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COMMENTARY ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES ISSUED BY THE UNITED STATES SENTENCING COMMISSION IN SEPTEMBER, 1986

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I. INTRODUCTION

This article is a result of an invitation extended to Mr. Silets by the members of the United States Sentencing Commission soliciting his comments on the proposed sentencing guidelines for criminal tax offenses. The Commission also invited comment on the general structure and/or animating rationale of the Preliminary Draft of the Sentencing Guidelines as issued by the Commission in September, 1986.[1]

This article addresses both issues: Section II discusses the general structure and rationale of the Preliminary Draft, and identifies the conceptual and practical difficulties that inhere in the concept of "modified real offense sentencing" as applied under the draft guidelines. Section III discusses the guidelines that have been drafted for tax offenses and explains how the aforementioned difficulties manifest themselves in this specific area.

II. "MODIFIED REAL OFFENSE SENTENCING"

The preliminary guidelines operate under a system of modified real offense sentencing that requires a judge to identify all relevant offense characteristics. These include unlawful acts or omissions that

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[1] *See infra* note 2.

were done in furtherance of the crime of conviction, as well as threatened, attempted, or completed injuries or harms that resulted therefrom.[2]

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[2] United States Sentencing Commission, Preliminary Draft of Sentencing Guidelines for the United States Courts, 51 Fed. Reg. 35,085 (proposed Sept., 1986). The Preliminary Draft is arranged in six chapters: Chapter One presents an "Introduction and Overview", Chapter Two defines "Offense Conduct", Chapter Three discusses "Offender Characteristics", Chapter Four is devoted to "Determining the Sentence", Chapter Five addresses "Violations of Parole and Supervised Release", and Chapter Six discusses such "Other Issues" as fines, organizational sanctions, plea agreements and offense values for multiple crimes.

As will be discussed in more detail, the Preliminary Draft is predicated upon "modified real offense sentencing" and upon the mathematical calculation of sentences by means of a series of "offense values" and "offender characteristics." *See id.* at 35,085-88. "Modified real offense sentencing" is discussed *infra* at notes 46-54 and accompanying text, along with the Draft's allocation of the burdens of proof and persuasion and its reliance upon the preponderance of the evidence standard.

The process by which a particular sentence is determined is described as follows:

> The court should follow the steps set forth below to determine sentence:
> 1. Determine what statutes the offender has been convicted of violating.
> 2. Refer to the Statutory Index and determine which section of Chapter Two [offense conduct] applies. If more than one section of Chapter Two is referenced, refer to each section and any application commentary to determine which is most appropriate to the offense before the court.
> 3. If the applicable section contains more than one base offense value, select the highest value that applies. Add special offense characteristics where applicable.
> 4. If the section contains a cross reference to one or more other sections, refer to those sections and proceed as in step 3 above.
> 5. Repeat steps 3 and 4 for each offense of conviction.
> 6. When all offenses have been scored, total the offense value.
> 7. Refer to Chapter Three [offender characteristics] for applicable adjustments in offense value(s). After applying an adjustment, always round down to the nearest whole number.
> 8. Apply an adjustment for role in the offense (Chapter Three, Part A). If the offender is convicted of more than one offense and plays different roles in each offense, determine which offense values apply to which offenses and apply the adjustment separately to each. Total the offense values after they have been adjusted, rounding down to the nearest whole number.
> 9. Determine whether the offender is entitled to an adjustment for post offense conduct (Chapter Three, Part B). If so, multiply the adjusted offense value from step 8 by the adjustment for post-offense conduct, rounding down to the nearest whole number.
> 10. Apply an adjustment for criminal history (Chapter Three, Part C) and multiply the adjusted offense value from step 9 by that adjustment, rounding down to the nearest whole number.
> 11. The new total is the offender's sanction unit score.
> 12. Refer to Chapter Four to determine the sentence.

As an example, the base offense value for homicide "level two," which is the offense of murder as committed in situations other than those involving terrorist acts, airplane hijackings and/or the assassination of a President or President elect, is 240. *Id.* at 35,089. If the offense involved the death of a government employee who was killed in or because of the performance of his or her official duties, then 36 is added to the base offense value. *Id.* If, however, the offense resulted from "reckless conduct that rises to the level of malice," then 100 is subtracted from the base offense value. *Id.*

The sentencing officer then proceeds to consider the offender characteristics that are listed in Chapter Three. *See infra* note 48. Once the appropriate adjustment has been made for offender characteristics, such as prior criminal history and role in the

According to the Commentary that was provided for this portion of the draft, the Commission was faced with the initial decision as to "whether to base its sentencing guidelines upon the real conduct in which the offender engaged or only the conduct for which the offender was convicted."[3] The Commission chose the former alternative because it felt that modified real offense sentencing was essential for the implementation of the new sentencing goals established by the Sentencing Reform Act of 1984.[4]

The Sentencing Reform Act redefined federal sentencing goals because Congress concluded that "[i]n the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation

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offense, the sentencing officer proceeds to determine sentence, based on the offender's "sanction unit score." 51 Fed. Reg. at 35,085.

For imprisonment, the Draft provides a table that transforms "sanction units" into months of imprisonment. *Id.* at 35,120-21. Assume that an offender was convicted of level two homicide, which carries a base offense value of 240 and that the offense was committed under circumstances entitling the offender to the 100 point deduction for "reckless conduct." A base offense score of 140 results. If the offender's prior criminal history required an upward adjustment of 9 (based on years served for prior offenses), then the final offense value, or sanction unit score, is 149. When this score is applied to the sanction unit table, it results in the imposition of a sentence of between "133-164" months of imprisonment. *Id.*

Although values differ for each offense, this analysis applies in every instance. For most offenses, the basic guideline includes cross references to other conduct that must be included in calculating the base offense value. *See, e.g., id.* at 35,084. In the example above, the cross references are (a) if the victim suffered psychological injury, and (b) if the death occurred in the course of another offense. *Id.* If either factor is present, then the offense value for that factor is added to the base offense value. *Id.* (Psychological injury is the subject of a separate guidelines and can add from 48 to 12 points to the base offense value.) *Id.* at 35,093-94.

The Preliminary Draft also notes that "[t]he following offenses are excluded in determining an offender's sentence under the guidelines:

1. conduct for which the offender has already been fully sanctioned;
2. conduct for which further prosecution is barred."

Id. at 35,086.

[3] *Id.* at 35,086.

[4] The rejected alternative is "a charge of conviction offense system [which] considers only those elements of behavior that formed part of the charge of which the offender was convicted." *Id.*

The Sentencing Reform Act of 1984, which is contained in Title II of the Comprehensive Crime Control Act of 1984, established the following goals for federal criminal sentencing:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . .

Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a)(2) (Supp. III 1985)(effective Nov. 1, 1987)(added by Pub. L. 98-473, tit. 2, § 212(a)(2), 98 Stat. 1989 (1984) and amended by Pub. L. 99-217, §§ 2 & 4, 99 Stat. 1728 (1985)). *See also* 51 Fed. Reg. at 35.

model."[5]

> Recent studies suggest that this approach has failed, and most sentencing judges . . . agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis . . . . Until the present sentencing statutes are changed, . . . judges . . . are left to exercise their discretion to carry out what each believes to be the purposes of sentencing.[6]

Although dissatisfied with the rehabilitative ideal, Congress did not consider it to be the critical flaw in the present system.

The critical flaw, according to Congress, was "the judge factor."[7] The "judge factor" is the role that judicial discretion plays in the articulation and imposition of sentences.

> [E]ach judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifi-

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[5] S. Rep. No. 225, 98th Cong., 1st Sess. 38 (1983). Senate Report No. 225 was issued to accompany S. 1762, 98th Cong., 1st Sess. (1984), which was a proposed Comprehensive Crime Control Act of 1984 that was passed by the Senate on February 2, 1984. *See* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3184-85. Much of Title II of the enacted Comprehensive Crime Control Act of 1984 was derived from the provisions of S. 1762. *See id.*

Attorney General William French Smith appeared before the Senate Committee and offered the following comments on the importance of sentencing reform:

> Of the improvements [under consideration by the Committee]. . . perhaps the most important are those related to sentencing criminal offenders. These provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing.

S. Rep. No. 225, 98th Cong., 1st Sess. 38 (1983).

[6] *Id.* at 40 (footnotes omitted). The report also includes the following comments on the unreliability of the rehabilitative ideal:

> The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.

Id. at 38. And the report goes on to criticize indeterminate sentencing:

> The sentencing provisions of current law were originally based on a rehabilitation model in which the sentencing judge was expected to sentence a defendant to a fairly long term of imprisonment. . . . The Parole Commission was charged with setting his release date if it concluded that he was sufficiently rehabilitated. At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of "coercive" rehabilitation, the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons.

Id. at 40. For a theoretical discussion of the reasons for the decline of "the rehabilitative ideal," see F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981). Allen also discusses the reasons for the increased popularity of punishment as retribution, or what he calls "just deserts." *See id.*; *see also* M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977).

[7] S. Rep. No. 225, 98th Cong., 1st Sess. 44 (1983).

> ably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another convicted of the very same crime and possessing a comparable criminal history may be sentenced to a lengthy term of imprisonment. . . .
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> These disparities . . . can be traced directly to the unfettered discretion the law confers on . . . judges . . . . This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts . . . might look.[8]

In order to eliminate disparities resulting from the conjoint effects of the rehabilitative ideal and the "judge factor," Congress set out to create a system which would ensure that sentences were consistent within certain parameters.[9] The system that resulted is founded upon determinate sentencing and a new concept, the sen-

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[8] *Id.* at 38 (footnote omitted). The original version of the quoted passage includes references to the Parole Commission, to which is attributed the responsibility for disparities in sentence *implementation*. *See id.* These references were deleted because they are irrelevant to the point at issue.

The drafters of the Sentencing Reform Act described the goals of the new measure in a report issued by the Committee on the Judiciary: "The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain." S. Rep. No. 223, 98th Cong., 1st Sess. 62 (1983). The report accompanying the Comprehensive Crime Control Act of 1984 included the following comment in its discussion of the necessity for the implementation of sentencing guidelines: "Recent studies indicate that sentences too often reflect the personal attitudes and practices of individual sentencing judges." S. Rep. No. 225, 98th Cong., 1st Sess. 53 n.72 (1983).

[9] This undertaking is predicated upon the assumption that sentencing disparities are inherently undesirable; this assumption results from the rejection of the rehabilitative ideal.

The rehabilitative ideal required that sentences reflect the pertinent idiosyncrasies of offenders and their offenses, because it conceptualized criminality as analogous to illness and susceptible to similar treatment. This conceptualization led to the assumption that there was an optimally "interventionist" sentence for each offender, and that the determination of this sentence was the province of the particular judge who had an opportunity to observe the offender and to inquire into his character and the circumstances of his offense. *See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 513-20 (1973); D. MELOSSI & M. PAVARINI, THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM (1981); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971). *See also* People *ex rel.* Forsyth v. Court of Sessions of Monroe County, 141 N.Y. 288, 36 N.E. 386 (1894)(upholding court's "inherent" power to suspend sentence in the presence of mitigating factors).

Although idiosyncratic sentencing is an essential element of the rehabilitative ideal, the rejection of the latter neither requires nor permits the rejection of the former. The eighth amendment's prohibition of "cruel and unusual punishment" has been interpreted to require that sentences be proportionate to the offense. Even the retributive ideal is predicated upon the concept of "just deserts," achieving some parity between the offense and the punishment imposed. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 284 (1983); Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 844 (1969). Indeed, the new act requires that the sentencing officer consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a)(2) (Supp. III

tencing guidelines.[10]

1985)(effective Nov. 1, 1987)(added by Pub.L. 98-473, tit. 2, § 212(a)(2), 98 Stat. 1989 (1984) and amended by Pub. L. 99-217, §§ 2 & 4, 99 Stat. 1728 (1986)).

It is this issue, the necessity for achieving some parity between the offense and the punishment imposed, that the Preliminary Draft fails to resolve. How can "modified real offense sentencing" achieve consistency and objectivity through the implementation of "categorical" sentences without sacrificing the idiosyncratic parity that is required by the eighth amendment and 18 U.S.C. § 3553(a)?

The legislative history of the Sentencing Reform Act reveals that, although the drafters rejected the rehabilitative ideal, they retained the concept of parity.

> The Committee does not intend that the [sentencing] guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983). The conflict between the language that is quoted above and the language that was quoted earlier, in the discussion of Congress' commitment to consistency and objectivity in sentencing, is not a matter that can be resolved in this essay. The purpose of this essay is, among other things, to point out the existence of the conflict, to suggest that the Commission consider the need to temper justice with mercy, and to consider modifying the guidelines to facilitate "the thoughtful imposition of individualized sentences."

[10] 28 U.S.C. § 991(b)(1) (Supp. III 1985)(added by Pub. L. 98-473, tit. 2, § 217(a), 98 Stat. 2017 (1984) and amended by Pub. L. 99-22, § 1(1), 99 Stat. 46 (1985)), provides that the Sentencing Commission is to "establish sentencing policies and practices" that

> (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. . . .

