, establishment of policies that will best accomplish the purposes of sentencing—which are usually summarized as just punishment, deterrence, incapacitation, and rehabilitation—is the subject of previous Commission-sponsored research as well as ongoing research at the Commission.

Development of the guidelines. The guidelines promulgated by the Commission were based on the directives in the SRA and other statutory provisions, as well as on a study of past sentencing practices. The Commission analyzed detailed data from 10,000 presentence reports and additional data on over 100,000 federal sentences imposed in the immediate preguidelines era. The Commission determined the average prison term likely to be served for each generic type of crime. These averages helped establish "base offense levels" for each crime, which were directly linked to a recommended imprisonment range. Aggravating and mitigating factors that significantly correlated with increases or decreases in sentences were also determined statistically, along with each factor's magnitude. These formed the bases for "specific offense characteristics" for each type of crime, which adjusted the offense level upward or downward. The Commission deviated from past practice when it determined there was a compelling reason, such as past under-punishment of white collar offenses, and when Congress dictated increased severity for an offense category. The Commission also factored offenders' criminal history into the guidelines as a way to identify offenders most likely to recidivate.

Real offense guidelines. The statute-defined elements of many federal crimes fail to provide sufficient detail about the *manner* in which the crime was committed to permit individualized sentences that reflect the varying seriousness of different violations. In addition, the many, sometimes overlapping provisions in the federal criminal code create the potential that similar offenses will be charged in many different ways. To better reflect the seriousness of each offender's actual criminal conduct, and to prevent disparate charging practices from leading to sentencing disparity, the original Commission developed guidelines that are based to great extent on offenders' real offense behavior rather than the charges of conviction alone. Some of the mechanisms to help ameliorate the effects of uneven charging include: 1) the multiple count rules, 2) cross-references among guidelines, and 3) the relevant conduct rule. In a real offense system, the offender's actual conduct proved at the sentencing hearing—not only the elements of the counts of conviction—factor into the sentence imposed within the statutory penalty range established by the legislature for the offenses of conviction.

Certainty and Severity of Punishment

Truth-in-sentencing, mandatory minimums, and sentencing guidelines. In some sense, the success of the guidelines at achieving certainty of punishment has never been at issue, because

the establishment of "truth-in-sentencing" with the elimination of parole accomplished it at a stroke. Under the guidelines, punishment became not only more certain but also more severe. The proportion of probation sentences declined, use of restrictive alternatives such as home confinement increased, and the rate of imprisonment for longer lengths of time climbed dramatically compared to the preguidelines era. While mandatory minimum penalties had some direct and indirect effects on these trends, careful analysis of sentencing trends for different types of crimes demonstrates that the sentencing guidelines themselves made a substantial and independent contribution.

Overall trends in the use of imprisonment and probation. Between 1987 and 1991, as the full impact of the sentencing guidelines gradually emerged in federal courts, the use of simple probation was cut almost in half. It continued to decline throughout the guidelines era. By 2002, the percentage of offenders receiving simple probation was just a third what it had been in 1987. The use of imprisonment spiked in the early years of guidelines implementation and then resumed a long gradual climb, reaching 86 percent of all offenders by 2002, about 20 percent higher than it had been in the preguidelines era. Some of the decrease in the use of simple probation following implementation of the guidelines is explained by increased use of intermediate sanctions, especially for "white collar" crimes. These offenders historically were more likely to receive simple probation, but under the guidelines they increasingly are subject to intermediate sanctions, such as home or community confinement or weekends in prison, and imprisonment.

In addition to an increase in use of imprisonment, the guidelines era is marked by longer prison terms actually served. Longer prison terms result both from the abolition of parole, which requires offenders to serve at least 85 percent of the sentence imposed, and also by increases in the sentences that are imposed for many types of crimes. Between November 1987 and 1992, the average prison term served by federal felons more than doubled. Since fiscal year 1992, there has been a slight and gradual decline in average prison time served, but federal offenders sentenced in 2002 will still spend almost twice as long in prison as did offenders sentenced in 1984, increasing from just under 25 to almost 50 months in prison for the typical federal felon.

The abolition of parole, the enactment of mandatory minimum penalty provisions, and changes in the types of offenders sentenced in federal court, along with implementation of the guidelines, all contributed to increased sentence lengths. The influence of each of these factors varies among different offenses.

Drug Trafficking. Drug trafficking offenses have comprised the largest portion of the federal criminal docket for over three decades. With the overall growth in the federal criminal caseload, the number of offenders convicted of drug trafficking or use of a communication facility to commit a drug offense has grown every year, reaching 25,835 offenders in 2002, or 40.4 percent of the total criminal docket. Only 592 additional drug offenders, less than 1 percent, were convicted of simple drug *possession*, as opposed to trafficking. As a result of the large number of drug offenders, overall trends in the use of incarceration and in average prison terms are dominated by drug sentencing.

In developing sentences for drug trafficking offenders, the Commission was heavily influenced by passage of the Anti-Drug Abuse Act of 1986 [hereinafter ADAA] which created five- and ten-year mandatory minimum penalties based on the weight of the "mixture or substance containing a detectable amount" of various types of drugs. Finding the correct quantity ratios among different drugs and the correct thresholds for each penalty level has proven problematic. The Commission previously reported that the ratios among certain types of drugs contained in the ADAA, and incorporated into the guidelines' Drug Quantity Table, fail in some cases to reflect the relative harmfulness of different drugs. This is particularly true for the 100-to-1 drug quantity ratio between powder and crack cocaine. The quantity thresholds linked to five- and ten-year sentences for crack cocaine have been shown to result in penalties that are disproportionately long given the relative harmfulness of crack and powder cocaine, and results in lengthy incarceration for many street-level sellers and other low culpability offenders. As a result, the Commission has recommended to Congress revision of the mandatory minimum penalty statutes and the guidelines. Congress has not yet acted on this recommendation.

There has been a dramatic increase in time served by federal drug offenders following implementation of the ADAA and the guidelines. The time served by federal drug traffickers was over two and a half times longer in 1991 than it had been in 1985, hovering just below an average of 80 months. In the latter half of the 1990s, the average prison term decreased by about 20 percent but remained far above the historic average. The decrease in time served during the late 1990s is a result of a trend toward less serious offenses and a greater incidence of mitigating factors in cases sentenced. The overall pattern is repeated for each drug type, although the severity levels are highest for crack cocaine, followed by powder cocaine, heroin, and other scheduled narcotics. Marijuana offenses received the shortest prison terms.

Economic Offenses. Economic offenses—which include larceny, fraud, and non-fraud white collar offenses—constitute the second largest part of the federal criminal docket. A wide variety of economic crimes are prosecuted and sentenced in the federal courts, ranging from large-scale corporate malfeasance to small-scale embezzlement to simple theft. The Commission's study of past sentencing practices revealed that in the preguidelines era, sentences for fraud, embezzlement, and tax evasion generally received less severe sentences than did crimes such as larceny or theft, even when the crimes involved similar monetary loss. A large proportion of fraud, embezzlement, and tax evasion offenders received simple probation. In response, the guidelines were written to reduce the availability of probation and to ensure a short but definite period of confinement for a larger percentage of these "white collar" cases, both to ensure proportionate punishment and to achieve adequate deterrence.

The most striking trend in economic offenses is a shift away from simple probation and toward intermediate sentences that include some type of confinement. The use of imprisonment for economic offenders also has increased steadily throughout the guidelines era. These data demonstrate some success in achieving the Commission's goal of assuring a "short but definite period of confinement" for white collar offenders. The guidelines ensure that offenses involving the

greatest monetary loss, the use of more sophisticated methods, and other aggravating factors are given imprisonment.

Immigration Offenses. Prior to fiscal year 1994 there were relatively few immigration cases sentenced in the federal courts. In the first three years of the 1990s the number of cases ranged between 1,000 and 2,000 annually. Beginning in 1995, however, the number of cases began to climb, and after the implementation of Operation Gatekeeper—the Immigration and Naturalization Service's southwest border enforcement strategy—the number began to soar, reaching a peak of just under 10,000 cases in 2000. Along with the phenomenal growth in the size of the immigration offense docket, a series of policy decisions by Congress and by the Commission have steadily increased the severity of punishment for the two most common classes of immigration offenses: alien smuggling and illegal entry.

Use of imprisonment has increased substantially for these offenses and is affected by the fact that many immigration offenders are non-resident aliens. Lacking a legal home in the United States, many are detained prior to sentencing. Immediate deportation has also become a frequent response to those individuals arrested for illegal entry. Legislative and Commission changes to these penalties have focused on increasing the guidelines offense levels. This has pushed more offenders into the zones of the Sentencing Tables in which probation and alternative sentences are unavailable. In addition to the increased use of incarceration, the average length of time served for both alien smuggling and illegal entry have increased considerably. Illegal entry offenders experienced the first wave of sentence increases in the early 1990s as the guideline amendments enacted in those years became effective. Alien smuggling experienced a steep increase in 1998, as the amendment promulgated pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 took effect.

Firearm trafficking and possession. The federal criminal code contains a variety of provisions proscribing the possession, use, and trafficking of firearms. In the last two decades, congressional attention has focused on 18 U.S.C. § 924(c), which provides for a mandatory minimum penalty for offenders who use, carry, or possess a firearm in relation to a drug trafficking or violent crime. In 1984, the statute was amended to require at least five years' imprisonment, to be served consecutive to the sentence for the underlying offense. In 1986, the statute's scope was expanded to include drug trafficking offenses, and additional penalties were added. In 1998, in response to *Bailey v. U. S.,* 516 U.S. 137 (1995)—a U. S. Supreme Court decision that narrowly construed the "use" criteria—the statute's scope was again expanded to include "possession in furtherance" of the underlying offense. Penalties were also increased for brandishing or discharging a firearm during a crime.

Federal statutes also define two other broad types of firearm offenses. Federal law regulates transactions in firearms and imposes record-keeping and other requirements designed to facilitate control of firearm commerce by the various states. In addition, possession of a firearm by certain classes of persons, such as felons, fugitives, or addicts, is prohibited, as is "knowing transfer" of

weapons to these persons. Under the guidelines, the certainty and severity of punishment for all these offenses have greatly increased.

For firearm traffickers, the use of probation has been steadily reduced to about one-quarter of its preguidelines level, replaced by imprisonment and, to a lesser extent, intermediate sanctions. After a period of volatility and decline in trafficking sentences in the first years of guidelines implementation, time served began a steady climb in fiscal year 1992, after the Commission enacted a major revision to the firearms guideline. The subsequent amendments to the guideline have continued to increase sentence severity. By 2000, prison terms were about double what they had been in the preguidelines era. For illegal possessors, probation has been replaced almost completely by imprisonment. The penalty increases for possession offenses were equally dramatic, doubling average time served between 1988 and 1995.

Some of the changes observed for firearm offenses may have been a consequence of more serious cases generated by Department of Justice [hereinafter the Department] initiatives. But the most significant factor driving the penalty increases appears to have been the guideline amendments. These revisions have dramatically increased offense levels, particularly for offenders with prior convictions and for those who used more dangerous types of weapons. These changes in sentences for illegal firearm transactions and possession represent one of the most substantial policy changes initiated largely by the Commission.

Violent Crimes. Unlike the state courts, the federal courts sentence relatively few offenders convicted of violent crimes. In 2002, murder, manslaughter, assault, kidnaping, robbery, and arson constituted less than four percent of the total federal criminal docket. Due to the unique nature of federal jurisdiction over these types of crime, a sizeable proportion of murder, assault, and especially manslaughter cases involve Native American defendants. The most common federal violent crime is bank robbery, which has long been of special concern to federal law enforcement.

For most violent offenses, rates of imprisonment have always been high and have remained so under the guidelines. Only manslaughter, the violent offense for which Native Americans are most highly represented, contained room for significant growth in incarceration rates. The use of alternatives to imprisonment for manslaughter cases has been steadily reduced under the guidelines, and now occurs in less than ten percent of cases. Kidnaping and murder have incarceration rates between 90 and 100 percent, with arson and assault somewhat lower. The imprisonment rate for bank robbers climbed from the mid to the high 90s under the guidelines.

Average prison sentences *imposed* on violent offenders decreased at the time of guidelines implementation, but due to the abolition of parole, the time served increased significantly. The greatest increases have been for murder, kidnaping, bank robbery, and arson. The more stable prison term lengths for manslaughter partly reflect the large number of these offenders who receive relatively short prison terms rather than an alternative sanction.

Sex offenses. Although sex offenses account for a very small percentage of cases in the federal docket, just 1.3 percent in 2002, Congress has legislated frequently on this issue during the guidelines era, particularly regarding offenses against minors. Much like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses. In the PROTECT Act of 2003, Congress, for the first time since the inception of the guidelines, directly amended the *Guidelines Manual* and developed unique limitations on downward departures from the guidelines in sex cases.

The guidelines treat separately three types of sexual offenses. Criminal sexual abuse involves offenses such as aggravated rape, statutory rape, or molestation. Sexual exploitation involves the production, distribution, or possession of child pornography. Promotion offenses involve inducing, enticing, or persuading commission of an illegal sex act, or traveling or transporting persons to commit such acts, or otherwise promoting illegal commercial sex acts.

The percentage of offenders receiving imprisonment increased for both sexual abuse and sexual exploitation offenders in the guidelines era, and dramatically so for sexual exploitation offenders. Fewer than ten percent of either type of offender receives probation or intermediate sanctions. The average length of time served for sexual exploitation has increased by 20 months from its preguidelines level. Sentences imposed on sexual abuse offenders show the same decreases observed for violent offenders, but time actually served has remained fairly constant throughout the period of study.

Inter-judge and Regional Disparity

Evidence of disparity in preguidelines sentencing. In the debates leading to passage of the SRA, Congress identified differences among judges and, to a lesser extent, differences among geographic regions in sentencing practices as particularly common sources of unwarranted disparity. Research demonstrated that philosophical differences among judges affected the sentences they imposed. The data showed that some judges were consistently more severe or more lenient than their colleagues, and that judges varied in their approaches to particular crime types. Several studies found geographical variations in sentencing patterns, suggesting that different political climates or court cultures can affect sentences. Regional differences arise not just from the exercise of judicial discretion, but also from differences in policies among U. S. attorneys.

Increased transparency and predictability of sentences under the guidelines. The guidelines have made sentencing more transparent and predictable. The SRA requires judges to document in open court the facts and reasons underlying the sentences they impose, which are then reviewable on appeal. Defendants and prosecutors are better able to predict sentences based on the facts of the case than in the discretionary, preguidelines era. By making sentencing policies more transparent, the guidelines make it easier to debate and evaluate the merits of particular policies. The effects of changes in sentencing policy can also be anticipated more precisely. The prison impact

model developed by the Sentencing Commission, and further elaborated by the Bureau of Prisons [BOP], has proven very accurate at projecting the need for prison beds and supervision resources, making management of correctional resources easier.

Statistics provide a method for quantifying the increased understanding of sentencing made possible by guidelines. Most of the "variance"—the deviation of sentences around the average—among sentences in the preguidelines era was unaccounted for in statistical studies. Only 30 to 40 percent of the variance could be explained by characteristics of the offense or offender, leaving open the possibility of considerable arbitrary variation. Today, approximately 80 percent of the variance in sentences can be explained by the guidelines rules themselves. This greater transparency makes it easier to dispel concerns that sentences vary arbitrarily among judges, or that irrelevant factors, such as race or ethnicity, significantly affect sentences.

Evaluation research has been made easier by another benefit of sentencing reform—the creation of a specialized expert agency with a substantial research mission. The Commission has developed and maintains huge databases on the sentences imposed in each fiscal year, as well as specialized data sets focused on particular issues. These represent the richest sources of information that have ever been assembled on federal crimes, federal offenders, and sentences imposed. As a result, we are in a better position to evaluate whether unwarranted inter-judge, regional, or racial discrimination affects sentences today.

The effect of guidelines implementation. The effect of the guidelines on unwarranted disparity is best evaluated by comparing, among judges who receive similar types of cases, the amount of variation in sentences *before* and *after* guidelines implementation. Researchers both inside and outside the Commission have made this comparison using the "natural experiment" created by the random assignment of cases to judges in many courthouses. The most recent and best of these studies found significant reductions in the unwarranted influence of judges on sentencing under the guidelines compared to the preguidelines era.

Studies of disparity divide judges' influence into "primary judge effects" (greater severity or leniency among judges in all types of cases, represented by differences in their average sentence) and "interaction effects" (greater severity or leniency in particular types of cases). Two judges with similar average sentences may greatly differ in their treatment of particular offenses. Interaction effects can reduce or even cancel the primary judge effect, with one judge sentencing drug offenses more severely than "white collar" offenses and another doing the opposite.

In the Commission's study, the influence of several different factors were compared, including the primary judge effect, interaction effects, city effects, as well as the general type of offense involved and whether an offender had any prior criminal conviction. General offense type accounted for the most variation in sentences both before and after guidelines implementation (between 15% & 20%) followed by interaction effects, city effects, and judge effects. The primary judge effect was relatively small in both the preguidelines and guidelines era, but was reduced by

between a third and half under the guidelines (*e.g.,* from 2.32 to 1.24 percent among judges who sentenced in both time periods). Interaction effects were about three to five times larger than primary judge effects. Interaction effects were reduced for most judges under the guidelines, although not among judges who sentenced in both time periods. The influence of judges was reduced by the guidelines for drug, fraud, firearm, and larceny offenses, though immigration or robbery offenses did not show a reduction. Notably, regional differences in drug trafficking cases were increased from the preguidelines to the guidelines era.

Disparity Arising at Presentencing Stages. The SRA focused primarily on sentencing, but Congress, the Commission, and other observers recognized that sentencing could not be considered in isolation. Decisions regarding what charges to bring, decline, or dismiss, or what plea agreements to reach can all affect the fairness and uniformity of sentencing. Congress directed the Commission to develop mechanisms to monitor and, if necessary, control some of the negative effects of plea bargaining, particularly through policy statements establishing standards for judicial review and rejection of plea agreements that undermine the guidelines. In addition, the Commission developed the real offense system of relevant conduct and multiple count rules to reduce the effects of charging variations on the sentencing of offenders who engage in similar conduct. The Judicial Conference of the United States developed procedures for presentencing investigations designed to inform judges of the effects of charging and plea bargaining decisions. The Department also took steps to help ensure that sentencing uniformity was not thwarted at the presentencing stages. The Department's efforts were recently renewed, demonstrating continuing recognition that presentencing decisions can undermine sentencing uniformity.

Congress has previously directed the Commission to study plea bargaining and its effects on disparity. Because fewer statistical data are available to investigate decisions made at presentencing stages, their effects are difficult for the Commission to monitor and precisely quantify. However, a variety of evidence developed throughout the guidelines era suggest that the mechanisms and procedures designed to control disparity arising at presentencing stages are not all working as intended and have not been adequate to fully achieve uniformity of sentencing.

The Commission, as well as outside observers, have reported that plea bargaining is re-introducing disparity into the system. The Commission in 1989, 1995, and again in 2000 compared descriptions of the offense conduct contained in samples of presentence reports with the conduct for which the offenders were charged and sentenced. Each time a large proportion of qualifying offenders (in some cases large majorities) were not charged with potentially applicable penalty statutes. While some offenders are charged in a manner that results in sentences above the guideline range that would otherwise apply to the case, in other cases the charges selected cap the statutory range below the guideline range that would properly apply to the offender's real offense conduct. Charging decisions that limit the normal operation of the guidelines result in sentences that are disproportionate to the seriousness of the offense and disparate among offenders who engage in similar conduct.

Surveys of judges and probation officers have suggested other forms of plea bargaining, such as fact bargaining, that can result in disparity. A majority of chief probation officers reported in a survey sponsored by the Commission's Probation Officer's Advisory Group that the facts included in plea agreements were complete and accurate in the majority of cases. However, 43 percent reported this was true just half the time or less. Probation officers in some districts reported that prosecutors tried to limit information used in applying the guidelines in some cases. The Federal Judicial Center found in a nationwide survey that more than a quarter of responding judges reported that plea stipulations understated the offense conduct somewhat or very frequently, while another 12 percent said they did so about half the time. Judges reported that they did sometimes "go behind" the plea agreements to examine underlying conduct, but they reported doing so "infrequently."

Field studies in several districts have demonstrated other ways that plea bargaining can result in sentencing disparity. An early study sponsored by the Commission estimated that plea agreements circumvented the guidelines in 20 to 35 percent of cases through charge, fact, or date bargaining. Some commentators have called circumvention of the guidelines through plea agreements a form of "hidden departure," in which prosecutors and courts create incentives for guilty pleas and defendant cooperation beyond the incentives contained in the guidelines themselves. In some cases, the sentence recommended in plea agreement appears to the parties and to the court more fair and effective at achieving the purposes of sentencing than the sentence required by strict pursuit of every potentially applicable charge or sentence enhancement.

Other Sources of Disparity Under the Guidelines. Several mechanisms within the guidelines system have been identified by commentators as continuing sources of disparity. These include variation in the rates of departure, including departures for substantial assistance to the government, or the extent of such departures. In addition, the guidelines give judges discretion over placement of the sentence within the guideline range, including, in some cases, whether to use a sentencing option such as probation.

The Commission analyzed the influence of each of these mechanisms on sentencing variations. Among these mechanisms, substantial assistance departures accounted for the greatest amount of variation in sentence lengths—4.4 percent. Other downward departures contributed 2.2 percent, while upward departures contributed just 0.29 percent. Only 0.07 percent of the variation was explained by use of the guideline range above the guideline minimum. Because data is unavailable on the types of assistance offered by defendants, or the nature of the mitigating circumstances present in cases, it is not possible to determine how much of these sentencing variations represent unwarranted disparity.

Even though the *rate* of substantial assistance and other downward departures is similar—17.1 percent and 18.3 percent, respectively—substantial assistance departures account for more variability in sentence length because the *extent* of departure for substantial assistance is on average greater. Commission research found varying policies and practices in different U. S. attorney's offices regarding when motions for departures based on substantial assistance were made, and in the extent of departure recommended for different forms of assistance.

Racial, Ethnic, and Gender Disparity

Growing caseload of minority offenders and a gap in sentencing. The proportion of the federal offender population consisting of minorities has grown over the past fifteen years. While the majority of federal offenders in the preguidelines era were White, minorities dominate the federal criminal docket today. Most of this shift is due to dramatic growth in the Hispanic proportion of the caseload, which has approximately doubled since 1984. Most notably, while the gap in average sentences between White and minority offenders was relatively small in the preguidelines era, the gap between African-Americans and other groups began to widen at the time of guidelines implementation, which was also the period during which large groups of offenders became subject to mandatory minimum drug sentences. The gap was greatest in the mid-1990s and has narrowed only slightly since then. The Commission had conducted a great deal of research to investigate possible reasons for this gap, including the possible influence of discrimination or of changes to the sentencing laws themselves.

Discrimination. The SRA sought to eliminate all forms of unwarranted disparity, including disparity based on irrelevant differences among offenders. Different treatment based on such characteristics is generally called *discrimination*. Discrimination may reflect intentional bias toward a group, or may result from unconscious stereotypes or fears about a group, or greater empathy with persons more similar to oneself. Discrimination is generally considered the most onerous type of unwarranted disparity and sentencing reform was clearly designed to eliminate it. Concern over possible discrimination in federal sentencing remains strong today. No sentencing issue has received more attention from investigative journalists or scholarly researchers.

The studies agree on a general point: racial and ethnic discrimination by judges, if it exists at all, is not a major determinant of federal sentences compared to the seriousness of offenders' crimes and their criminal records. But the studies disagree over whether discrimination continues to affect sentencing at all. Many of the earlier studies were plagued by methodological problems, including a lack of good data on legally relevant considerations that might help explain differences in sentences and a failure to take account of statutory minimum penalties. Many of these problems can be overcome by using a "presumptive sentence" model.

The Commission studied whether race, ethnicity, or gender affects federal sentences after controlling for the influence of legally relevant considerations, including the guidelines rules and mandatory statutory penalties. Across five recent years, a typical Black male or Hispanic male drug trafficker had somewhat greater odds of being imprisoned when compared to a typical White male drug trafficker. No differences were found in non-drug cases. The odds of a typical Black drug offender being sentenced to imprisonment are about 20 percent higher than the odds of a typical White offender, while the odds of a Hispanic drug offender are about 40 percent higher. Differences in odds are difficult to translate into plain language, but further analysis examining the proportional reduction in error achieved by using race and ethnicity suggest that in only a handful of cases in any given year does being Black or Hispanic influence the decision whether to incarcerate. Some of these differences might be explained by legally relevant considerations for which we have no data.

For offenders whom judges choose to incarcerate, the question becomes: do similar offenders receive similar prison terms? For Black offenders, the results are once again limited to drug trafficking offenses and to male offenders. The typical Black drug trafficker receives a sentence about ten percent longer than a similar White drug trafficker. This translates into a sentence about seven months longer. A similar effect is found for Hispanic drug offenders, with somewhat lesser effects also found for non-drug and female Hispanic offenders. These findings indicate that all types of Hispanic offenders are placed above the minimum required sentence more frequently than similar White offenders, or receive somewhat lesser reductions when receiving a downward departure. The same is true of Black drug trafficking offenders and Black males.

While any unexplained differences in the likelihood of incarceration or in the lengths of prison terms imposed on minority and majority offenders is cause for concern, there is reason to doubt that these racial and ethnic effects reflect deep-seated prejudices or stereotypes among judges. Most noteworthy is that the effects, which are found only for some offense types and for males, are also unstable over time. Separate year-by-year analyses reveals that significant differences in the likelihood of imprisonment are found in only two of the last five years for Black offenders, and four of the last five for Hispanic offenders. The effects for sentence length disappear for both Black and Hispanic offenders in the most recent year for which data are available. Offense-to-offense and year-to-year fluctuations in racial and ethnic effects are difficult to reconcile with theories of enduring stereotypes, powerlessness, or overt discrimination affecting sentencing of minorities under the guidelines. In addition, the effects that we observe may be due in part to differences among groups on factors that judges legitimately may consider when deciding where to sentence within the guideline range or how far to depart, but on which we have no data.

Unlike race and ethnic discrimination, the evidence is more consistent that similar offenders are sometimes treated differently based on their gender. Gender effects are found in both drug and non-drug offenses and greatly exceed the race and ethnic effects discussed above. The typical male drug offender has twice the odds of going to prison as a similar female offender. Sentence lengths for men are typically 25 to 30 percent longer for all types of cases. Additional analyses show that the effects are present every year.

Rules Having Questionable Adverse Impacts. Discrimination by sentencing judges cannot explain the growing gap between African-American and other offenders observed during the guidelines era. Another possibility is sentencing rules that have a disproportionate impact on a particular demographic group. Research has shown that differences in the types of crimes committed by members of different groups and in their criminal histories explains much of the gap in average sentences among them. Rules that are needed to achieve the purposes of sentencing are considered fair, even if they adversely affect some groups more than others. But if a sentencing rule has a significant adverse impact and there is insufficient evidence that the rule is needed to achieve a statutory purpose of sentencing, then the rule might be considered unfair toward the affected group.

In its cocaine reports, the Commission addressed crack cocaine defendants—over eighty percent of whom are Black—who are given identical sentences under the statutes and the guidelines

as powder cocaine offenders who traffic 100 times as much drug (the so-called 1-to-100 quantity ratio). The average length of imprisonment for crack cocaine was 115 months, compared to 77 months for the powder form of the drug. The Commission reported that the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine. For these reasons, the Commission recommended that cocaine sentencing be reconsidered. If the Commission's recommendations were adopted, the gap between African-American and other offenders would narrow significantly. Other rules in the statutes and guidelines have adverse impacts on particular groups. The efficacy of these rules for advancing the purposes of sentencing should be carefully assessed.

Summary and Conclusions

Significant achievement of the goals of sentencing reform. In general, the guidelines have fostered progress in achieving the goals of the Sentencing Reform Act. Sentencing is more transparent, based on articulated reasons stated in open court and reviewable on appeal. Punishment is more certain and predictable, allowing the parties to better anticipate the sentencing consequences of case facts, and allowing the system to better predict the impact of changes in policy on prison populations and correctional resources. Sentence severity has been increased for many types of crime, in some cases substantially. Most important, the guidelines do not admit consideration of factors, such as race or ethnicity, that are irrelevant to the purposes of sentencing. There is less inter-judge disparity for similar offenders committing similar offenses**.**

Sentencing reform has had its greatest impact controlling disparity arising from the source at which the guidelines themselves were targeted—judicial discretion. Disparity arising from the decisions of other participants in the sentencing system, or from the process of sentencing policymaking itself, has been less successfully controlled. Statutory minimum penalties are invoked unevenly and introduce disproportionality and disparity when they prevent the guidelines from individualizing sentences. Presentencing stages, such as charging and plea negotiation, lack the transparency of the sentencing decision, making research more difficult. But significant evidence suggests that presentencing stages introduce disparity in sentencing. There is still work to be done to achieve the ambitious goals of sentencing reform in all respects.

Partial implementation of the components of sentencing reform. Part of the reason not all the goals of sentencing reform have been fully achieved is that not all of the components of guidelines implementation put in place at the dawn of the guidelines era have been fully implemented or have worked as intended. Probation officers conduct presentencing investigations to the best of their abilities given limited resources. Judges conscientiously apply the guidelines to the facts as they know them. Appellate review corrects guideline misapplications and alerts the Commission to areas of ambiguity where clarification of the guidelines is needed. But neither appellate review nor guidelines amendments have prevented, at least through the 2002 data currently available, significant variations in departure rates. Neither Department policy nor judicial review of plea agreements has prevented plea bargaining from sometimes circumventing proper application of the guidelines needed to ensure similar treatment of offenders who commit similar crimes.

The SRA also outlined three major components of sentencing policy development: 1) utilization of research and criminological expertise developed by the Commission, 2) collaboration among policymakers and front-line implementers in the courts, and 3) political accountability through legislative directives and review. The Commission has worked to be responsive to the concerns of Congress, and its priorities and policymaking agenda have been greatly influenced by congressional directives and other crime legislation. In some cases, the results of research and collaboration have been overridden or ignored in policymaking during the guidelines era through enactment of mandatory minimums or specific directives to the Commission.

The Commission is uniquely qualified to conduct studies using its vast database, obtain the views and comments of various segments of the federal criminal justice community, review the academic literature, and report back to Congress in a timely manner. These are the processes set out in the SRA, which established the Commission as the clearinghouse for information on federal sentencing practices and the forum for collaboration among policymakers, implementers, and other stakeholders. As an independent agency in the Judiciary, but with frequent interaction with the three branches of government, the Commission is well-positioned to develop fair and effective sentencing policy as long as it continues to receive the resources and support it needs to carry out its vital mission.

Preface

Prior to November 1, 1987, the implementation of federal sentencing guidelines, sentencing in the federal courts was very different. Crimes typically carried broad statute-defined ranges of possible penalties and sentencing judges had discretion to choose the penalty within the statutory range they felt would best achieve the purposes of sentencing. Judges were not required to explain the reasons for their sentences, and the sentences themselves were largely immune from appeal. If prison time was ordered, the time defendants actually served depended only partly on the sentence imposed by the judge. Release dates generally were determined by the United States Parole Commission and defendants typically served just 58 percent of the sentence that had been imposed (BJS, 1987).

These factors contributed to a widespread perception that sentences imposed and sentences and prison terms served under the old "indeterminate" sentencing system were unfair, disparate, and ineffective for controlling crime. Respect for law enforcement and the entire criminal justice process was undermined when offenders served only a fraction of the sentence imposed by the judge. The Sentencing Reform Act of 1984 [SRA] sought to establish sentencing practices that would eliminate unwarranted disparity, assure certainty and fairness, reflect advances in criminological knowledge, achieve proportionate punishment, and control crime through the deterrence, incapacitation, and rehabilitation of offenders.

The SRA established the U.S. Sentencing Commission, composed of federal judges and other experts in the field of sentencing, and charged it with the task of promulgating sentencing guidelines for federal courts. After eighteen months of deliberations, the Commission issued the initial set of guidelines, which took effect on November 1, 1987. Four years later, in December 1991, the Commission submitted its report to Congress, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* to Congress. The gradual implementation of the guidelines, which applied only to offenses committed after their enactment, and numerous court challenges delayed full implementation until the early 1990s. Furthermore, the guidelines were accompanied by changes of policy and practice that took time to be fully established. Thus, when the Commission released its Four-year Evaluation, it noted the report was a "preliminary assessment of some short-term effects" (USSC, 1991a) rather than a comprehensive examination of the effects of the guidelines on federal sentencing practices.

Twenty years after the SRA was passed and with fifteen years of data on sentences imposed under the guidelines, the Commission is in a better position to evaluate how well the changes brought by the SRA have achieved the ambitious goals Congress set for federal sentencing. This report will update the Four-year Evaluation and outline areas for further research in the continuing evolution of sentence reform.

Overview of the Fifteen-Year Evaluation

Fifteen Years of Guidelines Sentencing is one of a series of publications describing the results of the Commission's fifteen-year anniversary evaluation of the guidelines. In addition to this report, the Commission has published three other monographs: *Cocaine and Federal Sentencing Policy* (May 2002), the third in a series of Commission reports on cocaine sentencing; *A Survey of Article III Judges on the Federal Sentencing Guidelines, Final Report* (February 2003), which provides all the findings of the Commission's survey conducted as part of the Fifteen-Year Evaluation; and *Downward Departures from the Federal Sentencing Guidelines* (October 2003). These reports are available at the Commission website, www.ussc.gov. In addition, the Commission is releasing on its website a research series on the recidivism of federal offenders. Two reports, *Recidivism and the First Offender and Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* are currently available.

Fifteen Years of Guidelines Sentencing undertakes a survey of the federal sentencing system in light of the goals for sentencing reform established by Congress in the SRA. It draws upon a diverse pool of research, including work from both inside and outside the Commission. A bibliography of the published research bearing on the effectiveness of the guidelines is included in this report as Appendix A. The report picks up where the Four-Year Evaluation left off. The Commission targeted three primary areas for special consideration in this report: 1) the guidelines' impact on the transparency and rationality of sentencing, and the certainty and severity of punishment, 2) the impact of presentencing stages and inter-judge and regional disparity, and 3) research on racial, ethnic, and gender disparities in sentencing today. In all three areas, evidence indicates that in the fifteen years under sentencing guidelines, we have made progress toward meeting the goals of sentencing reform.

As policymakers reconsider the federal sentencing system's purposes and effectiveness, the Commission believes improvements in the system can best be achieved by careful consideration of the best available evidence concerning what works in sentencing policy, what doesn't work, and what we still do not know. The Fifteen-Year Evaluation was designed to inform this debate by summarizing the current state of "knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C § 991(b)(1)(C).

Chapter One:
Introduction to the Sentencing Reform Act

A. The History of the Sentencing Reform Act

The history of the Sentencing Reform Act [SRA] has been described in the Commission's Four-Year Evaluation (USSC, 1991a), as well as in numerous articles and books listed in the bibliography in Appendix A (*see, e.g.*, Stith & Cabranes, 1998; Miller & Wright, 1999). This history will not be recounted in detail here. Instead, this section briefly sketches the historical context of sentencing reform, the legislative history of the SRA, and the initial development of the sentencing guidelines for those who are unfamiliar with other sources, with an emphasis on aspects that are valuable for understanding the workings of the guidelines system today.

1. The Roots of Reform

Federal sentencing reform has been described as another in a line of twentieth century legal reform movements that reflect two sometimes-competing American themes of Progressivism and Populism (Brooks, 2002). In the realm of government, the Progressive spirit has generally favored formation of public policy by expert agencies empowered to conduct research. By contrast, the Populist spirit has generally favored formation of public policy based on common sense and public sentiment.

The heritage of Progressivism can be seen in the SRA's emphasis on creation of an expert and independent agency, the United States Sentencing Commission. The SRA created a bipartisan commission in the judicial branch of government, and directed it to establish a "research and development program" (28 U.S.C. § 995 (a)(12)) that can "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(2). The Commission is to establish sentencing polices that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process . . . ." 28 U.S.C. § 991(b)(1)(C). These sections all reflect the Progressive impulse, articulated by such early twentieth century reformers as John Dewey, to develop a scientific approach to social problems. Creation of independent commissions was a favorite tool of Progressive reformers intent on bringing expertise to public policymaking insulated from the passions of politics.

Early in the twentieth century, the Progressive impulse in criminal justice was expressed through the growth of indeterminate sentencing and the rise of the rehabilitative ideal (Rothman, 1983). Prisons were re-conceptualized from places of penance and punishment to institutions for the transformation of offenders into law-abiding citizens. Parole release and probation supervision were invented as central components of the new approach. Medical and social-psychological experts were called upon to design treatment and supervision programs, and indeterminate sentences allowed the

length of incarceration to be tailored to each offender's progress toward rehabilitation, as judged by expert evaluators.

By the 1970s, faith in the rehabilitative ideal had declined (Allen, 1981), but faith in expert commissions remained. Progressive-minded reformers were led to a search for alternatives to indeterminate sentencing by growing mistrust of a "therapeutic state" and the dangers to liberty and fairness it potentially posed (Kittrie, 1971; Twentieth Century Fund Task Force on Criminal Sentencing, 1976), and by the lack of strong evidence for the effectiveness of correctional treatment programs (Martinson, 1974). Several proposals to rationalize the federal criminal code (ALI, 1962; ABA, 1968, 1979; Nat'l Comm. on Reform of Federal Criminal Law, 1971) included proposals for sentencing reform. Judge Marvin Frankel's influential book, *Criminal Sentences: Law Without Order* (1972), called for creation of an independent sentencing commission that could replace judicial and parole board discretion with sentencing guidelines. In this new Progressive vision, the medical model of rehabilitation was replaced with legal and technocratic expertise, which could fashion penalties that were calibrated to the seriousness of the crime (Von Hirsch, 1976) or that were optimal for maximizing the control of crime while minimizing the costs of criminal justice (Becker, 1968).

Alongside the sections of the SRA that reflect a Progressive spirit, however, are sections that reflect a Populist distrust of both elite "experts" and politically unaccountable judges. The sentencing guidelines were intended most importantly to curtail judicial and Parole Commission discretion, which was viewed as "arbitrary and capricious" and an ineffective deterrent to crime.[1] The Sentencing Commission was also ordered to eliminate sentences that, in the view of Congress, "in many cases . . . do not accurately reflect the seriousness of the offense." 28 U.S.C. § 994(m). The SRA contains dozens of other detailed instructions to the Commission, including directives to consider "the community view of the gravity of the offense;" and "the public concern generated by the offense . . . ." 28 U.S.C. § 994(c). Most importantly, while the Commission is charged with developing and amending the guidelines, the SRA ensures that the people's elected representatives in Congress have an opportunity to review the Commission's work before it becomes law. Congress reserved to itself the power, each year, to "modify or disapprove" any of the Commission's amendments to the guidelines. 28 U.S.C. § 994(p).

Distrust of judges is a recurring theme of Populism, voiced early in the twentieth century by Nebraska Senator George Norris (1922), who declared that "Federal judges are not responsive to the pulsations of humanity" (Brooks, 2002). On two major occasions in the second half of the twentieth century, this distrust led to a very different type of determinate sentencing reform—a proliferation of mandatory minimum penalty statutes. Fixed mandatory penalties had been common in Colonial times but grew increasingly rare during the nineteenth century (Lowenthal, 1993). In 1956, however, Congress enacted the Narcotic Control Act, also known as the "Boggs Act," which established minimum terms of imprisonment without parole for certain drug trafficking offenses. Finding that

[1] S. REP. NO. 225, 98th Cong., 2nd Sess. (1984), at 65 [hereinafter SENATE REPORT].

increases in sentence length "had not shown the expected overall reduction in drug law violations"[2] Congress pulled back from statutory minimum penalties with passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which repealed virtually all of the mandatory sentencing provisions. But beginning again in 1984, with expansions in 1986 and 1988, Congress enacted a series of mandatory penalties targeted at firearm, drug, and sex offenses, and at repeat offenders. Over one hundred such statutory penalties exist today alongside the sentencing guidelines, and more mandatory penalty provisions continue to be proposed in almost every session.

The tension between Commission developed guidelines and Congress enacted mandatory minimum penalty statutes greatly complicates the task of sentencing reform, as discussed in the Commission's *Special Report to Congress: Mandatory Penalties in the Federal Criminal Justice System* (USSC, 1991b). The root tension between Progressive and Populist reform—between delegation to experts and popular oversight—also contributed to a lengthy process of public debate and legislative development before final passage of the SRA in 1984. These tensions resulted in legislation that reflects aspects of both movements, and thus, compromises and contradictions in both the goals to be achieved by sentencing reform and in the mechanisms created to achieve them.

2. Legislative Development of the SRA

The legislative history of the SRA has been subject to widely varying interpretations. Some scholars view the legislation as a thoughtful blueprint for rationalizing the sentencing process, with significant liberal elements meant to reduce over-reliance on imprisonment and preserve significant judicial discretion, albeit with some compromise of these principles as the legislation took final shape (Miller & Wright, 1999). Others believe the SRA was subtly transformed from the liberal blueprint originally introduced by Senator Edward Kennedy in 1975 into a law-and-order measure designed to increase the severity of punishment and virtually eliminate judges' discretion to consider individual offender characteristics (Stith & Koh, 1993). Most agree, however, that the legislation that emerged from nearly a decade of deliberation and compromise contained important ambiguities, which left the original Sentencing Commission with significant administrative discretion to shape the guidelines system it was directed to create (Feinberg, 1993; Miller & Wright, 1999; Hofer & Allenbaugh, 2003).

