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The Commission's Revised Draft represents a substantial improvement over the September Draft. The revised structure seems workable and appropriate overall, but the details still need attention. There remain numerous problems of incompleteness, inconsistency and poor drafting. In several areas, substantive judgments appear to have received inadequate thought. I will discuss (1) the degree of discretion preserved, (2) plea agreements, (3) severity levels and (4) the guiding principles of sentencing. An Appendix lists miscellaneous examples of sections that need to be "debugged."

1. The degree of discretion preserved

The September Draft put forward an extremely rigid system that left inadequate scope for appraisal of individual facts and circumstances. The present Draft may go too far in the opposite direction. Considerable discretion results from three parts of the structure: (a) base offense levels in Chapter Two are often stated as ranges; (b) these base offense levels are subject to further departures and adjustments; and (c) discretion to impose consecutive sentences is not significantly confined.

Judicial discretion under guidelines might prove even more dangerous than judicial discretion in current law because parole release decisions will no longer offset aberrant judicial sentencing and because appellate review (intended in part to

replace the checking function of the Parole Commission) will be largely inoperative when the sentence is within guidelines. As a result the Commission's approach in the three areas mentioned warrants a close look.

a. Base offense levels stated as a range.

The practice of stating base offense levels as a range appears on its face to violate §994(b)(2) because the available spread between minimum and maximum sentences is well over 25%. For involuntary manslaughter the judge can choose an offense level between 10 and 14 (i.e. a sentence of imprisonment from 6 to 21 months). For bribery the offense level can vary from 11 to 23 (i.e. a prison sentence from 8 to 57 months). Numerous examples of this kind permeate Chapter Two.

It is obviously preferable for the Commission to pick a single offense level if available information permits it to do so. But in many areas greater specificity is not possible in the current state of knowledge. Where that is the case, the Commission can appropriately state the offense level as a narrow range, together with concrete criteria for choosing within the range. The classic techniques for control of discretion are confining (by narrowing boundaries), structuring (by identifying criteria) and checking (by subsequent review). Where further confining is no longer feasible, it is appropriate to structure discretion by identifying the relevant criteria.

There remains the question whether the 25% limitation in §994(b)(2) bars this approach. Congress apparently assumed that precision adequate to meet §994(b)(2) would be attainable in all

cases. Since this assumption has proved incorrect, one must guess at Congress's preference. It would be prudent for the Commission to request a statutory amendment to confirm that choice among a range of offense levels may be left to the judge.

In the absence of amendment, can the statute be interpreted to permit the flexible approach I recommend? If the 25% limitation is inflexible, then the Commission would be barred from promulgating any guideline for an offense category in which such precision was unattainable. Since the Commission clearly has power to promulgate no guideline, the statute should be interpreted to permit guidelines which, where necessary, produce flexibility that exceeds the 25% standard. Congress's main goal in §994(b)(2) was to avoid unrestricted discretion; compared to the prospect of no guideline at all, a range of offense levels can serve as a "less unrestrictive alternative."

I conclude that flexibility exceeding the 25% limit is permissible, but only if three conditions are satisfied. Present knowledge must be inadequate to support more refined categories meeting the 25% limit, the range of offense levels authorized must be as narrow as available knowledge and analysis permits, and the Commission must provide judges with concrete criteria for choosing the proper offense level within the authorized range. Guideline provisions that do not meet these three criteria fail to fulfill the Commission's charge and are vulnerable under §994(b)(2).

Many of the guideline ranges appear to satisfy these three conditions without difficulty. Section A214 (range of 28 to 33

levels for attempted murder) is an example. Others are dubious, however. A prize (of sorts) goes to Section N211(a)(2) which authorizes a range of 7 to 10 levels for food and drug violations, without mentioning any criteria whatsoever to guide the judge's choice. Numerous other sections are functionally identical (and identically vulnerable) because they state only that the selection of an offense level should depend on "the circumstances of the offense." The Commission must make an effort to be more specific. In addition, some ranges are much too wide. Bribery sections C211 and C212 (range of levels 11-23) come immediately to mind.¹ The Commission must break such offenses into sub-categories with narrower ranges and then specify concrete criteria for selecting within the narrowed range. The authorized range need not be broad enough to capture every conceivable case. Under the statutory scheme the Commission is expected to promulgate narrow guidelines that are appropriate for the typical case. Judges remain free to depart from those guidelines, for stated reasons, when the circumstances are unusual.

b. Departures and Adjustments.

