

FEDERAL SENTENCING GUIDELINES:  
TASKS PROPOSED FOR THE  
UNITED STATES SENTENCING COMMISSION

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THE SERIOUSNESS OF THE OFFENSE

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I. Overview.

Probably the most important single criterion in Guideline sentencing is the "seriousness" criterion. Most states that have adopted sentencing Guidelines have undertaken initially to quantify "seriousness" as the major Guideline criterion, to be followed eventually by other factors such as the offender's "background." Most Americans would agree that an offense -- any given offense -- can be measured roughly such as by placing it in between two other offenses, one deemed a more serious crime, the other a less serious one. This process may be repeated as many times as felt necessary, so that, as a result, a continuum of crimes may be constructed whereon an ordinal hierarchy of offenses emerges. This is a relatively easy task to perform, with substantial, if not total, consensus among most right-thinking persons.

The harder effort, by far, is weighting, rather than merely ordering, the hierarchy of crimes. Most states seem not to have addressed this issue in any detail, some not at all. For instance, within sentencing Guidelines states such as Pennsylvania have established ten offense gravity scores ("OGS") ranging from a low of "1" to a high of "10." Unsurp-

risingly, homicides have tended to occupy OGS "10", whereas misdemeanors have filled the ranks of the lowest OGS ranking ranges, such as "1" and "2". Such distinctions are unlikely to provoke significant criticism. Greater difficulty arises when one compares any two given offense gravity scores, however, particularly at the upper levels. For instance, Pennsylvania places Involuntary Deviate Sexual Intercourse in an OGS of "9", just under the homicides that occupy an OGS "10". Similarly, Pennsylvania places Burglary within three contiguous offense gravity scores: "5", "6" and "7", depending upon circumstances surrounding perpetration of the offense. A critical question, therefore, arises: should the difference between an OGS "5" and "6" be the same as the difference separating an OGS "9" and "10"? Are these offense gravity scores ordinal only, or are they interval ranges? Instead of there being arithmetic progressions from one OGS to the next, proceeding upward, should there be geometric progressions? Thus, if a "Guideline" sentence for an offense having an OGS of "6" were to be six years, for easy figuring, should a "Guideline" sentence for an offense having an OGS of "7" be seven years or, perhaps, should it be eight or nine years, even ten?

## II. Establishing Offense Gravity Scores ("OGS").

No task seems to be more difficult than, or even as difficult as, setting offense gravity scores (OGS) for each statutory crime. Yet, this task has to be done if any Guideline sentencing structure is to be implemented. Undoubtedly, this is the first major task the Sentencing Commission would

confront, on a substantive rather than a procedural level as it goes about its business. Where does a commission begin?

Two outer parameters have to be set, rather arbitrarily, from the beginning. In practice, one of these is rather obvious: the lowest OGS should be "1" rather than "0", simply because any crime, no matter how trivial, must have a certain degree of "gravity," otherwise why is it a crime? Setting the upper ceiling on offense gravity scores is much harder. Commissions seem to prefer fewer, rather than a larger number of, offense gravity score ranges. Thus, the tendency exists for sentencing commissions to set convenient ceilings such as "10" and then labor to fit all crimes between such a confining space as "1" and "10". The Sentencing Commission is urged to avoid this mistake.

Instead, the Commission should begin at OGS "1", then progress upward through as many intervals (ordinals) as seem necessary to fully distinguish the comparative seriousnesses of all criminal offenses. Hence, the Commission might wind-up with 23 OGS ranges, for instance, rather than an even-numbered ten or twenty. Sentencing should not be equated with playing the piano; we are not limited to eight notes per octave, or to a finite number of octaves.

The difference between offense gravity scores must be meaningful to be effective, or even to be fair. In some states, such as Pennsylvania, the difference between one OGS and the ones immediately above or below it may be but a matter of a few months. Too many months are crammed into the total of ten OGS, largely because Pennsylvania spread out its OGS ac-

ross the range of minimum sentences only, ignoring completely the range of maximum sentences. The United States Sentencing Commission should not repeat this mistake.

