

THE UNITED STATES SENTENCING GUIDELINES
AND CRACK COCAINE:
A CALL FOR PARSIMONY IN THE FORM
OF INTERMEDIATE SANCTIONS

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ABSTRACT

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This is a qualitative study that examines the assertions made by other legal scholars that minority based sentencing disparity, as it relates to the U.S. Sentencing Guidelines, is due to intentional racial, ethnic, and gender discrimination. Professor Celesta A. Albonetti (1997) makes the unfounded assertion that minority based sentencing disparity, as it relates to the Guidelines, is due to intentional discrimination by federal judges and prosecutors. When examining minority based sentencing disparity under the U.S. Sentencing Guidelines, black males are incarcerated longer than other minority groups for violations of federal cocaine statutes. Black males are also incarcerated longer than nonminority offenders for violations of federal cocaine statutes. Minority based sentencing disparity does exist, but is *not* due to intentional discrimination. Minority based sentencing disparity is the product of past employment discrimination in the United States and legal, structural aspects of federal statutes and their interaction with the Guidelines. The primary cause for large numbers of black males being incarcerated more often and for longer periods of time is due to the fact that certain federal crimes committed disproportionately by blacks are punished more severely than crimes that are committed disproportionately by white males. Crack cocaine violations are committed disproportionately by black males due to discrimination and economic deprivation. The false perception of *intentional* racial and ethnic sentencing disparity erroneously attributed to the Guidelines is due to the U.S. Congress and its willingness to place more emphasis upon the possession, use, and distribution of crack cocaine, the historical existence of deeply rooted racial, ethnic, and economic discrimination embedded in American culture, and the failure of the U.S. Sentencing Commission to formulate a sound and well balanced sentencing rationale.

This study examines the controversy surrounding the U.S. Congress and the negative impact of mandatory minimum sentences on the Guidelines and minority

offenders. The Guidelines transition from legally binding administrative law to vague advisory provisions is also considered. In addition to a consideration of the negative effects of mandatory minimum sentences on the Guidelines and minority offenders, the Commission's inability to justify a modified just dessert sentencing rationale with prolonged periods of offender incapacitation is also scrutinized. In order to dispel the myth of intentional discrimination presented by Albonetti, and to further support the argument for the legal, structural causes of discrimination, an experiment by David B. Mustard (2001), a professor of Law and Economics at the University of Georgia, and an experiment conducted by Professors Rodney L. Engen, a professor at North Carolina State University, and Rodney R. Gainey, a professor at Old Dominion University are compared. Mustard applies standard regression analysis to the Guidelines determinate sentencing grid and comes to the conclusion that the greatest sentencing disparity exists between black male and white male offenders who are isolated in a one-on-one basis in the same district court with similar characteristics.

Engen and Gainey (2000) assert that *standard linear* regression analysis is unsuited for the determinate sentencing grid because it assumes a linear, additive relationship between crime seriousness and criminal history. In order to properly control for interaction between these two legal factors, Engen and Gainey assert that researchers should be aware that standard linear regression models erroneously assume a uniform change in the dependent variable with each unit increase of the independent variable. Mustard's standard regression model *does* assume a uniform change in the dependent variable with each unit increase of the independent variable. The Guidelines typically increase the severity of the variables radically for more serious offenses, including offenders with *drug* and weapons related criminal histories. Standard regression experiments in the field of criminal law and determinate sentencing that fail to control for interaction between legal factors will result in distorted extralegal factors. Norval Morris (1990), a professor at the University of Chicago School of Law, asserts that the answer to past discrimination against minorities and the legal, structural problems that plague the Guidelines is to implement intermediate sanctions in the form of compulsory, community based drug rehabilitation programs.

INTRODUCTION

The examination of the U.S. Sentencing Guidelines and racial, ethnic, and gender based sentencing disparity is vital to restore the integrity of the federal court system and to insure the longevity of the Guidelines themselves. In order to determine the extent of possible minority based sentencing disparity, a qualitative study is conducted by contrasting and comparing legal, structural aspects of the Guidelines, two controversial experiments in the field of criminal justice and sentencing, and the researchers approach to applying their methodology. As a result of considering the structural and statistical characteristics of the Guidelines, it is determined that minority based sentencing disparity is not due to overt discrimination within today's federal court system, but may be attributed to a long history in the United States of past discrimination against minorities and the legal structure of the Guidelines. The false perception of intentional racial and ethnic sentencing disparity erroneously attributed to the Guidelines is due to the U.S. Congress and its willingness to place more emphasis upon the possession, use, and distribution of crack cocaine, the historical existence of deeply rooted racial, ethnic, and economic discrimination embedded in American culture, and the failure of the U.S. Sentencing Commission to formulate a sound and well balanced sentencing rationale.

In order to define the structural elements of the Guidelines that are responsible for creating a *false* perception of minority based sentencing disparity, a brief legislative history of sentencing reform is conducted, the sentencing philosophy and

methodology drafted and applied by the Congress is scrutinized, and the Commission's inability to translate Congress' mandate for drug offenses and sentencing rationale is examined. Ever since the Guidelines took effect in November of 1987, they have been a great source of controversy in legal and academic circles. While the Commission faces many challenges as stewards of the Guidelines, many legal scholars are guilty of making unfounded assertions that federal sentencers are intentionally discriminating against minority offenders. The bedrock of determinate sentencing is crime seriousness and criminal history. Crime seriousness and criminal history are legal factors. This study demonstrates how the failure to properly control for interaction between these two legal factors will lead to distorted results for extralegal factors. Thus, minority based sentencing disparity is greatly exaggerated. Since minority based sentencing disparity is greatly exaggerated, the problem of too much emphasis on crack cocaine violations of federal statutes created by the Congress, a long history of past racial, ethnic, and economic discrimination in the United States directed against minorities, and the failure of the Commission to originate a clear sentencing philosophy can be mitigated through the implementation of parsimony in the form of intermediate sanctions.

Chapter 1

The U.S. Sentencing Guidelines: A Brief Overview

The Guidelines are a determinate system of criminal sentencing that was created to bring an end to the indeterminate era of criminal rehabilitation and sentencing. The rehabilitative or indeterminate approach to sentencing derives from the notion that the primary purpose of the criminal justice system is to make changes in the “characters, attitudes, and behaviors of convicted offenders” (Bunzel, 1995, p. 936) in order to strengthen society against drug related criminal violations, but also to contribute to the welfare of the offender in question. Indeterminate sentencing was not based upon the sentence imposed at conviction, but consisted of the offender’s steps toward rehabilitation while they were incarcerated. The determinate approach to sentencing is associated with the emphasis on the offense. The indeterminate approach is affiliated with a humanistic tradition that assesses the shortcomings of the individual and treats the criminal as a “social malfunctioner” that needs to be treated or rehabilitated.

The sentencing reform movement and the Guidelines are the products of the era of progressivism. In the past, the progressive movement employed experts in the field of criminology, psychology, and the law to analyze and implement public policy through research. Sentencing disparity present within the progressive approach to the rehabilitation of the criminal mind sparked a need for sentencing reform. This desire for sentencing reform resulted in the Comprehensive Crime Control Act of 1984 (CCCA) and the Sentencing Reform Act of 1984 (SRA). The

Congress was responsible for drafting the SRA. Congress had three important goals when implementing the SRA. First, The Congress sought to implement truth in sentencing. Second, they were hoping to achieve reasonable equality in sentencing. And third, the Congress wanted proportionality in sentencing. These three important elements were to eliminate the negative sentencing disparities present within the old federal rehabilitative criminal justice system (Dreissen & Durham, 2002).

Some elements of progressivism are still evident within the SRA through the creation of experts as seen in the Commission. The Commission is a bipartisan commission housed in the judicial branch of the government. “The seven voting members on the Commission are appointed by the President of the United States, confirmed by the U.S. Senate, and serve staggered 6 year terms” (*Fifteen Years*, 2004, p. 5). The Commission has a history of having federal judges on the panel. These federal judges are chosen by the Judicial Conference of the United States and are recommended to the President of the United States as candidates for appointment to the Commission. The Commission has a member of this six-person panel act as chair. The Commission also has three vice chairs. Expressing a need to solve social problems through scientific means, the Commission established a research and development program to determine the effectiveness of the Guidelines and federal criminal justice policy.

The Guidelines have been sharply criticized by lawyers, scholars, and the courts. There are three areas that are usually the target of criticism. The first involves the loss of the sentencing judge’s discretion. Prior to the CCCA and the SRA, the

courts were free to apply discretion on a case-by-case basis (Dreissen & Durham, 2002). There are many legal experts who feel that recent legislation that takes historically established discretion away from the federal sentencing judge creates an imbalance in the federal criminal justice system.

Second, many legal experts are challenging the approach to policy implemented by the Commission. For example, the Commission adopted a modified real offense sentencing scheme rather than a charged based system. In addition to this criticism, the Commission did not require a burden of proof at the sentencing phase, but wrote one in after the district court expressed a need for one.

The final source of criticism is that Guidelines only address one potential source of unwarranted disparity they were designed to address. The Guidelines inform the judge of her responsibilities and limit her discretion, but they do not legally obligate other members to address sentencing issues in a specific manner. Since these instructions do not apply to the police, parole officers, or prosecutors, and only apply to the judge, the Guidelines may not eliminate sentencing disparity (Dreissen & Durham, 2002). The police may affect the ultimate outcome of the sentencing process by narrowing the focus of their investigation toward a preconceived outcome. Prosecutors have a tremendous amount of power over the outcome of any defendant's sentencing decision. Prosecutors have the discretion to decide what evidence will be criminalized.

Chapter 2

The Rise and Fall of Indeterminate Sentencing

Early in the 20th century, the progressive ideal was expressed through indeterminate sentencing and the rehabilitative model. Prisons were no longer places to punish offenders, but were institutions where criminals were absolved of their moral and social ills (Bunzel, 1995). Parole and probation soon became the central pillars of the rehabilitative model. The indeterminate form of sentencing emerged in 1870 and was a program created by the National Congress of the American Prison Association at Cincinnati, but the rehabilitative approach to sentencing later prevailed due to the work of reformers like John Augustus.

