

February 27, 1997

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Dear Alan:

The following are my comments on the current Proposed Guideline Amendments for Public Comment -- Part I. My comments are similar to a September 26, 1996 submission to the Commission, made in my individual capacity.

I shall begin by stating my views as to the principles that should govern two of the most important subjects addressed in the proposed amendments, (1) the topic of 'departures' (amendment number 34), especially departures based on offender characteristics, and (2) the topic of so-called "relevant conduct," along with the subtopic of acquitted conduct (amendment number 9). I consider the need for simplification of the

Guidelines to be closely related to these two topics, and I understand the Commission is considering that problem, so I shall state my views concerning it as well.

I. Departures and offender characteristics

In the long run, the Guidelines should be radically revised to permit or require judges (1) to base sentences on offender characteristics that they now are forbidden to consider or strongly discouraged from considering, and (2) to give greater weight than now to many offender characteristics judges currently are allowed to consider.

I say this should be done "in the long run," because probably it would not be practical to adopt such a radical change comprehensively within the next year or two. On the other hand, it would not be wise to delay the change entirely for a period longer than that. The best course would be to try this change for a few selected categories of offenses and offenders, evaluate the results, and then make additional trials.

My principal concern is that the current Guidelines unduly forbid or minimize judges' reliance on offender characteristics that would justify greater severity of sentences, especially longer terms of imprisonment designed to incapacitate and to deter specifically and generally. However, my reasons for suggesting this change apply also to many offender characteristics that would justify more lenient sentences in some cases. Thus my concern does extend also to the unwisdom of forbidding or minimizing reliance on mitigating facts about

offenders.

The most basic reason for this recommendation is that the predominant purpose of criminal punishment should be to protect society from future crimes, through incapacitation, deterrence, and rehabilitation. The concept of "just deserts" should serve only to place a ceiling on the penalties used to serve the purpose of public protection.

Many of the facts that are most instructive, when a judge is selecting a sentence designed to protect the public, are facts about the offender (other than facts about the crime or crimes for which he is now being sentenced). Such facts about the offender include other crimes or non-criminal, anti-social acts he has committed (whether he was convicted for them or not); his current motivations and skills; his past personal and economic experiences; and many other facts shedding light on his current and likely future character and personality, and thus on his future behavior.

Many federal judges have understood these things. Before 1987 many of them deemed crime prevention the main purpose of their sentences. They relied heavily in selecting sentences on information about crimes of which an offender had not been convicted, on various kinds of information tending to show that another offender was unlikely to offend again, and on many other types of offender characteristics that the current Guidelines place off-limits or give only slight weight. The Guidelines should be revised to permit, and in many kinds of cases to

require, that judges give great weight to many offender characteristics of various kinds.

It would be a red herring to respond that such a change would cause disparity in sentences. The word "disparity," when used to disparage differences in sentences, is always understood to mean unjustified differences. Furthermore, members of Congress and the Commission have often acknowledged that unjustified parity not only is as bad as unjustified disparity, but really is just a different manifestation of the same problems.

The most basic command Congress gave the Commission was to devise Guidelines such that every sentence would be based on all the important facts about each offense and offender, in such a way that the sentence would serve the purposes of crime prevention and just punishment as well as possible in view of economic limitations. Under revised Guidelines such as I recommend, when important differences between two offenders cause them to receive different sentences for the same type of offense, there is no unjustified disparity.

Conversely, under the current Guidelines, when important differences between two offenders are ignored or given trivial weight, and consequently the two receive about the same sentences even though one poses a greater threat of future crime, there is unjustified parity. More importantly, one of the similar sentences fails adequately to prevent crimes.

Research the Commission did before promulgating the initial

Guidelines, and its later research, have obscured the true incidence of both unjustified disparity and unjustified parity among sentences.