See also 28 U.S.C. § 994 (Supp. III 1985)("Duties of the Commission"). The court, in imposing sentence, is to consider the appropriate guidelines and directives that have been issued by the Commission. 18 U.S.C. § 3553(a)(4)-(5) (Supp. III 1985)(effective Nov. 1, 1987)(added by Pub. L. 98-473, tit. 2, § 212(a)(2), 98 Stat. 1989 (1984)).

"The Commission is established as an independent commission in the judicial branch, consisting of seven voting members appointed by the President by and with the advice and consent of the Senate." S. Rep. No. 225, 98th Cong., 1st Sess. 159 (1983). "In addition to the seven voting members, the Commission [has] one permanent non voting ex officio member, the Attorney General or his designee, and. . . one temporary non-voting ex officio member, the Chairman of the United States Parole Commission." *Id.* at 160.

The Commission has been given "twenty one specific powers. . . that may be exercised by majority vote of the members present and voting. . . ." *Id.* at 181; *see also* 28 U.S.C. § 995(a) (Supp. III 1985). The Commission has also been given the "power to. . . perform such other functions as are required to permit Federal courts to meet their responsibilities under section 3553(a) of Title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities." 28 U.S.C. § 995(a)(22) (Supp. III 1985).

"The sentencing guidelines to be developed by the Sentencing Commission are at

A. PURPOSE OF THE GUIDELINES

A primary goal of sentencing reform is the elimination of unwar-

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the heart of the congressional effort to curtail . . . judicial discretion, mitigate disparities in sentencing and inject more predictability into the process." Rezneck, *The New Federal Criminal Sentencing Provisions*, 22 AM. CRIM. L. REV. 785, 786 (1985). *See also supra* note 8.

In adopting a "a determinate sentencing system with sentencing guidelines," Congress was following an example set by the state of Minnesota. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 61 (1983). At the time the new legislation was drafted, Minnesota was the only state that was operating under such a system. *See id.* (citing MINN. STAT. ANN. §§ 244.04, .05, .08, .09 & .10 (West Supp. 1983)). The National Academy of Sciences conducted a study which concluded that

> the Minnesota sentencing reform had been more successful than any other State or local reform effort in . . . reducing unwarranted sentencing disparity, increasing emphasis on punishment for violent offenders, and avoiding unintended burdens on the prison system. . . .
>
> The . . . study concluded that the Minnesota sentencing guidelines system was more successful in changing sentencing behavior to reduce unwarranted sentencing disparities for three reasons. First, the sentencing guidelines were required by legislation rather than adopted voluntarily by the courts. Second, the guidelines prescribed what sentencing behavior ought to be rather than merely describing past sentencing practices. And third, the Minnesota statute included a mechanism availability of appellate review of all sentences outside the guidelines to assure judicial compliance with the guidelines. The study also found that Minnesota was able to create a model of its criminal sentencing system that permitted it to test the impact of any given set of sentencing guidelines on its prison system, thus enabling it to fashion guidelines that avoided any unintended impact on the prison system.

Id. at 62 (footnotes omitted)(citing NATIONAL ACADEMY OF SCIENCES, PANEL ON SENTENCING RESEARCH, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (A. Blumstein, J. Cohen, S. Martin & M. Tonry eds. 1983).

The Minnesota sentencing guidelines are predicated upon the following premises: (a) that sentencing should be neutral "with respect to . . . race, gender, social or economic status"; (b) that the severity of sentencing sanctions should be directly proportionate to offense severity and to the offender's criminal history; (c) that "incarcerative sanctions should be limited to those convicted of more serious offenses or those who have longer criminal histories"; and (d) that "departures from the presumptive sentences established in the guidelines should be made only when substantial and compelling circumstances exist." Minnesota Sentencing Guidelines and Commentary, 16 MINN. STAT. ANN. app. § I, at 299 (West Supp. 1987). To achieve these ends, the Minnesota guidelines are predicated upon a sentencing grid: "The presumptive sentence . . . is determined by locating the appropriate cell of the Sentencing Guidelines Grid. The grid represents the two dimensions most important in current sentencing and releasing decisions offense severity and criminal history." *Id.*, § II, at 300.

The sentencing grid is used to prescribe an offender's "presumptive sentence length[] in months," and ranges from a possible "one year and one day" sentence for unauthorized use of a motor vehicle to a possible 324 month sentence for second degree murder "with intent." *Id.*, § IV, at 330. (First degree murder is excluded from the guidelines because a state statute imposes a mandatory sentence of life imprisonment. *Id.*, § II.A, at 300.) The grid also determines whether the sentence is "presumptive commitment to state imprisonment" or whether it can include time in jail or non-jail time characterized by specified conditions of probation. *Id.*, § IV, at 300. Both the grid and the guidelines apply only to felonies. *Id.*, § I, at 299.

The grid is used to determine the offense severity level, which can range from I to X. The second factor is determined by calculating the offender's "criminal history index score." "[T]he offender is assigned one point for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing. . . ." *Id.*, § II.B.1,

ranted sentencing disparity. The [Act] requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing. He is then to determine which sentencing guidelines and policy statements apply to the case. Either he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics and impose sentence according to the guideline recommendation or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance and impose sentence outside the guidelines. A sentence outside the guidelines is appealable, with the appellate court directed to determine whether the sentence is reasonable. Thus, the [Act] seeks to assure that most cases will result in sentences within the guideline range and that sentences outside the guidelines will be imposed only in appropriate cases.[11]

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at 302. Points are only assigned for convictions within the last fifteen years. *Id.*, § II.B.1.d, at 303.

One point is added if the offender was "on probation or parole or confined in a jail, workhouse, or prison . . . or released pending sentencing at the time the felony was committed. . . ." *Id.*, § II.B.2, at 305. Offenders are assigned one unit for each misdemeanor conviction and two units for each "gross misdemeanor conviction"; four units equal one point on the criminal history index. *Id.*, § II.B.3, at 307. Offenders are assigned "one point for every two offenses committed and prosecuted as a juvenile that would have been felonies if committed by an adult. . . ." *Id.*, § II.B.4, at 309.

The Minnesota Supreme Court developed a "sentencing worksheet" which courts must use in determining a particular offender's status on the sentencing grid. MINN. SENTENCING GUIDELINES AND COMMENTARY § II(B)(4) at 329 (1985)(amended 1986). The worksheet includes sections for categorizing past and present offenses. *Id.* The section devoted to present offenses lists several "conviction offense modifiers," which include "attempt," "conspiracy," "firearm used" and/or "other dangerous weapon used/firearm possessed." *Id.* For a discussion of the substantive provisions of the Minnesota guidelines, see *infra* note 48.

The authors are convinced that the Minnesota guidelines have played an important role in the formulation of the Preliminary Draft both because of the Senate Report's reference to the Minnesota system and because an individual who was research director on the Minnesota Sentencing Guidelines Commission is on the staff of the United States Sentencing Commission. Although there are dissimilarities between the two systems, it is apparent that the Minnesota guidelines had an influence on the Preliminary Draft.

The general structure of the two systems is similar. Both systems rely on mathematical calculations as the means for determining the offender's "presumptive sentence." *See id.*, § IV, at 329. The Preliminary Draft substitutes a table of sentence lengths for the Minnesota sentencing grid, but the general analysis involved in the two procedures is strikingly analogous. Each system predicates its calculations on offense and offender characteristics, and both emphasize that what the Minnesota system refers to as the "presumptive sentence" is to be imposed absent compelling considerations to the contrary. *See id.*, §§ II(A)-(D).

[11] S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983)(footnotes omitted).

> The court shall impose a sentence of the kind, and within the range [established by the Sentencing Commission] unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described [therein].

18 U.S.C. § 3553(b) (Supp. III 1985)(effective Nov. 1, 1987)(added by Pub. L. 98-473,

A subsequent enactment, the Sentencing Guidelines Act of 1986,[12] "provide[d] the . . . Sentencing Commission [with] limited, additional discretion in the promulgation of sentencing guidelines."[13] The legislative history for this measure described the Commission's role as follows:[14]

> The [Sentencing Reform] Act requires a sentencing judge to impose a sentence authorized by the applicable sentencing guideline. A judge may go outside the applicable guideline, but only if [he] finds . . . an aggravating or mitigating factor that was not adequately considered when the guidelines were formulated and that should lead to a sentence different from that called for by the applicable guideline. *The judge, moreover, is not encouraged to go outside of the applicable guideline, for if the judge does, the aggrieved party is entitled to appeal the sentence. It is clearly intended that judges will confine their exercise of discretion to choosing a point within the range (if any) specified in the applicable guideline. Thus, the Sentencing Reform Act really vests most of the sentencing discretion in the United States Sentencing Commission, the body responsible for drafting the sentencing guidelines.*[15]

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tit. 2, § 212(a)(2), 98 Stat. 1989 (1984) and amended by Pub. L. 99-217, §§ 2 & 4, 99 Stat. 1728 (1985)).

12 Pub. L. 99-363, 100 Stat. 770 (1986).

13 H.R. Rep. No. 99-614, 99th Cong., 2d Sess. 2 (1986).

14 No Senate Report was issued for this enactment; the quoted material is excerpted from the House Judiciary Committee Report accompanying H.R. 4801, the measure that became the Sentencing Guidelines Act of 1986. *See* U.S. CODE CONG. & ADMIN. NEWS 1762 (1986).

15 H.R. Rep. No. 99-614, 99th Cong., 2d Sess. 2-3 (1986)(footnotes omitted and emphasis added). *See also id.* at 4 ("The Act . . . places . . . limitations on the Commission's discretion, but these limitations do not seriously restrict the Commission or prevent it from issuing such guidelines as it deems appropriate.").

In the passage that immediately precedes the above quoted material, the report notes that although the Act appears to give the judge greater control over the punishment that is meted out, by abolishing parole and halving good time credit, "other provisions of the Sentencing Reform Act reduce judicial control." *Id.* at 2.

Although the Act does not specifically authorize appeals from sentences that are within the applicable guideline(s), it appears that such appeals are possible. *See, e.g., id.* at 3 n.8.; Conyers, *Unresolved Issued in the Federal Sentencing Reform Act*, 32 FED. B. NEWS & J. 68, 69-70 (1985).

The Sentencing Commission is specifically charged with accomplishing "two basic purposes," which are codified at 28 U.S.C. section 991(b) and described in the legislative history as follows:

> The most important purpose of the Commission is the establishment of sentencing policies and practices for the Federal criminal justice system that are designed to meet three goals.
>
> First, the policies and practices established should assure that, to the maximum extent possible, the Federal sentencing practices and policies carry out the four purposes of sentencing set forth in section 3553(a)(2) of Title 18, United States Code. These purposes are deterrence, protection of the public from further crimes by the defendant, assurance of just punishment, and promotion of rehabilitation.
>
> Second, the policies and practices are required to provide certainty and fairness in meeting the purposes of sentencing. . . .
>
> Third, the sentencing policies and practices are required to reflect, to the ex-

Judges are "not encouraged to go outside of the applicable guideline," therefore, judicial discretion will be confined to applying the appropriate guideline(s).[16] The constraints on judicial discretion will transform sentencing into a formalistic exercise predicated upon the assessment of "offender characteristics," "offense severity" ratings and permutations thereof. Because the sentencing guidelines are the final arbiter of this process, they must be

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tent practicable, advancement in knowledge of human behavior in the context of the criminal justice process. . . .

The second basic purpose of the United States Sentencing Commission is to develop means of ensuring the effectiveness of different sentencing, penal, and correctional practices in meeting the purposes of sentencing set forth in section 3553(a)(2) of Title 18.

S. Rep. No. 225, 98th Cong., 1st Sess. 161-62.

[16] The validity of this conclusion is reinforced by the statement which the President issued upon signing the Sentencing Guidelines Act of 1986. *See* U.S. CODE CONG. & ADMIN. NEWS 1770-71 (1986). The Act amended 28 U.S.C. § 994(b), which is concerned with guidelines that "establish a sentencing range" for a particular offense. As amended, 28 U.S.C. § 994(b) provides that

> [i]f a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than *the greater of 25 percent or 6 months, except that, if the [minimum] term of the range is 30 years or more, the maximum may be life imprisonment.*

28 U.S.C. § 994(b) (Supp. III 1985)(amended by Pub. L. 99-363, 100 Stat. 770 (1986)(emphasis added and technical correction included). *See, e.g.*, statement of President Reagan upon signing H.R. 4801, U.S. CODE CONG. & ADMIN. NEWS 1770-71 (1986). The original version provided that the maximum of the range was not to exceed the minimum "by more than 25 per centum." *See* 28 U.S.C. § 994(b) (Supp. III 1985)(added by Pub. L. 98-473, tit. 2, § 217(a), 98 Stat. 2019 (1984)).

The amendment was prompted by concern that the "25% rule" would "creat[e] problems for the Commission in drafting guidelines calling for short terms of imprisonment," the concern being that "the 25% rule would result in such a proliferation of guideline ranges that it would be virtually impossible to draw enough meaningful distinctions to justify all of the guideline ranges." H.R. Rep. 99-614, 99th Cong., 2d Sess. 5 (1986). The amendment was also prompted by the concern that there was "no way to compute the minimum term of imprisonment in a range where the maximum term is life imprisonment." *Id.* at 6 (quoting *Testimony of William W. Wilkins, Jr. before the House Judiciary Committee, Subcommittee on Criminal Justice, on H.R. 4801*, at 3 (1986)).

