

ARTICLES

The Federal Sentencing Guidelines: Striking an Appropriate Balance*

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INTRODUCTION

Prior to the new federal sentencing guidelines, federal judges exercised virtually unreviewable discretion when sentencing. Too often, Congress decided, this discretion resulted in unwarranted disparities in sentences imposed on similar defendants convicted of similar crimes.¹

The Sentencing Reform Act of 1984 envisioned the creation of

* Portions of this article were derived from the following United States Sentencing Commission publications: SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (June 18, 1987); ANNUAL REPORT (1989); MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991); and GUIDELINES MANUAL (Nov. 1991).

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¹ Commenting on the pre-guidelines sentencing system at a 1983 hearing, one member of Congress stated:

Sentencing is a scandal that permits the courts to play judicial roulette in determining whether defendants convicted of violent crimes go free or go to jail. Almost every day, the press reports the abuses caused by the unfettered discretion of judges in criminal sentencing. Excessively harsh sentences and incredible examples of leniency proliferate side by side, and undermine public confidence in our system of justice.

Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 3 (1983) (statement of Sen. Edward M. Kennedy).

a sophisticated system of sentencing guidelines and established the United States Sentencing Commission to develop this structured sentencing system for the federal courts. While it is true that learning the mechanics of guidelines application requires time, the benefits that accrue from the guidelines are clearly worth the effort. To understand them, their underlying rationale, and the reasons for their sophistication, it is important to focus on Congress's three objectives in enacting the Sentencing Reform Act.

The Act's overarching goal was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve that end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose from the preguidelines sentencing system in which parole and "good time" credits often significantly reduced a court's indeterminate sentence. To rectify this situation, Congress mandated that the abolition of parole accompany the implementation of guidelines sentencing. Congress also limited to fifty-four days per year (after service of the first year) the amount of credit for good behavior an inmate could earn.²

In addition, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity among sentences imposed on similar offenders who commit similar criminal offenses. Finally, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity. Congress assured fairness in sentencing by requiring judges to resolve disputed issues both by making specific findings of fact stated on the record and by providing appellate review of sentences.

Effectuating these broad congressional objectives required the Commission to resolve a host of important policy questions that

² According to Congress:

Prison sentences imposed will represent the actual time to be served and the prisoners and the public will know when offenders will be released from prison. Prisoners' morale will probably improve when the uncertainties about release dates are removed. Public respect for the law will grow when the public knows that the judicially-imposed sentence announced in a particular case represents the real sentence, rather than one subject to constant adjustment by the Parole Commission.

S. REP. NO. 225, 98th Cong., 2d Sess. 56 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3239.

typically involved rather evenly balanced sets of competing considerations. These complex issues required sophisticated solutions.

I. STRIKING AN APPROPRIATE BALANCE

A. *Proportionality Versus Uniformity*

One of the guidelines' major goals was to increase uniformity in sentencing by narrowing the wide disparity among sentences that hundreds of different federal courts were imposing on similar offenders convicted of similar criminal conduct. The increase in uniformity, however, was not to be achieved through sacrificing proportionality. Instead, the guidelines authorize different sentences for crimes of significantly different severity.³

While a very simple system may produce uniformity, it cannot satisfy the requirement of proportionality. For example, the Commission ostensibly could have achieved perfect uniformity simply by specifying that every defendant convicted of robbery would receive a two-year prison sentence. Doing so, however, would have destroyed proportionality. In addition, guidelines of this kind would likely be ineffective because their unreasonableness would ensure that ways would be found to subvert them. Similarly, having a few simple, general categories of crimes might make the guidelines easy to administer, but only at the cost of lumping together offenses that are different in important respects.⁴

On the other hand, a sentencing system tailored to account for every conceivable offense and offender characteristic would quickly become too complex and unworkable. Complexity can seriously compromise the certainty of punishment and its deterrent effect. The larger the number of subcategories in a guidelines system, the greater the complexity and the less workable the

³ See 28 U.S.C. § 991(b)(1)(B) (1988).