Both departures and adjustments are appropriate concepts under the statute. Logically, adjustments come first (and the next Revision should so place them) because they are part of the guidelines themselves. A departure, unlike an adjustment should

1. For both §§C211 and C212, the "specific offense characteristic" seems substantially to duplicate the elements necessary to prove the base offense.

always be optional with the judge. The present "Departures" section creates problems by its varying language that is alternatively hortatory ("should increase," §Y211), mandatory ("shall increase," §Y216), or injunctive ("reduce," §Y217; "decrease," §Y218). Are these varying formulations intended to convey a difference in emphasis? If so why, and in what way? If the judge disregards the order (e.g. "reduce"), is his refusal to depart a "departure from the departure guideline" and appealable as such? Tighter draftsmanship would be of great help here.

In choosing between departures and adjustments (a matter on which the Commission has requested comment), the Commission should, wherever possible, use adjustments -- that is changes in offense levels that are specific and mandatory. The reason is that resort to adjustments confines discretion as the statute intended, while relegating a matter to departures produces the problems of increased discretion and inadequate checks mentioned above. In addition, every resort to the "departure" approach increases the number of cases likely to be appealed and increases the appellate burden because sentences in such cases must be reviewed for "unreasonable[ness]."

The hard question is whether the Commission is knowledgeable enough to determine the precise relevance of sentencing factors by specific, mandatory adjustments. I am not optimistic. The proposed adjustment for duress illustrates the problems. Suppose a bank clerk steals \$300,000 from his employer, or a smuggler carries 300 grams of cocaine into the country, both in response to credible threats of serious physical harm. How is the judge

to determine whether the threatened injury outweighs the harm of the offense? The problem of incommensurate harms is inescapable under §Y228(a)-(c) which deal by hypothesis with weighing threats of serious injury against the harm of non-violent offenses. In any event, assume that both offenders qualify for the maximum 5 level reduction. This would mean punishment at level 7 (1-7 months) for the bank clerk and at level 19 (30-37 months) for the smuggler. But under present federal law, both defendants would have a defense requiring complete acquittal.² Acquittal would also be required under present law where the threatened injury does not outweigh the harm caused and where the offense is violent (with the possible exception of homicide).

It is unclear whether §Y228 was proposed with awareness of applicable law, but such a provision can still do damage. Although duress is recognized as a complete defense, its contours in current law are sufficiently vague that a Commission pronouncement could influence its development at the margins; an authoritative Commission pronouncement about when duress should mitigate punishment might even change the Supreme Court's assumptions about the availability of a substantive defense in core cases. Commission judgments should influence such developments if they represent thoughtful appraisals of the problem in light of previous knowledge and precedent. By the

2. United States v. Contento-Pachon, 723 F.2d 691 (9th Cir. 1984); R.I. Recreation Center v. Aetna Cas. & Sur. Co., 177 F.2d 603 (1st Cir. 1949) (dictum). See generally United States v. Bailey, 444 U.S. 394 (1980); Kawakita v. United States, 343 U.S. 717, 736 (1952).

same token the Commission must take care not to pronounce dogmatic judgments prematurely, when it has not had the opportunity to come to grips with the issues.

These concerns carry over to other sentencing factors included as adjustments. The proposals for property damage, personal injury and psychological harm are all independent of the offender's intent, knowledge, recklessness or criminal negligence with respect to such results, an oversight that will render these adjustments unworkable and unjust. The proposal with respect to diminished capacity (though listed as a "departure") is seemingly written to preclude adjustment or departure in the case of violent offenses, voluntary intoxication or departures in any event by more than 4 levels. In all these respects, the Commission should not allow its draft proposal to become final without assuring itself that it has fully absorbed the range of viewpoints on the issues and come to grips with existing precedent, much of which is at odds with the Commission's proposal. The same would have to be said with respect to other possibly mitigating factors that one would have wanted the Commission to address if time and available expertise had permitted: e.g., mistake of law, superior orders, mistake as to justification or victim consent.

My conclusion is that the adjustment approach, though important to preserving consistency and coherence and to avoiding unduly burdensome appellate review, is probably beyond the Commission's capacity at the present time. The four weeks remaining in the present schedule do not seem adequate for the

task required. This means that the Commission should, regrettably, deal with general sentencing factors more diffidently, either by flexible adjustment ranges or as grounds for departure. Alternatively, the Commission might consider asking Congress for a further extension of time (roughly 6-9 months) so that this important aspect of the job can be done properly.

c. Consecutive sentences.