In approving the amendment, President Reagan issued a statement, the language of which reveals the minimal role that judicial discretion is to play under the new sentencing scheme.

> I am today approving H.R. 4801, but I do so with serious reservations. . . . The purpose of the Sentencing Reform Act, which I submitted to the Congress as part of the Comprehensive Crime Control Act of 1983, was to establish a determinate sentencing system with narrow sentencing ranges for criminal offenses. *The range of up to six months provided in this bill is far in excess of what we visualized in 1983 and, if implemented by the Sentencing Commission, would restore an undue measure of discretion to judges that could threaten to undermine the core purpose of the Sentencing Reform Act to establish fairness and certainty in sentencing by confining judicial discretion within a relatively narrow range.*

Statement by President Reagan upon signing H.R. 4801, U.S. CODE CONG. & ADMIN. NEWS 1770-71 (1986)(emphasis added). It is difficult in light of the present system to understand why a range of six months represents the bestowing of "an undue measure of discretion" upon sentencing judges.

drafted to avoid uncertainty, ambiguity and bias toward either the prosecution or the defense, while aggressively promoting the fundamental requirements of due process and ensuring that humanistic and policy considerations play some role in the imposition of penal sanctions.

This is, of course, a Herculean task.[17] This article points out certain respects in which the Sentencing Commission has not carried out its task to its necessary fruition. The next section below discusses these issues and explains why they are matters of great concern to those who represent defendants in federal criminal proceedings.

B. BURDENS OF PROOF AND PERSUASION

The sentencing guidelines are intended to transform sentencing into an exercise unenlightened by the interposition of judicial idiosyncracy. The realization of this ambition requires (1) a complete restructuring of the policies and practices of the federal sentencing system, since that system is and always has been predicated upon the concept of judicial discretion, and/or (2) a careful evaluation of existing policies and practices to determine which, if any, are constitutionally acceptable in the absence of discretionary sentencing.

The former alternative represents an undertaking of gigantic magnitude. Although the Preliminary Draft is offered as the successful culmination of this undertaking, it founders upon the rocks of the second alternative. That is, the central defect of the Preliminary Draft is that it attempts to retain practices and doctrines that were developed for a system of discretionary sentencing. Because these concepts were designed to assist a judicial officer in the informed exercise of his sentencing discretion, they are animated by considerations that are necessarily different from, and often antithetical to, the considerations that inhere in the new, determinate sentencing system.

This proposition is best illustrated by means of an example, and the best example is the Draft's allocation of the burdens of production and persuasion:

> In determining the appropriate sentence under these guidelines, the court may rely on any information produced at trial, in the presentence report, or at the sentencing hearing that the court finds is supported by a preponderance of the evidence. . . .[18]

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[17] For one commentator's assessment of "the magnitude of the task facing the Sentencing Commission," see Rezneck, *supra* note 10, at 788-90.

[18] The omitted material is a citation to 18 U.S.C. § 3577, which was redesignated,

> 1. The court may find that an offense characteristic exists or an adjustment factor applies if a preponderance of the evidence supports such finding.
> 2. The burdens of production and persuasion as to the existence of an offense characteristic or an adjustment factor shall be on the government unless the offense characteristic or adjustment factor mitigates the potential sentence in which case the burdens of production and persuasion shall be on the offender.[19]

The Commentary informs us that the "less demanding" preponderance of the evidence standard was chosen over "either the beyond a reasonable doubt standard used to determine the defendant's guilt or a clear and convincing evidence standard" because

> [t]he use of the preponderance standard at sentencing was recently upheld in *McMillan v. Pennsylvania*, — U.S. —, 106 S. Ct. 2411 (1986). In *McMillan*, the Court examined a Pennsylvania statute that permitted a judge to impose a mandatory minimum sentence of five years for specific felonies when the judge found by a preponderance of the evidence that the offender "visibly possessed a firearm."
>
> The Court found that establishment of the preponderance standard was permissible under the Due Process clause, and noted that "sentencing courts have always operated without constitutionally imposed burdens of proof; embracing petitioners' suggestion that we apply the clear and convincing standard here would significantly alter criminal sentencing, for we see no way to distinguish the visible possession finding at issue here from a host of other express or implied findings sentencing judges typically make on the way to passing sentence."[20]

As support for its holding that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all," the *McMillan* Court relied upon *Williams v. New York*.[21]

1. Williams v. New York

Williams v. New York[22] involved a challenge to the imposition of the death penalty. A jury found Samuel Titto Williams guilty of first degree murder and recommended that he be sentenced to life imprisonment.[23] The recommendation was not binding upon the

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effective November 1, 1987, as 18 U.S.C. § 3661 by the Comprehensive Crime Control Act of 1984. *See* 51 Fed. Reg. at 35,085. Title 18 U.S.C. § 3557 (1982) provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

19 51 Fed. Reg. at 35,085.

20 *Id.* (quoting *McMillan*, 106 S. Ct. at 2420 n.8).

21 337 U.S. 241 (1949).

22 *Id.*

23 *Id.* at 242-44.

court, which was authorized to impose the death penalty notwithstanding the jury's recommendation.[24] The court sentenced Williams to death.[25] In imposing the sentence, "the judge gave reasons why he felt that the death sentence should be imposed."[26] The "reasons" included "the shocking details of the crime, as shown by trial evidence" and additional information that had not been presented to the jury but that was presented to the court in the report of the pre-sentence investigation.[27]

Although Williams did not contest "[t]he accuracy of the statements made by the judge as to [his] background and past practices," he did attack the sentence as having been imposed in violation of the requirements of due process.[28] The Supreme Court rejected his challenge in a thoughtful opinion that analyzed the evidentiary and procedural considerations implicated in imposing "sentence upon an already convicted defendant."[29]

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law . . . .
>
> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender . . . . Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences . . . have . . . taken the place of the old rigidly fixed punishments . . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation . . . have become important goals of criminal jurisprudence . . . .
>
> [I]ndeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. . . . [A] strong motivating force for the[se] changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.[30]

In the above-quoted excerpts and in the even more lengthy analysis contained in the opinion, the Court made it very apparent

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[24] *Id.*

[25] *Id.* at 244.

[26] *Id.*

[27] *Id.* The "additional information" concerned Williams' involvement in " 'thirty other burglaries in and about the same vicinity' where the murder had been committed" and "certain activities . . . as shown by the probation report that indicated [that Williams] possessed 'a morbid sexuality' and classified him as a 'menace to society.' " *Id.*

[28] *Id.* at 244-45.

[29] *Id.* at 244.

[30] *Id.* at 246-50 (citations omitted).

that its ruling was predicated upon a sentencing scheme the central features of which were judicial discretion and indeterminate sentencing as the instrument for effecting rehabilitation and reformation.[31] In this scheme, since discarded by the Sentencing Reform Act of 1984, the sentencing officer's role is analogous to that of a treating physician. The judge's obligation is to "diagnose" the sources and circumstances of the offender's propensity for malefaction and then to impose a sentence that is optimally calculated to eliminate this propensity and restore the offender "to complete freedom and useful citizenship."[32]

Because the judge's role is that of diagnostician, he must be provided with complete information about the offender's background and potential for rehabilitation. Only then can he formulate a sentence that is calculated to achieve the desired ends.

2. Williams *and the Preliminary Draft*

Williams' holding was delivered in a factual context that was very different from that which would exist if the guidelines of the Preliminary Draft were implemented. Under the guidelines, and under the Sentencing Reform Act of 1984, sentencing is no longer an exercise in discretion, rather, it is an exercise in calculation. The sentencing officer is required to calculate the offender's score on a variety of pertinent characteristics and then, through a mathematical exercise, determine the sentence that must be imposed.[33]

Under the new guidelines, *Williams*' "additional information" ceases to be a resource to be used by a judicial officer in the exercise of his informed discretion and becomes the determinant of the sentence that will be imposed. Under the old system, the sound judgment of the sentencing officer was a reliable check on any potential abuse of the information because he controlled sentencing and was therefore free to disregard or use the "additional information" as he saw fit.[34] This discretion permitted the relaxation of certain evidentiary and procedural requirements. Under the proposed guidelines, however, "additional information" becomes evidence that is presented at what would certainly become an adversarial proceeding, the sentencing hearing.

The premise of the old sentencing paradigm was that information was provided to the court to assist it in the informed exercise of

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[31] *See id.*

[32] *Id.* at 249. *See also id.* at 248 nn.10 & 13; *id.* at 249 n.14.

[33] *See, e.g.*, 51 Fed. Reg. at 35,085.

[34] *See, e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 38-56 (1983).

its sentencing discretion. Under the new paradigm, as represented by the proposed guidelines, the purpose of the information is dramatically changed. The parties are invited to present evidence relating to aggravating or mitigating factors. Although it is not spelled out in the guidelines, once the government has presented evidence supporting the existence of aggravating factors, it logically follows that the burden necessarily shifts to the defendant to rebut the government's evidence.

This shift in the burden of proof, coupled with the provisions of 18 U.S.C. section 3661,[35] puts the defendant in a perilous position. The Commentary states that the preponderance of the evidence standard comes into play "[w]hen a sentencing fact is disputed."[36] The government is free to introduce any and all evidence of "the background, character, and conduct" of a convicted defendant.[37] Does this mean that the defendant faces the sentencing equivalent of a directed verdict if he does not, and cannot, introduce evidence controverting the evidence that has been submitted in support of aggravation? Or, does it mean that the court is free to ignore uncontroverted evidence under some as-yet unexplicated standard?[38]

The Commentary also notes that "[t]he judge may admit all evidence that is relevant and reliable except for evidence that is barred by evidentiary rules."[39] The crucial question is "relevant to what?" As the *Williams* Court noted:

> Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. . . . A sentencing judge, however, is not confined to the narrow issue of guilt.[40]

Because the new sentencing paradigm rejects judicial discretion and the rehabilitative ideal, a judge no longer can rely upon these concepts as the rationale for conducting a free-wheeling inquiry into the nature of the offender's character. This means, therefore, that the

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35 *See supra* note 18.

36 51 Fed. Reg. at 35,088.

37 *Id.*

38 If this is the intention, then the Preliminary Draft has retained the concept of judicial discretion despite its ambitions and instructions to the contrary.

39 51 Fed. Reg. at 35,088.

40 337 U.S. at 246-47.

new sentencing paradigm must articulate equivalent concepts to guide the conduct of the sentencing inquiry.

Absent the articulation of such concepts, the reference to "relevant" evidence becomes meaningless. If the guidelines are going to be meaningful and practicable, they must define the scope of the inquiry at the sentencing hearing. Otherwise, the government will be free to introduce evidence of the defendant's bad character and thereby require the defendant to refute whatever has been said against him or face the equivalent of a directed verdict on the issue of aggravation. Such a result could turn the sentencing hearing into an instrument of abuse.

This problem raises a related issue, namely, whether the judge's determination, as a fact-finder, will be subject to appellate review under a sufficiency of the evidence standard. Assume the following hypothetical circumstances: At the sentencing hearing, the government puts in "some" evidence of the existence of aggravating factors; the defendant is unable or elects not to put in controverting evidence, and the court imposes an aggravated sentence based upon the evidence adduced by the government. Can the defendant then seek appellate review, arguing that the evidence was insufficient to support the imposition of an aggravated sentence? If so, what standard will be used to determine whether the evidence was sufficient?[41] What, in other words, is necessary to establish a prima facie

[41] If appellate review of the sufficiency of the evidence is not permissible, then the Preliminary Draft effectively reinstates discretionary sentencing without, however, including the moderating effects of a sentencing system that is predicated upon a commitment to rehabilitation and its attendant guarantees. That is, if no review is permitted, then the defendant is thrown to the ungoverned mercies of the government and of the sentencing court. Although the court may be constrained by the number of offender and offense characteristics that are conceivably relevant to the matter that is before it, the court could predicate findings of aggravating factors upon little or no evidence, thereby imposing a sentence that is far harsher than is actually warranted.

In enacting the Sentencing Reform Act of 1984, Congress was concerned about "the judge factor," the frequency with which sentences reflect the predilections of particular jurists rather than the objective realities of the offense and the harm inflicted. *See, e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 41-56 (1983). Assuming, *arguendo*, that "the judge factor" can and should be eliminated, the fact remains that the Preliminary Draft fails to do so. If there is no appellate review of the sufficiency of the evidence supporting a particular sentence determination, then, under the circumstances assumed herein and in the text above, judges will be free to indulge their predilections by manipulating their findings on certain criteria, including aggravating and mitigating factors.

Assume, for example, that a particular judge has a strong "prosecution bias." That judge is therefore likely to utilize a very low evidentiary threshold for finding the existence of aggravating factors. As a result, his sentences will be more severe than those imposed by a "defense oriented" judge who requires a substantial evidentiary foundation before he will incorporate aggravating factors into his sentences.