John Augustus was known as the “Father of Probation” (Bunzel, 1995, p.946). He believed that criminal offenders could be reformed and often petitioned the court system in Boston Massachusetts to have them released into his custody and insured that they were able to find food, shelter, clothing, and work. As a result of the efforts of John Augustus and other reformers, in 1878 the State of Massachusetts made the probation officer a permanent part of the criminal justice system. The probation officer and the rehabilitative approach to sentencing later became embedded in the historical fabric of other state jurisdictions, as well as the federal criminal justice system. Physicians, sociologists, and psychologists created a regimen of treatment to cure the depraved. Indeterminate sentencing allowed expert evaluators to determine the length of sentence that would bring the offender to a specified place in the rehabilitative continuum (*Fifteen Years*, 2004).

Disparity in sentencing criminal offenders started to become an issue of concern in the political, legal, and academic world in the 1960's. This disparity seemed to be based upon geography, race, gender, and class (Hall, 1999). The Congress passed the SRA in order to address these sentencing disparities. The SRA helped to create the Commission. The Commission was responsible for formulating a system of determinate or structured mandatory sentencing guidelines to bring an end to the era of indeterminate sentencing and broad judicial discretion.

In the 1970's, the rehabilitative model of criminal sentencing had begun to fall into disrepute. Confidence in the rehabilitative model had declined, but faith in the progressive method of expert commissions still remained (*Fifteen Years*, 2004). Empirical studies conducted by criminologists and psychologists demonstrated that the reform movement was a failure. Other issues regarding the inequality and disparity associated with indeterminate sentencing raised issues concerning the rule of law. Also, during this time frame, the crime rate in the United States began to rise to increasingly high levels. During the 1970's and 1980's, steadily increasing crime rates brought about the "Age of Backlash" (Bunzel, 1995, p. 946). The Age of Backlash was a response to the perceived leniency of the rehabilitative ideal. As a result of rising crime rates and the perceived leniency of the criminal justice system, Americans began to place pressure on politicians to get tough on crime. Essentially, the criminal justice system in America became politicized. Emphasis was shifted from the judiciary to the legislature and from the offender to the offense. This set the stage for the introduction of a crime control model in the United States. Crime control is deterrence and incapacitation.

In 1971, the National Commission on Reform of Federal Criminal Laws attempted to eliminate sentencing disparity and implement a program of mandatory determinate sentencing. Some delay occurred with sentencing reform as a result of partisan politics, but rising crime rates later insured the passage of the Sentencing Reform Act of 1983 (Webber, 1993). On October 12, 1984, the CCCA was voted into law. The CCCA contained the SRA.

The Guidelines represent the shift from the rehabilitative approach to crime and indeterminate sentencing to retribution, incapacitation, and a new determinate sentencing philosophy in the federal criminal justice system. As support for the rehabilitative model began to erode, organizations like the American Friends Service Committee began to produce literature that served as the death nail in the rehabilitative process (Bunzel, 1995). The American Friends Service Committee, an organization dedicated to prison reform, published a report in 1971, criticizing the rehabilitative process and indeterminate sentencing. This report later led to the creation of determinate sentencing.

The Committee believed that the theory of indeterminate sentencing was “faulty, systematically discriminatory in administration,” (Bunzel, 1995, p.948) and inconsistent with the basic principles of the rule of law. The Committee also believed that all offenders who were in a broad class, such as the category of crime committed, should be treated alike during the sentencing phase. The Committee believed that individual characteristics should not be considered during the sentencing process.

Marvin Frankel created the American Friends Service Committee’s manifesto on

determinate sentencing, which later became the forerunner to the Guidelines. Marvin Frankel, a former District Judge for the Southern District of New York, crystallized the Committee's penal philosophy by conducting lectures at the University of Cincinnati Law School. He called for a national committee to study sentencing, corrections, and parole (Bunzel, 1995). During the same lecture at the University of Cincinnati, he also expressed that it was necessary to establish laws and rules for sentencing research, including rules that were subject to congressional veto (Fifteen Years, 2004, p. 4). Frankel later organized his thoughts on sentencing reform in 1972 by writing a book entitled, *Criminal Sentences: Law Without Order*.

In his book, Frankel criticized the use of "judicial discretion, indeterminate and rehabilitative sentencing, and individualized justice" (Bunzel, 1995, p. 949). He believed that the rehabilitative model as represented through indeterminate sentencing was excessively broad. He also believed that the medical parallels that were used as a basis for the rehabilitative model were flawed. Judge Frankel did not see these offenders as those who were simply ill and were awaiting a cure. He saw criminal offenders as miscreants, cold and calculating risk takers, who had flaunted morality and public order and were made to pay the price for their transgressions with their liberties. Judge Frankel also proposed a permanent national commission to study sentencing and to issue rules for "objective, effective, and uniform sentencing". Frankel's proposal was the forerunner to the Commission and the Guidelines.

After the publication of Frankel's work and rising crime rates in the 1970's, the Congress eventually began to take a harder stance toward crime when revising

criminal statutes. When the Commission began to promulgate mandatory guidelines, statutory laws simply possessed maximum sentences with very little emphasis on mandatory minimum sentences for criminal defendants (Hall, 1999). In 1975, U.S. Senator Edward Kennedy introduced a bill during the 94th Congress (S.2699) to form the Commission, issue sentencing guidelines, and reduce statutory maximum sentences (*Fifteen Years*, 2004). This legislation was drafted to place more emphasis on mandatory minimum sentences and to reduce crime rates.

Another concern in legal, political, and academic circles was the wide discretion practiced by judges through indeterminate sentencing. Judicial discretion applied through indeterminate sentencing appeared to discriminate against minority groups (Hall, 1999). The sentencing reform movements of the 1980's stem directly from this need to address the perceived disparity and subsequent discrimination present within the indeterminate sentencing structure.

Politicians, legal scholars, and the general public eventually began to realize that there was no truth in sentencing. After the Congress defined criminal violations through statutory law, a judge prescribed the appropriate sentence, but the United States Parole Commission (USPC) could allow the same offender to serve only 1/3 of the sentence. Another offender incarcerated for the same crime may be required to serve the *entire* sentence (Dreissen & Durham, 2002). Under the indeterminate system of sentencing, the judge and the prosecutor were aware that an offender would not serve the entire sentence. This lack of truth in sentencing later became apparent to an unsuspecting public in the late 1970's and the 1980's.

During the 98th Congress, from 1983 to 1984, Senators Strom Thurmond and

Paul Laxalt introduced comprehensive crime legislation (S.829) aimed at implementing sentencing reform. After Senators Thurmond and Laxalt introduced the initial sentencing reform bill on the Senate floor, the Senate Judiciary Committee held hearings and transformed S.829 into several bills. One of these bills was S. 1762, which later became the Comprehensive Crime Control Act of 1983. The Comprehensive Crime Control Act of 1983 contained a major section on sentencing reform. Another sentencing reform bill was also introduced on to the Senate floor at about the same time (*Fifteen Years*, 2004). This bill was S. 668. S.668 was very similar to the Title 2 bill created by Senator Edward Kennedy. Both S.1762 and S.668 passed the Senate in 1984. During this same time frame, the House Judiciary Committee introduced H.R. 6012. This legislation required determinate parole terms and the creation of a part-time commission within the Judicial Conference to write advisory sentencing guidelines.

Soon after the House considered H.R. 6012, an amended Comprehensive Crime Control Act is merged into an appropriations bill. This bill was passed by the House and the Senate, and was signed into law by President of the United States Ronald Reagan, on October 12, 1984. This bill became the SRA and established Commission. The Commission drafted the Guidelines for the federal court system (*Fifteen Years*, 2004).

From 1985 to 1989, United States Supreme Court Justice Stephen Breyer (1988) was a member of the Senate Judiciary Committee. Breyer helped to formulate the original Guidelines policies. In 1984, he was a U.S. Senator assigned to the Senate Judiciary Committee and was involved in efforts to create new federal sentencing

legislation that was designed to curb the growing crime rate in the United States and bring an end to the era of indeterminate sentencing. In 1988, he authored and published a legal research paper for the *Hofstra University Law Review* entitled “The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest.” In his research article, Breyer discusses the general principles of the Guidelines and some of the controversial issues surrounding federal sentencing policy.

When the Commission began writing the new Guidelines in 1985, several states in the United States had already placed similar determinate sentencing policies in place within their own jurisdictions. Two of these states mentioned in Breyer’s (1988) article are Minnesota and Washington. In his article for *Hofstra University Law Review*, Breyer compares the state sentencing policies to federal sentencing policy. Essentially, the federal criminal code contained many more crimes than state codes. The Minnesota and Washington State commissions wrote guidelines for 250 and 108 statutory crimes. These state violations consisted of murder, theft, robbery, and rape. After comparing the States of Minnesota and Washington to the federal system, Breyer came to the conclusion that the federal criminal justice system had to deal with 688 different statutes. These federal criminal statutes included complex legal issues such as the Hobbs Act, the Travel Act, and the Racketeer and Corrupt Organizations Act.

Another issue that Breyer (1988) discusses in his article is the problem of writing new federal sentencing policy that extended over 52 state jurisdictions. The compact and cohesive cultural, social, and political environments in the various

states in the United States made it much easier for the individual states to address their region's specific law enforcement needs. This is in stark comparison to the diverse requirement of the federal sentencing statutes.

In his article, Breyer (1988) also outlined the primary purpose of the new federal sentencing statutes. He explains that the primary purpose was honesty in sentencing. Honesty meant that when an offender was sentenced and incarcerated for a set number of years, the offender actually had to serve this amount of time in prison. Breyer explains that the U.S. Senate Judiciary Committee responded by abolishing parole. The only exception to this particular action would be 54 days of good time granted to each offender per year.

