True Grid: Revealing Sentencing Policy

*Marc Miller**

Everything should be made as simple as possible, but not simpler.
Albert Einstein[1]

[T]he 258-box federal sentencing grid . . . should be relegated to a place near the Edsel in a museum of twentieth-century bad ideas.
Albert W. Alschuler[2]

INTRODUCTION

One of the most notorious features of the federal sentencing guidelines is the 258-box sentencing grid.[3] The grid fails to communicate the absolute severity of many guidelines sentences or the relative severity (ranking) of common federal crimes. Its complexity makes it difficult to assess the basic policy choices about offenses and offenders that steer each convicted defendant to one of its boxes. The mechanical image cast by the many boxes and numbers contributes to the distrust of the Commission and noncompliance with the guidelines by judges, probation officers, and lawyers. Finally, complex and intricate rules invite calculation errors. This article examines whether Congress mandated a sentencing grid, whether law or policy necessitated such an intricate

* Associate Professor, Emory Law School. Editor, *Federal Sentencing Reporter* (University of California Press/Vera Institute of Justice). I would like to thank Barry Adler, Daniel J. Freed, Michael Tonry, Ronald Wright, and Deborah Young for their comments on this paper, and Kathryn Lumpkin for research assistance.

1 THE NEW INTERNATIONAL DICTIONARY OF QUOTATIONS 281 (Hugh Rawson & Margaret Miner eds., 1986).

2 Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation,* 58 U. CHI. L. REV. 901, 950 (1991).

3 The Commission refers to the grid as the "Sentencing Table." *See* U.S. SENTENCING COMMISSION, GUIDELINES MANUAL 279-81 (Nov. 1991) [hereafter U.S.S.G.]. This article uses "table," "grid," and "array" interchangeably.

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grid, and why a simpler grid would be preferable. It concludes with an experiment showing how a simplified grid highlights key aspects of the current guidelines.

The guidelines grid has forty-three rows, or "Offense Levels," and six columns, or "Criminal History Categories."[4] Together they produce 258 "boxes"—one for each combination of offense level and criminal history category.[5] Each box contains a sentencing range. For example, level 1, category 1—the top left box—reads "0-6" (months); the bottom right, at level 43, category 6 reads, simply, "life."[6]

The grid conveys one piece of information: the presumptive prison sentence that results from applying the guidelines to a particular case. Lines may be added to the grid to indicate the levels at which sanctions other than imprisonment are available.[7] Even the simple exercise of painting a "nonimprisonment option" line on the current grid communicates a basic policy choice: a "nonimprisonment option" line shows the extremely restricted availability of nonimprisonment sanctions under the current guidelines.[8]

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4 The table looks like the board for the game of "GO" (also known as "Go Bang"), which is a 19 by 19 matrix. *See* ALBERT H. MOOREHEAD ET AL., THE NEW COMPLETE HOYLE REVISED: THE AUTHORITATIVE GUIDE TO THE OFFICIAL RULES OF ALL POPULAR GAMES OF SKILL AND CHANCE (1991).

5 U.S.S.G. § 5A.

6 *Id.*

7 A marked grid is provided by the Commission on the inside back cover of the guidelines manual.

8 There is no "IN/OUT" line under the federal guidelines because there are no boxes where probation or other nonprison sanctions are the presumptive sentence. In other words, prison is the presumptive sentence for all offenders, with probation an option only at the lowest severity levels. Straight probation is an option up to offense level six (or lower offense levels for those with a higher criminal history score). Sentences with a nonprison component are available to level twelve.

A less precise though highly informative line can also be placed to show the statutory authority for nonprison sentences. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1873 (1992), allows probation or other nonprison sanctions for any defendants except those convicted of a class A or B felony. 18 U.S.C. § 3561 (1988). As of 1988, a B felony is an offense with a maximum term of 25 years of more, Pub. L. No. 100-690, 102 Stat. 4181, 4399, *codified at* 18 U.S.C. § 3559(a)(2)(West Supp. 1991), an increase from the 20 years originally stipulated by the Sentencing Reform Act. Congress thus expanded the number of offenses subject to a nonprison sentence. Because the Act defines the availability of probation by the maximum sentence for each offense and not the guidelines range, it is

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Grids can do more than serve as simply the last stage in the machinery used to produce a sentence. Grids can depict the comparative severity of different offenses. A simple grid can highlight the severity of an entire system, casting a spotlight on particularly harsh sentences rather than burying such sentences in a sea of numbers. It is far easier with a simple grid to compare the degree of impact allowed for an offense factor, such as the amount of drugs involved in a conspiracy or the defendant's role in a multiparty offense, or an offender factor, such as age or chemical dependency. Finally, grids can display the available sentencing options.

State guidelines systems illustrate the communicative and functional advantages of a simple, clear grid. The Minnesota grid, for example, has ten offense levels and six criminal history categories.[9] Each offense level is linked to one or more major offenses, making readily apparent the relative punishments for different crimes.[10] Adjustments based on offense and offender characteristics may easily be compared to the base sentences for crimes. In addition, the Minnesota grid reflects a decision by that state's commission to create a substantial number of offenses and criminal history combinations where the presumptive sentence is time in a local jail or a sanction other than incarceration.

Only limited conclusions can be drawn by comparing grids from different systems. The kinds and scope of crimes, the most frequent crimes, and the elements of crimes, such as drug

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impossible to draw a firm line on the grid depicting the statutory boundary for nonprison sentences. However, even a rough line reflecting Congress's (as opposed to the Commission's) view of where probation may be used would lie nearer to the bottom of the grid than the top.

[9] *See* ANDREW VON HIRSCH, ET AL., THE SENTENCING COMMISSION AND ITS GUIDELINES 179 (1987). The Washington grid has fourteen offense levels and nine criminal history categories. *Id.* at 183. The Oregon grid has eleven offense levels and nine criminal history categories. *See* Kathleen Bogan, *Oregon's Sanction Units Exchange System for Felony Sentencing Guidelines,* 4 FED. SENTENCING REP. 36 (1991). The many fewer offense levels on the Minnesota, Washington State, and Oregon guidelines grids make it possible to more easily display comparative offense levels by listing common offenses that fit each category.

[10] The list of offenses that fit within each presumptive offense level can be expanded. The small number of offense levels and the list of common offenses provide a framework for assessing relative offense seriousness for those and other offenses. Identifying an offense as a "level 5" offense in Minnesota communicates far more information than associating an offense with offense level 25 in the federal system.

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offenses, that appear similar are in fact often different in each system. In addition, grids are a projection of rules and policy judgments; substantive comparisons between systems should be made about the underlying rules and policies. Comparison of grids, however, does indicate the kind of information about sentencing policy that a well-constructed sentencing grid can convey.

Complexity is a contextual concept. There is no abstract measure of whether something is "complex." One test of "complexity" is whether something is "as simple as possible." The fundamental problem with the federal grid is the lack of adequate justification for its complexity. The United States Sentencing Commission (Commission), has given three reasons for why it designed such an intricate, number-filled grid. Part I of this Article explores whether a 258-box grid is justified by the Commission's reasons: the "6 month or 25 percent" rule in the Sentencing Reform Act, the nature of the federal criminal justice system, and the goal of minimizing sentencing appeals.