The operative language of §A562(b) guides the judge by telling him to decide on the basis of "the statutory purposes of sentencing." This is not very helpful. Such language also creates a problem for the appellate courts: when a judge chooses to impose consecutive sentences (in order to serve "the statutory purposes of sentencing") in his decision within guidelines or a departure from guidelines?

There are many possible standards for the consecutive sentencing question, focusing on such elements as the number of distinct transactions, objectives or victims. In order to guide both sentencing judges and appellate courts, the Commission needs to be much more specific here. For related transactions the Commission's base offense levels and specific offense characteristics already contain a judgment about the proper sentencing consequences of multiple transactions and victims, total dollar amounts of loss or gain, sophisticated schemes and the like. As a result, the consecutive sentencing guideline applicable to such cases should direct judges to impose consecutive sentences but only to the extent necessary to produce

the overall sentence called for by the other guidelines. For unrelated transactions, limited power to impose consecutive sentences is sometimes appropriate, but only if concrete criteria are specified. See, e.g., 128 U.Pa.L.Rev., at 827 (1980). Judges will retain power to impose a consecutive sentence in other situations anyway, but those decisions should constitute guideline departures requiring specific justification.

2. Plea Agreements

Chapter Four sets up a sound framework for review of plea agreements and makes a major contribution to truth in sentencing, especially in §A413. But there are several details that could create serious problems of substance:

a. Section 412(c)(2) calls for the judge to make an independent determination, but there is no reference to independence in the determinations mentioned in §§412(a)&(b). Is this difference in wording intentional, and if so what difference in emphasis is implied? Some members of the Commission could well think it unnecessary to tell judges to be independent; from this perspective the superfluous adverb in §412(c) should be deleted. With respect to plea agreements, however, it is necessary to tell judges to be independent: prevailing practice is for judges to defer heavily to prosecutors, especially with respect to reduction of charges, and there is some case law requiring judges to defer to prosecutors with respect to charge-reduction plea agreements.³ Such heavy deference will be inappropriate in a world of sentencing guidelines and is contrary

to the Congressional intent expressed in 28 U.S.C. §994(a)(2)(D). Nonetheless, if the Commission expects prevailing habits to change, it must say so clearly -- by requiring an independent determination under all subsections of §A412. The same idea could be conveyed more effectively, and without the superfluous connotations of "independence," by requiring a de novo determination.

b. Section A412(c)(2) requires that departures "not undermine any of the legislatively mandated purposes," but §A412(b)(2) contains no parallel requirement. A difference of substance presumably could not have been intended here, but why invite speculation? The language of §A412(b)(2) should be tightened.

c. Both Sections A412(b) and (c) tell the judge to approve departures only if a "reason exists." To tell judges to do something only for a reason is similar to telling them to be independent: The exhortation is either superfluous or unhelpful. Presumably, the Commission has in mind a requirement of some content, but the content needs to be spelled out. Which of the following are a "reason" for purposes of §A412?:

- that the defendant pleaded guilty (§C323 implies the contrary, but may not govern where the plea is part of an agreement with the government);
- that there is doubt about factual guilt;
- that there are problems of proof;

-- that the trial will be expensive;

-- that a sentencing factor exists that was not adequately considered by the Commission in formulating the guidelines [18 U.S.C. §3553(b)].

In principle, only the last of the above factors should be recognized as a legitimate "reason." Acceptance of the other factors would in practice mean leaving the sentencing decision in the hands of prosecutors and defense counsel in every case. In any event the concept of adequate reason must be clarified.

d. Section A412(d) gives the judge discretion to defer decision, presumably pending receipt of the presentence report. This discretion is consistent with F.R.Crim.P. 11(e)(2), but it creates problems under §§A412(a)-(c). How can the judge properly decide whether to accept a plea agreement without having the presentence report? This problem is particularly acute given the present scope of §A413, which does not require disclosure of relevant criminal history, but the problem would persist even if §A413 is extended (as it should be) to cover factors necessary for application of Chapter Three. The judge should be required to consult a presentence report before accepting a plea agreement in all but narrow categories of minor, exceptional cases.

e. Section A412(a) allows dismissal of charges and counts only if the remaining charges "reflect the seriousness of the offense behavior." The meaning here may leave too much to the reader's imagination. Language should either be added for emphasis (e.g., "fully reflect") or Commentary should make clear the meaning intended.

f. More generally, the absence of Commentary for these sections is troublesome. The language of §§A412-A415 works significant changes in current practice, and judges will have to work with it in 80-90% of their cases. The concepts used and the reasons for them should be explained.