The second purpose of the Guidelines was to reduce sentencing disparity. Breyer (1988) explains that some sentences handed down for the same crime may result in a sentencing disparity of 17 years difference between different federal circuit courts. Sentences for the same crime committed in California may be 6 months longer than those committed in the Deep South. Black male offenders may receive longer sentences than a white female offender for the same crime. Finally, Breyer asserted in his article that the remedy for this type of regional, race, and gender disparity was the Commission. Breyer believed that the Commission would regulate the Guidelines through research and an incremental form of evolutionary revision.

Chapter 3

Determinate Sentencing and the States

In the United States, there is a long history of experimentation with public policy. The states often act as a laboratory for policies that are later refined and implemented on a national level (Dreissen & Durham, 2002). The United States Supreme Court cites this as an advantage of federalism. The states have served for the last 30 years as a proving ground for sentencing reform.

Beginning in the 1970's, state level officials began to realize that indeterminate sentencing was an ineffective and unfair means of applying punishment. State law enforcement administrators began to reform the courts in order to implement a structured or determinate system of criminal justice (Dreissen & Durham, 2002). A few states completely overhauled their court systems and made an immediate and decisive change to determinate sentencing. Other states made changes through trial and error over a longer span of time.

There are several types of determinate sentencing provisions, and many states have adopted a combination of these methods. Mandatory minimum sentence laws insure that offenders serve a minimum length of time in prison for certain offenses (Moore & Miethe, 1986). Truth-in-sentencing laws require that an offender must serve a certain minimum proportion of the sentence granted before parole officials may even consider this offender for release from prison. Two-or three-strike laws require incarceration, which eliminates a judge's discretion to offer probation as a sentence, when an offender is convicted of a serious felony more than once.

On the state level, one of the most successful determinate sentencing programs was created by the State of Minnesota. Minnesota's determinate sentencing program went into effect on May 1, 1980. Minnesota adopted a commission approach to sentencing. There are two important elements contained within the Minnesota determinate sentencing program that insure its' success. The first consists of a "modified just-deserts" (Moore & Miethe, 1986, p. 256) approach to criminal punishment in which the focus of a criminal sanction is based upon the seriousness of the offense and the offender's criminal history. It is simply concerned with retribution. It is a sentencing philosophy that is focused on punishment for the criminal act and past criminal acts rather than demonstrating concern for "deterrence, rehabilitation, and isolation". This allowed emphasis to be placed upon the seriousness of the offense and crimes against persons. The retributionist theory of criminal punishment eliminated offender and case characteristics that had previously been a part of past sentencing policies. The Minnesota Sentencing Guidelines Commission (MSGC) insured that sentencing would be neutral according to "race, gender, social, or economic status of the offender". The MSGC also insured that State guidelines prohibited judges from taking into consideration "race, sex, employment status, education, marital status, and the offender's exercise of constitutional rights during the adjudication process".

Another asset to the success of the Minnesota determinate sentencing program was the MSGC's application of the sentencing guidelines as law rather than as advisory policy. While the guidelines allow for departures from the law, these departures must be justified by the sentencing judge in writing. Reasons for

aggravating or mitigating departures are clearly defined for the judge and references during the sentencing phase to the “exercise of an offender’s rights, race, or social class” (Moore & Miethe, 1986, p. 257) are specifically prohibited. Any other departures from the guidelines should be embarked upon for “substantial and compelling” reasons. Any sentences based upon unauthorized reasons may be appealed. If the Minnesota sentencing guidelines were advisory, all of these strict legal sentencing controls over the use of offender attributes would be voluntary.

Chapter 4

The United States Sentencing Commission and Structure

The Commission uses a sentencing grid to determine the length of incarceration (see Appendix A). When the Commission considers criminal sanctions, they consider the severity of the crime from the most to the least severe and place it along one axis of the sentencing grid. The criminal history score is placed on the opposite axis. The sentencing table is broken down into zones. A is the least severe sentencing zone. D is the most severe sentencing zone (*Guidelines Manual, 2006*). Where the two axes intersect, a sentencing score or range has been literally determined.

The sentencing judge applies the guidelines established by the Commission to a base offense level (1-43) according to the specific crime that has been committed. “A total offense level of less than 1 is to be treated as an offense level of 1” (*Guideline Manual, 2006, p. 382*). “An offense level of more than 43 is to be treated as an offense level of 43” (*Guideline Manual, 2006, p. 382*). This criminal base offense level may be adjusted according to any aggravating or mitigating circumstances that may be related to the offense and the offender.

The judge also computes the offender’s criminal history category (1-6) where points for prior criminal convictions are tallied and a criminal history category for sentencing purposes is established. Additional sanctions are considered for Career Offender and Armed Career Offender (*Guideline Manual, 2006*). The criminal base offense level and the criminal history score are added together for the total.

Next, a departure provision which allows the judge to deviate from the average Guideline sentence is applied to the total criminal base offense level score. The departure provision assumes that the judge may issue a sentence within the appropriate sentencing range. She may depart from the score obtained through the average application of the sentencing grid by considering any aggravating or mitigating circumstances that may be attached to the case (Webber, 1993). The departure provision is very controversial because it appears to be a judicial discretionary provision within a determinate sentencing framework.

According to statute, “the number of months of incarceration established as the top of any guideline range cannot exceed the number of months at the bottom of that range by more than 6 months or 25%” (Dreissen & Durham, 2002, p. 632). If this method of allocation is carried out, the general assumption is that defendants charged with similar crimes will receive similar sanctions. This sentence should not vary “any more than 6 months in comparison to the number of months equal to 25% of the total guideline range.” This should be a consistent standard implemented nationwide with every judge, district, or circuit.

One reason for the lack of sentencing structure in the SRA is that members of the Congress had very little or no practical experience sentencing offenders to prison. One could easily come to the conclusion that the allotment of three judges on the original Commission was inadequate (“Crime Package,” 1984). For example, not many people are capable of sentencing a first time offender found guilty of drug distribution to 15 years in prison where the previous penalty under federal law was merely 5 years. The distribution of illegal substances is a serious offense, but, as a

result of preexisting mandatory minimum sentences for drug trafficking, sentencers are unable to use the Guidelines to properly consider mitigating circumstances.

The Guidelines operate under a system of real offense sentencing. Real offense sentencing requires the judge to identify unlawful acts, omissions, attempted threats or harms that were carried out against the victim. The Commission was charged with deciding between two criminal sentencing philosophies (Silets & Brenner, 1986). The U.S. Sentencing Commission could choose between a real offense system of sentencing based upon the illegal conduct that the offender actually engaged in while committing the offense, or they had the option of choosing a system based upon what the offender was actually charged and convicted of in a federal court of law. The Commission chose a real offense system of sentencing, because they felt that real offense sentencing would represent the sentencing reforms required by the SRA. Another important factor outlined by the SRA was the judge factor. The Congress wanted federal judges to remain within a certain parameter. Sentencing was to be seen as a formalized predictable exercise in jurisprudence. The problem with this approach to sentencing is that it required a complete overhaul of the federal criminal justice system. The sentencing judge has gone from using the beyond a reasonable doubt standard to being forced to determine the guilt or innocence of a defendant simply based upon the preponderance of the evidence.

Because of the lack of judicial experience in the Congress, and later on the Commission, the reforms implemented may have gone too far and drastically altered the very foundation of Anglo-American justice. Completely replacing the

process of judicial discretion with a structured or calculated procedure has pushed the federal court system past the point of sound constitutional legal practices (Silets & Brenner, 1986). Under the Guidelines, the emphasis in determining guilt is placed upon all the harms that the offender actually caused while committing the crime. The problem with this approach to determining guilt and defining culpability is that these acts are intermingled with the conduct that constitutes the criminal charge itself.

If the real elements are something other than the crime charged, one must wonder, what exactly are they? Essentially, they are facts or conduct that the government was unable to prove in a court of law. Instead of proving facts beyond a reasonable doubt, these elements are introduced at a hearing and the criminal law is simply reduced to the lowest levels of procedural law (Silets & Brenner, 1986). This leaves the defendant with having to prove his or her innocence where they have not been charged. This is in direct conflict with the beyond a reasonable doubt standard. Since the Guidelines are based upon a modified real offense system rather than a strict charge or conviction sentencing rationale, the standardized sentencing structure sought by the SRA is undermined. A conviction based system would not entangle the court in vague and often complex proceedings and would insure that hearings are fair and sentences are completely justified. If the Congress was attempting to create a system of criminal sentencing that is fair and would actually have a direct impact on crime, they should have chosen a charge of conviction sentencing system that relies upon standardized penalties for each type of crime committed. Since the Congress failed to choose a conviction based system, it is

nearly impossible for the Congress, the courts, and the Commission to monitor the success of the Guidelines. The performance of a modified real offense system of sentencing is too uneven in its characteristics and is difficult to gather consistent data that would act as an indicator regarding the success or failure of the Guidelines.

Indigent defendants are at a disadvantage under a real sentencing system. Many inmates in the U.S. Prison system believe that they are incarcerated because the incompetence of their legal counsel. When the Commission promulgated the Guidelines in 1987, the defense lawyer's role in sentencing changed. The prosecutor is now in control of a process that once was the sole discretion of federal district court judges (Hall, 1999). The lack of the public defender's resources and the new found powers of the prosecuting attorney to obtain a plea or an extremely lengthy sentence may determine a defendant's punishment.

Those represented by public defenders are especially disadvantaged under the new determinate sentencing guidelines. Under the old indeterminate system of federal sentencing, the public defender was already severely taxed with an overwhelming responsibility to represent those who could not afford an attorney. Under the Guidelines, the public defender spends much of her time attempting to simply minimize harsh and lengthy sentences. Defense counsel is now forced to prepare for two hearings. The first hearing consists of the statutory charges and evidence that will be presented to the jury (Hall, 1999). The second hearing is a departure hearing that consists of aggravating or mitigating circumstances that may be presented during the sentencing phase and may lead to another sentence.

The public defender's responsibilities have increased while their effectiveness has decreased, but the standard for proving ineffective assistance of counsel remains the same. Politics have also contributed to a smaller budget for the public defender's office. An overzealous prosecutor gladly uses these issues to dispose of cases in a quick and cost effective manner (Hall, 1999).