Before the first Guidelines, the Commission chose to focus its data collection and analysis only on hard sentencing variables, those that could be defined precisely and objectively, and measured quantitatively. Soft variables were largely ignored, despite their great importance in explaining sentences actually imposed before the Guidelines. As a result, although the initial Guidelines purported to track past practices in most respects, in fact they treated similarly cases that judges wisely had been treating very differently.

After promulgation of the first set of Guidelines, the Commission has persisted in this error. Its data-gathering and analysis have focused almost exclusively on the few, artificially defined offense characteristics to which the Commission had unwisely confined the attention of sentencing judges. Since judges' discretion to depart from the Guidelines is limited and many of them seem timid about departing (especially upward), the data gathered have necessarily given the false impression that the Guidelines have caused almost universal sentencing parity.

The result is that the Commission has overstated the incidence of unjustified disparity that occurred before the Guidelines, and has both understated the incidence of unjustified parity and overstated that of justified parity after the Guidelines took effect. If all the variables that judges

formerly deemed important in sentencing were studied, both for the period before 1987 and for later cases, one would find that the Commission has brought about a very drastic change in the criteria on which federal sentences are based, and in the average time served for some kinds of offenders (and even for some kinds of crimes). This revolution was neither commanded by Congress, nor necessary to the reduction of unjustified disparity. On the contrary, the Commission's relentless course of demanding similar sentences for dissimilar cases has impaired the effectiveness of sentencing to prevent crime, without producing a substantial net improvement in real parity of sentences.

Without doubt, there were plenty of both unjustified disparity and unjustified parity among federal sentences before 1987, for several reasons. There were no substantive standards for sentencing, not even general ones. There were almost no specified procedures. Judges did not have to give reasons for sentences. There was virtually no appellate review of sentences.

The drastic deficiency of that system and of the results it produced was not a good reason, though, for the Commission to build unjustified parity into the Guidelines by ascribing little or no significance to offender characteristics that shed light on the likelihood of future crimes. The Commission should begin expanding the power and duty of judges to rely on such facts.

The issue of offender characteristics is functionally related to that of judicial departures from the specific dictates of the Guidelines. In theory the two issues have no peculiar,

intrinsic interrelationship. However, the current Guidelines' banishing or downplaying of many offender characteristics has created a practical interrelationship between these two issues, in the sense that departures are an escape valve by which a judge can in some circumstances try to ameliorate the Guidelines' deficient treatment of offender characteristics. If the Commission were to conclude, as it should, that the current Guidelines unduly bar or restrict reliance on some important offender characteristics, the most cautious way to experiment with allowing wider and heavier reliance on them would be for the Commission expressly to invite or even encourage specified kinds of departures in this area.

Even if the Commission does so, it would be advisable also to select some kinds of offenses and some kinds of offenders as to which the Guidelines themselves would provide for weighty reliance on certain offender characteristics that the current Guidelines give little or no significance. More would be learned from an experiment with both techniques than with only the former, especially since many judges seem loath to depart, especially upward.

Proposed amendment number 34 seems to permit departures a bit more broadly than do the current Guidelines, but not enough. No proposed amendment would give offender characteristics substantially greater weight than now, in the more specific ways that should be tried. Thus this batch of proposed amendments as a whole does not represent an implementation of the approach I

recommend.

II. Relevant conduct and acquitted conduct

Phrases such as "relevant conduct" are in wide usage, and it is common for people to link the phrase "relevant conduct" with the phrase "real offense sentencing." However, I have long considered use of such phrases confusing and even misleading, for the following reasons.

All can agree that sentences should be based only on relevant facts, not irrelevant ones. Likewise all agree that, among the facts relevant to sentencing, some are best described as facts about the offense or offenses for which this sentence is to be imposed, while the other facts are best described as facts about the offender. Thus, there are relevant offense characteristics and relevant offender characteristics, both of which should be considered, while irrelevant offense and offender characteristics should be disregarded.