Part II elaborates on the vices of a complex grid and the virtues of a simple grid. It includes an experiment in grid simplification. The experiment collapses the 43-level federal grid into just 7 levels and then attaches common offenses to each of those levels. This experiment is not intended to produce a replacement grid. Instead, it is meant to offer a clearer picture of key policy choices hidden in the current guidelines. In doing so, the collapsed grid suggests the advantages of a simpler sentencing table and of a simpler sentencing system.

I. The Necessity of a Complex Grid

If a many-boxed grid were required by provisions in the Sentencing Reform Act or by the expectations of Congress, then a critique of its complexity might be directed to Congress and not to the Commission. If the 258 boxes were the product of unique aspects of the federal criminal justice system, then the current complexity would be justified. If the grid were produced by a clear and compelling policy, such as the goal of minimizing appellate review, then, again, the burden would shift to critics of the grid to explain why its vices are greater than its virtues. None of these explanations, however, justifies the current grid.

A. Congress Did Not Mandate a Grid

No statutory language mandates a detailed grid. Indeed, no

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statutory language or legislative history mandates a grid at all. Congress did not dictate the form the guidelines would take. The key legislative history, encapsulated in a long Senate Report,[11] makes myriad references to "guidelines," but few references to their form.[12] The report indicates that Congress was aware of sentencing guidelines built around grids, but, to the limited extent it considers the question, the report steers away from suggesting Minnesota's grid and guidelines as a model. The Senate Report explains that "[t]he guidelines may be designed and promulgated for use in the form of a series of grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices."[13]

It could be argued that the list of possible forms *excludes* the possibility that an adequate federal system could be built around a *single* grid because it only mentions "a series of grids." The most sensible reading of this language, however, is probably that Congress meant to leave questions of form to the Commission. What mattered to Congress was the standard of clarity, wisdom, and completeness that the new guidelines should meet:

> Whatever their form, the general logic underlying the effects of individual factors would presumably be apparent or at least would be traceable to Sentencing Commission determinations. The result should be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases and that reliably breaks cases into their relevant components and assures consistent and fair results.[14]

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[11] S. REP. No. 225, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3128. This report is widely considered to be the most important piece of legislative history about the Sentencing Reform Act. *See* Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. (forthcoming 1992); *see also* Daniel J. Freed, *Sentencing in the Wake of Guidelines: The Consequences of Unreasonable Limits on the Discretion of Sentences*, 101 YALE L.J. (forthcoming 1992).

[12] *Cf.* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988). Breyer asserts that "[t]he statute suggests (but does not require) that the guidelines take the form of a grid that determines sentencing in light of characteristics of the offense and . . . offender." Breyer's reference to 28 U.S.C. §§ 994(c)-(d), *id.* at 5 nn.28-30, does not seem to support the assertion that Congress "suggests . . . a grid."

[13] S. REP. No. 225, at 168.

[14] *Id.*

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In one of its few references to form, the Report expresses the hope that the guidelines would not be too complex:

> In developing the form in which the guidelines are to be used, the Committee expects that the Commission will undertake an evaluation to assure that the guidelines are not so complex *as to detract from their effective use.*[15]

The Sentencing Reform Act was passed against the backdrop of the new guidelines sentencing system in Minnesota. Congress was aware of initial reports praising the success of the Minnesota system.[16] The Minnesota system was constructed around a grid which produced presumptive sentences as a product of the seriousness of the offense of conviction and the offender's criminal history.[17] It might have been expected that the federal guidelines would take the form of the Minnesota system.[18]

Despite the presence of the Minnesota model, however, Congress did not have a firm expectation that the federal guidelines would follow the same structure. Some of the statutory provisions, such as the capacity constraint limitation on prison population, certainly reflect the Minnesota experience.[19] The Senate

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[15] *Id.* at 168 n.405 (emphasis added).

[16] *See id.* at 62 (citing study showing success of Minnesota system); *see also* NATIONAL ACADEMY OF SCIENCES PANEL ON SENTENCING RESEARCH, RESEARCH ON SENTENCING, THE SEARCH FOR REFORM (Alfred Blumstein et al. eds., 1983); MINNESOTA SENTENCING GUIDELINES COMM'N, PRELIMINARY REPORT ON THE DEVELOPMENT AND IMPACT OF THE MINNESOTA SENTENCING GUIDELINES (1982); DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 177-201 (1988).

[17] Von Hirsch et al., *supra* note 9, at 179.

[18] *See* S. REP. No. 225, at 625 (noting similarity of Minnesota legislation and federal legislation).

[19] Congress directed the Commission to formulate sentencing guidelines that would "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . ." 28 U.S.C. § 994(g). The Commission, with little regard for its statutory obligation, has designed guidelines that *guarantee* the federal prisons will remain overcrowded for the forseeable future. *See* UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS, *reprinted in* Kenneth R. Feinberg, FEDERAL SENTENCING GUIDELINES 322-29 (1987) [hereafter SUPPLEMENTARY REPORT] (predicting roughly a doubling of the federal prison population in 5-7 years and a tripling in 10-15); U.S. SENTENCING COMMISSION, 1990 ANNUAL REPORT 96-97 (1991) [hereafter 1990 ANNUAL REPORT]; *see also* Robert W. Sweet, *The Sentencing Commission's 1990 Annual Report and Beyond*, 4 FED. SENTENCING REP. 126, 127 (1991). ("The projections that the prison population will triple by the year 2002 are reported in matter-of-fact terms but the

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Report indicates that Congress knew about the Minnesota guidelines and early reports of their success at reducing disparity and avoiding prison overcrowding.[20] The Report makes several references to Minnesota, including an observation that the Minnesota guidelines were promulgated "under legislation substantially similar to this bill."[21] The Report, however, distinguishes the federal system based on "[t]he relatively greater magnitude of the

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implications both monetarily and societally shriek for attention."). As of January 1991, the federal prison population stood at 165% of design capacity. Attorney General William P. Barr, Speech (Jan. 14, 1992). *See* Franklin E. Zimring, *Are State Prisons* Under*crowded?*, FED. SENTENCING REP. (forthcoming 1992). The United States Commission's avoidance of this key principle for moderating sentences is ironic given the Minnesota Commission's development of the concept under far weaker statutory direction from the Minnesota Legislature. *See* Dale G. Parent, *Linking Sentencing Policy to Confinement Capacity,* 3 FED. SENTENCING REP. 273 (1991).

[20] S. REP. No. 225 states:

> The National Academy of Sciences has recently published an extensive study and evaluation of all the research that has been done on State and local sentencing reform efforts. That study concluded that, in every respect studied, the Minnesota sentencing reform had been more successful than any other State or local reform effort in achieving its goals of reducing unwarranted sentencing disparity, increasing emphasis on punishment for violent offenders, and avoiding unintended burdens on the prison system. This finding is especially important to the consideration of this bill because of the substantial similarity between the Minnesota legislation and this Federal sentencing reform measure.
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> The National Academy of Sciences study concluded that the Minnesota sentencing guidelines system was more successful in changing sentencing behavior to reduce unwarranted sentencing disparities for three reasons. First, the sentencing guidelines were required by legislation rather than adopted voluntarily by the courts. Second, the guidelines prescribed what sentencing behavior ought to be rather than merely describing past sentencing practices. And third, the Minnesota statute included a mechanism—availability of appellate review of all sentences outside the guidelines—to assure judicial compliance with the guidelines. The study also found that Minnesota was able to create a model of its criminal sentencing system that permitted it to test the impact of any given set of sentencing guidelines on its prison system, thus enabling it to fashion guidelines that avoided any unintended impact on the prison system.