The legislation that ultimately became the SRA survived the introduction of competing proposals in both the House and Senate. It was repeatedly amended over a decade of development before enactment, somewhat surprisingly, on October 12, 1984, as part of an omnibus continuing appropriations measure. The final version differed from the bill that was originally introduced and from competing proposals in many important respects.

---

[2] S. REP. NO. 613, 91st Cong., 1st Sess. 2 (1969).

Sentencing Reform Act Time Line

Jan. 1971 National Commission on Reform of Federal Criminal Laws (the "Brown Commission") issues report. The commission recommends classification and grading of offenses, concise listing of authorized sentences, limits on the cumulation of punishment for multiple offenses, parole following longer periods of imprisonment, and limited appellate review.

Nov. 1971 U.S. District Judge Marvin E. Frankel (S.D.N.Y.) delivers lectures at the University of Cincinnati Law School, calling for a national commission to study sentencing, corrections, and parole; formulate laws and rules on the basis of the research; and enact rules subject to congressional veto.

1971-1974 Senate Subcommittee on Criminal Laws and Procedures considers Brown Commission proposals. The subcommittee holds hearings during the 92nd Congress and in the 93rd focuses on two legislative proposals: (1) S. 1, the Criminal Justice Codification, Revision, and Reform Act of 1973 and S. 1400, the Criminal Code Reform Act of 1973. The bills include large-scale criminal code re-codification. No mention is made of a sentencing commission or sentencing guidelines.

1975 Yale Law School professors (with support of the Guggenheim Foundation) advocate creation of a sentencing commission to issue sentencing guidelines, appellate review of sentences, and the abolition of parole.

Nov. 1975 Sen. Edward Kennedy introduces bill during the 94th Congress (S. 2699) to form United States Commission on Sentencing to issue sentencing guidelines and to reduce numerous statutory maximum sentences.

May 1976 The Parole Commission and Reorganization Act of 1976 (Pub. L. No. 94-233, 90 Stat. 219 (May 14, 1976)) is enacted. The act codifies the Parole Commission's program that applied guidelines to all parole decisions beginning in 1974.

1977-78 In the 95th Congress, Senator McClellan and Sen. Kennedy sponsor S. 1437 to re-codify federal criminal laws, restrict parole, and to establish a sentencing commission to draft sentencing guidelines. An amended S. 1437 passes the Senate. The Subcommittee on Criminal Justice of the House Judiciary Committee subsequently conducts hearings on the bill and an alternative proposal, but reports a number of problems and takes no further action.

Sentencing Reform Act Time Line (Continued)

1979-1980 During the 96th Congress, S. 1722, the Criminal Code Reform Act of 1979 is introduced, which is similar to S. 1437 and creates a sentencing commission, but abolishes parole and adds the concept of supervised release. The House Judiciary Committee approves a sentencing bill (H.R. 6915) that proposes promulgation of guidelines by a seven-member, part-time, Judicial Conference Committee on Sentencing; authorizes greater flexibility to depart from those guidelines; and retains parole. Neither chamber acts on its version of the legislation.

1982 During the 97th Congress, Senate Judiciary Committee, reports a comprehensive criminal code revision bill, S. 1630, but no Senate action occurs on the proposal. A nearly identical sentencing reform package, S. 2572, passes the Senate, but gets deleted from the House version of the bill.

1983-1984 Senators Strom Thurmond and Paul Laxalt, during the 98th Congress, introduce S. 829, comprehensive crime control legislation that contains sentencing reform as Title II. Senate Judiciary Committee holds hearings and breaks S. 829 into several bills, including S. 1762, the Comprehensive Crime Control Act of 1983, which contained a major section on sentencing reform, and S. 668, a bill by Sen. Kennedy virtually identical to Title II. Both bills pass the Senate in 1984.

The House Judiciary Committee reports out H.R. 6012 that calls for determinate parole terms and the creation of a part-time commission within the Judicial Conference to draft advisory sentencing guidelines. The bill is not considered by the full House.

An amended Comprehensive Crime Control Act is made part of a continuing appropriations bill, is passed by both chambers of Congress, and is signed into law by President Reagan on October 12, 1984. The portion of the act creating the United States Sentencing Commission and instructing it to create sentencing guidelines for the federal courts is termed the Sentencing Reform Act of 1984.

Away from judicial control of guidelines development. The bill originally introduced by Sen. Kennedy[3] and subsequent competing proposals in the House[4] called for development of sentencing guidelines within the existing administrative structure of the judiciary. Some proposals called for guidelines to be developed by a committee of the Judicial Conference of the United States. Sen. Kennedy's bill called for a commission whose members would be chosen entirely by the Judicial Conference. But over its years of development, the idea of the Sentencing Commission was transformed from a judge-dominated agency to an agency whose membership is more closely connected to the Executive and Legislative branches. Under the terms of the SRA, as finally enacted, all commissioners are to be chosen by the President with the advice and consent of the Senate. 28 U.S.C. § 991(a). The role of the Judicial Conference was reduced from choosing the commissioners, to recommending a list of judges from which the President would be required to choose, to recommending a list of six judges which the President is required only to "consider." The SRA required just three of seven voting commissioners to be active federal judges. The PROTECT Act recently further changed the Commission structure to eliminate the requirement of a minimum judicial presence on the Commission and set the maximum number of judge-members at three.

Proponents of judicial involvement had argued that the judiciary already had the capacity for guidelines development, which was similar to their existing responsibility for developing rules of practice and procedure for the courts. Some members of the House believed that "[j]udges who have had a strong

The U.S. Sentencing Commissioners

The seven voting members on the Commission are appointed by the President, confirmed by the Senate, and serve staggered six-year terms. The Commission has always included federal judges, which are selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. The Commission has a chair and three vice chairs.

No more than four commissioners, or two vice chairs, may belong to the same political party. The Attorney General or his/ her designee is a non-voting, *ex-officio* member of the Commission, as is the chair of the U.S. Parole Commission. No commissioner may serve more than two full terms. When an appointment expires, the commissioner may continue to serve until Congress adjourns sine die or a new commissioner is appointed. Four affirmative votes are necessary for the Commission to pass sentencing policy.

Since its inception there have been four Commission chairs: Judge William W. Wilkins, Jr., U.S. Court of Appeals, Fourth Circuit; Judge Richard P. Conaboy, U.S. District Court, Middle District of Pennsylvania; Judge Diana E. Murphy, U.S. Court of Appeals, Eighth Circuit; and the present chair, Judge Ricardo H. Hinojosa, U.S. District Court, Southern District of Texas.

[3] S. 1437, 95th Cong., 1st Sess. (1977).

[4] H.R. 6915, 96th Cong., 2nd Sess. (1980).

voice in developing the guidelines will be more likely to consistently and fairly apply them."[5] But the prevailing opinion was "a reluctance to have the people in the middle of the problem try to solve it."[6] Rather than retain even tighter control over sentencing—as some states such as California had with legislatively drafted determinate sentences, and as Congress itself did when enacting mandatory minimum penalties—Congress instead opted for an independent Commission within the Judiciary with close connections to the Legislative and Executive Branches.

Away from voluntary guidelines. As it developed, sentencing reform legislation shifted from a model that continued significant discretion for sentencing judges toward a model of sharply limited discretion. Sentencing guidelines systems in the states range along a continuum from "voluntary" or "advisory," to "presumptive," to "mandatory" (BJA, 1998). The differences among them are marked by the standards governing when a judge may depart from the recommended guideline range, and the extent of appellate review of those departures. The original federal legislation called for advisory guidelines with limited appellate review. During Senate debates in 1978 however a standard was added requiring that judges sentence within the prescribed guideline range unless "the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Commission in formulating the guidelines and that should result in a different sentence."[7] This was intended to ensure that the guidelines were treated as "presumptive" rather than "voluntary" (Miller & Wright, 1999). Subsequent attempts to loosen the departure standard in the Senate and the House were defeated (Stith & Koh, 1993).

The final SRA also provided for an automatic right-of-appeal if a judge sentences outside the prescribed guideline range. 18 U.S.C. § 3742. Defendants have an automatic right-of-appeal if a judge departs upward (imposes a sentence that is longer than the top of the guideline range). The government has an automatic right-of-appeal if the judge departs downward. Sentences may also be appealed by either party based on a misapplication of the guidelines.

As the guidelines were taking effect in 1987, the departure standard was again revisited and revised slightly:

> The court shall impose a sentence of the kind, and within the range [required by the guidelines] unless the court finds that there exists an aggravating or mitigating circumstance *of a kind, or to a degree,* not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described" (new language italicized). 18 U.S.C. § 3553(b).

The author of this amendment, Rep. John Conyers, apparently intended it to expand the discretion of the sentencing judge to depart from the guidelines. However, a "joint explanation" inserted into the Congressional Record by several senators contradicted this analysis (Miller & Wright, 1999).

---

[5] H.R. REP. NO. 1017, 98th Congress, 2nd Session, at 93-94 (1984).

[6] CONG. Q., 1983, at 339.

[7] 124 CONG. REC. 382-83 (1978) (unprinted amend. No. 1100, adopted Jan. 23, 1978).

Thus, the legislative history and final text of the SRA are somewhat ambiguous as to just how restrictive the departure standard was intended to be, particularly in combination with other provisions of the Act. Ultimately, actions of the Commission, the appellate courts, and Congress shaped where the federal guidelines fall on the continuum between presumptive and mandatory. Prior to the

Blakely v. Washington: A New Challenge for Federal Sentencing Reform

On June 24, 2004, the Supreme Court decided *Blakely v. Washington*, 124 S.Ct. 2531 (2004), a case with potentially profound consequences for the federal sentencing guidelines and for the sentencing reform movement. The court invalidated a sentence imposed under the Washington State sentencing guidelines because it violated the defendant's rights under the Sixth Amendment to the United States Constitution. The judge in the case had departed from the standard sentencing range, set out by the legislature in the state's sentencing statutes, based on an aggravating factor that had not been admitted by the defendant as part of his guilty plea nor proven to a jury beyond a reasonable doubt.

Although the majority opinion made clear that the court was not passing judgment on the constitutionality of the federal sentencing guidelines, which were not before the court, some of the dissenting justices and numerous commentators argued that the decision raised questions about the constitutionality of the federal guidelines or the procedures used to enhance sentences under them. District judges and circuit courts have reached varying opinions on the implications of the decision for federal sentencing. The Supreme Court has accepted certiorari in two cases in order to clarify the implications of *Blakely*, if any, for the federal sentencing guidelines. Oral arguments were given in *United States v. Booker* (375 F.3d 508 (7th Cir. 2004)) and *United States v. Fanfan* (2004 U.S. Dist. LEXIS 18593 (D.Me. June 28, 2004) on October 4, 2004, the first day of the court's 2004-2005 term, with a decision in the case expected later in the year.

Until these questions are resolved, the ultimate status of the federal sentencing guidelines will remain uncertain. In the meantime, numerous observers have hoped that the *Blakely* decision will inaugurate a renewed national conversation about the state of federal sentencing and the sentencing guidelines. (Testimony of witnesses at a hearing before the Senate Judiciary Committee, "*Blakely v. Washington* and the Future of the Federal Sentencing Guidelines," July 13, 2004.) The Commission will be part of this conversation and believes that the results of the Fifteen-Year Evaluation of the guidelines can make an important contribution to understanding and improving federal sentencing.

Supreme Court's decision in June, 2004, in the case of *Blakely v. Washington,*[8] which again raised questions about the constitutionality of the federal guidelines, all observers agreed that the federal guidelines were far from voluntary. Judges were legally bound to apply them unless a departure could be justified to the appellate court if the case were appealed. But whether the guidelines were sufficiently mandatory was a source of continuing debate.

In 2003, Congress concluded that the governing standards for appellate review of departures had resulted in an unacceptably high downward departure rate, particularly in the area of sex offenses against children. For these latter offenses, the PROTECT Act of 2003 eliminated judicial departures for all reasons except those specifically authorized in Chapter Five, Part K, of the *Guidelines Manual*. For other downward departures, the PROTECT Act established *de novo* review upon appeal. The Act also directed the Sentencing Commission to amend the guidelines and policy statements in order to substantially reduce the incidence of downward departures. The Commission implemented this directive in amendment 651, which narrowed the circumstances in which departure is authorized. Results of a Commission study of downward departures was published simultaneously with the amendment (USSC, 2003b).

The PROTECT Act made other changes to sentencing policies and practices that will be discussed further where appropriate in the remainder of this report. It also established requirements for reporting sentencing and departure information to the Commission and, upon their request, to the Department and Congress. Data from these new reporting requirements are not available at the time this report is being written, but departures will continue to be closely monitored by the Commission.

Toward greater sentencing severity. Changes in the legislation through its decade of development also encouraged the Commission, and in some cases required it, to increase sentence severity. Provisions designed to control or reduce the use of imprisonment were weakened. For example, the bill as originally introduced directed the Commission to assure that the capacity of the federal prisons "will not be exceeded."[9] But, in the final SRA the Commission is required only to "minimize the likelihood" that prison capacity will be exceeded. 28 U.S.C. § 994(g). Similarly, while the original legislation encouraged the Commission to be guided by the prison terms then typically served for various types of crime, the final Act specifically directed the Commission to use then-current practice only as a "starting point." The Commission was to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." 28 U.S.C. § 994(m).

As described above, the SRA contains other provisions reflecting a Populist belief that judges tend toward leniency and should be constrained by "guidelines and policy statements that have teeth in them."[10] The final SRA also contained an early type of "Three-Strikes-You're-Out" provision that requires a term "at or near the maximum term authorized" for repeat drug and violent offenders.

---

[8] 124 S.Ct. 2531 (June 24, 2004).

[9] S. 1437, *supra* note 3, at § 124.

[10] 130 CONG. REC. 1644, 838 (1984)(statement of Sen. Strom Thurmond).

28 U.S.C. § 994(h). As will be shown in Chapter Two, the SRA ultimately resulted in guidelines that have contributed to a doubling of the average prison time served by federal felony offenders.

Toward regulation of plea bargaining. Finally, concern that charge selection and plea bargaining could limit or thwart the goals of sentencing reform surfaced early in scholarly writings (Twentieth Century Fund, 1976; Zimring, 1976) and in congressional debates (*see* Schulhofer & Nagel, 1989). Reform skeptics pointed out that prosecutors had considerable discretion to select charges and structure plea agreements, but that in the preguidelines era judges and the Parole Commission, in setting sentences and release dates, could temper the effects of prior prosecutorial decisions. Binding sentencing guidelines, without parole, could eliminate these checks, and prosecutors could conceivably exercise considerable control over sentences through the charges they bring and the facts they prove at sentencing. The result would be a shift of discretion toward prosecutors, which could perpetuate disparity and reduce the certainty of punishment.

In 1978, in response to these concerns, the Federal Judicial Center [hereinafter FJC] undertook a study of the interaction of prosecutorial discretion and sentencing (FJC, 1979). It concluded that in the preguidelines era, judges could control the impact of plea bargaining in various ways. Under sentencing guidelines, however, discretion could be transferred to prosecutors. Further, the exercise of prosecutorial discretion would be relatively invisible; unless some judicial mechanism were found to control it, plea bargaining would be subject to supervision only within the Department of Justice and each U. S. attorney's office. The report recommended that the sentencing reform bills then pending before Congress should be amended by adding a directive to the Sentencing Commission to issue guidelines for judges to use when deciding whether to accept a guilty plea.

The FJC report heightened congressional concern that sentencing reform might actually increase disparities in federal sentencing by shifting discretion to prosecutors (*see* Schulhofer & Nagel, 1989). To address this possibility, Congress adopted a slightly weakened version of the mechanism recommended in the report. The Senate amended the pending bill to direct the Sentencing Commission to issue *policy statements*, instead of binding *guidelines*, governing the acceptance of plea agreements. This provision was included in the SRA as 28 U.S.C. § 994(a)(2)(E), which ordered the Commission to promulgate policy statements to all courts regarding the appropriate use of "the authority granted under Rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement . . . ." The *Senate Report* accompanying the SRA confidently asserted that "this guidance will assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines."[11]

By the time the SRA was signed into law by President Reagan in 1984, it had undergone nearly ten years of development. It was designed to revamp a federal sentencing system Congress described as "ripe for reform."[12]

---

[11] SENATE REPORT, *supra* note 1, at 63.

[12] *Id.*

B. Goals and Purposes of the SRA

The goals identified in the SRA for the new system provide the best criteria for judging whether sentencing reform has been successful. These goals can be divided into two groups. The first group, the goals of sentencing reform itself, include certainty and transparency in punishment and the elimination of unwarranted disparity. Research on the effectiveness of the system at achieving these goals is the subject of the remaining chapters of this report. The second group, establishment of policies that will best accomplish the purposes of sentencing—which are usually summarized as just punishment, deterrence, incapacitation, and rehabilitation—is the subject of previous Commission-sponsored research (*see* Rossi & Berk, 1996) as well as ongoing research at the Commission. Results of this work will be addressed in future installments of the research series on the recidivism of federal offenders and other commission reports.

1. The Goals of Sentencing Reform

Reducing unwarranted disparity. The "first and foremost" goal of sentencing reform is avoiding unwarranted sentencing disparity (Feinberg, 1993). Much has been written defining unwarranted disparity (Blumstein, 1983). Obviously, not all different treatment of offenders is unfair, so long as it reflects differences in the seriousness of their crimes or in other relevant case or offender characteristics. But sentencing reform aimed to:

> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities *among defendants with similar records who have been found guilty of similar criminal conduct* while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; 28 U.S.C. § 991(b)(1)(B) (emphasis added).

Section 994(f) reiterates this goal of "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities."

The possibility that different racial or ethnic groups might receive unfair treatment was part of the motivation for the SRA, and it remains the subject of much public and scholarly interest. Research investigating the role of race, ethnicity, and gender in federal sentencing is presented and discussed in Chapter Four of this report. The legislative history of the Act clearly shows, however, that different treatment by different judges was the chief problem the Act was designed to address, as well as regional differences in sentencing.[13] The success of the guidelines at reducing inter-judge and regional sentencing disparities will be discussed in Chapter Three of this report.

Assuring certainty and severity of punishment. In a narrow sense, the success of the guidelines at achieving certainty of punishment has never been an issue, because the establishment of truth-in-sentencing through the elimination of parole accomplished it at a stroke. In a broader

[13] SENATE REPORT, *supra* note 1, at 41-46.

sense, however, certainty of punishment is weakened when defendants are not held accountable for all of the criminal acts they actually committed. Charging or plea bargaining practices that allow defendants to avoid punishment for some acts, can undermine the certainty of punishment in this sense. Existing evidence regarding the effects of charging decisions, plea bargaining, and guideline avoidance on the certainty of punishment and on sentencing disparity will be reviewed in Chapter Three of this report.

The SRA also called for increased sentence severity for many types of offenses. The effect of the guidelines on the use of probation and the length of time served for various types of crime will be discussed in Chapter Two of this report.

Increased rationality and transparency of punishment. Finally, the SRA aimed to increase the rationality and transparency of sentences. By replacing the unguided discretion of the preguidelines era with a system of binding legal rules that specify in advance the effect of most offense circumstances the predictability of sentences was increased. Rationality was further advanced by requiring the Commission to develop policies and practices that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process" (28 U.S.C.§ 991(b)(1)(C)) and to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing." 28 U.S.C.§ 991(b)(2). Transparency was advanced by requiring each judge to "state in open court the reason for its imposition of the particular sentence" and to provide a written record of these reasons. 18 U.S.C. 3553(c). Disclosure of the presentence report, with its preliminary application of the guidelines to each case, at least ten days before the sentencing hearing, further reduces the possibility of surprise and confusion regarding the reasons for the sentence ultimately imposed. 18 U.S.C. § 3552(d). The increased rationality, transparency, and predictability of the guidelines system will be discussed in Chapter Five of this report.

2. The Purposes of Punishment

In addition to these goals of sentencing reform, the SRA directed the Commission to: "(1) establish sentencing policies and practices for the Federal criminal justice system that—(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of Title 18, United States Code." 28 U.S.C. § 991(b)(1). That section lists the purposes as:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

Proportionality: Making the Punishment Fit the Crime. The vast majority of the sentencing guidelines, particularly in Chapters Two and Three of the *Guidelines Manual*, are aimed at assuring that the severity of punishment is proportional to the seriousness of the crime. Each crime is assigned a "base offense level" as a starting point in grading the seriousness of the offense. Guideline

adjustments then increase or decrease this score to account for aggravating or mitigating factors that differentiate degrees of harm of different offenses and the varying culpability in each case. The Commission has used a wide variety of information to assess crime seriousness, including survey data on public perceptions of the gravity of different offenses, analysis of various crimes' economic impacts, and medical and psychological data on the harm caused by drug trafficking, sexual assaults, pollution, and other offenses.

Crime control through incapacitation and deterrence. The original Commission recognized crime control as the ultimate objective of the criminal law and of sentencing policy (*Guidelines Manual*, Historical Introduction, at 2). It also recognized that proportionate punishment can control crime through a deterrent effect. It followed the practice of most state guideline systems (Kauder, et al., 1997) and the federal Parole Commission—which had developed a "Salient Factor Score" to help predict the recidivism risk of various offenders—by increasing the term of imprisonment for offenders who were at a greater risk of recidivism (Hoffman & Beck, 1997). To minimize conflict with the other purposes of punishment, the Commission chose to predict risk using only the offender's criminal history (Hofer & Allenbaugh, 2003). Chapter Four of the *Guidelines Manual* provides rules for assigning each offender to a "criminal history category" which, along with the offense level, determines the range of imprisonment and sentencing options available to the judge.

As part of the Fifteen-Year Evaluation, the Commission has undertaken a major empirical study of the recidivism of federal offenders. The results of this study, published as Release 1 in the Research Series on the Recidivism of Federal Guideline Offenders, have reconfirmed the validity of the criminal history score as a measure of recidivism risk (USSC, 2004). Further analysis of these data will allow the Commission to refine the criminal history category to make it an even more accurate predictor of risk. Additional research is also underway to assess the deterrent effect of various terms of imprisonment and other aspects of the guidelines' efforts at crime control.

Rehabilitation. The SRA directs judges to consider each defendant's need for educational and treatment services when imposing sentence. However, the SRA and the guidelines make rehabilitation a lower priority than other sentencing goals (*see* Hofer & Allenbaugh, 2003). For example, the Commission was directed to ensure that "the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." 28 U.S.C. § 994(k). Despite the relatively low priority given rehabilitation, judges are still required to assess a defendant's need for treatment or training when they decide whether to impose any special conditions of probation or supervised release. *See* USSG §5D1.3(d). (Supervised release has replaced parole as the means to provide offenders with post-imprisonment supervision.) Because prison rehabilitation programs are administered by the Bureau of Prisons and post-imprisonment programs are administered by the probation service of the Administrative Office of the United States Court, these agencies have conducted the most extensive research on the effectiveness of treatment and training programs (BOP, 1997).

C. The Commission's Implementation of the SRA

A number of articles by original commissioners have described in detail how they set about implementing the directives in the SRA (Breyer, 1988; Nagel, 1990; Wilkins, 1992a; Corrothers, 1992). The details of these efforts will not be repeated here, but a brief summary of the guideline development process is provided for readers unfamiliar with the history of the Commission. An introduction to how the guidelines determine the sentence is also provided for those unacquainted with the guidelines' operation.

1. Guidelines Drafting Procedures

Sentencing Philosophy. The SRA directed the Commission to develop guidelines that would advance all of the goals of sentencing reform and all the purposes of sentencing reviewed above. Sentencing philosophy was a source of much discussion among the original Commissioners. For the first 18 months of its existence, competing versions of the Guidelines were developed and debated, each built on different theoretical principles, such as just desert theory or the economics-based theory of optimal penalties (Nagel, 1990). None of these proposals gained sufficient support to win acceptance, so the Commission decided to use an empirical approach instead (*see* Breyer, 1988, for a fuller discussion of these developments).

Although the Commission has never explicitly articulated a philosophy of sentencing, the guidelines rules themselves reflect a fairly clear ordering (Bowman, 1996; Hofer & Allenbaugh, 2003). Like guideline systems in the states, the federal guidelines reflect the current "consensus model of criminal punishment" (Frase, 2003), a form of "limiting retributivism" (Morris, 1977). This approach places primary emphasis on punishment proportionate to the seriousness of the crime and, within the broad parameters of this retributivism, lengthier incarceration for offenders who are most likely to recidivate. Some scholars call this approach "modified just desert" (Monahan, 1982). The Commission approvingly cited scholars working within this model in the *Supplementary Report* that accompanied promulgation of the guidelines (USSC, 1987, p. 16).

The use of data on past practices and recidivism. The original Commission based the guidelines on many considerations, including distinctions made in the substantive criminal statutes, the United States Parole Commission's guidelines, and public commentary. However, an important starting point in the deliberations was a statistical analysis of preguidelines sentencing practices. The Commission analyzed detailed data drawn from more than 10,000 reports of offenders sentenced in 1985 and additional data from approximately 100,000 more federal convictions. The Commission determined the average prison term likely to be served for each generic type of crime. These averages established offense levels for each crime, which were directly linked to a recommended imprisonment range. Aggravating and mitigating factors that significantly correlated with increases or decreases in sentences were also determined statistically, along with each factor's magnitude (USSC, 1987). These formed the bases for "specific offense characteristics" for each type of crime, which adjusted the base offense level upward or downward.

The Commission used the statistical results as a starting point for deliberations, departing from past practice when a majority of the Commissioners agreed there was a reason to do so. Guidelines for most crimes were based on past practices, but important considerations led the Commission to depart from past practices for certain crimes such as fraud and drug trafficking. Some of these considerations were driven by statute. The SRA required that the Commission provide "a substantial term of imprisonment" for certain categories of offender,[14] and statutory minimum penalties, enacted as the guidelines were being drafted, dictated many terms of the drug trafficking guidelines. The Commission also sought to correct past under-punishment of crimes, such as "white collar" crimes.

In addition to the offense level, the guidelines take into account each offender's criminal history. The offender's "criminal history score," designed to predict recidivism, is based on the frequency, seriousness, and recency of prior criminal convictions, and whether the offender was under criminal justice supervision at the time of the present offense. The rules the Commission developed were based on factors that prior research had found to be empirically related to the likelihood of future criminal behavior (Hoffman & Beck, 1997). The criminal history score was designed to predict recidivism, but uses only criminal history to do so (as opposed to also using employment or drug use history, as had the Parole Commission's salient factor score). In this way, the Commission sought to reduce the tension between preventing future crime and just punishment for the current crime. Offenders with prior convictions were shown to be more likely to recidivate, and also were viewed as more culpable and therefore more deserving of punishment.

The necessary level of detail. One important question in developing the guidelines was how much detail to build into the system, that is, how many different offense level adjustments and criminal history categories were needed to adequately differentiate among crimes and offenders. A very simple system could produce sentence uniformity, but at the expense of proportionality. A few general categories might make the guidelines easy to administer, but at the cost of lumping together offenders who are very different in important respects. This problem arises in statutory minimum penalties that require the same penalty for very different offenders—for example, at least ten years imprisonment for all offenders who traffic in a certain quantity of drug, regardless of the mitigating factors that may be present in some of the cases (USSC, 1991(b)).

On the other hand, a sentencing system that attempts to account for every conceivable offense and offender characteristic relevant to sentencing could quickly become unworkable. As the number and complexity of decisions needed to apply the guidelines increase, so do the resources required for investigations and sentencing hearings, as well as the risk that different judges will apply the guidelines differently (Ruback & Wroblewski, 2001). In the end, the original Commission balanced these concerns and devised a Sentencing Table with 43 offense levels and 6 criminal history categories with overlapping ranges of imprisonment. In creating this table the Commission was guided by the provision in the SRA, sometimes called the "25 percent rule," which requires that the maximum of each recommended sentencing range exceed the minimum of the range by no more than six months or 25 percent of the minimum range, whichever is greater.[15] This rule requires guidelines of sufficient detail to assign offenders to relatively narrow ranges of recommended prison terms.

---

[14] 28 U.S.C. § 994(i).

[15] 28 U.S.C. § 994(b)(2).

2. How the Guidelines Determine the Presumptive Sentence

The federal sentencing *Guidelines Manual* sets out the rules that determine the presumptive guideline range in every case and contains additional policy statements, background commentary, and application notes to assist courts in applying the guidelines as intended. The manual is revised annually, and all versions can be found at the Commission's website www.ussc.gov. The basic structure of the guidelines, has remained constant throughout the guidelines era.

General application principles. Chapter One of the manual lays out the steps to be followed in determining each offender's guideline range. The process begins with deciding which guideline from Chapter Two best applies to each count of conviction or group of closely related counts. (Counts that are closely related—for example, fraud and conspiracy to commit the fraud, or multiple drug sales that are part of an ongoing common scheme—are treated as single offenses and sentenced under the same Chapter Two guideline according to the "Multiple Count" rules in Chapter Three, Part D.) If a plea agreement stipulates a more serious offense than the offense of conviction, the Chapter Two guideline for the more serious offense is used. USSG §1B1.2.

A preliminary offense level is then determined under Chapters Two and Three for each count or group of counts. In determining which base offense level, specific offense characteristics, cross-references among guidelines, or other special instructions apply, the court considers all "relevant conduct." The relevant conduct rule has been called the "cornerstone" of the guidelines system (Wilkins & Steer, 1990) and it is described in greater detail later in this chapter. After the offense levels for all counts or groups have been determined, a "combined offense level" is determined according to the multiple count rules found in Chapter Three, Part D. This offense level may be reduced by two or three levels if the offender qualifies for a reduction under the "acceptance of responsibility" guideline found in Chapter Three, Part E. The court then determines the offender's criminal history score and placement in a Criminal History Category. Together, the offense level and criminal history category determine where the defendant's case falls in the Sentencing Table.

The offense level. Each guideline contains a base offense level, which is the starting point for ranking the seriousness of each particular offense. More serious types of crime have higher base offense levels; for example, trespass has a base offense level of 4, while kidnaping has a base offense level of 32. Most guidelines include a number of specific offense characteristics, which can increase or decrease the offense level. For example, the guideline for theft increases the offense level based on the amount of loss involved in the offense. The guideline for robbery increases the offense level by five if a firearm was brandished or possessed, and by seven if a firearm was discharged.

Chapter Three contains additional offense level adjustments that pertain to all kinds of offenses. Categories of adjustments include: victim-related adjustments, the offender's role in the offense, and obstruction of justice. For example, if the offender knew that the victim was unusually vulnerable due to age or physical or mental condition, the offense level is increased by two levels. If the offender was a minimal participant in the offense, the offense level is decreased by four levels. If the offender obstructed justice, the offense level is increased by two levels. Chapter Three also includes the multiple counts rules and the adjustment for the offender's acceptance of responsibility.

The Sentencing Table

The Sentencing Table is found in Chapter Five, Part A, of the *Guidelines Manual*. The range of recommended sentences for every offender is given in the cell of the table at which the offender's final offense level and the criminal history category intersect. The table provides 43 levels of offense seriousness and six criminal history categories, making a total of 258 cells.

In the following excerpt from the table, an offender with a criminal history category of I and a final offense level of 20 would have a guideline range of 33 to 41 months.

Sentencing Table (excerpt)

(in months of imprisonment)

	Criminal History Category					
Offense Level	**I**	**II**	**III**	**IV**	**V**	**VI**
...	...	...	...	...	...	...
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
...	...	...	...	...	...	...

The lowest level of the table is divided into four zones, which define the alternatives to imprisonment that are available to the judge. In Zone A, involving ranges of 0-6 months, judges may impose any sentencing option from probation to imprisonment. In Zones B and C, certain more restrictive alternatives to imprisonment are available (*see* accompanying text). In Zone D, which includes 206 of the cells, only sentences of imprisonment are available. At offense level 43, life imprisonment is required.

Criminal History. Chapter Four contains the rules that assign offenders to one of the six criminal history categories. Criminal History Category I is for offenders with the least serious criminal record and includes many first-time offenders. Criminal History Category VI is for offenders with the most extensive criminal records. The chapter also contains a special provision for "Career Offenders," USSG §4B1.1, which implements the directive in the SRA that requires the Commission to provide a sentence "at or near the maximum term authorized" for certain categories of violent and drug trafficking offenders with two or more prior offenses. (28 U.S.C. § 994(h). Other provisions apply to "Armed Career Criminals" USSG §4B1.4, who are subject to a statutorily enhanced sentence under 18 U.S.C. § 924(e), and to "Repeat and Dangerous Sex Offender Against Minors" USSG §4B1.5.

Determining the final sentence. Judges must impose a sentence within the guideline range unless a reason for departure can be identified and stated on the record. For offenders convicted of less serious offenses with relatively little criminal history, Chapter Five, Part F provides sentencing options other than imprisonment. The Sentencing Table is divided into four zones, A through D. Offenders in all zones *may* receive a sentence of imprisonment, but offenders in Zone D, which is the great majority of the Sentencing Table, *must* receive a term of imprisonment equal to at least the minimum of the guideline range. In Zones A through C judges have the option of imposing alternative sentences, depending on the particular zone in which the defendant falls.

Zone A (offenders with sentencing ranges of 0-6 months):

- probation;
- probation with confinement conditions (*i.e.*, intermittent confinement, community confinement, or home detention).

Zone B (offenders with sentencing ranges of 1-12 months):

- probation with a condition that substitutes intermittent confinement, community confinement, or home detention for at least the minimum of the guideline range;
- imprisonment of at least one month plus supervised release with a condition that requires community confinement or home detention to be served for the remainder of the minimum term specified in the guideline range.

Zone C (offenders with minimum terms of 8-16 months):

- imprisonment of at least one-half of the minimum term plus supervised release with a condition requiring community confinement or home detention to be served for the remainder of the minimum term specified in the guideline range.

Chapter Five, Part D, contains provisions governing the use of "supervised release," which is a period of supervision following release from prison. Supervised release provides the opportunity for the managed re-entry of an offender back into the community, as was once provided by parole release. (Chapter Seven of the *Guidelines Manual* contains policy statements for the revocation of probation or supervised release if an offender fails to abide by the conditions of his or her supervision.) Chapter Five, Part E, establishes guidelines for the imposition of fines, restitution, assessments, and forfeitures. Other provisions of Chapter Five provide rules for the use of consecutive or concurrent sentences and other sentencing matters. Parts K and H establish policies regarding departure from the guidelines for various reasons, as discussed further below.

D. Components of the Reformed Sentencing System

The SRA contained a long list of specific goals for sentencing reform. Inherent in these goals is the preservation of American values, such as fundamental fairness, due process of law, and the efficient administration of criminal justice. Congress recognized that to achieve all of this, more than just the promulgation of sentencing guidelines would be needed. A new and coordinated federal sentencing *system* involving all three branches of government was required. The components of this new system can be divided into two stages: policy *development* and policy *implementation*. In this section, we explore the components of these stages and illustrate how they were intended to work together to realize Congress's goals for federal sentencing.

1. Components of Guidelines Development

- ***Collaboration among policymakers, implementers, and other stakeholders***
- ***Utilization of specialized criminological and sentencing expertise***
- ***Political accountability through Executive participation and Legislative directives and review***

Collaboration among policymakers, implementers, and other stakeholders. The SRA contemplates the development of sentencing policy and practices through a process of collaboration between the Commission and all major "stakeholders" in the federal criminal justice system, as well as input from interested observers and the general public.

> The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines. . . . In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the federal Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the U. S. Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.
> 28 U.S.C. § 994(o).

Clearly, the SRA envisions a highly collaborative process of guideline development and revision.

The Commission heeded these instructions and "decided early in its deliberations that the only way to develop practical sentencing guidelines was through an open process that involved as many interested individuals and groups as possible. By tapping the expertise and experience of those who work in the system, the Commission ensured that its guidelines would be grounded in reason and practicality" (USSC, 1987). The Commission conducted nationwide hearings and met with representatives of a wide range of federal agencies, even beyond the list contained in the SRA.

Through the years, the Commission has been advised by Standing Advisory Groups of Probation Officers and Attorney Practitioners, as well as by Special Advisory Groups on research, organizational crimes, environmental crimes, Native Americans, and a variety of other topics. The Department of Justice, through its *ex-officio* member of the Commission, and with the help of the Sentencing Subcommittee of the Attorney General's United States Attorneys Advisory Committee, provides important feedback on Commission priorities and proposed amendments. The Commission

collaborates with the Judicial Conference of the United States through meetings with the Conference and its Committee on Criminal Law, which has a Subcommittee on Sentencing.

The SRA directs the Commission to comply with the "notice and comment" provisions of the Administrative Procedures Act. 28 U.S.C. § 994(x). In addition, the Commission adopted its own Rules of Practice and Procedure, which were revised in 2001 (USSC, 2001c). These rules provide for the annual publication of a Notice of Priorities, the timely publication of Issues for Comment and Proposed Amendments in the Federal Register and through the Commission's own website. The rules also provide for a period of public comment, all of which is reviewed prior to any Commission action. The Commission conducts almost-monthly public meetings and annual public hearings where it receives testimony from concerned interest groups and citizens.

These extensive mechanisms for obtaining input from interested parties are both required by law and recommended by experience. Research on program change and evaluation has consistently demonstrated that for sentencing reform to succeed, it must enjoy the confidence of those charged with implementing the new policy (Von Hirsch, et al., 1987). Open collaboration with key stakeholders is intended to obtain "buy in" from the essential participants in the federal sentencing system to help ensure that the guidelines are perceived as legitimate and credible.

Utilization of specialized criminological and sentencing expertise. The SRA envisions policymaking informed by a research program that can "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(2). This ongoing research helps ensure that the guidelines "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. . . ." 28 U.S.C. § 991(b)(1)(C). The Commission serves as a "clearinghouse and information center for the collection, preparation, and dissemination of information on federal sentencing practices" (28 U.S.C. § 995(a)(12)(A)), and to "collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process. . . ." 28 U.S.C. § 995(a)(15).

The Commission responded to these mandates by developing a large data collection and policy analysis facility. Documents, including presentence reports, written plea agreements, and Judgment and Conviction orders, are received from courts throughout the country on virtually every federal defendant sentenced under the guidelines. Data from these documents are extracted and entered into the Commission's Monitoring Database, the most extensive collection of information on federal crimes, offenders, and sentences collected by any agency. The Commission's annual *Sourcebook of Federal Sentencing Statistics* (USSC, 2002) is based on these data, and contains descriptions of the types of crimes and sentences imposed for each federal judicial district. The Commission also houses a library containing an extensive collection of books and articles relevant to federal sentencing and sentencing guidelines. This material is available to the public through Commission publications and the release of datasets through the Inter-University Consortium for Political and Social Research (USSC, 2003). Additional information is gathered through the Commission's Helpline, training sessions, and through specialized research projects.

All of these sources of data inform guidelines development and revision through the use of multi-disciplinary Policy Development Teams, whose work is described in the Commission's *Annual Reports* (USSC, 2002b). These teams engage in a wide variety of research projects relevant to their assigned topics, including, for example, consultation with psychologists on the recidivism of sex offenders or with economists on the financial impact of copyright infringement or corporate crime. In addition, as required by statute 18 U.S.C. § 4047, the Commission uses a statistical Prison Impact Model to estimate the effects of any proposed change in the guidelines on the types and lengths of sentences imposed under the revised guidelines, and the fiscal impact of such changes on the Bureau of Prisons.

Political accountability through Executive participation and Legislative directives and review. The final component of policy development provides political accountability for the Commission's actions. The Commission's authority is derived from Congress. For this delegation of legislative power to be Constitutional, Congress must provide minimum "intelligible principles" to guide the Commission's work.[16] Congress did so in the SRA which provides the foundational principles governing the Commission's guideline development process. In addition, the SRA provides mechanisms for Congressional direction and oversight.

The most important mechanism for political accountability of the Commission, however, is the SRA's provision for a period of review for guideline amendments prior to an amendment's effective date. Under the normal amendment procedures outlined in the SRA, the Commission must submit proposed amendments to Congress no later than the first day of May, together with a statement of the reasons for the amendment. The Commission must specify an effective date for the change that is not earlier than 180 days after submission to Congress and no later than the first day of November. Congress can modify or disapprove the amendment during this period of review. Two amendments (regarding guidelines for trafficking in crack cocaine and money laundering) out of 674 were disapproved in this manner in the first fifteen years of the guidelines.

The advent of the guidelines system has provided new opportunities and mechanisms for Congress to work with and through the Commission to influence sentencing policy. The advantages and disadvantages of many of these mechanisms was first discussed in the Commission's 1991 report *Mandatory Minimum Penalties in the Federal Criminal Justice System*. In addition to formal oversight hearings, informal communication with individual commissioners or with the Commission's Office of Legislative Affairs is possible. Congress has also shaped policy by changing the statutory maximums applicable to a particular crime, at times in conjunction with Sense of Congress resolutions indicating its intention that the Commission amend the relevant guidelines.