Perhaps it is impossible to eliminate all vestiges of idiosyncratic sentencing, and it may undesirable to do so. The author's concern, however, is that the Preliminary Draft

"case" in aggravation or, for that matter, in mitigation? If review is available, is it necessary to make the equivalent of a motion for directed verdict at the close of the government's "case" in order to avail oneself of that possibility for relief?

Further, is discovery available to assist the parties in their respective roles in the sentencing hearing? That is, can the defendant obtain discovery from the government (a) in aid of his attempting to establish the existence of mitigating factors and/or (b) to enable him to rebut government-adduced evidence of aggravating factors?

The determination of the discovery issue requires the resolution of the nature of the sentencing hearing: Is this proceeding a continuation of the criminal proceeding or is it a civil proceeding akin to that instituted by the filing of a petition for habeas corpus?[42] One would assume that the sentencing hearing is a continuation of the criminal proceeding except that the Commission adopted a preponderance of the evidence standard, which suggests that the Commission views it as somehow analogous to civil, post-conviction relief proceedings.

If the proceeding is civil in nature, do the discovery provisions of the Federal Rules of Civil Procedure apply? Conversely, if the proceeding is a continuation of the criminal matter, is discovery confined to the limits of Rule 16 of the Federal Rules of Criminal Procedure? In either eventuality, how much time is to be allowed for discovery and for general preparations for the sentencing hearing?

The Commentary indicates that "[t]he parties will have the right to present and to cross-examine witnesses."[43] Does this mean that, prior to the commencement of the hearing, the parties will have the right to depose each other's witnesses, to ascertain what

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establishes a system with a distinct "prosecution" bias. If federal sentencing is to proceed according to a categorical paradigm, as opposed to a discretionary one, then the categories of that system must be completely value neutral if they are to serve the ends of justice and the goals identified in 18 U.S.C. § 3553(a)(2).

[42] Habeas corpus is a separate civil action and not a further step in the criminal case. *See, e.g., Ex parte* Tom Tong, 108 U.S. 556, 559 (1883); Advisory Committee Note, Orders of the Supreme Court of the United States Adopting and Amending Rules Governing Proceedings in the United States District Courts 28 U.S.C. § 2255.

[43] 51 Fed. Reg. at 35,088. The *Williams* Court offered the following comments on the use of witnesses at sentencing:

> We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross examination. . . . The type and extent of this information make totally impractical if not impossible open court testimony with cross examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

337 U.S. at 250.

they are likely to say? If so, what use can be made of such depositions? Can these depositions, for example, be introduced at a subsequent criminal proceeding in order to impeach and/or convict a witness who offered testimony at the sentencing hearing? Can they be used as discovery devices by prosecutors who are interested in initiating new investigations into issues tangential to those raised at the sentencing hearing? Can these depositions be admitted into evidence at grand jury proceedings? Finally, can "live" testimony offered at the sentencing hearing be put to any of these uses?[44]

Do the provisions of the Jencks Act apply to sentencing hearings, requiring the government to produce "any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified"?[45] If so, is the defendant subject to a "reverse Jencks" obligation to produce statements in *his* possession?

It would be possible to continue on in this vein, but the purpose of this discussion is not to offer every specific objection that might be made to the Preliminary Draft. Rather, the purpose is to point out that the conceptual rationale of the proposed guidelines is flawed insofar as it attempts to retain certain aspects of the old sentencing paradigm while forcing them into the confines of a new and radically different paradigm.

3. "Modified Real Offense Sentencing"

The Sentencing Reform Act of 1984 drastically revised the rationale and procedures of sentencing in the federal system. As the *Williams* Court noted, judicial discretion is a venerable feature of Anglo-American justice, and its influence and effect is implicit in all of our sentencing practices and assumptions. It is not possible to engraft a new sentencing system onto these practices and assumptions without ascertaining whether, and to what extent, they are

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[44] These questions are intended to illustrate the fact that the sentencing hearing could very easily become an instrument of abuse, a device which the government could use as a "fishing expedition" into the existence and particulars of suspected but as yet unconfirmed offenses. Under the guidelines as written, the government could offer evidence that could not be admitted at trial because it was insufficient to establish the commission of any criminal offense beyond a reasonable doubt. This evidence could be used by the government (a) to obtain sentence aggravation if the defendant was unable to refute it, and/or (b) to develop leads that might be used in other investigations. The latter possibility, of course, would exist if and when the defendant chose to present evidence controverting the government's "case" against him. It is easily foreseeable that the government might be persuaded to put on a remarkably tenuous "case" in order to force the defendant to put on evidence that might save himself while jeopardizing the future of others.

[45] *See* 18 U.S.C. § 3500 (1982).

constitutionally permissible under a system that discards judicial discretion and replaces it with a structured, almost categorical sentencing procedure.

The allocation of the burdens of production and persuasion is the perfect example of this proposition. Under a discretionary system, the focus of the inquiry is the individual and the measures that are necessary to ensure that he is adequately sanctioned for his criminal conduct and is "re-formed" into a productive member of society. Because the focus of inquiry is the individual, and prophylactic intervention in the course of his life, the sentencing officer is provided with the widest possible information about the individual's life. The assumption underlying this approach is that the officer will exercise his discretion in a reasonable, responsible manner that is calculated to achieve these ends.[46] This assumption was responsible for the Supreme Court's decision in *Williams*,[47] and this same assumption underlies all the existing sentencing practices and policies.

Under the new paradigm, however, the focus of inquiry shifts. The Preliminary Draft is predicated on "modified real offense sentencing," thus the focus of inquiry becomes "all the harms that the offender actually caused during the course of the conduct for which he was charged."[48] Although this concept is never specifically de-

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46 *See also* United States v. Tucker, 404 U.S. 443 (1972). The present system enforces this assumption, of course, through the present provisions of Rule 35 of the Federal Rules of Criminal Procedure. *See, e.g.*, FED. R. CRIM. P. 35 (effective until Nov. 1, 1987).

47 The Preliminary Draft predicates its allocation of the burdens of production and persuasion on the holding in McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986). *See* 51 Fed. Reg. at 35,085. This predication is misplaced, however, because it is based upon an impermissible generalization of a situation specific holding. The issue in *McMillan* was the permissibility of employing the preponderance of the evidence standard in finding the existence of a particular aggravating factor. *See* 106 S. Ct. at 2416-17. As is discussed in more detail in Section II(C), *infra*, the Court upheld the use of the standard in the narrow context presented in *McMillan* without doing violence to the principles that were responsible for the Court's holding in *Williams*.

48 51 Fed. Reg. at 35,086. The differences between the two systems are dramatically highlighted by the material contained at Part E of Chapter Three of the Preliminary Draft. Chapter Three is devoted to "offender characteristics," and includes issues such as "role in the offense" (Part A), "post offense conduct" (Part B), "criminal history" (Part C), and "plea agreements" (Part D). Part E is "other offender characteristics." *See* 51 Fed. Reg. at 35,114-15. The "other offender characteristics," as listed in Part E, are:

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

fined, the Draft notes that it includes "only those real elements (not

8. community ties;
9. role in the offense;
10. criminal history; and
11. degree of dependence upon criminal activity for a livelihood.

Id. at 35,120. As noted above, the last three characteristics are addressed in preceding sections of Chapter Three. Characteristics 1 through 8, however, are not addressed in the Preliminary Draft. *See id.*

The Commentary notes that the Commission has not decided how the unaddressed characteristics should be factored into the sentencing process. *Id.* Several suggestions have been made, one of which is "allow[ing] the court the discretion to consider one or more [of] them, as appropriate, in setting the sentence within the 25 percent range." *Id.*; *see supra* note 16. The fact that these factors, which are a primary concern in sentencing under the present, "rehabilitative" system, have been allowed to languish unconsidered and unaddressed vividly illustrates the dramatic difference between the old and new sentencing systems.

The Preliminary Draft departs from the Minnesota guidelines as follows: The Minnesota guidelines are predicated upon the "offense severity level [which] *is determined by the offense of conviction.*" Minnesota Sentencing Guidelines and Commentary, 16 MINN. STAT. ANN. app. II.A (West Supp. 1987)(emphasis added). The Minnesota draftsmen chose this predicate because they "thought that serious legal and ethical questions would be raised if punishment were to be determined on the basis of alleged, but unproven behavior, and prosecutors and defenders would be less accountable in plea negotiation." *Id.*, § II.A.01, at 300 (comment).

In the Minnesota system, felonies "are arrayed into ten levels of severity, ranging from low (Severity Level I) to high (Severity Level X)." *Id.*, § II.A, at 300. The most frequently occurring offenses within each severity level are listed on the vertical axis of the Sentencing Grid. *Id.* The severity level for infrequently occurring offenses is determined by consulting a special table of offenses. *Id.* "The offense of conviction determines the appropriate severity level." *Id.*, § II.C, at 311.

The severity level and the offender's criminal history are used to calculate the presumptive sentence, which is to be imposed absent compelling considerations to the contrary. *Id.*, §§ II.C-D, at 311-14. The guidelines list "[f]actors that should not be used as reasons for" departing from the presumptive sentence. *Id.*, § II.D.1, at 314. These factors include race, sex, employment history and impact of sentencing on profession or occupation, educational attainment, marital status and "living arrangements." *Id.*

Factors that can be used to permit a departure from the presumptive sentence include both aggravating and mitigating factors. *Id.*, § II.D.2, at 315. Aggravating factors include the victim's peculiar infirmities, the offender's unusual cruelty, "major controlled substance offense[s]," conviction for inflicting injury in the course of committing a felony when the offender has prior convictions for similar conduct, and committing "a major economic offense." *Id.*, § II.D.2.b, at 316-17.

Mitigating factors include the victim's aggressive role in the incident that led to injury, the offender's minor role in the offense, the offender's commission of the offense due to physical and/or mental impairment not attributable to drugs or alcohol, the offender's having committed the offense due to coercion or duress, and "[o]ther substantial grounds . . . which tend to excuse or mitigate the offender's culpability although not amounting to a defense." *Id.*, § II.D.2.a, at 315-16. The factors cited, however, are merely "illustrative." Neither the aggravating nor the mitigating factors are "intended to be an exclusive or exhaustive list of factors" for departing from presumptive sentences. *Id.*, § II.D.2.01, at 318 (comment).

The guidelines prescribe the considerations that are to be utilized in determining whether sentences are consecutive or concurrent. The guidelines also provide that whenever a mandatory minimum sentence is prescribed for a particular offense, the presumptive sentence is the mandatory minimum sentence or "the duration . . . provided in

necessarily found as elements of the crime charged) that are importantly bound up with the conduct that constitutes the crime charged."[49]

One wonders what "real elements" of a criminal offense are if they are not "elements of the crime charged." The unfortunate suspicion is that they are, or are likely to become, conduct and circumstances for which the government was unable or unwilling to return an indictment. That is, this open ended definition of "real elements" would permit the government to introduce evidence that was too tenuous to support either the return of an indictment or a conviction beyond a reasonable doubt but which could withstand the attenuated procedural requirements of the sentencing hearing.

Under the existing system, the court could disregard such tenuous evidence and enter the sentence that it deemed appropriate. Under the new system, as outlined in the Preliminary Draft, the court would apparently not be able to disregard evidence presented by the government unless the defendant was able to controvert it by introducing sufficient evidence to satisfy the preponderance of the evidence standard.[50] This change is a *de facto* reallocation of what had been a value neutral burden of proof. The parties, under the present system, are both free to introduce evidence in aggravation or mitigation, the focus of inquiry being the offender's peculiar characteristics and his potential for rehabilitation. Under the new system, the government is free to introduce any evidence that is conceivably relevant to "the real conduct in which the offender engaged."[51] This means that the defendant is very likely to find himself in the position of having to prove that he is innocent of conduct for which he has not been charged. The government is therefore given the opportunity to ignore the requirement that conduct be proven "beyond a reasonable doubt" before sanctions can be imposed.

This unfortunate state of affairs is the direct result of predicating sentencing on "modified real offense sentencing." Since the aim of the Sentencing Reform Act of 1984 and of the guidelines to

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the appropriate cell of the Sentencing Guidelines Grid, whichever is longer." *Id.*, § II.E, at 318. The Minnesota guidelines provide that "[t]he presumptive sentence length for those convicted of attempted offenses or conspiracies to commit an offense is one half the duration provided . . . for the completed offense." *Id.*, § II.G.01 (comment).

49 51 Fed. Reg. at 35,087.

50 As noted above, it is unclear whether the court could disregard the evidence if it found that it was insufficient to establish the government's prima facie case, however that concept is defined.

51 51 Fed. Reg. at 35,086. This is as opposed to "only the conduct for which the offender was convicted." *Id.*

be promulgated thereunder is to standardize sentencing and to ensure that it proceeds, as nearly as possible, "categorically," the logical solution is to predicate the system on a "charge of conviction offense system." Such a system "considers only those elements of behavior that formed part of the charge of which the offender was convicted."[52]

If the goal is ensuring that sentences are standardized across offense categories, then predicating the sentence on a charge of conviction offense system would achieve this goal without entangling the sentencing court in a lengthy, complex and possibly unfair inquiry into the "real" circumstances of the affair.[53] Predicating sentencing on a charge of conviction offense system would mean that a sentence could be imposed based on the evidence introduced at trial; this, in turn, would protect the defendant by ensuring that sentencing decisions are based on facts that were established beyond a reasonable doubt.