However, the relevant offense and offender characteristics are not all facts about the "conduct" of the offender and his accomplices. This is true even when we examine only relevant offense characteristics. For example, some of these are facts about the offender's state of mind at the time that he or an accomplice engaged in a particular bit of conduct that is one element of the offense. Others are facts about the results of certain conduct, or about the circumstances existing at the time of certain conduct. Thus, even as to offense characteristics, the phrase "relevant conduct" is misleading.

The point is even plainer when we examine relevant offender characteristics. Some of these, such as prior convictions, are amalgams of prior conduct, states of mind, circumstances, and results. Others, such as an offender's traits of character and personality, are not facts about his conduct at all, but facts inferred from various sources including his conduct, his utterances, and things that others have done to him.

The current Guideline entitled "Relevant Conduct," section 1B1.3, covers not only conduct, but also resulting harm, "any other information specified in the applicable guideline," and "the conduct and information specified in the respective guidelines." The latter phrases cover numerous and various provisions, many of which describe mental states, circumstances, and results, rather than conduct.

The real function of section 1B1.3, beyond merely cross-referencing other Guidelines, is to prescribe the extent to which offenders will be held responsible at sentencing for the conduct of others and for resulting harms. This function is much narrower than the title "Relevant Conduct" suggests. More importantly, section 1B1.3 barely scratches the surface of the issues encompassed by the idea of "real offense sentencing," as the Commission discusses it in Chapter 1 Part A.4.(a) of the current Guidelines.

I therefore suggest different terms in which to frame the issues that people usually have in mind when they use phrases such as "relevant conduct," "acquitted conduct," and "real

offense sentencing." The essential concerns regarding these issues are procedural. That is, on what kinds of evidence should a finding be based that certain alleged facts are true, when a sentencing court will rely on the finding? See, e.g., United States v. Shonubi, 1997 WL 2540 (2d Cir. 1997). How heavy a burden of persuasion should the proponent of the finding carry? See, e.g., United States v. Gigante, 94 F.3d 53 (2d Cir. 1996). Otherwise what procedures should be used to make the finding? See, e.g., Bullington v. Missouri, 451 U.S. 430 (1981); Specht v. Patterson, 386 U.S. 605 (1967). Whatever the answers are to those questions, is there unfairness in letting the government propose such a finding where the offender has obtained an acquittal of a charge in which the government alleged the same or similar facts?

Terms such as "relevant conduct" are misleading ways in which to refer to these procedural issues, because the same procedural concerns should be raised not only when the facts to be found are covered by the "relevant conduct" guideline (e.g., acts committed by the offender during the offense of the current conviction (sec. 1B1.3)), but also when the facts to be found are facts about offender characteristics. Under the current Guidelines, for example, they might be facts (a) about other crimes of the offender (e.g., the offender's prior similar crimes not resulting in conviction, sec. 4A1.3(e)), (b) about the offender's lack of legitimate economic resources (e.g., his dependence on criminal activity for a livelihood, sec. 5H1.9), or

(c) about his mental and emotional condition (sec. 5H1.3).

Consequently, one should not refer to this as an issue of "relevant conduct." This phrase would not be apt unless expanded to cover various other kinds of facts, e.g., "relevant harms." Nor should one refer to it as an issue of "real offense" sentencing. This phrase would likewise have to be expanded to cover the analogous question of "real offender" sentencing: should we, for procedural reasons, make judges close their eyes to some facts about the offender that bear on the risk of his offending again?

Instead of using these misleading phrases, one should simply address this topic as a set of interrelated issues in the law of sentencing procedure. There are constitutional limits, and within such limits these issues of procedure should be resolved as a matter of policy.