A defendant's ability or inability to hire a lawyer may have a direct impact upon the length of their sentence under the Guidelines. A defendant's lawyer needs to make sound legal arguments, perform important criminal investigations, and successfully carry out the appropriate legal research. The judge no longer has the power to keep the prosecutor from seeking undue plea bargains and lengthy prison sentences (Hall, 1999). The pendulum of power has swung in the prosecutor's favor. The only individual to stem the tide under the new Guidelines system is an overworked and underpaid public defender who is attempting to deal with statutory evidence and the ever evolving Commission's promulgations. At this point, the defendant is forced to gamble. Should the defendant plead guilty to a crime that they did not commit, or should they prepare a defense and take the chance of spending a good portion of their life in prison? Under the determinate system, the defendant is solely at the mercy of the prosecutor.

It is exactly this type of disparity that makes the new Guidelines very similar to the disparities found under the old indeterminate system of sentencing. Instead of the sentencing judge, the new factors that determine an indigent defendant's prison sentence have evolved into the goals of an ambitious prosecutor and the competence of a public defender with an ever expanding caseload (Hall, 1999).

Instead of fighting the charge and proving their innocence, an indigent defendant is simply attempting to implement damage control and minimize their sentence.

The Guidelines were designed to eliminate these kinds of disparities, but now an offender's sentence is reliant upon effective assistance of counsel now more than ever in the history of American jurisprudence (Hall, 1999). These disparities in sentencing for criminal violations may lead to an increase in prison overcrowding and violence, a decrease in law-abiding behavior in the general public, and a decline in the effectiveness of the criminal justice system and its ability to make an impact upon crime.

Over time, the Guidelines have evolved into a confusing, mixed system of criminal sentencing with both real offense and charge offense elements. Initially, the Commission considered implementing a pure real offense system of criminal sentencing, but was forced to abandon this idea after a period of time due to complex mathematical formulas that were found to be impracticable. The Commission was concerned that the quadratic root formulas applied to the new real offense system of sentencing would actually cause sentencing disparity. To avoid the risk of undermining the Guidelines with a real offense system that produced sentencing disparity, the Commission was forced to move toward a charge offense system of sentencing (*Guidelines Manual*, 2006).

Chapter 5

Minority Based Sentencing Disparity

The perception of intentional, racial, and ethnic sentencing disparity erroneously attributed to the Guidelines is due to the historical existence of deeply rooted racial and economic discrimination embedded in American culture. Norval Morris and Michael Tonry (1990) assert that black males in America per 100, 000 are more than 7 times as likely to be incarcerated as white adult males. Morris and Tonry certainly believe that the American criminal justice system has a secondary effect upon disproportionate incarceration rates for black males, but, primarily, this kind of disparity between blacks and whites is “deeply rooted in history” (p.32) and social structure. “The primary cause for large numbers of black males being incarcerated more often and for longer periods of time is due to the fact that certain federal crimes committed disproportionately by blacks are punished more severely than crimes that are committed disproportionately by white males” (Klein & Steiker, 2002, p.237).

When taking into consideration cocaine violations, these disproportionate incarceration rates are also due to the Congress placing more emphasis upon the possession, use, and distribution of crack cocaine. The largest cause of disparity between blacks and white offenders within the federal criminal justice system takes place when federal prosecutors are given discretion to circumvent the Guidelines in order to give sentence reductions to those offenders who cooperate with the government by giving information or testifying against other defendants (Klein &

Steiker, 2002). As a result of past discrimination and economic deprivation, black males are especially vulnerable to the awesome discretionary powers of the federal prosecutors.

“Black males consist of approximately 12 % of the population in the United States, and 13 % of its drug users, but account for 33 % of the drug related arrests” (Sandy, 2003, p. 4). Black males also account for 62 % of drug-related convictions, and 70 % of drug related incarcerations. In 1980, there was approximately 3 times the number of black males in college as there was in prison or jail. Within 2 decades, there were actually fewer black males in college than there were in prison or jail.

Critical race theory may offer some explanation as to why disproportionate numbers of blacks come into contact with the criminal justice system in America. Critical race theorists believe that race is a social construct that is a permanent fixture in American language, perceptions, and culture. In any culture, people feel a need to categorize others and the American culture is no different. These categories, as misguided as they may be, is an attempt by people to understand others and the world around them. These kinds of interpretations can often go unchecked and manifest themselves as social norms. The dominant race in any given culture may use these kinds of superficial observations and interpretations regarding people of other races to “solidify their power” (Sandy, 2003, p. 5) over minorities. This is especially true in political and legal systems. The United States was founded during a time in history when racial differences were self-evident and this interpretation of racial distinctions has become firmly embedded into the American culture.

When drafting the SRA, Congress made it apparent that the past practice of allowing judges to consider and weigh personal information about the criminal offender should continue under the new legislation. The Congress did not want any limitation placed on the information that may allow a federal district court judge to assess the “background, character, and conduct of a person convicted of an offense” (Freed, 1992, p. 1715) for the purpose of imposing a sentence upon them. The Congress also instructed the Commission to consider other personal information when relevant to the case. The Congress asked the Commission to focus on “age, education, vocational skills, mental and emotional condition, physical condition, drug dependence, previous employment record, family ties, responsibilities, and community ties.” The role in the offense, the offender’s criminal history, and dependence upon a life of crime for their livelihood was also expected to be considered, but these final three elements were part of the formal sentencing criteria.

The Congress did not want the sentencing judge to be limited in regards to the consideration of background information and characteristics about the offender. The Congress made the Commission the sole decision maker regarding the legal relevance of this information. Five of the background characteristics were found to be unsuited for sentencing purposes. This directly conflicted with U.S.C. 18 and 28, which provide standards for imposing prison sentences. In order to reconcile this difference, the Commission simply implemented the unlimited discretion of the sentencing judge directly into the *Guidelines Manual* (Freed, 1992).

The federal sentencing judge may also depart from the Guidelines based upon

offender characteristics. The judge may depart from the guidelines based upon “not ordinarily relevant” (Guidelines Manual, 2006, p. 435) offender characteristics.

Though offender characteristics are actually defined in the *Guidelines Manual* as not ordinarily relevant, the sentencing judge may circumvent the Guidelines at this juncture by declaring the offenders characteristics as “present to an exceptional degree”.

In her study entitled, “Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992,” Professor Celesta A. Albonetti (1997), a professor of sociology at the University of Iowa, discusses four theories that directly effect the discretion of judges, prosecutors, and probation officers: labeling theory; the structural perspective of rational decision making; social-psychological perspective of causal attribution in punishment; and uncertainty avoidance-causal attribution in punishment perspective.

Labeling theory is when minority offenders who are male and less educated will receive harsher sentences compared with white male or female offenders. For example, instead of taking into consideration that an otherwise law abiding black or Hispanic male has simply committed a first time mistake by getting involved with drugs, a judge or prosecutor may simply assume that an offender is a gang member or drug dealer (Albonetti, 1997).

The merger of the structural perspective of rational decision making and social-psychological perspective of causal attribution in punishment implies that “sentencers attempt to achieve rational outcomes as a result of a lack of knowledge

by relying upon stereotypes that suggest that certain defendant groups are potentially repeat offenders. Albonetti (1997) asserts that from these psychological theories, social perspectives, and stereotypes come very harsh sentences. Albonetti also believes that lengthy sentences are handed down by federal sentencers to insure that those who are perceived to be a member of a potentially dangerous offender groups will not become repeat offenders.

Uncertainty avoidance-causal attribution in punishment perspective takes place when a white defendant benefits more from a judicial Guideline departure. This means that the judge's only opportunity to exercise discretion under the Guidelines creates a disadvantage for minority offenders. Based upon these facts, it appears that departures regarding substantial assistance and acceptance of responsibility create unwarranted sentencing disparity. Albonetti (1997) believes that these four theories are affecting the consistency of the Guidelines and mandatory minimum statutes.

Chapter 6

Mandatory Minimum Sentences

The perception of intentional racial and ethnic sentencing disparity erroneously attached to the Guidelines and cocaine related violations of federal law is due to a combination of mandatory minimum sentences created by the Congress, and the Congress' willingness to place more emphasis upon the possession, use, and distribution of crack cocaine. United States cocaine policy is influenced by populism. The populist approach to public policy is based upon gut reaction, common sense, and the pendulum of public opinion (*Fifteen Years*, 2004). The main goal of legislators is to stay in office. Crime is the one key public concern that inflames constituents. A legislator giving a fiery stump speech about rising crime rates in America has been the fuel on the fire of political debate throughout the history of the United States. Crime fighting is the sphere where legislators can please their constituents the most (Stuntz, 2001).

In order to please their constituents, legislators must draft rules that are simple and easy for the public to understand. When legislators are able to produce catch phrases related to violent crime, their constituents seem to respond. Mandatory minimum sentences for drug and gun crimes are the kind of plain language that will generate votes (Stuntz, 2001). Politicians will often mention harsher prison terms, but rarely do they take a comprehensive public policy position on matters of crime.

The second legislative goal is taking popular symbolic stands. Populism is overwhelmingly apparent when legislators take symbolic stands on drug policy.

Sometimes new crime problems will rear their ugly heads, but at the time that a crime wave is taking place, legislators can do little about it. Once members of Congress have an opportunity to address these kinds of criminal matters, they often cease the moment and draft legislation that results in excessively harsh prison sentences (Stuntz, 2001).

The use of powder cocaine escalated in the 1970's. Many people who used powder cocaine smoked the substance through a method known as free basing. Free basing is one of the most dangerous ways of smoking cocaine (Sandy, 2003). Free basing cocaine has been proven to give the same affect as smoking crack cocaine, but the media failed to sensationalize the use of powder cocaine and refused to pose affluent white users as dangerous criminals.