The authors believe it to be difficult, and virtually impossible, to construct offense gravity scores meaningfully in fewer than twenty OGS categories. This should not be witnessed as being inconsistent with what has just been said: that the Commission should not constrain itself by presetting any fixed number of OGS categories. Rather, the Commission is urged to spread-out OGS ranges across the full sentencing gamut permissible for every crime -- across both minimum and maximum sentence, using ranges that have self-significance both to the offender and to the public. Thus, the Commission should avoid ranges distinguished by only a matter of weeks, and, instead, should calculate most ranges at intervals of at least six months.

The United States Code offers a wider assortment than most states in terms of both number of different crimes and seriousness of crimes. Federal law encompasses traditional "common law" crimes plus numerous "special" offenses arising, for instance, under the Internal Revenue Code and similar statutes. The difference between failure to file an employer's quarterly return and espionage, also, is a greater difference than exists between offenses under many state laws. This characteristic compels the Sentencing Commission to use a larger number of offense gravity scores. Yet, ultimately, the Commission will have to select its own intervals; there is no "cookbook" from which it may draw this information.

### III. Aggravation and Mitigation.

Most crimes are not "cut and dry" in terms of the harm perpetrated upon the victim(s) thereof. Yet, is not the sentencing judge, rather than this Commission, the proper authority to distinguish factual differences in offender conduct that may impact on sentence?

We have learned from Gregg v. Georgia, 428 U.S. 153 (1976) and other similar cases that (a) aggravating as well as mitigating circumstances can be articulated generally and (b) this may improve the Constitutional muster of the sentencing process. Of the two, perhaps, aggravating circumstance is easier to articulate than mitigating circumstance, yet neither fosters wide consensus except, maybe, within the narrow confines of capital offenses. Yet, the Gregg criteria could be a starting point. They do not have to be limited only to crimes for which the death penalty is permissible.

Again, we do not intend to provide the Commission any "cookbook" of aggravating or mitigating circumstances. We do offer suggestions as to categories of aggravation and mitigation. These might include the status of the offender and/or the victim (offender a previously-convicted felon; victim a police officer or a child); the conduct of the offender during, immediately before, or immediately after commission of the offense; actual harm befalling a victim (loss of one's entire home through arson) or the Government (loss of a vital national secret); and the likelihood of restitution. Potential ruin of a victim, like attempted murder, should be punished; but actual ruin of a victim's property or a Government

secret, like actual murder, should be punished more severely than its mere attempt.

#### IV. Violence and Constructive Violence.

One major distinction the Commission may wish to consider as it formulates our National sentencing policy is whether a given crime has involved violence, actual or constructive. Our Nation suffers from violent crime that makes citizens afraid to walk our streets at night or, sometimes, even during the day. The mugger who knocks elderly ladies on the head to steal their pocketbooks is a violent criminal. Also, the drug trafficker is a violent criminal, because he encourages muggers to knock ladies on the head, in order to raise funds sufficient to purchase drugs.

What about the drug-banker? The principal management of those banks that "launder" drug money either knowingly or under circumstances where it is evident they should have realized what they were doing, must be held accountable as violent criminal offenders, particularly where their conduct has endured over a significant time interval and contributed substantially to the bank's prosperity. Principal managers who fall into this category would be branch managers who repeatedly fail to report cash transactions; but, also, chief executive and chief financial officers of banks that repeatedly transfer large sums to offshore correspondents, frequently in violation of our tax policies.

Our National Sentencing Policy must reflect current reality: we are at war with drug traffickers, terrorists or

any group of criminal offenders whose mission, primary or secondary though it may be, is to destroy our way of life. The individual criminal must be punished. The criminal syndicate has to be destroyed. This Commission must formulate a clear and comprehensible distinction between the two sorts of criminals, and punish the latter far more severely than the former whenever possible.