This alternative also proceeds on the constitutionally irre-

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[52] *Id.*

[53] Indeed, the net effect of the Draft's reliance upon "modified real offense sentencing" is to exacerbate the unfortunate effects attendant upon what Congress referred to as "the judge factor." *See* Section II(A), *supra*. That is, the proposed system is a semi-categorical sentencing system that relies upon offense characteristics which are extraneous to the charged offense in calculating its "sanction units." *See, e.g.*, 51 Fed. Reg. at 35,085 & 35,120. In relying upon factors that are extraneous to the charged offense, the proposed guidelines deprive the convicted offender of the right to be punished only for conduct that has been proven beyond a reasonable doubt, and thereby heightening the potential for sentences that reflect judicial prejudices and/or vindictiveness.

If the substitution of a charge of conviction offense system is found unacceptable, then the final guidelines should incorporate a rule of the type discussed in the Commentary to the guidelines for the application of modified real offense sentencing. *See id.* at 35,088. The rule in question would allow a sentencing officer to consider "all real offense elements unless any such element constitutes a separate crime, in which case the government must charge that offense separately." *Id.*

The proposed guidelines reject both this rule and a rule allowing "the sentencing judge to consider all conduct or harms (threatened or accomplished) committed in furtherance of the crime of conviction." *Id.* Instead, the proposed guidelines substitute a system of cross-references, the rationale for which is that they "identify additional conduct that is often associated with the statutory elements charged in [an] indictment." *Id.*

The only reason given for rejecting the rule that would bar consideration of elements that constitute separate crimes is that "the Commission does not believe that this particular rule would work in the federal system, where the existence of separate crimes often depends upon the happenstance of factors creating federal jurisdiction." *Id.* Although this statement is never clarified, the logical conclusion seems to be that the rule was rejected out of a concern that the fortuitousness of federal jurisdiction would render it underinclusive and, therefore, limit its effectiveness.

The better alternative would be to incorporate the rule in question, and then to supplement it with specific cross references whenever they may be necessary to avoid the consideration of conduct which logically constitutes a separate criminal offense but which is not so defined under applicable federal statutes.

proachable assumption that the legislature's definition of an offense and specification of penalties includes a consideration of all of the "harms" associated therewith. If the ambition is creating a system that achieves the maximum impact on offense commission by imposing essentially identical sanctions for each instance of an offense, then the logical way to achieve this goal is through a charge of conviction offense system that relies on standardized offense categories and standardized penalties.

The onus would then be (properly) on the legislature to draft offense statutes (a) that are directed toward the harms associated with each offense, and (b) that identify the penalties that could be imposed for the commission of each such offense. The Sentencing Commission could then monitor the success of each penalty, and establish guidelines to be used in determining when imprisonment or lesser sanctions are appropriate. The Commission could also develop guidelines to be used in determining when certain offender characteristics could warrant the imposition of a sentence other than incarceration. If sentencing were predicated on a charge of conviction offense system, then it would be both logical and constitutionally permissible to require the defendant to bear the burden of establishing the existence and operation of offender characteristics warranting such a non-prison sentence.[54]

Unless the system proceeded according to absolutely standardized offense and sanction categories, it would be impossible to eliminate any vestiges of judicial discretion. Since it does not appear that Congress intended to rely on absolutely standardized offense and sanction categories, a charge of conviction offense system would require the good offices of the Sentencing Commission to ensure that there was an equitable correlation between generalized sanction categories and specific offenses.

The requirement that the Sentencing Commission oversee the categories might very well necessitate the establishment of guidelines analogous to those contained in the Preliminary Draft. The

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54 The reference is, of course, to establishing the existence and operation of the as-yet-undefined "other characteristics." *See id.* at 35,120. The suggestion is that the offender be allowed to establish the existence of such characteristics in order to establish that a sentence of a non-incarcerative sanction should be imposed. Requiring the offender to bear such a burden is constitutionally permissible and pragmatically appealing, because the offender has primary access to the information required for such a demonstration and because aggravating factors are a constitutionally cognized burden for defendants. The incorporation of this factor would require, of course, that the Commission undertake to define the proof required for each mitigating factor and the relationship which these factors would have, jointly and/or severally, to the non-incarcerative sentences discussed. *See id.* at 35,122-23.

difference would be, however, that the guidelines would be formulated for, and apply to, conduct that had already been established beyond a reasonable doubt. This defense alone would alleviate the procedural problems discussed above, and would obviate the necessity for transforming the sentencing hearing into a second, "mini-trial."

C. OTHER PROBLEMS

It is simply not possible, given the constraints on the authors' time and the reader's attention span, to analyze every conceivable issue inherent in the guidelines in the Preliminary Draft. The previous section addressed what is perhaps the most compelling issue, namely, the difficulties inherent in "modified real offense sentencing" as expressed in the Preliminary Draft. This section points out several other issues which the authors feel are of sufficient importance to warrant reconsideration by the Commission.

1. Presumptive Aggravation

One problem, the magnitude of which is second only to that of "modified real offense sentencing," is that the guidelines, as drafted, are skewed so that they at least implicitly establish presumptive aggravation. In so doing, the guidelines offend the dictates of due process as interpreted by the Supreme Court in *Patterson v. New York*,[55] *Mullaney v. Wilbur*,[56] and *In re Winship*.[57]

In *Mullaney*, the Supreme Court was confronted with a Maine statute that "require[d] a defendant charged with murder to prove that he acted 'in the heat of passion on sudden provocation' in order to reduce the homicide to manslaughter."[58] Under Maine law, murder carried a mandatory sentence of life imprisonment, while manslaughter was punishable by a fine or imprisonment not to exceed twenty years.[59] Stillman E. Wilbur, Jr. was convicted of murder under this statute and appealed, arguing that "he had been denied due process because he was required to negate the element of malice aforethought by proving that he had acted in the heat of passion on sudden provocation."[60] Wilbur argued that malice aforethought was an essential element of the crime of murder and thus, the burden was on the prosecution to establish the existence of this ele-

55 432 U.S. 197 (1977).
56 421 U.S. 684 (1975).
57 397 U.S. 358 (1970).
58 421 U.S. at 684-85.
59 *Id.* at 686 n.3.
60 *Id.* at 687.

ment by proof beyond a reasonable doubt.[61]

Maine's representatives argued to the Supreme Court that *Winship* did not apply to Wilbur's circumstance, since "the absence of the heat of passion on sudden provocation is not a 'fact necessary to constitute the *crime*' of felonious homicide in Maine."[62] They argued that the statutory presumption was outside the compass of *Winship* because it came into play only after the jury had determined guilt,[63] and its only effect was on the quantum of punishment inflicted.[64]

The Supreme Court rejected this argument, holding that "[t]he safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty."[65]

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment . . . . If *Winship* were limited to a State's definition of the elements of a crime, . . . States could define all assaults as a single offense and then require the defendant to disprove the elements of aggravation. . . .[66]

The Court also held that *Winship*'s protections extend to the allocation of the burdens of production and persuasion:

> In *Winship* the ultimate burden of persuasion remained with the prosecution, although the standard had been reduced to proof by a fair preponderance of the evidence. In this case, by contrast, the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erro-

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61 *Id.* Wilbur relied on the Court's decision in *In re* Winship, 397 U.S. 358 (1970), which held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. The Maine Supreme Court rejected Wilbur's argument, holding that the state could rely upon a presumption of malice aforethought and require the defendant to rebut the presumption by establishing that he had acted in the heat of passion. *Mullaney*, 421 U.S. at 688 (discussing State v. Wilbur, 278 A.2d 139 (Me. 1971)).

62 *Id.* at 697 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)(emphasis in original)).

63 *Id.*

64 [P]etitioners seek to buttress this contention by arguing that since the presence or absence of the heat of passion on sudden provocation affects only the extent of punishment it should be considered a matter within the traditional discretion of the sentencing body and therefore not subject to rigorous due process demands. *Id.* at 697 n.23.

65 *Id.* at 698.

66 *Id.* at 698 n.24.

> neous . . . conviction. Such a result directly contravenes the principle articulated in Speiser v. Randall, 357 U.S. 513, 525-26 (1958): "[W]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the fact finder at the conclusion of the trial. . . ."[67]

Many of the guidelines contained in the Preliminary Draft are inconsistent with the holding in *Mullaney* because they presume the existence of aggravating factors unless the defendant comes forward with evidence sufficient to rebut that presumption by a preponderance of the evidence.[68] This directly contravenes *Mullaney*'s holding that the prosecution must bear the initial burden of production and the ultimate burden of persuasion on factors that effect the severity of the punishment that is inflicted.[69]

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[67] *Id.* at 700-01.

[68] This is a matter that is discussed in more detail *infra*, in the critique of the tax offense guidelines. It is also important to note that the guidelines in the Preliminary Draft suffer from what might be termed "systemic presumptive aggravation." That is, aggravating factors and their effects have been specified in great detail. Nowhere is this more apparent than in Chapter Three, which is devoted to "offender characteristics." *See supra* Section II(B)(3).

As noted above, the Commission has taken great pains to specify offense values for such aggravating offender characteristics as "role in the offense," "post-offense conduct" and "criminal history." *See* 51 Fed. Reg. at 35,114-18. True, the section on "post-offense conduct" does include a consideration of mitigating factors; it is noteworthy, however, that the factors that have been included—e.g., cooperation with federal authorities, surrender and restitution—are factors that are of primary importance to the prosecution. *See id.* at 35,115-16.

Traditional mitigating factors such as age, education, mental, emotional and physical condition, community and family ties and other similar considerations have been left unaddressed. If the guidelines are to be truly value-neutral, then these and other mitigating considerations must be factored into the sentencing calculus in order to ensure that some equitable balance is struck between mitigation and aggravation. If the Commission decides to retain the mathematical structure of the Preliminary Draft, mitigating factors should be given negative scores so that the total mitigating factor score can be summed and subtracted from the offense value. The Commission should also define multipliers to be used in circumstances in which certain mitigating factors will have a cumulative and/or additive effect the true influence of which would not be felt absent recourse to such a factor.

[69] *See, e.g.*, 421 U.S. at 697-98. In this respect *McMillan* is distinguishable from *Mullaney* and from the sentencing paradigm contained in the Preliminary Draft. *McMillan* upheld a Pennsylvania statute that made convicted felons "subject to a mandatory minimum sentence of five years imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offense." 106 S. Ct. at 2414. The issue in *McMillan* was the permissibility of employing the preponderance standard in this determination; McMillan unsuccessfully argued that the standard for the determination should be either the beyond a reasonable doubt or the clear and convincing evidence standard. *See id.* at 2415-20.

The Supreme Court held that the preponderance standard was constitutionally acceptable and upheld the statute because "consistent with Winship, Mullaney, and Patterson, [it] '*creates no presumption as to any essential fact and places no burden on the defendant.*' " *Id.*

2. *Other Issues*

One author has already observed that, under the new Act and the sentencing guidelines, "a substantially enlarged sentencing process in the district courts, more wide ranging and adversarial, can be anticipated."[70] This same author also observed that it is readily foreseeable that "it will be an important part of the effective assistance of counsel for defense lawyers to litigate the application of the guidelines."[71]

This points out another important issue, namely, the effect the Preliminary Draft system will have on an already overburdened court system. As noted above, the transformation of the sentencing hearing into a "mini trial" will have serious consequences. First, it will be necessary to determine what evidentiary and procedural rules apply to the proceeding. Once that determination is made, it will be necessary to address the pragmatic issues that the determination raises.

Assume, for example, that it is determined that discovery is permissible in this sentencing proceeding and that it is governed by the

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at 2415 (quoting Commonwealth v. Wright, 508 Pa. 23, 35, 494 A.2d 354, 359 (1985)(emphasis added)).

All *McMillan* means, therefore, is that the preponderance of the evidence standard is an appropriate standard to be employed in determining the presence or absence of aggravating and/or mitigating factors. It does not mean that the burden of establishing any such factor can be alleviated by establishing a presumption in favor of the proponent thereof.

70 Rezneck, *supra* note 10, at 790.

71 Rezneck, *supra* note 10, at 791. With respect to this issue, it is of interest to note the litigation that has apparently been generated by the implementation of the Minnesota sentencing guidelines. The Minnesota guidelines have been in effect since 1980. *See* Minnesota Sentencing Guidelines and Commentary, 16 MINN. STAT. ANN. app. (West Supp. 1987)(most recent version).

In the interests of curiosity and a modest empiricism, the authors undertook a LEXIS search to determine whether these guidelines have generated a significant amount of litigation. As of December 23, 1986, a LEXIS search consisting of "sentenc! w/8 guideline!" produced a listing of 601 cases in which the existence and/or application of the Minnesota sentencing guidelines was at issue. With all due respect to Minnesota, it is a state with a relatively small population; if sentencing guidelines can produce 601 cases in Minnesota in six years, one wonders what similar guidelines will do to the federal system.

