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OPENING THE FEDERAL SENTENCING GUIDELINES TO ALTERNATIVES

STEVEN R. LINDEMANN†

INTRODUCTION

The federal sentencing guidelines promulgated under the authority of the Sentencing Reform Act of 1984 (the Act),¹ and recently upheld by the United States Supreme Court against constitutional challenge² place limits on the discretion of federal courts that revolutionize the process of sentencing federal offenders. Never before have federal judges been required by law to conform their sentences to anything other than the statutory minimum and maximum penalties for the conviction of a crime.³ Reactions to the guidelines vary widely among judges, prosecutors, defense attorneys, legislators, and academics.⁴ Virtually all parties agree, however, that the guidelines will increase the use of imprisonment for many types of offenders. This article criticizes this development and presents an alternative guideline system that will open the sentencing process to a wide spectrum of criminal sanctions. The article also encourages judges to implement nonimprisonment sentences within the current guideline system and demonstrates that the use of nonimprisonment alternatives conforms to the intentions of Congress as they are manifested in the Act.

† A.B. with distinction from Stanford University 1985; J.D. from Yale Law School 1988; current law clerk to the Honorable Paul A. Magnuson, United States District Court for the District of Minnesota. The author would like to thank Prof. Daniel J. Freed of the Yale Law School for providing helpful input.

1. The Sentencing Reform Act of 1984 was enacted as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, October 12, 1984 (codified in 18 U.S.C. §§ 3551-86, 3621-25, 3742 and 28 U.S.C. §§ 991-98 (Supp. II 1984)).

2. In *Mistretta v. United States*, 109 S. Ct. 647 (1989), the Supreme Court ruled that the Sentencing Reform Act of 1984 and the sentencing guidelines regime do not violate the constitutional doctrines of separation of powers and nondelegation.

3. See *id.* "Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected [by Congress]." *Id.*

4. See, e.g., *Post-Mistretta Forum: How Can Guideline Sentencing Be Improved?*, 1 FED. SENT. R. 359-76 (1989).

In the early 1970s Federal District Judge Marvin Frankel spurred reform of the federal criminal sentencing regime with his book, *Criminal Sentences: Law Without Order*. Frankel described a regime in which judges who possessed little or no training exercised broad discretion in formulating sentences. No obligation to state reasons for a particular sentence burdened the judges' discretion, and for the most part the sentences imposed were not subject to appellate review. This state of affairs prompted Frankel to remark that "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."⁵

In response to mounting calls for reform Congress passed the Sentencing Reform Act. The Act created the United States Sentencing Commission (the Commission)⁶ and granted it the authority to promulgate guidelines to govern the sentencing practices of the federal judiciary. As set forth in section 991 of the Act, the primary purpose of the Commission was to establish sentencing policies and practices that

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.⁷

The sentencing guidelines ultimately adopted by the Commission became effective on November 1, 1987. The guidelines regime focuses on two sets of factors—offense characteristics and offender characteristics. The guidelines designate a base offense level ranging from one to forty-three for each statutorily defined crime.⁸ Specific offense guidelines include adjustments based on the amount of property in-

5. M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973).

6. The President appoints all seven of the voting members of the Commission. At least three members must be federal judges, and no more than four members may belong to the same political party. The President also appoints one nonvoting member, and the Attorney General, or his designee, sits as a nonvoting, ex-officio member as well. 28 U.S.C. § 991(a).

7. 28 U.S.C. § 991(b)(1)(B).

8. See UNITED STATES SENTENCING COMMISSION, *FEDERAL SENTENCING GUIDELINE MANUAL* ch. 2 (1988) [hereinafter *GUIDELINES MANUAL*].

volved, whether firearms were used, the degree of personal injury sustained by the victim, and so on. In addition, the guidelines set forth general adjustment provisions applicable to all offenses. These relate to the status of the victim, the offender's specific role in the offense, obstruction of justice, and acceptance of responsibility.⁹

The offender characteristics deemed relevant by the Commission relate to prior criminal history.¹⁰ From the offender's prior record the court calculates a criminal history score. Specifically excluded from the calculus are the offender's age, education, vocational skills, mental condition, emotional condition, physical condition, previous employment record, family ties and responsibilities, and community ties.¹¹

To choose the appropriate guideline sentence the court consults a two-dimensional matrix with offense level and criminal history category as its two axes. Each combination of offense level and criminal history score yields a specific range of months of imprisonment. Nonimprisonment or probation sentences may be substituted for a sentence of months in prison, but the guidelines strictly limit the availability of non-imprisonment sanctions to a small area of the matrix.¹²

Given this background, the objectives of this article are threefold. The first part of the article argues that the guidelines fall short of the mandates of the Sentencing Reform Act in several important respects and that where the Act and the guidelines are at odds judges must follow the Act. The second part proposes a guideline system that encourages the use of nonimprisonment sanctions in a manner that is faithful to the objectives of the Act and that is consistent with the Act's terms. The final section of the article suggests means by which judges can both operate within the current guideline regime and at the same time steer it back to the course of reform that Congress mapped out in the Act.

I. INCONSISTENCIES BETWEEN THE CURRENT GUIDELINES AND THE MANDATES OF THE SENTENCING REFORM ACT

The guidelines are a positive step toward bringing order to

9. *See id.* at ch. 3.

10. *See id.* at ch. 4.

11. *See id.* at ch. 5 pt. H.

12. *See id.* at ch. 5 pt. B; *see infra* text accompanying note 41.

the federal criminal sentencing system. Prior to the guidelines criminal sentencing was cloaked in the mantle of judicial discretion. Courts afforded little or no appellate review of sentences, and the rationale behind sentences was hidden from view. Against this background the Commission conducted research into crimes of conviction, sentences imposed, and time served by offenders. The Commission also solicited expert and general public comment through a number of public hearings. Considering the paucity of empirical data available and the discretionary nature of the sentencing system then in effect, both the Commission's efforts and its results are commendable.

Nevertheless, the magnitude of the Commission's achievements should not overshadow the serious flaws embodied in its guidelines. This article focuses on three such flaws. First, the guidelines neglect the relationship between the basic purposes that justify criminal sentencing in general and the application of those purposes to specific fact situations. Second, the guidelines unduly restrict the availability of nonimprisonment sanctions. Finally, the guidelines ignore the resource constraints under which the sentencing system must operate, the most palpable being prison overcrowding. These inadequacies not only compromise the effectiveness of the guidelines, they bring the guidelines into conflict with the purpose and explicit provisions of the Act as well.

A. Sentencing Purposes

Section 3553 of the Act sets out the factors to be considered in imposing a criminal sentence. Prominent among them are the four underlying purposes of sentencing. The statute describes them as the need for the sentence:

- (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 the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.¹³

In short, these are the traditional purposes of just punishment, deterrence, incapacitation, and rehabilitation.

13. 18 U.S.C. § 3553(a)(2).

Congress did not include section 3553 in the Act merely to suggest what a judge should have in mind when sentencing an offender. According to section 994(f) of the Act, a primary purpose of the Commission is to “establish sentencing policies and practices . . . that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2).”¹⁴ The legislative history behind this provision emphasizes that both the Commission and the courts are bound. The Senate Report on the Sentencing Reform Act, the most comprehensive legislative history available, states that the Act “requires the Sentencing Commission to consider [the four basic] purposes in developing guidelines and policy statements.” As the Senate Report further notes, the Act requires sentencing judges to consider them “in imposing sentence.”¹⁵

The Act does not require or even encourage the Commission to designate one or another purpose as the sole philosophical basis for the guidelines regime. Nor does the Act furnish clues regarding the order in which Congress would have ranked the four purposes. Congress purposely refrained from assigning them priorities.¹⁶ Instead, Congress intended that a judge working within the guidelines system consider *each* of the purposes “in determining the *particular* sentence to be imposed.”¹⁷ The Commission should have established rules or principles to govern this inquiry. At a minimum the guidelines must allow the court to conduct an analysis of purposes in each case and to have that analysis influence the sentence in some meaningful way.

The Commission lost sight of the full range of purposes beginning with its research methodology. The Commission claims that its “empirical approach” was faithful to existing sentencing practice. It gathered data from 10,500 cases regarding the elements of the offense committed, the offender’s background and criminal record, the method of disposition of the case (i.e., guilty plea or conviction), the sentence imposed, and the time served.¹⁸ The Commission calculated the average time served by various kinds of offenders over the entire range

14. 28 U.S.C. § 991(b)(Supp. IV 1986).

15. S. REP. No. 225, 98th Cong., 2d Sess. 59-60, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS, 3182, 3242-43 [hereinafter SENATE REPORT].

16. *Id.* at 67-68.

17. 18 U.S.C. § 3553(a) (emphasis added).

18. UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE IN-

of offenses and identified a number of relevant distinctions that seemed to influence the sentences.

The list of empirical data considered by the Commission appears comprehensive, but its elements are more probative of sentencing outcomes than sentencing practices. For example, if two judges had sentenced identical offenders for identical crimes, the judges may have arrived at their sentences by means of entirely different thought processes. One judge may have determined that the offender was amenable to rehabilitation and therefore sentenced him to probation under the condition that the offender receive the appropriate treatment and counseling. The other judge may have decided that the offender was dangerous and needed to be locked up. On the basis of certain assumptions¹⁹ one can average these sentences, but what is the significance of this figure? It reveals nothing about the jurisprudence of either judge. In fact, the average sentence hides the rationale used by the judges in formulating their sentences.

The Commission admits that its methodology may have blurred distinctions between the philosophies of sentencing judges, but it rationalizes that, “[g]iven the disagreement that exists among judges about the ‘rules of sentencing,’ no statistical model could replicate judicial decision making.”²⁰ Adherence to a method of statistical modelling deprived the Commission of access to a rich body of information. The Commission’s empirical approach may have uncovered the factors that influence sentencing, but investigation into the thought processes of judges may have brought to light the ways in which those factors relate to one another when combined together in a particular case.

Notwithstanding the incompleteness of its data base, the Commission drafted sentencing guidelines. The Commission claims that it carefully avoided “slavishly adher[ing] to current sentencing practices,” but it concedes that the guidelines essentially constrain “sentences within a fairly narrow range centered about average current practice.”²¹ This result does not

ITAL SENTENCING GUIDELINES AND POLICY STATEMENTS 21 (June 18, 1987) [hereinafter SUPPLEMENTARY REPORT].

19. The Commission assumed that probation was equivalent to zero months imprisonment. See *infra* text accompanying notes 43–44.

20. SUPPLEMENTARY REPORT, *supra* note 18, at 22.

21. *Id.* at 17.

further the objectives of sentencing reform. It may appear to advance the goal of reducing disparity, but Congress was not concerned about disparity per se. Congress sought to reduce unwarranted disparity—that which has no justifiable basis. The Senate Report makes this point well: “The key word in discussing unwarranted disparity is ‘unwarranted.’ The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records.”²²

The Commission recognized its duty under sections 3553(a)(2) and 994(f) to give effect to the four purposes of sentencing but concluded that the results of its empirical method satisfied the obligation. Average sentencing outcomes, in the Commission’s view, embody the collective philosophical wisdom of judges because “[i]n practice, the differing philosophies are generally consistent with the same result.”²³

The legislative history of the Act exposes the error in the Commission’s logic:

[T]he Committee has deliberately not shown a preference for one purpose of sentencing over another in the belief that different purposes may play greater or lesser roles in sentencing for different types of defendants. . . . The intent of [section 3553] (a)(2) is . . . to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case.²⁴

B. Nonimprisonment Sanctions

When a child misbehaves parents often consider a variety of alternatives to teach the child right from wrong, to encourage appropriate behavior, to impose punishment, or to coerce the child to make amends for his behavior. Often the circumstances surrounding the misdeeds dictate the course of action chosen. If the child purposely breaks a neighbor’s window, the parents may require restitution. On the other hand, if the vandalism is part of a pattern of rebellion against the child’s parents, some kind of family counseling may be appropriate. If the problem is inattention to homework, the parents may re-

22. SENATE REPORT, *supra* note 15, at 161.

23. SUPPLEMENTARY REPORT, *supra* note 18, at 16.

24. SENATE REPORT, *supra* note 15, at 77.

strict television privileges or social activities. Certainly a variety of punishments might be appropriate, including the more traditional options of confining the child to the house or sending him to his room.