This is not a semantic quibble; these choices of terms have practical consequences. Discussion of these issues of policy and of constitutional law is impeded by use of misleading phrases such as "relevant conduct" and "real offense sentencing." The persons who initially chose these phrases apparently believed in the implicit premise they convey: that the sole or dominant purpose of sentencing is to give offenders their "just deserts," that is, sentences designed entirely to be proportional to the specific crimes for which they are being sentenced. However, the premise that "just deserts" are the purpose of sentencing is unsound, as Congress, judges, and most experts have recognized

for most of American history. I shall explain below why the premise is unsound. For now, it suffices to observe that, for those who view the primary purpose of sentencing as prevention of future crimes, phrases such as "relevant conduct" and "real offense sentencing" impede rational discussion of issues of sentencing procedure.

The discussion is facilitated when the procedural issues are identified more precisely: What kinds of evidence should be usable? What burdens of production of evidence and of persuasion should each party bear? What other procedures should be used? Are crimes of which an offender was previously acquitted a special case for these purposes? What does the Constitution require on each point?

The proper starting place to address these issues is recognition of the functions of procedural rules. In the context of sentencing, there are two principal functions.

First, the procedures should strike a wise balance between (a) reducing the risk of error by using thorough, careful procedures, on the one hand, and (b) reducing delay and expense by using simple, informal procedures, on the other hand. The most important factor in striking this balance is that federal sentencing is done by judges, not juries. Federal judges generally are good at evaluating evidence and applying informal procedures in a sensible and fair manner. For that reason, it has been wise for Congress and the courts to conclude, as they always have, that the rules of evidence applicable in trials

should not govern sentencing, and that simple, informal procedures are wise.

The second principal function of rules of sentencing procedure is to allocate the risk of error between the parties. Since errors will certainly occur under any set of procedures, the procedures should wisely allocate the risk of such errors as between the parties.

The most important factor in allocating the risk of error is that (a) errors in favor of the offender typically increase the danger of future crimes by him and by other prospective offenders, due to inadequate incapacitation and deterrence, while (b) errors in favor of the prosecution typically increase the punishment of an offender above the optimal level, i.e., the level that best achieves crime prevention while limiting the economic costs of punishment and preventing greater punishment than is fair to the offender.

Sentencing procedures should be designed to place most of the risk of error on the offender, rather than on the public. After all, this problem of allocating the risk of error in sentencing would never have arisen but for the offender's admitted or already proven criminal behavior. His presumption of innocence has been waived or rebutted. The current Guidelines unwisely refer to him as the "defendant," a term that ignores the crucial change in his status when he pled or was found guilty. That misleading appellation tempts one to draw unsound analogies between sentencing procedures and trial procedures.

Contrary to the implication carried by the word "defendant," the offender being sentenced is guilty of the crime for which he is about to be sentenced. The prospective victims of his and others' future crimes are innocent, or at least strongly presumed so. Wise procedures would be designed, in cases where facts and predictions bearing on the sentence are in doubt and errors may occur, to protect innocent members of society more than may be necessary, rather than to give convicted offenders undue leniency.

This principle should lead us, for example, to establish burdens of persuasion of sentencing facts different from the preponderance standard currently endorsed by the Commission (sec. 6A1.3) and used by most federal courts. When a convicted offender tries to prove a fact that would mitigate his sentence, he should have to prove it by more than a preponderance. Clear and convincing proof might wisely be required, for example.

Conversely, when the government tries to prove a fact that would support a more severe sentence, the burden of persuasion should be less than a preponderance. There are, of course, other contexts in which a standard lower than a preponderance is used. See, e.g., Kyles v. Whitley, 115 S. Ct. 1555 (1995) (holding that a defendant claiming a violation of the prosecutorial disclosure requirement articulated in United States v. Bagley, 473 U.S. 667 (1985), need only adduce less than a preponderance of evidence that the undisclosed evidence would have been likely to prevent a conviction). "Substantial likelihood" of an aggravating fact

describes pretty well the showing that should justify greater protection of the innocent public from a guilty offender.