⁴ For example, a single robbery category that lumped together armed and unarmed robberies, robberies with and without injuries, and robberies of a few dollars and millions would have been far too simplistic to achieve just and effective sentences, especially given the narrowness of the legislatively required sentencing guidelines ranges. If the guidelines-specified sentence includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25% or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment. 28 U.S.C. § 994(b)(2).

system. Perhaps most importantly, each sentencing judge, in applying such a complex system, would have to make numerous decisions about whether each of a large number of potentially relevant sentencing factors applied. This added factfinding would impose a substantial burden on judicial resources. Furthermore, as the number and complexity of required decisions increase, the risk that different judges will apply the guidelines differently to situations that are in fact similar also increases. As a result, the very disparity that the guidelines are designed to eliminate would be reintroduced.

Even if a system that attempted to include and quantify every potentially relevant sentencing factor were administratively feasible, devising such a system would probably not be. The list of potentially relevant sentencing factors is long; because factors can occur in multiple combinations, the list of possible permutations of factors is virtually endless. Even in a sentencing system based purely on perceived seriousness or "just deserts," the appropriate relationships among these different factors are exceedingly difficult to establish because they are often context specific. Weapon use or possession, for example, is clearly more significant when the crime involves a threat of injury to a person (for example, robbery) than when the crime has no such element (for example, damaging property or hunting wildlife on protected land). The same is true even when the factor represents a specific loss or harm. With good reason, sentencing courts do not treat the occurrence of a minor injury identically in all cases regardless of whether that injury occurred during a bank robbery or a breach of peace. Similarly, the destruction of \$100 worth of property when the crime is vandalism is more significant for sentencing purposes than when the crime involves criminal sexual conduct.

In addition, the relationship between punishment and multiple harms is not simply additive; rather, it varies depending on how much other harm has occurred.⁵ The introduction of crime control makes the proper interrelationship among sentencing factors

⁵ Thus, research has shown that the perceived seriousness of an offense cannot be derived by adding the seriousness of its component "harms." Two or three offenses generally are not two or three times as serious as a single offense, and the seriousness rankings do not necessarily correspond with imprisonment rankings. See, e.g., Alfred Blumstein & Jacqueline Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public View*, 14 *LAW & SOC'Y REV.* 223, 236-37 (1980); Stephen D. Gottfredson et al., *Additivity and Interactions in Offense Seriousness Scales*, 17 *J. RES. CRIME & DELINQ.* 26 (1980);

even more complex.⁶ Given the impracticality of attempting to include in the guidelines every distinction that might appear relevant in sentencing, it would have been tempting to retreat to the simple, broad-category approach that some states utilize. State guidelines systems that use relatively few categories and narrow imprisonment ranges, however, are ill-suited to the federal criminal law. Indeed, the bulk of serious federal crimes might well be treated as departures from such guidelines.⁷ To permit a court to impose proportional sentences within the guidelines, a simple broad-category approach would require broader guidelines ranges than the six-month or twenty-five percent width that the Sentencing Reform Act allows. The Commission considered, but ultimately rejected, employing specific factors with flexible adjustment ranges (for example, one to six levels depending on the degree of damage or injury). Because of the broad discretion that it entails, such an approach would have risked correspondingly broad disparity in sentencing; different courts would have exercised their discretionary powers in significantly different ways. Either of these approaches would have risked a return to the wide disparity that Congress established the Commission to reduce. In short, either of these approaches would have violated the spirit and letter of the Sentencing Reform Act.

In the end, the Commission had to balance the comparative virtues and vices of broad, simple categorization with detailed, complex subcategorization and devise a system that could most effectively meet the statutory goals of sentencing reform. Any system developed would, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

Hugh Wagner & Kenneth Pease, *On Adding Up Scores of Offence Seriousness*, 18 BRIT. J. CRIMINOLOGY 175 (1978).

⁶ Incapacitation, for example, calls for incarcerating offenders primarily on the basis of predictions of the likelihood that they will commit future crimes. To the extent that a sentencing system seeks to protect the public from the defendant's future crimes, the sentences that would result purely from harm rankings likely would be inappropriate. Similarly, some crimes that are less harmful than others may require greater sentences to provide adequate deterrence.

⁷ Various state guidelines, for example, have recommended departures for "major economic offenses" and "major controlled substance offenses." Both terms are broadly defined and could well encompass a majority of federally-prosecuted fraud and drug offenses.