3. Severity questions

The severity levels need to be tested carefully against current practice and expected prison impact. The Commission has not made available the data necessary to permit outside comment on this crucially important aspect of its work. The reliability of the prison impact study currently under way will be problematic because the proposed guidelines leave so much flexibility to the judge. It is essential that the prison impact study produce estimates based on three or four alternative sets of assumptions about how judicial discretion under the guidelines will be exercised.

Some of the white collar sentences appear too low (e.g. §N221), but evaluation of this question requires attention to the data.

The sentence of life imprisonment for first-degree murder is consistent with 18 U.S.C. §1111, but the Congress that enacted this statute assumed the availability of parole. Life imprisonment without parole is not appropriate for all first-degree murders. If legislative clarification is necessary to confirm the propriety of shorter sentences in some first-degree cases, the Commission should seek such clarification promptly.

In my view the Commission already has the power to specify a guideline sentence less than life, since such a guideline would reflect assumptions about what life imprisonment meant when the murder statute was enacted. In addition, 18 U.S.C. §3559(a)(1)(A) provides that murder is a Class A felony, and 18 U.S.C. §3581(b)(1) states explicitly that the authorized imprisonment for a Class A felony is "life or any period of time" (emphasis added).

The Sentencing Reform Act requires the Commission "to insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment" for first offenders not convicted of violent or otherwise serious offenses. 28 U.S.C. §994(j) There are several serious problems concerning the extent of the Commission's compliance with this mandate.

a. There is not a single offense in the guidelines for which the Commission has expressed a preference for non-incarceration. At most, the Commission has made non-incarceration available as an option, along with imprisonment. This non-incarceration option approach can be supported only by a strained reading of §994(j). The clear intention of this section was to indicate that a sentence of imprisonment is inappropriate for non-serious, non-violent first offenders, just as the second clause of §994(j), which uses language identical to the first, indicates that non-incarceration is inappropriate for violent offenders who inflict serious injury. The Commission has complied with the latter mandate by denying the non-incarceration option for such cases, but it has not denied the imprisonment

option for any cases at all. To comply with §994(j) the Commission should specify in the lowest offense levels (e.g. 6 and below), that imprisonment is not a guideline option for first offenders. In exceptional cases, of course, the judge would remain free to impose imprisonment by departing from the guidelines for stated reasons.

b. Section §A521(c) permits minimum imprisonment terms of 6 months or less to be satisfied by intermittent confinement, community confinement or home detention. This concept of converting imprisonment into less costly restraints is sound and important. It is also essential to carrying out the Commission's mandate under §994(j) because without such conversion, imprisonment becomes mandatory even for the relatively less serious offenses that fall in levels 7-10.

My concern is that the conversion option may not work smoothly in practice. Has the Commission verified the availability of the resources and programs necessary to insure that the conversion option is viable in Districts throughout the country? In Districts not highly urbanized, some of the conversion options may be unavailable or difficult to implement on a cost-effective basis for small numbers of offenders. Imprisonment should not become mandatory for a level 7 offense simply because suitable alternatives are locally unavailable. The Commission needs to ascertain the extent of this problem and to provide judges some flexibility in responding to it. In addition, community service should be recognized as an appropriate alternative, at least to the extent of 2-3 months of

imprisonment. Without these steps, the conversion option can break down in practice, and the treatment of level 7-10 offenses would be at odds with §994(j).

c. At offense level 10 probation (with some substitute confinement) remains an option, but at level 11, imprisonment for a minimum of 8 months becomes mandatory. This abrupt discontinuity is inappropriate in terms of just and effective punishment. The discontinuity will also create pressures for manipulation of facts or dubious guideline departures in order to reduce offenses to level 10 or below. Evenhandedness and "truth in sentencing" will suffer.

To avoid such strains on the guidelines system, some transition conversion principles should be recognized for offense levels 11-13. For example, the judge could be permitted to satisfy the required minimum sentence by converting a portion of the specified prison term into a period of supervised release conditioned on community confinement, home detention, or community service. 18 U.S.C. §3583(d)(3). The portion of the prison term eligible for conversion could be 6 months at level 11, 4 months at level 12 and 2 months at level 13.

d. The guidelines make imprisonment mandatory for offense levels 11 and above. But mandatory imprisonment of non-violent first offenders is permissible only if the offenses placed at that level are "serious." §994(j) Many non-violent offenses seem to have been graded without sufficient attention to this requirement. The following offenses seem insufficiently serious to warrant imposing on first offenders a mandatory minimum prison

sentence of 8 months or more:

-- copyright infringement involving reproduction (without distribution) of 65 videotapes (\$B253: level 16, minimum 21 months).