Id. at 62 (footnotes omitted); *see also id.* at 52 (stressing importance of eliminating sentencing disparity).

[21] *Id.* The reference appears in brackets within a quotation.

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task."[22]

The Commission's first draft of the guidelines, offered for public comment in October of 1986, did not include a grid.[23] The absence of a grid suggests the Commission's own belief in the possibility of a gridless system under the Act.[24] The October 1986 draft received strong critiques because of its complexity.[25]

Congress made its only firm decision with respect to the form the guidelines would take in the controversial "twenty-five percent" rule:

> If a sentence specified by the guidelines 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 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.[26]

This provision says nothing directly about the use of a grid. It does require that sentences of imprisonment included in the guidelines, whatever form they take, must be restricted to a modest range.

There are two ways of reading the twenty-five percent rule with respect to the availability of probation and other nonprison sanctions.[27] One reading limits the use of nonprison sanctions to

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[22] *Id.* at 163.

[23] *See* U.S. Sentencing Comm'n, *Excerpts of Preliminary Draft of Sentencing Guidelines for Federal Courts*, [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 50, at 480 (Oct. 2, 1986).

[24] The October 1986 draft used a point system with different starting levels for different offenses and specific additions and subtractions for sentencing factors, including criminal history. The combination of applicable offense and sentencing factors would produce a total amount of "sanction units." *Id.* at 496. The draft included a list translating 73 "sanction units" levels (from "less than 14" to "372 or above") to guidelines ranges specifying narrow spans of imprisonment. *Id.* at 496-97.

[25] The Commission's assessment of its initial efforts capture the flavor of most critiques:

> The Commission's early efforts, which were directed at devising such a comprehensive guideline system, encountered serious and seemingly insurmountable problems. The guidelines were extremely complex, their application was highly uncertain, and the resulting sentences were often illogical.

SUPPLEMENTARY REPORT, *supra* note 19, at 334.

[26] 28 U.S.C. § 994(b)(2).

[27] The 25% rule is confusing in both purpose and application. Commissioner Paul Robinson, in his vigorous dissent from the initial

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offenders whose guidelines imprisonment range is less than six months. This reading requires that probation and other nonprison sanctions be treated as the equivalent of "zero" time in prison.[28] This is reflected in the current unavailability of nonconfinement sanctions for offenders whose sentencing range extends beyond six months.[29]

The second way to read the twenty-five percent rule is that it only limits the range of *prison* terms attached to each guideline. The provision limits the way a sentencing range appears, but not the number of different ranges that might apply to a particular offense, nor the kind of nonprison sentences that might be allowed. Under this reading, the six-month figure would be irrelevant to the availability of nonprison sanctions. For example, a guideline might specify that an offender may be punished by 27-33 months in prison *or* by 3 years of supervised probation with 100 hours per year of supervised community service *or* by a fine calibrated to the offender's income level to be both severe and payable.

The narrow reading of the twenty-five percent rule conflicts with the provision in the Sentencing Reform Act making probation, fines, and other nonprison sanctions available for all offenders whose maximum statutory term of imprisonment is less than

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guidelines, accused the Commission of violating the 25% rule because "[t]he guideline ranges for specific offenses are frequently far in excess of the 25% permitted by statute . . . ." Paul H. Robinson, *Dissent from the United States Sentencing Commission's Proposed Guidelines,* 77 J. CRIM. L. & CRIMINOLOGY 1112, 1117 (1986). The statute, however, says nothing about limiting ranges for "specific offenses."

[28] *See* SUPPLEMENTARY REPORT *supra* note 19, at 335.

[29] *See* U.S.S.G. Sentencing Table (inside back cover). Nonprison sanctions are available through departures. *See, e.g.,* United States v. Glick, 946 F.2d 335, 337-39 (4th Cir. 1991) (downward departure from 27-33 months guidelines range to 5 years probation on the ground of diminished capacity); United States v. Pena, 930 F.2d 1486, 1494 (10th Cir. 1991) (downward departure from 27-33 months guidelines range to 5 years probation and 6 months in community treatment center because of "unique family responsibility"); United States v. Jagmohan, 909 F.2d 61, 65 (2d Cir. 1990) (downward departure from 15-21 months guidelines range to 3 years probation due to "unusually unsurreptitious conduct" in bribery); United States v. Parker, 902 F.2d 221 (3d Cir. 1990) (downward departure from 6-12 months guidelines range to 6 months work release program and 3 years probation for substantial assistance to authorities).

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twenty-five years.[30] Congress *expanded* the statutory authority for use of nonprison sanctions in 1987.[31] In addition, Congress substantially expanded statutory authority for additional conditions of probation, fines, and other new sanctions in the original Sentencing Reform Act.[32]

The twenty-five percent rule has been used by the Commission as one of three reasons for the creation of a 43-level grid. The next section explores that use of the rule.

B. The Commission's Reasons for a Complex Grid

The Commission expressed concern about the "level of detail" appropriate for guidelines. On one hand, it posited a "very simple" system in which every federal offender would be sentenced to two years regardless of the offense. On the other extreme, it described a system "tailored to fit every conceivable case"— something like its 1986 tentative draft.[33] A more realistic example of a "simple" system offered by the Commission was the "broad-category approach utilized by some states."[34] The Commission rejected the state model of "relatively few, simple categories and narrow imprisonment ranges" as "ill suited to the breadth and diversity of federal crimes."[35]

The Commission gave three "technical and practical" reasons for establishing a 43-level grid. The "breadth and diversity" of the federal system was one reason for having so many offense levels. The twenty-five percent rule was another reason. A third justification for creating so many offense levels was that overlapping levels would "limit the importance of disputed sentencing

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[30] Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837, 1991 (1984) (codified at 18 U.S.C. § 3561(a)(1)); *see supra* note 8.

[31] Criminal Act of 1987, Pub. L. No. 100-185, 101 Stat. 1279 (codified at 18 U.S.C. § 3559(b)).

[32] *See* Marc Miller & Daniel J. Freed, *Developing Intermediate Sanctions,* 4 FED. SENTENCING REP. 3, 4 (1991). The Senate Report notes that "[c]urrent law is not particularly flexible in providing the sentencing judge with a range of options from which to fashion an appropriate sentence." S. REP. No. 225 98th Cong., 2d Sess. To remedy this problem, the Act "substantially increased" maximum fines, changed probation to a form of sentence with conditions rather than a deferral of imposition of a sentence, and added "a new sanction" of requiring fraud defendants to give notice to victims. S. REP. No. 225, *supra*, at 59.

[33] *See* SUPPLEMENTARY REPORT, *supra* note 19 at 333.

[34] *Id.* at 334.