In most instances criminal sentencing involves much more serious misbehavior, but the principles applicable to dealing with the misbehavior of children are nonetheless relevant to sentencing decisions. In recent years a growing number of state and federal court judges have formulated sentences tailored to meet the specific needs of offenders and to protect the public at the same time. Some judges imposed such sentences pursuant to a comprehensive program of alternative sanctions. Others drew on their experience and constructed sentences that they deemed to be most appropriate given the offender's circumstances and the resources locally available.

When considering sentencing reform legislation Congress knew about nonimprisonment sanctions and incorporated them into the Act. According to the Senate Report, "[t]he comprehensive sentencing provisions of the bill provide a full range of sentencing options."²⁵ Many of these options are listed in section 3563(b) of the Act, which describes the conditions of probation that a court may impose. This provision authorizes the court to impose fines, restitution and community service orders. The court also may require the probationer to procure and maintain suitable employment, a course of study, vocational training or treatment for problems such as drug or alcohol addiction. Among the numerous other conditions listed, the court also may restrict the place in which the probationer resides.

Currently it is common practice for courts to impose fines in criminal cases. According to a study conducted by the Vera Institute of Justice, "fines are widely used as a criminal sanction and their use is not confined to traffic offenses and minor ordinance violations. Many American courts depend heavily on fines, alone or as the principal component of a sentence in which the fine is combined with another sanction."²⁶ Almost a third of the sentences imposed in federal district courts involve

25. *Id.* at 159.

26. Hillsman, Sichel & Mahoney, *Fines in Sentencing: A Study of the Use of the Fine as a Criminal Sanction* (summary abstract)(1984).

finer. Annually, this represents fifty million dollars in fines.²⁷ One criticism leveled at those who would expand the use of fines is that fines are rarely collected. However, the Vera Institute study found that "a number of courts frequently impose fine sentences upon offenders with limited means and are relatively successful in collecting them."²⁸ Another report estimates that well over a billion dollars in fines are collected each year in American criminal courts.²⁹

Another criticism of fines is that they burden the poor disproportionately. This criticism is well taken with regard to the practice of American courts. The fines imposed have been too low to punish the wealthy and have been set without considering the offender's ability to pay. The European "day-fine" system addresses this problem. In this system the number of days corresponds to the severity of the crime, and the per diem amount is set in relation to the financial situation of the offender.³⁰ Thus the amount of punishment associated with each day-fine sentence is neutral with respect to the wealth and income of the offender. The United States Sentencing Commission was fully aware of the European experience with day-fines and could have adopted a similar approach in drafting the guidelines.³¹

Courts also have ordered offenders to perform community service work in lieu of prison sentences. Courts have frequently imposed community service as a sentence for white collar criminals, but some community service programs have targeted nonviolent street criminals. For example, in 1978 the Vera Institute persuaded officials in the Bronx borough of New York City to consider minor street crime offenders for a program operated by the Institute.³² The Institute sought a mix of fifty percent jail bound offenders and fifty percent offenders who would normally receive probation. The court ordered each participant in the program to perform seventy hours of

27. Statement before the United States Sentencing Commission by Sally T. Hillsman (July 15, 1986) [hereinafter Hillsman Statement].

28. Hillsman, *supra* note 26.

29. Hillsman, Mahoney, Cole & Auchter, *Fines As Criminal Sanctions* 1987 NAT'L INST. OF JUST. 2 (1987).

30. Thornstedt, *The Day-Fine in Sweden*, Bulletin of the National Swedish Council for Crime Prevention (Aug. 1986).

31. Hillsman Statement, *supra* note 27.

32. For a general description of the Vera program see D. McDONALD, *PUNISHMENT WITHOUT WALLS: COMMUNITY SERVICE SENTENCES IN NEW YORK CITY* (1986).

unpaid labor. The labor ranged from maintenance work such as mopping and waxing floors, shoveling snow and painting walls to community development projects in the form of light construction work on abandoned buildings slated for renovation by the city. Vera Institute project managers strictly enforced compliance with the work orders. Any offender who did not show up for work received a warning notice, which, if unsuccessful in eliciting a positive response, was followed by initiation of resentencing proceedings. The majority of offenders resentenced after noncompliance received jail terms.

Another effective sentencing alternative is home confinement. This option is sometimes called intensive probation or house arrest, but regardless of the label, any sentence of this type involves confinement of the offender to his residence during certain hours of the day. The restriction may range from curfew during nighttime hours to total confinement outside work or school hours. The means of enforcement also vary greatly. Some programs utilize electronic devices to monitor the offender's whereabouts. Others employ stepped up surveillance and more frequent unscheduled contacts by probation officers.

Several states have embraced home confinement programs, largely in response to prison overcrowding problems. In a recent survey of innovative sentencing practices Joan Petersilia catalogued over forty states that were operating some sort of intensive probation as of January 1, 1987.³³

The best-known program in the country is Georgia's intensive probation supervision program. It was established in 1982 and it has served as a model for many other jurisdictions. The Georgia plan targets prison bound, non-violent offenders with the express goal of reducing the prison population without endangering the public. It "was designed to convince traditionally tough-minded Georgia judges that some of the offenders they normally sent to prison could be safely managed in the community."³⁴

The Georgia program assigns no more than twenty-five selected offenders to a two-person team comprised of one surveillance officer and one probation officer. Each offender is

33. J. PETERSILIA, EXPANDING OPTIONS FOR CRIMINAL SENTENCING 12 (1987).

34. Erwin, *Turning Up the Heat on Probationers in Georgia*, JUNE 1986 FED. PROBATION 17.

expected to meet with one of the officers five times a week, either at the probation office or in the offender's home. Some of these contacts are scheduled and others are unannounced curfew checks. The offender must work 132 hours in a community service program. In addition, he must be employed or be enrolled in an educational or vocational program full-time. Most offenders must pay a supervisory fee to cover the cost of the surveillance, and many must subject themselves to regular drug and alcohol tests. Finally, each offender must obey a mandatory curfew that is set by the probation officer.³⁵

The Georgia program is only one example. Other states have created variations on the Georgia theme, and a few federal courts have initiated home confinement sentences as well. The attractiveness of home confinement lies in its inherent flexibility and compatibility with other types of sanctions. By manipulating the design features of the sentence, a judge can fulfill any or all of the purposes of sentencing that he finds relevant in the case.

Congress recognized that these alternative sanctions satisfy the purposes of sentencing. The Senate Report clearly states that imprisonment is not "the only form of sentence that may effectively carry deterrent or punitive weight. It may often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any deterrent or punitive purpose."³⁶ In addition, many of the conditions listed in section 3563(b) are inherently rehabilitative in nature. Section II of this article analyzes the relationship between purposes and alternatives in greater detail.³⁷

Moreover, the Act adopts the rule of parsimony as a guiding principle. The Act authorizes sentences that are "sufficient, but not greater than necessary, to comply with the purposes"³⁸ Apart from capital punishment, a long term of imprisonment is the most onerous and restrictive form of punishment available in the federal system. If a sentence is to be "sufficient but not greater than necessary," the court must look first to other kinds of sanctions that might serve the purposes of sentencing. Section 3553(a) of the Act instructs that

35. *Id.*

36. SENATE REPORT, *supra* note 15, at 92.

37. See *infra* notes 99-115 and accompanying text.

38. 18 U.S.C. § 3553(a).

“[t]he court, in determining the particular sentence to be imposed, shall consider . . . the kinds of sentences available. . . .”

In furtherance of its rule of parsimony, Congress limited the circumstances in which a prison sentence is appropriate. When rehabilitation is the goal, the Act directs the Commission to “insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment. . . .”³⁹ Furthermore, the Act states that nonimprisonment sentences are generally appropriate for first offenders who have not been convicted of “a crime of violence or an otherwise serious offense.”⁴⁰

The picture that emerges from these provisions and their underlying legislative history is not one that disparages imprisonment as a valid method of punishing criminals. On the other hand, Congress did not embrace imprisonment as the preferred sanction for the majority of offenses. In fact, the Act prohibits probation only if (1) the offender has been convicted of a class A or class B felony, (2) Congress has explicitly precluded probationary sentences for the offense committed, or (3) the offender is sentenced at the same time to a term of imprisonment for the same or a similar offense.⁴¹ In terms of the guidelines matrix this would leave probation as a permissible sentencing option in over two-thirds of the potential combinations of offense levels and criminal history scores. This compares with the less than one-sixth allowed by the guidelines.

Although sentences other than imprisonment and regular probation have been imposed in recent years, their use is far from routine, especially in the federal system. The Commission’s empirical research method neglected the success that such alternatives have enjoyed in individual cases. In effect, the Commission took a snapshot of sentencing practice that could neither capture developments in alternative sanctions over time nor explain factors that made specific alternative sentences effective. The Commission’s study favored imprisonment sentences over less traditional ones simply because the newer alternatives represented a small percentage of the sentences imposed.

The Commission made no attempt to compensate for the re-

39. 28 U.S.C. § 994(k).

40. 28 U.S.C. § 994(j).

41. 18 U.S.C. § 3561(a).

sulting bias against alternative sanctions. In studying the 10,500 cases, the Commission treated probationary sentences in a manner that actually exacerbated the statistical disparity between imprisonment and alternative sanctions. The Commission failed to distinguish between routine, nonrestrictive probation and the variety of more onerous nonincarcerative sentences that exist. For instance, a suspended sentence with two years of straight probation was deemed to be equivalent, for the purposes of the guideline grid, to a suspended sentence with three years of intensive probation, random drug testing, strict curfews, and close surveillance.⁴²

Concededly, these distinctions are difficult to quantify, but this does not excuse neglecting them altogether. Unfortunately, this is precisely what the Commission did in drafting the guidelines. The guidelines authorize a sentence of probation only if the lower limit of the presumptive guideline range is zero months, or if the lower limit is one to six months and the court imposes intermittent or community confinement.⁴³ The clear message is that in the Commission's opinion, probation, regardless of its duration or conditions, is equivalent to zero months in prison. The Commission does not acknowledge the punitive nature of restrictive probation unless the offender resides at some type of institution.

To say that two years of probation with six months of confinement to the home outside of working hours, 200 hours of community service, and an obligation to pay restitution is equivalent to zero months in prison distorts reality. The probationary sentence clearly has a punitive effect. However, a court that wishes to substitute such a sentence in place of one to seven months in prison cannot do so and remain within the

42. This assumes that the Commission used the same method for constructing the guidelines that it used for assessing the impact of the guidelines on prison population. In its report on the latter the Commission states, "Offenders not sentenced to imprisonment are treated as having zero months imprisonment." SUPPLEMENTARY REPORT, *supra* note 18, at 69 n.1.