-- selling a single stolen vehicle worth \$6000 with an altered VIN (\$B262: level 13, minimum 12 months).

-- offering a gratuity to a government meat inspector, or to a District of Columbia police officer to fix a traffic ticket (\$C211: level 11, minimum 8 months).

-- two acts of mail fraud involving small amounts, or two acts of bribing a traffic court judge, if prosecuted under 18 U.S.C. §1962(c) (\$E211: level 19, minimum 30 months).

-- defrauding 2 victims of \$12,000 each (\$F211: level 11, minimum 8 months).

-- making a \$60,000 profit by trading on an inside tip (regardless of the degree of sophistication, planning or degree of fiduciary responsibility) (\$F212: level 12, minimum 10 months).

-- tampering with the odometer on two cars, with the help of a partner or employee (\$N233: level 12, minimum 10 months).

-- one violation of fish importing regulations for commercial purposes, goods valued at \$6000 (\$Q226: level 12, minimum 10 months).

Compliance with §994(j) requires a careful, detailed review of Chapter Two and a downgrading of non-serious offenses such as these.

4. Principles of Sentencing

The proposed language dealing with this subject (p. 2 of the Revised Draft) is largely symbolic, but it sets a tone for the entire guidelines and can affect application of the guidelines in marginal cases. I assume that this language is meant to be taken seriously and that it therefore warrants careful review.

a. The Commission's basic premise is "that the fundamental objective of the Comprehensive Crime Control Act is to prevent crime and protect the public." No citations are provided to back up this statement, and I cannot find anything in the statute or legislative history to support it. To the extent that the sections of the Act relevant to the Commission can be said to have any single purpose, it is the one articulated by Attorney General William French Smith and quoted prominently at the outset of the Senate Report on the bill: "These [sentencing] provisions . . . rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing."⁴ The remainder of the Report speaks repeatedly of such interrelated objectives as "comprehensiveness," "consistency," removing "disparity and uncertainty," "assuring fairness," "certainty in release date," and the like.⁵ Of course, crime control can be among the derivative benefits of greater certainty in sentencing. But the Senate Report gives little or no attention to this fringe

4. S.Rep. 98-225, p. 38 (emphasis added).

5. Id. at 39-60.

benefit, and nowhere in the Report do the stated objectives include crime prevention and public protection as such.

The Commission's emphasis on crime prevention as the "fundamental objective" to the exclusion of all others, and its disregard of the statutory goals of certainty and consistency thus seem seriously at odds with the intention and spirit of the authorizing legislation. This misconception of the animating objective may be partly responsible for two of the major weaknesses of the Revised Draft already discussed -- its preservation of excessive, unguided judicial discretion and its inappropriately severe sentences for non-violent first offenders.

b. The fourth of the Commission's "five general principles" is the statement that when retributive and crime control models conflict, "justice for the public is the overreaching goal." Since the term "justice to the public" is left undefined, it could be read to include justice to the individual. But most readers will assume that the Commission's language expresses a choice for the crime control objective, in preference to justice to the individual. So read, the language is highly problematic. There is of course a vast philosophical literature on this subject. Virtually all of this literature rejects, in one way or another, the principle that the Commission appears to propose. It may be more helpful, however, to focus on the extent to which the proposed principle is reconcilable with existing federal law and judicial precedent.

Strict liability, prominent in the food and drug laws and other regulatory offenses, is a good example of an area where

protection of the public has been held paramount to justice to the individual defendant. So is the generally prevailing refusal to allow reasonable mistake of law as a defense.⁶ But federal law has for decades regarded these instances of strict liability as exceptional. Where serious crimes carrying substantial penalties are concerned, justice to the individual is consistently held to be the overriding concern. This tradition, best articulated in Justice Jackson's famous opinion for the Court in Morissette v. United States, 342 U.S. 246 (1952), continues to be reaffirmed in recent decisions, as for example in Chief Justice Burger's opinion for the Court in United States v. U.S. Gypsum Co., 438 U.S. 422 (1978). And even where the law permits conviction on a strict liability basis, the courts have stressed that attention to actual culpability, i.e. justice to the individual, remains a dominant concern at sentencing. Indeed, the assumption that sentencing judges will be attentive to this concern has been among the primary justifications for the willingness to deemphasize fairness to the individual in these exceptional situations at the conviction stage.⁷

I conclude that the Commission's fourth principle is seriously at odds with federal law, including the previous

6. "Justice to the individual is rightly outweighed by the larger interests on the other side of the scale." United States v. Barker, 546 F.2d 940, 964 (D.C. Cir. 1976) (Leventhal, J., dissenting).