[35] *Id.*

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factors" and thus limit appeals.[36]

1. The Twenty-five Percent Rule

For those who wonder why the grid has exactly 43 levels—rather than 42 or 44, or a round number like 40—the Commission explained that it adopted a system "which generally utilizes the maximum 6-month or 25% range permitted by the Sentencing Reform Act."[37] Thus, the 43 levels are the product of a largely mechanical calculation: "The offense level numbers correspond to a series of overlapping ranges *that increase in width, to the extent permitted by statute*, as the offense level increases."[38] Designing offense levels in this fashion had the following effect:

> The minimum of any range is at or below the center of the next lower range. Ranges that are two levels apart have at least one point (*i.e.*, imprisonment sentence) in common. The ranges are roughly proportional to permit percentage increases or decreases to be made by adding or subtracting levels. (For example, adding 6 levels roughly doubles the average sentence, while subtracting 6 levels roughly halves it).[39]

The algebraic virtues of the 43-level grid are not matched by any policy advantage. Nothing in the statute encouraged a grid built step-by-step with the six month or twenty-five percent rule. The Commission's approach implies that if Congress had limited guidelines ranges to "4 months and 20 percent," the grid would have perhaps 67 levels; at "2 months and 10 percent" it would have been in the vicinity of 100 levels; and if Congress had required single presumptive prison sentences, the number of levels would approach infinity.

The Commission might have chosen some smaller and rounder number than forty-three. In doing so it could still have kept enough separation to capture the "breadth and diversity" of the federal system. A smaller number of levels would have many advantages. A 10-level grid would be likely to produce more distinct starting points for many common offenses. It would also provide a clearer picture of the Commission's decisions about the relative severity of various offenses and the proper impact of different factors.

The Commission praised the use of "proportional (percentage)

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36 *Id.* at 334-35; *see* U.S.S.G. § 1A.4(h).

37 *See* SUPPLEMENTARY REPORT, *supra* note 19, at 334-35.

38 *Id.*

39 *Id.*

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adjustments to sentence length."[40] Because of the nature of the 43-level grid, the Commission incorporated into the guidelines only those sentencing factors "sufficient to bring about a change in the offense level by making a difference of at least 12% in the sentence."[41] With fewer levels, the Commission might have decided to incorporate direct percentage changes for some factors and flat amounts of imprisonment time (or some other sanction) for other factors. Moreover, the Commission, in keeping with modern trends, could have picked a less English and more metric number—identifying, say, all factors with at least a ten percent impact.

2. The Complex Federal Criminal System

The Commission attributes the need for many offense levels to the breadth and diversity of federal crimes. Commissioner (now Chief Judge) Stephen Breyer distinguishes the federal system because it has "many more crimes than most state codes."[42] He also argues that the federal system has less "political homogeneity" than individual states, thus making it hard to achieve consensus.[43]

Given the limited powers of the federal government relative to the plenary power of the states, the federal system might be expected to have *less* breadth and diversity than the states' systems. In our federal system, the federal criminal law is restricted, in theory, to those crimes that threaten a federal interest.[44] Criminal law, like contract, tort, and property law, is among the many areas left, as a general matter, to the states. State offenses range from the most trivial—spitting on the sidewalk—to rape and murder. Conversely, federal offenses cluster, at least traditionally, around substantial and complex offenses that designate a clear

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[40] *Id.*

[41] *Id.*

[42] *See* Breyer, *supra* note 12, at 3.

[43] *See id.* It is not clear what aspects of the federal guidelines Breyer was trying to explain with his observation about the lesser "political homogeneity" of the federal system. Even if there is less "political homogeneity" in the federal system than in Minnesota, why did heterogeneity produce a 43-level grid? Politics may require tradeoffs, but why does it require obscurity? In any case, wasn't the avoidance of political pressures one of the reasons for creating an independent, expert commission in the judicial branch?

[44] A special class of cases involves crimes that happen on federal land. *See* 18 U.S.C. § 13 (adopting law of local state for such crimes).

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federal interest.[45]

The raw number of offenses says little about their diversity. Repetitive and even conflicting federal offenses have been added to our criminal statutes over the past century. Efforts to codify a uniform federal crime code in the fifteen years before the Sentencing Reform Act was enacted never produced a revised code acceptable to Congress.[46]

The number of possible crimes says far less than the number of different kinds of crimes that arise frequently.[47] In the federal system, a handful of offenses arise frequently. Drug offenses, most of which are prosecuted under a handful of statutory provisions, make up almost fifty percent of the federal case load.[48] Fraud offenses account for another 10.4 percent.[49] Firearm, immigration, and larceny offenses each account for more than six

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[45] The federal criminal case load has changed substantially in recent years. From 1980 to 1989, Federal prosecution of drug crimes increased 247%. In 1980, 17% of convicted federal offenders were drug violators. In 1989, this rose to 33%, and the level continues to increase. Almost 50% of federal offenders sentenced to prison in 1989 were convicted of drug offenses. Federal prosecution of other offenses such as murder, rape, assault, and embezzlement also increased from 1980 to 1989, but less dramatically. The long list of federal "public order" offenses (including weapons, immigration, antitrust, and tax crimes) stayed essentially unchanged over the same period. *See* BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING 1980-89 (Oct. 1991). It is becoming harder and harder to distinguish many federal drug prosecutions—which now make up almost 50% of the federal criminal caseload—from state drug prosecutions. Some jurisdictions, notably the District of Columbia, have seen forum shopping between state or local and federal courts by prosecutors seeking the highest possible sentence or using the threat of severe federal sanctions to generate guilty pleas. *See* Garry Strugess, *Judges Rap Stephens on Drug Cases*, LEGAL TIMES, Feb. 11, 1991, at 7; Tracy Thompson, *Stop Complaining, Stephens Tells Judges*, WASHINGTON POST, June 8, 1991, at B1.

[46] The federal criminal code movement reached its peak in the decade before the Sentencing Reform Act was enacted. *See* Paul W. Spence, *The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?*, 37 MD. L. REV. 739 (1978).

[47] *See* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 10 (Aug. 1991). The Commission describes 100 federal minimum provisions in 60 different statutes. Only 4 of these statutes, however, account for 94% of cases involving mandatories. *Id.*

[48] 1990 ANNUAL REPORT, *supra* note 19, at fig. 3.

[49] *Id.*

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percent of the federal offenses.[50] Other fairly straightforward classes of federal crimes include robberies (mostly of banks—4 percent) and forgery and counterfeiting (3.5 percent).[51] Thus, over eighty percent of the federal case load is accounted for by a fairly short list of offenses.

Though efforts to codify a federal criminal code have ceased, they can be said to have succeeded. In effect, the guidelines may be seen as a kind of revised code. Regrettably, it is an unsatisfactory code, which focuses on harm and largely ignores mens rea. Nevertheless, hundreds of offenses now fit within an overlay of twenty basic categories—listed in chapter two of the guidelines.[52]

Even if the large number of federal offenses and their "diversity" require a large number of offense gradations, the proportion relative to the states—following the Commission's mathematical bent—do not explain all forty-three levels. Breyer identifies 688 federal crimes, compared to only 251 crimes in Minnesota.[53] Minnesota's 10 offense levels for 251 crimes produces a ratio of 1:25. A similar ratio in the federal system would have produced about twenty-seven levels.