43. GUIDELINES MANUAL, *supra* note 8, at § 5B1.1. In order to satisfy the requirements of a community confinement sentence, the offender must reside in a community treatment center, halfway house, or similar facility. A sentence of intermittent confinement merely imprisons the offender for a number of days that need not be consecutive (weekends in prison for example). In either case, the offender receives credit only for the actual number of days spent in the institution. *Id.* at § 5C2.1.

guidelines.⁴⁴ To make matters worse, the guidelines significantly reduce the number of cases in which probation is available. According to the Commission's own estimates, the number of defendants who will receive straight probation under the guidelines will fall by somewhere in the range of fifteen to fifty percentage points in comparison to current practice.⁴⁵

C. Prison Overcrowding

According to official Bureau of Prison statistics, on April 24, 1989, the federal prison system housed 47,860 prisoners—almost 17,000 more than it was designed to hold.⁴⁶ This represents overcrowding greater than fifty percent beyond capacity, and does not even account for the more than 6000 prisoners housed in contract facilities. In order to cope with the flood of prisoners, officials have placed two prisoners in cells which are designed for only one person; converted day rooms, recreation areas, and other common rooms into sleeping areas; and shuttled prisoners back and forth from federal facilities to already overcrowded state prisons.⁴⁷

Overcrowded prisons disserve both the prisoners who inhabit them and the taxpayers who pay for them. Prisons are not intended to provide comfortable, subsidized housing for people who choose to violate the norms of society. Prisons are and should be an effective means of punishment. However, prisons also must be humane. At a minimum, any punishment must avoid the Eighth Amendment prohibition against cruel and unusual punishment. "Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment."⁴⁸

No federal court has ruled that incarceration in an overcrowded prison by itself violates the Eighth Amendment. But overcrowding often acts in concert with other conditions that,

44. "Home detention may not be substituted for imprisonment." GUIDELINES MANUAL, *supra* note 8, commentary to section 5C2.1.

45. *Supplementary Report*, *supra* note 18, at 68.

46. U.S. Dept. of Justice, Monday Morning Highlights (April 24, 1989).

47. Kerr, *War On Drugs Puts Strain On Prisons, U.S. Officials Say*, N.Y. Times, Sept. 25, 1987, at A1, col.3; Madden, *Overcrowding Pervades Prison Life in Connecticut*, N.Y. Times, March 21, 1988, at B2, col. 3.

48. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

taken as a whole, do violate prisoners' rights. Indeed, overcrowding may cause the other conditions, and it certainly contributes to the severity of their impact. In any prison, inmates assault and abuse one another. In overcrowded prisons disruptive and violent behavior abounds.

Edwin Megargee studied population density and the frequency of disruptive behavior in the Federal Correctional Institution at Tallahassee, Florida. He found that "there is a clear association between restrictions on personal space and the occurrence of disruptive and aggressive behavior."⁴⁹ Using data from thirty-seven institutions in the Federal Prison System, other researchers confirmed Megargee's findings.⁵⁰ Federal courts have recognized the relationship between overcrowding and disruptive behavior as well.⁵¹

Overcrowding also challenges the capacity of a prison to meet the basic human needs of the prisoners. In the case of *Capps v. Atiyeh*⁵² a federal district court described a number of health hazards to which inmates were exposed. Prisoners risked contraction of diseases from sleeping on the floor in close contact with toilets. Many suffered gastric problems caused by eating with 1400 inmates in a dining room designed for a capacity of 440. The stress on prison facilities from such overcrowding is enormous. Prisoners also face restricted access to whatever programs are available. For example, medical care must be rationed to those who demonstrate the most urgent need. Prisoners must also wait months in order to participate in educational or vocational programs. Once enrolled, inmates find their training interrupted by transfers both within and between prisons. Additionally, the main goal of prison administrators often degenerates into crisis management. Officials necessarily worry more about where to put the never-ending stream of prisoners and how to keep them under con-

49. See Megargee, *Population Density and Disruptive Behavior in a Prison Setting*, in PRISON VIOLENCE 135, 141 (A. Cohen, G. Cole & R. Bailey eds. 1976).

50. Nacci, Prather & Teitelbaum, *Population Density and Inmate Misconduct Rates in the Federal Prison System*, 41 FED. PROBATION 26, 29 (June 1977).

51. *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) ("There is a direct correlation between overcrowding and violence"); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1286 (S.D. Tex. 1980), *cert. denied*, 460 U.S. 1042 (1983) ("The record makes plain the rampant violence associated with overcrowding").

52. 495 F. Supp. 802 (D. Or. 1980).

trol and less about how to meet the prisoners' long term needs.

If prisoners were the only constituency harmed by overcrowding, the criminal justice system might safely turn a deaf ear to all but the most egregious of prisoner complaints. However, when inmates leave prison, the problems of prisoners inevitably become the problems of society. Strong evidence indicates that in terms of recidivism there is a high negative relationship between overcrowding and effectiveness.⁵³ In other words, as we pack more and more offenders into prisons ill-equipped to hold them, it becomes more likely that they will emerge from incarceration only to resume a life of crime. The precise causal links are unclear, but some scholars suggest "that prisoners are more likely to become contaminated by other prisoners in overcrowded conditions, or that it is more difficult to attempt rehabilitative activities in overcrowded conditions, or that the experience of living in an overcrowded prison produces stress and aggression."⁵⁴

Whatever the reasons, the effects of overcrowding on recidivism demonstrate that overburdening prisons is a dangerous and costly practice. Perhaps sending a convicted felon to an overcrowded prison rather than setting him free reduces the net number of crimes committed, but other options are available. The government can construct more prisons, or courts can sentence offenders to home confinement, intensive probation, or other nonimprisonment punishments. The tradeoffs in terms of dollars spent and crimes committed have not been

53. The British Home Office collected statistics for 1978 in England and Wales for the purpose of predicting recidivism. The researchers constructed a prediction index based on criminal history, age, marital status, living arrangements, and employment history. In general, there was a close correspondence between predicted and actual reconviction rates. David Farrington and Charles Nuttall conducted a study in which they combined these results with statistics on prison overcrowding in order to determine whether overcrowding influenced recidivism. The authors calculated the difference between predicted and actual reconviction rates in order to obtain an index of correctional effectiveness for each prison. They found that prisoners from overcrowded prisons recidivated at a rate significantly greater than that predicted by the Home Office. The authors concluded that "[o]vercrowding was the factor that was clearly negatively related to effectiveness, not size." Farrington & Nuttall, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 J. CRIM. JUST. 221, 229 (1980); see also Farrington & Nuttall, "Overcrowding and Recidivism": A Response to Gaes's Comment, 11 J. CRIM. JUST. 269 (1983).

54. Farrington & Nuttall, *supra* note 53, 8 J. CRIM. JUST. at 230.

studied adequately at this time, but the alternatives must at least be considered.

Recognizing that the federal prison system was overburdened, Congress issued two directives to the Commission. First, the Act obligated the Commission to "take into account the nature and capacity of the penal, correctional, and other facilities and services available, and . . . make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines. . . ." ⁵⁵

Building a new prison typically costs \$50,000 to \$75,000 per cell, and operating it costs an average of \$14,000 per year per inmate. ⁵⁶ Considering the recent controversy over the size of the budget deficit Congress wisely requested the Commission to assess the resource constraints of the criminal justice system. Not surprisingly Congress issued a second directive, seeking to limit the expenditure on new or existing prisons. Section 994(g) requires that the guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."

The Commission furnished data regarding the impact of the guidelines on the federal prison system only after the final draft of the guidelines had been delivered to Congress. The Commission published its findings in the Supplementary Report issued on June 18, 1987. According to the Commission's projections the federal prison population will increase seventy-one to eighty-eight percent in the next five years, bringing the population to an estimated 150-175 percent over today's capacity. ⁵⁷ Stretching further into the future, the accuracy of the Commission's projections becomes less certain. Nevertheless, by 1992 the Commission projects that the federal prison population will have grown from 42,000 to between 92,000 and 118,000.

The Commission does not apologize for these results. Instead, it chooses to avoid responsibility. The Report neatly explains how the lion's share of the increase in prison population will result from the new drug law ⁵⁸ and the career-offender

55. 28 U.S.C. § 994(g) (Supp. IV 1987).

56. J. Petersilia, *supra* note 33, at v.

57. SUPPLEMENTARY REPORT, *supra* note 18, at 62-75.

58. 21 U.S.C. §§ 801-1308 (Supp. IV 1987).

provisions of the Act.⁵⁹ Compared to the impact of these laws, the Commission claims, the effect of the guidelines on prison population is insignificant. The fact remains that the Commission did not minimize the likelihood that prison population would exceed capacity. Nowhere in the Act does Congress state or imply that the career-offender provisions or any subsequent laws would relieve the Commission of its duty to do so. The Commission faced a difficult, but not intractable problem. It could have issued guidelines that limited or reduced the sentences for other crimes in order to compensate for the drug and career-offender provisions. At a minimum the Commission could have taken steps to assure that the guidelines themselves did not aggravate prison overcrowding. Instead, the Commission chose to formulate guidelines that increase average sentences and reduce the availability of probation, a combination guaranteed to worsen prison overcrowding.

II. A VISION FOR GUIDELINES MORE FAITHFUL TO THE OBJECTIVES OF SENTENCING REFORM

The current federal sentencing guidelines fulfill neither the letter nor the spirit of the Sentencing Reform Act with respect to purposes, nonimprisonment sanctions, and prison overcrowding. To a certain extent complete fulfillment of the ideals behind the Act is unattainable at this time. The guidelines merely provide a starting point for a long process of reform. As a starting point the current guidelines are acceptable, but in order to advance the process of sentencing reform a vision for the future is necessary.

The following section outlines a vision for an alternative guideline system. It attempts to provide federal judges with a picture of a sentencing regime located farther along the road to the objectives of sentencing reform. This vision is offered not as a definitive model for federal sentencing practice, but as a stimulus both for the Commission to consider when amending the guidelines and for judges to reflect upon in formulating and explaining sentences in individual cases.

59. 28 U.S.C. § 994(h), (i).

A. *A Comprehensive Philosophy of Sentencing*

1. *A Duty to Consider Alternative Sanctions Before Imposing a Term of Imprisonment*

In order to attain the goals of sentencing reform the underlying philosophy of the guidelines must be redefined, and the specific sentencing procedures of the guidelines must be restructured. On the issue of sentencing philosophy, the Commission has cited a general consensus that the ultimate aim of the criminal justice system is crime control.⁶⁰ On the surface the Commission's statement is correct, notwithstanding the controversy over which of the four basic purposes of sentencing should be paramount, because each of the purposes, with the possible exception of retribution, goes toward reducing or controlling crime. The Commission claims that beyond crime control the philosophical consensus breaks down. However, two other philosophical bases exist on which there is general agreement.

The first principle is that society is not willing to shoulder the expense of eliminating crime at all costs, and as a result, the criminal justice system must be aware of its resource constraints. As discussed above in the context of prison overcrowding, Congress rightfully expects an effective return on the dollars spent on crime control. A substantial reduction in the crime rate cannot occur without a massive transfer of financial and human resources to capture, conviction, and punishment of criminals. Even then a lasting change is unlikely. Not even the ambitious prison building programs that the federal government and a few states have recently launched will create a noticeable reduction. The new prisons will be quickly filled by the overflow from the older, crowded, deteriorating prisons.

This state of affairs presents a dilemma for policy makers. On the one hand, society wants to put more and more offenders in prison, but on the other hand, people do not want to pay the taxes necessary to finance the job. The result of this no-win situation is that prison population will continue to exceed capacity by a substantial margin. Moreover, stemming the tide of crime would require greater expenditures in support of law enforcement efforts to apprehend criminals. It would absorb

60. SUPPLEMENTARY REPORT, *supra* note 18, at 15.

even more resources for the work of prosecutors to obtain convictions or guilty pleas. However, society demands a wide variety of other goods and services from the government ranging from national defense to highway maintenance. Crime control must compete with all of these for a piece of the federal budget. In the face of these tradeoffs, Congress should not authorize large expenditures of taxpayers' money without estimating the expected benefits beforehand.