B. Real Offense Versus Charge Offense Sentencing

One of the most important decisions the Commission faced was whether to base sentences on the defendant's actual conduct regardless of the charge(s) of conviction ("real offense" sentencing) or on the conduct that constitutes the elements of the convicted offense ("charge offense" sentencing). A bank robber, for example, might have used a gun, threatened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and damaged property during escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system, on the other hand, would overlook those harms that did not constitute statutory elements of the convicted offenses.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved less than satisfactory, primarily for practical reasons. To make such a system work, or even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with an unduly burdensome and excessively time consuming sentencing process that took into account the myriad of "real harm" facts which might apply in a given case. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system that also contained a significant number of real offense elements. The hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines descriptive of generic conduct rather than guidelines that track purely statutory language. As such, the guidelines take account of a number of important, commonly occurring real offense elements through alternative base offense levels, specific offense characteristics, cross references, and other adjustments.

The Commission recognized that a charge offense system had drawbacks of its own. One of the most important was the potential it afforded prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Several factors, however, served to guard against this count manipulation. First, the defendant's actual conduct imposes a natural limit upon the prosecutor's ability to affect the sentence. Moreover, the Commission wrote its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation.⁸ Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power.⁹ Finally, the Commission closely monitors charging and plea agreement practices and will make appropriate adjustments to the guidelines should they become necessary.

C. Use of a Defendant's Prior Criminal History

Congress directed the Commission to determine the relevance of criminal history in establishing guidelines categories of defendants.¹⁰ The guidelines' criminal history component thus addresses the statutory sentencing purposes of just punishment and the protection of the public from the defendant's future misconduct.¹¹ Enhancing a defendant's sentence on the basis of criminal history furthers the crime control goals of general and specific deterrence as well as incapacitation. It is also consistent with public perceptions of just punishment. The use of criminal history to adjust a defendant's sentence is similarly consistent with historical sentencing practice. Analyses of past practices in different jurisdictions have consistently shown a defendant's prior criminal record to be one of the key determinants of sentence length.¹²

From a just punishment perspective, a defendant with a criminal history is deemed more culpable and deserving of greater

⁸ For example, the guidelines treat a three-count indictment (each count of which charges the sale of 100 grams of heroin or theft of \$10,000) the same as a single-count indictment charging the sale of 300 grams of heroin or theft of \$30,000.

⁹ See discussion *infra* subpart F.

¹⁰ 28 U.S.C. § 994(d)(10).

¹¹ See 18 U.S.C. § 3553(a).

¹² See RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 83-87 (Alfred Blumstein et al. eds., 1983).

punishment than a first offender. From a crime control perspective, a criminal history component is especially important because it is predictive of recidivism. Imposing more restrictive sentences on defendants who have a greater likelihood of recidivism protects the public from those defendants' future crimes. In addition, announcing a policy that future offenses will be more severely dealt with furthers specific deterrence.

The criminal history score used in the guidelines requires consideration of the frequency, seriousness, and recency of a defendant's prior criminal history. The particular elements that the Commission selected have been found empirically related to the likelihood of future criminal behavior, and are also compatible with the purposes of just punishment.¹³ Because the elements selected are compatible with both a just punishment and crime control approach, the conflict that might otherwise exist between these two purposes of sentencing diminishes.¹⁴

The Commission also designed the guidelines' criminal history component with regard for reliability in field scoring. Field scoring reliability refers to the accuracy and consistency with which decision-makers can score actual cases, and is affected by a number of factors, including the complexity of the items and the difficulty of obtaining reliable information. If field scoring reliability is lacking, both predictive power and equity in decision-making suffer.

¹³ In selecting elements for the criminal history score, the Commission examined a number of prediction instruments, paying particular attention to the four prediction instruments reviewed by the National Academy of Sciences Panel on Criminal Careers. See 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" 178-90 (Alfred Blumstein et. al eds., 1986). The Commission developed two of these four instruments, the United States Parole Commission's "Salient Factor Score" and the "Proposed INSLAW Scale for Selecting Career Criminals for Special Prosecution," by using data on federal offenders. Four of the five elements that the Commission selected for inclusion in the guidelines' criminal history score are very similar to elements contained in the Salient Factor Score. The Commission derived the remaining element from a factor contained in the Proposed INSLAW Scale.