The crack cocaine legislation drafted in the Congress is symbolic drug policy that is rooted in populism. In the 1980's, under the Reagan administration, the first batches of crack cocaine were introduced into a few urban ghettos, and the media posed crack cocaine as a unique "demon drug" (Sandy, 2003, p. 8) that was unlike any drug that had come before it. Legislators ceased upon the media craze and later rode the public wave of dissent in order to wring as many votes out of the crack cocaine hysteria as possible. Crack was portrayed by the media to be "highly potent, instantly addictive, and conducive to systematic violence and moral decadence." While crack cocaine is much cheaper and more accessible than free base, the absorption rate into the user's system is much faster. As far as the chemical composition of the two drugs is concerned, powder cocaine and crack cocaine are identical. The only difference between the two forms of the drug is that crack

cocaine has been demonized and associated through the media with the urban minority populations, while free basing powder cocaine is more acceptable due to its association with trendy and affluent whites.

In today's federal sentencing scheme, mandatory minimum sentences have been expanded to include entire classes of offenses. Many of these sentences stem from drug offenses. Mandatory minimum sentences are statutory requirements that insure that a person convicted of a specific offense shall receive at least the minimum sentence prescribed by law (Free, 1997). The SRA has also changed the federal sentencing landscape. In order to understand sentencing reform in the United States, it is necessary to understand the concept of mandatory minimums.

Mandatory minimums began in 1956 when the Narcotic Control Act required minimum sentences for the possession and distribution of illegal substances. By 1970, mandatory minimums had been cast aside by the Congress. The Congress replaced mandatory minimums with the Comprehensive Drug Abuse Prevention and Control Act.

Mandatory minimums were reintroduced into the federal sentencing landscape in 1984. When the U.S. Congress created the SRA, they also reintroduced mandatory minimums back into the federal criminal justice system. Soon, more than 60 federal offenses were punishable by mandatory minimum sentences (Free, 1997). This new federal legislation focused upon drug possession, drug distribution, and violent crime. Drugs and violent crime are a deadly mixture that often goes hand-in-hand. Between 1984 and 1990, 91 % of offenders in the federal criminal justice system sentenced to mandatory minimum sentences were convicted for drug offenses.

The War on Drugs has contributed to the disproportionate racial and ethnic balance of offenders in the U.S. prison system. The supply side approach to attacking the drug problem in the United States has created disproportionate increases in the prison population since 1985 (Blumstein, 1993). The theory of incapacitation does not work. A demand for cocaine still exists because there are other dealers on the street waiting to take the incarcerated offender's place. Deterrence has failed for the very same reason that incapacitation has failed. Those who are actually deterred are immediately replaced by those who are willing to distribute illegal substances.

Harsher penalties for drug possession and distribution have contributed to the racial imbalance of incarceration in the federal prison system. From 1970, until 1980, the arrest rates for whites were higher than those for nonwhites (Blumstein, 1993). Arrest rates for both groups are derived from a rate of about 10 per 10,000 juveniles in 1965, to a peak of approximately 30 times higher in 1974. This amounts to 329 for whites and 257 for minorities.

After 1974, arrest rates for drug offenses declined in the United States. This drop in the number of arrests was due to the cultural revolution of the 1960's and the unwillingness of legislators to criminalize the possession and use of marijuana by middle and upper class whites (Blumstein, 1993). After 1974, arrest rates for both whites and nonwhites continued to decline. For nonwhites, arrest rates leveled out in the early 1980's and began to increase at a rate of between 20% and 25% per year, until arrests finally peaked in 1989. This clearly demonstrates a direct correlation between deliberate choices in drug policy and drug enforcement.

The War on Drugs continued to contribute to sentencing disparity for drug crimes in the latter part of the 1980's. In 1986, the Anti-Drug Abuse Act was passed by the Congress. This act established mandatory minimum sentences for drug distribution based upon the quantity of the illegal substance confiscated at arrest and the type of drug confiscated (Free, 1997). Based upon past employment discrimination, limited economic opportunities, and cheap and easy accesses to crack cocaine, minorities were more likely to be charged with the possession and distribution of crack cocaine. Whites were more likely to be charged with powder cocaine offenses. The lack of community based drug treatment programs for crack cocaine created further disparity in drug sentences between white and nonwhite offenders.

Based upon a study conducted by the Commission for the fiscal year 1990, the Commission came to the conclusion that blacks were more likely than whites to be convicted under mandatory minimum drug statutes. The Commission came to this conclusion even though black defendants amounted to a smaller percentage of the defendant population when compared to white defendants. Blacks amounted to 28.2 % of the total of all federal defendants (Free, 1997, p. 275). This figure should be closely compared with 38.5 % of black defendants who were convicted under mandatory minimum statutes. In comparison, figures for whites were 46.9 % and 34.8 %.

In their study regarding information gathered from fiscal year 1990, the Commission also found that "African Americans were more likely than either whites or Hispanics to be sentenced at or above the mandatory minimum" (Free,

1997, p. 275). More than 2/3 (67.7 %) of black offenders received sentences that were at or above mandatory minimum provisions. When taking white and Hispanic offenders and their sentences for the same criminal violation into consideration, whites were at 54 % and Hispanics were at 57.1 %.

Much of the disparity under the U.S. Sentencing Guidelines can be attributed to the emphasis on drug offenses. Emphasis on drug offenses can be analyzed by comparing data before 1984 to data on drug offenses after the Guidelines took effect in 1987. In 1986, only 19 % of all blacks convicted in federal court were convicted for drug offenses. By the early part of 1990, the conviction rate for drug offenses had risen to 46 %. The conviction rate for whites amounted to 26 % in 1986 and 35 % in 1990. This demonstrates that the conviction rate and the harsh sentences that follow are directly affected by drug policy. Before the implementation of the Guidelines “whites were more likely than blacks to be convicted of drug trafficking, whereas the reverse was true after these provisions went into effect.”

The change in drug policy actually had a very profound effect on black males in the United States who were charged for crack cocaine offenses. The Anti-Drug Abuse Act of 1986 determined that 1 gram of cocaine is equal to 100 grams of powder cocaine. Since crack cocaine is a cheaper more accessible form of the drug, many blacks whose families were denied economic opportunities in the United States through years of employment discrimination found crack cocaine to be an inexpensive remedy to some of their economic, social, and personal woes. Unfortunately, for blacks who are charged with possession and distribution of crack

cocaine, 5 or more grams of this substance results in a mandatory 5 year prison sentence (Free, 1997). Before the Guidelines came into effect in 1987, a first time offender who was convicted with this same amount of cocaine would have been given probation, but under the new provisions for drug violations, offenders are now subject to incarceration.

When Congress created the 1986 Act, the Commission was in the process of formulating the new Guidelines. The Commission responded to this new legislation by incorporating the mandatory minimum statutes into the Guidelines and using them as a basis to establish and calculate upward and downward sentencing ranges for federal crimes.

Offenses involving 5 grams or more of crack cocaine or 500 grams or more of powder cocaine were assigned a base offense level [level 26] corresponding to a Sentencing Guideline range of 63 to 78 months for a defendant in Criminal History Category One. (*Report to Congress, 2007, p. 3*)

This was a Guideline range that exceeded the 5 year statutory penalty by 3 months. Previously, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine were assigned a base level offense of 32. This corresponds to a Guideline range of 121 to 151 months for an offender in Criminal History Category One; this offense results in an additional 30 days of incarceration when compared to the 10 year mandatory minimum for the same offense. Crack cocaine and powder cocaine offenses for possession of the drug that were above or below the mandatory minimum were set proportionately using the same 100:1 drug quantity standard.

Because of the 100:1 drug quantity standard, the Sentencing Guideline penalties, which are based solely upon quantity, are 3 to 6 times longer for crack cocaine offenders than for powder cocaine offenders who were arrested with the same quantity of the drug (*Report to Congress, 2007*). As a result of the differences between federal mandatory minimum standards and the Sentencing Guidelines, the penalties for crack cocaine are much longer than the sentences for powder cocaine for the same unlawful possession of this illegal substance.

First time offenders charged with crack cocaine violations received very harsh sentences as a result of mandatory minimum statutes. When drafting the Anti-Drug Abuse Act of 1988, Congress drew a bright line between penalties for crack cocaine and sentences for powder cocaine. The 1988 Act established a mandatory minimum sentence for first time possession of crack cocaine. This is the only federal mandatory minimum penalty for a first offense of “simple possession of a controlled substance” (*Report to Congress, 2007, p. 4*). Today, possession of 5 grams or more of crack cocaine will result in a mandatory minimum sentence of 5 years for the first offense. “Simple possession of any quantity of any other controlled substance by a first time offender is a misdemeanor offense punishable by a maximum of one year in prison.” (*Report to Congress, 2007, p. 4*) This means that a first time offender who *simply* possesses 5 grams of crack cocaine or more will receive the same sentence as a first time convicted *trafficker* of powder cocaine.

Many believe that crack cocaine is more addictive than powdered cocaine. A study by the Careers in Crack Project asserts that crack cocaine is no more addictive

than powdered cocaine. Another myth is that those who use crack cocaine are more apt to engage in violent behavior. According to the Careers in Crack Cocaine Project study, the element of violence surrounding crack cocaine does not come from users of the drug, but *directly stems from the sale of the drug* (Free, 1997). It appears that the turf wars and quick money associated with the sale of crack cocaine is the key to understanding and resolving the violence surrounding crack cocaine.

Another myth that surrounds crack cocaine is that it is an illegal substance that is far removed from the powder form of the drug. It is important to note that the mood altering ingredient present in powdered cocaine is also present in crack cocaine. If powder cocaine is dissolved in water and injected intravenously, the pharmacological effect is very similar to smoking crack cocaine (Free, 1997). Powder cocaine can be transformed very easily into crack cocaine by placing powder cocaine, baking soda, and water into a covered jar and mixing the contents of the jar by shaking it in order to remove the hydrochloride element from the powder cocaine.

Another problem the Congress failed to consider was the potentially negative effect that preexisting mandatory minimum legislation may have on the U.S. Sentencing Guidelines. Once again, the primary goal of the U.S. Sentencing Guidelines is proportionality or fairness. The Commission responded to Congress' mandate regarding proportionality by creating a "continuum of graduated increases and decreases in sentence severity from a wide variety of aggravating and mitigating circumstances" (Lowenthal, 1993, p. 92). The Congress failed to consider that previous mandatory minimum legislation would isolate aggravating

circumstances and create a disproportionate increase whenever the mandatory minimum statutes intermingled with the proportionate goals of the Guidelines.