Most commonly, Congress has influenced and controlled sentencing policy through formal statutory directives to the Commission, supplementing the directives contained in the SRA itself. Appendix B describes these directives—which by 2004 numbered over eighty-five separate enactments, many containing multiple directives—and indicates the dates they were enacted and the types of crime with which they were concerned. The most common area for directives has been drug

[16] Mistretta v. United States, 488 U.S. 361 (1989).

trafficking crimes, which have been the subject of 22 directives, followed by economic crimes with 16 directives, and sex offenses with 15 directives. The directives have varied along a continuum from general to specific, leaving more or less discretion to the Commission to finalize the details of the policy change. General directives obviously permit a greater role for collaboration and research in policy development than do specific directives. The most general directives instruct the Commission to study a problem and report back to Congress with any recommendations or guideline amendments the Commission views as appropriate.[17] More specific are directives to increase the offense level applicable to a particular crime. At other times, Congress has directed that a certain offense level be increased by a specific number of levels, or that specific offense adjustments be added to a guideline.[18] In the PROTECT Act of 2003, Congress for the first time directly amended the *Guidelines Manual* itself.

Congress, of course, retains authority to control sentencing policy directly through a mechanism completely outside the framework established by the SRA—enactment of new statutory minimum penalty statutes or amendment of existing ones. Some commentators view mandatory minimum penalties as inconsistent with the guidelines system (Lowenthal, 1993; Wallace, 1994). Others view mandatory penalties as superfluous given the tough, binding, sentencing guidelines (Cassell, 2004). The legislative history of the SRA lends some support to the view that the guidelines system and mandatory minimum penalty provisions are "sentencing policies in conflict" (USSC, 1991b). Yet, Congress enacted mandatory minimum penalties for firearm and drug offenses the very same year it enacted the SRA, and more mandatory minimum penalties for drug offenses were added in 1986 while the guidelines were being developed. Additional mandatory minimums for drugs and other types of offenses have been added or increased several times since guidelines implementation.

The SRA envisions multiple mechanisms for Legislative and Executive influence over sentencing policy within a framework that also assures input from the front-line actors charged with implementing the policies in the courts, and in light of the best in criminological research. Mechanisms for direct control over the guidelines bypass these other components of sentencing policy development envisioned by the SRA.

2. Components of Guidelines Implementation

- ***Uniform charging of readily provable offenses***

- ***Transparent plea agreements consistent with the goals of the SRA***

---

[17] *See, e.g.,* Pub. L. No. 103-322, § 250003, 108 Stat. 1796 (Sept. 13, 1994). This statute directed the Commission to review and, if necessary, amend the guidelines to ensure that sentence enhancements for frauds committed against the elderly were adequate, and to report to Congress on the reasons for the Commission's actions. *Id.*

[18] *See, e.g.*, Pub. L. No. 106-310, § 3663, 114 Stat. 1101 (Oct. 17, 2000). This Act directed the Commission to provide enhanced punishment for traffickers in MDMA, otherwise known as the club drug "ecstasy." *Id.*

- ***Reliable fact-finding regarding real offense conduct and criminal history***
- ***Conscientious application of the guidelines to the facts***
- ***Departure when needed to achieve the purposes of sentencing***
- ***Appellate review***

Uniform charging of readily provable offenses. Prosecutors and defense attorneys alike recognize that the advent of the guidelines has made the *sentencing consequences* of their *presentencing* decisions a central focus of the entire federal criminal justice process. In the words of one defense attorney: "In federal criminal practice, almost all strategic decisions of the defense attorney should initially flow from federal sentencing guidelines analysis" (Wisenberg, 2003). Because the guidelines are designed to bind judges to particular sentencing consequences for particular proven facts, even law enforcement officers have been trained to anticipate the sentencing impact of their criminal investigations (Berlin, 1993). Observers have recognized that uniform charging of offenders' criminal conduct will be needed if unwarranted sentencing disparity is to be eliminated (Schulhofer & Nagel, 1989; Edmunds, 1996).

From the beginning of guidelines implementation, Department policies have recognized that prosecutors' charging and plea agreement practices could have a major impact on the success of sentencing reform.[19]

> Under the new system, the nature of the charge to which a defendant pleads is particularly important because it will more precisely than ever determine the defendant's actual sentence. . . . [I]f prosecutors consult the guidelines at the charging stage in an effort to achieve the most appropriate sentence for the conduct committed, the purpose of the SRA of eliminating unwarranted disparity in sentencing will be served since similar conduct should result in the bringing of similar charges, which will form the bases for similar sentencing.[20]

The Department clearly recognized that charging decisions would have a significant impact on sentencing, and on the success of sentencing reform.

---

[19] William F. Weld, Assistant Attorney General, U. S. Department of Justice [DOJ], "Prosecutors Handbook on Sentencing Guidelines" [hereinafter Redbook], Nov. 1, 1987. *Excerpts reprinted in* 6 FED. SENT. REP. 333 [hereinafter FSR] (1994).

[20] Memorandum from Stephen Trott, Associate Attorney General, DOJ, to All United States Attorneys, regarding "Interim Sentencing Advocacy and Case Settlement Policy Under New Sentencing Guidelines" [hereinafter Trott Memo], Nov. 3, 1987. *Reprinted in* 6 FSR 342 (1994).

To advance the goal of similar charging of similar conduct, the Department directed prosecutors to "initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct."[21] Limited exceptions to this rule were permitted, for example, if there was a need to protect the identity of a witness. But the long-standing principle that prosecutors should select "the most serious offense that is consistent with the nature of the defendant's criminal conduct, that is likely to result in a sustainable conviction,"[22] was recognized in Department policies as important to the success of sentencing reform. These national policies set by the Department were met with skepticism by some district offices, who argued that varying local conditions required that they retain discretion and flexibility (Braniff, 1993). Clarification of the policy in 1993 was perceived by some as granting local prosecutors more flexibility, in that it authorized prosecutors to consider the proportionality of sentences resulting from their charging decisions (Beale, 1994).[23]

The PROTECT Act of 2003 again highlighted the importance of sentencing consistency and the need for Department guidance to prosecutors in the field. Subsequent to its passage, the Attorney General issued further guidance to federal prosecutors concerning Department charging and plea agreement policies.

> The fairness Congress sought to achieve by the Sentencing Reform Act and the PROTECT Act can be attained only if there are fair and reasonably consistent policies with respect to the Department's decisions concerning what charges to bring and how cases should be disposed. Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.[24]

This latest guidance reiterates that prosecutors "must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case" except in limited, enumerated, circumstances.

A first look at real offense sentencing. Because sentencing uniformity is crucially dependent on charging uniformity, the original Commission was concerned that continuing unevenness in

---

[21] Memorandum from Richard Thornburgh, Attorney General, DOJ, to All United States Attorneys, regarding "Plea Policy for Federal Prosecutors, Plea Bargaining Under the Sentencing Reform Act" [hereinafter Thornburgh Blue Sheet], March 13, 1989. *Reprinted in* 6 FSR 347 (1994).

[22] DOJ, "Principles of Federal Prosecution," 9-27.310, July 1980. *Excerpts reprinted in* 6 FSR 317-329 (1994).

[23] Memorandum from Janet Reno, Attorney General, DOJ, to All Holders of U.S. Attorneys' Manual, Title 9, regarding "Principles of Federal Prosecution" [hereinafter Reno Bluesheet], Oct. 12, 1993. *Reprinted in* 6 FSR 350 (1994).

[24] Memorandum from John Ashcroft, Attorney General, DOJ, to All Federal Prosecutors, regarding "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing" [hereinafter Ashcroft Charging Memo], Sept. 22, 2003.

charging could undermine sentencing reform despite the Department's efforts to control it. The Commission sought to build mechanisms into the guidelines themselves that would help to ameliorate some of the effects of uneven charging. These mechanisms include: 1) the multiple count rule, found in Part D, Chapter Three of the *Guidelines Manual*, 2) cross-references among guidelines, and 3) the relevant conduct rule found at USSG §1B1.3. Together, these mechanisms make the federal guidelines a significantly *real offense*, as opposed to *charge offense*, sentencing system. (The relevant conduct rule and real offense sentencing is discussed further in a text box later in this section.)

The original Commission explained the need to consider aspects of the real offense committed by defendants instead of only the charges of conviction. First, the statute-defined elements of many federal crimes fail to provide sufficient detail about the *manner* in which the crime was committed to permit individualized sentences that reflect the varying seriousness of different violations. "[T]he hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language."[25] The Commission recognized that in the preguidelines system judges and the Parole Commission took into account many details of offenders' actual conduct. "A pure charge system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted." *Id.*

Furthermore, the Commission remained concerned that the charges to which defendants were subject would continue to depend to some extent on which prosecutors were assigned to each case or in which district the offense was prosecuted, leading to unwarranted sentencing disparity. "The Commission recognized that a charge offense system has drawbacks. . . . One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in the indictment." The Commission created rules for grouping multiple counts to help control excessive severity that could arise from charging what was essentially a single criminal act as multiple counts. And the Commission created the relevant conduct rule and cross-references among guidelines to prevent excessive leniency that could arise from prosecutors failing to charge all of the offender's conduct, or failing to charge the most serious of the conduct.

The Commission's approach to multiple count convictions was discussed in the original introduction to the *Guidelines Manual* in Chapter One, Part A4(e), which is reproduced for historical reference in the current edition of the manual. (*See also* Breyer, 1988.) The rules are designed to reduce some of the sentencing disparity that can result from charging variations. For example, charging *both* a criminal act and conspiracy to commit that act results in the same sentence as charging *only* the act or the conspiracy. Similarly, a kidnapping involving an assault is sentenced the same if charged and convicted only as a kidnapping or as one count of kidnapping and one count of assault. For offenses involving fungible quantities, such as drugs or money, sentences are based on the total amount involved in the ongoing offense, not on how many counts involving various transactions or acts are charged or convicted. Indeed, for these offenses sentences are based on all relevant conduct, whether or not all of the conduct is charged or conviction is obtained.

---

[25] USSG, Ch. 1, Pt. A, sec. 4(a).

Real Offense Sentencing and the Relevant Conduct Rule, USSG §1B1.3

The relevant conduct rule is the guideline that defines the scope of a defendant's criminal behavior that is used by the court in applying the Chapters Two and Three guidelines. The rule allows the court to consider facts beyond those specified in the indictment or in the elements of the offense of conviction. Relevant conduct includes details about the manner in which the offense was committed. It can also include other criminal conduct that was not charged, that was described in counts that were dismissed prior to sentencing, conduct of accomplices, and even conduct for which the defendant was acquitted at trial.

In determining an offense level, judges generally use Appendix A of the *Guidelines Manual* to identify the guideline applicable to the offense of conviction (unless a plea agreement stipulates a more serious offense—*see* section 1B1.2). The court then uses all relevant conduct to determine the base offense level, the specific offense adjustments, and whether any cross-references to other guidelines should be applied. Relevant conduct includes acts the defendant personally committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused if the acts occurred during the offense of conviction, in preparation for that offense, or in avoiding detection or responsibility for the offense. It also includes acts within the same time context that were committed by the defendant's accomplices, if those acts took place within the scope of a joint undertaking with the defendant and were reasonably foreseeable to the defendant. Any harms resulting from the relevant acts of the defendant and accomplices are also relevant.

In certain offenses, primarily those where the guidelines determine the offense level based on fungible items, such as quantities of drugs or amounts of money involved in the offense, the acts of the defendant and accomplices as analyzed above are expanded to include those acts and resulting harms within the context of the "same course of conduct or common scheme or plan as the offense of conviction." This means, for example, that a defendant convicted of selling drugs to an undercover officer on one occasion is sentenced under USSG §1D1.1 for the amount of drugs involved in *all* the drug trafficking known to the court that was part of the same course of conduct or common scheme or plan as that one sale. Because the standard of proof used in the determination of relevant conduct, as with any sentencing factor, has been the preponderance of evidence,"a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *United States v. Watts*, 117 S. Ct. 633, 638 (1997).

Cross-references among guidelines, which are applied based on all relevant conduct, also serve to reduce the impact of charging variations. An offender convicted of criminal sexual abuse of a minor under the age of sixteen (statutory rape), but whose conduct actually involved the more serious offense of forcible rape, will be sentenced under the more severe guideline for the more serious offense pursuant to the cross-reference from the statutory rape guideline, section 2A3.2 to the sexual abuse guideline, section 2A3.1. The *Guidelines Manual* contains many cross-references, many of which were added after promulgation of the initial guidelines in light of evidence that undercharging of offenses was resulting in significant sentencing disparity and disproportionately lenient sentences.[26]

These mechanisms were designed to reduce sentencing disparity resulting from uneven charging decisions, but they were never intended to eliminate it altogether. The guidelines retain some characteristics of a charge offense system, particularly for offenses that do not involve fungible goods like drugs or money. For example, the guideline rules take into account only those robberies for which a conviction is obtained, and not other robberies committed by the defendant that may come to the attention of the court at sentencing. Policy statement USSG §5K2.21 permits judges to take uncharged or dismissed conduct, such as additional bank robberies, into account through upward departure, but the relevant conduct rule itself does not require consideration of such conduct as it does uncharged conduct involving fungible harms. In addition, statutory minimum penalties and sentencing enhancements continue to give prosecutors considerable control over final sentences in many cases, because prosecutors determine whether the statutory minimum penalties are invoked. Chapter Three presents data on the effects of these charging decisions on unwarranted sentencing disparity.

Transparent plea agreements consistent with the goals of the SRA. The need for efficient administration of justice has led to a recognition of plea agreements as a common method for securing convictions in American courts. In the forty years prior to the guidelines, between 85 and 90 percent of all convictions in the federal courts annually involved pleas of guilty or nolo contendere (BJS, *Sourcebook,* 1987; AO, *Annual Report*, 1987). If the guidelines system is to be workable, it must accommodate plea bargaining and provide incentives for defendants to plead guilty. In the preguidelines era, these incentives were provided when prosecutors agreed not to bring charges, or to dismiss charges, or to make various sentencing recommendations to the judge. But, as a general rule, these agreements only loosely bound the court (FJC, 1979).

In the guidelines era, both the goals and the dynamics of the system have changed. Congress has now defined reduction of unwarranted sentencing disparity as an important goal of the system. The guidelines bind judges more tightly to the sentencing consequences of the charges of conviction and the guideline-relevant facts proven at sentencing. Given all this, the first component of guidelines implementation—uniform charging—cannot ensure uniform sentencing if plea bargaining results in the dismissal of provable charges that would affect the applicable guideline range, or stipulations to misleading facts, or other agreements that result in sentences different from those required by complete and proper application of the guidelines to offenders' criminal conduct.

---

[26] *See*, *e.g.,* USSG, App. C, Amends. 313, 323 (Nov. 1, 1990); Amend. 444 (Nov. 1, 1992).

Congress directed the Commission to develop policy statements governing judges' acceptance and rejection of plea agreements in the hope that "judicial review of plea bargaining under such policy statements should alleviate any potential problem in the area."[27] These policy statements are found in Chapter Six, part B of the *Guidelines Manual*. The Commission believed that if judicial power to reject plea agreements "were properly exercised, undue shifting of authority [from judges to prosecutors] will not occur." (USSC, 1987, p. 49). Some commentators believed the Commission's initial policy statements sent mixed signals regarding how strictly judges should monitor agreements. Accordingly, the *Guidelines Manual* was amended in 1992 to make clear "the Commission's policy that plea agreements should not undermine the sentencing guidelines."[28]

The policy statements address the various types of plea agreements that are contemplated by Federal Rules of Criminal Procedure, Rule 11(e), which include agreements to dismiss or not bring charges, and various types of binding and non-binding sentencing recommendations. (This rule has itself been recently amended to reflect new types of agreements made possible by implementation of the guidelines, such as agreements that a particular provision of the guidelines does or does not apply. It is now denoted as Rule 11(c).) Despite variations in the types of agreements, the policy statements all adopt a simple principle: plea agreements should be accepted by the judge only if the resulting sentence is within the applicable guideline range or departs from the range for a reason that can be justified according to the normal departure standard at 18 U.S.C. § 3553(b).[29] The fact of an agreement itself should not be used to impose a sentence outside the range otherwise required by the guidelines. This principle has recently been reinforced by an amendment to the policy statements reiterating that "the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense."[30] Other policy statements in Chapter Six require that plea agreements be disclosed to the court (USSG §1B1.1; *see also* F. R. Crim. P. 11(c)(2)), and that any factual stipulations accompanying the agreement shall set forth the "circumstances of the actual offense conduct and offender characteristics" and "shall not contain misleading facts."[31]

To implement judicial review of plea agreements, some mechanism for judges to compare the agreement with the offender's actual conduct was needed. This was provided through changes to the presentence investigation and report, which are discussed in the following section Federal Rules of Criminal Procedure, Rule 11(c)(3) allows judges to defer acceptance or rejection of a plea agreement "until the court has reviewed the presentence report." USSG §6B1.1, p.s., goes further, stating that the court "shall defer" its decision "until there has been an opportunity to consider the report."

---

[27] SENATE REPORT, *supra* note 1, at 63; *see* sec. A.2 (discussing move toward regulation of plea bargaining during the legislative development of the SRA).

[28] USSG, App. C, Amend. 467 (Nov. 1, 1992).

[29] *See* USSG §6B1.2.

[30] USSG, App. C, Amend. 651 (final provision) (Oct. 27, 2003).

[31] USSG §6B1.4.

Even with the help of the probation officer's investigation and report, it was recognized that the judiciary and the Commission would have limited power and resources with which to police plea bargaining. "It will be up to the government to insure that inconsistencies in the treatment of plea agreements do not frustrate the purpose of the Guidelines" (Trott Memo, Nov. 3,1987). To that end, the Department adopted strict policies regarding plea agreements. "The overriding principle governing the conduct of plea negotiations is that plea agreements should not be used to circumvent the guidelines" (Redbook, Nov. 1, 1987). The Department recognized that, as a practical matter, judges would be tempted to accept plea agreements outside the guideline range, since appeals of bargained-for sentences would be unlikely. But the Department instructed prosecutors to ensure that plea bargains result in imposition of a sentence within the guideline range unless a departure could be justified. The policies made clear that the existence of a plea agreement alone was not enough to justify a departure. Further, the Department reinforced the Commission's policy statement on factual stipulations: "The Department's policy is only to stipulate to facts that accurately represent the defendant's conduct" (Thornburgh Bluesheet, 1989).

In 2003, following passage of the PROTECT Act, the Department again reiterated the importance of consistency in the manner charges are disposed of and the importance of adherence to the sentencing guidelines when entering into plea agreements. To achieve "honesty in sentencing"

> [a]ny sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.[32]

"This policy applies fully to sentencing recommendations that are contained in plea agreements."[33] Thus, these new policies reinforce the Department's commitment to the goals of sentencing reform.

The Commission recognized that defendants would need *some* incentive to plead guilty if trial rates were to be kept within manageable limits. Research on sentencing practices in the preguidelines era had demonstrated that offenders typically received a sentence discount for sparing the government the time and expense of a trial. The original Commission sought to maintain this benefit so that defendants retained sufficient incentive to plead guilty and "the number of trials facing an already overburdened federal court system" would not be increased.[34] At the same time, the Commission sought to regularize the guilty plea benefit in order to reduce disparity. "The Commission considered, but rejected, a proposal to give the sentencing judge considerable latitude to give a sizeable sentence reduction because of the entry of a guilty plea. Doing so would have risked the introduction of

---

[32] Memorandum from John Ashcroft, Attorney General, DOJ, to All Federal Prosecutors, regarding "Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals," July 28, 2003.

[33] Ashcroft Charging Memo, *supra* note 24, September 22, 2003, at 5.

[34] USSC, SUPPLEMENTARY REPORT, at 49 (1987).

considerable unwarranted disparity and unpredictability into the system."[35] The Commission decided to balance competing concerns regarding plea bargaining by relying on judges to police bargains that could undermine the guidelines and by allowing various types of prosecutors' recommendations—for example, that the judge sentence at the bottom of the guideline range or depart for a justifiable reason.

The Commission provided an explicit incentive to plead guilty in USSG §3E1.1, the "Acceptance of Responsibility" guideline. This guideline was designed both as a reward for offenders who plead guilty and also as a recognition of the reduced culpability of offenders who acknowledge guilt and take steps to mitigate the harm caused by their offense. The guideline provides a reduction in the offender's offense level "[i]f the defendant clearly demonstrates "acceptance of responsibility for his offense." The first factor judges are directed to consider when deciding whether to grant this reduction is the defendant's "[t]ruthfully admitting the conduct comprising the offense(s) of conviction."[36] Data show that 94 percent of offenders who plead guilty receive the acceptance of responsibility reduction. Later amendments to this guideline increased its utility as an incentive for defendants to provide helpful information to prosecutors and to enter pleas in a timely manner so that the government may avoid wasting resources in trial preparation.[37]

It is clear from the data that plea bargaining has continued, and even expanded, in the guidelines era. Guilty plea rates steadily increased from 87 percent in the years preceding the guidelines to 96.6 percent in 2001. However, the system of regularized incentives for guilty pleas that was put in place by the original Commission has never operated in isolation from statutory minimum penalties. Department policies allow prosecutors to invoke statutory minimum penalties and statutory enhancements as further incentives for guilty pleas, even barring their declination or dismissal except as part of a plea agreement (DOJ, 2003).

Reliable fact-finding regarding real offense conduct and criminal history. It was apparent from the beginning of the guidelines era that the reformed sentencing system would require new procedures to establish facts relevant to application of the guidelines. Rule 32 of the Federal Rules of Criminal Procedure, which concerns sentencing procedures, was amended by the SRA itself. Additional procedures needed to make guideline sentencing fair and efficient were the subject of much thought by the Sentencing Commission and by various committees of the Judicial Conference of the United States. The procedures ultimately put in place emphasized the role of the probation officer in investigating the relevant facts, recommending the guidelines applicable to the case, and identifying any remaining disputes for resolution by the judge at a sentencing hearing. Each district also retained discretion to fashion local rules and informal procedures that were tuned to local conditions.

---

[35] *Id.*

[36] USSG §3E1.1, comment. n.1(a).

[37] USSG, App. C, Amends. 459 (Nov. 1, 1992) & 649 (Sept. 30, 2003). The latter amendment was pursuant to a directive to the Commission contained in the PROTECT Act.

Amended Rule 32 requires a presentence report in virtually all guidelines cases and establishes a timeline for its completion, its disclosure to the parties, and for any party to the file objections to its contents. The rule also specifies matters to be included in the report, including the probation officer's determination of how the guidelines apply in the case. The Judicial Conference provides more detailed instructions and training to probation officers about how to conduct the presentence investigation and write the report. These policies are contained in Publication 107 (Administrative Office of the U.S. Courts, last revision 2001), which was extensively revised at the time of guidelines implementation. Procedures for the presentence report have recently again become a topic of concern to the judiciary as growing caseloads and budgetary constraints make detailed presentence investigations in every case increasingly difficult.

At the dawn of the guidelines era, the presentence report was redesigned to make it effective in assisting judges in application of the guidelines, and to support judicial review of plea agreements. Probation officers were instructed to provide a "concise but complete description" of all information relevant to application of the guidelines, including the "offense(s) of conviction and all relevant conduct" and all verifiable criminal history. An "Impact of the Plea Agreement" section was developed to assist the court in evaluating the effects of "counts to be dismissed, stipulations, or any other factors in the plea agreement that may affect the guideline range or the sentence to be imposed" (AO, Publication 107, II-79). Inclusion of an "Impact of the Plea Agreement" section in the presentence report demonstrates that courts, like Congress, anticipated plea agreements that would sometimes understate the offender's real offense conduct. As described above, the relevant conduct rule instructs courts to look beyond the counts of conviction to the offender's actual criminal conduct, including conduct that was never charged or was specified in counts that were subsequently dismissed. The aim was to ensure that a judge's fact finding—and not just the prosecutor's charging and bargaining decisions—would determine the sentence (Breyer, 1988; Wilkins & Steer, 1990).

While offering fewer procedural protections than fact finding at trial, fact finding at sentencing under the guidelines is subject to more formal procedures than was fact finding in the preguidelines era. "The court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair." USSG §6A1.3 p.s., comment. In addition to disclosure of the presentence report and taking of objections, amended Rule 32(I) gives counsel an opportunity to comment on the probation officer's findings. The court may permit the parties to introduce testimony and other evidence at an evidentiary hearing. The court must rule on any disputed fact that affects the sentence and append a record of its rulings to the presentence report, which is then made available to the Bureau of Prisons and the Sentencing Commission. However, Commission policy statements permit courts to "consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3(a) p.s. Courts have held that, in most circumstances, sentencing facts must be proven to the judge only by a preponderance of the evidence (FJC, 2002, p. 484).

Conscientious application of the guidelines to the facts. The core of the new system is the judge's imposition of a sentence "of a kind, and within the range" established by the guidelines for the circumstances of the offense and the offender's criminal history. 18 U.S.C. § 3553(b). In most situations, guideline application is straightforward, but it could break down in several ways.

Probation officers and judges could make mistakes due to confusing or complex guidelines (Ruback & Wroblewski, 2002). The guidelines could be circumvented, explicitly or covertly, through manipulation of the facts found to be present in the case, through strained guidelines interpretations, or through the granting of departures for unjustifiable reasons. Pressure to find a way around the guidelines can be acute if a judge finds the guidelines-required sentence unjust (Weinstein, 1992, p. 365; Stith & Cabranes, 1998, p. 90) and the parties agree that a sentence outside the guideline range is acceptable. Enforcement of 18 U.S.C. § 3553(b) relies on each judge's duty to follow the law in good faith, and on the provisions for appellate review created by the SRA, discussed below.

To improve comprehension of the guidelines and help avoid mistakes, the Commission, on its own and in conjunction with the Federal Judicial Center, the Administrative Office of the U. S. Courts, the Federal Bar Association, and other groups, participates in extensive training of probation officers, judges, defense attorneys, and prosecutors. The Commission also maintains a "HelpLine" available to court personnel who have specific questions about guidelines applications. To reduce pressure to circumvent the guidelines, the Commission communicates with judges through conferences, seminars, and newsletters, and seeks to improve "buy in" among those charged with implementing the guidelines through collaborative guidelines development.

Departure when needed to achieve the purposes of sentencing. Congress recognized that the Commission could not anticipate and describe in general guidelines every possible circumstance relevant to sentencing in every case. It included a provision in the SRA permitting departure from the guideline range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). In implementing this provision the original Commission instructed judges to

> treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.[38]

The Commission also encourages, discourages, or flatly prohibits departures in various circumstances in commentary throughout the *Guidelines Manual* and in policy statements in Chapter Five, Parts H and K. The Supreme Court reaffirmed the importance of the Commission's role in regulating departures in *United States v. Koon*, 518 U.S. 81 (1996). In the PROTECT Act of 2003, Congress directed the Commission to review these provisions and amend them "to ensure that the incidence of downward departures are substantially reduced."[39] The results of the Commission's

---

[38] USSG, Ch. 1, Pt. A.4(b). (This provision was transferred to an Editorial Note at the end of sec. 1A1.1 as part of the Commission's implementation of the PROTECT Act of 2003.)

[39] PROTECT Act, Pub. L. No. 108-21 § 401(m)(2)(a), 117 Stat. 650 (April 30, 2003).

review were published in *Downward Departures from the Federal Sentencing Guidelines* (USSC, 2003) and the amendments to the *Guidelines Manual* became effective on October 27, 2003.[40]

Departures serve several functions in the sentencing system established by the SRA. They help maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . . ." 28 U.S.C. § 991(b)(1)(B). They allow fine-tuning of sentences when literal application of a guideline would fail to achieve the guideline's intended purpose (Hofer & Allenbaugh, 2003). And they provide a feedback mechanism to the Commission. "By monitoring when courts depart from the guidelines and analyzing their stated reasons for doing so, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted."[41]

Sections 5K1.1 and 5K3.1 departures. The guidelines also provide for additional types of departure to reward defendants who assist the government in various ways. The first of these—often called 5K1.1 departures, after the policy statement that governs them—was not part of the SRA itself but was added in response to the Anti-Drug Abuse Act of 1986 (ADAA),[42] which also established mandatory minimum penalties for a wide variety of drug trafficking crimes. The ADAA permits waiver of statutory minimum penalties for persons who assist the government in the "investigation or prosecution of another person who has committed an offense" 18 U.S.C. § 3553(e). It also directs the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance." 28 U.S.C. § 994(n). The Commission implemented this provision by issuing a policy statement encouraging judges to depart in such cases "upon motion of the government." USSG §5K1.1 p.s.

The Department of Justice recognized that "[t]his departure provides federal prosecutors with an enormous range of options in the course of plea negotiations" (Thornburgh Bluesheet, 1989). Later concern that charging and plea bargaining might be undermining sentencing reform led to changes in Department procedures involving section 5K1.1 motions.[43] Authority to approve the filing of such motions was limited to top management in each U. S. Attorney's office, and documentation of the facts justifying a motion to depart from the guidelines on these grounds was required.

---

[40] USSG, App. C, Amend. 651 (Oct. 27, 2003).

[41] USSG, §1A1.1, Ed. Note, Ch. 1, Pt. A.4(b).

[42] Pub. L. No. 99-570, §§ 1007, 1008, 100 Stat. 3207 (Oct. 27, 1986).

[43] Memorandum from George J. Terwilliger, III, Acting Deputy Attorney General, DOJ, to Holders of United States Attorneys' Manual Title 9, regarding "Indictment and Plea Procedure Under Guideline Sentencing" [hereinafter Terwilliger Bluesheet], Feb. 7, 1992. *Reprinted in* 6 FSR 350 (1994).

In the PROTECT Act, Congress directed the Commission to promulgate a policy statement authorizing a new ground for downward departure. The Commission's response was to add USSG, §5K3.1 p.s., which became effective October 27, 2003.[44] If the Government files a motion, an offender may receive a departure of no more than four offense levels for participating in an early disposition program authorized by the Attorney General and the United States Attorney.[45] This provision was created to help regularize so-called "fast-track" departures that had developed in a number of districts in recent years to accommodate overwhelming caseloads that outstrip both prosecutorial and judicial resources. The new departure provision rewards offenders for pleading guilty early in the process and waiving certain procedural rights, such as the right of appeal, most rights to challenge a conviction under 28 U.S.C. § 2255 (the federal habeas corpus provision), and any of the motions described in the Federal Rule of Criminal Procedure 12(b)(3), such as motions for discovery or to suppress evidence.

The Department issued a memorandum outlining its criteria for authorization of early disposition programs on September 22, 2003. The memorandum stressed that the programs were "properly reserved for exceptional circumstances . . . [and] are not to be used simply to avoid the ordinary application of the guidelines to a particular class of cases."[46] In addition to downward departures, the Department's policies contemplate that some districts may reward offenders for participation in early disposition programs by agreeing not to charge or pursue all readily provable criminal conduct. Results of the Commission's review of early disposition programs, and implications of the new departure provision, were discussed further in the Commission's report *Downward Departures from the Federal Sentencing Guidelines* (2003).

Appellate review. Appellate review of sentences, which the SRA codified for the first time at 18 U.S.C. § 3742, was intended by Congress to "reduce materially any remaining unwarranted disparities by granting the right to appeal a sentence outside the guidelines and by providing a mechanism to assure that sentences inside the guidelines are based on correct application."[47] Any party may appeal a sentence that they allege "was imposed in violation of law" or "as a result of an incorrect application of the sentencing guidelines."[48] The government may appeal any sentence resulting from a departure below the guideline range, and the defense may appeal an upward departure. The SRA directed appellate courts to accept the district court's findings of fact unless they were clearly erroneous, and to give due deference to the district court's application of the guidelines

---

[44] USSG, App. C, Amend. 651 (Oct. 27, 2003).

[45] PROTECT Act, Pub. L. No. 108-21 § 401(m)(2)(B), 117 Stat. 650 (April 30, 2003).

[46] Memorandum from Attorney General John Ashcroft, DOJ, to All United States Attorneys, regarding "Department Principles for Implementing an Expedited Disposition or 'Fast-Track' Prosecution Program in a District" [hereinafter Ashcroft Fast-Track Memo], Sept. 22, 2003, at 5.

[47] SENATE REPORT, *supra* note 1, at 86.

[48] 18 U.S.C. § 3742

to the facts. In the case of an appeal of a departure, the appellate court determines if the sentencing judge's stated reasons for departure were reasonable, and met the standards set out in 18 U.S.C. § 3553, described above. The U.S. Supreme Court further clarified the standards for judicial review of departures in *Koon v. United States*.[49]

In early 2003, the Department of Justice cited with alarm the increasing rate of downward departures. The Department's representatives testified before Congress that "[m]uch of the damage is traceable to the Supreme Court's decision in *Koon v. United States.*"[50] That decision had established "abuse of discretion" as the proper standard for review of departures and had also cautioned appellate courts against categorically prohibiting departures on grounds not specifically prohibited by the Sentencing Commission. In the view of the Department, these holdings had made it difficult to appeal unjustified downward departures, thereby contributing to their increasing rate. The Department called for *Koon* to be effectively overruled by statute. It encouraged legislation that would both 1) establish *de novo* review as the proper standard for review of departures, and 2) prohibit departures on any grounds not affirmatively encouraged by the Commission. As ultimately enacted, the PROTECT Act prohibited departures on grounds not affirmatively encouraged by the Commission only for offenders convicted of sex crimes against children. However, the Act did change the standard of review for all departures to *de novo*.

Some early advocates of sentencing reform (Morris, 1977), and some recent commentators (Berman, 1999), have envisioned appellate review as making substantial contributions to the development of a principled "common law of sentencing." Others have noted the inherent weaknesses in such a vision, however, and have argued that the "enforcement function" of appellate review—ensuring that sentencing courts faithfully implement the guidelines system—has emerged as more important than any "lawmaking function" (Reitz, 1997).

In any event, the legislative history of the SRA makes clear that Congress's primary purpose in establishing appellate review was to ensure that unwarranted disparity did not re-emerge through misapplication of the guidelines or through unjustified departure. Appellate review has also helped alert the Commission to important ambiguities in the guidelines and other problems of guidelines application. It has identified areas in need of guideline amendments to resolve circuit conflicts and help control sentencing disparity (Wilkins & Steer, 1993).

The appellate courts cannot perform their assigned functions without the cooperation of other participants in the system. Appellate review depends on clear fact findings and statements of reasons by the sentencing courts to provide a sufficient record for review. And, of course, correction of

---

[49] 518 U.S. 81 (1996).

[50] *The Child Abduction Prevention Act and The Child Obscenity & Pornography Prevention Act of 2003; Hearing on H. R. 1004 and H.R. 1161 Before the House Subcomm. on Crime, Terrorism, and Homeland Security, of the House Comm. on the Judiciary,* 108th Cong.,1st Sess. 38 (March 11, 2003) (statement of Daniel P. Collins, Associate Deputy Attorney General, DOJ).

guidelines errors or improper departures depends on appeal of the sentence by at least one of the parties to the case.

E. From Theory to Practice

This detailed description of the components of the reformed sentencing system shows how much was changed by enactment of the SRA. The Sentencing Commission, the Department of Justice, and the Judicial Conference of the United States all responded by establishing new policies and procedures to support the SRA's objectives. This systemic perspective shows how implementation of each component is needed for Congress's goals for sentencing reform to be fully realized. Changes to the system and departure from the original vision of the SRA—including enactment of statutory mandatory minimum penalties, the PROTECT Act, and application of *Blakely v. Washington* to the federal guidelines—could change the dynamics of federal sentencing and upset the interaction of components needed to achieve Congress's goals for sentencing reform. A quick contrast between the system as envisioned and the ways it might function in practice reveals what is at stake.

Guidelines development. If the Commission develops policy informed by its research and by "advancement in knowledge of human behavior" (28 U.S.C. §991(b)(c)), we would expect the guidelines to achieve the purposes of sentencing as effectively as current criminological knowledge will allow. If collaborative guidelines development obtains "buy in" from the courts and practitioners, then those charged with implementing the system would have a stake in its success. Practices that could undermine or circumvent the guidelines would be avoided, and implementers would undertake their new duties and responsibilities conscientiously. If collaborative guidelines development and political accountability were harmonized, then direct congressional intervention in sentencing outside the guidelines framework, through mandatory minimum legislation or other specific directives, could be avoided.

If, however, there were a breakdown in any of these components, we could expect negative consequences for the system. If research weren't utilized, correctional resources could be squandered on ineffective sentences. If guidelines were imposed from above rather than developed through collaboration, implementers might shirk their new responsibilities, leading to circumvention and disparity. If the Commission failed to be accountable to Congress, legislative micro-management through specific directives or statutory minimum penalties would be more likely.

Guidelines implementation. If prosecutors charge uniformly and obtain plea agreements that fully account for each offender's criminal conduct, then sentencing uniformity will be advanced. But if prosecutors charge statutory penalties that trump the guideline range and don't permit consideration of the guidelines' mitigating adjustments, then different offenders will be treated similarly. On the other hand, if prosecutors don't pursue all relevant conduct, then independent probation officer investigations into offense conduct is needed to inform judicial review of plea agreements. But if judges accept plea agreements that undermine the guidelines, or depart for unwarranted reasons, or misapply the guideline provisions, then unfair and disparate sentences can result. If appellate courts

correct mistaken guideline applications or unjustified departures, uniformity would be restored. But if neither party appeals the sentence, then the corrective and enforcement functions of appellate review cannot operate.

The role of empirical research. There are many ways the system could fail to reach its ambitious goals. Reforms this comprehensive, requiring coordinated actions among all three branches of government, present a formidable challenge. It may be unreasonable to expect this new system to be fully implemented at a stroke. The original commissioners recognized that sentencing reform would have to be incremental. They wrote that "[t]he Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements. . . . The Commission will collect data on . . . whether plea agreement practices are undermining the intent of the [SRA]" in order to seek corrective actions as needed.[51] The Commission also contemplated "monitoring when the courts depart from the guidelines and . . . analyzing their stated reasons for doing so" in order to "refine the guidelines to specify more precisely when departures should and should not be permitted."[52] And guideline amendments, informed by research and appellate review, was expected to help reduce ambiguities, circuit conflicts, and problematic guidelines provisions (Wilkins & Steer, 1993).

Further research and guideline revisions were anticipated in many other areas. Data collection was planned to evaluate the validity and "crime-control benefits" of the criminal history score (*Supplementary Report*, 1987, at 44). The Four-Year Evaluation called for additional research on the effects of the guidelines on sentence length and the use of incarceration, and on sentencing disparity, especially "in the area of departures and the interaction of the guidelines with mandatory minimum penalties" (USSC, 1991a, at 54).

Because the guidelines had been fully implemented for only a short time, the statutorily mandated Four-Year Evaluation was recognized as "a preliminary examination of the short-term effects of the guidelines during the first few years of implementation" (USSC, 1991a, at 1). Much more data is available today. While the guidelines have been the subject of a large critical literature, and anecdotal reports from the field suggest breakdowns in some of the key components of the system, objective evaluation must be based on empirical evidence. This report seeks to use all the available research from both inside and outside the Commission to answer two sets of questions:

- *Evaluative questions: Are the goals of the SRA being met? Have certainty, severity, rationality and transparency increased, and unwarranted disparity decreased?*

- *Diagnostic questions: Are the components being implemented? And if not, how has this affected the system's ability to reach its goals?*

---

[51] USSG §1A1.1, Ed. Note, Ch. 1, Pt. A.4(c).

[52] *Id*. at Pt. A.4(b).

Chapter Two:
Impact of the Sentencing Guidelines on the Certainty and Severity of Punishment

A. Introduction to the Chapter and the Data

1. Sentencing Policy and the Scale of Imprisonment

The text and legislative history of the Sentencing Reform Act [SRA], reviewed in Chapter One, make clear that the SRA aimed to increase the certainty and severity of punishment by eliminating parole and increasing sentencing severity for some crimes. Congress instructed the Commission to ensure that "the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."[53] The SRA specifically required "a substantial term of imprisonment" for some types of offenses and offenders.[54] The Commission also determined from its own analyses that penalties for some types of crime, such as "white collar" offenses, were disproportionately low compared to other types of theft involving similar economic losses. Thus, both Congress and the Commission endeavored to change historic sentencing practices by using the new instrument of policy control created by the SRA—the federal sentencing guidelines. In this chapter we evaluate the effects of these efforts.