The second principle also involves a type of cost-benefit analysis which cannot be measured in dollars and cents. Society values individual rights and liberties and will not sacrifice them completely—even rights and liberties of convicted criminals—in order to control crime. The Act's requirement that a sentence be "sufficient but not greater than necessary" expresses this idea. Section 7.01 of the Model Penal Code also reflects this principle. It states:

The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public⁶¹

The commentary following this section states that one of its major purposes is to insure that imprisonment sentences are not routinely imposed. The American Law Institute argues that, "If the court . . . begins by asking, 'Why not imprisonment?', it commences at the wrong place. Rather, subsection (1) requires the court to approach sentencing by asking, 'Why imprisonment?'"⁶²

These concerns suggest that a court should look to less restrictive and less expensive sanctions before imposing a sentence of imprisonment. Prisons absorb a large quantity of resources, and they intrude deeply on individual rights. In a proposal for sentencing reform, O'Donnell, Churgin, and Curtis argue that imprisonment should always be "the sentence of last resort."⁶³ They do not suggest that incarceration should rarely be employed, but "[b]efore a court may consider a prison term of any length, it must first determine whether the

61. Model Penal Code § 7.01(1) (1985).

62. *Id.* at 225 (commentary).

63. P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 38 (1977).

sentencing goals in a particular case can be accomplished through the use of probation, special probationary conditions, and/or a fine."⁶⁴ Congress was not willing to go so far as to require the Commission or the court to adopt this procedural requirement,⁶⁵ but this kind of presumption would advance the goals of the Act in general and of section 3553(a) specifically without undermining the objectives of sentencing in any way. Therefore, my alternative guidelines system would require the court to look first to nonimprisonment sanctions. If, however, the court determines that prison is more appropriate than other options, the court must explain the reasons for imposing a prison sentence instead of a nonimprisonment sanction in every case where imprisonment is not mandatory.

2. Purposes

A comprehensive guidelines philosophy also should include a collection of principles to govern a court's determination of when and to what extent each of the four purposes of sentencing should dictate the sentence in a particular case. The guidelines should list various offense and offender characteristics and connect them with the appropriate purposes. Specific sanctions should then be linked with the designated purposes. This facially simple task becomes quite complicated in reality because the purpose associated with any given characteristic may change as that characteristic is combined with different factors. For example, youth may correlate with amenability to rehabilitation for a first time offender, but rehabilitation may be inappropriate for young repeat offenders. Many studies show that such offenders are highly likely to recidivate because they are in the prime of their criminal careers. Therefore incapacitation may be a more salient concern.

Within the scope of this article it is not possible to explore the myriad of potential offense and offender characteristics. Such an inquiry merits extensive research and analysis. Instead, this article focuses on the purposes themselves and how they relate to one another in the context of sentencing deci-

64. *Id.*

65. "[T]he Committee feels that the best course is to provide no presumption either for or against probation as opposed to imprisonment, but to allow the Sentencing Commission . . . and the courts, the full exercise of full discretion in tailoring sentences to the circumstances of individual cases." SENATE REPORT, *supra* note 15, at 91.

sions. The analysis begins with deterrence and then proceeds to rehabilitation, punishment, and incapacitation respectively.

a. *Deterrence*

Scholars have long debated the merits of general deterrence as a purpose of sentencing. Some critics of deterrence theory argue that most criminals are not rational utility maximizers. In other words, offenders do not decide whether to commit a crime by calculating the costs and benefits. They commit crimes on impulse, when need and opportunity intersect.⁶⁶ Other critics contend that those who do engage in a rough sort of cost-benefit analysis operate under false or incomplete information.⁶⁷

Proponents of deterrence theory respond with studies evaluating a number of programs designed to increase the probability and severity of punishment inflicted for specific kinds of crime.⁶⁸ Deterrence advocates argue that every criminal need not be a rational actor and that each criminal's perceptions need not be wholly accurate. For deterrence to work it is sufficient that some potential criminals act rationally and that their perceptions are substantially correct.⁶⁹

On some level deterrence works. Without a police force and a criminal justice system the crime rate would undoubtedly increase. But the important question for sentencing policy is whether the force behind deterrence derives more from probability of receiving punishment or from severity of the punishment received. If a potential criminal has a ten percent chance of being imprisoned for a year or a five percent chance of receiving two years of imprisonment, he should be deterred equally by both sentences. After all, the expected cost of committing a crime is the same in each scenario—10 years in prison. Both conventional wisdom and empirical studies disprove this hypothesis.⁷⁰ Offenders respond much more readily

66. Jacob, *Rationality and Criminality*, 59 SOCIAL SCIENCE QUARTERLY 584 (1979).

67. *Id.*

68. See Chaiken, Lawless & Stevenson, *The Impact of Police Activity on Subway Crime*, 3 URB. ANALYSIS 173 (1974); Ross, *Law, Science, and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1 (1973); Ross, *Deterrence Regained: The Cheshire Constabulary's "Breathalyzer Blitz"*, 6 J. LEGAL STUD. 241 (1977); G. PIERCE & W. BOWERS, *THE IMPACT OF THE BARTLEY-FOX GUN LAW ON CRIME IN MASSACHUSETTS* (1979).

69. Cook, *Research in Criminal Deterrence: Laying the Groundwork for the Second Decade*, 2 CRIME & JUST. 211, 226-27 (N. Morris & M. Tonry eds. 1980).

70. *Id.* at 230-32.

to policies that increase the likelihood of arrest, conviction, and punishment than to policies that make the punishments more severe.

Consideration of marginal changes in crime control policy should govern deterrence analysis in specific cases. When the goal is greater deterrence more resources should be devoted to increasing the certainty of punishments because incremental changes in the severity of sanctions will not substantially bolster the deterrent effect. Adequate deterrence can be achieved through sentences that serve the other three purposes of sentencing, especially retribution. If a sentence is sufficiently onerous to satisfy the requirements of just punishments, then it also should serve deterrent purposes.

In unusual circumstances, increasing the severity of punishment may affect deterrence significantly. However, a court should embark on this course with caution because “[i]f we try to improve on deterrence by sharply increasing the severity of sentences, and we are wrong, then we may spend a great deal of money and unnecessarily blight the lives of offenders who could safely be punished for shorter periods of time.”⁷¹ The Senate Report suggests two scenarios in which the calculated risks may be warranted. The first involves popular or trendy crimes. The Report states that “during a period in which the incidence of a particular kind of crime is increasing rapidly, it may be entirely appropriate for the court to give paramount emphasis to the deterrent purpose of sentencing.”⁷² The Report also states that deterrence “is particularly important in the area of white collar crime” because white collar criminals receive lenient sentences and can write off sentences as a cost of doing business.⁷³ In both situations tougher sentences, as well as stricter enforcement, may be necessary to shock the offenders into awareness that these types of criminals not only get caught, but that they receive serious punishment as well.

b. Rehabilitation

In the pre-guidelines system, the purpose of rehabilitation was the driving force in correctional policy. Criminologists and social scientists placed great faith in counseling and train-

71. J. WILSON, THINKING ABOUT CRIME 144 (rev. ed. 1983).

72. SENATE REPORT, *supra* note 15, at 92.

73. *Id.* at 76.

ing programs designed to reform offenders, believing that virtually anyone could be cured of his criminal tendencies as long as the appropriate programs were used. Policy makers also accepted the rehabilitative ideal and granted broad discretion and authority to specialists in the field. Numerous legislatures adopted indeterminate sentencing policies with the understanding that someone would ultimately pronounce the offender rehabilitated and terminate the sentence. Under standard operating procedures the judge would sentence the offender "to the care and custody of the department of corrections until such time as he is rehabilitated."

From the day of sentencing until the time of release, the offender received few if any clues regarding the probable termination date for his punishment. Nor did anyone explain to the offender how he was expected to demonstrate successful rehabilitation. Parole boards commonly gave no reasons for denying parole, and when they did, the reasons given rarely reflected any coherent rationale. This state of affairs fostered tension and anxiety among offenders and actually impeded rehabilitation.

Beginning with a study by Robert Martinson in 1974, a flood of criticism rained upon the rehabilitative ideal and on indeterminate sentencing in particular. After studying over 200 efforts to evaluate rehabilitative programs Martinson concluded, "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."⁷⁴ The United States National Academy of Sciences Panel on Research on Rehabilitative Techniques conducted the most recent comprehensive study of this issue and essentially reinforced Martinson's general conclusion. The Panel, however, stopped short of abandoning the rehabilitative ideal. Instead, the Panel suggested that while present knowledge provides no basis for positive recommendations about techniques to rehabilitate offenders, "[t]he strongest recommendation that can be made at the present time is that research on ways of rehabilitating offenders be pursued more vigorously, more systematically, more imaginatively, and certainly more rigorously."⁷⁵

74. Martinson, *What Works?—Questions and Answers About Prison Reform*, 1974 *THE PUBLIC INTEREST* 22, 25.

75. U.S. NATIONAL ACADEMY OF SCIENCES PANEL ON RESEARCH ON REHABILITATIVE

Proponents of rehabilitation theory highlight the flaws in many of the studies criticizing rehabilitation programs. James Q. Wilson argues, "Though the evaluators of rehabilitation programs typically speak of 'recidivism rates,' in fact they do not mean 'rate' at all; they mean 'percent who fail.'" ⁷⁶ A typical study of this sort would equate rearrests occurring one week after termination of the program with rearrests effected two years later. Both offenders would be "failures" as long as the rearrest occurred within the study period. Moreover, each study used a different measure of failure, ranging from technical violations of probation (such as failing to report to the probation officer as scheduled) to reconviction and imprisonment.

Because of these two ambiguities many of the studies ignored any potential decline in the frequency of an offender's criminal behavior. In order to be a "success" the offender must have quit his life of crime cold turkey—slowdowns did not count. Wilson contrasts a study of rehabilitation by Charles A. Murray and Louis A. Cox, Jr. in which the authors attempted to remedy this problem. They found that the "failure rate" of their sample of juvenile delinquents was high—82 percent rearrested. However, the arrest rate for these hard core delinquents had actually declined from 6.3 per year before being sent away to 2.9 per year after release. ⁷⁷

Other scholars have argued that certain individuals are more amenable to rehabilitative treatment programs than others and that it is inaccurate to gauge the success of rehabilitation using aggregate data. In a 1961 California study Stuart Adams found that "bright, verbal, and anxious" juveniles were most amenable to treatment. ⁷⁸ After reviewing the more recent evaluative studies on juvenile offenders, Daniel Glaser reached similar conclusions. He found that anxious, neurotic, guilt-stricken offenders benefited from intensive counseling. ⁷⁹

The United States National Academy of Sciences Research Panel report briefly addressed the concept of amenability and

TECHNIQUES, *The Rehabilitation of Criminal Offenders: Problems and Prospects* 10 (L. Sechrest, S. White & E. Brown eds. 1979) [hereinafter PANEL REPORT].

76. J. WILSON, *supra* note 71, at 171.

77. *Id.* at 172.

78. Adams, *The PICO Project*, in *THE SOCIOLOGY OF PUNISHMENT AND CORRECTION* 213-14 (N. Johnston, L. Savitz & M. Wolfgang eds. 1962).