The mandatory minimum statutes created complications for the Commission regarding the application of sentencing ranges for drug trafficking offenses. The Commission could either “coordinate the drug trafficking guidelines with the mandatory minimum sentencing statutes” (Lowenthal, 1993, p. 93) and disregard the individual proportional due process, or it could sentence drug traffickers in a manner that was inconsistent with mandatory minimum laws. Unfortunately, the Commission chose to sacrifice proportionality when sentencing drug traffickers. The Congress’ attempt to double their crime fighting efforts resulted in redundant and conflicting penalties for crack cocaine possession.

Another problem regarding the Guidelines is the dual role that the Congress and the Commission assign to the quantity of illegal substances. The Congress placed emphasis upon culpability, assuming that the quantity of a drug that an offender is associated with reflects their status within a particular drug operation (Hafer & Allenbaugh, 2003). The Commission is more concerned with the harm that large quantity of illegal substances like crack cocaine may have on the individual and the community. Since the purpose of the quantity of illegal substances is ambiguous, judges are simply left to weigh the drugs and calculate disproportionate sentences as they are related to the offender’s culpability.

Contradictory congressional directives have also led to the need to quell political and public pressure, while at the same time, insisting upon a fair and consistent sentencing system. A good example of these contradictory directives would be the

elements in the SRA that require two adult prior convictions for drug trafficking to result in sentencing under special circumstances (Hofer & Allenbaugh, 2003).

Chapter Four of the Guidelines (4B1.1), which is associated with 28 USC 994 (h) requires those with two prior adult drug trafficking violations, essentially career criminals, to receive at or near the maximum penalty (Hofer & Allenbaugh, 2003).

These kinds of ambiguous congressional directives have resulted in the Commission and federal judges being faced with a policy dilemma. The Congress sought to establish a fair and proportionate sentencing philosophy, but asked federal judges to make exceptions for drug offenses. These kinds of contradictory directives have led to disproportionate sentences for drug offenders within an allegedly consistent sentencing framework, as well as prison over-crowding and too much emphasis being placed on crack cocaine violations. The extreme 100: 1 ratio has created many legal challenges, bringing into question the constitutional application of this segment of the Guidelines, but the United States Supreme Court has not found any “racially discriminatory purpose, explicit or inferable, on the part of lawmaker[s]” (Haude, 1996, p. 2).

Chapter 7

U.S. Sentencing Guidelines: Sixth and Eighth Amendments

As a result of the constitutional system of checks and balances, the Congress and the Court have a very unique relationship. The Congress reacts to evolving social and legal trends by drafting legislation that will enable the federal criminal justice system to confront these changing social and legal standards on a daily basis. As social, cultural, and legal trends change over long periods of time, the Court may update public policies by striking down laws that are determined to be unconstitutional or antiquated. This back and forth exchange of legal concepts can be seen in the evolving significance of the Guidelines. An examination of the 6th and, 8th Amendments to the U.S. Constitution is vital in order to obtain a clear understanding of the various challenges presented by crack cocaine, minority based sentencing disparity, and the Guidelines.

The 6th Amendment to the Constitution plays a vital role in determining the significance of the Guidelines. The Founding Fathers believed that a trial by jury was an important part of the Constitution's system of check's and balances. The executive and legislative branch could not punish a person without the involvement and consent of the masses. A jury of the defendant's peers acted as a system of checks and balances against the threat of judicial despotism (Clary, 2006).

The Framers concern regarding wrongful punishment and a lack of due process grew out of Colonial America's struggles with the English Crown. The Crown attempted to limit the powers of the Colonies to govern them and conduct their own

business by removing the right of a jury trial for certain offenses. Criminal court was a battle ground between the Colonies and the Crown (Clary, 2006). The Colonial powers regularly attempted to use the criminal courts to challenge the authority of the Crown to try persons for political offenses and violations of revenue laws. The 6th Amendment guarantees the right to an impartial jury. At the time of the framing of the Constitution, trial by jury meant that the truth of every criminal accusation should be confirmed by 12 of the defendant's peers.

There are two principles regarding the 6th Amendment and its application that must be considered if the true purpose of the Amendment is to be understood properly. First, "the 6th Amendment does not prevent fundamentally unfair trials" (Jonakait, 1992, p. 744). It insures that a criminal defendant receives a certain type of trial. The 6th Amendment guarantees the criminal defendant "a public and speedy trial decided by impartial jurors" who are informed from the defense's perspective.

The 6th Amendment guarantees a trial by jury, but many jurorists consider a bench trial to be fair. Even though a judge who gives a criminal defendant a bench trial is certainly capable of being fair and impartial, a defendant is denied their unique constitutional right to a trial by jury. Due process and the 6th Amendment may have some similar characteristics and uses, but they are not one in the same.

Under the 6th Amendment, the accused is not provided with the most efficient fact finding process, but must simply have a trial by an impartial jury who is willing to scrutinize and genuinely consider the evidence that allegedly supports the charges against them. The 6th Amendment guarantees a defendant a "particular trial process" (Jonakait, 1992, p. 745) that is intended to check government power.

Before 2005, the Guidelines were legally binding administrative policy. As a result of two 6th Amendment challenges brought by offenders charged and sentenced for federal cocaine violations, the Guidelines were determined to be unconstitutional and parts of the SRA were severed in two landmark cases which resulted in the Guidelines being classified as advisory administrative sentencing policy.

In the *United States v. Booker* and *United States v. Fanfan*, the Court determined that the Guidelines were in direct violation of the 6th Amendment guarantee to a fair trial. In 2005, the Court heard *United States v. Booker* and *United States v. Fanfan*. In *United States v. Booker*, Freddie Booker was arrested in Beloit, Wisconsin, for possession and distribution of cocaine. In violation of 21 U.S.C., he was indicted for possession with intent to distribute more than 50 grams of cocaine (Clary, 2005). Booker was found guilty of both charges. The statute that he was convicted under required a minimum sentence of 10 years in a federal penitentiary and could have amounted to a maximum sentence of life in prison. At trial, the judge determined that he had obstructed justice and had possessed an additional 566 grams of cocaine. Booker had 23 previous convictions. He believed that he should only serve a sentence for possessing the 92 grams of cocaine presented to the jury. The Court of Appeals for the Seventh Circuit agreed with Booker's position regarding his sentence. The Appellate Court believed that the additional 566 grams of cocaine possession should have been presented to the jury. The court's failure to present this evidence to the jury violated his 6th Amendment right to a trial by jury. The Appellate Court ruled that Booker must receive the sentence given by the jury

or the additional evidence of cocaine possession must be presented to a jury in the form a special sentencing hearing. The Government appealed the Appellate Court's decision and the Court decided that it would consider his case.

In *United States v. Fanfan*, Duncan Fanfan was arrested for selling cocaine to a government informant. He was in possession of 1.25 kilograms of cocaine powder and 281 grams of cocaine base. In 2003, a federal grand jury indicted him for "conspiracy to distribute and possession with intent to distribute 500 or more grams of cocaine" (Clary, 2005, p. 3). He was found guilty of both charges. He received additional points under the Guidelines system for being a leader of a criminal activity. Fanfan also had an extensive criminal history. The final tally resulted in him being eligible for a sentencing range of 188 to 235 months in prison. The government appealed to the Court of Appeals for the First Circuit. The government believed that the trial court had decided his case in error. The Court granted certiorari.

United States v. Booker and the *United States v. Fanfan* presented two issues of legal significance for the United States Supreme Court to consider. The first issue that would have to be considered by the Court was whether the 6th Amendment was violated when facts necessary for sentencing were presented under the Guidelines to the judge rather than the jury. Second, if the 6th Amendment was violated, were the Guidelines still valid (Clary, 2006)?

The Court came to the conclusion that the right to a trial by jury is necessary whenever a judge attempts to hand down a sentence that is based upon evidence that has not been presented to the jury or revealed by the defendant. During their

deliberations, the Court also defined the term statutory maximum (Clary, 2006).

Statutory maximum is the maximum sentence a judge may give a defendant based upon evidence that has been scrutinized by an impartial jury or revealed in testimony by the defendant.

The mandatory nature of the Guidelines was also a matter of contention with the Court. It was the Court's position that no 6th Amendment violation would take place if the Guidelines were advisory. The selection of a sentencing range was consistent with the trial judge's broad discretion to hand down a sentence to the defendant within the statutory range. The Court had established in earlier case law that the Guidelines carried the weight of law. The Guidelines placed emphasis on the power of the judge to determine the upper sentencing ranges and usually diminished the jury's findings of the initial facts found in most cases.

The government believed that the guidelines should not have to be presented to the jury. The solicitor general's office challenged the Court and asserted that any Guideline provisions that were required to be presented to the Court would transform the Guidelines into something similar to a criminal code of conduct. This would grant the Commission unconstitutional legislative authority. The Court responded by asserting that it did not matter what the facts of the case were called. The facts must be presented to an impartial jury to avoid a 6th Amendment violation (Clary, 2006).

After determining that evidence must be presented to an impartial jury in order to avoid a 6th Amendment violation, the Court was obligated to insure that the SRA was in full compliance with the 6th Amendment. The Court came to the conclusion

that they would have to “sever” (Clary, 2006, p. 8) or remove some provisions from the SRA and make the Guidelines advisory in order to insure that they were constitutional. The Court attempted to explain their reasoning. First, when the Congress drafted the SRA, the Guidelines were created to assist the judge with the task of sentencing. The jury was never expected to be a part of this Congressional plan. Congress did not intend to have the jury participate in determining “the nature and circumstances of the offense, and the history and characteristics of the defendant”.

Second, The Congress intended the Sentencing Guidelines to create a uniform system of sentencing based upon the offense. The federal district court judge must rely upon pre-sentence reports to obtain information regarding the offender’s conduct while the criminal act was being committed (Clary, 2006). Details regarding some aspects of offender conduct may not go to the jury, but conduct that is not part of the formal adjudication process may be entered into the applicable guideline sentencing range.