Congress has not forbidden this general approach, i.e., allocating most of the risk of sentencing error to offenders. It remains to be seen what constitutional limits the courts will set on the resolution of most specific issues of sentencing procedure. Certainly the Supreme Court has not categorically rejected the general approach I suggest. The Commission, the Congress, and the courts should do all in their power to adopt sentencing procedures that limit the risk of error to the degree that best makes practical sense, and that then allocate most of the remaining risk to the guilty offenders who have created the problem.

An acquittal should not be treated as a special matter for this purpose. Current constitutional precedents make it quite clear that it need not be so treated. See, e.g., United States v. Watts, 117 S.Ct. 633 (1997); Dowling v. U.S., 110 S. Ct. 668 (1990). All an acquittal shows is that the government failed, under the especially rigorous rules of procedure and evidence that govern the trial of one who is presumed innocent, to prove at least one element of the charged offense beyond a reasonable doubt. The acquittal creates no reasonable expectation in the defendant (who later becomes the offender being sentenced for another crime), or in the public, that the same misconduct will not later be proven under less rigorous procedural and evidentiary rules, to a lower degree of probability, at the

subsequent sentencing.

All three of the options in proposed amendment number 9 are unsatisfactory, even Option 3. It provides no articulation of the "substantial concerns of fundamental fairness" that supposedly might arise. Attempts by courts and commentators to identify and explain the nature of any perceived unfairness have not been specific or cogent. There should be no general invitation to depart downward on such a vague ground and, unless the Commission can articulate the purported unfairness specifically and persuasively, there should be no such invitation at all.

III. Simplification of the Guidelines

It may seem that my suggestion to add more offender characteristics is incompatible with simplification of the Guidelines. The impression that my views are contrary to simplification may be strengthened when I add that, in my view, the current Guidelines unduly limit the number of offense characteristics courts can consider, and their ways of doing so. It may also seem that the Congressional limit on ranges of terms of imprisonment to the lesser of six months or a 25% span obstructs simplification.

Despite these likely impressions, simplification is indeed possible and desirable. The Commission's attempt to simplify the Guidelines should be based on the following fundamental observations and principles.

Criminal behavior is enormously voluminous, varied, and

complex. Likewise, the character traits and other personal qualities that lead offenders to commit crimes are extremely varied, complex, and subtle, and the facts about an offender's life that shed substantial light on these traits and qualities are even more numerous, varied, and complex.

Crime prevention is extremely important. Therefore, it is wise to design the criminal justice system so that the public actors (e.g., legislatures, prosecutors, judges, and jurors) who make decisions about criminal law, prosecutions, convictions, and sentences can consider every important fact about each crime and each defendant. Only in that way can crime prevention be made as effective as practically possible, while at the same time unjust convictions and excessive sentences are avoided.

However, it would be impracticable to consider every significant offense and offender characteristic at every stage of the criminal process. Dealing sensibly with information that is so voluminous, varied, complex, and subtle requires great flexibility and discretion to handle every case in a unique way. The presumption of innocence and other important procedural protections would be impossible to enforce adequately if every stage of a criminal case were handled with great flexibility and discretion.

The basic solution to this problem that the federal and all state governments have followed for most cases, for almost the entire history of the Republic, is as follows. To protect the presumption that one accused of crime is innocent until proved

guilty by overwhelming evidence under rigorous procedures, the middle stage of the criminal process, that of formal adjudication of guilt, is designed in peculiar way.

First, the facts to be proved at this middle stage relate only to the charged offense, not to the character or personality of the defendant. Then, those facts are deliberately selected and worded so as to be few in number and relatively simple and specific in content. These elements are chosen and defined in such a way as to make them provable in a very technical and rigorous trial process; the other side of the same coin is that these elements lack realistic richness and subtlety. For example, the defendant is alleged to have possessed something specified (burglar tools, or a specified drug, for example) with a specified state of mind (e.g., the intention to make an unauthorized entry of another's property, or to transfer the drug).

These few facts, deemed the elements of the crime, must be proved to a very high probability, through rigorous evidentiary and procedural rules. Harmful errors in application of these requirements can almost always be identified and remedied on direct or collateral review of the conviction.