Although it is beyond the scope of this article, it would be interesting to undertake an analysis of the Minnesota sentencing litigation in order to determine (a) whether it has increased over the years, decreased over the years or become relatively stable, and (b) the percentage of the litigation that is concerned with challenging the *application* of the guidelines, as opposed to associated issues. From a quick scan of selected cases, this appears to be a primary issue in the litigation. *See, e.g.*, State v. Litzinger, 394 N.W.2d 803 (Minn. 1986); State v. Solomon, 359 N.W.2d 19 (Minn. 1984); State v. Gist, 358 N.W.2d 664 (Minn. 1984); State v. Mallory, 329 N.W.2d 60 (Minn. 1983).

Federal Rules of Civil Procedure or some analogue thereof.[72] This determination alone will present the court system with an incredible number of decisions that must be made as to the scope of discovery, the amount of time allowed for discovery and similar issues. These problems will, in effect, double the amount of time required for the final resolution of a criminal proceeding.[73]

Yet another issue is the problem of the defendant's need to preserve his right to appeal while not exposing himself to the possibility of an unnecessarily harsh sentence. Assume, for the moment, that a criminal defendant (a) has been convicted after a trial in which he chose not to put in a defense based on his determination that the government's proof was insufficient to establish a prima facie case, or (b) has entered a conditional plea under Federal Rule of Criminal Procedure 11(a)(2), which allows a defendant to enter a plea while reserving the right to appeal on a specified issue.[74]

The time comes for sentencing. What is the defendant to do when the government introduces evidence in aggravation at the sentencing hearing? If he stands mute, and declines to introduce evidence on his own behalf, he runs the risk of receiving an enhanced sentence. If, however, he decides to introduce evidence on his own behalf, can that evidence later be used against him, as the basis for denying his appeal? If he decides to waive his fifth amendment privilege against self-incrimination and testify on his own behalf, can that testimony be used to supplement the trial record and provide the basis for ruling against him on his challenge to the sufficiency of the evidence introduced against him?[75]

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72 As Rezneck notes, "H.R. 6012, 98th Cong., 2d Sess. (1984), which attempted to spell out some of the procedures for the sentencing hearing, was not enacted." Rezneck, *supra* note 10, at 791 n.39.

73 The sentencing hearing will also have a negative effect on the conservation of judicial resources that is currently effected by guilty pleas. Under the present system, of course, pleas ensure that matters are concluded with minimal impact on the court's resources and calendar. Under the proposed system, however, the guilty plea will no longer have this necessary effect; under the new system, as noted above, even guilty pleas are likely to require the convening of lengthy sentencing hearings which will necessitate the expenditure of additional judicial resources. This, too, will have a cumulative negative effect upon the already overburdened federal court system.

74 With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

FED. R. CRIM. P. 11(a)(2).

75 The above-described situation is perfectly analogous to that which exists when a criminal defendant has made a motion for judgment of acquittal at the close of the government's evidence, the motion has been denied, and he proceeds to put on a defense:

[A] criminal defendant who, after denial of a motion for judgment of acquittal at the

The Preliminary Draft does not address the operation and effect of plea bargains.[76] The Federal Rules of Criminal Procedure expressly permit the parties to plea bargain a sentence.[77] The Sentencing Reform Act of 1984 did not change this aspect of the Federal Rules.[78] The Act has raised a number of questions regarding plea bargaining under the new provisions.

Can the parties, for instance, enter into a plea bargain that calls for a sentence that is outside the applicable guidelines? If they do enter into such a bargain, is the court bound to honor it, or can the court disregard "unconventional" bargains at its discretion? If the court disregards such a bargain, can the defendant then petition the appellate court for reinstatement of the bargain?[79] If the parties can "bargain away" applicable guidelines, then what effect will this have on the sentencing system?[80] If the parties cannot "bargain away" applicable guidelines, then what is the incentive for engaging in plea bargaining?

The question of whether or not the parties can plea bargain for

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close of the government's case in chief, proceeds with the presentation of his own case, waives his objection to the denial. The motion can . . . be renewed . . . but appellate review of denial of the later motion would take into account all evidence introduced to that point.

United States v. Foster, 783 F.2d 1082, 1085 (D.C. Cir. 1986)(en banc). Under the so-called "waiver rule," a defendant who proceeds with the presentation of his evidence thereby risks putting in evidence that will "fill[] in the gaps in the government's case." 8A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 29.05 (2d ed. 1986). The authors' concern is that an analogue of the waiver rule will emerge in the context that is discussed in the text, above.

76 *See* 51 Fed. Reg. at 35,130.

77 *See, e.g.*, FED. R. CRIM. P. 11(e)(1)(B)-(C).

78 *See, e.g.*, Rezneck, *supra* note 10, at 794 n.61.

79 The availability of appellate relief for violations of plea bargains is established by 18 U.S.C. § 3742, which was added by the Sentencing Reform Act and which establishes the mechanisms for appellate review of sentences. *See* 18 U.S.C. § 3742 (Supp. III 1985)(effective Nov. 1, 1987)(added by Pub. L. 98-473, tit. 2, § 213(a), 98 Stat. 2011 (1984) and amended by Pub. L. 99-217, § 4, 99 Stat. 1728 (1985)).

Under 18 U.S.C. § 3742(a)(4), a defendant can seek review of a sentence that "was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission . . . and the sentence is greater than . . . the sentence specified in a plea agreement . . . under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure." The equivalent right is granted to the government in 18 U.S.C. § 3742(b)(4), which allows it to seek review of a sentence that is less than a sentence specified in a plea agreement under either subsection of Federal Rule of Criminal Procedure 11. The unanswered question is, however, whether the above cited provisions of 18 U.S.C. § 3742 apply to plea bargains the terms of which are *outside* the applicable guidelines.

80 "[I]n Minnesota where a sentencing guideline [system] is already in effect, the plea bargaining process has superseded the guidelines and has reintroduced the disparities which the system [was] intended to eliminate." Rezneck, *supra* note 10, at 795 (citing the remarks of Professor B. James George at a conference on the Comprehensive Crime Control Act of 1984, as reported in 36 Crim. L. Rep. (BNA) 2343 (Feb., 1985)).

a sentence outside the guidelines raises yet another issue. Under the present system, a defendant can plead guilty to certain conduct contained, let us say, in Count I of a two count indictment, and thereby assure himself that the penalty imposed will reflect only a portion of the unlawful conduct attributed to him. The net effect is to lessen the defendant's exposure to penal sanctions; since this effect has advantageous consequences for the defendant, it represents a direct inducement to engage in plea bargaining.

Will the same result occur under the new system? Under the proposed guidelines, a defendant could plead guilty to Count I of the same two count indictment, and then find that the conduct alleged in Count II was being introduced into evidence against him at the sentencing hearing, under the guise that it constituted part of the "actual harm," or "real conduct" involved in the commission of Count I. Although the sentence that would result from this scenario should be less than would have been imposed had the defendant been convicted of both counts, the fact remains that the advantageous consequences of the plea bargain have been markedly reduced.

Defendants under the new system may thus find it more to their advantage to proceed to trial and require the government to prove the allegations contained in both counts beyond a reasonable doubt. Although this alternative is fraught with its own risks, it holds out more hopeful possibilities than pleading to one count with the certainty that the conduct in the remaining counts will ominously appear, like Banquo's ghost, at the sentencing hearing.

Although there are other observations that can be made, one final point is that the system established by the guidelines markedly increases the bargaining power of the prosecutor. His ability to draft indictments ensures that he will be able to manipulate the guidelines to his advantage, by crafting indictments that will permit the maximum possible exploitation of charged and uncharged conduct.[81] If the Commission intends, insofar as possible, to establish a system that is value neutral in regard to the comparative bargaining power of the parties, the Commission should reconsider the guidelines in light of their potential for producing "inflated" sentences resulting from the clever manipulation of charging considerations.[82]

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81 *See, e.g.*, Rezneck, *supra* note 10, at 795-96.

82 The potential for such abuse could, of course, be dramatically reduced if the final guidelines were to include a rule of the type that is discussed *supra* at note 53.

Similar criticisms of the Preliminary Draft were advanced by the Honorable Michael M. Mihm, a federal judge sitting in the Central District of Illinois, in the comments which he offered to the Commission, and by John J. Jones, Chair, Section of Taxation,

III. "OFFENSES INVOLVING TAXATION"

The comments presented earlier in Section II apply with equal force to the guidelines that have been proposed for "offenses in-

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American Bar Association. In addition to the criticism leveled by invited commentators, the Preliminary Draft has also received critical reviews in the National Law Journal and in the ABA Journal.

In an article entitled "Is Sentencing Panel on the Rocks?", the National Law Journal offered the following observations on the Preliminary Draft:

> Sentencing commission members once optimistically thought they could revolutionize the federal criminal justice system. Now, however, in light of the harsh reaction to their proposals, many lawyers closely associated with the commission fear the panel may have tried too much, too soon, and failed.
>
> At hearings around the country, during the last month, the response from judges, defense attorneys, prosecutors and probation officers has ranged from concern over the scheme's enormous complexity to worry that punishment by formula inevitably will lead to unjust results, despite attempts to fine- tune sentences.

Nat. L.J. Dec. 8, 1986, at 3, col. 1. The article goes on to describe the criticism that has come from various quarters of the legal community, and quotes the Honorable Mark L. Wolf, a federal district judge sitting in Boston, as predicting that when the guidelines become effective "all hell is going to break loose in the court system." *Id.* at 12, col. 1.

In this same vein, the article notes that "[a] second group of critics, including many judges, is particularly distraught over the impact the guidelines could have on court caseloads. The way the guidelines have been drawn, they say, will cause a tidal wave of protracted sentencing hearings, wreaking havoc on the federal courts." *Id.* The piece also includes the observation that "many suggest [that] the incentive to plead guilty will dissolve under the guidelines, sharply increasing the number of jury trials." *Id.*

Similar comments appear in the ABA article, "Fixed Sentencing Proposed," which appeared in the January 1, 1987 edition of the Journal. *See* 73 A.B.A. J. 27 (Jan. 1, 1987). The ABA article begins by describing the structure of sentencing under the guidelines, and then goes on to describe certain of the criticism which the Preliminary Draft has elicited:

> Fred Bartlit, Jr., a criminal defense attorney with Kirkland & Ellis in Chicago, said the proposal would result in more complex and longer sentencing hearings because defense lawyers would argue about the factors that increase or decrease the penalty.
>
> "It would be a bonanza for lawyers like me," Bartlit said. "We will write briefs, we will bring in expert witnesses, we will bring in economists."

Id. The article quotes Terence MacCarthy, director of the Federal Defender Program in Chicago, as stating that the sentencing proposal "would . . . result in more trials and appeals." *Id.* "More defendants will request trials just to produce evidence that will mitigate the sentence, MacCarthy said. And, more appeals will be sought on whether the judge used the correct sentencing procedure." *Id.* The article also quotes the criticisms offered by Judge Mihm, who said, among other things, " 'that it's too complicated to work, that error is almost inevitable, that it's too formalistic.' " *Id.*

The ABA article concludes by describing the position which the ABA has taken with regard to the Preliminary Draft.

> In a draft statement at the December hearing [on the Draft], the ABA criticized the guidelines as too rigid and too severe.
>
> The ABA said that sentencing should not be "reduced to a mechanistic ritual."
>
> "The Association recommends that the Commission rethink the level of detail set forth in the guidelines and hence, the degree to which the sentencing judge's discretion is limited considering the substitution of more general standards, set forth in words rather that [sic] in numbers," the draft testimony said.

Id. at 28.

volving taxation," and the reader should consider that they have been incorporated into this section by reference. The purpose of this section is not to reiterate issues that have already been considered but, instead, to comment on issues that are peculiar to tax offenses and the guidelines that have been proposed for these offenses.

With that purpose in mind, this section has been divided into two sub-sections, the first of which discusses specific problem areas in order to illustrate how the issues previously considered in Section II, affect particular guidelines. The second sub-section demonstrates that the tax guidelines are flawed because they have been generated by a sentencing paradigm that is constructed around a central, undefined term.

A. SPECIFIC PROBLEM AREAS

Guideline section C211 is concerned with the offense of tax evasion,[83] and provides as follows:

> The base offense value is determined by the table below.[84] Application of the table is to be based on the tax deficiency, *i.e.*, the total amount of tax that the taxpayer evaded or attempted to evade. The deficiency does not include any interest or penalties. If multiple counts are involved, *e.g.*, when the taxpayer evaded taxes in several years, the deficiencies should be added. If the offense involved an attempt to evade taxes that, as of the time of the offense had not yet become due, compute the deficiency using a tax rate of 30%.[85]

The general guideline is supplemented with the following "specific offense characteristics":

> If all or part of the taxpayer's income was obtained unlawfully, application of the table is to be based on the deficiency plus the amount of any unreported unlawfully obtained income. *Unreported income is presumed to have been obtained unlawfully, unless otherwise established by the offender.* Example: Suppose that the offender's tax deficiency is $25,000 and the amount of unreported income is $60,000. Unless it is established that the unreported income was obtained unlawfully, the deficiency . . . would be $85,000 and the offense value would be 26 rather

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83 26 U.S.C. § 7201 (1982) makes it a criminal offense to "willfully attempt[] in any manner to evade or defeat any tax imposed by this title or the payment thereof. . . ."