79. Glaser, *Remedies for the Deficiency in Criminal Justice Evaluation Research*, 11 J. RES. CRIME & DELINQ. 144 (1974).

stated that evidence was lacking to draw any significant conclusions. The Panel found that amenability had not been rigorously defined and that the studies had been conducted with insufficient methodological controls.⁸⁰ Again, these findings emphasize that definitive answers are lacking in the area of rehabilitation. Many scholars would like the criminal justice system to throw up its hands in frustration and forget about rehabilitation. But no one has proved that nothing works or that nothing can work. All one can say with certainty at this point is that nobody has proved that something specific does work.

In the legislative history of the Act, Congress acknowledged disillusionment with rehabilitation and rejected the rehabilitation model as the sole basis for sentencing policy.⁸¹ On the other hand, Congress did not abandon rehabilitation as a valid sentencing purpose. Both section 3553(a)(2)(D) and the Senate Report make it clear that "the Committee has retained rehabilitation and corrections as an appropriate purpose of a sentence. . . ."⁸²

Congress acted wisely in refusing to eliminate rehabilitation from the philosophical foundation for the guidelines. All that can be gleaned from the dearth of good information on rehabilitation is that rehabilitation should stand on an equal footing with the other purposes, instead of occupying a position of prominence over them. Courts should continue to assess whether offenders are amenable to treatment, focusing on those groups of offenders who are plagued by specific, treatable problems (such as drug and alcohol addiction) and who have not failed repeatedly in previous rehabilitative programs.

In addition, some new programs have shown promising results in preliminary evaluations. Often they involve a great deal of structure and discipline in the life of the offender on the outside. This contradicts the common notion that rehabilitation refers to interventions in the offender's life that are benevolent and include the provision of services. Yet there is no reason for rehabilitation to be categorized so narrowly. As Wilson notes, "Rehabilitation can (and usually does) involve a

80. PANEL REPORT, *supra* note 75, at 43-46.

81. See SENATE REPORT, *supra* note 15, at 40.

82. *Id.* at 76.

substantial degree of coercion, even of intimidation. . . .”⁸³ The rehabilitative effect of such programs will be described in detail below. Some of the more basic components of rehabilitation are restitution, intensive probation supervision, and community service.

c. Retribution

As support for rehabilitation has declined the purpose of retribution or just punishment has assumed a position of prominence. Andrew von Hirsch, a leading proponent of the retributive model of sentencing, argues that punishment is conceptually distinct from the other three purposes because it does not purport to serve the utilitarian goal of crime control. He contends that the principle of just punishment views crime retrospectively in an attempt to determine precisely the amount of punishment that a particular offender “deserves” based on the seriousness of the crime. Von Hirsch explains that “[s]eriousness’ depends both on the harm done (or risked) by the act and on the degree of the actor’s culpability.”⁸⁴

Von Hirsch’s theory contradicts the Commission’s “general consensus” that crime control is the ultimate aim of the criminal justice system. Perhaps von Hirsch overstates his case when he argues that the objective of retribution is not crime control. Punishment influences notions of right and wrong in society, and this signalling function may foster respect for legal norms. Nevertheless, von Hirsch correctly isolates retribution as a distinct and important goal of the criminal law. Retribution certainly has ancient roots. Judaic law required proportionality: “life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.”⁸⁵ The principle that the gravity of the punishment should be commensurate with the seriousness of the crime has remained prominent in the language of sentencing. Many countries and states have incorporated it into their criminal law and constitutions.⁸⁶ However, the rigor with which authorities apply the principle in individual cases has softened over time. We no longer sanction torture or corporal punish-

83. J. WILSON, *supra* note 71, at 173.

84. A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 69 (1976).

85. *Deuteronomy* 19:21 (New American Standard Version).

86. See VON HIRSCH, *supra* note 84, at 67.

ment to compensate for assault and battery, and rarely do we require that a life be taken for a life.

Once the concrete reference points have been removed, it is difficult to justify any absolute scale of punishments. Any level of punishment imposed is inherently subjective because "we lack the moral calipers to say with precision of a given punishment 'that was a just punishment.'"⁸⁷ We encounter less difficulty conceptualizing the appropriate quantity of punishment in relative terms. Murder merits greater punishment than burglary, and armed robbery is more serious than shoplifting. But ranking crimes necessarily involves subtle discernment of harm to the victim and culpability of the offender. Is rape worse than kidnapping? How about possession of drugs versus theft? H.L.A. Hart identifies this problem in his book, *Punishment and Responsibility*. He argues that any scale of gravity of offenses

no doubt consists of very broad judgments both of relative moral iniquity and harmfulness of different types of offence: it draws rough distinctions like that between parking offenses and homicide, or between "mercy killing" and murder for gain, but cannot cope with any precise assessment of an individual's wickedness in committing a crime.⁸⁸

The difficulties inherent in formulating a sentence that satisfies the requirements of retribution have led Norval Morris to modify von Hirsch's notion of just deserts. Morris contends that "a deserved punishment must mean a not undeserved punishment which bears a proportional relationship in the hierarchy of punishments to the harm for which the criminal has been convicted."⁸⁹ In other words, for any given crime a range of punishments is appropriate for retributive purposes. Within the range of punishments bounded by just deserts the other purposes of sentencing interact to fix the specific sentence. Or as Morris puts it, "Desert justifies and limits eligibility for punishment; desert and utility combine to distribute punishments."⁹⁰

Von Hirsch rejects Morris' modification and clings to the notion that it is unjust to impose different absolute penalties on

87. Morris & Miller, *Predictions of Dangerousness*, in 6 CRIME AND JUSTICE 1, 37 (M. Tonry & N. Morris eds. 1985).

88. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 25 (1968).

89. N. MORRIS, MADNESS AND THE CRIMINAL LAW 150 (1982) (Morris' theory of retribution in sentencing is in the context of the mentally ill criminal).

90. *Id.* at 149.

equally deserving offenders.⁹¹ Von Hirsch's argument is ultimately unpersuasive because he does not explain how one determines with precision which offenders are equally deserving, nor does he explain the manner by which one arrives at the absolute level of punishment that is "just."

Congress did not explain whether the just punishment embodied in the Sentencing Reform Act referred to specific points on a scale of punishment or to a range of punishments. Congress merely listed it with the other purposes to be considered, and in the Senate Report stated that just punishment "should be reflected clearly in all sentences."⁹² Serious offenders must not get off easy while petty offenders receive long prison terms, but the inherent subjectivity involved in assigning punishments that are "just" requires that the purpose of retribution act only as a limiting principle on sentencing. As long as the sentence falls within the range of not unjustified punishments, concern for rehabilitation and incapacitation should dictate the specific terms of the sentence.

d. Incapacitation

As a theoretical matter incapacitation generally sparks less controversy among scholars because, as Wilson notes, incapacitation "works by definition."⁹³ Three assumptions undergird that definition: (1) some offenders would commit crimes after conviction; (2) incapacitated offenders are not immediately replaced by new criminal recruits; and (3) offenders do not commit an inordinately high number of crimes after release so as to make up for the crimes not committed while incapacitated. Wilson contends not only that these propositions are plausible, but that the available empirical data supports their validity as well.

The more difficult question is how to make incapacitation work most effectively. Locking up all offenders for long periods of time may lower the crime rate, but the cost of such a sentencing policy would be prohibitive. Studies have shown that a small percentage of offenders account for a large percentage of crimes.⁹⁴ Therefore, a more efficient course of ac-

91. See A. VON HIRSCH, *supra* note 84, at 73-74.

92. SENATE REPORT, *supra* note 15, at 75.

93. J. WILSON, *supra* note 71, at 145.

94. See, e.g., M. PETERSON, H. BRAIKER & S. POLICH, WHO COMMITS CRIMES

tion would be to selectively incapacitate high-rate offenders more often and longer than low-rate offenders.

Three major studies on selective incapacitation have attempted to isolate factors that are predictive of recidivism. Using data from offenders arrested in Washington, D.C., Kristen Williams of the Institute for Law and Social Research (INSLAW) identified twenty-one variables that correlated either positively or negatively with recidivism. She categorized them into three groups—factors related to the current arrest, characteristics of the offender's criminal record, and social and personal factors.⁹⁵ A later study by Peter Greenwood of the Rand Corporation found seven factors highly probative in the identification of high rate offenders. An offender is more likely to recidivate if (1) he was convicted as a juvenile, (2) he used illegal drugs as a juvenile, (3) he used drugs in the previous two years, (4) he was employed less than fifty percent of the time in the last two years, (5) he served time in a juvenile facility, (6) he was incarcerated for more than fifty percent of the last two years, and (7) he was previously convicted of the same offense.⁹⁶ Greenwood was able to predict low-rate offenders with eighty-two percent accuracy but had more difficulty distinguishing between moderate and high-rate offenders. A study by William Rhodes at INSLAW claimed even greater accuracy. It found that high-rate offenders are likely to be relatively young, heroin and alcohol abusers, who started committing crimes at an early age, who have served a long prison term, and whose present offense involves violence. Using these criteria Rhodes predicted which of the individuals would become career criminals. After five years eighty-five percent of those predicted to be career criminals were in fact rearrested for serious crimes, while only thirty-six percent of those not predicted to be high rate offenders were rearrested.⁹⁷

Critics raise two main objections to selective incapacitation. First, they argue that sentencing decisions based on predictions of dangerousness and recidivism create a risk that some

186-88 (1981); K. WILLIAMS & J. LUCIANOVIC, *ROBBERY AND BURGLARY: A STUDY OF THE CHARACTERISTICS OF THE PERSONS ARRESTED AND THE HANDLING OF THEIR CASES IN COURT* 22-29 (1979).

95. K. WILLIAMS, *THE SCOPE AND PREDICTION OF RECIDIVISM* 19 (1979).

96. P. GREENWOOD, *SELECTIVE INCAPACITATION* (1982).

97. W. RHODES, *DEVELOPING CRITERIA FOR IDENTIFYING CAREER CRIMINALS* 44 (1982).

offenders who do not in fact pose a threat to society will be punished too severely. Each model inevitably yields a certain number of these "false positives." The critics of selective incapacitation contend that this number will always be too high, and therefore predictions of dangerousness and recidivism do not provide a reliable basis for imposing punishments. The second objection is that even if judges can make these predictions with great accuracy, the method of making the predictions involves consideration of conduct or status not directly related to the offense of conviction.

These criticisms miss the mark because they are grounded in invalid assumptions. They implicitly embrace the contention of von Hirsch that each offense carries with it a discrete amount of punishment that is "just." As indicated above, any sentencing body at best can agree only on a range of not unjust punishments for a particular offense. Small variations in quantity of punishment within the range may be justified.⁹⁸ Assuming that agreement can be reached on a range of just punishments for a particular crime, a judge must find a principled basis for sentencing within that range. The utilitarian goals embodied in the notion of selective incapacitation can help here. A judge may determine that a high-rate burglar merits a four year term in prison while a low-rate burglar warrants only three years. If the range of just punishments is three to four years, then the judge has not violated notions of fairness and justice. On the contrary, he has merely followed explicit rules for choosing a sentence rather than using some other, perhaps more arbitrary, means of deciding.

Furthermore, criticisms of selective incapacitation erroneously assume that incapacitative sentences are necessarily more punitive than sentences not involving incapacitation. Under the current sentencing regime this may be true, but nonincapacitative sentences need not be lenient. Fines, restitution, and community service sentences do not involve incapacitation, yet each of these sanctions is punitive to some degree. A combination of these sanctions could be more oner-

98. A sentencing regime based purely on the principle of selective incapacitation might allow large variations, sentencing high-rate offenders to long terms of imprisonment and letting low-rate offenders avoid any sort of restrictive sentence. Since such a system would clearly violate the concept of just deserts, I do not consider it here.

ous from the offender's perspective than a short incarcerative sentence.