As a result of these rules for the stage at which guilt is adjudicated, it is extremely rare for innocent defendants to be convicted of crimes. A collateral result is that, during this middle stage of the criminal process, the decisionmaker (the judge or jury deciding whether guilt has been proven) learns very

little about the defendant's character and personality. In addition, the decisionmaker makes findings that describe even this particular crime in a peculiar way: the findings leave out many significant facts about the crime, and they oversimplify or state very generally even the facts the findings do cover.

For example, the jury returning a guilty verdict may find only that the offender possessed at least one object designed to open a locked door. The jury may find it unnecessary to decide whether the offender also possessed a large kit of other, highly sophisticated devices indicating great professional skill at such a crime. He may or may not, as far as the verdict indicates, have possessed also equipment for disabling alarm systems, a case designed for transporting valuable crystal without damage, and the like.

In the other hypothetical case mentioned above, the jury may find only that the offender possessed heroin, not also facts about its quantity, purity, and packaging that indicate his role in its distribution. In neither of these two cases does the jury find the offender's ultimate motive for the crime, nor his character or propensity to commit similar or different kinds of crimes in the future.

Thus, in the stage of a criminal case where guilt is adjudicated, an unrealistically simplified presentation is made of some of the key facts about the crime. No facts at all are presented about other offense characteristics or about the characteristics of the offender that should inform the selection

of a punishment.

This partial blindness and complete oversimplification during the middle stage of a criminal case did little harm in the traditional American system, because the first and third stages allowed consideration of all relevant facts, as well as discretion to respond to all of them. At the first stage, that of charging, the prosecutor had almost complete discretion (1) not to charge at all, (2) to charge a less serious offense than the evidence would justify if the narrow view taken during the middle stage governed, or (3) to accept a bargain for a lesser conviction. He could base such leniency on details of the offense that are ignored or oversimplified in the middle stage, and on facts about the offender that could not be proved at all at trial.

In view of these facts, the prosecutor could be lenient when more aggressive prosecution would strike an unwise balance among competing factors such as the seriousness of the offense in all its real, complex details; the degree of likelihood that the defendant or others would commit future crimes of various kinds in the absence of any criminal conviction or punishment; the likelihood that the defendant would respond well to probation or various kinds of treatment or training; and various other facts and predictions too numerous, varied, complex, and subtle to be considered during the much more formal and structured middle stage.

Similarly, the third stage of a criminal case, sentencing,

traditionally allowed another consideration of any kind of information bearing on the whole gamut of offense and offender characteristics. Cases that appeared identical, if one looked only at the indictment and verdict, were examined again at the sentencing stage and found to be very different, as the judge took a more thorough and subtle look at the facts of the offense, as well as his first thorough look at the character of the offender. This system thus had a first and third stages in each of which a decisionmaker had discretion to consider and act upon all relevant information about the offense and the offender, and a middle stage where artificially narrow factual allegations must be proved through rigorous evidentiary and procedural methods.

This system is excellent in conception. It allows potential criminal defendants to be screened out of the process before being tried or even charged, or to receive other forms of leniency, where the specifics of the offense or the offender make this a wise resolution of the competing demands of crime prevention, economy, and justice. This system also minimizes the chance that an innocent defendant will be convicted, by requiring very strong proof of just a few important facts under very demanding procedures. And then it creates an opportunity for wise crime prevention and punishment of the guilty offender, by basing the sentence on all significant information about the crime and the offender.

Under this basic, traditional system, sentencing should not be simple. There are methods by which to achieve simple

sentencing, but each of them fails to accomodate adequately the needs for effective crime control, economy, and justice.