7. In Barker, supra n.6, at 965, Judge Leventhal wrote that "flexible opportunities for mitigating the law's impact -- through prosecutorial discretion, judicial sentencing, and executive clemency -- avoid the necessity for bending and stretching the law [in its formal elements for conviction.]"

judgment of respected authorities who have never been thought insensitive to crime prevention concerns. In this area, as in others I have mentioned today, the Commission has a responsibility to familiarize itself fully with the range of relevant considerations, with the views expressed by thoughtful judges and with the leading precedents of federal jurisprudence before pronouncing premature judgment on complex issues of fundamental importance.

c. Absent from the list of general principles is any policy to promote consistency, certainty or the elimination of unwarranted disparities. This is a most surprising, and possibly revealing, oversight.

* * *

Thank you for this opportunity to present my thoughts on the Revised Draft.

Appendix:

Examples of Miscellaneous Problems

- §C324 violates 18 U.S.C. §3553(c).
- §B231(a)(1) should not have a weapons enhancement greater than that in §A221(a)(1); robbery by definition includes an assault.
- §B253(a)(1) & (2) should not have such abrupt discontinuities; the difference between 60 and 70 copies is 6 levels or over a year in prison.
- §E211 should not place non-violent RICO offenses (e.g. mail fraud) seven levels higher than violent crimes in aid of racketeering (§E213).
- §N221(a) provides substantially overlapping enhancements in subsections (1) & (2).
- §N221 offense levels seem much too low as applied to reckless conduct involving risk of substantial harm.
- §N231 grading structure and levels differ inappropriately from §N221.

- §X211 Conspiracies and attempts should carry the same punishment as the underlying offense only when substantially all acts necessary to commit the crime have been completed; conspiracies and attempts intercepted at early steps, or involving only an agreement with minimal overt acts, should carry substantially lower offense levels.
- §X212 Solicitation should be treated the same as conspiracy and attempt.
- Part Y instructions should repeat the limitation indicated at p. 11, that harms count only if they are intended or within a risk with respect to which the defendant was reckless or criminally negligent.
- §Y225 injury adjustments should not be the same for violent offenses (e.g. robbery) and non-violent offenses; the former already are graded with the risk of injury in mind.
- §Y226 weapon adjustment (and related weapon adjustments under specific offenses) should not apply to the full extent when an injury adjustment (§§Y211, Y221, Y222, Y225) also applies. The underlying principle is that an offender should not receive cumulative punishments for an inchoate

offense and for the harm that was the object of the inchoate offense. See 28 U.S.C. §994(1)(2); 18 U.S.C. §3584(a).

- §A311 needs to be reconciled with Chapter Two provisions that increase the offense level for some prior convictions; such double counting is appropriate only under unusual circumstances.
- §A311(e) should not apply where §A311(d) also applies; In addition, the ¶(e) circumstances, being substantially less serious than those in ¶(d), warrant an increase of only one level.
- §A312(b)(1) appears to treat the defendant sentenced to 18 months and released after serving 6 months the same as a defendant sentenced to 18 months who fails to qualify for early release.
- A312(c)(1) should provide for the exclusion of all non-similar misdemeanors resulting in minor sentences; otherwise six prior prostitution convictions (with \$100 fines for each) would produce six points. Other minor misdemeanors (petty theft, simple assault) also do not warrant a full point when minor sentences were imposed.

- A312(c)(1) should treat sentences to one year's probation (which are common) the same as shorter probationary terms; the exclusion should remain applicable unless the term of probation was for more than one year.
- §A312(d)(2)(B) adds a point for offenders under 18 (whether convicted as juveniles or adults) for misconduct that would not produce added points in the case of an over-18 offender. Compare §A312(c).
- §C321 appropriately requires a determination (largely discretionary) whether the acceptance of responsibility is genuine, but if it is genuine, the judge should then be required to reduce the offense level.