3. *A Spectrum of Sanctions*

A comprehensive sentencing philosophy also should provide guidance for translating the purposes found relevant in each case into concrete sanctions. Since the federal sentencing guidelines do not address purposes adequately, it is not surprising that they fail at this task as well. For example, where probation is permitted within the guidelines matrix the Commission gives no counsel to a judge in choosing probation over imprisonment or in designating the conditions associated with the probationary sentence, if chosen. The guidelines merely list the types of conditions that are allowed.

One of the cornerstones of the sentencing philosophy proposed in this article is parsimony—not burdening the offender or society any more than is necessary to achieve the relevant purposes of sentencing. Given this concern, a judge must understand the ways in which the various types of sentences serve each of the four purposes and must appreciate the costs associated with each sanction. The links between purposes and types of sentences deserve far more attention than can be provided within the confines of this article, but the following discussion of fines, restitution, community service, home confinement, and imprisonment illustrates the type of analysis that is required.

Fines are a popular sanction for several reasons. First, they can serve both as meaningful punishments and effective deterrents. A court can adjust the amount of the fine in relation to the offender's resources and thereby insure that the wealthy and the poor do not bear unequal burdens. In addition, a fine does not destroy the offender's chance to receive needed training, treatment, and education; nor does it disrupt the offender's home or work life severely. Finally, fines lessen the cost borne by the criminal justice system for supervising offenders on probation or keeping inmates in custody.

Under the Sentencing Reform Act the maximum fines have been increased substantially. Any felony offender may now be fined up to \$250,000. Thus, the heavy fines now available reinforce the notion that "a fine may often be a highly useful means of providing just punishment and deterring others from

engaging in like offenses.”⁹⁹ While recognizing the punitive effect of a fine, Congress did not seek merely to intensify the onerousness of criminal penalties. Instead, it authorized courts to “permit the imposition of a substantial fine *in lieu of* part or all of a prison term in appropriate cases.”¹⁰⁰

Section 3572 of the Act lists several factors for a court to consider in determining whether to impose a fine. The court’s point of departure must be based upon “the factors set forth in section 3553(a),” a provision whose main concern is the purposes of sentencing. The court also must take into account all of the offender’s background characteristics, including ability to pay, the burden that the fine will impose on the offender and his dependents, any restitution made to the victim, and any other pertinent considerations. Applying these principles, a sentencing judge would first decide whether a fine is warranted and then set the amount high enough to punish and deter the offender but not so high that it would undermine whatever rehabilitative effect the sentence as a whole is intended to carry.

The guidelines invert this inquiry by making fines mandatory in all cases unless the defendant establishes that he is unable to pay the fine or that the fine is unduly burdensome.¹⁰¹ The question thus becomes whether *not* to impose a fine. Moreover, under the guidelines the answer may not be influenced by the already punitive nature of the sentence, such as five years in prison plus a fine. Only in setting the *amount* of the fine may the court consider the degree to which the combined sentence provides adequate punishment and deterrence.¹⁰²

The guidelines’ presumption in favor of fines in all cases is unwarranted. A fine should be a component of a sentence only in cases where an extra measure of deterrence or punishment is merited. If an offender receives a prison sentence, a fine is not appropriate unless it serves to reduce the term of imprisonment dictated by just deserts. On the other hand, a fine may dovetail nicely with a sentence of straight probation that might otherwise be perceived as too lenient.

Sentences requiring offenders to pay restitution to their vic-

99. SENATE REPORT, *supra* note 15, at 107.

100. *Id.* at 59 (emphasis added).

101. GUIDELINES MANUAL, *supra* note 8, at §§ 5E4.2(a), (f).

102. *Id.* at § 5E4.2(d).

tims deter and punish in the same manner as fines. The extent of the punishment depends on the amount of restitution involved. Some proponents claim that restitution has a rehabilitative effect on criminals as well. An offender who is forced to repay his victim either with money or in-kind service must confront the consequences of his criminal act. This type of encounter may be therapeutic because it helps the offender to appreciate the nature of his crime and to take responsibility for it.¹⁰³

Congress heavily favored restitution in the Act. Section 3553(a)(7) requires the court in each sentencing decision to consider "the need to provide restitution to any victims of the offense." If the court chooses not to order restitution, section 3553(c) requires the judge to state his reasons. The guidelines faithfully implement the intent of Congress here.¹⁰⁴

The potential rehabilitative effect on the offender and the compensatory result for the victim justify the presumption in favor of restitution. A sentence of restitution, however, poses problems similar to those discussed above with reference to fines. A sentence comprised of restitution and other punitive elements may inadvertently exceed the requirements of just deserts unless the punitive effect of restitution is taken into account. There is a real danger that the court may decide that five years in prison is warranted by just deserts and then order \$10,000 restitution merely to compensate the victim. Certainly this helps to make the victim whole, but it also boosts the level of punishment. Apart from this potential problem, the increased use of restitution mandated by the Act and the guidelines is a positive development. Such sentences may deter, punish, and possibly rehabilitate the offender.

Many indigent offenders do not have the resources or the ability to pay fines or restitution. Other wealthy offenders can make large payments without suffering greatly. For these offenders especially, as well as some in between, community service may be a more effective sentence. Advocates of community service justify its use on a number of grounds. Some see it as restitution to society at large and point to the

103. Casson, *Restitution: An Economically and Socially Desirable Approach to Sentencing*, 9 N.E. J. ON CRIM. & CIV. CONFINEMENT 354 (1983). *But see* D. McDONALD, *supra* note 32, at 165.

104. GUIDELINES MANUAL, *supra* note 8, at § 5E4.1 and commentary.

benefits both to community and offender.¹⁰⁵ Others emphasize that forcing an offender to provide unpaid labor restricts his liberty, and therefore both punishes and deters. In the Vera Institute program in New York City “[t]he community service sentence was to be first and foremost a punishment.”¹⁰⁶ The perceptions of the offenders sentenced to the Vera Institute program varied. Some viewed their sentences as not punitive in comparison to jail sentences and felt that they were getting a break. Others perceived their sentences as serious punishments. A study of the program concluded that, on the whole, offenders perceived a community service sentence to be less desirable than a small fine or unconditional discharge and that the community service sentences were punitive to some degree.¹⁰⁷

The guidelines allow the court to require community service as a condition of probation or supervised release. However, the guidelines shed little light on when such a condition is warranted. Section 5F5.3 of the guidelines obligates the court in felony cases to impose one or more of the following: a fine, restitution, or community service. The guidelines leave two questions unanswered with respect to these conditions. Why is the court obligated to impose at least one condition in all felony cases? And how is a court to decide which conditions are appropriate?

A fair interpretation of section 3563(b) of the Act indicates that Congress expected an answer to these questions. In this provision Congress empowered the courts to impose a number of discretionary conditions upon a probationary sentence, including fines, restitution, and community service. However, section 3563(b) limits the court’s discretion “to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2).” Section 5F5.3 of the guidelines implies that a sentence of felony probation standing alone is not sufficiently onerous to provide adequate deterrence and just pun-

105. See Perrier & Pink, *Community Service: All Things to All People*, June 1985 FED. PROBATION 32, 37 (discussion of community service and rehabilitation).

106. D. McDONALD, *supra* note 32, at 45.

107. *Id.* at 163.

ishment, but neither the guidelines nor the Commission's commentary compel such a reading. Where there is a conflict the court is bound to follow section 3563 of the Act, not section 5F5.3 of the guidelines. Each element of the sentence must be justified independently. Therefore, whenever the purposes of section 3553(a)(2) are met by the other aspects of the sentence, such as prison or probation, additional conditions are unwarranted.

The final nonimprisonment sanction discussed in this article is home confinement. As the restrictions of the Georgia program demonstrate, home confinement can pack strong punitive and deterrent effects.¹⁰⁸ A recent study conducted by the Federal Judicial Center found that offenders perceive home confinement programs to be extremely punitive. In fact, some offenders "have refused to participate in home confinement programs, once they learned of the strict rules, because they felt it would be easier to spend the time in jail."¹⁰⁹

Data on the incapacitation effects of home confinement is sparse at this time. However, the strength of the incapacitative effect surely is dependent on the restrictiveness of the conditions imposed. Close electronic monitoring or probation officer check-ups can insure that the offender will not have free rein in the streets. Joan Petersilia reports that a program in Palm Beach, Florida, in which more than sixty percent of the participants were felons, was a "resounding success in this respect." Only three percent of the offenders in the program escaped or were rearrested during their term of home confinement.¹¹⁰ In addition, any violation of probationary conditions could be strictly enforced with more restrictive terms or even incarceration.

The Federal Judicial Center study reports that home confinement also may hold great promise as a rehabilitative tool. "[O]ffenders can learn to structure their time, budget their money, and generally make significant changes in their habits under the enforced regime of home confinement."¹¹¹ Meanwhile, job responsibilities and attention to the needs of the of-

108. See *supra* notes 33-35 and accompanying text.

109. Federal Judicial Center, *Home Confinement: An Evolving Sanction in the Federal Criminal Justice System* 46 (1987) [hereinafter Federal Judicial Center Study].

110. J. PETERSILIA, *supra* note 33, at 44-45.

111. Federal Judicial Center Study, *supra* note 109, at 51.

fender's family need not be seriously disrupted. At this time the rehabilitative effects of home confinement can only be measured by anecdotal evidence. Stories of changed lives abound, but until empirical data can be gathered a conclusion that home confinement is the great hope for the rehabilitative ideal is premature.

The guidelines allow for home confinement, but only as a condition of probation or supervised release.¹¹² They explicitly reject home confinement as a substitute for imprisonment. As discussed, the guidelines narrowly restrict probation to cases in which the lower limit of the guidelines, sentencing range is six months or less. Within this category of cases a judge may order home confinement only if the lower limit is zero months.¹¹³ This scheme implies that the punishment value associated with home confinement is zero. Thus a sentence of probation with six months of home confinement would be considered zero months of punishment within the guidelines matrix.

Once again the guidelines unduly limit the court's discretion to take advantage of a promising alternative sanction. As with the other alternatives, the guidelines fail to account for the punitive effect of home confinement. Moreover, the guidelines do not recognize home confinement as a credible incapacitative sentence. The guidelines remove the primary incentive that would motivate a federal court to impose home confinement. States consider home confinement attractive largely because it diverts offenders otherwise bound for prison, but the guidelines prohibit the use of home confinement as a substitute for prison. Home confinement is not a panacea, but many states have invested in home confinement programs that hold great potential for meeting the objectives of sentencing. In the federal system, however, home confinement has been robbed of its lifeblood. The Federal Judicial Center study observes that "the Sentencing Commission has prematurely restricted the use of home confinement."¹¹⁴ The study recommends that the Commission reintroduce home confinement as an alternative to imprisonment. In order to act on this recommendation the Commission need only amend the guidelines to allow

112. GUIDELINES MANUAL, *supra* note 8, at § 5F5.2 and commentary.

113. *See supra* note 43.

114. Federal Judicial Center Study, *supra* note 109, at 69.

home confinement to be substituted for imprisonment, or in the alternative the Commission could expand the definition of community confinement to include home confinement.

Nonimprisonment sanctions obviously serve a variety of purposes at a reasonable cost, but under the guidelines imprisonment remains the preferred punishment. Why is this? What purposes does prison serve? The answers here are straightforward. Prison keeps convicted criminals off the streets. Prison punishes offenders severely. And to the extent that punishment discourages crime, prison is a deterrent. Prison does not, however, rehabilitate. All studies of prison rehabilitation programs agree on this, and Congress has explicitly disapproved of using imprisonment as a rehabilitative sanction.¹¹⁵ Nevertheless, incarceration is an appropriate sentence for many offenders, and it should be maintained as a sentence for the most dangerous or recalcitrant offenders. This conclusion does not contradict the underlying principle that the guidelines should treat imprisonment as a sentence of last resort. A court should give an imprisonment sentence serious consideration, but should choose to incarcerate the offender only if the objectives of sentencing cannot be achieved effectively by a combination of other sanctions.