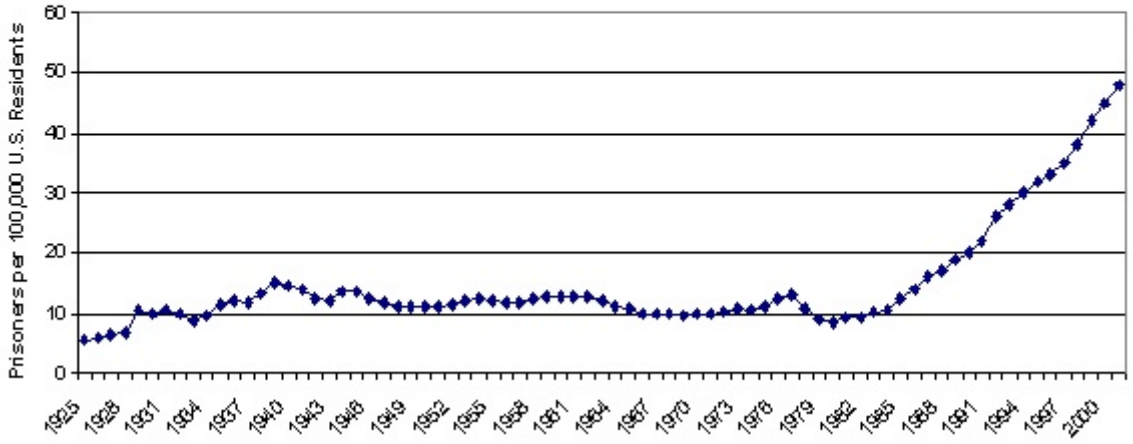
Some criminologists have been skeptical that explicit policy changes imposed by centralized authorities, such as adoption of sentencing guidelines, can significantly alter historic sentencing practices. The "going rates" of punishment for various types of crime and the overall "scale of imprisonment"—the proportion of a jurisdiction's population that is imprisoned at any given time—seem subject to local, cultural, and institutional forces that are hard to explain and even harder to control (Zimring & Hawkins, 1991). Experience with sentencing reform in the states has convinced some observers that guidelines can successfully change sentencing practices, despite evidence of circumvention through plea bargaining and other practices (Tonry, 1996). But room for skepticism remains. It has been shown, for example, that neither variation in crime rates among different jurisdictions, nor the adoption of determinate sentencing policies, have consistent effects on rates of prison admissions or on prison populations (Marvel & Moody, 1996). Explicit policymaking through law appears to be just one factor among many that determine incarceration rates at a given time in a given jurisdiction. The analyses in the remainder of this chapter demonstrate, however, that the federal sentencing guidelines have had a significant, independent effect on federal sentencing practices, along with other legal and policy changes occurring during the last fifteen years.

---

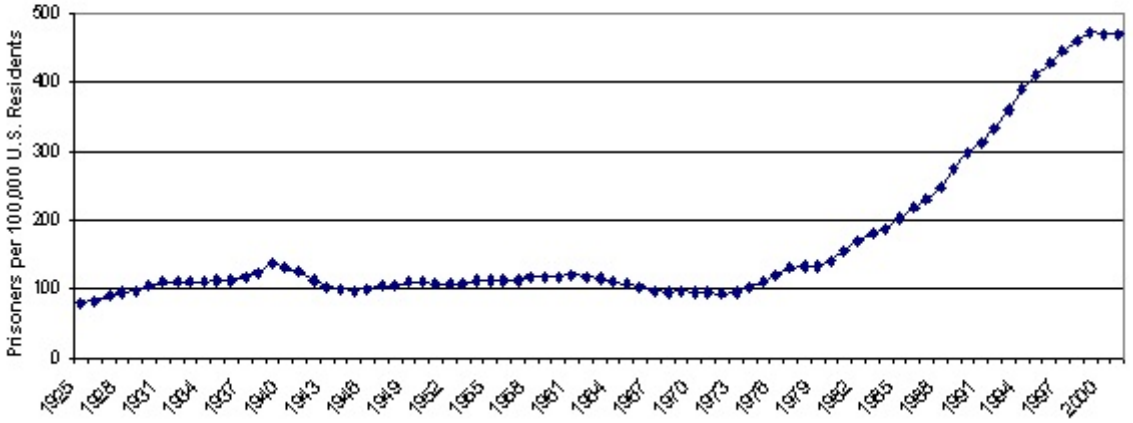
[53] Pub. L. No. 98–473 (1984). *See generally* 28 U.S.C. § 994(m).

[54] 28 U.S.C. § 994(i).

Figure 2.1:
Sentenced Prisoners in Federal Institutions



Sentenced Prisoners in State and Federal Institutions



Source: Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics (2001); BJS, Historical Statistics on Prisoners in State and Federal Institutions (1988).

Whatever the causes, there is no dispute that in recent decades the scale of imprisonment has climbed dramatically over historic levels in the federal and in most state criminal justice systems. Figure 2.1 shows that both federal and national imprisonment rates—the number of prisoners per 100,000 adult residents—remained fairly steady for fifty years before climbing to over four times their historic levels by 2002. The growth of the federal system began a decade after the states but has continued even as growth in the states has flattened. In 2002, the Federal Bureau of Prisons became the largest prison system in the country, surpassing California, and is now responsible for over 174,000 inmates (BJS, 2003; BOP, 2004).

This chapter explores the contribution of the sentencing guidelines to these trends. Specifically, longitudinal data on federal sentencing practices is reviewed, beginning with changes in the percentage of offenders who receive prison time instead of simple probation, or instead of one of the new "intermediate sanctions," such as home confinement with electronic monitoring. The chapter discusses how the abolition of parole has changed the relationship between sentences imposed and time actually served and tracks the expected length of imprisonment for various types of crime over the period of guidelines implementation. After examining overall trends for the major crime groups, the chapter focuses on specific crime types and notes that sentences have increased dramatically for some types of crime while remaining largely unchanged for others. Finally, the extent to which the observed changes can be attributed to the guidelines themselves, as opposed to other legal and social changes that occurred over the same time period, is discussed.

2. Assembling the Data

Longitudinal data on the effects of the guidelines on federal sentences are hard to assemble. One early study covered the beginning of guidelines implementation, but could not continue past 1991 because its data source—the Federal Probation Sentencing and Supervision Information System [FPSSIS]—was dismantled as the Sentencing Commission's database became operational (McDonald & Carlson, 1993). Data from the Administrative Office of the U. S. Courts [AO] cover a long time period but contain limited information on intermediate sanctions and offender characteristics. Periodic reports from the Federal Justice Statistics Program provide trends from data compiled from various agencies, including the AO, the Executive Office for U.S. Attorneys, the U.S. Sentencing Commission [USSC], and the Federal Bureau of Prisons (*see*, *e.g.,* BJS, 2002a). Different agencies collect data for different purposes, however, so it is not surprising that the information collected, and the definitions and categories used, vary somewhat from agency to agency (BJS, 1998). To identify the effects of a particular policy intervention, such as implementation of the guidelines, different datasets must be combined making every effort to ensure comparability across the years.

Technical Appendix D gives more detailed explanations of the data and methods used in this chapter. Trends in the use of imprisonment were determined using FPSSIS for the years in which it is available and USSC monitoring data for subsequent years. Changes is average imprisonment length were determined controlling for the effects of parole for preguidelines cases, and credit for good time for guidelines cases, using an estimation procedure developed by the Commission. Trends are reported for offenders *sentenced,* rather than *released*, in each year to assess the immediate impact of changes in sentencing policy.

B. The Increased Certainty of Imprisonment

1. Historical Development of the Use of Imprisonment in the Federal System

To put the changes of the last fifteen years into context, it is useful to review briefly the history of imprisonment in the United States. Today, the punishment for almost all serious crimes is a term of imprisonment, but prisons were not always the dominant form of punishment. In colonial times, whipping, fines, banishment, and public humiliations, such as time in the stocks, were common punishments for the least serious crimes. Following English practice, repeat offenders and those guilty of more serious offenses were sentenced to capital punishment. After independence, reform-minded legislators sought forms of punishment that were more effective (jurors were reluctant to convict simple thieves knowing that they faced execution) and that were more suitable to the new popular republic. Imprisonment quickly emerged as an enlightened alternative to "barbarous usages," such as corporal punishment or the gallows, for all but the most serious crimes (Rothman, 1995, quoting New York sentencing reformer Thomas Eddy).

During the Jacksonian period, prisons became "penitentiaries," and moral reform of the convict became the goal. Every state—federal criminal courts did not yet generate enough convicts to require separate federal prisons—spent considerable sums on construction of penitentiaries. These were such a noteworthy American experiment that many European visitors, including Alexis de Tocqueville, came to the new republic specifically to study them. As the mix of offenders changed and the number of incarcerated offenders increased, prisons became crowded and unruly, and prison discipline came to include corporal punishment as a way of enforcing strict prison rules (Rotman, 1995). By the end of the Civil War, the reformatory ideals of the penitentiary had largely given way to the practical realities of modern imprisonment, with overcrowding and brutality among prisoners and staff a grim reality.

Prison was not the only method of punishment historically, and is not the only method available today.

The increasingly obvious failure of prisons to achieve the moral reform of inmates led to repeated calls for change and a search for sentencing alternatives (Rotman, 1995). The invention of probation and parole release and the conversion to indeterminate sentences during the Progressive Era early in the twentieth century, as discussed in Chapter One, were responses to these failures. The federal government began to develop separate prisons during this era, with construction of penitentiaries at Leavenworth in 1897 and Atlanta in 1902. The federal system was among the first to adopt innovations, such as merit selection of prison wardens and eight-hour workdays for prison guards, and to humanize conditions in the cell blocks through the introduction of basic amenities, such as round dining tables to replace the long wooden benches of the state "big houses." Most importantly, from its inception, the federal system operated largely as an indeterminate sentencing system. The Federal Bureau of Prisons, created in 1929, set a new standard for classification and assignment of prisoners based on criminological studies, with lower-risk offenders sent to new lower-security prison camps (Rotman, 1995). The Parole Board, later the Parole

Commission, determined release dates based on an assessment of the inmates' progress toward rehabilitation.

As faith in rehabilitation faltered in the 1970s, indeterminate sentences fell into disfavor (Allen, 1981). Many criminologists turned to developing a theory of punishment focused on the seriousness of the offender's current offense and the offender's danger to the community, rather than the offender's potential for rehabilitation (Von Hirsch, 1976; Singer, 1979). Faced with criticism about arbitrary decisions and limited procedures, the federal Parole Commission began the process of developing guidelines for release decisions. These were based on empirical analyses and emphasized the seriousness of the offense and the offender's risk of recidivism, rather than an assessment of their progress toward rehabilitation (Gottfredson, et al., 1975).

In the last quarter of the twentieth century, making punishments uniform and proportionate became the dominant concern of sentencing reformers. To satisfy the principle of proportionality, the *severity* of punishment had to be fitted to the *seriousness* of the crime, and the *length* of imprisonment came to be seen as the primary measure of punishment severity. To avoid the need for imprisonment in all cases, however, interest in "intermediate sanctions," such as home confinement (FJC, 1987) or community service (Feeley, et al., 1992), also grew in the 1980s. To ensure that these intermediate sanctions were sufficiently punitive to punish proportionately, "exchange rates" were invented to equate alternative sanctions with various lengths of imprisonment (Morris & Tonry, 1990).[55] Studies confirmed that offenders found some alternative sanctions equally or more punitive than some types of incarceration (Crouch, 1993; Wood & Grasmick, 1995; Spelman, 1995; Wood & Grasmick, 1999). The perception remained widespread, however, that only imprisonment—the "clanging of the steel doors"—was sufficiently punitive to punish and deter (Sigler & Lamb, 1995).

2. Overall Trends in the Use of Imprisonment

Figure 2.2 displays trends in the percentage of all federal felony and major misdemeanor offenders given either prison, simple probation, or intermediate sanctions from 1984 through 2002. The solid line indicates a term of imprisonment, the dotted line indicates sentences of probation only, and the dashed line indicates an intermediate sanction. In all the figures that follow, split sentences—which involve a period of imprisonment followed by a period of confinement in one's home or a community-based treatment facility—are considered sentences of imprisonment. Sentences to confinement at home or in a community-based facility for the *entire* period of confinement are considered intermediate sanctions, as is intermittent confinement in a local jail or community-based facility on weekends. Sentences involving no confinement of any type,

The percentage of offenders receiving simple probation has been cut in half under the guidelines.

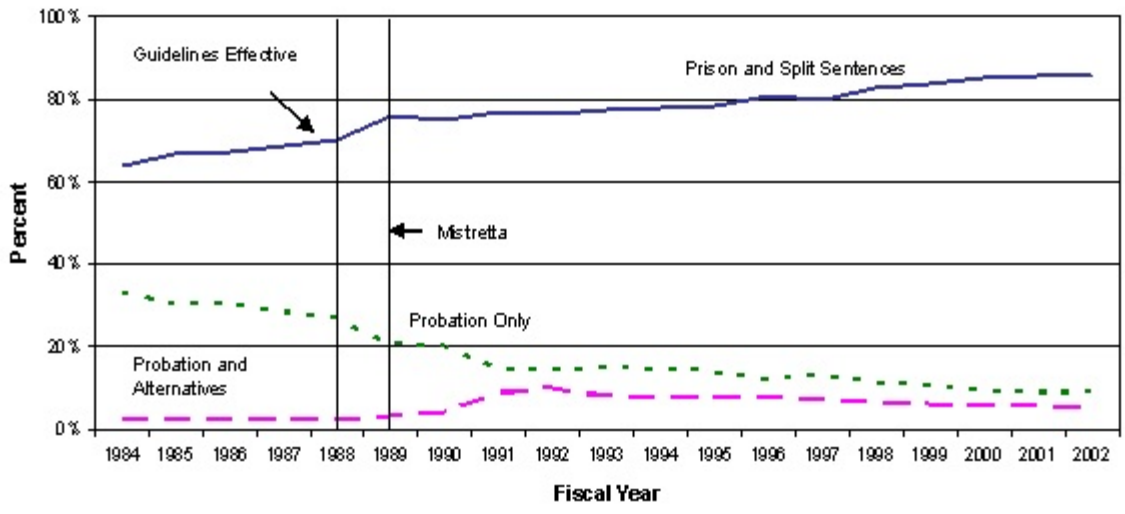
[55] USSG §5C1.1(e) represents a simple schedule of this type.

including sentences involving fines and restitution, community service orders, court-mandated drug or mental health treatment, or other restrictive conditions, are all considered simple probation only.

The shift to guidelines sentencing was gradual over several years. Since the guidelines applied only to offenses that were *committed* after their effective date, November 1, 1987 (fiscal year 1988), many of the defendants sentenced during the early guidelines period, in fact, were not sentenced under the guidelines. [All years reported are fiscal years, which end on September 30 of the named year and begin on October 1 of the previous year.] In addition, many courts held the SRA unconstitutional until the United States Supreme Court's decision in *Mistretta v. United States* [56] in fiscal year 1989, indicated by the vertical right line. Thus, no single point marks the beginning of the guidelines era, but the years from 1988 to 1991 are critical transition years. Important mandatory minimum legislation concerning drug trafficking and the use of a firearm during a crime was also enacted in 1986 and 1988. Isolating the effects of these different policy changes is difficult, as discussed at the end of this chapter, but together they established trends toward greater certainty and severity that would become hallmarks of the guidelines era.

Away from the use of simple probation. As shown in Figure 2.2, between fiscal year 1988 and 1991, the first four fiscal years of guidelines implementation, the use of simple probation was cut by half. In 1987, 29 percent of offenders received sentences of probation, while only 14 percent did in 1991. The use of imprisonment spiked in the first few years of guidelines implementation and then declined slightly before resuming a long gradual climb to 86 percent of all offenders sentenced in 2002, over 20 percent higher than during the immediate preguidelines era.

Figure 2.2: Type of Sentence Imposed for All Felonies



Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

[56] 488 U.S. 361 (1989).

Examining the seventeen-year trend shows that the percentage of felony and major misdemeanor offenders receiving some time in prison was increasing even prior to implementation of the guidelines, and has continued its gradual long-term increase during the guidelines era. The percentage of serious federal offenders receiving sentences of simple probation declined gradually over the same time period, with the sharpest "step" decrease at the time of guidelines implementation. The decrease in the use of probation is consistent with projections of the effects of the guidelines made by the Commission when the guidelines were promulgated (Block & Rhodes, 1987). The overall pattern suggests that numerous factors—including changes in the composition of the federal caseload, in social attitudes toward crime, and in federal penalty statutes—were toughening sentences throughout the period of study, with implementation of the guidelines having a substantial additional effect.

Widening the net. As described in the section on economic offenses below, much of the decrease in the use of simple probation following implementation of the guidelines is explained by increased use of intermediate sanctions for "white collar" crimes involving lesser economic losses. These offenders historically were likely to receive simple probation, but under the guidelines they increasingly are subject to intermediate sanctions and imprisonment. This development runs counter to the recommendations of some advocates for intermediate sanctions. Many had hoped that alternative sanctions would be used to divert offenders from prison and avoid "net widening"—use of intermediate sanctions for offenders who would historically have received simple probation (Tonry, 1995). Intermediate sanctions have been recommended as cost savers, since they can punish low-risk offenders for somewhat less money than imprisonment (GAO, 1994). But in the federal system, home, community, and intermittent confinement have been used almost exclusively to increase the severity of punishment for offenses that historically received simple probation. The only exception to this general finding is among larceny offenders, as described below.

The increased use of intermediate sanctions during the guidelines era was influenced by both legal and practical factors. Under the guidelines' zone system, discussed in Chapter One, prison is available as a sentence for all offenders, but simple probation is available only for the least serious offenders who fall in Zone A. Offenders in Zone B of the Sentencing Table *must* receive some period of alternative confinement if they are not imprisoned. Offenders in Zone C must receive imprisonment, but may serve up to half of the minimum term in some form of alternative confinement. The Commission amended the Sentencing Table in 1992 to expand modestly the number of offenders who were eligible for alternative confinement, in order to take advantage of the increasing availability of a new technology.[57] Electronic monitoring, considered an important enforcement tool for home confinement, became available nationwide in the early years of guidelines implementation, through the joint endeavors of the Federal Probation Service and the Bureau of Prisons. This made an intermediate sanction available in locations without access to community confinement facilities.

Judges responding to the 2002 Commission survey were very positive about the availability of these alternatives to incarceration. The majority of district judges urged greater availability of

[57] USSG, App. C, Amend. 462 (Nov. 1, 1992).

probation with confinement conditions, particularly for drug trafficking offenders (64 percent), and the majority of circuit judges requested that such sentencing options be made either more available or not reduced from their current availability (USSG, 2003d, III-18). Across all types of offenses, only a small minority of judges (approximately 15 percent) urged reduced availability of these options.

C. The Increased Severity of Prison Sentences

1. The Elimination of Parole and the Importance of Time Served

To appreciate long-term changes in the severity of federal prison sentences, it is important to distinguish between the *sentences imposed* by the courts and the *time actually served* by offenders. In the preguidelines system, the division of authority between the Parole Commission and sentencing judges gave rise to a large gap between sentences imposed and the time offenders actually served in prison. On average, preguidelines offenders served just 58 percent of their imposed sentences (Sabol & McGready, 1999). In the SRA, Congress mandated that all offenders would serve at least 85 percent of the sentence imposed by the sentencing judge, with a maximum reduction of about 15 percent as a reward for good behavior while in prison.[58] Time served today can be affected by other sentence reductions of various kinds. For example, offenders may qualify for early release for successful completion of drug treatment while in prison,[59] or upon motion of the Director of the Bureau of Prisons, for extraordinary and compelling reasons, such as terminal illness.[60] The Commission has occasionally made reductions in the guideline range applicable to certain categories of offenders retroactive under USSG §1B1.10, p.s.

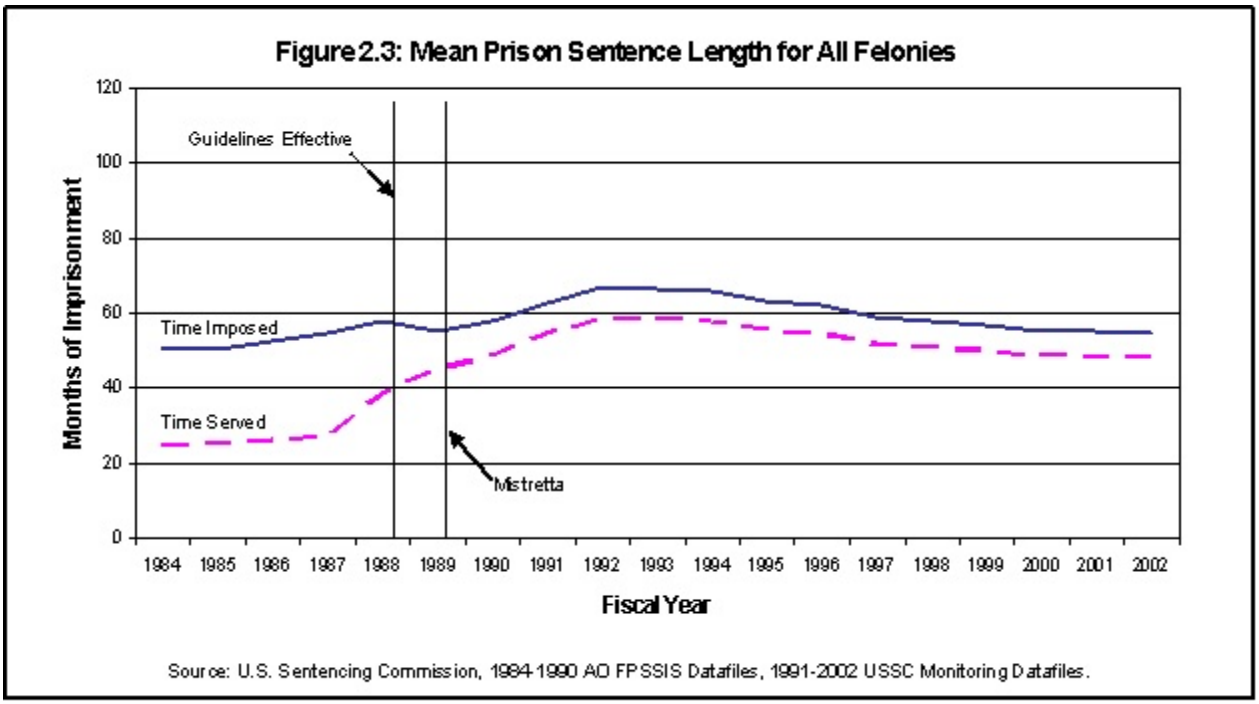
Figure 2.3 illustrates the importance of accounting for the abolition of parole. The solid line shows average sentences imposed on offenders, while the dashed line shows an estimate of the prison time likely to be served. (The sentence severity charts in the remainder of this chapter all follow this standard format.) Examination of the solid line gives no hint of any substantial change at the time of guidelines implementation. Time imposed actually decreased slightly before resuming its gradual upward trend, which continued until 1992. The dashed line, however, shows that prison time likely to be served increased dramatically over the period of guidelines implementation.

---

[58] 18 U.S.C. § 3624(b).

[59] 18 U.S.C. § 3621(e).

[60] 18 U.S.C. § 3582(c)(1)(A).



Offenders sentenced to simple probation or intermediate sanctions are excluded from these trends, so readers are cautioned to interpret changes in average sentences in conjunction with changes in the rates of imprisonment. The interaction of these trends can be potentially misleading. For example, imposing short prison terms on offenders who historically received simple probation could cause the average prison term to *decrease*, even while the sentences of other imprisoned offenders remained the same. These interactions will be discussed in greater detail in the sections on variations among different offense types later in this chapter.

2. Overall Trends in Sentencing Severity

The data clearly demonstrate that, on average, federal offenders receive substantially more severe sentences under the guidelines than they did in the preguidelines era. Between 1987and 1989, the first year in which the majority of federal offenders were sentenced under the guidelines, the average prison time expected to be served almost doubled. By 1992, the average time in prison had more than doubled, from 26 months in 1986 to 59 months in 1992. Since fiscal year 1992 there has been a slight and gradual decline in average prison time, but federal offenders sentenced in 2002 will still spend about twice as long in prison as did offenders sentenced prior to passage of the SRA.

Average prison time for federal offenders more than doubled after implementation of the guidelines.

The abolition of parole, the enactment of mandatory minimum penalty provisions, and changes in the types of offenders sentenced in federal court all contributed to increased sentence

severity along with implementation of the guidelines. The influence of each of these factors varies among different offenses, which is the subject of the next section.

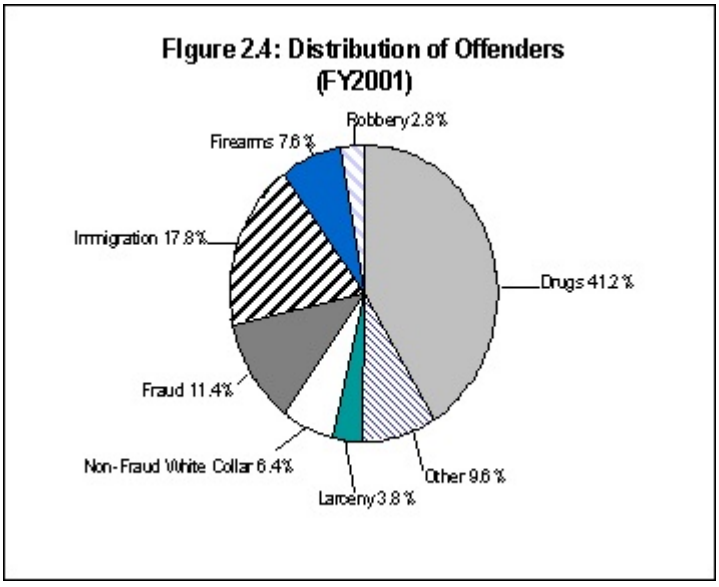
D. Variations Among Different Offense Types

During congressional debates on sentencing reform and in the early discussions of the Commission, considerable attention was paid to the adequacy of existing sentences for various types of crime. For most offenses, the Commission decided to base guideline ranges on the existing average time served, as revealed in the past practice study discussed in Chapter One. One would expect average prison time for these crimes to remain relatively constant under the guidelines. For several other offenses, however, the Commission, either on its own initiative or in response to congressional actions, established guideline ranges that were significantly more severe than past practice. Drug trafficking and "white collar"offenses are the two most notable examples, but guideline ranges were also set above historical levels for robbery of an individual, murder, aggravated assault, immigration, and rape (USSC, 1987). Fifteen years later, it can be confirmed that the policy changes initiated by Congress and the Commission substantially increased sentence severity for virtually all of the targeted offenses. And because these guidelines apply to the most frequently sentenced offenses in the federal courts, they account for the overall severity increases seen in Figure 2.3.

A major advantage of the guidelines approach to sentencing is that offenses and offenders can be categorized along dozens of dimensions relevant to the purposes of sentencing, rather than only a few dimensions. This section, however, must necessarily over-simplify and lump together offenses that are dissimilar in many ways. To obtain comparable groups across the preguidelines and guidelines eras, we categorize offenses only in terms of the most serious count of conviction. When relevant, changes to statutory elements or other factors affecting the characteristics of offenses in each category are noted. Technical Appendix D gives more complete information on the statutes included in each group.

1. Drug Trafficking Offenses

Drug trafficking offenses have comprised the largest proportion of the federal criminal docket for over three decades (AO, Annual Reports, 1971-2001). At the beginning of the guidelines era, approximately half of the persons sentenced under the new laws were drug offenders (USSC, Annual Report, 1989, Fig. VI). As shown in Figure 2.4, that proportion has decreased to about 40 percent in recent years, largely due to a substantial increase in immigration



offenses (USSC, *Sourcebook*, 2001, Tbl. 33). But with growth in the overall size of the federal criminal docket, the sheer number of drug trafficking offenders sentenced in federal court has continued to increase every year, reaching 25,376 in 2002.

The large number of drug offenders means that overall trends in the use of imprisonment and in average prison terms, reviewed above, are dominated by drug sentencing. Analysis using the Federal Bureau of Prison's population simulation model demonstrated that three-quarters of the growth in the federal prison population in the early years of guidelines implementation could be attributed to changes in drug sentencing policies (Simon, 1993). Changes in drug sentencing policies are also a primary cause of a widening gap between the average sentences of Black, White, and Hispanic offenders, which will be discussed in Chapter Four. Understanding these trends, and the influences of the policy choices made by Congress and the Commission, is thus especially important.

Increases in sentence lengths for drug trafficking offenders are the major cause of federal prison population growth over the past fifteen years.

Development of the drug trafficking guideline. The Commission's work developing sentences for drug trafficking offenders was heavily influenced by passage of the Anti-Drug Abuse Act of 1986 [ADAA]. The Commission had begun its work prior to passage of the ADAA by examining the Parole Commission's guidelines, which set release dates for drug traffickers based, in part, on the quantity of pure drug with which an offender was involved (USSC, 1987; Scotkin, 1990). The ADAA codified this quantity-based approach by triggering five- and ten-year mandatory minimum penalties based on the weight of the "mixture or substance containing a detectable amount" of various types of drugs.[61] The ADAA was expedited through Congress in the summer of 1986 in the wake of a number of well-publicized tragic incidents, including the overdose death of a first-round NBA draft pick, Len Bias (USSC, 2002a). The legislative history of the statute is limited primarily to statements made on the House and Senate floors. It presents only a partial picture of why Congress made quantity a dominant consideration for sentencing drug offenders (USSC, 1991b). There are several indications, however, that Congress intended to establish a two-tiered penalty structure for most drugs. Relying on information supplied by law enforcement, Congress apparently linked five-year penalties to amounts that were indicative of "managers of the retail traffic," while amounts linked to ten-year penalties were believed generally indicative of "manufacturers or the heads of organizations" (USSC, 2002a).[62]

Enactment of the ADAA created dilemmas for the Commission. For example, if the Sentencing Commission had followed the Parole Commission and made drug trafficking sentences dependent on the amount of pure drug, instead of the amount of any "mixture or substance containing a detectable amount," courts would be required to consider two different quantities at

[61] 21 U.S.C. § 841(b).

[62] H. REP. NO. 845, 99th Cong., 2nd Sess. Pt. 1, at 16-17 (1986).

sentencing, one for purposes of the statutes and another for the guidelines. If the Commission had given more weight to other potentially relevant factors, such as an offender's role within the drug trafficking organization, then sentences under the guidelines might conflict with sentences required by the statutes in a large number of cases. The statutes would "trump" the guidelines and consideration of the other factors effectively would be voided.

The Commission drafted a drug trafficking guideline that 1) generally measures the applicable amount based on the weight of the mixture or substance, and 2) linked the quantity levels in the ADAA to guideline ranges corresponding to the five- and ten-year mandatory minimum sentences. USSG §2D1.1 assigns base offense levels according to a Drug Quantity Table. The Table requires imprisonment of 63-78 months for offenses involving drug amounts at the five-year mandatory minimum penalty level, and imprisonment of 121-151 months for drug amounts at the ten-year statutory level. Adjustments lengthen the sentence for any prior offenses, for an offender's leadership role, for the possession of any weapon, for any death or injury resulting from use of the distributed drug, and for a variety of other aggravating factors. Downward adjustments for accepting responsibility or for a mitigating role in the offense can reduce the guideline range below the statutory minimum in some cases, in which case Part G of the *Guidelines Manual*, "Implementing the Total Sentence of Imprisonment," requires a guideline sentence at the mandatory minimum level. This "trumping" of the otherwise applicable guideline range creates disparity by treating less culpable offenders the same as more culpable ones (USSG, 1991b), but is necessitated by the need to make the guidelines consistent with the quantity thresholds found in the mandatory minimum penalty statutes.

USSG §2D1.1 adopts and extends the drug quantity-based approach to sentencing drug traffickers found in the Anti-Drug Abuse Act of 1986.

In addition to linking the drug amounts in the statutes to guideline ranges at the five- and ten-year levels, the Drug Quantity Table extends the quantity-based approach across 17 different levels falling below, between, and above the two amounts specified in the statutes. The current table ranges from offense level six, which allows probation for some first-time marijuana offenders, to level 38, which requires prison terms of 235-293 months for first time offenders accountable for large quantities of drugs. Offenders receiving adjustments for criminal history, a leadership role, or other aggravating factors can receive higher guideline ranges up to life in prison. The *Guidelines Manual, Supplementary Report* (USSC, 1987) and other documents published at the time of guideline promulgation do not discuss why the Commission extended the ADAA's quantity-based approach in this way. This is unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline that ultimately was promulgated, in combination with the relevant conduct rule discussed below, had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.

One explanation for the Commission's approach is the need to provide a full range of quantities and penalties to achieve proportionality in drug sentencing. Under this view, drug type and quantity are reasonable first measures of the *harm* for which a drug trafficker should be held

accountable. Another possible reason for the Commission's approach was to avoid sentencing "cliffs" (USSC, 1991b). A cliff arises where a trivial change in quantity has a substantial effect on sentences. For example, if the Drug Quantity Table contained only the two thresholds found in the ADAA, an increase from 499 to 501 grams of powder cocaine could result in a dramatic increase in punishment, just as it does under the mandatory minimum statutes. The drug trafficking guideline provides more finely tuned distinctions among offenses and, therefore, more incremental increases in punishment.

Finding the proper measure of drug offense seriousness. Whatever the reasons for the emphasis on quantity in the drug trafficking guideline, commentators soon raised potential problems with its operation (Judicial Conference of the United States, 1995; Reuter & Caulkins, 1995). By providing a wide range of punishments for different drug amounts, the importance of quantity was greatly elevated compared to other offense characteristics. Some observers doubted that drug quantity was a reliable measure of offense seriousness, or could be determined with sufficient precision to justify seventeen meaningful distinctions among offenders (Schulhofer, 1992). Specific types of cases in which quantity served as a poor proxy for offense seriousness were identified by the Commission and by other observers (USSC, Working Group Report, 1992; FJC, 1994). For example, the weight of different inactive ingredients mixed with the drug—dilutants, carrier media, and even humidity—can result in disparate sentences for offenders who sell similar numbers of doses of a drug (Alschuler, 1991). Subsequently, the Commission developed a standardized weighing method for LSD doses and added other application notes designed to control for these problems,[63] but arbitrary variations due to the weight of inactive ingredients remain (Meier, 1993; Stockel, 1995).

More generally, the amount of drugs for which an offender is held accountable is determined by the relevant conduct rules and research suggested significant disparities in how these rules were applied (Hofer & Lawrence, 1992). The Commission repeatedly amended the relevant conduct commentary to clarify its operation in drug trafficking cases,[64] but questions remain about how consistently it can be applied (Marks, 2003). Drug quantity often is highly contested, and disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators. Drug quantity has been called a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making (Goodwin, 1992; Wasserman, 1995). The Commission also identified ways that drug quantity can *under*estimate offense seriousness, and promulgated commentary encouraging upward departure in these situations.[65]

---

[63] *See* USSG, App. C, Amends. 484, 485, 488 (Nov. 1, 1993), & 503 (Nov. 1, 1994). *See also* Chapman v. U.S., 500 U.S. 453 (1991)(holding that the Commission's LSD weighing method could not be used to determine the applicability of mandatory minimum penalties).

[64] USSG, App. C, Amends. 78 (Nov. 1, 1989) & 439 (Nov. 1, 1992).

[65] *See* USSG §2D1.1, comment., n. 1, 9, 12, 15, 16 and comment., backgr'd. (citing examples of circumstances where the Commission recognizes that quantity may underestimate offense seriousness).

Finding the correct ratios among different drugs and the correct quantity thresholds for each penalty level has also proven problematic. The Commission previously reported that the 100-to-1 drug quantity ratio between crack and powder cocaine fails to reflect the relative harmfulness of different drugs (USSC, 1995, 1997, 2002). In addition, the quantity thresholds linked to five- and ten-year sentences for crack cocaine have been shown to result in severe penalties for many street-level sellers and other low culpability offenders. As a result, the Commission recommended revision of the mandatory minimum penalty statutes and the guidelines. In 1995, the Commission recommended that the quantity levels for crack cocaine should be set at the same level applicable to powder cocaine. This recommendation, and a guideline amendment promulgated to implement it, were rejected by Congress.[66] In 1997, the Commission suggested a range of quantity thresholds for both powder and crack cocaine that would have reduced the ratio between them by both raising the threshold for crack and reducing the threshold for powder (USSC, 1997). This recommendation was not acted upon. Most recently, the Commission recommended that the ratio between powder and crack be reduced to 20-to-1 by raising the threshold quantity amounts for crack cocaine. Certain enhancements to the drug trafficking guideline generally were also recommended to better target the most dangerous and culpable offenders (USSC, 2002a). To date, Congress has not acted on this recommendation.

Evidence that the mandatory minimum statutes were resulting in lengthy imprisonment for many low-level, non-violent, first-time drug offenders (DOJ, 1994)[67] led Congress in 1994 to enact a so-called "safety valve," which waived the mandatory penalties for certain categories of less serious offenders.[68] In the same legislation, Congress directed the Commission to revise the guidelines to better account for the mitigating factors that qualify offenders for the safety valve, and thus reduce the importance of drug quantity in those cases. In 1995, a two-level reduction was added for some offenders who met the safety valve criteria,[69] and in 2001 this was expanded to all qualified drug offenders.[70] Most recently, the Commission again attempted to ameliorate the influence of large drug quantities on sentences for the least culpable offenders by capping the quantity-based offense level for defendants who receive a mitigating role adjustment under USSG §3B1.2.[71]

---

[66] Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

[67] *See also Federal Mandatory Minimum Sentencing: Hearing on H. R. 2199 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103rd Cong., 1st Sess. 30 (1993).

[68] *See* 18 U.S.C. § 3553(f) and USSG §5C1.2.

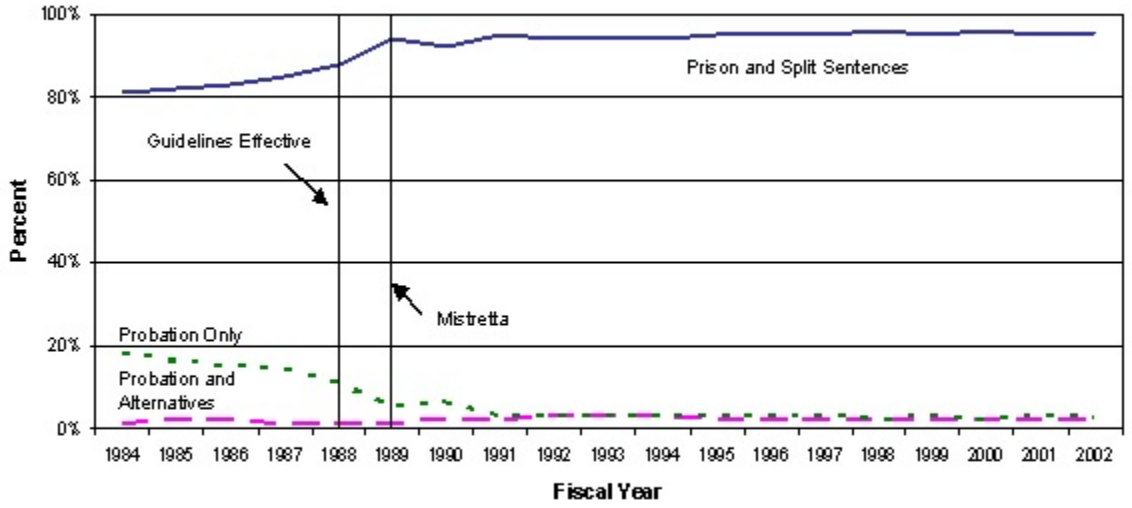
[69] USSG, App. C, Amend. 515 (Nov. 1, 1995).

[70] *Id*. at 624 (Nov. 1 , 2001).

[71] *See id.* at 640 (Nov. 1, 2002) and 668 (Nov. 1, 2004).

Given the problems with relying on drug type and quantity to measure the seriousness of drug trafficking offenses, some observers have called for a fundamental re-examination of the role of quantity under the guidelines (Bowman, 1996; RAND, 1997; ABA, 2002). Thirty-one percent of district court judges responding to the Commission's 2002 survey listed drug sentencing as the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing (USSC, 2003d), with 73.7 percent of district court judges and 82.7 percent of circuit court judges rating drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses (USSC, 2003d). The Commission has been asked to identify ways to amend current drug penalties to better target the most culpable and dangerous offenders.[72]

Figure 2.5: Type of Sentence Imposed for Drug Trafficking

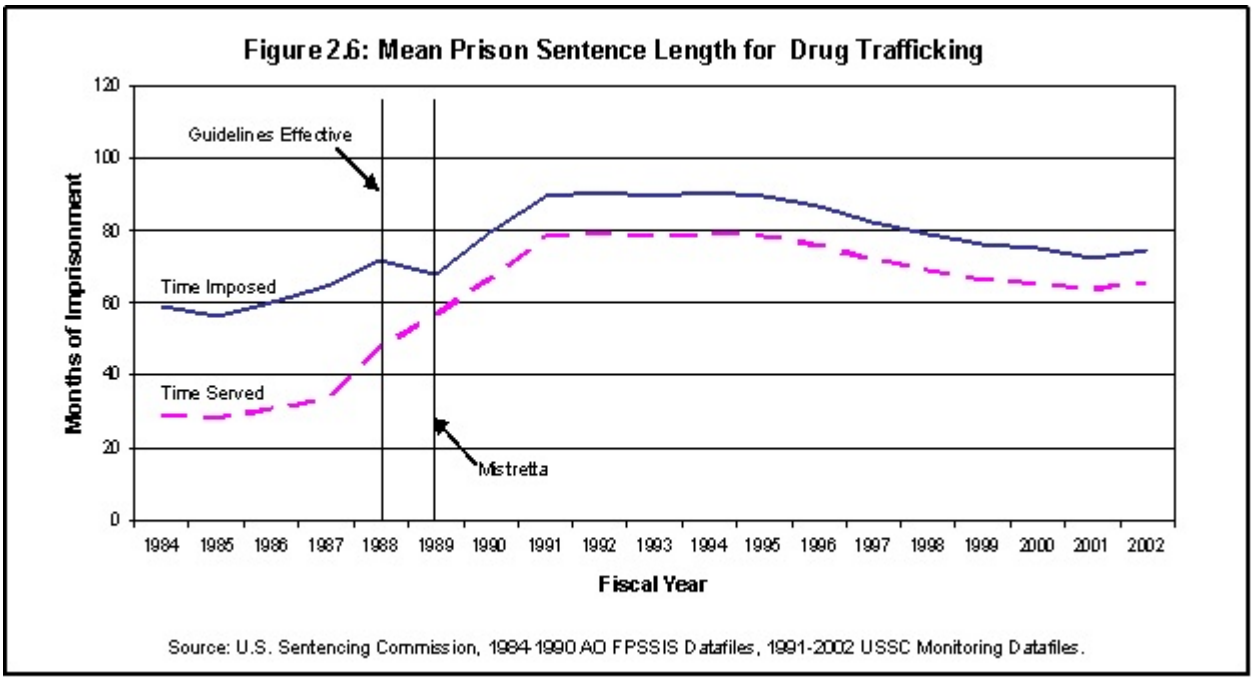


Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

Use of imprisonment. Figure 2.5 shows that a large proportion of drug traffickers received sentences of imprisonment in the preguidelines era, and this proportion was increasing at the time of guidelines implementation, perhaps as a result of the ADAA enacted in 1986. Upon full implementation of the guidelines, the percentage rose and has held steady at about 95 percent. The use of simple probation and intermediate sanctions has dropped to less than five percent each. Separate analyses of heroin and other schedule I narcotics, cocaine and other schedule II narcotics, and marijuana (the only breakdowns possible with the data available across the entire time period) show only minor variations in this general pattern.