The actual distribution of sentences under the current grid practically begs for at least a fifty percent reduction in the number of offense levels. Instead of being evenly distributed across all forty-three levels, sentences have clustered around even offense levels. With only one exception (from level seven to level eight), the pattern of actual sentences reads like a ride on a roller coaster. Between levels 15 and 35, the ratio of the number of sentences falling in even compared to odd levels runs from 3:1 to 10:1. For example, the 1990 Annual Report describes 137 cases at level 23, up to 1183 at level 24; down to 72 at level 25, and back up again to 976 at level 26.

3. Minimizing Appeals

The Commission offered another explanation for the forty-three offense levels: they wanted levels to overlap. The product of the twenty-five percent rule and the desire to have levels over-

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50 *Id.*

51 *Id.*

52 Further efforts to revise the federal criminal code would need to take account of the guidelines scheme. However inadequate the guidelines may be as a complete criminal code, the calls for a revised federal code have faded since the guidelines took effect.

53 Breyer, *supra* note 12, at 3.

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lap was a large number of levels. The Commission explained that "[t]he levels overlap in order to limit the importance of disputed sentencing factors."[54] The introduction to the guidelines explains that "[b]y overlapping the ranges, the table should discourage unnecessary litigation."[55]

The Commission's desire to minimize appeals based on small disputes turned into a rule of law in *United States v. Bermingham*[56] by the Second Circuit. Bermingham, a Canadian citizen, pleaded guilty to reentering the United States after a previous deportation. He was sentenced to nine months and appealed, challenging the application of a two-level upward adjustment.[57] The Second Circuit had to decide whether Bermingham could appeal a sentence that fit within both the guidelines sentencing range applied by the judge and the range, two levels lower, claimed by the defendant. The court rejected appeals from sentences that lie in overlapping ranges, relying on the structure of the grid.[58] The opinion noted that "[i]t is hard to think of any reason for the Sentencing Commission to have gone to such lengths to build overlapping into the table if it did not expect this feature to reduce the number of disputes that needed to be adjudicated in the applica-

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[54] SUPPLEMENTARY REPORT, *supra* note 19, at 335.

[55] U.S.S.G. § 1A.4(h). As the court noted in United States v. Bermingham, 855 F.2d 925 (2d Cir. 1988), overlapping ranges are unlikely to keep parties from litigating a point at trial before they know if the judge's sentence will fall in an area of overlap between two ranges, but such overlap may discourage appeals once the sentence is announced. *Id.* at 931 n.6.

[56] 855 F.2d 925. The decision has been widely noted and followed. *See, e.g.*, United States v. Williams, 891 F.2d 921, 923 (D.C. Cir. 1989); United States v. White, 875 F.2d 427, 432 (4th Cir. 1989); United States v. Turner, 881 F.2d 684, 688 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989). It has also been qualified by its author in a later case. *See* United States v. Rodriguez, 928 F.2d 65 (2d Cir. 1991) (Newman, J.) (applying *Bermingham* "only where judge has indicated that he would impose the same sentence regardless of which of two overlapping guidelines ranges applies").

[57] 855 F.2d at 929-30. The adjustment applied "if the defendant previously has unlawfully entered or remained in the United States." U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2L1.2(b) (Nov. 1987). Congress amended this provision January 15, 1988, by establishing a higher base offense level and, therefore, eliminating the upward adjustment. U.S. SENTENCING COMM'N, GUIDELINES MANUAL, App. C.18-C.19 (Nov. 1989).

[58] *See Bermingham*, 855 F.2d at 926-29. The court remanded Bermingham's case because the judge had suggested that he was sentencing at the lower end of the applicable range. *Id.* at 935-36. If that was true, then it would matter which of the ranges applied.

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tion of the guidelines."[59] In essence, the "overlapping levels" approach to limiting appeals adds a "de minimis" standard that discourages courts from reviewing minor guidelines disputes.

There are many different ways to minimize appeals. Using the mechanical relationships of disputed ranges in a grid seems like a relatively unprincipled method. Moreover, it is an approach that may encourage appeals, of which there has been no shortage.[60] It may also diminish proper (statutory) deference to trial judges on all but trivial factual determinations and encourage ambiguity rather than clarity by trial judges at sentencing.

Prior to the guidelines, the federal system had virtually no sentencing appeals.[61] One of the most important aspects of the Sentencing Reform Act was an appellate review standard.[62] Congress restricted appeals to sentences imposed "in violation of law" or "as a result of an incorrect application of the sentencing guidelines,"[63] or for departures that may be reviewed to determine whether they are "unreasonable."[64] The statute directs appellate courts to give "due regard to the opportunity of the district court to judge the credibility of the witnesses" and to "accept the findings of fact of the district court unless they are clearly erroneous" and to "give due deference to the district court's application of the guidelines to the facts."[65]

The congressional approach, if followed, seems a sensible way to limit appeals. If the dispute is factual, great deference will be given to the trial judge through the application of the "clearly erroneous" standard. If the question is one of applying facts to the guidelines, the court will give "due deference" to the trial judge. If the question is one of law, then the decision of the court will be subject to de novo review.

The "overlapping ranges" approach adds perverse incentives to Congress's traditional and sensible scheme. The *Bermingham*

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[59] *Id.* at 930.

[60] Over 5000 sentencing cases were appealed in 1990. *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 163 n.11 (1991).

[61] *See* Marc Miller, GUIDELINES ARE NOT ENOUGH: THE NEED FOR WRITTEN SENTENCING OPINIONS 7 BEHAV. SCI. & THE LAW (1989).

[62] Pub. L. No. 100-690, 102 Stat. 4181, 4416-17 (codified at 18 U.S.C. § 3742).

[63] 18 U.S.C. § 3742(e).

[64] *Id.*

[65] *Id.*

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opinion implies that *minor* factual *and legal* disputes[66]—those that only shift the possible sentence into a range with an overlapping sentence—should not be appealed. This encourages litigants to cast their claims as disputes sufficiently great to move to a nonoverlapping level.[67] It may encourage appellate review of factual disputes with an impact beyond an overlapping level, thus diminishing deference to trial judges on the basis of the size rather than the nature of the dispute.

Finally, the rule encourages trial judges to avoid clarity in giving reasons for their sentences. Under *Bermingham*, a judge who explains why a defendant deserves a sentence at the top or bottom of the applicable range will be subject to appeal even when ranges overlap. This is because if the judge meant to sentence at the top or bottom of the applicable range, it matters which range applies, even if the range is one level away and includes the chosen sentence. A judge who picks a sentence in overlapping ranges, *and does not explain the placement*, will minimize the chance of appellate review.

Whatever virtues may be produced by a grid with overlapping ranges, such as limiting appeals, they do not outweigh the substantial costs. The limitation on appeals when ranges overlap, even if one way to create a "de minimis" rule, simply cannot bear the weight of a 43-level grid.

Detailed as the grid is, the Commission has considered making it more so. In 1991, the Commission proposed, but in the face of stiff criticism did not adopt, the addition of a seventh criminal history level.[68] This would have produced an additional 43 boxes —

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[66] The dispute in *Bermingham* was whether the defendant's previous residence in the United States after a prior drug conviction meant that he had "unlawfully . . . remained" in the United States within the meaning of then § 2L1.2(b)(1). The defendant argued that he had been in the United States lawfully until the moment of his drug conviction and therefore had not *previously* "remained." *Bermingham*, 855 F.2d at 929. This is not a factual dispute. It might be portrayed either as a legal issue (the meaning of § 2L1.2(b)(1)) or as a question of the application of the acknowledged facts to that provision. In either case, statutory deference to the trial judge would have served to limit the appeal for reasons related to the substance of the dispute, not its size.