¹⁴ In support of this approach, see H.R. REP. NO. 1017, 98th Cong., 2d Sess. 100 (1984); John Monahan, *The Case for Prediction in the Modified Desert Model of Criminal Sentencing*, 5 INT'L J.L. & PSYCHIATRY 103 (1982); Mark H. Moore, *Purblind Justice: Normative Issues in the Use of Prediction in the Criminal Justice System*, reprinted in 2 CRIMINAL CAREERS AND "CAREER CRIMINALS," *supra* note 13, at 314.

D. Use of Past Practice Data

The Commission sought to resolve the practical problems of developing a coherent sentencing system by taking an empirical approach that grounds itself in existing sentencing practices. To determine pre-guidelines sentencing practices, including the distinctions significant in past practice, the Commission analyzed and considered the following: detailed data drawn from more than 10,000 presentence investigation reports; less detailed data from approximately 100,000 federal convictions; distinctions made in substantive criminal statutes; the United States Parole Commission's guidelines and resulting statistics; public commentary; and information from other relevant sources. The Commission accepted, modified, or rationalized the more important of these distinctions in formulating the initial set of guidelines. This approach, while criticized by some as insufficiently radical, clearly appears to be the one Congress contemplated.¹⁵

This empirical approach provided a concrete starting point and identified a list of relevant distinctions that, although considerably lengthy, was sufficiently short to create a manageable set of guidelines. The categories discerned from the analysis were relatively broad, and they omitted distinctions that some may believe important; nevertheless, they included most of the major distinctions that statutes and data suggest tend to make a significant difference in sentencing decisions. Important distinctions that rarely occurred remained to form the basis for a departure from the guidelines. Again, this appears to be the result the drafters of the legislation contemplated.¹⁶

The Commission's pragmatic approach does not imply that it ignored philosophical issues. Rather, the Commission attempted to reach results that were consistent with the differing philosophies. Thus, the Commission reviewed the guidelines' relative ranking of offenses to ensure that they were reasonably consistent with a "just deserts" philosophy. At the same time, the Commission generally viewed specific sentences as acceptable from a crime control perspective. The emphasis on increased certainty of punishment primarily serves the crime control goal of deterrence, but is also compatible with most views of just desert because of the greater consistency it provides. While the criminal

¹⁵ See H.R. REP. NO. 1017, 98th Cong., 2d Sess. 100 (1984).

¹⁶ See S. REP. NO. 225, 98th Cong., 1st Sess. 166, 168 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260, 3360.

history section is included primarily for crime control purposes, the Commission consulted the just desert literature in determining which factors to include. In some instances, the Commission adopted positions that favor one approach over another, but it did so on an issue-by-issue basis, considering the merits of the respective arguments.

The Commission did not simply copy estimates of average past sentences as revealed through analyses of the data. Rather, it used the results of past practice analyses as a guide, departing at different points for various reasons. As a result, the guidelines represent an approach that begins with and builds upon empirical data, but does not slavishly adhere to past sentencing practices. It is important to emphasize that guidelines based upon average past practice will not duplicate past practice; nor are they intended to do so. By constraining sentences within a fairly narrow range centered at about the average of past practice, such guidelines limit the otherwise broad range of sentences that may be imposed. That is precisely their goal.

Although the results of detailed statistical analyses usually provided the starting point for the adopted guidelines, in some instances these analyses were of little value in explaining or rationalizing past sentences.¹⁷ For some violations, the Commission reviewed a selection of presentence investigation reports. It also consulted with judges and practitioners in an effort to synthesize a coherent rationale that generally explained and was reasonably consistent with past sentencing practice.¹⁸ For other offenses, such as those involving national defense, prosecutions are infrequent. Consequently, the Commission drafted guidelines based upon the statutes and the nature of the cases actually prosecuted.

Sometimes, the Commission's review of the data showed that distinguishing factors which appeared in actual practice were questionable. For example, in the area of property offenses, the empirical results showed that loss and sophistication were the most important determinants of the sentences. However, the specific results for each crime, when compared with one another, showed considerable variation. The sentences for "white-collar"

¹⁷ In some instances, for example, there simply were insufficient data to yield statistically significant results.