[72] Letter from Senator Jeff Sessions, United States Congress, to Judge Diana E. Murphy, Chair, United States Sentencing Commission, regarding "Targeting Sentences on the Degree of Culpability and the Likelihood of Recidivism," July 13, 2000.

Length of time served. The graph in Figure 2.6 shows the dramatic increase in time served by federal drug offenders following implementation of the ADAA and the guidelines. The time served by federal drug traffickers was over two and a half times longer in 1991 than it had been in 1985, hovering just below an average of 80 months. In the latter half of the 1990s, the average prison term decreased by about 20 percent but remained far above the historic average. Analysis of three separate drug groups showed that this overall pattern is repeated for each drug type, although the severity levels are highest for crack cocaine, followed by powder cocaine and heroin and other scheduled narcotics. Marijuana offenses received the shortest prison terms.



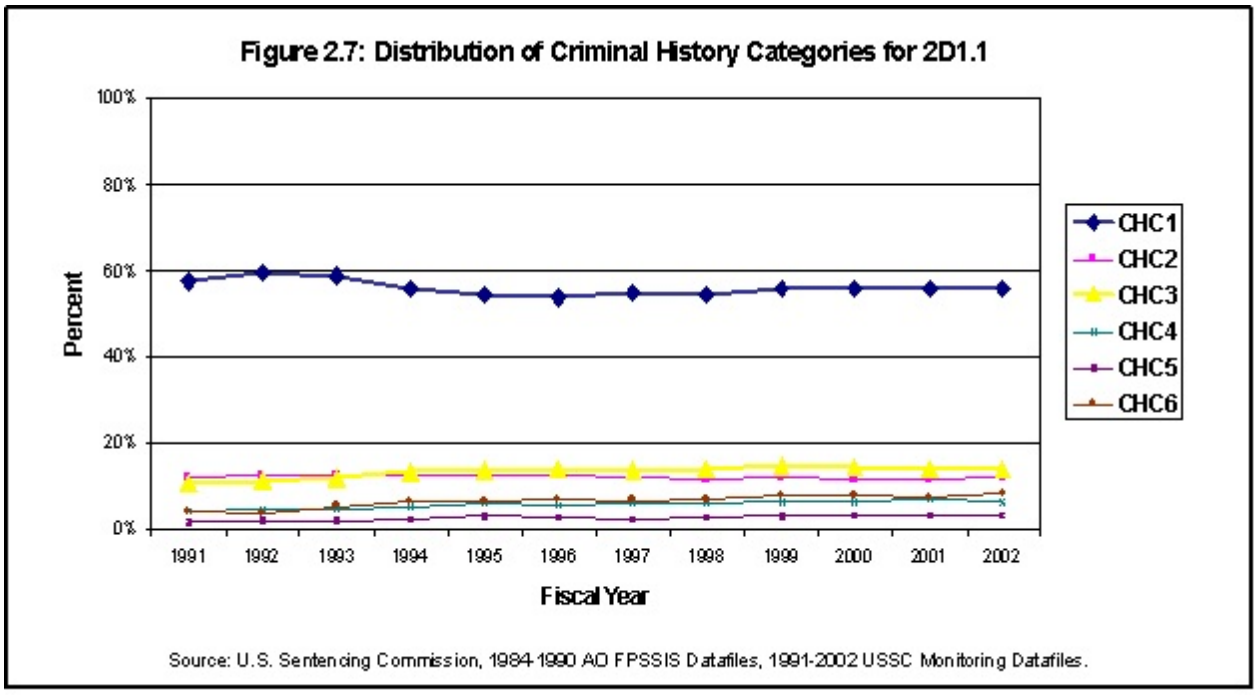
What caused the trends? While sentences for drug trafficking were changing prior to enactment of statutory minimum penalties and implementation of the guidelines, and have continued to change since, there can be no doubt that the policy choices of Congress and the Commission in 1986, 1987, and 1988 each had a dramatic impact on federal sentencing policy for drug offenders. Attempting to precisely allocate responsibility for these changes between the statutes and the guidelines may be impossible (Schwarzer, 1992). As described above, the Commission accommodated the mandatory minimum penalty levels when it developed the drug trafficking guideline, so the influence of the ADAA is both *direct* when it controls the sentence in an individual case by trumping the guidelines, and *indirect* through its influence on the design of the drug guideline itself.

It is important to note, however, that the Commission's choices when drafting the guidelines contributed significantly to these trends. In the *Supplementary Report* that accompanied promulgation of the guidelines, the Commission projected the estimated impact of 1) the ADAA, 2) the career offender provisions of the SRA (implemented at USSG §4B1.1) and 3) the guidelines themselves (USSC, 1987, Table 3, at 69). This analysis suggested that the ADAA would increase average sentences from 23 months to 48 months, and the career offender provision would add another nine months. The guidelines themselves were projected to increase sentences by only an additional month. Later analyses raised questions about this result, however, by reporting that the sentences required by the guidelines above the minimums required by the ADAA significantly increase the average prison term, at least for crack cocaine offenders (McDonald & Carlson, 1993). Analyses conducted for the present report confirm the later findings for all drug offenders: the guidelines have significantly increased average sentence length above the levels required by statute. About 25 percent, or eighteen months, of the average expected prison time of 73 months for drug offenders sentenced in 2001 can be attributed to guideline increases above the mandatory minimum penalty levels. (Appendix D gives details of the analysis supporting this conclusion.)

Over 25 percent of the average prison time for drug offenders sentenced in 2001 can be attributed to guideline increases above the mandatory minimum penalty levels.

The recent downturn. In recent years, attention has focused on the decrease in prison terms that began in the 1990s. There are many possible explanations for the trend, including changes in the characteristics of drug crimes being committed or being sentenced in federal courts, changes in the charges being brought or plea bargains being offered, or changes in the way the guidelines are being applied. In addition, as noted above, Congress and the Commission adopted several measures during this time period that would decrease sentence lengths for some offenders, including the "safety valve" and additional reductions for first-time, low-level offenders. Congress and the Commission also increased penalties for several types of drugs over this time period, however, including methamphetamine, amphetamine, "ecstasy," and various "date rape" drugs.

The available data suggest a general trend toward less serious offenses and a greater incidence of mitigating factors in cases sentenced in the late 1990s. The median drug amount for powder and crack cocaine and for marijuana decreased from 1996 to 2001 (the only years for which data are available). The percentage of defendants pleading guilty and receiving the acceptance of responsibility adjustment has increased steadily over the past decade. The application of mitigating guideline adjustments associated with the safety valve and a defendant's minor role in the offense also have increased. And the percentage of offenders benefitting from downward departures became increasingly frequent, with the use of USSG §5K1.1 departures growing in the early part of the 1990s and other downward departures increasing in later years. On the other hand, as shown in Figure 2.7, the percentage of first offenders sentenced under the drug guideline, while still over 50 percent, has declined slightly since the early 1990s.



The trend toward somewhat lower sentences in the late 1990s has led observers to conclude that those charged with implementing drug sentences have searched for ways to mitigate the severe prison terms mandated by the ADAA and the guidelines (Schulhofer & Nagel, 1997; Saris, 1997; Bowman & Heise, 2001, 2002). This conclusion is reinforced by surveys that have consistently shown that the "harshness and inflexibility" of the drug trafficking guideline is seen as the most significant problem with the sentencing guidelines system (GAO, 1992; *see also* FJC, 1997; USSC, 1991c, 2003).

2. Economic Offenses

Similar punishment for similar loss. As shown in Figure 2.4, economic offenses—which include larceny, fraud, and non-fraud white collar offenses—constitute the second largest portion of the federal criminal docket. A wide variety of economic crimes are prosecuted and sentenced in the federal courts, ranging from large-scale corporate malfeasance, to small-scale embezzlements, to simple thefts. The federal criminal code contains a plethora of provisions covering economic offenses, many of which are not easily placed into simple categories such as fraud or larceny (Bowman, 2001). Particular scholarly and media attention has occasionally focused on "white collar" crimes, although there is no general agreement on what is meant by that term (Schlegel & Weisburd, 1992).

In establishing sentences for economic offenses, the Commission grouped the many statutory provisions into a small number of guidelines and made the pecuniary loss resulting from the crime a primary consideration in determining sentences. The Commission's empirical study of past sentencing practices revealed that in the preguidelines era, sentences for fraud, embezzlement, and

tax evasion generally received shorter sentences than did crimes such as larceny or theft, even when the crimes involved similar monetary losses (USSC, 1987). A large proportion of fraud, embezzlement, and tax evasion offenders received simple probation. In response, the guidelines were written to reduce the availability of probation and to ensure "a short but definite period of confinement"[73] for a larger proportion of these "white collar" cases, both to ensure proportionate punishment and to achieve adequate deterrence (Steer, 2003).

Over the years, additional aggravating adjustments were added to the theft and fraud guidelines, often in response to congressional directives (*see* Appendix B.) The appearance early in the guidelines era of these mandated sentence increases for economic crimes, and the perceived absence of empirical research establishing the need for them, led one former Commissioner to warn that the SRA's promise of policy development through expert research was being supplanted by symbolic "signal sending" by Congress (Parker & Block, 1989).

In 2001, following a six-year process of deliberation, collaboration with the Judicial Conference and DOJ, and field testing, the guidelines governing economic crimes were comprehensively amended as part of an "Economic Crime Package" (*see* Bowman, 2001, for a history of the efforts leading to this package).[74] This amendment sought to further refine and simplify the guidelines, focus the most severe sentences on the most serious offenders, and clarify the definition of pecuniary loss. In the wake of the corporate scandals of 2002, the guidelines again were amended at the direction of Congress to further increase sentence severity (Steer, 2003).[75] The data reported in this section reflect only the initial effects of the Economic Crime Package and none of the effects of the 2002 Sarbanes-Oxley amendments because these changes had not taken effect for cases sentenced by fiscal year 2002.

Use of imprisonment. Figure 2.8 displays trends in the use of imprisonment, intermediate sanctions, and probation for offenders convicted of all economic crimes. The most striking trend is a shift away from simple probation and toward intermediate sentences that occurred as more economic offenders became subject to the guidelines in the early 1990s. These trends among economic offenders drive the overall trends for all felons portrayed in Figure 2.2, because economic offenders comprise the largest share of offenders receiving intermediate sanctions in the federal system. The use of imprisonment for economic offenders also has increased steadily throughout the guidelines era.

---

[73] *Sentencing Commission Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., 55 (1987)(statement of Stephen Breyer, Commissioner, USSC).

[74] USSG, App. C, Amend. 617 (Nov. 1, 2001).

[75] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, §§ 805, 905, 1104, 116 Stat. 745 (July 30, 2002).

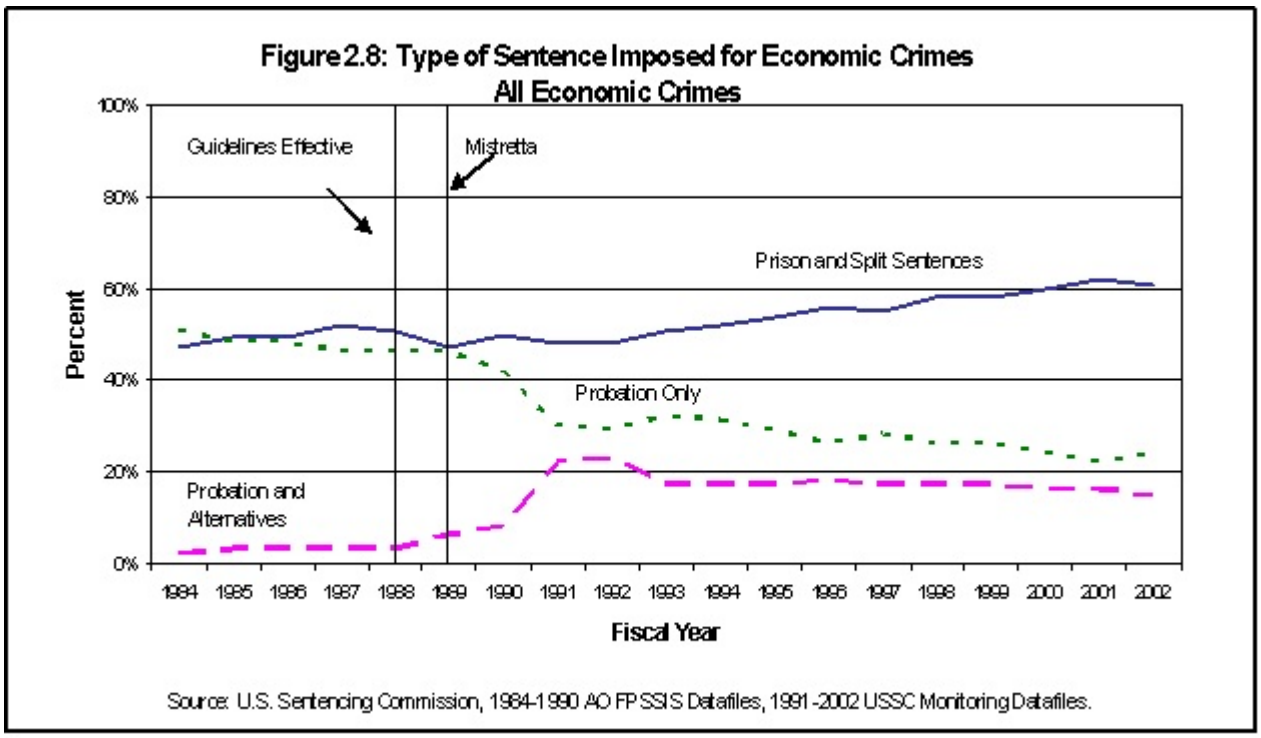


Figure 2.8: Type of Sentence Imposed for Economic Crimes
All Economic Crimes
100%
80%
60%
40%
20%
0%
Percent
Guidelines Effective
Mistretta
Prison and Split Sentences
Probation Only
Probation and
Alternatives
1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002
Fiscal Year
Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

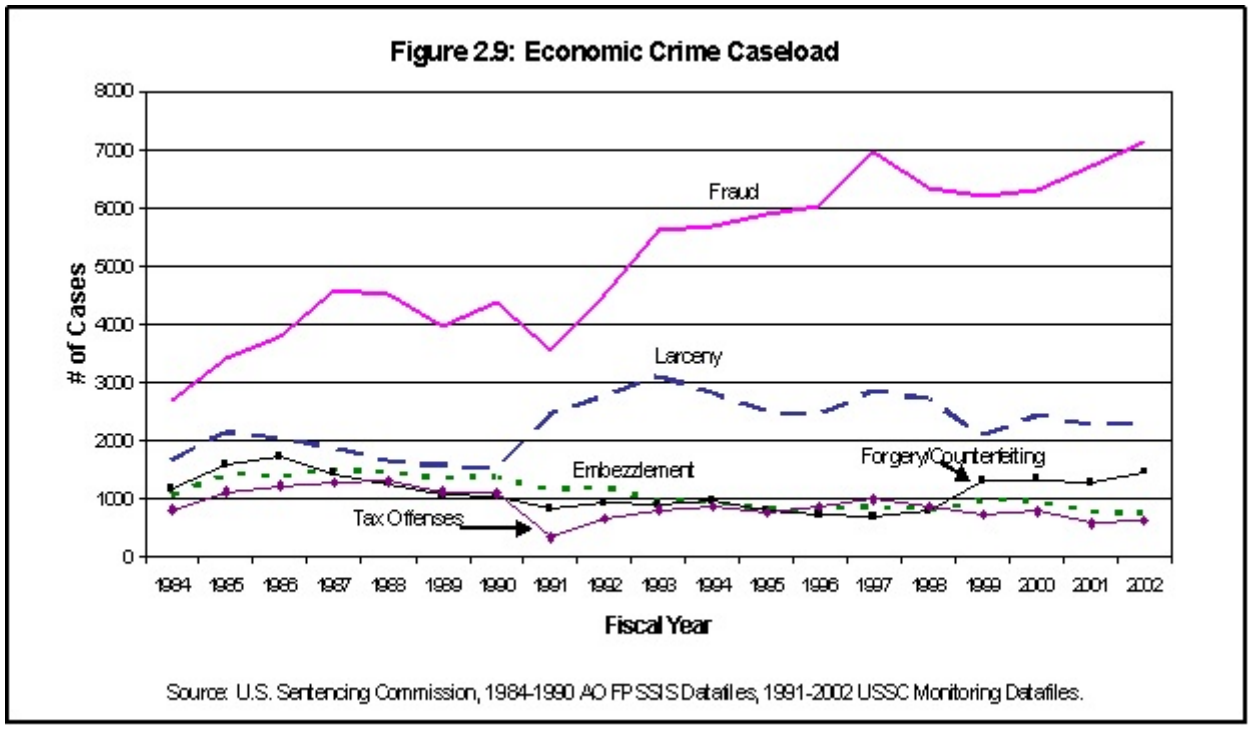


Figure 2.9: Economic Crime Caseload
8000
7000
6000
5000
4000
3000
2000
1000
0
# of Cases
Fraud
Larceny
Embezzlement
Forgery/Counterfeiting
Tax Offenses
1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002
Fiscal Year
Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

As shown in Figure 2.9, fraud offenses constitute the largest proportion of economic offenses, and their proportion has grown. Thus, the trends for economic offenses are dominated by fraud offenders. The thumbnail graphs show that the shift to intermediate sanctions is pronounced for fraud, forgery/counterfeiting, and tax offenders. Embezzlement showed the same shift in the early 1990s, but beginning in 1992, larger numbers of embezzlers were imprisoned. The use of simple probation has been reduced by about two-thirds for fraud offenders and by about half for embezzlers and tax evaders. The rate of imprisonment for fraud offenders rose from about 50 percent in the preguidelines era to almost 70 percent by 2001. For embezzlers, the increase over the same time period was from about 35 to 60 percent. The one unexpected finding is that while use of intermediate sanctions for tax offenders increased from virtually nothing to nearly 30 percent of all cases, the use of imprisonment for tax evaders actually fell slightly after guidelines implementation until returning to historic levels in 2000.

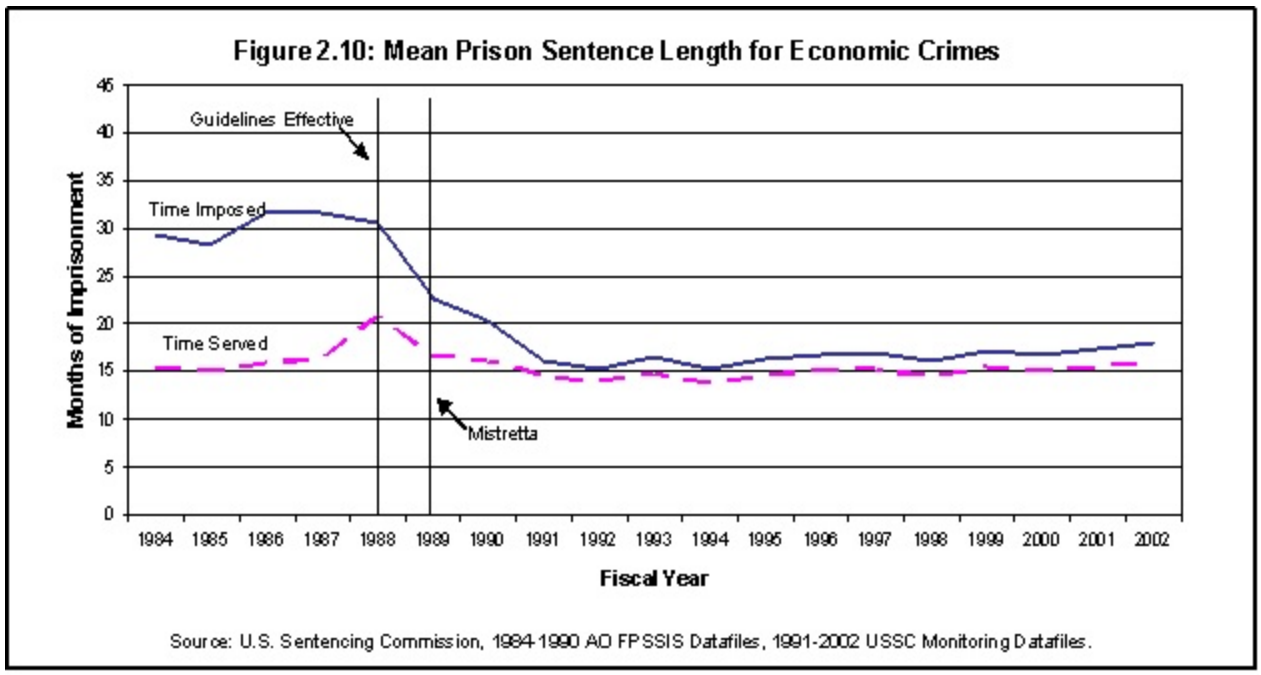
The rate of imprisonment for fraud offenders, the most common economic crime, rose from about 50 percent in the preguidelines era to almost 70 percent by 2001.

Interestingly, among larceny offenders, intermediate sanctions have been used to divert from prison about 20 percent of the offenders who once were incarcerated. While this pattern is commonplace in state systems, it is something of an anomaly in the federal system where intermediate sanctions have generally "widened the net," as discussed above. The reduced use of imprisonment for larceny offenders appears to reflect the Commission's concerted effort to equalize penalties between "white collar" and "blue collar" offenders.

These data raise the question of whether the Commission's goal of assuring a "short but definite period of confinement" for white collar offenders has been achieved. The answer depends both on whether intermediate sanctions satisfy the goal and which offenses count as "white collar." The guidelines ensure that offenses involving the greatest monetary losses, the use of more sophisticated methods, and other aggravating factors are given imprisonment. Certainly the use of simple probation has been slashed—by about two-thirds for fraud offenders and by about half for embezzlers and tax evaders. For most types of economic crime, the rate of imprisonment has also been substantially increased. Despite these increases, in 2002 many district (63%) and circuit (64%) court judges still felt the guideline sentences were less than appropriate to reflect the seriousness of fraud offenses, with smaller majorities believing the same regarding theft/embezzlement/larceny (USSC, 2002). These findings were obtained prior to the full impact of the Commission's 2001 Economic Crime Package and the 2002 amendments made pursuant to the Sarbanes-Oxley Act.

Length of time served. As shown in Figure 2.10, the amount of prison time imposed on economic offenders declined significantly upon implementation of the guidelines, but with the abolition of parole the length of time actually served remained fairly constant at about 15 months. Fraud offenders again dominate the trends, with their average sentence hovering close to 15 months. (The one-year peak in 1988, seen across all economic offense types except tax offenses, may reflect

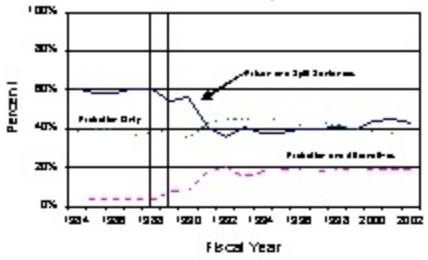
differential implementation of the guidelines in the first year of their application. But it may be a statistical artifact. As a general rule, statisticians look with suspicion on one-year fluctuations in otherwise stable trends, especially if they occur at a time of great tumult in the system. Remember that many courts held the guidelines unconstitutional for this year, potentially affecting the selection of cases for sentencing.)



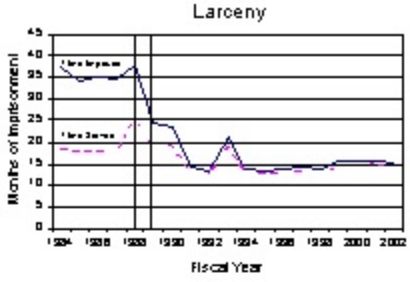
The relatively stable time served by economic offenders, as well as the decreases for some types of offenses, was noted early in the guidelines era (Block, 1989). These trends were caused by the Commission's decision to increase the use of imprisonment. As one Commissioner stated, "[T]he flip side of the Commission's dramatic increase in the likelihood of confinement is an equally dramatic *decrease* in the projected time served by defendants who serve time" (Block, 1989, emphasis supplied). For example, average time served for embezzlement has decreased from preguidelines levels, but nearly twice the proportion of embezzlers are going to prison. As more embezzlers were given short periods of imprisonment, the average length of imprisonment among all embezzlers declined as the new offenders were included in the average. In the case of larceny, however, the reduction in the percentage going to prison is matched by a reduction in time served, again reflecting the Commission's design to reduce sentence severity for simple theft, while increasing it for fraud, embezzlement, and tax offenses (USSC, 1987).

Economic Crime Thumbnails

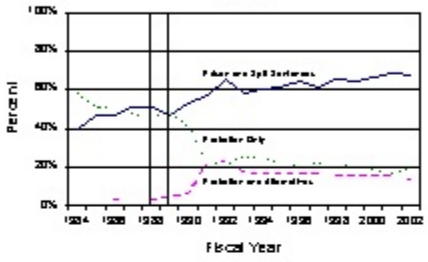
Larceny



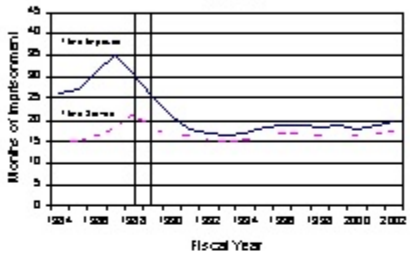
Larceny



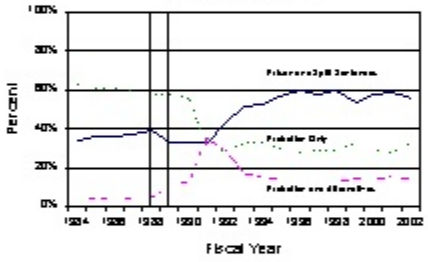
Fraud



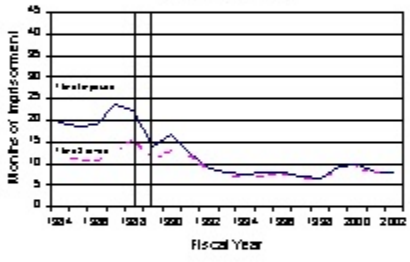
Fraud



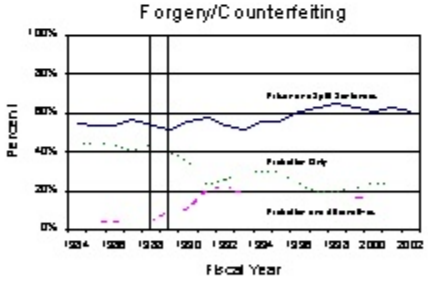
Embezzlement



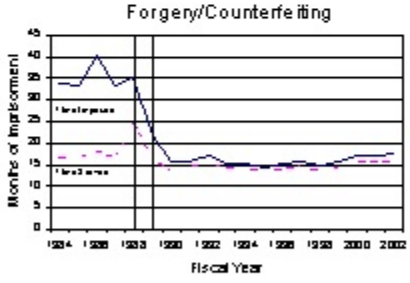
Embezzlement



Forgery/Counterfeiting



Forgery/Counterfeiting

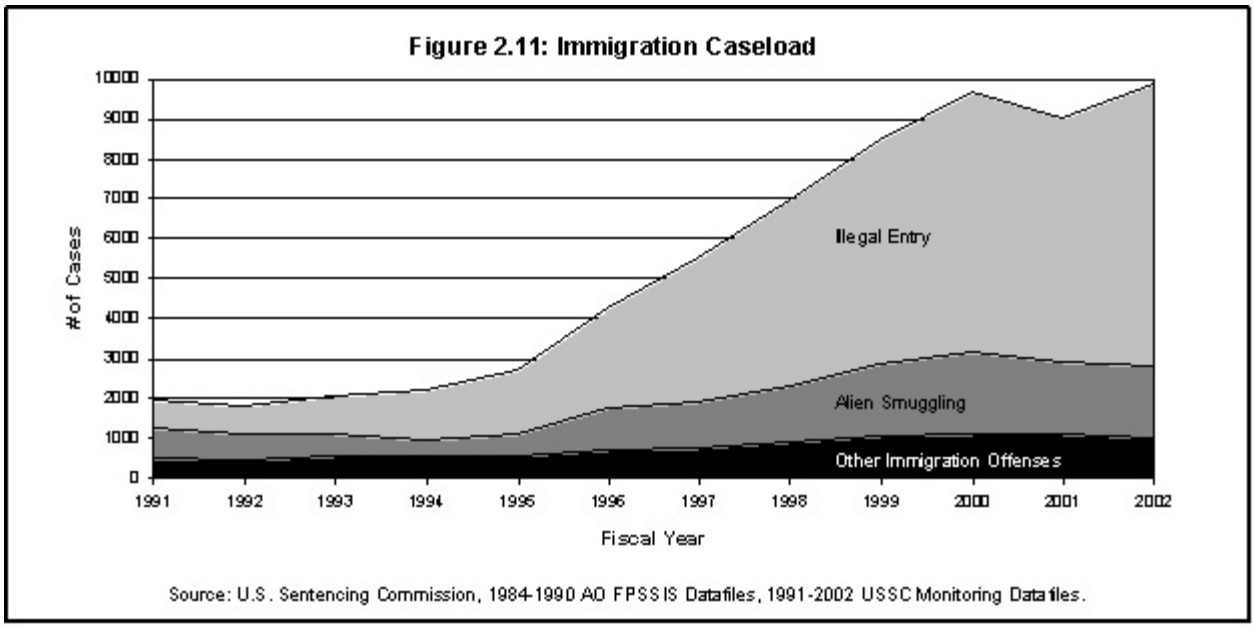


Tax Offenses

Tax Offenses

3. Immigration Offenses

Prior to fiscal year 1994 there were relatively few immigration cases sentenced in the federal courts. Figure 2.11 shows that in the first three years of the 1990s the number of cases ranged between 1,000 and 2,000 annually (BJS, 2002c). Beginning in 1995, however, the number of cases for alien smuggling and illegal entry began to climb, and after the implementation of Operation Gatekeeper—the Immigration and Naturalization Service's southwest border enforcement strategy—the number began to soar, reaching a peak of just under 10,000 cases in 2000. Along with the phenomenal growth in the size of the immigration offense docket, a series of policy decisions by Congress and the Commission have steadily increased the severity of punishment for the two most common classes of immigration offenses: alien smuggling and illegal entry, sentenced under USSG §§2L1.1 and 2L1.2, respectively.



When the Commission constructed the original guidelines for alien smuggling and illegal entry, they were based largely on past practice, with a slight reduction in the availability of straight probation and the amount of time served (Block & Rhodes, 1989). Beginning in 1988, one year after the original guidelines were enacted, the Commission began a series of amendments which significantly increased the penalties for these offenses.

Smuggling, Transporting, or Harboring an Unlawful Alien—§2L1.1. In early 1988, the Commission amended §2L1.1 to better reflect the typical case sentenced under the guideline, which involved for-profit alien smuggling. The base offense level was increased by three levels, and a three-level reduction was provided if the offense was *not* committed for profit or involved only the

defendant's family members.[76] A second amendment to section 2L1.1 occurred less than a year later, when the Commission increased the base offense level for defendants with prior deportations.[77] In 1991, the Commission increased the base offense level to 20 if the defendant had been previously deported after conviction for an aggravated felony.[78] And again in 1992, the Commission revised the specific offense characteristics to enhance penalties based upon the number of aliens, documents, or passports involved in the offense.[79] Finally, responding to a congressional directive in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Commission increased the alien smuggling base offense level by three levels and made various other changes to the alien smuggling guideline.[80]

Unlawfully Entering or Remaining in the United States—§2L1.2. The first amendment to §2L1.2, effective on January 15, 1988, limited the guideline to felony cases only and increased the base offense level from six to eight.[81] In 1989, the Commission added a specific offense characteristic to section 2L1.2, increasing the offense level by four levels for defendants previously deported after conviction for a non-immigration related offense.[82] Two years later, the Commission made the most significant change to the guideline by creating a 16-level enhancement for re-entry by offenders with prior convictions for aggravated felonies.[83] In 1997, acting upon a congressional directive in the 1996 Immigration Reform legislation, the Commission expanded the eligibility criteria for the "aggravated felony" enhancement to include numerous other offenses.[84] Finally, in 2001, responding to complaints from sentencing practitioners along the southwest border, the Commission altered the aggravated felony enhancement to provide graduated enhancements of eight, twelve, or sixteen levels for prior aggravated felonies,[85] depending on the seriousness of the prior offense.

---

[76] USSG, App. C, Amend. 35 (Jan. 15, 1988).

[77] *Id.* at 192 (Nov. 1, 1989).

[78] *Id.* at 375 (Nov. 1, 1991).

[79] *Id.* at 450 (Nov. 1, 1992).

[80] *Id.* at 543 (May 1, 1997) & 561 (Nov. 1, 1997).

[81] *Id.* at 38 (Jan. 15, 1988).

[82] *Id.* at 193 (Nov. 1, 1989).

[83] *Id.* at 375 (Nov. 1, 1991).

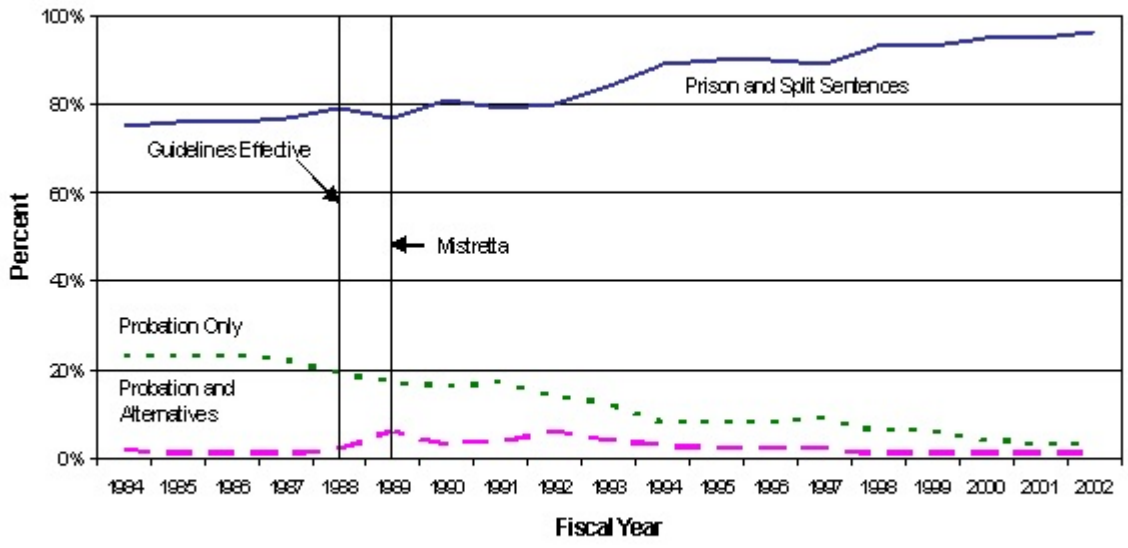
[84] *Id.* at 562 (Nov. 1, 1997).

[85] *Id.* at 632 (Nov. 1, 2001).

These amendments, especially the enhancement for prior aggravated felonies, and when coupled with the elimination of petty immigration offenses from the guidelines, explain why the original impact projections for the immigration guidelines underestimated the percentage of offenders who would be sentenced to prison and the length of time they would serve (Gaes, et al., 1992; Gaes, et al., 1993). They also explain the trends visible in Figures 2.12 and 2.13, which show the percentage of offenders receiving each type of sentence and the length of prison time likely to be served for all types of immigration offenders combined.

Use of imprisonment. The use of imprisonment in immigration cases is affected by the fact that many offenders are non-resident aliens. Lacking a legal home in the United States, many are incarcerated even prior to sentencing. Immediate deportation has also become a frequent response for those individuals arrested for illegal entry (BJS, 2002c). Figure 2.12 shows that there has been a gradual increase in the use of imprisonment throughout the period of study, reflecting a gradual decrease in the use of simple probation. Legislative and Commission changes to these penalties have focused on increasing offense levels. This has pushed greater numbers of offenders into the zones of the Sentencing Tables in which probation and alternative sentences are unavailable. Even when these alternatives are available, non-resident aliens are generally unable to participate in alternative confinements such as home confinement due to their lack of a home in the United States and their high risk of flight from community detention.

Figure 2.12: Type of Sentence Imposed for Immigration Offenses



Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

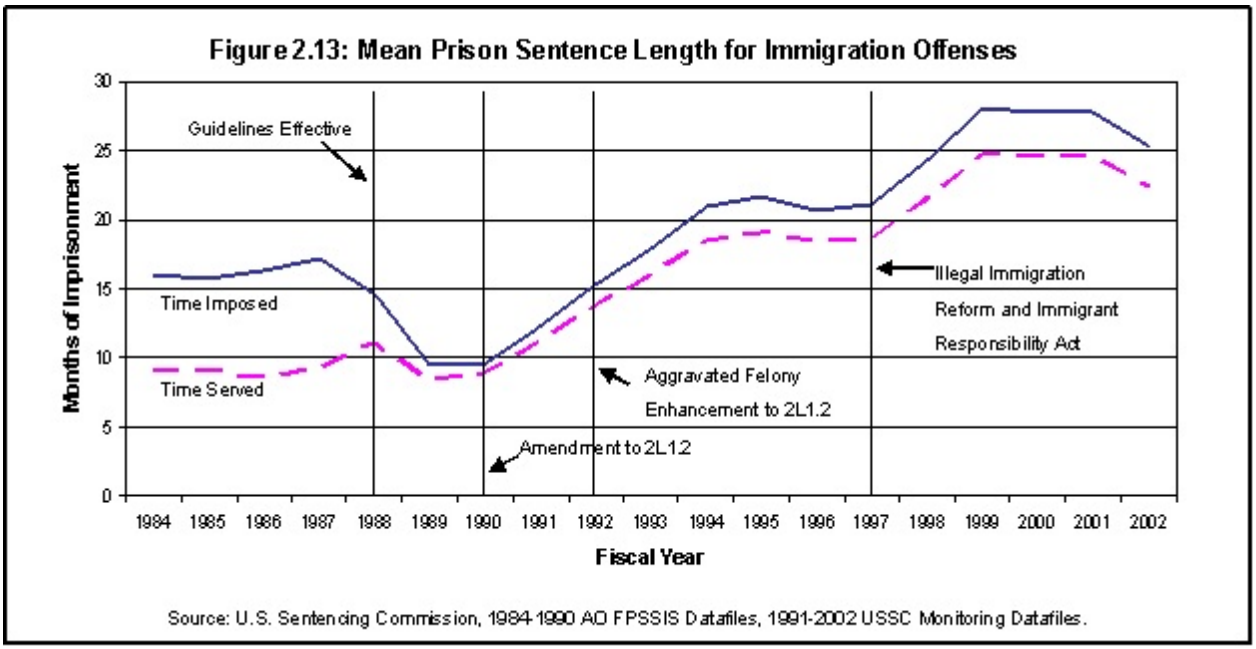


Figure 2.13: Mean Prison Sentence Length for Immigration Offenses
Months of Imprisonment
Guidelines Effective
Time Imposed
Time Served
Amendment to 2L1.2
Aggravated Felony
Enhancement to 2L1.2
Illegal Immigration
Reform and Immigrant
Responsibility Act
Fiscal Year
Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

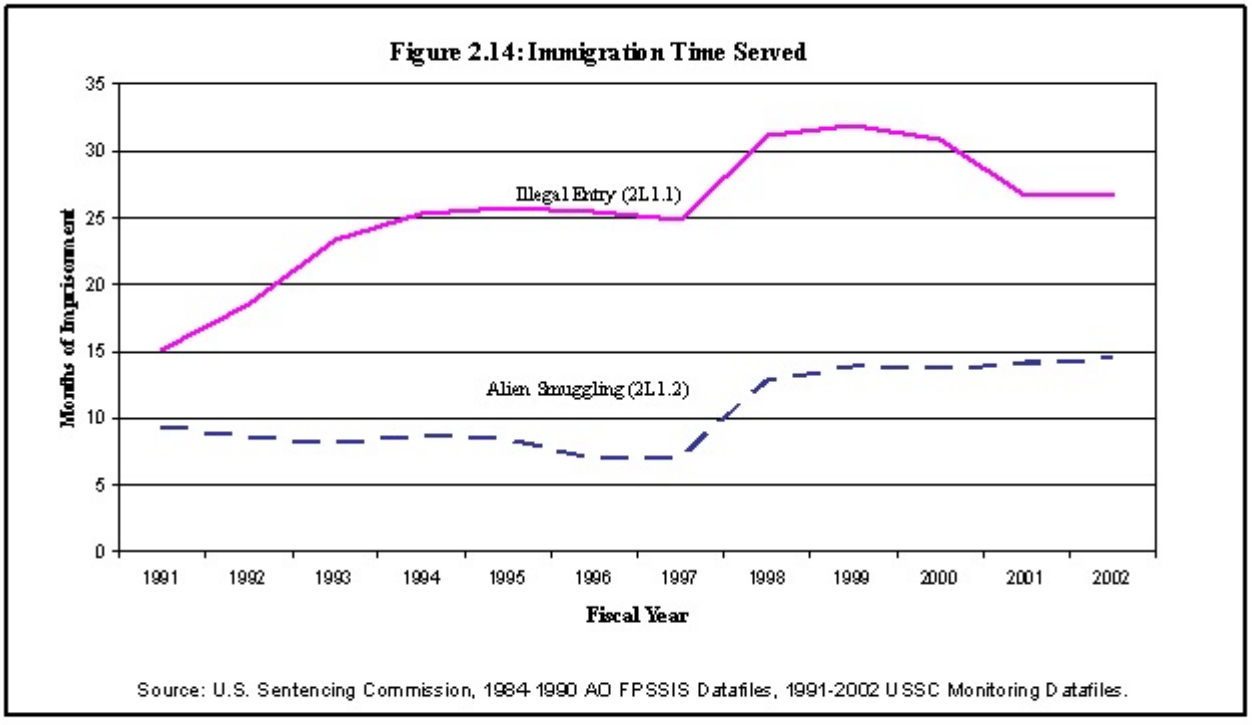


Figure 2.14: Immigration Time Served
Months of Imprisonment
Illegal Entry (2L1.1)
Alien Smuggling (2L1.2)
Fiscal Year
Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

Length of Time Served. As discussed above, the original immigration guidelines did not deviate substantially from past practice. The amount of time served actually decreased slightly with guidelines implementation. However, subsequent revisions to the guidelines significantly increased penalty levels. As shown in Figure 2.13, the average length of time served by immigration offenders nearly tripled between 1990 and 2001.