84 The table, which is omitted here, lists thirteen deficiency categories, each of which is accompanied by a corresponding "base offense value." 51 Fed. Reg. at 35,095. The first category is for deficiencies of "up to $1,000" and carries a base offense value of 10; the second category is for deficiencies of from $1,001 to $5,000, and carries a base offense value of 12. The next to the last category consists of deficiencies of from $1,000,001 to $2,000,000 and carries a base offense value of 54, while the final category is for deficiencies of over $2,000,000 and carries a base offense value of 60. *See id.*

85 *Id.*

than 18.[86]

The first issue to be addressed is the issue that is raised by the italicized portion of the above quotation, namely, the fact that "[u]nreported income is presumed to have been obtained unlawfully, unless otherwise established by the offender."[87] This article has demonstrated that it is constitutionally impermissible to rely on presumptions which assume the existence of aggravating factors and require the defendant to bear the burdens of production and persuasion to the contrary. Yet, that is precisely what this statement accomplishes. A defendant who has been convicted of tax evasion bears the burden of producing evidence sufficient to establish that his unreported income was not obtained unlawfully; if he fails to satisfy this burden, he has also failed to discharge his burden of persuasion and will be given an enhanced sentence based on the assumption that all of his unreported income was obtained through unlawful means.[88]

Aside from the fact that it is inconsistent with the requirements of due process as interpreted in *Mullaney*, *Winship* and *Patterson*, the presumption is also subject to objection on other grounds. First, the existence of the presumption directly jeopardizes the offender's right to rely on his fifth amendment privilege against self-incrimination.

Assume that the offender did not take the stand during trial, and assume, further, that the source of his unreported income was conduct which is, itself, not illegal but the circumstances of which could expose him to additional criminal charges.[89] Our hypotheti-

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86 *Id.* (emphasis added).

87 *Id.*

88 In the example quoted above, the tax deficiency was $25,000 and the amount of unreported income was $60,000. If the base offense value is calculated on the basis of the tax deficiency alone, it results in a score of 18. If the offender is unable to rebut the presumption of unlawfulness, however, the additional $60,000 is added into the equation and the base offense score rises to 26.

The sinister implications of the presumption are even more evident in another, possibly more realistic, example. Assume that the tax deficiency is $28,000 and the amount of unreported income is $100,000. If the base offense value is calculated on the amount of tax deficiency alone, the score is 18. If the offender is unable to prove that his unreported income was obtained through lawful means, however, then the $100,000 is added to the $28,000 tax deficiency, which means that the base offense value rises to 30, a net increase of 12 offense value points.

89 A vivid, if perhaps slightly bizarre, illustration serves to demonstrate the validity of the point at issue: Assume that an individual, a male, owns and operates a "mom and pop" grocery store. Assume, further, that the individual has been indicted and convicted of tax evasion, his conviction having resulted from the government's proving unreported income through a net worth case. The time comes for sentencing. The defendant has a secret that he did not reveal at trial, namely, that the increase in net worth resulted from his having operated the store on two shifts, a daytime shift and a

cal offender is faced with two equally unattractive choices: (1) exercise his privilege, allow the presumption to stand unrebutted and receive a sentence that is enhanced in direct proportion to the amount of income received; or (2) waive the privilege, reveal the circumstances under which the income was generated and face the possibility of additional criminal charges.

Requiring the offender to elect between the Scylla of exercising his privilege and suffering therefor or the Charybdis of waiving the privilege and suffering for that choice would seem to be inconsistent with the Supreme Court's decisions in *Garrity v. New Jersey*,[90] and in *Spevack v. Klein*,[91] both of which held that no penalty can be attached to an individual's right to exercise his fifth amendment privilege against self-incrimination.[92] The presumption contained in guideline section C211 directly imposes a penalty on one's right to stand silent and is therefore inconsistent with the requirements of the fifth amendment.

In addition to the fact that the unlawfulness of the income is "presumed," the proposed specific offense characteristics for guideline section C211 are subject to another objection. The guideline is predicated on the concept of "unlawfully obtained income," but this concept is never defined.[93] When is income "unlawfully obtained" for the purposes of guideline section C211?

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nighttime shift. Each shift was operated with the assistance of a different wife, a different "mom," as it were.

What should the defendant do at his sentencing hearing? He can rebut the presumption that his income was unlawfully obtained by revealing his secret. If he does so, however, he exposes himself to a bigamy charge. His only hope of avoiding an enhanced sentence on the tax evasion conviction is to reveal his secret and expose himself to the possibility of being tried and convicted for bigamy and receiving an additional sentence for that offense. The net effect of the above quoted presumption is to enact a penalty for his exercising his fifth amendment right to remain silent, an effect which is blatantly unconstitutional.

90 385 U.S. 493 (1967).

91 385 U.S. 511 (1967).

92 *Garrity* involved police officers who, when questioned about the alleged fixing of traffic tickets, answered the questions after being told that they were entitled to remain silent but that if they did so, they would be removed from office. *See* 385 U.S. 494-95. In *Spevack*, an attorney who had exercised his privilege and refused to testify at a judicial inquiry was disbarred because the Appellate Division of the New York Supreme Court held that the privilege was not available to him under the holding of Cohen v. Hurley, 366 U.S. 117 (1961). In *Garrity*, the Court held that the threat of losing one's employment was sufficient coercion to implicate the protections of the privilege. 385 U.S. at 496-97. In *Spevack*, the Court overruled *Cohen* and held that under the fifth amendment a person has the right to remain silent without suffering any penalty therefor; the Court found that, because "penalty" refers to the imposition of any sanction which makes assertion of the privilege "costly," disbarment was a penalty sufficient to implicate the protections of the fifth amendment. 385 U.S. at 514-16.

93 *See* 51 Fed. Reg. at 35,095.

Is "unlawfully obtained income" only income that is generated by activities that are prohibited by lawfully enacted criminal statutes? If so, does the concept extend to activities that are unlawful under state statutes or is it limited to activities that are prohibited by federal criminal statutes? Or is the concept intended to have a wider meaning, extending to activities that are "immoral" or "wrong" or "unethical"? The uncertainty inherent in the guideline's use of the concept of "unlawfully obtained income" is best illustrated by means of yet another example. Assume that an individual is the sole stockholder of a corporation, and assume further that he has been skimming money from the corporation's receipts. Let us say that he has been diverting all the corporation's even numbered sales receipts to his own use, and reporting only the income generated by the odd numbered sales receipts. Having done so, he then signs an income tax return that is based on and reflects his diversion of approximately half of the corporation's actual income.

Our perpetrator is indicted, tried and convicted of tax evasion. When the time for sentencing comes, is he liable for an enhanced sentence as one whose "income was obtained unlawfully"? Was the unreported income "obtained unlawfully" in that it was the product of theft from his own corporation? Or is "unlawfully" obtained income limited to income that is the direct proceeds of "unlawful" activity such as drug dealing, numbers running and prostitution?

The difficulty is that the guideline places the burden on the offender to demonstrate that his income was not obtained unlawfully, and then fails to provide any guidance as to what is necessary to establish that income is, in fact, "lawful." Aside from the impermissibility of enacting such a presumption, the whole concept of "unlawfully obtained income" is so amorphous that it imposes tremendous conceptual and practical difficulties on an offender who is required to demonstrate that his income was not obtained unlawfully.[94]

Turning to another, equally important issue, most of the tax offense guidelines are predicated on, or include a consideration of, the amount of tax that has not been paid.[95] Until now, the amount of unpaid tax was not relevant to establishing the offense except in-

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94 One commentator has noted yet another concern, namely, "that this factor should not be used to punish individuals for unproven offenses." Letter from Ian M. Comisky to the Honorable William W. Wilkins, Jr., Chairman of the United States Sentencing Commission (July 11, 1986)[hereinafter cited as *Comiskey Letter*].

95 As discussed above, the tax evasion guideline, § C211, determines base offense values according to the "total amount of tax that the taxpayer evaded or attempted to evade." 51 Fed. Reg. at 35,095; *see also supra* note 83. Guideline § C212, which applies to the "willful failure to file [a] return, supply information or pay tax," uses a base of-

sofar as the amount provided inferential evidence that the omission of the income was due to factors other than negligence or inadvertence. Under the proposed guidelines, however, the amount of income becomes a significant factor in determining the sentence that will be imposed.

One concern that immediately comes to mind is the question as to how this amount will be determined at the sentencing hearing. Will the government be allowed to introduce evidence that was not presented at trial? Will the issues at the sentencing hearing be confined to issues that were defined at trial, or will the government be allowed to introduce any "dirty laundry" that it has unearthed that involves the defendant's tax and/or business affairs? If the Commission is seriously committed to including the amount of unpaid tax as a factor in sentencing, then the guidelines must be reformulated so that they narrow the concept to reflect only the conduct with which the defendant was charged and convicted.[96]

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fense value that is "80% of the offense value for Tax Evasion specified in [§] C211." *Id.* (emphasis deleted).

Guideline § C213, which applies to "fraud and false statement" offenses, includes a cross reference to the base offense values for tax evasion. *See id.* ("If the conduct was in furtherance of an effort to evade payment of a tax . . . the offense value is the offense value for [§] C211. . . ."). Guideline § C214, which applies to the offense of "aiding, assisting, procuring, counseling, or advising tax fraud," uses a base offense value of 10, but includes the following as a specific offense characteristic: "If the conduct occurred in connection with an effort to evade a specific tax obligation, the base offense value is that for evasion of tax by the principal from [§] C211 (Tax Evasion)." *Id.* (emphasis deleted).

Guideline § C216, which applies to the offense of "failing to collect or truthfully account for and pay over tax," uses the base offense values given in guideline § C211. *See id.* (emphasis deleted). And, finally, guideline § C217, which applies to the offense of "failing to deposit collected taxes in trust account as required after notice," uses a "base offense value [of] 6, or 25% of the offense value from [§] C211 (Tax Evasion), whichever is greater." *Id.* (emphasis deleted). (These references to the guidelines are, of course, not intended to blur the conceptual distinctions between 26 U.S.C. § 7201 and 26 U.S.C. § 7206(1) offenses. In 26 U.S.C. § 7201, the government must prove that there is a *tax* due and owing, which required that the government prove the existence of additional unreported income. 26 U.S.C. section 7206(1), on the other hand, merely requires that the government establish that the return was false as to a "material matter," which may or may not be unreported income.)

96 Even if this proposal is incorporated into the proposed guidelines, there is still another issue that remains to be resolved, namely, whether the computation of tax for sentencing purposes includes only those items alleged and proven at trial or whether it includes items such as the disallowed deductions that always appear in the Revenue Agent's Report. Often, items in the Revenue Agent's Report are considered for a civil fraud case, but are eliminated from the criminal case, since only the clearest items are used in a criminal proceeding. Under the guidelines, if an offender is convicted based upon the government's proof of "clearly fraudulent" items, can the government go back at sentencing and reopen these issues, introducing items that could not have been proven beyond a reasonable doubt but which can satisfy a preponderance of the evidence standard?

It may be, however, that the better course is to eliminate this element entirely, or at least to minimize its importance. In this regard, we agree with a statement which Ian M. Comisky[97] submitted to the Commission in a letter dated July 11, 1986.[98] In his statement, Mr. Comisky makes the following observation regarding the proposed tax offense guidelines:

> Under the proposal, a person convicted of evading $2,000,000 of taxes would be classified with someone who evaded $100,001 in tax liability and a person who evaded $89,999 of tax would be grouped with someone attempting to evade $1200 of tax. The tremendous disparity between these offenders will defeat the purpose for which the Guidelines were created. In addition, it may not be appropriate to treat a $100,000 tax evasion when 6 million dollars of taxes were paid with the return in a similar fashion to a $100,000 tax evasion when only $20,000 of taxes were paid with the return.[99]

Comisky also quotes a statement from Roger Olsen, at that time Assistant Attorney General and presently Assistant Attorney General, in the Tax Division of the Department of Justice, in which Mr. Olsen made the following comment about the proposed tax offense guidelines:

> In short, we urge that the Commission should not use the amount omitted, falsely characterized or deducted, as a primary or controlling factor in judging the seriousness of tax crimes. Rather, . . . the amount in dispute in tax cases is but one of a numbers [sic] of factors.[100]

The point is, that the guidelines' reliance on the unpaid tax is misplaced, because it gives rise to arbitrary and erratic distinctions that are a poor substitute for the idiosyncrasies of sentencing under the

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97 Chairman, Sub-Committee on Constitutional and Attorney Client Privileges, Committee on Civil and Criminal Tax penalties, American Bar Association Section on Taxation.

98 The letter was addressed to the Honorable William W. Wilkins, Jr., Chairman of the Sentencing Commission, and expresses the reactions of members of the American Bar Association's Committee on Civil and Criminal Tax Penalties.