B. Guideline Structure Must Reflect the Comprehensive Philosophy

A coherent philosophy is the cornerstone of any sound sentencing regime. Without it, sentencing practice may be internally consistent, and sentencing outcomes may still be consistently bad. However, the structure of the sentencing system is nearly as important as its foundation. Poorly designed procedures may skew the sentencing analysis and undermine the court's ability to arrive at the appropriate sentence.

Apart from the provisions of the guidelines that allow a court to depart, the guideline procedures suffer from such a design flaw.¹¹⁶ A well-intentioned judge may fully comply with

115. 28 U.S.C. § 994(k).

116. Certainly the departure provisions are an integral part of the guidelines, but the Commission's position is that departures will occur only in unusual circumstances. "[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often." GUIDELINES MANUAL, *supra* note 8, at Introduction p. 1.7. Therefore, it does not distort the issue to analyze the guideline sentencing process as an initial matter without considering departures. Departures are addressed in section III below.

the procedures of the guidelines without getting a sense of who the offender is and what his needs are. A step-by-step walking tour through the guidelines will illustrate this point. The first stop is the offense itself. The court must make a finding of fact regarding the events surrounding the crime itself and then calculate the offense level. Next the court must consider victim related adjustments. Was the victim vulnerable? Was he a government official? Did the offender physically restrain the victim? An affirmative finding here raises the offense level.¹¹⁷ The third step evaluates the role of the offender. Was he an organizer or leader or merely a minor participant? Did he abuse a position of trust? Again, the court may adjust the offense level.¹¹⁸ Fourth, did the offender impede or obstruct, or attempt to impede or obstruct, investigation or prosecution of the case?¹¹⁹ The final inquiry regarding the offense is whether the offender demonstrably accepted responsibility for his actions.¹²⁰

The next phase, calculation of criminal history category, purports to satisfy the court's obligation under section 3553(a)(1) of the Act to consider "the history and characteristics of the defendant." Under guideline section 4A1.1 the court adds up points for the prior convictions and sentences that are reflected in the offender's criminal record. The seriousness and recency of the prior sentences imposed affects the point total. On the basis of these points the guidelines place the offender into one of six criminal history categories. The offender's record may further influence his sentence if it qualifies him for career offender status¹²¹ or shows that the current offense is part of a pattern of conduct from which the offender made a livelihood.¹²² In either case the guidelines set a minimum floor for punishment and in addition raise the maximum punishment allowable for the offense level. The only step remaining is to consult the grid, find the range associated with the offense level and criminal history category, and then choose a point within the range.

The court need not do anything beyond what has just been

117. GUIDELINES MANUAL, *supra* note 8, at § 3A1.1-3.

118. *Id.* at §§ 3B1.1-3.

119. *Id.* at § 3C1.1.

120. *Id.* at § 3E1.1.

121. *Id.* at §§ 4B1.1-2.

122. *Id.* at § 4B1.3.

described in order to comply fully with the guidelines. Nowhere in this process has the judge been compelled to acknowledge the humanity of the offender or to seek an understanding of the causes behind the criminal conduct. In fact, the Commission attempts to eliminate from consideration many highly probative characteristics such as age, education, vocational skills, mental, emotional, and physical condition, drug or alcohol dependence, employment record, family ties and responsibilities, and community ties. Through policy statements the Commission deems them all "not ordinarily relevant" to sentencing.¹²³

The legislative history of the Sentencing Reform Act demonstrates that this is not the kind of system that Congress had in mind. "The Committee does not intend that the guidelines be imposed in a mechanistic fashion. . . . 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."¹²⁴ The Senate Report emphasizes that the structure of the guidelines is intended to aid the judge in formulating a sentence. The structure should not limit the judge's thoughtful consideration of all relevant factors.

The terms of the Act strongly imply that at least some of the factors listed above are relevant to sentencing. Section 994(d) bound the Commission to consider each of them and "to take them into account only to the extent that they do have relevance." The Act does cite the "general inappropriateness" of considering several of these factors "in recommending a term of imprisonment or length of a term of imprisonment,"¹²⁵ but no provision states or implies that these factors are not relevant to sentencing at all. On the contrary, the Senate Report indicates that "each of these factors may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment. . . ."¹²⁶ In order to be faithful to congressional intent, guideline structure therefore must be sufficiently open-ended to give the judge room to consider all relevant factors. He can then im-

123. *Id.* at §§ 5H1.1-6.

124. SENATE REPORT, *supra* note 15, at 52.

125. 28 U.S.C. § 994(e)(Supp. IV 1986).

126. SENATE REPORT, *supra* note 15, at 174.

pose a sentence upon a human offender rather than on a set of statistics.

A few small changes in the guidelines sentencing process could solve this problem. As it stands now the end-product of the guidelines' numerical calculations is a presumptive prison sentence. For each pair of offense level and criminal history category the guidelines matrix assigns a range of months of imprisonment. This time interval presumptive prison sentence immediately influences the thought process of the judge. If it seems reasonable, the judge may accept it outright. If it seems unreasonable, the judge may exercise his discretion to raise or lower the sentence. But where do purposes come in? What about nonimprisonment sanctions? The judge need not ever consider them, and he probably will not consider them unless he has been exposed to them and supports them as alternatives to incarceration.

Whether the current guidelines system establishes the proper quantity of punishment is open to question. But even if the guidelines yield the proper quantity, the result of the guidelines calculus is still flawed. The shortcoming is that the quantity of punishment is expressed in terms of months in prison. This short-circuits the judge's thoughtful consideration of alternatives. It implies that the offender belongs in prison. A solution to the problem would be to replace the ranges of months with sanction units. For example, 0-1 months could equal one sanction unit, and 0-2 months would equal two sanction units. The entire grid could be converted so that no preference for a particular sentence is expressed.

Although this change is simple, it is not insignificant. Paul Robinson, the only dissenting member of the Sentencing Commission, has suggested that the guidelines matrix be replaced with a step-by-step process that quantifies punishments into sanction units.¹²⁷ Under this kind of system a judge looking at the presentence report and guidelines calculations completed by the probation officer will see the details of the offense, the characteristics of the offender, and the presumptive sanction value. He will not be influenced by a presumptive sentence. On this basis he must apply the principles discussed above in

127. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 26-27 (1987).

relation to purposes and alternatives and then must decide which kind of sanctions are appropriate and in what measure.

A hypothetical case may help to illustrate this process. Suppose that John Doe, a thirty-year-old male, is convicted for passing counterfeit government securities in the amount of five thousand dollars. Mr. Doe has two prior convictions. Five years ago he received a sentence of two years probation for larceny, and two years ago he served a sentence of thirty days in jail for tax evasion of ten thousand dollars. Mr. Doe's presentence investigation report reveals that he graduated from high school and attended a vocational school for one year. During the past ten years he has worked on and off as a carpenter, the last four years as an independent contractor. Mr. Doe was divorced five years ago and has custody of two children, ages six and eight years. Mr. Doe also has an alcohol problem that dates back at least five years. Recently Mr. Doe has been unable to procure subcontracting jobs consistently and has encountered difficulty in providing for his children as a result. Apparently his financial problems led Mr. Doe to undertake this counterfeiting activity, and his role in the offense was limited to passing notes that had been produced by a friend.

On a grid similar to the current guidelines matrix let us suppose that the counterfeiting conviction is an offense level ten and that Mr. Doe is in criminal history category II. In the proposed sentencing system the quantity of punishment that Mr. Doe deserves would be equal to twelve sanction units. This would replace the eight to fourteen months presumptive sentence in the current guidelines matrix.

The next step under the proposed structure would be consideration of purposes relevant to this particular case. In order to complete the purposes phase of the sentencing process the judge need not evaluate the justifications for the sentencing system as a whole. He need only identify the purposes relevant to the case at hand and the characteristics that make them relevant. The judge should attempt to understand the offender as fully as possible in order to determine his needs and to assess his dangerousness and potential for recidivism. These are simple tasks, but judges must make an effort to articulate coherent principles in this heretofore uncharted area of the law.

In the case of Mr. Doe, just punishment is an important concern. Mr. Doe knowingly violated the law and in doing so undermined public confidence in government securities. He deserves to be punished for his offense, and his punishment should serve as a deterrent to similar acts that might be committed by Mr. Doe and others. Incapacitation is not a significant issue in this case because Mr. Doe does not pose a serious threat to the safety of society. Rehabilitation, however, is a legitimate concern. An alcohol treatment program might improve Mr. Doe's ability to deal with an already difficult family situation that has been complicated by financial problems.

Section 3553(a)(3) of the Act mandates the third step in the sentencing process. The court must consider "the kind of sentences available." Prison must remain the sentence of choice whenever an extremely dangerous offender is involved or whenever the offender has repeatedly failed to change his ways after numerous encounters with the criminal justice system. The court must uphold respect for the law in these cases and must protect the public as well. Since these kinds of offenders generally would have higher sanction values than other offenders, the guidelines may establish a cut-off sanction level beyond which nonincarcerative sanctions are presumptively unavailable.

In some sense the current guidelines adopt this approach by barring probation in cases where the lower limit of the range is six months. This cut-off level is well below the current practice of a criminal justice system that has already overloaded its prisons. A better cut-off level would be approximately twenty sanction units. This corresponds to about 30–37 months under the current guidelines. Since Mr. Doe's sentence has a sanction value of twelve units, the full range of nonimprisonment alternatives would be available.

Perhaps the most appropriate sanction in this case would be restitution. Mr. Doe could be ordered to repay the recipient of the counterfeit securities for the financial losses that were incurred as a result of the transaction. An additional monetary penalty might be in order, but Mr. Doe's precarious financial situation probably precludes it. A more effective alternative would be to require Mr. Doe to donate his time to work on community or charitable construction projects. As mentioned earlier, rehabilitation might be achieved by a mandatory alcohol treatment program.

The final step in the proposed guideline procedures is to distribute the appropriate quantity of punishment among the chosen sanctions. Each element of the sentence must carry its own sanction value, and the sum of all the sanction values must be determined by the guideline calculation. This contrasts with the current guidelines, which assign a prison sentence to the crime and then add on other sanctions such as fines, restitution, supervised release, and community service without altering the prison sentence. Under the guidelines these additional sanctions do not count in measuring the quantity of punishment.

Surely the guidelines are wrong when they effectively assign a sanction value of zero to these punishments, yet one can understand the Commission's hesitancy to delve into this area. How can a sentence of two months in prison be compared to six months of intensive probation with 100 hours of community service? This type of inquiry has drawn increasing attention from scholars, but as Robinson notes, "preliminary empirical research on the proper assignment of sanction values to particular sanction methods so far has resulted in mere informed speculation."¹²⁸

Uncertainty and a paucity of information should not have dissuaded the Commission from attempting to establish exchange rates between sanctions. As Thomas Quinn points out, "no logical scaling or quantification process preceded the establishment of the current [pre-guidelines] system. . . ."¹²⁹ The Commission should have used available knowledge and experience to set initial values that could be adjusted over time. Robinson suggests that "[e]xperience with offender preferences for one or another sanctioning method will quickly identify overvalued sanctions."¹³⁰

Robinson is right to focus on offender preferences because the goal of reducing unwarranted disparity, the driving force behind sentencing reform, has been fueled by offenders' perceptions that their sentences were harsher than similarly situated offenders. In the proposed scheme the Commission would assign values to various kinds of sentences. Taking Mr.