Figure 2.14 displays trends in the average length of time served for alien smuggling and illegal entry separately. Both guidelines have experienced considerable increases in the amount of time served. Illegal entry offenders experienced the first wave of sentence increases in the early 1990s as the guideline amendments enacted in those years became effective. Alien smuggling experienced a steep increase in 1998, as the amendment promulgated pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 took effect.

The average length of time served by immigration offenders nearly tripled between 1990 and 2001.

4. Firearm trafficking and possession

Guns in violent and drug trafficking offenses. The federal criminal code contains a variety of provisions proscribing the possession, use, and trafficking of firearms. In the last two decades, congressional attention has focused on 18 U.S.C.§ 924(c), which provides for a mandatory minimum penalty for offenders who use, carry, or possess a firearm "during and in relation to" a drug trafficking or violent crime. The predecessor to this provision was enacted by Congress in 1968 and originally required a one- to ten-year mandatory prison term for using or carrying a firearm during the commission of a violent felony. In 1984, the statute was amended to require at least five years' imprisonment, to be served consecutive to the sentence for the underlying offense. In 1986, the statute's scope was expanded to include drug trafficking offenses, and additional penalties were added. Further amendments in 1988, 1990, and 1994 required sentences of twenty years to life imprisonment for offenders with prior convictions.

In 1998, in response to a U. S. Supreme Court decision that had narrowly construed the "use" criteria,[86] the statute's scope was again expanded to include "possession in furtherance" of the underlying offense. Penalties were again increased for brandishing or discharging a firearm during a crime, among other things.[87] These sentencing enhancements have been incorporated into the guidelines (Hofer, 2000). In this chapter, the effects of 18 U.S.C. § 924(c) are included in the data for drug trafficking and violent crimes presented in other sections of this chapter.

---

[86] Bailey v. U. S., 516 U.S. 137 (1995).

[87] Pub. L. No. 105–386, 112 Stat. 3469 (Nov. 13, 1998).

Firearm trafficking and possession or transfer to prohibited persons. Federal statutes also define two other broad types of firearm offenses. Federal law regulates transactions in firearms and imposes record-keeping and other requirements designed to facilitate control of firearm commerce by the various states. Failure to abide by these federal regulations is a federal crime. In addition, possession of a firearm by certain classes of persons, such as felons, fugitives, or addicts, is prohibited.[88] Knowingly transferring weapons to these persons is also prohibited. Congress has been somewhat less active in sentencing for these offenses over the last two decades than it has for drug trafficking, economic, or sex offenses. But the Commission has chartered several staff working groups concerning sentencing policy for these issues. The Department of Justice and the Bureau of Alcohol, Tobacco, and Firearms have also been active, both in collaborating with the Commission on the development of sentencing policies, and in organizing Task Forces, such as Project Triggerlock, Project Weed and Seed, and Project Exile, which utilize the federal firearm statutes to target dangerous offenders.

The Commission originally based the guidelines for these firearm offenses on its study of past practices (USSC, 1987). Soon thereafter, however, the Commission undertook several major revisions of firearms guidelines, which resulted in significant severity increases over historic levels. In 1990, the Commission increased the base offense level applicable to some offenses.[89] In 1991, the Commission again increased penalties and reorganized the guidelines by consolidating them into a single provision, USSG §2K2.1, which was created to handle most firearm trafficking and possession offenses.[90] The base offense level was linked to the statute of conviction, and enhancements were provided based on the number of firearms trafficked and other aggravating factors. Several later amendments clarified this basic structure.

In the Violent Crime Control Law Enforcement Act of 1994, Congress created several new offenses involving the possession or transfer of firearms to juveniles and expanded the list of persons prohibited from possessing firearms. It also directed the Commission to increase penalties for offenses involving semiautomatic weapons. The Commission amended USSG §2K2.1 in response to these directives.[91] The most recent amendments track statutory changes expanding the class of persons prohibited from possessing firearms and further increasing penalties.[92] In 2001, at the suggestion of the Bureau of Alcohol, Tobacco, and Firearms, penalties were increased for trafficking offenses involving more than 100 weapons.[93]

---

[88] 18 U.S.C. § 922(g).

[89] USSG, App. C, Amend. 333 (Nov. 1, 1990).

[90] *Id.* at 374 (Nov. 1, 1991).

[91] *Id.* at 522 (Nov. 1, 1995).

[92] *Id.* at 578 (Nov. 1, 1998).

[93] *Id.* at 631 (Nov. 1, 2001).

Use of imprisonment and length of time served. Figure 2.15 shows changes in the percentage of firearm trafficking and possession offenders who receive sentences of imprisonment, probation, and intermediate sanctions. For traffickers, the use of probation has been steadily reduced to about one-quarter of its preguidelines level, replaced by imprisonment and, to a lesser extent, intermediate sanctions. For illegal possessors, probation has been replaced almost completely by imprisonment.

By 2000, prison terms for firearm offenders were about double what they had been in the preguidelines era.

Figure 2.16 shows changes in the length of time served. After a period of volatility and decline in trafficking sentences in the first years of guideline implementation, when the guideline was being reconsidered and redesigned by the Commission, time served began a steady climb in fiscal year 1992, the year the Commission's major revision to USSG §2K2.1 became effective. The subsequent amendments to the guideline have continued to increase sentence severity. By 2000, prison terms were about double what they had been in the preguidelines era. The severity increases for possession offenses were equally dramatic, doubling between 1988 and 1995.

Figure 2.15

Type of Sentence for Firearms Trafficking

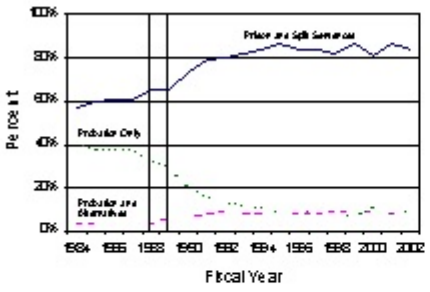
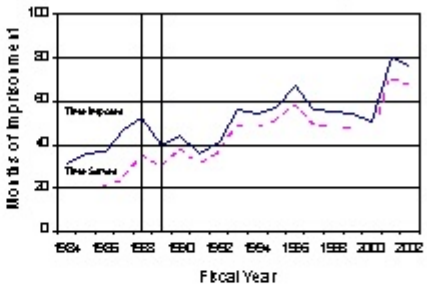
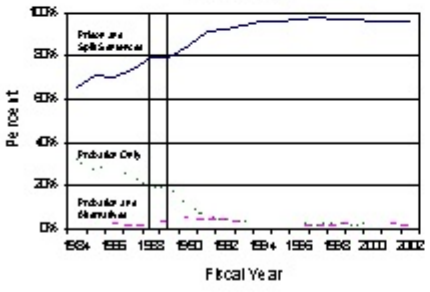


Figure 2.16

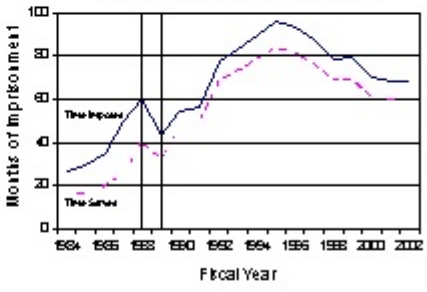
Mean Prison Sentence Length for Firearms Trafficking



Type of Sentence for Illegal Firearms Possession



Mean Prison Sentence Length for Illegal Firearms Possession

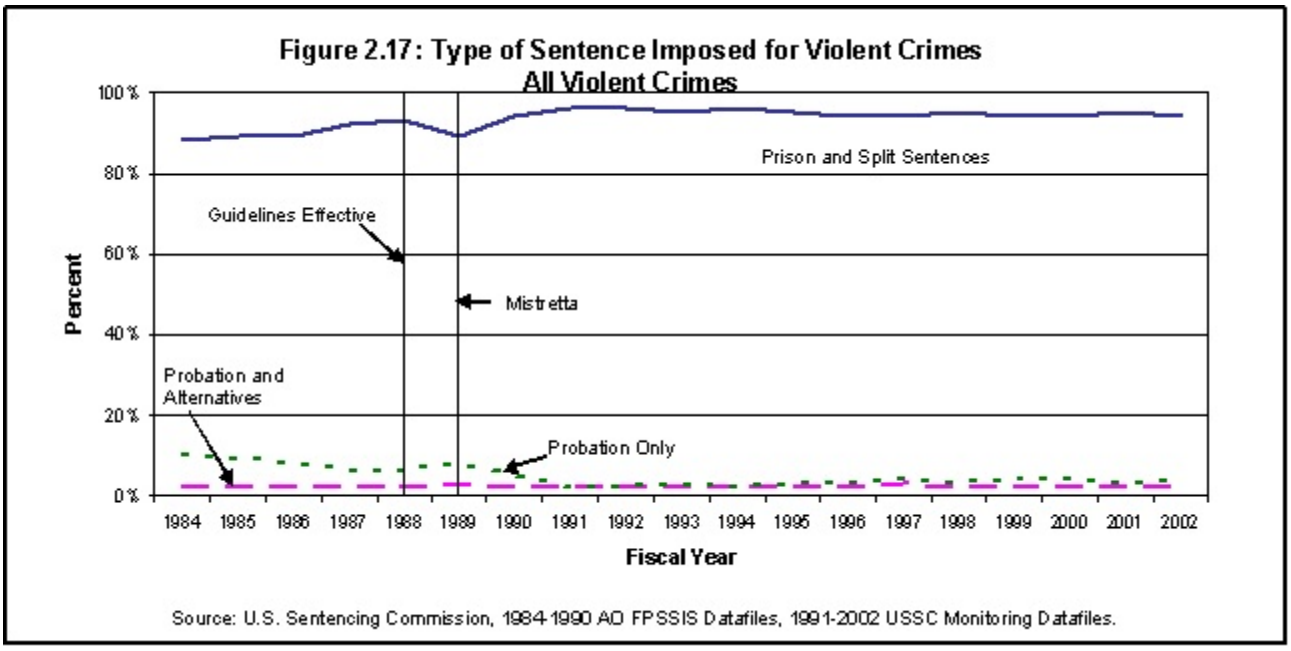


Source: U.S. Sentencing Commission, 1984-1990 AOFPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

5. Violent Crimes

Unlike the state courts, the federal courts sentence relatively few offenders convicted of violent crimes. In 2001, murder, manslaughter, assault, kidnaping, robbery, and arson constituted less than four percent of the total federal criminal docket. Due to the unique nature of federal jurisdiction over these types of crime, a sizeable proportion of murder, assault, and especially manslaughter cases involve Native American defendants. The most common federal violent crime is bank robbery, which has long been of special concern to federal law enforcement.

While not expressly directing a change in federal sentencing practices for violent offenses, the SRA and numerous other penalty statutes display a special concern with violent crimes.[94] In addition, "the Commission was careful to ensure that average sentences for such [violent] crimes at least remained at current levels, and it raised them where the Commission was convinced that they were inadequate" (USSC, 1987, 18-19). For robbery, the Commission found from its study of past practices that bank robbers and muggers were treated differently. Lacking a principled reason why this should be, it increased the sentences for personal robbery to make them more proportional to those for bank robbery while still recognizing the greater seriousness of offenses against financial institutions (USSC, 1987, 18). For murder and aggravated assault, the Commission felt that past sentences were inadequate since these crimes generally involved actual, as opposed to threatened, violence (USSC, 1987, 19).

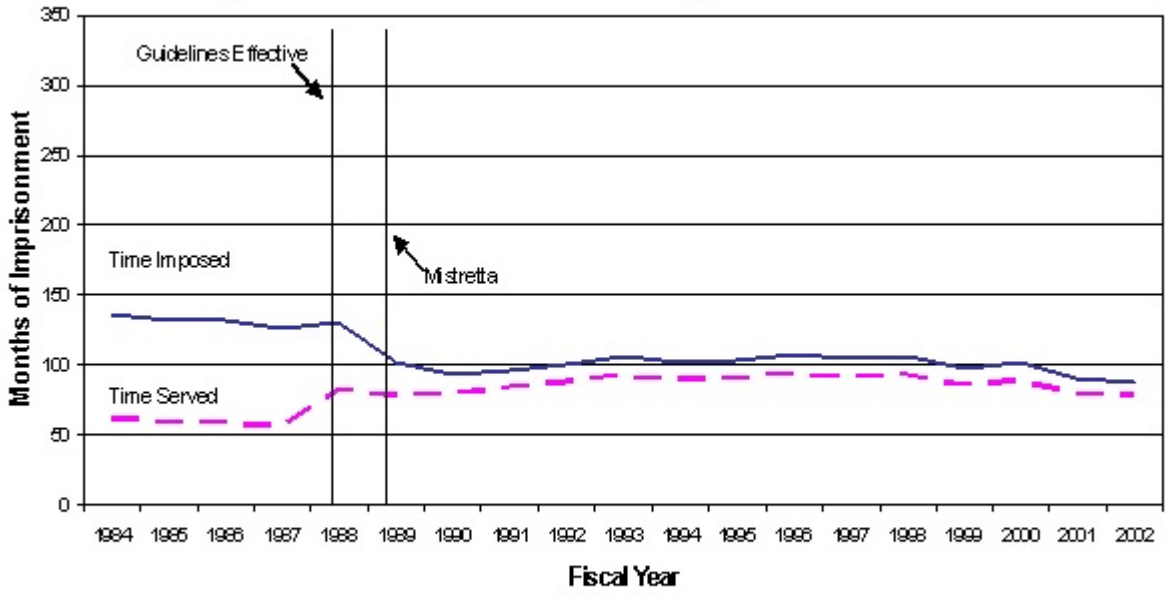


[94] *See e.g.,* 28 U.S.C. § 994(h)(1)(A) and § 994(j); 18 U.S.C. § 924(c).

Use of imprisonment. Figure 2.17 and the accompanying thumbnails in the following pages show that, for most violent offenses, rates of imprisonment have always been high and they have remained so under the guidelines. Only manslaughter, the violent offense for which Native Americans are most highly represented, contained room for significant growth in incarceration rates. The use of alternatives to imprisonment for manslaughter cases has been steadily reduced under the guidelines, and now occurs in less than ten percent of cases. Kidnaping and murder have imprisonment rates between 90 and 100 percent, with arson and assault somewhat lower. The imprisonment rate for bank robbers climbed from the mid- to the high-90s under the guidelines.

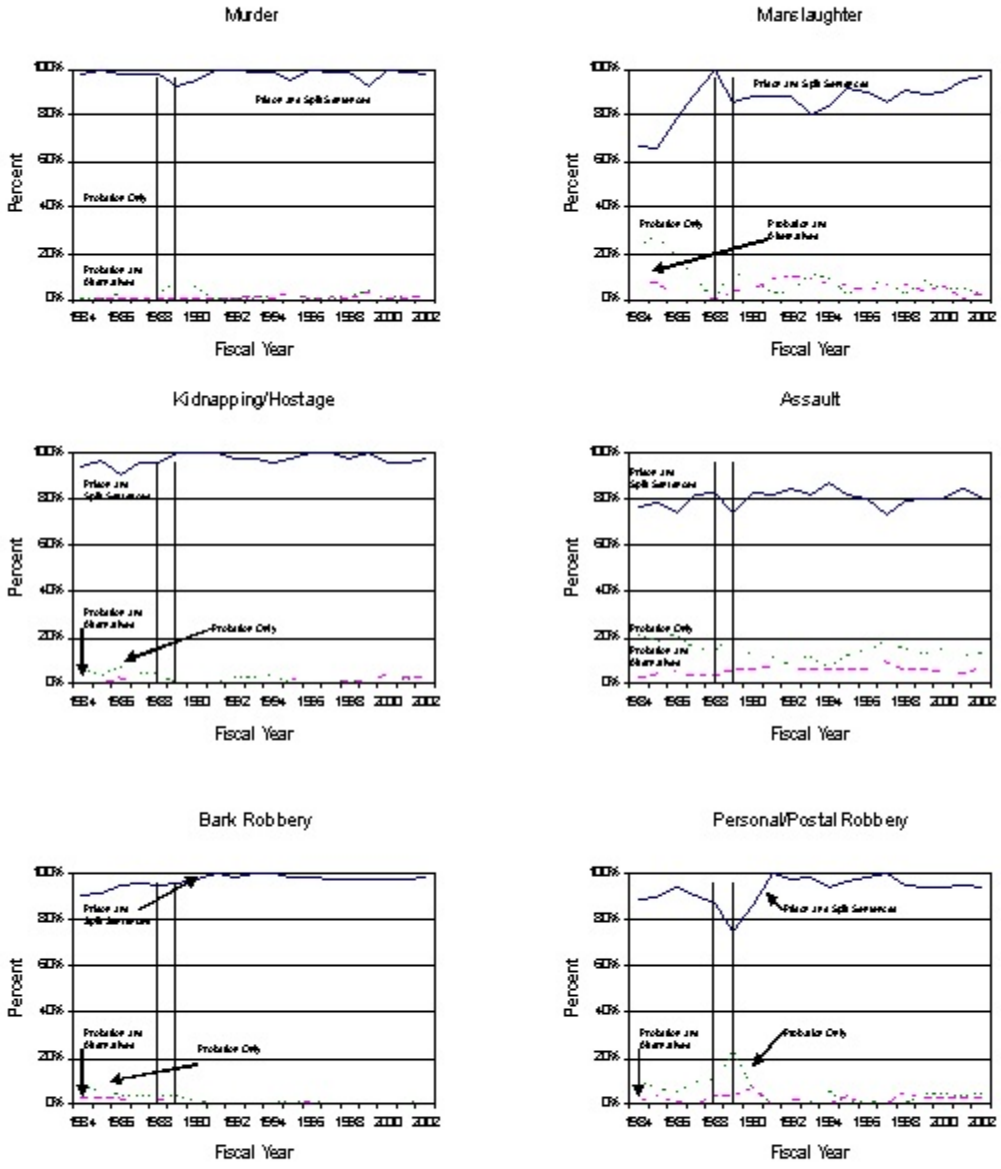
Length of time served. Figure 2.18 provides a striking example of the importance of examining time served rather than sentences imposed. Average prison sentences imposed on violent offenders actually decreased at the time of guideline implementation, but, due to the abolition of parole, the time served actually increased significantly. The greatest increases are seen for murder, kidnaping, bank robbery, and arson. The more stable prison term lengths for manslaughter partly reflect the larger proportion of these offenders who are receiving relatively short prison terms rather than an alternative sanction.

Figure 2.18: Mean Prison Sentence Length for Violent Crimes



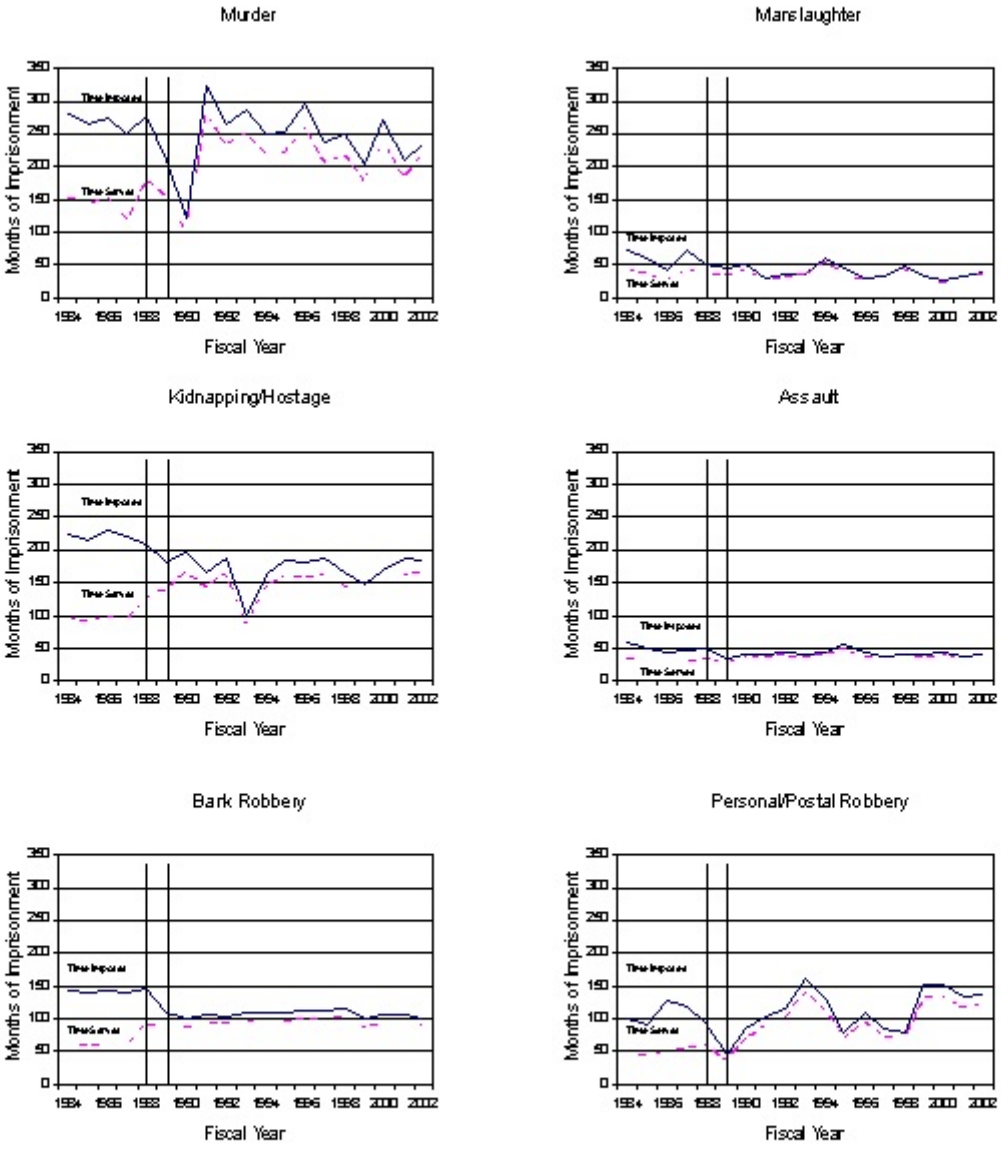
Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

Type of Sentence Imposed for Violent Crimes



Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

Mean Sentence Length for Violent Crimes



Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

6. Sexual Abuse, Exploitation, and Transportation for Illegal Sexual Activities

Frequent congressional involvement. Sexual offenses were among the first crimes to test the limits of federal criminal jurisdiction early in the twentieth century (*see* the "White Slave Traffic Act" of 1910, popularly known as "the Mann Act"), and Congress has shown a continuing interest in the federal prosecution of sex crimes. In recent decades, concern has focused on sex offenses involving minors. As shown in Appendix B, Congress has legislated frequently on this issue and at times in rapid succession during the guidelines era. Much like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses. In the PROTECT Act of 2003, Congress, for the first time since the inception of the guidelines, directly amended the *Guidelines Manual* and developed unique limitations on downward departures from the guidelines in sex cases.

Direct congressional control over sentencing policy for sex offenses has increased throughout the guidelines era.

A brief history of just the major sex offense sentencing legislation from the past ten years gives a sense of the frequency and complexity of congressional actions. The Sex Crimes Against Children Prevention Act of 1995 directed the Commission to increase guideline offense levels for crimes involving child pornography, prostitution, and the use of a computer.[95] The Commission amended the guidelines effective November 1, 1996, and also recommended several statutory changes for congressional consideration designed to improve guidelines operation.[96] That same year, however, the Amber Hagerman Child Protection Act and the Child Pornography Act of 1996, while adopting some Commission recommendations, also added new mandatory minimum penalties, including "two-strikes-you're-out" life imprisonment for a second conviction of coercive sexual abuse of a child under the age of 16 years.[97]

In 1998, Congress again directed the Commission to raise penalties for a wide variety of sex offenses, including those involving travel or transportation, the use of a computer, or misrepresentation of the perpetrator's identity.[98] Penalties were directed to be increased for offenders who engaged in a "pattern of activity involving sexual abuse or exploitation of a minor." The Commission responded with a comprehensive revision of the sex offense guidelines, effective November 1, 2000,[99] including significant across-the-board penalty increases and creation of a new, severe guideline, section 4B1.5,

---

[95] Pub. L. No. 104–71, 109 Stat. 774 (Dec. 23, 1995).

[96] USSG, App. C, Amends. 537 & 538 (Nov. 1, 1996).

[97] Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996). *See generally* 28 U.S.C. § 2241(c).

[98] Pub. L. No. 105–314, Title V., §§ 501 to 507, 112 Stat. 2974 (Oct. 30, 1998).

[99] USSG, App. C, Amend. 592 (Nov. 1, 2000).

for "Repeat and Dangerous Sex Offenders."[100] Offenders convicted of serious sex offenses with previous convictions for sex offenses were made subject to severe penalties, typically requiring twenty or more years in prison. Offenders who engaged in a "pattern of activity" were also subject to severe penalties, regardless of whether the previous activity had resulted in a conviction. "Pattern of activity" was defined as two separate occasions of sexual activity with at least two separate minors. This definition was crafted to target pedophiles who seek out multiple minor victims, rather than "opportunistic" offenders who engage in sexual activity with the same minor on more than one occasion. These "opportunistic" offenses were found to be typical, in the federal system, of offenses involving Native Americans.

In the PROTECT Act of 2003 more mandatory minimum penalties were added and existing statutory minimums and maximums were again increased. The "two-strikes-you're-out" provisions were expanded to include most federal sex offenses against any person under 18 years of age. The definition of "pattern of activity" was revised to include engaging in sexual activity with multiple minors or with any single minor on more than one occasion. In addition, Congress dramatically restricted the permitted grounds for departure below the guideline range for sex offenses.[101] The Commission implemented provisions of this Act in 2003.[102]

The frequent mandatory minimum legislation and specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress. The guideline amendments effective on November 1, 2000, will have affected only some cases in the final year of data in the following graphs. None of the changes in the PROTECT Act will be apparent in these data.

Growth of the Internet. Part of the explanation for the flurry of sex offense legislation in the last fifteen years has been the rapid growth of the Internet, which occurred almost simultaneously with implementation of the guidelines. The Internet has been used to facilitate distribution of illegal pornography and for communication among sex offenders and their potential victims. Congress passed the Child Protection and Obscenity Enforcement Act in 1988 to help control misuse of the new technology, and subsequent legislation has focused on strengthening law enforcement and increasing penalties for computer-distributed and computer-generated images.

A special Task Force of the FBI, "Innocent Images," was developed to target pedophiles by using computer-based investigations. Prosecutions resulting from these investigations are often brought under the provisions of Chapter 117 of Title 18, United States Code (the modern revision of the Mann Act), which prohibit transporting persons or traveling interstate to engage in prohibited sexual activities. Recently amended provisions of Chapter 117 prohibit use of the mails or any facility of interstate

---

[100] *Id.* at 615 (Nov. 1, 2001).

[101] Pub. L. No. 108–21, 117 Stat. 650 (April 30, 2003).

[102] USSG, App. C, Amend. 651 (Oct. 27, 2003).

commerce to persuade or entice a minor to engage in prohibited sexual conduct, or to transmit information about a minor that might encourage any person to engage the minor in prohibited sexual activity.

Sexual exploitation and sexual abuse. Other *sexual exploitation* offenses are prosecuted under Chapter 110 of Title 18, United States Code. Sexual exploitation offenses involve the production of child pornography or the exploitation of children for the purposes of prostitution or pornography production, as opposed to *sexual assault* offenses, which involve sexual contact between the offender and victim. Trafficking and possession of child pornography by any means, including but not limited to the Internet, also are prosecuted under these provisions.

A significant number of additional offenses come to the federal courts through federal jurisdiction over Native American lands, military bases, and federal parks. These are usually *sexual abuse* cases, involving what are commonly called rape, statutory rape, and molestation. These are prosecuted under Chapter 109A of Title 18 United States Code. As a result of this special federal jurisdiction, the majority of defendants sentenced for these crimes in the federal courts are Native Americans, with the vast majority in the districts of New Mexico, Arizona, and South Dakota. In 2001, 63 percent of the offenders subject to these sentences were Native Americans.

In practice, some cases might be prosecuted under a number of alternative statutory provisions. The guidelines contain cross-references so that, for example, a conviction for traveling to engage in prohibited sexual conduct with a minor will be sentenced under the guideline for sexual abuse, or attempted sexual abuse, if that guideline better captures the defendant's real offense behavior. When describing historic trends extending to preguidelines practice, however, cases must be grouped according to their statutes of conviction.

Use of imprisonment and prison time served. The thumbnail graphs, Figures 2.19 and 2.20, show the percentage of sexual abuse offenders and sexual exploitation offenders who receive each type of sentence as well as changes in the sentences imposed and time actually served. The percentage of offenders receiving imprisonment increased for both types of offenders, and dramatically so for sexual exploitation offenders who are subject to the recent crackdowns on child pornography. Fewer than ten percent of either type of offender receives probation or intermediate sanctions.

Sentences imposed on sexual abuse offenders show the same decreases observed for violent offenders, but time actually served has remained fairly constant throughout the period of study. The average length of time served for sexual exploitation, however, has increased by twenty months from its preguidelines level.

Figure 2.19

Type of Sentence for Sexual Abuse

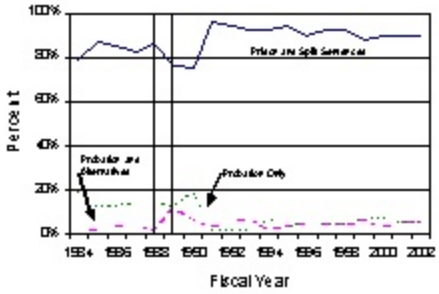
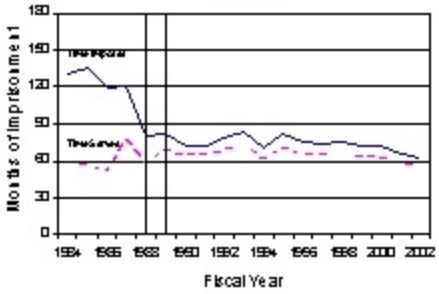
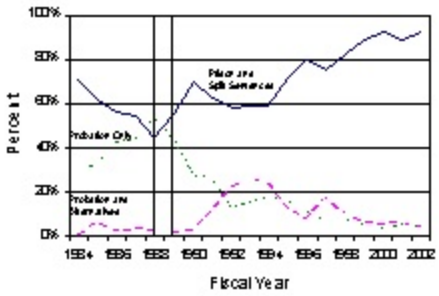


Figure 2.20

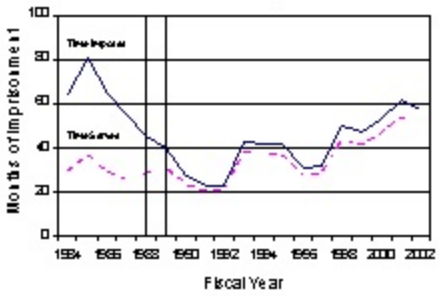
Mean Prison Sentence Length for Sexual Abuse



Type of Sentence for Sexual Exploitation



Mean Prison Sentence Length for Sexual Exploitation



Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

E. Certainty, Severity, and the Scale of Imprisonment

1. Policymaking in the Guidelines Era

A mix of independent and joint actions. The preceding survey of sentencing trends for different offenses reveals a mixed pattern of policymaking by both Congress and the Sentencing Commission. Continuity with past practices, or changes from them, often can be traced to particular decisions by the Commission when it drafted or amended the guidelines. The Commission chose to keep prison terms for many types of crimes consistent with historic levels, as revealed by its study of past practices. But for several offenses, notably firearm and certain violent offenses, the Commission chose to increase penalties. Among economic crimes, the Commission reduced the use of simple probation for "white

collar" offenses while lowering sentences for some other property crimes in order to eliminate disparity that it detected in past practice. For still other offenses, particularly alien smuggling and illegal entry, separate actions by both the Commission and Congress resulted in significant increases in sentence severity at repeated points over the past fifteen years.

For several important offenses, however, it is impossible to disentangle the effects of Commission actions from those of Congress. Mandatory minimum penalties directly control the sentence in many cases, but their greatest influence is indirect. Mandatory minimum statutes highlight certain case characteristics, such as drug quantity, and establish offense severity levels that the Commission incorporates within the guidelines structure. In addition, as shown by congressional directives to the Commission listed in Appendix B, Congress has influenced policymaking through a variety of other methods, including changes to statutory maximums accompanied by instructions to the Commission to amend the guidelines, general "sense of the Congress" resolutions, and specific directives to amend the guidelines in particular ways. The Commission has invariably followed congressional directives and has taken care to ensure that all its actions conform to law.

Sentencing and prison populations. The changes in sentencing policy occurring since the mid-1980s—both the increasing proportion of offenders receiving prison time and the average length of time served—have been a dominant factor contributing to the growth in the federal prison populations depicted in Figure 2.1. Given that drug trafficking constitutes the largest offense group sentenced in the federal courts, the two-and-a-half time increase in their average prison term has been the single sentencing policy change having the greatest impact on prison populations. Increases for other crimes, such as firearms, also have been significant (Blumstein & Beck, 1999).

Sentencing policy is not the only factor contributing to prison population increases, however. Sheer growth in the federal criminal docket has also been a major influence. The number of cases referred to United States Attorneys for prosecution has grown considerably during the guidelines era, reflecting increased resources appropriated for federal law enforcement (BJS, 2001). No decrease in federal prosecution rate or increase in declination rate, while varying somewhat from crime-to-crime and year-to-year, has offset the growth in the number of cases referred for prosecution. The result is dramatic growth in the number of offenders convicted and sentenced in federal court. For example, the number of drug trafficking offenders sentenced in federal court increased from just under 5,000 cases in 1984 to nearly 25,000 cases in fiscal year 2001.

This growth in the federal criminal docket is *not* a reflection of rising crime rates; indeed, throughout the 1990s, the national crime rate decreased, as measured both by the Uniform Crime Reports and the National Victimization Survey. Similarly, the number of daily and monthly users of most types of drugs, and by inference the number of drug dealers, has declined throughout the guidelines era (BJS, 2001). The federal criminal justice system simply is handling an increasing proportion of a decreasing number of criminals in the United States and imposing increasingly severe penalties upon them.

2. Sentencing Guidelines: A New Instrument of Policy Control

As described at the beginning of this chapter, studies of the "scale of imprisonment" have questioned whether imprisonment rates vary as a result of conscious policymaking or from cultural and historical forces beyond human control (Zimring & Hawkins, 1991). The different trends for different offense types reviewed in the previous section certainly suggest that federal prison population growth in the guidelines era has resulted in significant part from deliberate policy choices made by Congress and the Sentencing Commission. The growth could have been less, or more, but the choices that were made substantially increased the certainty and severity of punishment for many types of crimes, and for some crimes quite substantially.

While it is often impossible to disentangle the influences of Congress and the Commission on sentencing practices, it is important to note that the data demonstrate that the guidelines can control and change sentencing practices even in areas where there are no mandatory minimum penalty statutes. Because they take into account many more factors than the statutes, the guidelines create the potential for more precisely targeted policymaking than is possible through mandatory minimum penalty statutes.

Sentencing with explicit and detailed rules, instead of the largely unguided discretion of the preguidelines era, has created something that did not exist before: a precise legal instrument for policy control. One may agree or disagree with the policies the rules represent, but the creation of rules itself brings greater *transparency* to sentencing. This allows all interested parties—whether attorneys negotiating a plea agreement in a particular case, or officials managing the prison population—to better understand and predict federal sentencing practices (Goldsmith & Gibson, 1998).

To date, the guidelines have been used, often pursuant to explicit congressional directives, to increase the certainty and severity of punishment for most types of crime. They could, however, be used to advance different goals, that also are mentioned in the SRA: "For example, the guidelines could be structured and managed "to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons, as determined by the Commission."[103] Some commentators have argued that the Commission neglected this goal (Parent, 1992), while others argue that this "capacity limitation" was given a low priority in the SRA as finally enacted (Stith & Koh, 1993). To date, Congress has proven willing to appropriate the funds needed to expand the capacity of the federal prisons to the levels needed to accommodate expanded federal prosecution and increased sentence severity.

If policymakers choose to limit prison growth in the future, however, the guidelines provide a precise instrument for controlling federal sentencing policy. Controlling prison populations and correctional budgets, while protecting the public by reserving prison space for the most dangerous offenders, has been one of the noteworthy successes of sentencing reform and sentencing guidelines

[103] 28 U.S.C. § 994(g).

in the states (Wright, 2002). If controlling the scale of federal imprisonment becomes a priority in the future, the guidelines are in place to shape sentencing practices to the evolving needs of the system.

Chapter Three: Presentencing, Inter-Judge, and Regional Disparity

A. Introduction

Eliminating unwarranted sentencing disparity was the primary goal of the Sentencing Reform Act [SRA]. The legislative history of the SRA, reviewed in Chapter One, devotes more space documenting the "shameful disparity" constituting a "major flaw in the existing criminal justice system" than on any other aspect of preguidelines sentencing practices.[104] The SRA directs the United States Sentencing Commission to establish policies and practices that will "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[105] The Commission is also directed to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."[106]

The following two chapters review the empirical evidence concerning whether these central goals of sentencing reform have been achieved. This chapter focuses on inter-judge and regional differences and the impact of presentencing stages on sentencing uniformity. The next chapter investigates potential sources of racial, ethnic, and gender disparity.

1. Definitions of Disparity

Form and substance. While there is widespread agreement that unwarranted disparity should be eliminated, there is less agreement on how to define it. Similar treatment for similar offenders and different treatment for different offenders is the hallmark of fair sentencing. But this formal definition is incomplete because it does not tell us how to classify offenders as similar or different (Cole, 1997). We need to identify which characteristics of offenses and offenders are relevant to our sentencing goals to know how to classify offenders.

In the federal system, sentencing goals are supplied by the statutory purposes of sentencing found at 18 U.S.C. § 3553(a)(2), which were prioritized by the federal sentencing guidelines (Hofer

---

[104] SENATE REPORT, *supra* note 1.

[105] 28 U.S.C. § 991(b)(1)(B).

[106] 28 U.S.C. § 994(d).

& Allenbaugh, 2003). The guidelines place primary importance on proportionate punishment—fitting the severity of punishment to the seriousness of the offense. Offense characteristics bearing on the *harms* caused by the offense and the offender's *culpability* for those harms are especially relevant to assessing offense seriousness. The need to protect the public from additional crimes by the offender makes the offender's *risk of recidivism*, as measured by their criminal history, also highly relevant. Unwarranted disparity is eliminated when sentencing decisions are based only on offense and offender characteristics related to the seriousness of the offense, the offender's risk of recidivism, or some other legitimate purpose of sentencing.