One such failed method is embodied by the current Guidelines. The Guidelines preclude or strongly discourage consideration of many facts, such as an offender's unadjudicated crimes dissimilar to the one for which sentence is to be imposed, that are of substantial importance in selecting a sentence to prevent future crimes. As to facts the Guidelines do allow judges to consider, i.e., the offense characteristics comprising most of the current Guidelines' great bulk, they are defined in ways that are artificially narrow and discontinuous; they inadequately reflect the true variety and subtlety of such facts. The result is that the Guidelines unduly restrict and oversimplify sentencing criteria.

Consequently, the current Guidelines set a task for sentencing judges that is much more technical than before the Guidelines, but is also simpler in substance, for two reasons. First, judges must ignore or give trivial weight to much important information. Second, even the information that the Guidelines do make significant in sentencing is broken into artificially defined and discontinuous bits, and given predetermined interrelationships. Judges must use this information more to make a calculation than to make a judgment.

Thus, the difficult and complex judicial sentencing process, which formerly involved weighing many, varied, interrelated factors having different degrees of importance, is replaced in

the current Guidelines by a computation. This computation has only the technical complexity of a math problem, not the substantial complexity of an attempt to evaluate human behavior and character, to predict criminal conduct and the reactions of criminals to sanctions, and thus to prevent and punish crime with optimal effectiveness.

The ultimate results of the current Guidelines are that crime prevention is less effective than it should be, that unjustified disparity and unjustified parity of sentences are unduly frequent, and that all we gain is an illusion of sentencing parity.

It is also true that the pre-Guidelines system of federal sentencing was grossly inadequate. There, too, unjustified disparity and unjustified parity were both rampant. Also, many sentences were surely ill-designed to prevent crime or to punish wisely. Sentencing was lawless, unreviewable, and insufficiently explained. There were inadequate processes for Congress and courts to create data, analyze them, and improve sentencing by learning from experience.

The concepts of Guidelines to be announced and then amended regularly, of limits on departures from the Guidelines, of stated reasons for sentences, and of appeals by both parties were sound. These concepts could have led to a great improvement in sentencing. Instead, the Commission has implemented these concepts in a way that (1) has definitely impaired crime prevention and just sentencing by barring or minimizing reliance

on some important sentencing factors, (2) has probably increased the problem of unjustified parity, (3) has not necessarily reduced that of unjustified disparity, and (4) has produced sentencing law that is excessively technical and complicated.

The wise approach to simplification, which also is the wise approach to solving the other problems just mentioned, would be as follows. Sentencing cannot be both simple and wise. We therefore must choose between having either (1) relatively simple Guidelines or (2) relatively simple judicial application of them. So far, the Commission has made the latter choice.

The Commission designed the initial Guidelines, effective in 1987, so as to limit courts to simple functions of factfinding and technical application of relatively precise rules. It tried also to make the Guidelines themselves rather simple, by leaving out important sentencing factors and by unduly quantifying the ones it put in. Even so, the initial Guidelines were rather complicated. Then the Commission promulgated annual sets of amendments making the Guidelines ever longer, more precise, and more complicated. At present, we therefore have a system where the judicial function is more mechanical (and thus easier in substance) than before the Guidelines; where the Guidelines are so technical as to be hard to use; and where, ironically, these complicated Guidelines are so much more simple than the real world of crimes and criminals that they do not produce sufficiently effective, economical, and fair crime prevention and punishment.

At this time, the Commission should begin experimenting with an approach that is virtually the opposite of the approach it has used to date. To be cautious, it should try this new approach at first only for a few kinds of offenses and a few kinds of offenders. The Commission should replace some of the current provisions with new ones so designed that the new Guidelines will be relatively simple and their use by the courts will be as complex as good crime prevention and just punishment demand.

Application of this approach should begin with the following observation: Although the statute requires that each range of imprisonment prescribed by the Guidelines cannot be wider than the greater of 25% or six months (sec. 994(b)(2)), the act does not require that the Guidelines employ narrow or specific factual categories or calculations in the preceding steps by which a judge considers facts relevant to the sentence. Offense and offender characteristics can be described in general language. The numerical values assigned to them can consist of ranges.