[67] Many guidelines factors alter the offense calculation by two levels. In addition, a defendant can argue that several factors together would have a sufficient impact to overcome *Bermingham*'s hurdle.

[68] *See* Thomas W. Hillier, *The Commission's Departure From an Evolutionary Amendment Process,* 4 FED. SENTENCING REP. 45, 47 (1991).

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bringing the box total to over 300. The 1992 amendments repeat the proposal for a seventh level at the high end *and add* a proposal for an eighth criminal history level—level "0"—at the low end.[69] Clearly the Commission is not concerned with the complexity of its grid.

One explanation for the many levels is partly historical and partly theoretical. The Commission produced the guidelines under enormous time pressures. Its first draft attempted to identify as many relevant factors as possible and to assign a weight to each factor in an intricate calculation.[70] Though the Commission rejected the first draft as excessively complex and unworkable, it may have felt obligated by the lack of time to work from that model. The Commission also appears to have retained a view of appropriate punishment implicit in the early draft that measures additional small harms (such as small drug amounts or money taken by fraud) and punishes each measurable harm with a corresponding increase in punishment. Judge Jon O. Newman refers to this perspective as "incremental immorality." Incremental division of harms requires many increments of punishment—and, therefore, encourages many different offense levels.

II. Simplifying the Grid to Reveal Policy Choices

Neither the Sentencing Reform Act, nor the complexity of the federal system, nor the need to minimize appeals requires a 43-level grid. This section explores the problems generated by a grid so complex and the virtues of tables that are simpler.

An intricate grid obscures information about the substance of the sentencing rules. Are all offenses with base levels around fifteen more severe than those with base levels around ten and less severe than offenses with base levels around twenty? Do all offenses with base levels of fifteen deserve presumptive prison sentences, or is that only true for some of the offenses? When there are so many levels it is hard to attach meaning to any level beyond its numerical position. The obfuscatory character of a number-filled grid is exacerbated by the presentation of ranges without identifying a midpoint. State guidelines grids tend to state a midpoint as well as the range. It is easier to comprehend, focus on, and compare midpoints—single numbers—then it is to compare "ranges."

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69 57 Fed. Reg. 90, 108-09 (1992).

70 *See supra* note 24.

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A complex grid obscures policy choices. Federal sentences are severe and becoming more so.[71] This severity is hidden within the over 500 numbers that appear in the boxes on the grid (most boxes have two numbers covering the presumptive range). Other policy choices about the relative effect of various offense and offender characteristics are also obscured behind the language of one, two, or three-level adjustments.

In addition, an intricate grid—indeed any set of intricate rules—invites disrespect from the officials who use it. The more persuaded officials are of the legitimacy and coherence of guidelines, the likelier they are to attempt in good faith to honor them. Complex rules have also been shown in the related context of parole guidelines to lead to a high level of calculation error.[72]

The strongest arguments against such a complex grid come from showing the communicative virtues of one that is simpler. The simpler sentencing tables in Minnesota, Washington State, and Oregon convey more information about those systems than merely the range of prison time produced by the sentencing calculus. These grids show the relative severity of offenses and the likely base sentence for each offense. They also display severity of sentences for the whole system. In addition, the Oregon grid describes the type of criminal behavior for each criminal history category. These grids reveal the policy choices in each system and assist in the efficient and fair application of each set of rules.

The same virtues can be seen through a modest simplification experiment involving the federal grid. The results of the experiment suggest the kinds of information the federal grid could convey, and reveal more clearly some of the basic policy choices underlying the federal guidelines system.

The experimental grid collapses the 43-level federal grid to seven levels. The collapsed version does not include a criminal history dimension. This experiment does *not* revise the Commission's presumptive sentences. Rather, *it merely reflects the current grid's presumptive sentences and its underlying policy choices*. The collapsed grid certainly obscures some relevant distinctions—but it

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[71] *See* Richard A. Posner, *Courting Evil:* NEW REPUBLIC, June 17, 1991 at 36, 42 (reviewing INGO MULLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (1991)).

[72] Jacqueline Cohen & Michael H. Tonry, *Sentencing Reforms and Their Impacts, in* 3 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 435-37 (Alfred Blumstein et al. eds., 1987).

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presumably makes up for that effect by clarifying more than it obscures. The twenty-five percent rule is retained. Because each new level follows the rule, there is a substantial jump between some of the presumptive ranges.[73] The simplified grid includes the midpoint of each range to make this jump even more apparent. Consider, for example, the fifteen-month difference between the midpoints of level II and level III. These jumps seem enormous, but remember that they reflect the Commission's sentencing ranges. The big jumps expose the overall severity of punishment and how dramatically the length of incarceration increases throughout the current grid.

The simplified grid is also meant to expose a rough ranking of some common federal offenses. A list of offenses is attached to each of the seven new levels based on a rough calculation of where the base level would fall. Each list includes offenses that are several "old" offense levels apart. By grouping offenses into a smaller number of divisions, however, the choices about relative severity become much clearer. Again, to emphasize: the list of offenses attached to the simplified grid is meant to roughly reflect the Commission's own choices. The number of offenses that are slightly exaggerated roughly equals the number of those that are slightly diminished.

This experiment is not meant to produce a revised grid. The over-simplified experimental grid contrasts with the overwhelming gradations of the existing grid. Furthermore, the 43-level grid is relatively easy to divide into 7 levels. If this grid successfully suggests the advantages of fewer levels, it might encourage the Commission to develop a simpler and more meaningful array.

The experimental grid exposes the widely disparate impact of different factors on the base sentence. Because drug cases now account for about fifty percent of the federal case load, this grid illustrates the dramatically different effect of three factors in such cases: drug amounts, the role of the defendant in the offense, and characteristics of the offender other than criminal history (for example, chemical dependency).

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[73] The presumptive range for each of the seven levels is the fourth range down of the six original levels encompassed by each new level. This range is an approximation of the midpoint of the six original levels. Given the roughness of the whole experiment, averaging the third and fourth of the original six levels results in ranges with fractions that introduces confusion.

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A. *The Importance of Offense Characteristics*

The relevant conduct provision of the federal guidelines directs judges to determine the base offense level based on "all acts or omissions committed or aided and abetted by the defendant."[74] The provision also directs the judge to include all acts "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense."[75] In these sweeping provisions, the Commission subsumes a host of important issues in the substantive criminal law relating to accomplice liability and the definition of an offense. One irony of blurring these distinctions is that this approach ignores the efforts in the Model Penal Code and many states to shift decisions about a defendant's relative role and culpability to the sentencing stage.[76]

For several important categories of offenses, including most drug offenses, the relevant conduct guideline directs that the judge include in the calculation of the base offense level "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction."[77] A complete critical analysis of this sweeping proposition has not yet been done. For present purposes, it is sufficient to observe that these rules allow the calculation of the offense level to turn on acts with which the defendant may have had only a tenuous link and which may be unrelated to the offender's culpability.