The Court was concerned that adapting the 6th Amendment requirement to the SRA would make it possible for the sentencing judge to access information regarding the conduct of the defendant from the pre-sentence report, which would prohibit sentencing based upon the defendant’s conduct at the time that the crime was being committed. This would undermine the uniform nature of sentencing intended by the Congress (Clary, 2006).

Third, severing two portions of the Sentencing Guidelines would make administering the sentencing policy much easier. The 6th Amendment holding

determined by the Court in *United States v. Booker* would require sentencers, defense attorneys, and juries to consider that a crime had been committed as well as determining *how* a crime was committed (Clary, 2006). This kind of approach would make indictments and criminal testimony burdensome.

Fourth, any 6th Amendment requirement would distort the true meaning of the Congressional intent to promote a uniform system of sentencing under the sentencing guideline as it applies to plea bargains. The Guidelines allowed federal district court judges to assess plea bargains based upon the defendant's conduct during the course of committing the crime (Clary, 2006). This would come from the pre-sentence report. In light of the 6th Amendment, the prosecutor would obtain a disproportionate amount of authority over the defendant's sentence without moderating the sentencing judge. Under these circumstances, prosecutors would determine which defendant's were deserving of more severe sentences and would charge them accordingly.

Finally, the Congress intended to initiate sentencing reform in order to make it easier to increase sentences rather than decrease them. The 6th Amendment requirement by the Court would make it difficult for federal district court judges to hand down stiffer penalties (Clary, 2006). Based upon these principles, the Court decided that it would be disastrous to apply the 6th Amendment requirement to the Guidelines and came to the conclusion that parts of the Guidelines would have to be severed in order to make the SRA constitutional.

A second majority of the Court led by U.S. Supreme Court Justice Breyer, Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Ginsburg issued

detailed opinions regarding the legal severance of particular provisions of the SRA in order to meet constitutional standards under the 6th Amendment. The majority decided to sever 18 U.S.C.A. 3553 (b) (1). This provision of the SRA made the Guidelines mandatory. By legally severing this part of the SRA, along with 18 U.S.C.A. 3742 (e), the federal sentencing guidelines became advisory instead of mandatory (*Booker*, 2006). The revised, advisory version of the SRA was redefined under 18 U.S.C. 3551 and 28 U.S.C. 991. These laws require a federal sentencing court to apply the guideline ranges, but it also allows the court to consider the sentence in conjunction with statutory concerns as deemed necessary according to each particular case.

Another constitutional challenge to the Guidelines presented to the federal courts was that the crack cocaine sentencing ranges recommended by the Guidelines were so disproportionate to the crime committed that it violated the 8th Amendment's prohibition against cruel and unusual punishment. Essentially, punishment is retribution for an injustice. The goal of retribution is to "punish individuals in relation to the scope of their offenses" (Brennan, 2004, p. 579). Retribution is known as strict proportionality. In its truest form, strict proportionality would require "an eye for an eye, a tooth for a tooth." The sentencing philosophy of just dessert is based in retribution. Just dessert is also known as commensurate justice or distributive justice. The Guidelines are a modified just dessert system of sentencing. Distributive justice is a deserved punishment prescribed to an offender that is proportionate to the harm done to the victim as a result of the offender committing the crime (Austin, 1979). Just dessert is a nontraditional approach to American

jurisprudence. Traditionally, the goal of the American criminal justice system has been deterrence or rehabilitation. In the past, judges and juries have been expected to find the proper fit for the crime and its appropriate punishment, but taking into consideration the modified just dessert features within the Guidelines, the key to defining proper fit within the Guidelines sentencing structure is determining what sentencing principle(s) receives the most emphasis. In this particular instance, just dessert and the harm done to the victim take priority over deterrence and rehabilitation.

Since the Court applies many criminal law theories, in the form of prison sentences, strict proportionality is impossible to achieve through modern penology. One penological theory accepted by the Court is utilitarianism. Utilitarianism seeks to select the punishment that is most beneficial to society. It is ordinarily asserted by those who are attempting to cosset the public sector's future goals. Three penological theories stem from utilitarianism: deterrence, rehabilitation, and incapacitation (Brennan, 2004). Just dessert is a hybrid system of sentencing based in retribution and the principles of utilitarianism in the form of prison sentences. The present day application and acceptance of the theory of utilitarianism within the federal criminal justice system makes this sentencing rationale an impractical solution to the crack cocaine problem. The question is, does the punishment benefit society or is it rendered to simply to cause unneeded pain and suffering, as well as undue cost? The United States Supreme Court struggles with this question in two test cases regularly used by the federal courts to determine the constitutionality of cocaine related violations of the law.

Solem v Helm (1983) is the test case that is being used by the Court to determine whether the Guideline's crack cocaine sentencing ranges are rational and not disproportionate to the crime committed. In *Solem v Helm*, the Court sought to determine whether disproportionate criminal sentences for low-level repeat offenders would be considered a violation of the 8th Amendment's prohibition against cruel and usual punishment. The defendant at the time, Helm, had written a bad check for \$100. He had a series of six prior nonviolent offenses and was facing life in prison without the possibility of parole. During the *Solem* deliberations, the Court formulated a three prong test: (1) it should be determined whether the severity of the punishment fits the crime; (2) a comparison of the sentences to other penalties in the same jurisdiction for more severe violations of the law should be conducted; and (3) whether the punishment was similar to those handed down in other jurisdictions (Brennan, 2004). Based upon this criterion, the Court overturned his life sentence. (It is important to note that no chance for parole was a vital factor in this case). Justice Powell wrote the majority opinion for the Court. In his opinion, Powell wrote that the 8th Amendment protected nonviolent repeat offenders from "grossly disproportionate punishments" (Chemersinsky, 2003, p. 21). Since Helm's crimes were petty and nonviolent in nature, the Court determined that a life sentence without the possibility of parole was grossly disproportionate to the crimes committed. Today, the Court applies the *Solemn* test to establish that federal crack cocaine sentences for low-level offenders may be harsh, but they are not *grossly* disproportionate and are not considered to be cruel and unusual punishment under the 8th Amendment. They are not considered to be a violation of the 8th Amendment

because most offenders are eligible for parole and possession or distribution of crack cocaine is not considered to be a petty offense (Haude, 1996).

Another test case that is used by the Court to weigh the proportionate value of crack cocaine sentencing ranges is *Harmelin v. Michigan* (1991). In the *Harmelin* case, a Michigan court sentenced Ronald Harmelin to life in prison for possessing more than 650 grams of cocaine (Brennan, 2004). The U.S. Supreme Court was reviewing Michigan's new anti-drug law that mandated a life sentence without the possibility of parole for possession of a controlled substance. During the *Harmelin* deliberations, Justice Kennedy used *Solem* to further expand upon the 8th Amendment's proportionality principles: (1) legal, historical precedent asserts that the legislative branch is responsible for the length's of prison terms; (2) the 8th Amendment does not require the application of any one penological system of criminal sentencing; (3) the recognition of the benefits of federalism, diverse interests, and law enforcement requirements within each state; and (4) a proportionality review should be conducted by considering objective factors. In the *Harmelin* case, Justice Kennedy wrote the majority opinion. In the majority opinion, he wrote that "the 8th Amendment does not require strict proportionality between crime and sentence" (Chemerinsky, 2003, p. 21). He expressed that the 8th Amendment prohibits only severe sentences that are "grossly disproportionate to the crime."

Based upon the large amount of drugs possessed by Harmelin, the State of Michigan's interest in controlling cocaine trafficking, and Kennedy's position that the 8th Amendment does not endorse any one penological philosophy, the Court

reaffirmed Harmelin's conviction for cocaine trafficking. Justice Kennedy also asserted that the principles of proportionality established in *Solem* should not be activated until the threshold of gross proportionality had been met (Brennan, 2004). Four dissenting Justices felt that Kennedy's gross proportionality standard was too restrictive as a constitutional standard of law. Probably the most important issue in the *Harmelin* case was Kennedy's willingness to assert that federalism and excessive deference to the Congress were deciding factors in 8th Amendment cases. Protecting the diverse penological interests of the states and yielding excessive deference to the legislative branch in 8th Amendment cases left the awesome power of the Congress completely unchecked.

Chapter 8

Controlling for Legal Factors

This is a qualitative study. In this study, Professor David B. Mustard (2001), Professor Rodney L. Engen, and Professor Engen's colleague, Professor Randy R. Gainey, apply two different methods of controlling for racial, ethnic, and gender disparity in determinate sentencing. Engen and Gainey (2000) assert that previous standard regression studies in determinate sentencing, similar to the one conducted by Professor Mustard, have failed to properly control for legal factors, such as the seriousness of the offense and criminal history. In addition to failing to properly control for offense seriousness and criminal history, Engen and Gainey also believe that Mustard has failed to take into consideration the effects of mandatory minimum sentences on the Guidelines and sentencing disparity. Engen and Gainey assert that once the effects of mandatory minimum sentences are properly considered, standard, linear additive regression models are found to be ill suited for presumptive sentencing grids, and this type of erroneous methodology will inevitably result in biased legal and extralegal factors as they relate to racial, ethnic, and gender based sentencing disparity. Engen and Gainey also believe that controlling properly for legal factors (offense seriousness x criminal history score) within a determinate sentencing framework will increase the variance in the study and will decrease extralegal factors.

The Commission is responsible for creating the rules for offenders who are sentenced in federal courts. The Commission is also responsible for promulgating

these standards to the various federal courts. Data about the individual's criminal record determines the offense level and criminal history scores, which indicates the sentencing range for each offense. If there are extenuating circumstances, the judge can depart from the Guidelines and issue a sentence that exceeds the maximum or is less than a minimum sentence (Mustard, 2001). When a departure is made, the reasons for it must be stated by the presiding judge.