For example, the Commission might choose to experiment with this new approach by replacing the Guideline for the offense of Failure to Appear by Offender (sec. 2J1.6). The Commission might also create a new Offender Characteristics Category Guideline to apply to this offense instead of the current Criminal History Category Guideline (sec. 4A1.1).

The new Failure to Appear Guideline could begin, as does the current one, by making 11 the base offense level for failure to report for service of sentence, and 6 the base level otherwise.

Then the new Guideline could authorize the sentencing judge, for example, to "decrease the offense level by 4 levels or less, or increase it by 6 or less, because of offense characteristics warranting the decision, including but not limited to the gravity of the charge or conviction in the case in which he failed to appear, the stage of the proceedings when he failed to appear, the kind of facility to which a sentenced offender was ordered to report, how long after he was scheduled to report he surrendered or was apprehended, and the circumstances under which he surrendered or was captured."

This draft adds offense characteristics that the current Guideline omits, such as the gravity of the offense for service of whose sentence the offender failed to appear. It also eliminates arbitrary discontinuities in the weight given to offense characteristics covered by the current Guideline, such as the 3-level difference between a pending charge punishable by 15 years imprisonment and one punishable by any less. In addition, it eliminates the unjustified parity of giving the same significance to a pending capital case as to a pending case where the maximum punishment is as little as 15 years.

The new Guideline for Offender Characteristics, to be adopted only for use with the new Failure to Appear Guideline, could direct the judge to determine the offender's "offender characteristics points" in a similar fashion. The court would choose from a wide range of points by considering a wide variety of facts, such as the nature, seriousness, and recency of prior

convictions and sentences and of prior crimes established for the first time in this sentencing proceeding.

To combine this new set of offense levels with this new set of offender points, the Commission could use a Sentencing Table very similar in substance to the current one. However, for this offense the vertical column would be headed "offender characteristics category," not "criminal history category."

These proposals are simpler than the current Guidelines, and they encourage judicial consideration of all significant offense and offender characteristics in their true subtlety and interrelatedness. They facilitate use of the kinds of procedures I recommend in the previous section of these comments, because they treat most sentencing facts as evidentiary rather than ultimate facts. They thereby confine the issue of burdens of persuasion, as well as other crucial procedural issues, to a manageably narrow scope of application.

At the same time, my proposals confine and guide judicial discretion vastly more than the pre-Guidelines law of sentencing. Coupled with the requirement of stated reasons for sentences, the authorization of appeals from sentences, and the roles of the Commission in gathering data and learning from experience, Guidelines drafted in this manner could promote effective sentencing while making unjustified disparity of sentences much less common than before 1987, and unjustified parity of sentences much less common than after 1987.

It would at least be worthwhile experimenting with this

approach. The current Guidelines comprise a lurch from the pre-1987 extreme of completely lawless sentencing, to the current extreme of artificial, unrealistic sentencing. It is time to try a more humble, cautious, and incremental method of reform.

It must be clear by now how interrelated are my views on the three sets of issues addressed above. Federal sentencing will not become as effective as it should be to prevent crime until offender characteristics are made much more important determinants of sentences than under the current Guidelines, nor until offense characteristics are described more comprehensively and in terms that encompass all their important variations. The only way the Guidelines can adequately cover all important offense and offender characteristics, and cover them with language that is reasonably simple, is to describe them in general terms and to provide ranges of numerical values for them. Procedures for finding sentencing facts and for applying Guidelines to the facts should be relatively informal, and should place most of the risk of error on convicted offenders, not on a public entitled to protection from crime.

This approach is so different from the current Guidelines that it should be tried in small steps. The results of both approaches should be studied carefully. In the long run, it will be found that the current Guidelines produce only illusory parity and indiscriminate prevention of crime, while the new approach produces more effective crime control, fairer sentences, relatively little unjustified parity or disparity, and a more

workable system.

Very truly yours,

Russell M. Coombs