Common sources of unwarranted disparity. In the debates leading to passage of the SRA Congress identified differences among judges in sentencing philosophy and, to a lesser extent, differences among regions in sentencing practices as common sources of unwarranted disparity. Research evidence demonstrated that philosophical differences among judges affected the sentences they imposed, and that sentences varied significantly depending on the judge to whom an offender was assigned. The Federal Judicial Center's Second Circuit Study—cited in the legislative history of the SRA—found dramatic differences among judges in the sentences they imposed on an identical set of hypothetical offenders (Eldridge & Partridge, 1974). Judges were sent presentence reports based largely on 20 actual federal cases representing a range of typical offenses and were asked what sentences they would impose. Differences of several years were common; in one case more than 17 years separated the most severe from the least severe sentence. The data showed that handfuls of judges were consistently more severe or more lenient than their colleagues. More important, judges varied in their approaches to particular crime types. Some judges treated drug traffickers relatively leniently while sentencing white collar offenders more harshly; other judges displayed the reverse pattern. Forst and Wellford (1981) also found significant inter-judge disparity and analyzed the role played by each judges' sentencing philosophy in greater detail. Using a sample of 264 federal judges sentencing a different series of hypothetical cases, they found that judges who were oriented towards utilitarian goals (incapacitation and deterrence) gave sentences at least ten months longer on average than judges who emphasized other goals.

In addition to differences in philosophy among individual judges, several studies of preguidelines sentencing found geographical variations in sentencing patterns, suggesting that different political climates or court cultures can affect sentences. Research sponsored by the Department of Justice in the 1970s showed that judges placed differing importance on various factors depending on the region in which they sat (Sutton, 1978; Rhodes & Conly, 1981). Regional differences arise not just from the exercise of judicial discretion, but also from differences in policies among U. S. attorneys and in the practices of individual prosecutors.

2. Increased Transparency of the Sentencing Decision

Sentencing may now be the most transparent part of the criminal justice system. Not only is sentencing done publically in open court, with factual findings and determinations of law made on the record, but a detailed database of offense and offender characteristics and the judge's decisions are compiled by the Sentencing Commission. With the exception of confidential

information contained in the presentence report (such as an offender's medical history) most of this information has been made available to researchers and to the public.

We know more about the federal sentencing process today than ever before. One measure of this growth in understanding is what researchers call the "percentage of variance accounted for" by statistical models of the sentencing decision. Variance is a statistical term for the total of all variations in a group of sentences from the average sentence. Prior to the guidelines, researchers typically could account for 30 to 40 percent of the variance in sentences. Today that percentage has risen to over 80 percent, primarily because the factors that determine sentences are in large part identified in the guidelines themselves and in the data the Commission collects. Sentencing is the most-studied stage of the criminal justice process, and investigations of sentencing disparity are the most common subject of empirical inquiry in part because of this transparency.

B. Disparity Arising at Presentencing Stages

The SRA focused primarily on sentencing, but Congress and the Commission recognized from the beginning that sentencing could not be considered in isolation. Decisions regarding how investigations should be conducted, what charges to decline or dismiss, what plea agreements to reach, and other decisions made prior to conviction and sentencing can all affect the fairness and uniformity of sentencing.

As described in Chapter One, the SRA directed the Commission to develop several mechanisms to monitor, and if necessary, control some of the effects of presentencing stages. The Department of Justice and the Judicial Conference of the United States also developed policies and procedures designed to ensure that the guidelines were not undermined by charging or plea bargaining variations. In 2003, the Department reaffirmed its belief that "[j]ust as the sentence a defendant receives should not depend upon which judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case."[107]

The detailed federal sentencing guidelines take into account a large number of aggravating and mitigating factors in order to precisely tailor the severity of punishment to the seriousness of the crime and the dangerousness of the offender. Presentencing decisions can result in punishment that is either more severe or more lenient than the guideline sentence that would otherwise apply to the case. Uneven charging or plea agreements that fail to fully account for offenders' criminal conduct can result in sentences that are both disproportionate to the seriousness of the crime and disparate among offenders who engaged in similar conduct. As reviewed below, several mechanisms leading to this type of disproportionality and disparity have been identified by researchers and by participants in the sentencing process.

---

[107] Ashcroft Charging Memo, *supra* note 24, September 22, 2003, at 2.

Disparity arising at presentencing stages has been described as often occurring "below the radar screen" (Saris, 1997). Plea and sentencing procedures require that plea agreements be disclosed to the court, but not all the reasons for presentencing decisions are necessarily stated on the record, and fewer public documents and statistical data exist to investigate the reasons for, and effects on sentences of, decisions to decline or bring charges, or to stipulate to particular sentencing facts or guideline provisions. Some commentators have called circumvention of the guidelines that would properly apply to a case a form of "hidden departure" (Wolf & Broderick, 1991; Schulhofer & Nagel, 1997; Hofer et al., 1999; Berman, 2000). Avoiding potentially applicable penalty statutes or circumventing applicable guidelines may result in sentences, in some cases, that are better suited to achieve the purposes of sentencing than the sentence that would result from strict adherence to every applicable law. But unlike judicial departures—which require reasons stated on the record and reviewable on appeal—presentencing decisions may open a gulf between sentencing "by the book" and sentencing "by the bargain," which can undo the transparency and uniformity intended by the SRA (Freed, 1992).

The extent to which concerns about the effects of presentencing decisions have proven valid is an important issue for federal sentencing today and in the years ahead. The data available to assess these effects are not as detailed and complete as data on the sentencing decision itself. The data that are available, however, suggest that presentencing stages remain important in achieving sentence uniformity, and that some of the components of guidelines implementation that were designed to ensure uniformity have proven inadequate to the task or have not worked as intended.

1. Presentencing Stages That Can Affect Sentencing Uniformity

Commentators have identified several stages and decision points prior to sentencing that can affect the uniformity of sentencing decisions.

Investigation techniques. Under the guidelines, sentences are based on detailed facts concerning offenders' criminal conduct. The links between sentences and, for example, the quantity of drugs or money involved in the offense, the presence of a gun, or the location of the crime, are widely known to prosecutors and police. This enables them to predict the likely sentence based on the facts developed and brought forward at sentencing. Berlin (1993) argues that manipulation of defendant's sentencing exposure during the investigation phase is a significant source of continuing disparity in the federal system. For example, rather than arrest a drug seller when his crime first becomes known, police could choose to make additional purchases until the quantity of drugs involved reaches the amount needed to trigger the sentence the police believe appropriate (Zlotnick, 2004). Judges have recognized a ground for departure from the guidelines for some types of police conduct— "sentencing entrapment"—when, for example, police induce a defendant to cook powder cocaine into crack cocaine in order to qualify the defendant for a harsher penalty (Fisher, 1996).

Charging decisions. Decisions about which charges to decline or bring against a defendant have binding consequences for the final sentence. The guidelines were designed to minimize the effects of uneven charging decisions in many circumstances, as described in Chapter One. But in

some cases the statutory minimum and maximum penalties provided for the counts of conviction constrain the judge's discretion and trump guideline range that would otherwise apply to the offenders' conduct (Nagel & Schulhofer, 1989, 1992).

Mandatory minimum statutory penalties sometimes require a sentence *above* the otherwise applicable guideline range. For example, many offenders who are convicted of trafficking drug amounts just above the five- and ten-year thresholds cannot receive the full benefit of the guidelines' adjustments for acceptance of responsibility or mitigating role in the offense, because they do not qualify for a waiver of the mandatory minimum penalty under USSG §5K1.1 or the "safety valve." Charging an offender with possession of a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c) usually, although not always, results in a sentence above the guideline range that would apply if the drug trafficking guideline's enhancement for possession of a firearm were applied instead (Hofer, 2000). Charging several counts of 18 U.S.C. § 924(c) in the same indictment—so-called "count stacking"—can result in sentences dramatically higher than the otherwise applicable guideline range, because mandatory prison terms are increased from at least five to at least twenty-five years for each subsequent conviction, even if sentenced at the same time, and must be imposed to run consecutively (Etienne, 2003). Including a money laundering count in an indictment once substantially increased the guideline range for conduct that might otherwise have been appropriately sentenced under a different guideline (USSC, 1997). (A 2001 amendment to the guidelines reduced, but did not eliminate, this effect of charging decisions.)[108]

In other cases, use of charges that understate the true offense conduct—for example, charging drug possession or use of a communications facility instead of drug trafficking—caps the statutory sentencing range *below* the level required by the guidelines for offenders' real offense conduct (USSC, 1995). The Commission has more than quintupled the number of cross-references to the guidelines through the years based on research findings that some offenders guilty of serious crimes, such as aggravated sexual abuse, were being charged and sentenced for less serious crimes like statutory rape or abusive sexual contact (USSC, 1992). Despite these attempts to undo the effects of undercharging, some evidence suggests that cross references are viewed as optional by some prosecutors and courts and are not always used as intended (USSC, 1996, 1997).

Plea bargaining. Agreements not to charge or to dismiss charges are often made as part of plea negotiations between the parties. Plea agreements can be reached before indictment or between the time of indictment and sentencing. Plea agreements also may contain stipulations that a particular sentencing factor or provision of the sentencing guidelines does or does not apply to the case, or recommendations that a specific sentence is appropriate.[109] These stipulations and recommendations may be either non-binding or binding. Courts may reject plea agreements, but once an agreement with a binding recommendation is accepted, the court is obligated to sentence in accordance with the agreement. If an agreement is rejected, the court must personally advise the

[108] USSG, App. C, Amend. 634 (Nov. 1, 2001).

[109] Fed. R. Crim. P. 11(c)(1)(B) and (C).

defendant that the sentence may be less favorable than the agreed-upon sentence and give the defendant the opportunity to withdraw his or her guilty plea.[110]

Early in the guidelines era, Commission-sponsored research suggested that plea bargaining was leading to circumvention of the guidelines in a significant number of cases (Schulhofer & Nagel, 1989, 1992, 1997). In addition to charge bargaining, researchers reported that new types of plea agreements had developed under the guidelines, including fact bargaining and date bargaining (Alschuler & Schulhofer, 1989). Fact bargains include agreements on sentence-relevant considerations, such as the amount of drugs involved in an offense or the presence of a firearm. Date bargaining occurs when the parties negotiate over when an offense occurred, in order to use a particular edition of the *Guidelines Manual* that is more favorable to a defendant than a later edition.

While charging and plea bargaining are officially regulated by nationwide DOJ policies, researchers reported that in practice these policies were less determinative of prosecutorial conduct than internal U.S. Attorney's office policies. Judicial scrutiny of plea agreements, supported by probation officers' independent presentence investigations, were often inadequate to control plea bargaining because both judges and probation officers were heavily dependent on the information provided by the prosecutor in a given case. In addition, resource limitations and a reluctance to reject agreements, for a variety of reasons discussed further below, made judicial rejection of plea agreements that undermined the guidelines relatively rare.

The presentence investigation. Probation officers are responsible for conducting the presentence investigation and informing the court in the presentence report of all the facts relevant to guidelines application. The probation officers' review of the offense conduct and explicit analysis of the impact of the plea agreement on the sentence helps inform judges' review of plea agreements. This investigative function that helps ensure that the guidelines are faithfully applied has led probation officers to be called the "guardians of the guidelines" (Bunzel, 1995).

Surveys of probation officers have consistently found variations in how offense conduct is investigated (FJC, 1990; USSC, 1991; Bowman, 1996). In some districts, probation officers conduct independent investigations, even interviewing prosecution witnesses and examining taped conversations or laboratory reports. In other districts, probation officers rely on the prosecution's version of the offense, even incorporating the government's written version of the offense directly into the "Offense Conduct" section of the presentence report. The amount of relevant conduct outside the counts of conviction, or potential grounds for upward or downward departure, uncovered by the probation officer depends on the intensity of the presentence investigation (Zlotnick, 2004). If these investigations are waived or abbreviated, relevant differences among offenders may go undiscovered and dissimilar offenders may be treated similarly.

Filings of motions and notices. Statutory provisions give prosecutors sole discretion to seek certain increases or reductions of sentences. For example, 21 U.S.C. § 841 provides lengthier

[110] Fed. R. Crim. P. 11(c)(5).

mandatory minimum prison terms for offenders who commit certain drug trafficking offenses subsequent to a prior conviction for a drug felony in either state or federal court. To obtain the increased penalties, 21 U.S.C. § 851 provides that prosecutors must file notice of their intention to seek the enhancement prior to the sentencing hearing. Similarly, departures from the guidelines for a defendant's substantial assistance in the prosecution of other persons under USSG §5K1.1, 18 U.S.C. § 3553(e) and Federal Rules of Criminal Procedure, Rule 35(b) may be granted only upon motion of the government. (These motions are the only means by which a mandatory minimum penalty can be waived, other than the "safety-valve" exception at 18 U.S.C. § 3553(f) for certain first-time nonviolent drug offenders.) More recently, the PROTECT Act gave prosecutors sole authority to move for an additional reduction of one offense level for offenders who accept responsibility for their crime in a timely manner, thereby saving the government the cost of preparing for trial—a decision that had previously been left to the court. In addition, the departure of up to four levels below the otherwise applicable offense level authorized by the PROTECT Act for offenders who participate in an authorized early disposition program may be granted only upon motion of the prosecutor.[111]

2. Surveys Suggest Sentencing Disparity Results from Presentencing Stages

Preliminary evidence suggesting that sentencing disparity results from presentencing decisions comes from surveys of court practitioners. Several times in the life of the guidelines, researchers have asked practitioners to complete detailed questionnaires on the practical operation of the sentencing guidelines. While the results of these surveys are not strictly comparable due to differences in the wording of questions, the surveys reveal the perceptions and concerns of court practitioners and how those concerns have evolved over the guidelines era.

The earliest warning that charge and sentence bargaining were persisting into the guidelines era came from a survey of judges in one circuit (Alschuler & Schulhofer, 1989). Judges reported that the frequency of charge and sentence bargaining was roughly the same during the guidelines era as before, and that new forms of plea bargains were being developed. Just over two years later, as part of its Four-Year Evaluation, the Commission conducted its own survey in which judges were asked the effects of presentencing bargaining on sentencing disparity (USSC, 1991). However, the majority of judges reported that pre-indictment or post-indictment plea agreements were a source of unwarranted disparity in only some or a few cases. Only a minority of judges supported additional regulation of plea agreements beyond the policy statements contained in Chapter Six of the *Guidelines Manual*. Many other members of the court community, however, including probation officers and defense attorneys, identified presentencing decisions as a source of unwarranted sentencing disparity.

Two more surveys of court practitioners were conducted in the mid-1990s. The Commission's Probation Officers Advisory Group conducted a nationwide survey of federal

---

[111] USSG App. C, Amends. 649 (April 30, 2003) and 651 (October 27, 2003); Pub. L. No. 108-21, §§ 401(g), 401(m)(2)(B), 117 Stat. 650 (April 30, 2003).

probation offices and received responses from eighty-five districts (Bowman, 1996). Although not without methodological limitations (Berman, 1996), the survey reported some troubling findings. Just over half of the districts reported that "when guideline calculations are set forth in a plea agreement, they are supported by offense facts that accurately and completely reflect all aspects of the case." But 43 percent of the districts reported that this was true just half the time or less. Probation officers reported preparing presentence reports that described the real offense conduct in almost all cases, but officers relied to a great extent on information supplied by prosecutors. In some districts and cases, respondents indicated that prosecutors tried to limit or manipulate information used in applying the guidelines. In a significant number of districts, probation officers reported that the court would usually or nearly always defer to the plea agreement when it conflicted with information in the presentence report.

The Federal Judicial Center conducted a survey of chief probation officers as well as Article III judges in 1996. The findings showed that "respondents believe much of the discretion that resided with judges before the guidelines has been shifted to prosecutors" (FJC, 1997, p. 6). About three-quarters of district judges and over half of chief probation officers reported that prosecutors had more influence on the final sentence than did judges. The vast majority of respondents reported that plea agreements in their district contained stipulated facts. More than a quarter of the judges reported that plea stipulations understated the offense conduct somewhat frequently or very frequently, while another 12 percent said they did so about half the time. Judges reported that they did sometimes "go behind" the plea agreements to examine underlying conduct, but they reported doing so "infrequently." In contrast to the 1991 survey, 73 percent of judges felt that plea agreements were a hidden source of unwarranted disparity.

3. Field Studies Suggest Sentencing Disparity Results from Presentencing Stages

More evidence that disparity arises at presentencing stages comes from field studies conducted in several federal districts. This research suggests that different districts have evolved different "adaptations" to the guidelines system and to caseload pressures and other local conditions (Braniff, 1993; Bersin & Feigin, 1998). These various adaptations may be more or less formalized and regularized within a given district, and may be developed by U.S. Attorneys in each district with or without coordination with local judges and probation officers. The various types of "fast-track" programs that were developed in several districts beginning in the late 1990s are an example of a relatively formalized adaptation. The provisions of the PROTECT Act and recent initiatives of the Department dealing with early disposition programs are an attempt to centralize and regulate these mechanisms (DOJ, 2003).

Some districts control their workload with strict intake and charge declination policies, declining to prosecute, for example, marijuana cases that involve less than a ton of drugs—an amount that would be a major federal case in another district (Gleeson, 2003). Still other districts utilize post-indictment charge bargaining, fact bargaining, or other plea agreements to move their cases and obtain defendant cooperation, either as part of a systematic program or on a more ad hoc

basis. One district may employ liberal use of section 5K1.1 motions and departures, while a neighboring district achieves a similar overall departure rate through use of departures for mitigating circumstances other than substantial assistance (Farabee, 1998). Comparing data from four different federal courts, Storto (2002) suggested that different paths—for example, systematic charge bargaining in immigration cases in one district and departure bargaining in another—can sometimes lead to similar results.

One of the earliest and most comprehensive series of field studies was the work of Nagel and Schulhofer mentioned above (Schulhofer & Nagel, 1989, 1992, 1997). They concluded that circumvention of the guideline sentence was common, but that such circumvention was not necessarily "wrong" but "a covert vehicle for downward departure." These hidden departures were motivated by a variety of reasons, including efforts to save time and resources and to provide incentives for defendant cooperation in addition to the incentives already included within the guidelines. In addition, several areas where the guidelines lacked flexibility were identified, which caused prosecutors, defense attorneys, and judges to search for ways to circumvent the guidelines' strict requirements. These areas included an overemphasis on harm- and quantity-driven offense characteristics, a relative neglect of offender characteristics, and overall severity levels required by statutory minimum penalties and the guidelines pegged to them that were regarded by a significant number of judges and prosecutors as unnecessarily harsh in some cases, particularly for drug trafficking offenses. The authors concluded that prosecutorial discretion "if unchecked, has the potential to recreate the very disparities that the Sentencing Reform Act was intended to alleviate" and they warned that the system for regulating plea bargaining—relying on 1) probation officers' investigations, 2) judicial review of plea agreements, and 3) Department of Justice charging and plea policies—might prove ineffectual.

More recently, Marks (2002) studied the effects of prosecutorial decisions in one district court, focusing on these same three mechanisms designed to help control disparity, as well as the relevant conduct rule. Interviews revealed that key participants in the sentencing process were generally unfamiliar with the contents of the policy statements in Chapter Six governing judicial review of plea agreements. "Informational asymmetry" between the government and the court made it unrealistic for probation officer investigation to fully inform the court about offenders' real offense conduct. Implementation of the relevant conduct provision was further hindered by ambiguity in the language of the rule, discomfort with the role of law enforcement in establishing relevant conduct, and discomfort with the severity of sentences that often result from inclusion of all relevant conduct in guidelines determinations. Department of Justice policies then in place were also viewed as ineffective at achieving charging and plea bargaining uniformity.

A former prosecutor and current federal judge has argued that regional disparities in prosecutorial conduct are endemic and may be impossible to eliminate (Gleeson, 2003). Using drug couriers as an example, the judge demonstrated how two similar couriers arriving into the country in two different districts are subject to penalties over fifty percent higher in one than the other, due to the existence in one district of an agreed-upon program of maximum reductions for role in the offense for drug couriers.

> The successful effort to restrain judicial discretion...has not produced a system in which similarly situated offenders are treated alike. Prosecutors have always been vested with ample discretion, and the Guidelines' diminution of the power of judges further enhanced the power of federal prosecutors. Differences in the exercise of that discretion among U.S. Attorneys, and by individual U.S. Attorneys in specific cases, have resulted in the differential treatment of similar cases, and account for the lion's share of the remaining disparities in federal sentencing (*id.* at 1701).

Judge Gleeson advised the Commission not to concern itself with presentencing disparity, however, since regional differences in public attitudes toward different types of crime and other local conditions make disparate practices inevitable. He concluded this does "not mean that the Guidelines have failed to achieve their essential goal" of controlling judicial discretion (*id.* at 1711).

4. Quantifying the Extent of Disparity Arising at Presentencing Stages

Limited data. While surveys and field research suggest that unwarranted disparity arises at presentencing stages, such evidence can be challenged as anecdotal and impressionistic. Quantifying the effects of presentencing decisions is hampered by a lack of systematic data on police and prosecutorial practices. Only a few numerical estimates have been attempted. Based on their field studies in ten federal districts early in the guidelines era, Schulhofer and Nagel (1997, p. 1284) estimated that circumvention of the guidelines occurred in 20 to 35 percent of cases. The only other attempt to quantify the exact impact of plea bargaining through statistical analysis was conducted by the Commission in its Four-Year Evaluation. The Commission reported that in 14 percent of all guilty plea cases sentenced in 1989, the plea agreement resulted in a sentence below the minimum of the original guideline range.

These early estimates are unreliable bases for quantifying the precise impact of presentencing stages on sentencing today and more research is sorely needed. Recent revisions to Department of Justice policies, which reiterate that plea agreements are to be placed on the record[112] and forwarded to the Commission,[113] may help facilitate additional research in the coming years. Yet the existence of pre-indictment bargaining, limitations in the ability of probation officers to investigate and report offenders' real offense conduct, and judicial inability or unwillingness to review and reject plea agreements that understate the real offense will continue to hamper research.

Research based on case documentation submitted to the Commission. The Commission has periodically used the case documentation it receives on the vast majority of cases sentenced under the guideline to shed light on the sentencing effects of charging and plea bargaining decisions. Original and superceding indictments, plea agreements, and information provided by probation

---

[112] Ashcroft Charging Memo, *supra* note 24, September 22, 2003, at 5.

[113] The PROTECT Act amended 28 U.S.C. § 994(w) to require the Chief Judge of each district to submit a report of each sentence to the Commission, including any plea agreement.

officers in presentence reports are studied to reconstruct, as best as possible, offenders' real offense conduct and to compare it with the conduct for which they were ultimately held accountable. This has proven some of the most difficult research undertaken at the Commission. First in 1990, as part of the Four-Year Evaluation, and again in 1995 and 2000, the Commission collected an Intensive Study Sample (ISS)—a representative, random sample of cases sentenced in each year. The ISS is discussed in greater detail in Technical Appendix D.

Research based on information provided in presentence reports has been challenged as not accurately reflecting, for example, evidentiary problems that may attend proof of criminal conduct in some cases. Thus, estimates of undercharging or fact bargaining may be overstated if they are based on criminal conduct described by probation officers for use at the sentencing hearing, where the rules of evidence and standard of proof are more lax, which could not have been readily proven at trial. On the other hand, probation officers report that information on potentially applicable charges is sometimes not provided to them or to the court, or is excised from the presentence report if it is not used to determine the final sentence. This would cause comparisons of the conduct described in the presentence report with the conduct used for sentencing to *under*state the extent of undercharging or fact bargaining. On balance, although imperfect, data on undercharging or fact bargaining derived from presentence reports are the most reasonable and best available to quantify how presentencing stages affect the uniformity of sentencing.

Uneven use of statutory penalty enhancements based on prior record. Research over the past fifteen years has consistently found that mandatory penalty statutes are used inconsistently in cases in which they appear to apply. Early in the guidelines era, the Commission reported that, among all offenders who engaged in conduct that qualified them for a mandatory minimum sentence, only 74 percent were initially charged with a count carrying the highest mandatory penalty applicable to their conduct (USSC, 1991b, pp. 56-58). Only sixty percent were ultimately convicted and sentenced at this penalty level or above.

Perhaps the firmest evidence of uneven use of statutory penalties concerns 21 U.S.C. § 841, which doubles the minimum statutory penalty for drug trafficking offenders who have a previous conviction for a felony drug offense, as long as the government files notice of its intention to seek the enhancement. Because criminal records are relatively straightforward compared to evidence concerning drug amounts or other factors, evidentiary problems are unlikely to prevent prosecutors from seeking this enhancement in a large number of cases. Yet the enhancement is more often avoided than sought. In 1991, the Commission reported that the enhancement was applied in a minority of qualified cases (USSC, 1991(b), p. 57). Analysis of data from both the 1995 and 2000 ISS samples found that the proportion of offenders with prior felony drug convictions who received the enhancement was under seven percent (6.5% and 6.9%, respectively).

Department of Justice policies explicitly permit prosecutors to forego the enhancement "after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and

the extent to which they are probative of criminal propensity."[114] This policy, however sound in theory, vests in prosecutors discretion to make sentencing judgments that were traditionally vested in judges, and that the Commission was designed to make with the benefit of research and study. There is reason to believe that the criminal history guidelines, which were developed based on empirical evidence on the links between prior convictions and the likelihood of recidivism, are better able to identify high-risk offenders than prosecutors deciding whether to pursue mandatory penalty enhancements available in the statutes (Krauss, 2003; USSC, 2004).

Uneven use of firearms enhancements. Research on sentencing for possession or use of a firearm during a drug trafficking or violent offense has also consistently found uneven use of the statutory enhancement found at 18 U.S.C. § 924(c), as well as the firearm offense level adjustments contained in the guidelines. In 1991, the Commission reported that among drug offenders, only about 45 percent who qualified for a mandatory penalty enhancement under 18 U.S.C. § 924(c) were initially charged under the statute. This firearms count was later dismissed for 26 percent of the offenders initially charged. Analysis of 1995 ISS data found that only 34 percent of offenders who qualified for the statutory enhancement based on use of a firearm received the enhancement. Thirty percent received the guideline SOC instead, while 35 percent received no weapon increase of any kind (Hofer, 2000). Offenders who had merely carried or possessed a firearm, as opposed to using it, were even less likely to receive the statutory enhancement. Notably, Blacks accounted for 48 percent of the offenders who appeared to qualify for a charge under 18 U.S.C. § 924(c) but represented 56 percent of those who were charged under the statute and 64 percent of those convicted under it.

Analyses conducted for this report found that in 2000, just 20 percent of offenders who used a firearm received the statutory enhancement, 35 percent received the SOC, while 49 percent received neither. (Percentages add to more than 100 because a small number of offenders received both the statutory enhancement and the SOC. These estimates have a margin of error of about plus or minus ten percent because they are based on a random sample of cases.) As in 1995, offenders who merely carried or possessed a firearm were even less likely to receive the statutory enhancement than those who used it. Data from 2000 also showed the same pattern of disproportionate over-representation of Blacks among qualified offenders who actually received the statutory enhancement.

There is little empirical research exploring why enhanced penalties are sought in some cases and not in others, or whether their use reflects legally relevant factors, extra-legal factors, or arbitrary variation. A re-analysis of the Commission's 1991 data found that racial disparity in use of mandatory penalties disappeared after controlling for additional factors, including whether the offender had pled guilty (Langan, 1992). Field research has reported that defense counsel believe the existence of penalty enhancements that are applicable at the sole discretion of the government gives prosecutors tremendous bargaining power to encourage defendant cooperation and discourage zealous defense advocacy (Etienne, 2003). Without more complete data on the legitimate

[114] Ashcroft Charging Memo, *supra* note 24, September 22, 2003, at sec. I.B.5.

considerations that affect charging decisions, it is not possible to evaluate the reasons for relatively rare use of these enhancements or the disparities observed.

Department policy was recently clarified to give prosecutors additional direction regarding use of the statutory firearm enhancement. The policy directs charging one count of 18 U.S.C. § 924(c) in every case in which it is applicable. If an offender has three or more possible counts and the predicate offenses are crimes of violence, prosecutors are directed to charge and pursue the first two such counts. The policy is silent on what should happen to offenders with two possible counts, or where the predicate offenses are drug convictions. It also permits exceptions to these rules if an office is "particularly overburdened" and in other circumstances.[115]

Statutory floors and statutory caps. *Not* seeking statutory minimum penalties can lead to *more* proportionate sentencing, because statutory penalties would often trump the otherwise applicable guideline range and prevent mitigating adjustments contained in the guidelines from being taken into account. From this perspective, high rates of circumvention of potentially applicable mandatory penalties may be desirable. Many offenders do not benefit from avoidance of the penalties in these circumstances, however. In 2002, ten percent of federal offenders (over 6,000) received sentences above the top of the guideline range that would otherwise have applied to their case because of a trumping statutory minimum penalty. For another five percent, a statutory penalty restricted the judge's discretion above the minimum of the guideline range that would otherwise have applied. Hispanic offenders, who were forty percent of all offenders, were forty-nine percent of those whose guideline range was completely exceeded by a statutory minimum penalty. Drug trafficking and firearm mandatory minimum penalties are the primary cause of trumping. In a small number of cases, 80 defendants in 2001, stacking of firearm counts resulted in statutory penalties that far exceeded the otherwise applicable guideline range.

On the other hand, charging decisions sometimes limit offenders' exposure to punishment *below* the guideline range that would otherwise apply to their offense. In 2002, 1,379 offenders were convicted of charges carrying a statutory *maximum* sentence that was below the bottom of the guideline range that applied to their offense. This was most often due to conviction of a less serious immigration offense than they actually committed, or conviction for use of a communication facility to commit a drug trafficking offense instead of drug trafficking itself.

Sentences that result from avoidance of applicable penalties may seem to those most familiar with a particular case sufficient to meet the purposes of sentencing and more appropriate than the penalty required by strict application of the statutes and guidelines. Present practices, however, which lead to strict application in some cases and avoidance in others, result in disparity that cannot be accounted for by existing data and may be unwarranted. The fact that charging decisions disproportionately disadvantage minority offenders is further reason for additional research.

---

[115] *Id*. at sec. I.B.6.

Departures pursuant to plea agreements. Finally, evidence that plea bargaining has resulted in unwarranted disparity is found in data that "pursuant to a plea agreement" has been the most or second most-frequently cited ground for downward departures in recent years (USSC, *Sourcebooks*, 1997-2002, Tbl. 25). While the policy statements in Chapter Six have always attempted to prevent judicial acceptance of plea agreements that undermine the guidelines, these policy statements were amended in 2003 to reiterate that the fact of an agreement alone is not sufficient to justify downward departure absent other mitigating circumstances.[116] Whether this change will be sufficient to reinvigorate the standards for acceptance of plea agreements, which field research suggests are largely unknown and widely disregarded, is an important question for the future.

One danger is that restriction of explicit downward departures will lead to an increase in "hidden departures" achieved through fact bargaining or other methods that fall "below the radar screen." Quantifying the extent of fact bargaining is among the most difficult research issues because the effects of the bargain are built into the offense level reported to the Commission. Only by inclusion of all real offense conduct in the presentence report can the extent of fact bargaining be detectible to researchers.

5. Presentencing Stages, Disparity, and the Mechanisms Designed to Control It

Although a lack of data raises a serious obstacle to quantitative research, a variety of evidence suggests that disparate treatment of similar offenders is common at presentencing stages. Disparate effects of charging and plea bargaining are a special concern in a tightly structured sentencing system like the federal sentencing guidelines, because the ability of judges to compensate for disparities in presentence decisions is reduced. While the guidelines contain some mechanisms to ameliorate the effects of disparate charging and plea bargaining practices—such as the relevant conduct and multiple count rules, and judicial review of plea agreements—some of these mechanisms are not working as intended. By their nature, some of these mechanisms tend to work in one direction. The relevant conduct rule, for example, can increase sentences to account for criminal conduct that was not charged or that was dismissed prior to sentencing. But there is no guidelines mechanism to decrease sentences for an offender who, for example, is convicted of several counts of 18 U.S.C. § 924 (c) and is therefore subject to multiple consecutive mandatory penalty enhancements. If some offenders are charged in this manner while other similar offenders are not, there is little a judge can do to compensate for the resulting sentencing disparity.

The remainder of this chapter is focused exclusively on sentencing. Uniformity is defined as similar treatment of offenders who appear to be similarly based on the charges of conviction and the facts established at the sentencing hearing. Achievement of the more ambitious goal of similar treatment of offenders who engage in similar real offense conduct will also depend on uniform treatment at presentencing stages.

---

[116] USSG, App. C, Amend. 651 (Oct. 27, 2003).

C. Inter-judge and Regional Sentencing Disparity

In the legislative history of the SRA, Congress identified unwarranted sentencing disparity among judges and, to a lesser extent, disparity among regions, as particularly disturbing national problems.

> Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public. A sentence that is unjustifiably high is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public. Such sentences are unfair in more subtle ways as well. Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add to disciplinary problems in the prisons.[117]

With over fifteen years of experience under the guidelines, it is fitting to evaluate the success of the guidelines system at achieving this goal and to identify any problem areas that may remain.

Analyzing sources of inter-judge and regional disparity is complicated because the potential sources are so many, varied, and interacting. Differences among judges in sentencing philosophy has long been identified as an important source of variation in sentencing (Hogarth, 1971; Carroll, 1987). Research sponsored by the Department in the 1970s showed that judges differed in the importance they placed on various factors depending on the region in which they sat (Sutton, 1978; Rhodes & Conly, 1981). Sentencing can be influenced by differences among the districts and circuits in their sentencing case law and "personas" (Demlietner, 1994). These, in turn, are influenced by the political climates of different regions of the country. A great deal of research has established the importance of the local norms of different district courts—what some researchers have called court communities (Eisenstein & Jacobs, 1977; Ulmer & Kramer, 1996; Ulmer, 1997). The norms of different courts are also influenced by practical constraints, such as court workload and the availability of different types of sentencing options.

The use of sentencing guidelines was intended to control the effects of philosophical differences among judges and varying local conditions.[118] But even under a detailed and binding system like the federal sentencing guidelines, differences might arise among judges in how they use the guideline range, the available sentencing options, or the departure power, all of which could result in disparity. This chapter begins by examining whether implementation of the guidelines reduced inter-judge and regional sentencing disparity. It then turns to an examination of the various sources of inter-judge and regional disparity that may remain in federal sentencing today.

---

[117] SENATE REP. NO. 225, 98th Cong., 1st Sess. 45-46 (1983).

[118] The legislative history of the SRA states "[f]or the first time, Federal law will assure that the Federal criminal justice system will adhere to a consistent sentencing philosophy." *Id*. at 59.

1. The Effects of the Guidelines on Inter-judge and Regional Disparity

The "central question" about the success of sentencing reform is whether implementation of the guidelines reduced unwarranted sentencing disparity. In its 1992 evaluation of the guidelines system, the General Accounting Office declared that this question "remained unanswered" (GAO, 1992). Today, better data and methodological innovations permit a more complete answer. The results of the latest analyses indicate that the guidelines have significantly reduced inter-judge disparity compared to the preguidelines era. Although some inter-judge disparity remains, the influence of judges' personal philosophy on sentencing decisions has been reduced.

> ***The best and most recent statistical analyses indicate that the guidelines have significantly reduced inter-judge disparity compared to the preguidelines era***.

Regarding regional disparity, however, the available data and the methods for analysis are less robust and the conclusions are less reassuring. The available evidence suggests that regional disparity remains under the guidelines, and some evidence suggests it may have even increased among drug trafficking offenses. Rates of use of guidelines mechanisms for sentencing outside the presumptive guidelines range, such as downward departures for substantial assistance to the government or departures for other mitigating circumstances vary dramatically among the circuits and the districts. In addition, with passage of the PROTECT Act[119] Congress re-opened the question of what types of regional disparities are to be considered unwarranted by creating a new mechanism for regional variation, "early disposition programs."[120]

2. Evidence of Inter-judge and Regional Variation in the Preguidelines Era

Uncontrolled studies. Data showing wide variations in the percentage of offenders sent to prison by different judges or in different regions, or in the average length of prison sentences imposed, were well known in the years preceding guidelines implementation. Congress cited some of these data (Sutton, 1978) in the legislative history of the SRA.[121] However, as discussed further below, simple tabulations of variations in sentences do not demonstrate *unwarranted* disparity because different judges and different regions have different types of cases, with differing offense seriousness and offender criminal histories. Some variation in average sentences is fully warranted. Only by controlling for case differences can we determine how much, if any, of the variation was unwarranted.

---

[119] Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650 (April 30 ,2003).

[120] 28 U.S.C. § 991(b)(1)(B).

[121] SENATE REPORT, *supra* note 1, at 41.

Primary judge effects and interaction effects. Congress was also presented data from experimental research, which controlled for case differences and isolated the disparity attributable to judges. The Federal Judicial Center's Second Circuit Study (Partridge & Eldridge, 1974) found dramatic differences among judges in the sentences imposed on hypothetical offenders. Judges were sent presentence reports representing a range of typical offenses, based largely on actual cases. Differences of several years were common. In one case more than seventeen years separated the most severe from the least severe sentence. The data showed that differences in the *average* sentences—what researchers call the "primary judge effect"—was fairly small for the majority of judges, even though a handful of judges were consistently more severe or lenient than their colleagues. This average similarity masked more substantial underlying disparities, however. Judges varied significantly in their approach to different types of cases—what researchers call "interaction effects." Some judges treated white collar offenders more harshly than their peers, but drug offenders less harshly, while other judges' treatment was the opposite. A second study quantified these two different types of disagreement among judges (Forst & Wellford, 1981). Again using hypothetical cases, the researchers identified how much of the variance in sentences was due to offense and offender characteristics, and how much was attributable to judges. Twenty-one percent of the variance was attributable to the primary judge effect, while thirty-four percent was attributable to interaction effects. The researchers also demonstrated that differences among judges in sentencing philosophy helped explain their differences in sentencing decisions.

Limitations of research using hypothetical cases. Research using hypothetical cases demonstrated that some disparity in sentences can be attributed to the judges to whom cases were assigned. However, critics have questioned whether these findings can be generalized to the real world (Stith & Cabranes, 1998; *see also* discussion of the limitations of using hypothetical cases to evaluate the guidelines in Hofer et al., 1999). Waldfogel (1997) used data on real cases from one federal district to evaluate the extent of inter-judge disparity in the preguidelines era. Like previous researchers, he found that the primary judge effect was less important than the interaction effects, but these accounted for only 2.3 percent and 9 percent of the variance in sentences, respectively. Research using hypothetical cases may exaggerate the extent of inter-judge disparity in the actual caseload.

3. Research Concerning the Guidelines' Effects on Disparity

The federal system has been evaluated perhaps more thoroughly than any other, by both the U.S. Sentencing Commission itself and outside researchers. However, this increased scrutiny did not initially result in consensus about whether disparity had been reduced. Early research, using a variety of research methods and assumptions, resulted in a spectrum of opinions that varied from those who believed disparity was reduced (USSC, 1991; Karle & Sager,1991) to those who could not tell whether there had been significant change (GAO, 1991) to those who believed disparity had actually gotten worse under the guidelines (Heaney, 1991).

Survey results indicate growing judicial support for sentencing guidelines. When the federal guidelines were adopted, many judges doubted that the guidelines would be effective in

reducing disparity (Alschuler & Schulhofer, 1989). As time passed and experience with the guidelines increased, judges began to have more favorable views on the guidelines system. A 1991 survey conducted by the Commission found that judges were evenly split between those that thought the guidelines increased disparity (31.8 percent), those that thought the guidelines decreased disparity (36.2 percent), and those that thought the guidelines had no impact on disparity (32.0 percent) (USSC, 1991). In later surveys, more respondents recognized that sentencing guidelines could be an effective tool to reduce unwarranted disparity. By 2001, more than a third (36.9 percent) of federal district judges indicated that the guidelines "almost always" avoided unwarranted sentencing disparity for similar offenders convicted of similar conduct. A similar proportion (32.1 percent) thought that the guidelines often avoided this form of disparity. Just about a quarter (25.4 percent) reported that the guidelines only sometimes avoided this disparity, and only a handful of judges (5.6 percent) reported that the guidelines rarely avoided disparity (USSC, 2002).

Early empirical evaluations of the guidelines. While surveys provide insights into judges' impressions of the effects of the guidelines, empirical research that examines data on changes in actual sentencing practices is necessary to assess if the guidelines have been successful. Even with such data, however, it is difficult to isolate the effects of the guidelines from the effects of other changes that occurred at the same time as guidelines implementation. Several early evaluations illustrate problems in isolating the effects of the guidelines from shifts in the types of cases sentenced in the preguidelines and guidelines eras. (Heaney, 1989; Karle & Sager 1991; GAO, 1992. *See* Hofer et al., 1999, for a review and critique of these early studies.)

The Commission's previous attempt to evaluate the guidelines' success at reducing unwarranted disparity was included in the Four-Year Evaluation (USSC, 1991, pp. 279-299). The report featured a "Distributional Analysis" that compared bank robbery, cocaine distribution, heroin distribution, and bank embezzlement cases sentenced during fiscal year 1985 with similar cases sentenced in the first months of full guidelines implementation. The Commission matched offenders from the two time periods on factors deemed relevant to sentencing, *e.g.*, the approximate amount of drugs, any injury caused to any victims, the defendant's role in the offense and criminal record, and whether the defendant pled guilty or went to trial. Variations among the matched groups at each time period were compared in terms of the sentence imposed and the expected time the defendant would actually serve. Because only offenders who met the strict matching criteria could be included in the study, the number of defendants in each group was relatively small. However, the analysis showed that the distribution of sentences for each group under the guidelines was narrower than in the preguidelines era. The Commission concluded from these results that unwarranted disparity was reduced by the guidelines.