¹⁸ For example, a review of civil rights cases led the Commission to conclude that the guidelines for such offenses primarily should be tied to the underlying crimes, with the civil rights violation treated as an aggravating factor.

crimes, such as embezzlement, fraud, and tax evasion, were considerably lower than those for the substantially equivalent crime of larceny. In light of the legislative history supporting higher sentences for white-collar crime,¹⁹ the Commission made a policy decision to adopt a guidelines structure under which all property crimes of similar seriousness would be treated essentially the same.

It is important to note, however, that in some instances, the Commission's examination of past sentencing practices was superseded by Congress's passage of mandatory minimum statutes²⁰ and express legislative directives.²¹ Mandatory minimums' one-dimensional approach to sentencing creates specific anchor points for certain quantities of drugs around which the guidelines must operate. To preserve proportionality in sentencing, the guidelines' more sophisticated calibrated approach takes into account gradations of offense seriousness, criminal record, and level of culpability.

E. Consideration of Individual Offender Characteristics

The Commission's authorizing legislation required it to consider whether a number of offender characteristics have "any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant.²² These characteristics are:

- (1) age;
- (2) education;
- (3) vocational skills;
- (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
- (5) physical condition, including drug dependence;
- (6) previous employment record;
- (7) family ties and responsibilities;
- (8) community ties;
- (9) role in the offense;

¹⁹ See S. REP. NO. 225, 98th Cong., 1st Sess. 77, 177 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260, 3360.

²⁰ See, e.g., the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

²¹ See S. REP. NO. 225, 98th Cong., 1st Sess. 177, 177-78 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3360-61.

²² 28 U.S.C. § 994(d).

- (10) criminal history; and
- (11) degree of dependence upon criminal activity for a livelihood.²³

In addition, the authorizing legislation required the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties in determining whether a term of imprisonment should be imposed or in determining the length of imprisonment.²⁴

After conducting public hearings and reviewing substantial public comment on these issues, the Commission set forth as policy statements the factors that it deemed not ordinarily relevant in determining whether a sentence should be outside the applicable guidelines range.²⁵ These factors are age, education and vocational skills, mental and emotional conditions, physical condition (including drug or alcohol dependence or abuse), employment, family ties and responsibilities, and community ties. Based upon its ongoing analysis of case law and monitoring data, the Commission amended the guidelines in November 1991 to include military, civic, charitable, or public service; employment-related contributions; and record of prior good works as factors not ordinarily relevant in determining whether a sentence should be outside the applicable guidelines range. However, the Commission's policy statements setting forth these factors do not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guidelines range.

The Commission determined race, sex, national origin, creed, religion, and socioeconomic status to be not relevant in the determination of a sentence. Meanwhile, the Commission determined the defendant's role in the offense, the defendant's criminal history, and the degree to which the defendant depended upon criminal activity for a livelihood to be relevant in determining the appropriate sentence. The Commission thus incorporated these factors into the guidelines.

²³ *Id.*

²⁴ 28 U.S.C. § 994(e).

²⁵ See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL Ch.5, Pt.H (Nov. 1991) (Specific Offender Characteristics).

F. Departures

A court is permitted by statute to depart from a guidelines-specified sentence when it finds “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.”²⁶ Accordingly, the Commission intends sentencing courts 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 should consider whether a departure is warranted.

The Commission adopted this departure policy for several reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to sentencing. The guidelines, offense by offense, seek to take account of those factors that the Commission’s data indicate made a significant difference in preguidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in preguidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not lead the Commission to conclude that the factor was empirically important in relation to the particular offense. Second, the Commission recognized that the initial set of guidelines need not attempt to specify every possible departure consideration. The Commission is a permanent body, empowered by law to amend the guidelines with progressive changes over many years. Thus, by monitoring when courts depart from the guidelines and by 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.

II. BENEFITS OF THE GUIDELINES

The guidelines are the core of a new federal sentencing system that is more honest, fair, and certain than the system under “old

²⁶ 18 U.S.C. § 3553(b).

law.” As a result of the guidelines, sentencing is much more predictable, both for those who plead guilty and those who are convicted at trial. In addition, defense attorneys now have information that is helpful in counseling a defendant because the guidelines give a meaningful idea of the approximate sentence that is likely to be imposed. Moreover, appellate review of guidelines sentencing is an important additional protection for defendants and society, and furthers the goals of the Sentencing Reform Act by providing important oversight and guidance in the evolving common law of guidelines sentencing.