*Executive Summary*

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1. Introduction.

Federal sentencing Guidelines are inadequate presently, and the opportunity exists for the United States Sentencing Commission to reform Federal sentencing practices. This opportunity has been long-coming, and it may not present itself again during our lifetimes. For this reason, the Commission must consider immediate and sweeping changes, rather than modest ones that would be less provocative but far less worthwhile. Sentences must reflect the will of the American people and be applied consistently with but a minimum of disparity. To be effective, criminal sentences have to exert an impact upon criminal behavior, either by reducing existing crime or deterring potential crime.

The Sentencing Commission should avoid becoming bogged-down in detail. Actual sentences imposed in given cases remain, and should remain, the prerogative of jurists. Rehabilitation, if this concept be workable at all, remains and should remain the province of correctional specialists. The task of the Commission is not to become embroiled in sentencing debate or in the differential effects various sentences may have upon offenders bearing peculiar characteristics. The task of the Commission is to set an American sentencing policy and an agenda for its implementation. Time is of the essence. Already, the Commission is behind schedule.

## 2. Setting Guidelines Parameters.

An initial, and perhaps the initial, task of the Commission must be to establish clear parameters within which to establish its Guidelines. Is the Commission going to propose Guidelines for every sentence involving violation of the Federal laws, or is it going to concentrate on major crimes? Is the Commission going to concern itself only with minimum sentences, or with maximum and mandatory sentences as well? How many criteria does the Commission wish to include in the sentencing process under its Guidelines? For instance, will the Commission go beyond severity of offense and the offender's background? How specific will the Commission become in prescribing aggravating and/or mitigating circumstances? Will the Commission be willing to recommend differential Guideline sentences for different aspects of the same generic crime, or remain content simply to set a Guideline for each crime as enumerated by the Congress in the United States Code?

The Commission should emphasize the harmfulness of serious crimes by imposing either mandatory sentences for these offenses or Guidelines that, in most instances, require the offender to serve a substantial proportion of his maximum sentence. As a set rule, the Commission will be better off if it adopts fewer rather than more criteria for Guideline sentencing. As states have done in regard to capital punishment, the Commission should enumerate examples of aggravating circumstances; perhaps, at the very least, it should narrowly define mitigating circumstances, to avoid the natural tendency of jurists simply to ignore Guidelines and impose sentences below the appropriate Guidelines for many offenses/offenders. The Commission might well create mandatory sentences, but only where

necessary and proper and, then, only when all aspects of the mandatory sentence are reflective of sound policy. For instance, a Guideline might prescribe a mandatory term of imprisonment for the commission of a crime while brandishing a weapon, but not for mere possession of a weapon during commission of a crime.

### 3. The "Seriousness" of the Offense.

Probably the most important single criterion in Guideline sentencing is the "seriousness" criterion. Of the states that are known to have adopted Guidelines in recent years, most, if not all, have short-shrifted this criterion for one or more of several reasons. First, it is not possible to quantify seriousness on a ten-point, much less on a seven- or eight-point scale. At least twenty points should be used in distinguishing seriousness across the spectrum from the most dangerous offenses to the most trivial. Moreover, the Commission should offer brief but genuine reasons, via a commentary, for seriousness criteria; for instance, why should Rape be a 16 instead of an 18 or a 14, for instance?

Violent crime is what seems to be plaguing the Nation at the moment. Therefore, violent crime is "serious" and must be punished as such. But what constitutes "violent" crime? Beyond the obvious such as murder, robbery, and forcible sexual offenses, should such crimes as burglary and arson be deemed "violent?" What about drug trafficking, particularly in addictive contraband? How far removed from the "street" should a co-conspirator be and still be punished for the violence of his/her conduct? For instance, should a banker who intentionally "launders" drug money be punished as a violent offender, just as if he dealt in the dirty substances on the street? Offenses that may reasonably be expected to cause physical harm are

violent offenses and should be punished as such.