The range of possible sentences based on the calculation of different drug amounts is staggering. That range becomes much clearer on the simplified seven-level grid. For marijuana, the possible sanctions extend from the lowest level to the highest, depending on amount. For all other drugs, the range extends from the simplified level two to the highest level.

In contrast, adjustments based on the defendant's role in the offense can at most move a sentence up or down one level in the simplified grid—and "role" has that impact only if the court finds

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[74] U.S.S.G. § 1B1.3(a)(1).

[75] *Id.*

[76] Scholars have questioned the wisdom of the Model Penal Code's effort to craft a handful of broadly defined offenses, leaving refinement to the sentencing stage. *See* Norval Morris, *Sentencing Under the Model Penal Code: Balancing the Concerns,* 19 RUTGERS L.J. 811 (1988); Michael Tonry, *Sentencing Guidelines and the Model Penal Code,* 19 RUTGERS L.J. 823 (1988).

[77] U.S.S.G. § 1B1.3(a)(2).

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as an aggravating factor that the defendant was "an organizer or leader of a criminal activity that involved five or more participants"[78] or as a mitigating factor that the defendant was "a minimal participant in any criminal activity."[79] The case law on both of these provisions has restricted their application to a point where the vast majority of role adjustments stay within the range of a single simplified level.

It may be perfectly appropriate to restrict the impact that relative roles in an offense ought to have. The simplified seven-level chart merely highlights the difference in the degree of impact that role and harm play in the federal system. The comparison is stark; it is far more important whether a defendant is lucky or unlucky about the amount of drugs she can be associated with than whether she is a kingpin or a courier.[80]

B. *The Irrelevance of Most Offender Characteristics*

The major offender characteristic taken into account in the guidelines is criminal history.[81] The Commission relegated other offender characteristics—including age, family relationships, work history, and drug and alcohol dependence—to policy statements, providing that such factors are "not ordinarily relevant."[82] It is difficult to reflect such "nonguidance" on a grid regardless of how many levels the grid has. The Commission has not guided the *degree* of most departures, including offender characteristic departures, though courts have developed some proportionality rules.[83] With respect to the simplified grid, offender characteris-

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[78] *Id.* § 3B1.1(a).

[79] *Id.* § 3B1.2(a).

[80] *See* Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability* 3 FED. SENTENCING REP. 63 (1990); Catharine Goodwin, 4 FED. SENTENCING REP. 226 (1992). *See generally* 3 FED. SENTENCING REP. 2 (1990) (listing role in offense and drug amount cases).

[81] The guidelines calculation of criminal history has been the subject of substantial criticism. *See, e.g.,* Hillier, *supra* note 68; Edward R. Becker, *Testimony on Guideline Amendments*, 2 FED. SENTENCING REP. 238 (1990); Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1 (1987). The criminal history guidelines have been criticized for overstating minor state offenses and old offenses. Trial courts have departed upwards in many cases to better reflect the offenders past criminal behavior.

[82] U.S.S.G. §§ 5H1.1-5H1.6.

[83] *See* Marc Miller & Daniel J. Freed, *The Emerging Proportionality Law for Measuring Departures*, 2 FED. SENTENCING REP. 255 (1990).

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tics other than criminal history generally will not alter the guidelines range at all—much less move the sentence to a new, simplified level.

The extreme restrictions on the relevance of offender characteristics is especially striking compared to the enormous impact of harm and the moderate impact of other offense factors. A recent study of the sentencing principles used by federal judges before the guidelines suggests that judges focused on the harm caused, the blameworthiness of the defendant, and the consequences of a sentence for people other than the defendant.[84] The simplified grid highlights the excessive focus of the federal system on harm and the trivialization of traditional considerations of blameworthiness.[85]

CONCLUSION

Grids may force sentencing systems to focus on easily measurable factors, such as amounts of drugs and money, to the exclusion of other important factors, such as the defendant's mental state, involvement in the offense, or personal characteristics.[86] Grids are also limited in the amount of information they convey: they tend to translate all judgments into prison sentences or other simply stated or quantified terms. A system that includes a variety of sentencing options might, at the very least, offer a set of options within each box on a grid—or a third dimension to reflect sentencing choices shaped by offender characteristics.

This Article suggests that grids can be useful. Many guidelines systems have adopted grids as a simple form through which to communicate sentencing ranges and options in light of two basic measurements—an assessment of the offense and an assessment of the offender's prior record. This simplicity mirrors the recognition of the centrality of the offense and the prior record in

[84] STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS (1988). The validity of the principles may be limited by the focus on the sentencing of white collar offenders. *See* Deborah Young, *Federal Sentencing: Looking Back to Move Forward*, 60 U. CINN. L. REV. 135, 142-43 (1991) (reviewing SITTING IN JUDGMENT and evaluating the guidelines in light of the principles of harm, blameworthiness, and consequence).

[85] *See* Young, *supra* note 80, at 144-51.

[86] *See* Alschuler, *supra* note 2, at 906-07 (guidelines tend to focus on countable factors).

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preguidelines sentencing systems.[87] If a grid is retained in the federal system, it can be made far simpler within the terms and expectations of the Sentencing Reform Act. Nothing about the federal system discourages a simpler grid. The current grid could be substantially changed to communicate more information about the policy choices underlying the system, including absolute sentence severity, the relative severity ranking of offenses, and the availability of sentencing options.

A simpler grid would, by itself, be only a modest improvement to a troubled system.[88] It would, however, offer substantial benefits. First, it would elicit greater trust and compliance from those who use the system. Second, because it would expose the underlying policy choices, those choices might then become subject to more adequate review and revision. If the Commission merely simplified the grid, but did not justify its changes, fundamental problems would remain. If the Commission explained its intricate grid in persuasive terms, even if it did not simplify the grid, some of the current criticism of the system and its "complexity" would be muted.

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[87] *See* Marc Miller & Norval Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J. ETHICS & PUB. POL'Y 393, 434 (1986).

[88] *See* Freed, *supra* note 11.

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FEDERAL SENTENCING TABLE (IN MONTHS OF IMPRISONMENT)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	1-7	2-8	4-10	8-14	12-18	15-21
8	2-8	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
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
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

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SIMPLIFIED 7-LEVEL GRID

USSC Offense Level	USSC Range	New Range & Midpoint	New Level	Offense List (base level) (sample offenses)
1 2 3 4 5 6	0-6 0-6 0-6 0-6 0-6 0-6	3 0-6	I	Minor assault Obstructing officers Larceny under $1,000[1] Fraud under $2,000 Mailing obscene matter Violation of laws for food, drug, biological product, cosmetic, or agricultural product Violation of odometer laws Under 250G marijuana.
7 8 9 10 11 12	1-7 2-8 4-10 6-12 8-14 10-16	9 6-12	II	Negligent involuntary manslaughter Larceny or fraud under $70,000 (including bank robbery) Blackmail Commercial bribery Removing vehicle identification numbers Gambling business Obscene telephone call Obstruction of justice[2] Insider trading under $20,000 Smuggling illegal alien[3] Interstate transportation of drug paraphernalia *DRUGS:[4] Under 5G Heroin; 25G cocaine; 250MG cocaine base; 50MG LSD; more than 250G marijuana.
13 14 15 16 17 18	12-18 15-21 18-24 21-27 24-30 27-33	24 21-27	III	Reckless involuntary manslaughter Aggravated assault Statutory rape Larceny or false representation under $1,500,000 Residential burglary under $2,500 Insider trading under $500,000 Transportation for prostitution Mailing obscene material involving minors Obscene telephone call to minor under 18 Substantial interference with administration of justice Renting or managing drug establishment Operating common carrier under the influence without injury *DRUGS: Over 5G heroin, 25G cocaine; 250MG cocaine base; 50MG LSD; 5KG marijuana