One of the more tangible benefits of the sentencing guidelines is their effect on reducing disparity. A recent study of sentencing disparity mandated by Congress examined whether the range of sentences for defendants with similar criminal records convicted of similar criminal conduct has narrowed as a result of guidelines implementation.²⁷ In conducting this analysis, the Commission used the definition of disparity that Congress provided. That is, disparity exists when defendants with *similar criminal records* found guilty of *similar criminal conduct* receive *dissimilar* sentences.²⁸

The study examined four major offense types: bank robbery, bank embezzlement, heroin distribution, and cocaine distribution. The Commission selected these categories both to ensure adequate samples and to examine offense types that represented a varied cross-section of federal crimes that make up a large proportion of the federal caseload.²⁹

The bank robbery analysis grouped offenders into relevant sub-categories of similar offenders with similar offense characteristics. The data from this analysis strongly demonstrate that in all

²⁷ See U.S. SENTENCING COMMISSION, 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 (Dec. 1991).

²⁸ 28 U.S.C. § 991(b)(1)(B).

²⁹ The Commission drew data from the Federal Probation Sentencing and Supervision Information System of the Administrative Office of the United States Courts (FPSSIS), an augmented FPSSIS dataset constructed by the Commission representing offenders sentenced in 1985, the Commission's guidelines sentence monitoring system, and the Federal Bureau of Prisons. The bank embezzlement data set contains 1143 cases (536 preguidelines and 607 guidelines); the bank robbery sample 1376 cases (503 preguidelines and 873 guidelines); the heroin distribution sample 1489 cases (542 preguidelines and 947 guidelines); and the cocaine distribution sample 1707 cases (332 preguidelines and 1375 guidelines).

matched categories, similar offenders convicted of similar bank robberies receive dramatically more similar sentences under the guidelines than did comparable offenders sentenced under preguidelines practices. For example, for bank robbery offenders with little or no criminal history who committed their offense without a weapon, the spread of sentences imposed for preguidelines offenders is 0 months (probation) to 120 months; meanwhile, the spread of sentences for offenders under the guidelines is 0 to 60 months, a dramatic reduction. The analysis reveals that the middle 80% of preguidelines offenders receive sentences between 4 and 120 months. In comparison, the middle 80% of guidelines offenders receive sentences between 21 and 42 months. The study found that this reduction following guidelines implementation is statistically significant.

The analysis also examined the question of estimated time to be served in recognition of the Parole Commission's major role in determining the actual period of incarceration. An examination of offenders with little or no criminal history who committed bank robberies without a weapon shows that the spread of preguidelines offenders' time to be served is 0 to 40 months, while the spread of guidelines offenders' time to be served is 0 to 52.3 months, an apparent widening of the range under the guidelines. However, the spread of the middle 80% of preguidelines offenders' time to be served is 4 to 40 months. The spread of the middle 80% of guidelines offenders' time is 21 to 38 months. This represents a decrease in the range of time to be served for the middle 80% from a spread of 36 months preguidelines to a spread of 17 months under the guidelines, a substantial reduction in the middle 80% range of time to be served. For the vast majority of cases under the guidelines, there is a dramatic reduction in disparity.

The analysis of offenders convicted of bank embezzlement suggests that there has been a reduction in the spread of sentences imposed and expected time to be served. Small sample sizes prevented most comparisons of heroin offenders sentenced under preguidelines and guidelines. However, in the one group with a sufficiently large sample size, the results for defendants convicted of distributing between 100 and 400 grams of heroin, disparity is reduced under the guidelines for both sentences imposed and time to be served. The cocaine disparity study suggests that, since guidelines implementation, the spread of sentences

imposed and time to be served for similarly situated cocaine offenders has narrowed considerably.

CONCLUSION

The sentencing guidelines embody the basic philosophy that the purposes of sentencing are to punish the offender, to deter future crimes by the offender and others, and to protect the public. The guidelines strike an appropriate balance between these competing concerns in attempting to achieve the ends Congress envisioned in establishing the Sentencing Commission. In doing so, the Commission has structured and limited—but not eliminated—the discretion judges exercise in sentencing. While the resulting system contains some elements of sophistication, the benefits of the guidelines system over the previous one are already apparent. The system of sentencing in our federal courts, of which the guidelines are an important part, is, compared to the past, fairer, more honest, and more predictable.