"White collar" crime may be viewed as being less-serious, at least in some respects. Today, we tend to witness this as a burgeoning category of offense, going far beyond what Edwin H. Sutherland had in mind when he coined the word nearly forty years ago. Is a drug banker a "white collar" criminal? We would say not, because of the physical injury his crime causes to victims. Is a large-scale securities con artist a "white collar" offender? We would say not, because of the psychological torture this kind of an offense can mean to victims of it. On the other hand, common offenses such as embezzlement, commercial bribery, and trade secret theft might be viewed more accurately as strictly "white collar" and be punished less-severely than most violent crimes.

#### 4. The Offender's Background.

Just as the seriousness factor cannot be quantified in fewer than twenty points, the offender's background can and should be so quantified in no more than three points: first offender (never before convicted of a serious crime); previous offender (convicted before of a serious crime, but on not more than two prior occasions); and recidivist (convicted before of three or more serious offenses). Currently, states try to typologize offenders in up to ten categories based upon prior record. A person who accumulates four felony convictions is a career criminal, no matter how one looks at it. No further "break(s)" ought to be given. No truly first offender convicted of any single offense (not in conjunction with other crimes) should be sentenced to imprisonment. The Commission should reject the "taste of jail" concept as far too expensive and without value. Previous offenders should not be entitled to probation, ordinarily,

and recidivists should be sentenced to lengthy terms of imprisonment without "good time" and without parole. Serious offenses committed by repeat offenders should no longer bring "newspaper sentences" but actual, predictable time.

Credit has to be given to a convicted offender, especially to a first offender, for positive aspects of his background. Thus, for instance, a politician convicted of a corrupt act should be evaluated in relation to the benefits he has provided to his community earlier. Older persons should be given credit for their positive life experiences, while young thugs must be punished for "taking away" without having "given" during their brief interactions with society. Thus, the Commission should encourage mitigation as well as aggravation in sentencing, but not out of sympathy, only as a result of evidence as to the offender's demonstrated worth from past deeds. Thus, the tax evader who has paid thousands of dollars to the Internal Revenue Service over a lifetime might be more forgiven for evasion during a single year than an evader who has rarely, if ever, paid significant taxes, either because of his youth, his lack of industriousness, or his consistent unwillingness pay taxes at all.

##### 5. Record Keeping.

States seem to be unreasonably slovenly in their record-keeping, not only as to offender criminal histories, but as to judicial sentences. Prosecutors seem unwilling or unable to allege, much less to document, the true and complete criminal histories of many convicted offenders. Moreover, state court judges seem unwilling to generate written sentencing reports, perhaps because they fear being monitored by the public; perhaps because of laziness or apathy. Federal jurists must keep proper records, and transmit the same to NCIC or a suitable repository from which records may be retrieved rapidly.

Offenders should be curtailed from "washing-out" multiple offenses by pleading guilty to one or to a few before authorities are able to identify and articulate their criminal case histories. Similarly, judges seem much too eager to impose sentences quickly, at the expense of researching thoroughly each offender's criminal record. Presentence investigations and reports should be mandatory before sentencing of potentially dangerous offenders, in particular, and these investigations (plus the resulting reports) should be certified by both probation officer (investigator) and prosecutor to be true and complete. Guideline sentencing can work only when it is the product of accurate information fully updated to moment of sentencing.

6. Revision of Guidelines.

The task of the United States Sentencing Commission is ongoing, and the Commission should take very seriously its monitoring responsibilities. Therefore, errors made in drafting initial Commission Guidelines may be rectified subsequently. However, Guidelines should not be undertaken against a premise that they will be fleeting concepts, here today but gone tomorrow. It is far easier to enact Guidelines initially than to revise and re-revise the same. In addition, too many revisions become confusing, and convicted offenders come understandably to regard them as being unfair. Justice should be swift and certain, but fair. So should be our sentencing Guidelines. The Commission must make every effort to formulate the correct set of Guidelines the first time around. It may not enjoy subsequent chances.