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19 20 21 22 23 24	30-37 33-41 37-46 41-51 46-57 51-63	 46 41-51	 IV	Aggravated assault with serious bodily injury Kidnapping Larceny over $1,500,000 Residential burglary over $2,500 Insider trading under $40,000,000 Robbery / extortion Arson Money laundering under $600,000 *DRUGS: Over 40G heroin; 200G cocaine; 2G cocaine base; 400MG LSD; 40KG marijuana.
25 26 27 28 29 30	57-71 63-78 70-87 78-97 87-108 97-121	 88 78-97	 V	Voluntary manslaughter Conspiracy to or solicitation of murder Attempted murder or assault with intent to murder Criminal sexual abuse Sexual exploitation of minor Robbery with use of a weapon and resulting in bodily injury Insider trading over $40,000,000 Operating common carrier under the influence where death results Destruction of national defense material or premises Tampering or attempt to tamper with consumer products Money laundering under $3,500,000 *DRUGS: Over 100G heroin; 500G Cocaine; 5G cocaine base; 1G LDS; 100KG marijuana.
31 32 33 34 35 36	108-135 121-151 135-168 151-188 168-210 188-235	 170 151-188	 VI	Second degree murder *DRUGS: Over 1KG heroin; 5KG cocaine; 50G cocaine base; 10G of LSD,; 1000KG marijuana.
37 38 39 40 41 42 43	210-262 235-293 262-327 292-365 324-405 360-life life	 329 292-365	 VII	First degree murder Air piracy (hijacking) Treason or espionage *DRUGS: Over 30KG heroin; 150KG cocaine; 1.5 KG cocaine base; 300G LSD; 30,000KG marijuana

NOTES FOR SIMPLIFIED GRID

1. The same offense levels apply to bank robbery, and to receiving, transporting, transferring, transmitting or possessing stolen property (USSG § 2B1.2), and to property damage or destruction (USSG § 2B1.3).
2. The same offense level applies to subornation of perjury and to bribery of a witness.
3. Similar base offense levels apply to unlawfully entering or remaining in the United States and trafficking or fraudulently using citizenship documents such as a passport.
4. The same offense level applies for manufacturing, importing, exporting, trafficking, possession, attempts and conspiracies, and use of a communication facility in committing a drug offense.

OREGON SENTENCING GUIDELINES GRID

Criminal History Scale

Crime Seriousness Scale		A Multiple (3+) Felony Person Offender	B Repeat (2) Felony Person Offender	C Single (1) Felony W/ Felony Non-Person Offender	D Single (1) Felony Person Offender	E Multiple (4+) Felony Non-Person Offender	F Repeat (2-3) Felony Non-Person Offender	G Significant Minor Criminal Record	H Minor Criminal Record	I Minor Misdemeanor or No Criminal Record
Murder	11	225-269	196-224	178-194	149-177	149-177	135-148	129-134	122-128	120-121
Manslaughter I, Assault I, Rape I, Arson I	10	121-130	116-120	111-115	91-110	81-90	71-80	66-70	61-65	58-60
Rape I, Assault I, Kidnapping I, Arson I Burglary I, Robbery I	9	66-72	61-65	56-60	51-55	46-50	41-45	39-40	37-38	34-36
Manslaugher II, Sexual abuse I, Assault II, Rape II, Using child in display of sexual conduct, Drugs-minors, Cult/manuf/del, Comp. prostitution, Neg. homicide	8	41-45	35-40	29-34	27-28	25-26	23-24	21-22	19-20	16-18
Extortion, Coercion, Supplying Contraband, Escape I	7	31-36	25-30	21-24	19-20	16-18	180 90	180 90	180 90	180 90
Robbery II, Assault III, Rape III, Bribe Receiving, Intimidation Property Crimes *(more than $50,000)*, Drug Possession	6	25-30	19-24	15-18	13-14	10-12	180 90	180 90	180 90	180 90
Robbery III, Theft by receiving, Trafficking Stolen Vehicles, Property Crimes *($10,000-$49,000)*	5	15-16	13-14	11-12	9-10	6-8	180 90	120 60	120 60	120 60
FTA I, Custodial Interference II, Property Crimes *($5,000-$9,999)* Drugs-Cult/Manufac/Del	4	10-10	8-9	120 60	120 60	120 60	120 60	120 60	120 60	120 60
Abandon Child, Abuse of Corpse, Criminal Nonsupport, Property Crimes *($1,000-$4,999)*	3	120 60	120 60	120 60	120 60	120 60	120 60	90 30	90 30	90 30
Dealing Child Pornography, Violation of Wildlife Laws, Welfare Fraud, Property Crimes *(less than $1,000)*	2	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30
Altering Firearm ID, Habitual Offender, Violation, Bigamy, Paramilitary Activity, Drug-sPossession	1	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30

In ***white blocks***, numbers are presumptive prison sentences expressed as a range of months; in ***gray blocks***, upper number is the maximum number of custody units which may be imposed; lower number is the maximum number of jail days which may be imposed.

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MINNESOTA

Structuring Criminal Sentences

Table A.1 — Presumptive Sentence Lengths in Months

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE 0	1	2	3	4	5	6 or more
Unauthorized use of Motor Vehicle Possession of marijuana	I	12*	12*	12*	15	18	21	24 *23-25*
Theft-related crimes ($150-$2,500) Sale of marijuana	II	12*	12*	14	17	20	23	27 *25-29*
Theft crimes ($150-$2,500)	III	12*	13	16	19	22 *21-23*	27 *25-29*	32 *30-34*
Burglary—felony intent Receiving stolen goods ($150-$2,500)	IV	12*	15	18	21	25 *24-26*	32 *30-34*	41 *37-45*
Simple Robbery	V	18	23	27	30 *29-31*	38 *36-40*	46 *43-49*	54 *50-58*
Assault, second-degree	VI	21	26	30	34 *33-35*	44 *42-46*	54 *50-58*	65 *60-70*
Aggravated robbery	VII	24 *23-25*	32 *30-34*	41 *38-44*	49 *45-53*	65 *60-70*	81 *75-87*	97 *90-104*
Assault, first-degree Criminal sexual conduct, first-degree	VIII	43 *41-45*	54 *50-58*	65 *60-70*	76 *71-81*	95 *89-101*	113 *106-120*	132 *124-140*
Murder, third-degree	IX	97 *94-100*	119 *116-122*	127 *124-130*	149 *143-155*	176 *168-184*	205 *195-215*	230 *218-242*
Murder, second-degree	X	116 *111-121*	140 *133-147*	162 *153-171*	203 *192-214*	243 *231-255*	284 *270-298*	324 *309-339*

*One year and one day.

Note: Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. First-degree murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

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