128. *Id.* at 54 (citation omitted).

129. Quinn, *Focus for the Future: Accountability in Sentencing*, March 1984 *FED. PROBATION* 10, 18.

130. Robinson, *supra* note 127, at 54-55.

Doe's case, restitution of six thousand dollars in losses might be worth four sanction units, 90–120 hours of community service might be worth four units, an alcohol treatment program might count for two units, and an 11:00 P.M. to 6:00 A.M. curfew for six months might be worth an additional two units. The sum of these is twelve units, which would be equivalent to the 8–14 month prison sentence. If the Commission finds that these exchange rates contradict the data taken from offender preferences, it can remedy this problem by making incremental changes in the sanction values associated with each type of sanction until offenders are indifferent between penalties that carry equal sanction values.

III. GUIDELINES SENTENCING AS AN EVOLUTIONARY PROCESS

On the surface the sentencing regime proposed in this article and the current guidelines do not differ radically. The proposed guidelines fit easily within the statutory framework legislated by Congress. In fact, the proposed system is more faithful to the intent of Congress because it gives full consideration to the purposes of sentencing and the variety of available sentencing options without causing unwarranted disparity in the quantity of punishment that offenders receive. On the other hand, the conceptual distance between the two guideline systems is enormous. The Commission's guidelines emphasize uniformity and just punishment, while the proposed guidelines see these concerns as limiting principles on an essentially utilitarian regime.

Since this article is written with the federal judiciary in mind the following pertinent questions remain to be discussed. First, how can a judge who shares the concerns expressed in this article operate within the current guideline system? Second, by what means can the judiciary exert pressure on the guidelines to bring them into conformity with the principles embodied in the Sentencing Reform Act? Obviously these two questions are closely related, but the first addresses the duty of the judiciary to interpret and apply the law while the second relates to the ability of judges to articulate principles that will establish a common law of sentencing.

According to section 3553(b) of the Act a court is bound to impose a sentence of a kind, and within the range, set forth in the guidelines "unless the court finds that an aggravating or

mitigating circumstance exists that was of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.”

Both Congress and the Commission recognized that they could not undertake a sweeping reform of sentencing practice without retaining a role for the discretion and experience of the federal judiciary. The power to depart from the guidelines lies at the heart of that role. In the Guidelines Manual the Commission states that it could have specified that a particular circumstance had been adequately considered and thereby could have barred the court from departing for that reason. The Manual clearly states, however, that “[i]n this initial set of guidelines . . . the Commission does not so limit the courts’ departure powers.”¹³¹ Furthermore, the Commission admits that “these initial guidelines are but the first step in an evolutionary process.”¹³²

This article makes a *prima facie* case that the Commission did not adequately consider nonimprisonment sanctions, the purposes of sentencing, and the impact of the guidelines on prison overcrowding. If the court believes that the presumptive guideline sentence is inappropriate in any given case for one of these reasons, it is obliged to depart and impose a sentence that addresses these factors adequately. In a case like Mr. Doe’s, where the presumptive guideline sentence is 8–14 months in prison, but the court finds that because of the offender’s background a rehabilitative sentence is warranted, the court must fashion an alternative sentence such as probation with community service and restitution. In another case the court might find the prison sentence appropriate but for an overcrowding crisis in the nearby federal prisons. Provided that the offender is not a serious threat to the public, a strictly enforced home confinement sentence might be more appropriate. These kinds of departure sentences, which the guidelines clearly allow, would permit the court to impose sentences that are more just, effective and parsimonious than the presumptive sentences dictated by numerical calculations.

The power to depart freely raises the specter of rampant, unwarranted disparity—the precise evil that motivated federal

131. GUIDELINES MANUAL, *supra* note 8, at Introduction p. 1.6.

132. *Id.* at Introduction p. 1.4.

sentencing reform. Two innovations of the new sentencing regime safeguard against unwarranted disparity. First, section 3553(c) of the Act requires a statement of reasons to support any departure sentence. Second, pursuant to section 3742 of the Act either the defendant or the government may appeal any departure sentence, depending on whether it is greater than or less than the guideline sentence. Both provisions not only act as a check on unwarranted disparity, but provide courts with an opportunity to shape the new guidelines regime over time as well.

Section 3553(c) requires the court to articulate the reasons for any sentence imposed, even if it falls within the guidelines. Although both Congress and the Commission acknowledged the importance of a statement of reasons, neither enumerated the required elements of such a statement. The Judicial Conference Committee on Criminal Law and Probation Administration, chaired by federal Judge Edward Becker, has addressed this issue in a memorandum circulated in May of 1988.¹³³ The memorandum discusses the requirements of section 3553(c), and proposes a standardized form on which a judge can state his reasons. The form has three parts. First, the court must make findings of fact. Second, the form requests the court to apply the guidelines to the findings of fact and to specify the resulting presumptive sentencing range. The final section requests the court to articulate its reasons either for choosing a particular sentence within the presumptive range (if the range is greater than twenty-four months) or for departing from the range.

Use of a standardized reasons form risks routine, boilerplate answers that will not reveal much about the sentencing process. On the other end of the spectrum, unstructured sentencing opinions are difficult to analyze and digest and therefore might prove less useful to the Sentencing Commission, judges, and academics. The form created by Judge Becker's Committee attempts to strike a balance with its guided but open-ended format.

The Committee's form represents a commendable effort to

133. Memorandum from the Honorable Edward R. Becker, Chairman of the Judicial Conference Committee on Criminal Law and Probation Administration, to all federal judges, magistrates, circuit executives, district court executives, clerks of the United States District Courts, and chief United States probation officers (May 1988).

gather and organize the thinking of federal district court judges on sentencing. However, the form is fundamentally flawed in two respects. The most egregious error is one of omission. The standardized reasons form does not require or encourage the judge to state the purposes that motivate the sentence. This omission contradicts the plain language of the Sentencing Reform Act. Section 3553(a) of the Act obligates the court to consider purposes in each case, and section 3553(c) requires the judge to state his reasons for imposing a particular sentence, reasons which obviously should include sentencing purposes.

Judge Becker's Committee would make an articulation of purposes optional. The memorandum accompanying the reasons form states, "A judge *may wish* to state how the guideline sentence selected serves the ends of sentencing called for by the Sentencing Reform Act."¹³⁴ The Committee would make consideration and articulation of purposes mandatory only in cases "[w]here the court concludes that the guidelines do not comply with the Act."¹³⁵ The Committee seems to be saying that in a particular case purposes become relevant only if the judge has already made a blanket determination that the guidelines violate the statute. "[W]here the court is satisfied that the guidelines comply with the Sentencing Reform Act, it need not engage in such an exercise."¹³⁶

Sentencing opinions without purposes are not only in violation of the Act, but are undesirable from a policy perspective as well. A judge cannot shape the common law of sentencing in any coherent way without addressing purposes in his sentencing opinion. Merely stating that a particular type of sentence is appropriate in a given case will neither bind nor persuade other courts when they encounter similar cases. Sentencing opinions that explain the purposes behind each sentence are far more likely to establish lasting sentencing norms.

The second flaw in the Committee's reasons form is the order in which the elements of the form appear. Ordering may seem insignificant, but, as explained above, the order in which certain factors are analyzed may strongly influence sentencing

134. *Id.* at 10.

135. *Id.*

136. *Id.* at 11.

outcome.¹³⁷ Inasmuch as the reasons form reflects the desired thought process of the judge, the order in which the elements on the form are presented becomes important. An alternative format for sentencing opinions, which will promote full consideration of sentencing purposes and all available sanction options is necessary. One such format is described below.

A prerequisite to sentencing is that the court must make findings of fact concerning the specific offense and the offender's characteristics. Consequently, the sentencing opinion begins with a section in which the court describes the pertinent facts of the case. On the basis of these facts the court considers purposes, and in the second section of the opinion the court explains the degree to which each purpose is relevant to the sentencing decision in the case at hand. The court should also state the reasons why these purposes are relevant. In other words, the court describes the facts which implicate each purpose. Next, the judge enumerates the types of sentencing options that might serve the designated purposes and explains the reasons for imposing one sanction or a combination of sanctions over another.

Through this procedure, the judge expresses the ways in which his own knowledge and experience in sentencing influences the outcome in the case at hand. In the pre-guidelines system, this rarely occurred. If the guidelines only accomplished this much, simply forcing judges to express the thought process that went into a sentence, the new system would be a vast improvement on prior practice.

The next phase of the opinion brings the guidelines into play. The judge calculates the presumptive guideline sentence range or adopts the probation officer's calculations. Then the judge compares his preferred sentence with the sanctions available within the presumptive guideline range. If the preferred sentence falls outside the range the judge should not hesitate to depart and to explain the reasons for doing so.

If a departure is warranted, it may take three forms: dispositional, quantitative, or both. Dispositional means that the preferred sentence is of a *kind* not available within the presumptive range. This might occur when the judge prefers a nonimprisonment sanction, but the lower limit of the guideline

137. See *supra* notes 127-28 and accompanying text.

range is greater than six months. A quantitative departure is warranted where the guideline sentencing range does not adequately reflect the *amount* of punishment necessary to accomplish the purposes of sentencing. The court also may wish to impose a sentence that differs in both kind and amount of punishment in appropriate cases.

Whenever the judge departs, he must explain why his preferred sentence is superior to a sentence within the guideline range. In doing so he should also describe the means by which he weighed the sanction values of the two sentences and settled on the duration or conditions of the sentence imposed. If the judge chooses not to depart, a statement outlining the appropriateness of the guideline sentence would also be in order.

Whether the judge departs or not, the sentencing opinions generated from this process can have a great impact on federal sentencing practice. Ideally, the opinions would be published, perhaps in some sort of sentencing law reporter.¹³⁸ At a minimum other judges should have access to sentencing opinions, even if they are not regarded as binding precedent. The opinions also provide a basis for appellate review of the sentence. If the reasons stated in the opinion tend to create unwarranted disparity, or violate the terms and objectives of the Act in any other ways, the appellate court may reverse the decision. Otherwise the trial court opinion will stand. Both on appeal and at trial a rich, well-reasoned trial court opinion will influence the common law of sentencing to a greater extent than a short, boilerplate statement of reasons.

Sentencing opinions also provide feedback to the Sentencing Commission, which has an obligation to evaluate sentencing practice under the guidelines as it emerges. The Commission's task did not end on November 1, 1987. The Commission is a permanent body that possesses the authority to amend the guidelines. As courts depart from the guidelines, the Commission will oversee the process of reform. "By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines."¹³⁹

138. An excellent example of such a reporter is the Federal Sentencing Reporter, published under the auspices of the Vera Institute of Justice.

139. GUIDELINES MANUAL, *supra* note 8, at Introduction p. 1.7.

CONCLUSION

The federal sentencing guidelines initiate an opportunity for dialogue between federal courts and the United States Sentencing Commission. If federal judges do not hold up their end of the conversation, however, the objectives of the Sentencing Reform Act will never be achieved. In the gestation period before the guidelines emerged the Commission neither sought nor received adequate input from the federal judiciary. Now that the guidelines are in place judges have another opportunity. As judges begin to sentence offenders under the new system, the guidelines invite them to express their concerns about the guidelines and their visions of ways in which the system can work better. This article has suggested a philosophy of sentencing and a framework for sentencing opinions that will encourage judges to consider the purposes of sentencing and the wide range of sentencing options available. Judges must not acquiesce to inadequate guideline sentences nor abdicate their responsibility to consider all factors relevant to deciding the fate of the human offender who stands before the court at sentencing.