99 *Comisky Letter, supra* note 94, at 3. Comisky also discusses an alternative approach to the problem:

> [S]ome Commentators have suggested that the Guidelines should group tax evasion by the percentage of total tax liability which has been understated. For example, persons understating their tax liability by 100% would be grouped together even if one person owed $200,000 and the other only $20,000 in additional taxes. The argument in favor of this approach is that these persons are equally culpable. While this Committee is not in total agreement on the importance of this factor as a sentencing criteria, it serves to highlight the conceptual difficulties with the Commission's present approach.

Comisky Letter, supra note 94, at 3. The use of the amount of unpaid tax liability as a sentencing consideration is a matter that is addressed in more detail in Section III(B), *infra*.

100 *Comisky Letter, supra* note 94, at 4.

present system and can easily give rise to inequity and injustice in sentencing.

What is the result if an offender is convicted of a conspiracy offense, either conspiracy to evade taxes or conspiracy to impede the Internal Revenue Service in the performance of its duties?[101] Either offense can be established without proving that some amount of tax is due and owing.[102] Must the amount of unpaid tax be proven at the sentencing hearing, even though it was never an issue at trial? If so, the sentencing hearing will of necessity become a far more elaborate proceeding than is apparently contemplated by the Preliminary Draft.[103]

Because it is simply not possible to analyze every issue that arises from the proposed tax offense guidelines, this portion of the discussion will conclude by considering an issue that is inherent in guideline section C212. Guideline section C212 is concerned with the offense of "willful failure to file a return, supply information or pay tax."[104] This guideline, like so many of the others, predicates its base offense value on the amount of the tax deficiency.[105] The amount of tax that has not been paid is not, however, a necessary element of the criminal offense of failure to file a return. To establish the commission of the offense of failure to file, the government is only required to establish that the taxpayer had sufficient gross

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101 The government can prevail by establishing the existence of either variety of conspiracy. *See, e.g.*, United States v. Mackey, 571 F.2d 376, 387 n.14 (7th Cir. 1978).

102 *See, e.g.*, United States v. Buckner, 610 F.2d 570, 573 (9th Cir. 1979); United States v. Fruehauf Corp., 577 F.2d 1038, 1071, 1072 (6th Cir. 1978).

103 *See, e.g.*, 51 Fed. Reg. at 35,088. The Commentary includes the following observations on the sentencing hearing:

> Factual disputes are unlikely in the vast majority of cases, for the jury will have resolved some disputes and the presiding judge will be able to determine the presence of associated conduct from evidence produced during the course of the trial. . . . If a hearing is necessary, it will be less formal than a trial. . . [although] [t]he parties will have the right to present and to cross-examine witnesses.

Id. These comments are intended to illustrate that the above observations are incorrect, at least as regards tax offense cases. As noted above, in these cases it is very likely that the trial evidence will not conclude the factual issues that must be considered at sentencing. Aside from the other difficulties inherent in the proposed tax offense guidelines, this factor means that they will require extensive and elaborate sentencing hearings that can only be convened after the parties have been allowed ample time to engage in discovery and pursue other preparations for litigating the issues that have not been resolved at the trial on the merits. At the very least, this will have a dramatic effect on the federal judiciary's ability to handle its docket with efficiency and some level of expedition.

104 51 Fed. Reg. at 35,095.

105 *See supra* note 84. Guideline § C212 uses a base offense value that is "80% of the offense value for Tax Evasion specified in sec. C211." 51 Fed. Reg. at 35,095. However, "[i]f the offense involved only a failure to pay tax when due, the base offense value is [only] 50% of the base offense value specified in [§] C211." *Id.*

income to oblige him to file a return. Gross income is not, however, synonymous with "gross receipts," as was established by the holding in *Siravo v. United States*.[106]

In *Siravo*, the court held that "total receipts must be reduced by the cost of goods sold and other costs representing a return of capital to arrive at gross income for a manufacturing business . . . ."[107] Assume, for the moment, that an individual was engaged in a manufacturing business, and that he has been convicted of failure to file a return. Also assume that he did not submit evidence at the trial on an issue that is irrelevant to the point under consideration because he was convinced that he could obtain a reversal on appeal.

What should he do at the sentencing hearing? Assuming that he wishes to do so, and that doing so will not violate his fifth amendment rights, can he re-open the issue of gross income at the sentencing hearing? Can he present evidence at the sentencing hearing of allowable costs that would reduce his gross income (a) below the point required for filing a return, and/or (b) to a sum lower than that alleged by the government?

In either eventuality, he will enjoy a net advantage, since the sentence that will be imposed will be substantially reduced. The unresolved question, however, is whether the evidentiary issues heard and determined at the trial on the merits become res judicata for the sentencing hearing. This is an issue that must be resolved because it implicates fundamental due process concerns and goes to the entire rationale of the sentencing proceeding.

B. CONCLUDING REMARKS

The central problem with the tax guidelines is the same problem that is encountered in connection with all of the proposed guidelines, at least, the guidelines that have been proposed for nonviolent, "white-collar" offenses. This central problem is that the guidelines are predicated on the proposition that they are intended to sanction offenses based on the "actual harms" inflicted.

This proposition is at once the result of and the reason for the Commission's decision to premise the guidelines on the concept of "modified real offense sentencing."[108] The initial Commentary uses an example to illustrate the reasons why "modified real offense sentencing" was chosen as the operative paradigm for the guidelines.

First, a man walks in a bank, hands a teller a shopping bag, pretends to

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106 377 F.2d 469 (1st Cir. 1967).

107 *Id.* at 473.

108 *See* 51 Fed. Reg. at 35,085-88.

> have a gun, and passes a note that says, "I have a gun. Give me all your money." The teller puts $1,500 in the shopping bag and the offender walks out. Second, a man walks up to a teller in a bank and points a loaded gun. The offender demands money. After the teller gives him $1,500, he strikes her with the gun and demands that she collect money from elsewhere in the bank. He leaves the bank with $20,000. Assume that the grand jury charges both these defendants with violations of the same statute, 18 U.S.C. § 2113(a), and that both are convicted. A guidelines sentencing system based solely on offense of conviction treats these two offenders similarly. . . . *A real offense sentencing system, however, would take account of all the harms that the offender actually caused during the course of the conduct for which he was charged. Thus, a real offense system would punish the second man more severely in light of the gun, the extra money taken, and the physical injury caused.*[109]

Even assuming, *arguendo*, that a real offense system would more perfectly "do justice" in the situation described above, it does not necessarily follow (a) that it applies with equal force to non-violent offenses, and/or (b) that identical factors can be employed in assessing the "harms" inflicted by violent and non-violent offenses.[110] The central difficulty is that while modified real offense sentencing may have an intrinsic appeal when one is confronted with an elemental offense, its appeal and utility break down when it is extrapolated into other categories.

In the example above, the "harms" are readily apparent on a basic, intuitive level. In the first instance, the "harm" is theft, the deprivation of $1,500; the deprivation is apparent even if the victim, presumably the bank, is relatively impersonal. In the second instance, the "harm" is even more readily apparent at that same intuitive level, namely, the use of a loaded weapon and the actual infliction of physical injury.[111]

The "harm" in both instances is readily apparent because the offenses are what might be termed "linear" offenses; that is, there is a direct, one-to-one relationship between the offender and his victim.[112] It is very easy to hear a description of the offense conduct

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109 *Id.* at 35,085 (emphasis added).

110 The terms "violent" and "non-violent" offenses are necessarily imprecise but are used in the discussion both because they refer to familiar categories and because no particularly apt substitute is readily available. The categories are intended to denote the conceptual distinction between what might be termed "linear" offenses, in which there is the equivalent of a one-to-one relationship between the offender and his victim, and "non-linear" offenses, in which there may be a definable offender but the victim category is generalized and difficult to define with precision.

111 Presumably, the "harm" in this instance would also include some level of psychological injury, especially since this is a factor that is explicitly included in the guidelines for violent offenses. *See* 51 Fed. Reg. at 35,092-93.

112 *See supra* note 105.

and readily apprehend the social evil that has resulted therefrom. This is true both because of the relatively simple nature of the conduct at issue and because of the fact that this is what one might term "conventional criminal conduct." That is, it is conduct that has been condemned at least as long as mankind has kept written records and is, therefore, more easily comprehended, both in its commission and in its implications.

Non-violent offenses, or "white-collar" crimes, are, however, quite a different story. Aside from their relative novelty, they differ from violent offenses in that both the criminal conduct and the resulting "harms" are more abstract and less intuitively apparent. The majority of "white-collar" crimes are defined as crimes because of social policy considerations.[113] Thus, the level of "harm" inflicted by these crimes must be ascertained with reference to the social policy considerations that were responsible for their enactment. The proposed guidelines beg this question by attempting to rely on the amount of money that was involved in a particular transaction. As was noted in the previous section, this is a poor standard and does not adequately reflect the "evil" that the punishment is intended to reach.

Perhaps an example will illustrate this point. Assume that there was a company that was in the business of processing and providing asbestos for use in construction and other industries. Assume, further, that this asbestos company was aware, as long ago as 1920, that asbestos was highly dangerous, resulting in various fatal respiratory diseases and a particularly malevolent form of cancer. Assume further that, possessing this knowledge, the company deliberately exposed hundreds of its workers to asbestos without providing protection that was readily available. The company chose

[113] Tax offenses, for example, are defined as offenses because of social policy interests in ensuring the timely and accurate payment of federal and state income taxes. *See, e.g.*, 1 Internal Revenue Manual—Audit (CCH) 7291, 7293-19 through 7293-54; 2 K. BRICKEY, CORPORATE CRIMINAL LIABILITY § 11.01 (1984). Antitrust offenses have been defined as criminal offenses because of a social policy commitment to free unrestrained trade and a competitive market. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); R. POSNER, THE ECONOMICS OF JUSTICE (1981); Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985). Various consumer offenses have been defined as offenses because of rising concerns about the public's right to be guaranteed products that meet certain minimal levels of safety and effectiveness. *See, e.g.*, Geis, *Criminal Penalties for Corporate Criminals*, 8 CRIM. L. BULL. 377 (1972); McAdams, *The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative*, 46 U. CINN. L. REV. 989, 995-96 (1977); Metzger, *Corporate Criminal Liability for Defective Products*, 73 GEO. L.J. 61 (1984). All of these criminal offenses are the result of social policy considerations that are, at once, of relatively recent development and that result from considerations that are far more abstract than those involved in condemning a bank robber who strikes a helpless teller.

not to equip its workers with such protection because to do so would directly increase the costs of production and thereby cut down on the company's profits. At the same time, the company was supplying asbestos for use in literally thousands of buildings across the country.

At some point in time, the workers and former workers realize what has been done to them, and they initiate personal injury and wrongful death actions against the company. At the same time, the owners of buildings in which asbestos has been installed bring property damage actions intended to recover the costs they will incur in removing the asbestos and replacing it with other, less deadly materials. Assume that the average personal injury claim is for the sum of $150,000 and that the average property damage claim is for the sum of $1,000,000.

Finally, assume that criminal action is instituted against the company for its conduct in both regards. The company and its representatives have been tried and convicted of both categories of offenses. How would a "modified real offense sentencing" paradigm choose the sanctions for each offense? Would such a system punish the property damage conduct more severely because the transaction costs were higher in terms of monetary considerations? If not, how would such a system ascertain the relative levels of "harm" inflicted by the two different types of conduct, both involving the same instrumentality and the same general level of culpability?

This example is intended to indicate that not all criminal conduct is reducible to a dollar amount. We suggest that the members of the Commission reconsider their commitment to using finances as a primary factor in determining the "harm" inflicted by a particular offense and in setting the punishment for the offense. Even if one assumes, for the purposes of argument only, that financial considerations are appropriate in sanctioning certain types of offenses, this proposition is not necessarily true in regard to white-collar offenses.

Of far more significance in the white-collar crime area are the social policy considerations responsible for the articulation of the offense, the forces that prompted the commission of the offense and the offender's potential for becoming and remaining a useful, productive member of society. Even if Congress has chosen to replace rehabilitation as the primary goal of federal sentencing, rehabilitation and the analysis that has been developed under the old system should still play a part under the new sentencing paradigm.

IV. Conclusion

This article considered the United States Sentencing Commission's Preliminary Draft of the Sentencing Guidelines that are to be implemented when the provisions of the Sentencing Reform Act become effective on November 1, 1987. The article points out the difficulties inherent in the Draft's reliance on the concept of "modified real offense sentencing" and suggested that the Commission substitute a "charge of conviction offense sentencing" paradigm for this intrinsically flawed concept. We also pointed out other problem areas, including the allocation of certain burdens of proof and persuasion, and demonstrated why these areas must be re-evaluated if the guidelines are to be a constitutionally permissible, and effective, sentencing implement. Finally, this article examined the guidelines that are proposed for tax offenses and demonstrated how they suffer from the same evils that were considered in connection with the general paradigm. The authors hope this article will contribute to the re-evaluation of the Guidelines contained in the Draft, and to the ultimate articulation of guidelines that will implement the provisions of the Act in a constitutionally acceptable, pragmatically feasible manner.