Several reviewers criticized the Commission's methods, however, and questioned whether the study so clearly demonstrated success. (Tonry, 1997; McDonald & Carlson, 1993; Rhodes, 1992; Weisburd, 1992. For more thorough analysis of these criticisms, *see* Hofer et al., 1999.) At the request of Congress, the GAO re-analyzed the data on several offenses using somewhat different techniques. Their analyses replicated and confirmed the Commission's basic findings, but the GAO concluded there was insufficient evidence to establish clearly that the guidelines had reduced

disparity (GAO, 1991). One of the problems identified by critics was the small and unrepresentative sample of cases used in the study, due to the use of matched groups to achieve comparability of cases. What was needed was a different method that could examine judge-created disparity in the caseload as a whole.

4. Recent Research Concerning the Guidelines' Effects on Disparity

The "natural experiment" method. In 1991, the economist Joel Waldfogel introduced a method that has since been used by researchers both inside and outside the Commission to evaluate the effect of the guidelines on inter-judge disparity (Waldfogel, 1991). This "natural experiment" method exploits a common court procedure: *random assignment* of cases to judges. By measuring variation in average sentences before and after guidelines implementation among judges in the same random assignment pool, the extent to which judges influence sentences can be quantified. Waldfogel's initial study reported no decrease in disparity under the guidelines (Waldfogel, 1991). In 1997, Payne replicated Waldfogel's approach in more districts, with mixed results (Payne, 1997). Limitations in these early studies, and the great promise of the natural experiment method, led researchers to extend the work using more recent data and more robust statistical models. (*See* Hofer et al., 1997, for further discussion of all studies using this methodology.)

Later research using the "natural experiment" method. Commission staff published results of its research in the *Journal of Criminal Law and Criminology* (Hofer et al., 1999) and details of the analysis can be found in the Technical Appendix accompanying that article. The statistical model permitted quantification of inter-judge disparity across all the different cities included in the study, while comparing each judge only to other judges in the same city who were part of the same random assignment pool. Both the primary judge effect and interaction effects between judges and seven different offense types were studied. In addition, measures of the amount of variation among different regions were calculated. The magnitude of the influence of each of the explanatory factors during the two time periods was measured with the R-squared—the percentage of variance in sentences accounted for by each factor.

The study compared sentencing in fiscal years 1984-85, immediately before implementation of the guidelines, with 1994-95, after the guidelines were fully implemented. Two sets of analyses were conducted. To control for changes in the composition of the bench, the first analysis involved only judges who sentenced during both time periods. This limited the analysis to just nine cities that had at least three judges meeting this criteria, however. The primary judge effect accounted for 2.32 percent of the variation in sentences in the preguidelines era. Under the guidelines, this dropped to 1.24 percent, a reduction of almost half. The effect of judges was statistically significant at both time periods, but was substantially reduced under the guidelines.

The second analysis included all judges who were part of a random assignment pool involving at least three judges, regardless of whether they sentenced during both time periods. This expansion allowed the analysis to include 41 cities. The overall pattern of results was similar to the nine-city analysis. Again, the primary judge effect was significant at both time periods, but was

reduced under the guidelines—2.40 percent in the preguidelines era and 1.64 under the guidelines, a reduction of one-third. In this 41-city analysis, the effect of the guidelines appeared more limited and differences among cities appeared more important.

As in studies conducted in the preguidelines era, the interaction effects between different offense types and judges were substantially larger than the primary judge effect. Judges disagree about the appropriate sentence for specific cases to a greater extent than is revealed by differences in the primary judge effect, which measures only the "tip of the iceberg" of sentencing disparity.

To examine whether the effects of the guidelines varied for different offenses and in different cities, results were calculated for seven offense types separately. The results suggest that the effect of the guidelines has not been uniform. For most offenses, the judge effect decreased under the guidelines, but for robbery and immigration offenses the influence of judges increased.

Most troubling were changes in the influence of cities on sentences, which actually increased in the guidelines era. Almost all of the increase was found in drug trafficking offenses, where the city effect increased from 6.2 before guidelines implementation to 12.7 percent under the guidelines. This suggests more regional disparity in the sentencing of drug cases under the guidelines. Interpreting the city effect is difficult, however, because cases are not randomly assigned to cities. In addition, policy changes between 1984-1985 and 1994-95 could exacerbate the effects of the guidelines. For example, the greater emphasis on drug quantity in sentencing following enactment of the Anti-Drug Abuse Act of 1986 could create greater disparity between small cities and large cities, which are distribution centers for larger quantities. Note also that fiscal years 1994-1995 were prior to adoption of early disposition programs in some districts, which may have contributed to growing regional disparity in other types of cases, such as immigration.

Research outside the Commission. A reduction in inter-judge disparity under the guidelines was found in a study by researchers outside the Commission, who also used the natural experiment methodology and a highly sophisticated statistical model. Anderson, Kling & Stith (1999) studied sentencing patterns in 26 cities over 12.5 years among judges who sentenced in both the preguidelines and guidelines eras. They conducted rigorous tests to confirm the randomness of assignment to judges and constructed a statistical model that allowed them to test the significance of changes in inter-judge disparity over the entire period of their study. These improvements in the model allowed them to detect "changes . . . more pronounced than the mixed results of previous studies" (p. 294).

In the preguidelines era, the expected difference in sentence lengths between two typical judges was about 17 percent of the average sentence length. Under the guidelines, this difference fell to 11 percent. Because average sentences are lengthier in the guidelines era, a given percentage of disparity among judges results in a larger absolute difference in months of imprisonment. Taking into account these changes, the authors report: "For 1986-87 when the mean sentence length was 29, the expected inter-judge difference was 4.9 months, which fell to 3.9 months in 1988-93 when the mean sentence length was 35." Further tests indicated that the switch to guidelines, and not

changes in the composition of the bench or in the types of cases sentenced over the period of their study, accounted for the decrease in inter-judge disparity.

These authors suggest that the enactment of mandatory minimum penalties for drug offenses in 1986 may have contributed to the decrease in disparity for drug offenses. They also note that the effects of discretionary decisions by law enforcement officers and prosecutors at presentencing stages have greater influence under the guidelines system, since later actors have fewer opportunities to ameliorate any effect of disparate treatment prior to sentencing. Some of the inter-judge disparity in preguidelines sentencing was likely ameliorated by the parole guidelines, which affected the prison time actually served by offenders prior to implementation of "truth-in-sentencing."

The sentencing guidelines have reduced inter-judge disparity. At this time, findings from research using the natural experiment method have not been challenged and it appears unlikely that a more powerful method for studying the effects of the guidelines on inter-judge disparity will be found. The convergence of findings by researchers both inside and outside the Commission lends additional credibility to the results. The conclusion is clear: the federal sentencing guidelines have made significant progress toward reducing disparity caused by judicial discretion.

The sentencing guidelines have made significant progress toward reducing disparity caused by judicial discretion.

D. Continuing Disparity Under the Guidelines

Though clearly reduced by the guidelines, inter-judge sentencing variations that cannot be explained by differences in the caseload remain statistically significant today. Regional disparity also appears to remain and may have increased for some types of cases. How can disparity continue in a system of detailed and binding sentencing rules? The remainder of this chapter reviews the evidence that inter-judge and regional disparity continue to exist in federal sentencing and explores how it occurs.

1. Continuing Regional and Inter-judge Disparities

The natural experiment method is best for establishing whether inter-judge disparity has been reduced by implementation of the guidelines, but it is not as precise as other methods for measuring the amount of inter-judge and regional disparity today and comparing the effects of judges and regions with the warranted effects of legally relevant considerations, such as the seriousness of the crime and the criminal history of the offender.

Uncontrolled comparisons. The Commission's annual *Sourcebook of Federal Sentencing Statistics* and additional information found at the Commission's website (http://www.ussc.gov/LINKTOJP.HTM) contain a wealth of information on departure rates and

other sentencing variations that some commentators have used to question the guidelines' success (Miller, 2002; Mercer, 2003). These data compare the sentencing practices of each federal district with other districts and with national rates and averages. The data show that the types of sentences imposed and the average sentence lengths for offenders convicted of various types of crime vary among the districts. The rates of departure for substantial assistance or other mitigating or aggravating conditions also vary substantially among the districts and circuits.

These regional variations do not necessarily indicate *unwarranted* disparity, however, because different districts sentence different types of crimes within the general offense categories found in the reports. The types of fraud sentenced in the Southern District of New York (average fraud sentence 23.5 months) are different than the frauds sentenced in the District of North Dakota (average sentence 11.4 months). The guidelines themselves require different sentences for frauds involving different amounts of monetary loss, different numbers of victims, and many other specific offense characteristics.[122] Similarly, variations in the rates of a particular type of departure among different districts must be evaluated within a larger context of each district's distinctive adaptation to the guidelines system. Inferring unwarranted disparity from uncontrolled comparisons of average sentences or rates of departure may be erroneous.

Multiple regression studies. One source of variation in sentences that is clearly warranted is differences in the types of cases sentenced by each judge and in each district. Researchers have sought to control for legally relevant differences among cases using the statistical technique of multiple regression. Many studies of racial and ethnic disparity have also included measures of the district and circuit in which each case was sentenced. These studies suggest that differences in offense seriousness, defendant criminal history, or other legally relevant factors account for the largest share of variation among cases, but that some statistically significant variation among regions remains unexplained.

Albonetti (1997) reported that the probability and length of imprisonment for drug offenses sentenced in the early years of the guidelines was affected by region in about half of the circuits, after controlling for offense level, criminal history points, and a number of other legally relevant factors. Everett and Wojtkiewicz (2002) grouped the circuits into five regions and reported harsher sentencing in the southern circuits and more lenient sentencing in the northeastern and western circuits. Kautt and Spohn (2002) reported a statistically significant effect in drug cases sentenced in 1997-1998 in a minority of circuits. These studies did not use the presumptive sentence method, discussed in greater detail in Chapter Four and in Technical Appendix D, to control for legally relevant differences among cases. This introduces some avoidable errors in the results, because the effects of trumping mandatory minimum statutes, mandatory firearm sentencing enhancements, and other legally relevant considerations binding on the judge were not properly specified.

---

[122] *See* USSG §2B1.1.

A new approach: hierarchical modeling. Recent developments in the field of statistics (*see e.g.,* Raudenbush & Bryk, 2002) have introduced researchers to a new method that may be superior to multiple regression for studying inter-judge and regional differences today. Hierarchical models avoid some types of statistical bias that can arise in multiple regression models and also permit researchers to explore the *direct effect*s of factors on sentences and the *conditioning effects* of higher-level factors on lower-level factors. For example, the effect of district workload on the extent of departure in a district might be studied using a hierarchical model. Several studies have appeared in the last two years using these new methods to investigate regional variation in sentencing under the federal guidelines (Ulmer et al., 2001; Albonetti, 2003; Spohn, 2003). One such study has been published at the time of this writing (Kautt, 2002).

In a study of federal drug trafficking sentences, Kautt found variations between jurisdictions that could not be accounted for by the legally relevant differences included in her model. Districts and circuits both affected sentences, with the influence of districts more important than the influence of circuits. Districts also appeared to differ in the way that legally relevant factors influenced sentences. From these results Kautt concluded that "despite the federal system's congressionally mandated return to determinate sentencing, extra-legal factors (specifically jurisdictional effects) continue to influence the federal sentencing system and its outcomes directly and indirectly . . . these findings indicate a far greater concern: that the mechanisms of federal structured sentencing may *foster* certain forms of extralegal sentence disparity" (Kautt, 2002, p. 659).

Hierarchical models are a powerful new tool for studying regional variation, but they are "delicate and complex" (Kautt, 2002, p. 645). Mis-specification of the relationship among explanatory factors might distort results in unpredictable ways. For this reason, using the presumptive sentence method to represent legally relevant considerations seems desirable. (Kautt considered but rejected the use of a presumptive sentence model for reasons that are unclear, *see id.* at 649, n. 15.) Additional research with hierarchical models using the presumptive sentence to control for legally relevant differences among cases could prove very useful.

A new hierarchical analysis of inter-judge and regional disparity. For this report, a hierarchical model of the determinants of sentence length was developed, using the presumptive sentence to control for differences among cases in the legally relevant factors taken into account by the guidelines and mandatory minimum statutes. Both judges and districts were included as levels of analysis. All cases sentenced in 2001 with full information were analyzed, with the exception of cases handled by visiting judges. Appendix D contains additional details of this analysis.

The analysis showed that legally relevant differences among cases explain the vast majority of variation among judges and regions in sentence length. Fully 73 percent of sentence variation is accounted for by the guidelines and statutes. The amount of variation that is associated with judges or

Research using the most current statistical models continues to show relatively minor inter-judge and regional disparity not explained by case differences.

districts is relatively small. Of the 27 percent of variance that is not accounted for by the presumptive sentence, just 2.9 percent is associated with judges within each judicial district, and 2.8 percent is among judicial districts. The remaining is unexplained case variation. The judge and district levels provide relatively minor variation of sentences compared to case differences.

2. Mechanisms for Disparity Within the Guidelines System

Congressional attention has recently focused on potential disparity arising from varying downward departure rates for mitigating circumstances identified by judges (Mercer, 2003; PROTECT Act, 2003). Less attention has been paid to other potential sources of disparity. These include variation in rates of other types of departure, such as rates of departures for substantial assistance to the government or the extent of such departures for different forms of assistance (Saris, 1997; Maxfield & Kramer, 1998; Farabee, 1998). The PROTECT Act authorized a new ground for departure for defendants who participate in qualified early disposition programs. In addition, the guidelines give judges discretion over placement of the sentence within the guideline range, including, in some cases, whether to use a sentencing option such as probation.

Relative contribution of different mechanisms to sentence variation. To assess the influence of each of these mechanisms on sentencing disparity, a multiple regression analysis of sentences imposed in 2001 was undertaken. Details of this analysis are provided in Technical Appendix D. In addition to the presumptive sentence, the analysis included variables indicating whether the case 1) received a sentence within the guideline range, but above the minimum of the range, 2) received an upward departure, 3) received a downward departure for a mitigating circumstance identified by the judge, or 4) received a downward departure for substantial assistance.

Among discretionary mechanisms within the guidelines system, substantial assistance departures contribute the greatest amount to variation in sentences, while judges' use of the guidelines range contributes the least.

As in other analyses using the presumptive sentence, the guideline and statutory factors represented by the presumptive sentence accounted for the vast majority of variation in sentences in 2001 —75 percent. (Slight differences in the amount of variation accounted for by the presumptive sentence are expected due to the different populations of cases included in each analysis.) Among the mechanisms, substantial assistance departures accounted for the greatest amount of the remaining variation in sentence length—4.4 percent. Other downward departures contributed 2.2 percent, while upward departures contributed just 0.29 percent. Only 0.07 percent of the variation was explained by use of the guideline range above the guideline minimum.

It may be surprising that substantial assistance departures account for so much more variability in sentence length than other types of downward departures, because the *rate* of the two types of departure are similar—17.1 percent and 18.3 percent, respectively (USSC, 2001, Tbl. 26).

However, the *extent* of departure for substantial assistance is on average far greater. The mean departure length for substantial assistance was 43 months (or a mean 56 percent decrease from the guideline minimum), while the mean departure length for other downward departures was just 20 months (or a mean 47 percent decrease from the lower average guideline minimum found among offenders receiving these departures).

The relative unimportance of placement within the guideline range above the minimum may also be surprising. Almost 38 percent of offenders received a sentence above the guideline minimum in 2001, and 13.8 percent were sentenced at the guideline *maximum* (USSC, 2001, Tbl. 29). But the average difference between the guideline minimum and the sentence imposed in these cases was just 6.8 months. It should be noted, however, that at the lower end of the sentencing table a six month difference may be the difference between a sentence of simple probation and six months in prison—a distinction of considerable importance to the offenders involved.

A total of just over 82 percent of the variation in individual sentence lengths could be explained by the model. This does not mean that 18 percent of the variation in sentences is unwarranted. The model only identified the relative importance of different mechanisms—how frequently the mechanism is used and how far from the presumptive sentence offenders affected by the mechanism are sentenced. It did not attempt to determine if the mechanisms were being used appropriately and uniformly. For this we must turn to research specific to each one.

3. Departures upon Motion of the Government

Several types of sentence reductions can be made only upon motion of the government. Departures from the guidelines and guideline adjustments for various forms of defendant cooperation—such as "substantial assistance in the prosecution of other persons" under USSG §5K1.1, 18 U.S.C. § 3553(e) and Federal Rules of Criminal Procedure, Rule 35(b); participation in an "early disposition program" under USSG §5K3.1 p.s.; and timely "acceptance of responsibility" under USSG §3E1.1(b)—may all be granted only upon motion of the government. Research on several of these mechanisms has revealed considerable regional variation, suggesting that uniform practices have not been in place. Policies put in place subsequent to the PROTECT Act are too new to be evaluated with the data available for this report.

Rates of substantial assistance departures vary widely among the districts.

Downward departures for substantial assistance. Downward departures for substantial assistance to the government in the prosecution of other persons are made pursuant to USSG §5K1.1. The policy statement permits such a departure only upon the motion of the government, but it does not require that the judge depart whenever the government so moves. Research has shown, however, that judges almost always grant these departures when a motion is made (Maxfield & Kramer, 1997). The rates of substantial assistance motions vary among the districts. In 2002, the national rate was 17.4 percent of all offenders. Five districts had rates twice

as high as the national rate, with three districts having rates over 40 percent (USSC, 2002, Table 26). On the other hand, 12 districts had substantial assistance departure rates less than half that of the national rate, while three had rates of less than five percent.

Policy statement, section 5K1.1 sets out a non-exhaustive list of reasons for judges to consider when determining the appropriate extent of a reduction. However, no detailed nationwide policies governing how substantial assistance motions should be used, nor how the extent of the departure should be determined, have been promulgated by either the Department of Justice or the Sentencing Commission (Lee, 1997; American College of Trial Lawyers, 2001). Case law has established some principles for determining the extent of departure in some circuits.[123] The Commission has received limited reports of standardized discounts in some districts, although in other districts, once a motion is made the determination of the sentence is left entirely to the discretion of the sentencing judge. The majority of sentencing judges reported cases where a defendant had substantially assisted the government, but had not received a motion for a departure on that ground (FJC, 1997).

Given the wide variety of behaviors that can qualify a defendant for a substantial assistance departure, some commentators have suggested that courts are given insufficient guidance regarding the appropriate extent of departure (Berman, 2002; Bowman, 1999). Some have argued that substantial assistance departures are a source of continuing unwarranted disparities (Tease, 1992; Marcus, 1993; Gyurici, 1994; Lee, 1994, 1997), although others have cautioned that differences in rates of departure do not necessarily result in sentencing disparities (Weinstein, 1998; Storto, 2002).

Empirical research on substantial assistance departures is extremely difficult because detailed information on the most important legally relevant consideration—the nature of the defendant's assistance to the government—is available only to the prosecutors familiar with the case. While U.S. attorneys offices are required to document the reasons underlying every substantial assistance motion (DOJ, 1992), these records are not collected into a comprehensive database that can be used for empirical analysis. However, what research has been done indicates that substantial assistance departures may be a source of continuing sentencing disparity.

A comprehensive study of substantial assistance departures was undertaken by the Sentencing Commission in the mid-1990s (Maxfield & Kramer, 1998). It included a survey of U.S. attorney offices' policies on substantial assistance, site visits to eight districts, and an examination of the types of cooperation given by a random sample of defendants receiving substantial assistance departures, as determined by analysis of the presentence reports prepared in the case. The research uncovered irregular and inconsistent policies and practices among the various districts.

---

[123] *See* Federal Judicial Center, *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues*, § VI.F.2 (2002).

(1) While every U.S. attorney office reported some review process for the approval of substantial assistance motions, and four out of five offices had written policies regarding the use of substantial assistance motions, review of a sample of cases showed that in practice districts frequently diverged from their stated policies.

(2) Different U.S. attorneys offices were consistent in authorizing motions for offenders who provided information against other persons, or participated in the investigation of other persons, or testified against them. But different offices varied in whether and how they considered information offenders provided concerning their own criminal conduct.

(3) Six out of ten offenders who provided some assistance did *not* receive a section 5K1.1 motion, suggesting that prosecutors generally require that the assistance be substantial.

(4) Offenders at higher levels of a criminal conspiracy are *not* more likely to benefit from a departure for substantial assistance than are lower-level offenders. Although occurring in some specific cases, the so-called "cooperation paradox" in which more culpable offenders receive shorter sentences than less culpable offenders was not common.

(5) Offenders providing similar types of assistance received varying magnitudes of departure. Offenders with longer presumptive guideline sentences tended to receive greater reductions.

A lower annual rate of substantial assistance departures for Blacks has been a consistent finding in the guidelines era. Minority defendants may, in fact, be less trusting of government officials, less willing to become "snitches" due to pride or fear of reprisal, or less well-positioned to provide useful information than White offenders. Maxfield and Kramer found that Whites and women were more likely to receive a motion after controlling for offense type, guideline range, weapon involvement, and a host of factors relevant to sentencing. However, a re-analysis by Langan (1996, 2001) found that part of the difference between the races was due to their different rates of pleading guilty, and that the statistical significance of the remaining difference was questionable. Neither of these studies could adequately evaluate whether there might be legitimate reasons for differences in substantial assistance departure rates among different groups due to lack of data on the nature of the assistance various offenders provide. Beginning in 1992, Department policy required prosecutors to "maintain documentation of the facts behind and justification for each substantial assistance pleading."[124] No standards for how this information is to be recorded appear to have been promulgated and the data have not been compiled or made available to outside researchers.

---

[124] Terwilliger Bluesheet, *supra* note 43.

Rule 35 sentence reductions. In addition to substantial assistance departures, U.S. attorneys offices can file motions with the court to have previously imposed sentences reduced based upon post-sentencing cooperation by an offender. These are known as Rule 35(b) motions. Data on the use of Rule 35(b) motions or on factors that might account for their use have been very difficult to obtain (Marcus, 1985). The Commission does not reliably receive reports on sentence reductions following the sentencing hearing, so analyses using the Commission's monitoring databases cannot detect their effects on sentences. However, a recent paper using data from the Federal Bureau of Prisons presented the first empirical look at these reductions (Adams, 2003). It suggests that regional variations in practice found with §5K1.1 motions may be present with Rule 35(b) motions as well.

The number of offenders receiving Rule 35(b) sentence reductions has increased dramatically over the guidelines era, from 30 offenders in 1988 to 1,453 offenders in 2000, the last year for which data are available. The average extent of the reduction has remained fairly stable through the years, varying between 30 and 42 percent of the originally-imposed sentence, although the extent varies by district. Drug offenders are by far the most frequent beneficiaries of Rule 35(b), accounting for 80 percent of the reductions. The use of Rule 35(b) varies significantly among the districts. Most districts account for less than one percent of offenders receiving Rule 35(b) reductions in any given year, but in one recent year ten districts accounted for over two percent of offenders receiving the reduction while one district accounted for over 15 percent.

Downward departures for participation in early disposition programs. The Department recently informed the Commission that prosecutors in certain districts have developed early disposition, or "fast-track" programs, that grant participating offenders sentencing concessions.[125] How many districts have employed these programs, and for how long, is not known. These programs offer defendants a sentence reduction, in the form of a downward departure, charge dismissal, or some other benefit, in return for the defendant's waiver of certain procedural rights. These rights might include a prompt guilty plea, a waiver of appeal rights, and in cases involving non-citizens, the defendant's agreement to immediate deportation. Practitioners and commentators have expressed concern that the presence of these programs in some districts, and their absence from neighboring districts, could lead to disparate sentencing outcomes for offenders convicted of similar conduct (USSC Hearing, 2003). The absence of reliable information on the types of cases which are, and which are not, sentenced pursuant to early disposition procedures prohibits analysis of the impact of these programs on sentencing disparity. But as discussed below, the presence of fact track programs in some districts explains a great deal of regional variation in downward departure rates.

The PROTECT Act sought to formalize and standardize these practices. Per the act, the Sentencing Commission authorized a downward departure from the guidelines of "not more than

---

[125] Letter from Eric H. Jaso, Counselor to the Assistant Attorney General, DOJ, to Hon. Diana E. Murphy, Chair, USSC, regarding "Fast-Track Program," August 12, 2003.

four levels" for offenders who participate in these programs.[126] The Department has outlined criteria to be used to authorize early disposition programs in some districts.[127] Whether these developments will ensure uniformity of sentencing under these programs cannot yet be determined. Evaluation of these programs will be possible only if the Department and relevant U.S. attorney offices provide data which reveal the workings of the fast track process.

4. Variability of Within-Guidelines Sentences

Congress recognized in the SRA that no set of rules could anticipate every circumstance relevant to the sentencing decision. In addition to authorizing departures in exceptional circumstances, Congress permitted the Commission to design guidelines that provide a limited range of prison time for each category of offender.[128] The Commission determined that in the lower zones of the sentencing table, judges should have discretion to sentence offenders to prison terms or to choose from a variety of sentencing options.[129] At the highest offense levels the guideline range is over six years and judges may impose sentences anywhere within it. Discretion within the guideline range permits consideration of subtle differences among offenses and offenders that are not considered by the guidelines, but that do not meet the exceptional standards for departure. Guidelines commentary encourages use of the range to take account of differences in offense seriousness in some circumstances.[130]

Use of sentencing options. The Commission's annual *Sourcebook* contains information on the use of the sentencing range and sentencing options for various types of offenses. Figure F from the 2002 *Sourcebook*, reproduced on the following page, shows the imprisonment rates of offenders who are eligible for a non-prison sentencing option for nine offense categories. Many offenders who could receive a sentence of probation under the guidelines are imprisoned instead. Imprisonment rates of probation-eligible offenders range from over 80 percent for immigration offenders (reflecting their frequent lack of a United States residence and imminent deportation) to about 20 percent for larceny offenders. All other offense types vary between 20 and 50 percent of probation-eligible offenders receiving imprisonment instead. These findings have remained fairly stable from year-to-year.

---

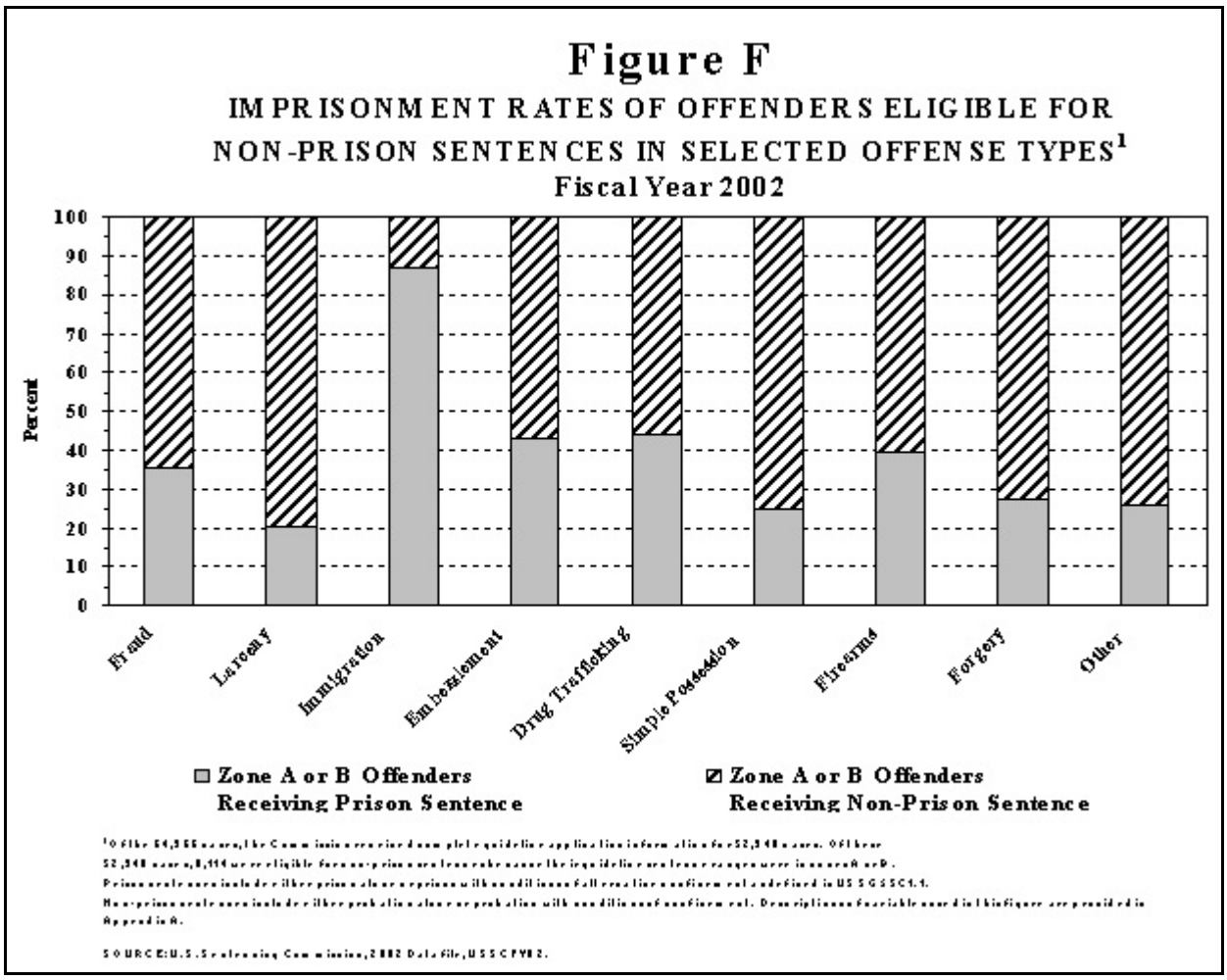
[126] USSG §5K3.1 (policy statement).

[127] Ashcroft Fast-Track Memo, *supra* note 46, Sept. 22, 2003.

[128] 28 U.S.C. § 994(b)(2).

[129] USSG §5C1.1.

[130] *See e.g.,* USSG §2C1.2, comment. n. 3.



The Commission's website contains this information for each district and each circuit. (*See* webpage for each jurisdiction at http://www.ussc.gov/JUDPACK/JP2002.htm, Tbl. 6). Nationally, 45.9 percent of offenders for whom probation is an option receive imprisonment instead, but this rate varies significantly by district. In 2001, the rates in each district varied from a low of 9.3 percent to a high of 78.1 percent. (Districts that sentenced fewer than 30 probation-eligible offenders were excluded from these analyses because their rates can be dramatically affected by a small number of offenders.) The incarceration of probation-eligible fraud offenders, for example, varied from 17 percent to 38 percent between New Jersey and Pennsylvania, two contiguous districts.

Some of this regional variation can be accounted for by differences in the specific types of offenses and offenders sentenced in each region. A 1996 Commission report examined factors associated with judges' use of sentencing options (USSC, 1996). Using a multiple regression model, it was found that criminal history, employment status, role in the offense, citizenship, and mode of conviction accounted for much, but not all, of the variation in the use of sentencing options. Judges are more willing to consider community placement for offenders who are employed, who plead

guilty, and who played a lesser role in their offense. The guidelines themselves discourage judges from using a probationary sentence for offenders with a criminal history category of III or above.[131]

Placement within the guideline range. For offenders who do not receive a sentencing option or a departure, judges must decide on a term of imprisonment within the prescribed guideline range. The *Sourcebook of Federal Sentencing Statistics* provides the percentage of offenders who are sentenced at the bottom, lower half, middle, upper half, or top of the guideline range for 32 different offense categories (USSC, 2002, Tbl. 29). Overall, in 2002, 59.8 percent of offenders were sentenced at the bottom of the ranges, 14.8 in the lower half, 8.9 percent at the middle, 6.4 percent in the upper half, and 10.1 percent at the top of the range. This distribution is slightly skewed to the bottom of the range compared to state guidelines systems on which data are available. For example, the Virginia Criminal Sentencing Commission reports that in fiscal year 2003, 65 percent of offenders were sentenced below the midpoint, 16 percent at the midpoint, and 19 percent above the midpoint (Virginia Criminal Sentencing Commission, 2003, p. 18).

Judges in different guidelines systems, and different judges in the federal system, vary in how they approach the guideline range. In some state guidelines systems, the presumptive sentence is in the middle of the guideline range. (*See e.g.,* Kansas Sentencing Commission, 2002, p. 42; Pennsylvania Commission on Sentencing, 2000.) Judges use the lower and upper ends of the range for mitigated and aggravated sentences that do not rise to the level of a departure. In other systems, including the federal system, the bottom of the range is most typically used.[132]

Different guidelines systems, and to a minor extent different federal judges, use the guideline range differently.

There appears to be general consensus among federal judges about how to approach the guideline range. In addition, plea agreements often specify where in the guideline range the parties agree the sentence should fall. Only a few judges use another part of the guideline range more frequently than the bottom of the range. Among the 911 federal judges who sentenced at least ten cases between 1999 and 2001, the bottom of the range was the most typical sentence for 880 of them. Twenty-four judges, however, most typically sentenced between the bottom and midpoint of the range, while two most typically sentenced between the midpoint and the top. Just one judge used the midpoint of the range most frequently, while four judges sentenced at the top of the range most frequently. It seems likely that judicial sentencing philosophy, rather than differences among the types of cases sentenced, account for these different approaches to the guideline range. While

[131] USSG §5C1.1, comment. n. 7.

[132] 18 U.S.C. § 3553(a) requires judges to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. When determining "the particular sentence to be imposed" the court shall consider "the kinds of sentence and the sentencing range established" by the guidelines.

generating a form of inter-judge disparity, these atypical practices are not widespread and fall within the range of discretion reserved for judges by the SRA.

5. Departures for Exceptional Circumstances

Commentators (Berman, 2000) and empirical analyses have suggested that departures for aggravating and mitigating circumstances articulated by the judge could be a continuing source of unwarranted sentencing disparity in the guidelines system (Gelacak et al., 1996; Farabee, 1998; Adams, 1998). Congress enacted the PROTECT Act to further limit the circumstances when downward departures are authorized. The Act became effective on April 30, 2003, and the Commission's guidelines amendments pursuant to it became effective October 27, 2003, after the data for this report were collected. Thus, the effects of the Act are not addressed in this report. Research on sentencing practices prior to the Act suggest that downward departures may well be contributing to inter-judge and regional disparities, but that the reasons for variations in downward departure rates have been poorly understood.

The Commission's report on departures. As part of its Fifteen-Year Evaluation of the guidelines system, the Commission published a special report, *Downward Departures from the Federal Sentencing Guidelines* (USSC, 2003), which discussed the PROTECT Act and some of the concerns that motivated it. Empirical analyses presented in the report demonstrate that the number of cases sentenced within the guideline range decreased from 1991-2001. Until 1994 this decrease was attributable largely to an increase in departures for substantial assistance to the government, but after 1995 these departures declined slightly and other downward departures for mitigating circumstances began to increase.

Several possible factors have contributed to the increases and variations in downward departure rates.

Rates of departure vary by offense type, with the rate of departure for immigration offenses increasing substantially over the same years that the number of immigration offenses increased substantially. Rates of departure also vary dramatically from district to district. While a clear majority of districts in 2001 had mitigating circumstance departure rates of less than ten percent, a quarter had rates of 10-20 percent and the remainder had rates even higher. Three districts had rates over 50 percent.

The Commission's departure report discussed several possible reasons for the increasing departure rate, as well as the concerns raised during debates preceding passage of the PROTECT Act. The Supreme Court's decision in *Koon v. United States*,[133] which held that an abuse of discretion standard applied to appellate review of departures, was discussed in Congress as a cause of increased departures. However, the Commission's report cited evidence suggesting that the impact of *Koon* was negligible. The report also showed that appeals of downward departures by the

[133] 518 U.S. 81 (1996).

government were rare both before and after the *Koon* decision, only ranging between 25 and 43 cases per year in five recent years. The data suggested that in 2001, the government initiated at least 40 percent of all downward departures for mitigating circumstances, often as part of an early disposition program or other guilty plea arrangement. The rate of downward departures for reasons other than substantial assistance that were *not* initiated by the government appeared to be approximately 10.9 percent in 2001.

The causes of variation in the rates of departure, and their potential effect on unwarranted sentencing disparity, is a complicated issue that cannot be resolved through simple examination of the reported rates. Problems with document submission (Mercer, 2003) and data accuracy (GAO, 2003) also complicate careful analysis. The strengthened reporting requirements put in place by the PROTECT Act and data collection improvements undertaken by the Commission are expected to address some of these concerns. When assessing the role of departures in creating unwarranted sentencing disparity during the first fifteen years of guidelines sentencing, however, caution is advisable and caveats are unavoidable.

District factors influence the rate of departure more than circuit factors. For this report, a new analysis using a hierarchical model compared the amount of variation in departure rates associated with circuits with the amount associated with districts. (Details can be found in Technical Appendix D.) The case law governing various grounds for departure varies somewhat from circuit to circuit (Nagel & Galacek 1996; Lee 1997; Johnson 1998) and different circuits have been recognized as having different climates or "personas" regarding their amenability to departure (Demlietner, 1994). But results from the hierarchical analysis suggest that differences in circuit case law or climate, while exerting some significant influence over departure rates, are less important than differences among the districts. Only about one quarter of the variation in downward departure rates is attributable to the circuits, while three quarters is attributable to districts.

The GAO's exploration of regional variations. Recent research by the GAO investigated how much regional variation in departure rates can be accounted for by differences in offense and offender characteristics (GAO, 2003). The GAO found "major variation among certain judicial circuits and districts" (*id*. at 3-4) in the likelihood of departure in drug trafficking cases, even after controlling for a variety of offense and offender characteristics, including the type of drug involved, the presence of a weapon, the severity of the offense, whether the defendant pled guilty, and whether the offense was eligible for a mandatory minimum penalty or the safety valve. Differences among circuits and districts in the likelihood of departure were usually reduced after controlling for these characteristics, indicating that some of the regional variation is due to the different types of cases and offenders in the various regions. Significant regional variation remained, however. For example, downward departure remained 6.78 times more likely in the Ninth Circuit than in the Eighth, even after controlling for offense and offender characteristics.

Because "empirical data on all factors that could influence sentencing were not available" the GAO noted that the remaining differences "may not, in and of themselves, indicate unwarranted sentencing departures or misapplication of the guidelines." As the Commission noted in its response

to the draft GAO report, several factors that might help account for regional variation in departure rates were not included in the GAO's analysis. Most noteworthy, the GAO did not take into account the existence in several districts of formal, government-created "fast track" programs that offer departures as part of a plea agreement as an incentive for quick waiver of certain defendant rights.

USSC replication and extension of the GAO analysis. To estimate the impact of "fast track" on regional variation in departure rates, the GAO's analysis was replicated including a variable indicating whether a "fast track" program involving departures was in place in a particular district. A letter from the Department of Justice to the Commission on August 12, 2003 was used to identify those districts having such programs during the years of our analysis. The results show that regional variation in downward departure rates is greatly reduced when the presence of "fast track" programs in some districts is taken into account. In particular, the increased odds of departure in the Fifth, Ninth, and Tenth Circuits (when compared to the Eighth Circuit, the same circuit used for comparison in the GAO report) are reduced by more than two-thirds. The variation in departure rates accounted for by "fast track" programs is much greater than the variation accounted for by all of the offense and offender characteristics included in the GAO's analysis combined.

However, while the highest departure rates are clearly due to the presence in some districts of "fast track" programs, significant variation remains after controlling for these programs. The odds of receiving a downward departure for mitigating circumstances remain over three times higher in the Ninth Circuit than in the Eighth, almost three times higher in the Second, and two times higher in the DC circuit. In the Fifth Circuit, on the other hand, the odds of departure are just 17 percent that of the Eighth Circuit. As noted above, however, district practices are more important than circuit factors in determining the departure rate. Within the Ninth Circuit, the odds of departure vary from Montana, with odds less than half those found in the District of Minnesota (again, the comparison districts used by the GAO) to almost twice the odds in the Northern District of California. (Arizona and Southern California were excluded due to the unusual case types and workload found in these border districts.) Similarly, while most of the districts in the Fourth Circuit have lower odds of downward departure than Minnesota, the District of Maryland has slightly higher odds. Clearly, practices particular to each district have a substantial impact on the departure rates in those districts.

Continuing debate over which regional variations are warranted. Identifying the reasons for regional variation in departure rates will not settle the policy question of whether the variation is warranted or unwarranted. Numerous commentators have argued that some regional variation is warranted by local conditions. In addition to different workload pressures (Braniff, 1993) commentators have suggested that different crimes generate different levels of public concern in different regions, which should be reflected in the sentences imposed (Broderick, 1993; Ragee 1993, Sifton, 1997). It has also been argued that departure can be used to ameliorate the unwarranted disparity that can arise when some offenders are prosecuted in federal court while others are prosecuted in state court where sentences are more lenient (O'Hear, 2002). Regional variation in sentencing has been, and will likely continue to be, a lively area of research and debate.