The Commission's data contains socioeconomic and demographic descriptions of the offenders. Racial, ethnic, gender, and citizenship disparity are also prevalent within the Guidelines (Mustard, 2001). Disparity is defined by comparing two offenders who are in the same district court and committed the same offense. Disparity would also include the same criminal history and offense level as another offender, resulting in different sentences on the basis of race, ethnicity, or gender.

In an article entitled, "Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts," David B. Mustard (2001), a professor of Law and Economics at the University of Georgia, asserts that blacks, and Hispanics, and others received 5.5, 4.5, and 2.3 months longer in sentencing under the Guidelines than whites. He also asserts that females received 5.5 fewer months than males. The average sentence length is 46 months. After evaluating this figure in relationship to the mean, blacks receive about 12 % longer terms than whites. Males receive 12 % longer terms than females.

Mustard (2001) also comes to the conclusion that racial and gender disparities are correlated with race such as income, age, family ties, and employment. The Guidelines state that these factors should not affect the sentence length of offenders,

but offenders who did not graduate from high school appear to have received longer sentences. Those offenders who held college degrees appear to have received shorter sentences than high school graduates. Those offenders who did not receive a high school diploma received a sentence that was 1.2 months longer.

Mustard (2001) concluded in his study that income impacted the length of sentences given to offenders under the Guidelines. Offenders with income less than \$5, 000 a year received the harshest sentences. Offenders at this income level received 6.2 months longer than people who had incomes between \$25,000 and \$35, 000. Those who are U.S. citizens received shorter sentences by about 1.7 months. He concluded that U.S. citizens are mindful of their rights and possess a greater knowledge of the court system. Age is also positively related to sentence length.

The greatest disparity under the Guidelines is for drug trafficking. According to Mustard (2001), “about 2/3 of the black-white disparity for drug trafficking is accounted for by departures from the guidelines” (p. 301). The sentencing disparity for drug traffickers is greatest when comparing Hispanics and white offenders. According to the study published by Mustard in 2001, the average sentence for drug trafficking is 24.5 months. The percentage difference is greatest for those convicted of drug trafficking. For the crime of drug trafficking, blacks received 13.7 % longer sentences than whites. Hispanics received sentences that were 6.1 months longer than whites. This amounts to 8 % difference in sentencing between these two groups.

Mustard (2001) conducts a linear regression analysis controlling for criminological factors, but also controls for extralegal variables that are “demographic, and socioeconomic” (p. 295) in nature. In his study, Mustard examines 77, 236 federal offenders sentenced under the SRA. This data was drawn from 120, 336 cases that met certain requirements set by the Commission. The sentencing dates were from October 1, 1991, to September 30, 1994. The criminal offenses analyzed in this section all took place after November, 1987, the effective date of the new SRA legislation. None of these particular offenses are categorized as petty offenses.

Cases were selected in the following manner: First, offenders given a life sentence and time served were not made a part of this study because a sentence length cannot be determined from these two categories. Excluding these categories of offenders from the sample dropped 740 offenders, leaving 119, 596 offenders to be considered. Second, individuals with incomplete criminal records (lack of offense level, criminal history, and months of imprisonment) were dropped from the sample, which removed an additional 11, 671 and retained 107, 925 (Mustard, 2001). This group incorporated those who were charged on multiple offense levels, including criminal history points, and those who were listed as being sentenced under special rules. Third, all offenders who did not have information that clearly defined their race, gender, or ethnicity were removed from the sample, which dropped an additional 946 and retained a total of 106, 979. Finally, those who lacked specific details regarding income, education, citizenship, age, and the number of dependents were eliminated from the study.

Mustard's (2001) study asserts that large disparities exist in the average sentence length on the basis of race, gender, and ethnicity. Whites received the lowest average sentence of 32.1 months. Hispanics receive a sentence of 54.1 months and blacks receive 64.1 months. This is 68.5% and 99.6% larger than the average sentences for whites. The difference between males and females is even a larger gap. The average sentence for males is 278.4% greater than that of females (this amounts to 51.5 months in comparison to 18.5 months). The average offense level for blacks is 22.8% higher than the offense level for whites, and blacks have an average criminal history score of 30.9% greater than the white average. The men's average offense level and criminal history are 39.6% and 53.3% greater than those of females.

There are disparities when taking into consideration average sentence lengths, but because they do not correct for offense level or criminal history, criminological variables may give some answers regarding these disparities (Mustard, 2001). To control for the offense level and criminal history, dummy variables are included for each cell in the sentencing table.

The offense controls help to remove bias from the experiment. Some offenses may be given more severe sentences, even if the score and criminal history are identical for another crime. If members of a specific group are overrepresented in regards to specific crimes, and the particular violation category is not controlled for, it will distort the results by giving the false impression that that these groups are being sentenced in a more discordant manner, even after taking the appropriate steps to control for criminological variables (Mustard, 2001).

Mustard (2001) determined that blacks and Hispanics are less likely to receive no prison time than whites. He also determined that those who are not U.S. citizens are less likely to receive no prison time than those who are citizens. Those with incomes of less than \$5, 000 annually are less likely to receive no prison time. The greater an offender's criminal history and offense level, the lower the probability that he will be assigned no prison time.

Mustard (2001) also came to the conclusion that there were differences in the probability of offenders receiving Guideline departures. Departure cases constitute more than half of the total sentencing differences. Examining these departures is a vital step in analyzing sentencing disparity. He determined that blacks, males, and Hispanics, and those with little education and income were less likely to receive downward and more likely to receive harsher upward departures from the presiding judges in comparison to white offenders. Females are more likely than males to receive downward departures.

There are also differences in the size of the adjustments for those who were given departures. "The downward adjustments are calculated by subtracting the actual sentence from the minimum sentence. Upward departures are calculated by subtracting the maximum sentence from the actual sentence" (p. 30). According to Mustard (2001), conditioned upon downward departures and controlling for offense level and criminal history, blacks, Hispanics, and others received downward departures 5.7, 5.6, and 5.0 months less than whites. Females received downward departures 6.9 months larger than males. When socioeconomic variables are considered, the sentencing disparities for blacks, Hispanics and other offenders.

Once again, Mustard's (2001) study considers the race, ethnicity, and gender of the individual sentenced in the same federal district court, with the same offense, criminal history, and offense level as another person. He concludes that large disparities in sentencing exist on the basis of race, gender, education, income, and citizenship. Over half of these disparities in sentencing are due to departures from the Guidelines rather than simply different interpretations of federal statutes. Racial and gender disparities exist for drug trafficking. A greater portion of the disparity between Hispanic offenders and white offenders is apparent in firearms possession and drug trafficking. The educational disparity is most apparent when analyzing drug trafficking, but is not statistically significant for other offenses.

Mustard (2001) has also concluded in his study that racial, gender, income, and education disparities are apparent in other areas of the Guidelines. Blacks and males are less likely to receive no prison time. Blacks and males are also more likely to receive upward departures and less likely to receive downward departures. When downward departures are actually given, blacks and males receive less consideration than whites and females in this area as well. Low income offenders are more prone to receive upward departures. Low income offenders also receive very small adjustments even when they receive downward departures. Highly educated offenders are more likely to receive larger downward departures than high school graduates. Being a U.S. citizen is helpful under all conditions.

The Commission asserts that the gap between majority and minority offenders is due to legally relevant differences among individual group members regarding the crime committed and individual criminal history (*Fifteen Years*, 2004). There are

three different explanations for the gap between black, Hispanic and other offenders. First, fair differentiation is when offenders receive different treatment based upon legally relevant characteristics needed to achieve the purposes of sentencing. The second possible explanation for the gap in sentencing between black, Hispanic and other offenders is due to discrimination. Discrimination is when offenders receive different treatment based on their race, ethnicity, gender, or other forbidden factors. Finally, the third explanation for gaps in sentencing between offenders is unsupportable adverse impact. Unsupportable adverse impact is when an offender receives different treatment based upon sentencing rules that are not clearly needed to achieve the purpose of sentencing.

In his study, Mustard (2001) asserts that sentencing disparity for drug crimes under the Guidelines is due to discrimination and that the relationship between offense level and sentence length for minority offenders has a nonlinear relationship (*Fifteen Years*, 2004). Once again, Mustard controls for the legally relevant factors of offense level and criminal history, but the disparity in his study results from applying principals of standard regression analysis and incorrectly assuming linear, additive relationships between legally relevant factors and sentencing length. Mustard also incorrectly controls for extra-legal variables of demographic and socioeconomic factors and fails to take into consideration that mandatory minimums often prevail over the Guideline sentencing ranges in some cases. Failure to properly consider the effects of mandatory minimum sentences on the Guidelines sentencing ranges will lead to racial and ethnic embellishments. Mustard asserts that a nonlinear relationship is found in his regression analysis by using

demographic and socioeconomic factors and asserts that this is proof that the Guidelines are creating racial, ethnic, and gender sentencing disparities for minorities when compared to white offenders. Mustard determined through his research that this is especially true for black and Hispanic males.

Paul Hofer and Kevin Blackwell (2000) conducted a study regarding the effect that mandatory minimum statutes have on the Guidelines. Hofer and Blackwell assert that mandatory minimums often prevail over the Guideline ranges in some cases and failure to properly consider this effect will lead to “exaggerated race and ethnic effects” (Fifteen Years, 2004, p. 119). For example, penalties under a mandatory minimum statute have no effect in cases where the Guidelines range is greater than the minimum penalty, but in other cases, the mandatory minimum penalty “trumps” the Guideline range and forces judges to mete out higher penalties. In a standard regression equation, like the study conducted by Mustard, a variable indicating the involvement of a mandatory minimum penalty will greatly “misspecify” the results of these important legal differences among offenders. Because mandatory minimums are associated with penalties for crack cocaine, and crack is a drug sold in urban areas where a disproportionate number of minorities reside and are often charged for the sale and possession of this substance, failure to recognize this important legal matter will give a false impression that racial, ethnic, and gender disparities are present.

A noteworthy amount of the gap between black and other offenders is attributed to the adverse impact of mandatory minimum anti-drug laws. In 1991, mandatory minimum sentences were a popular way for the Congress to demonstrate to the

voting public that they are willing to get tough on crime (Breyer, 1999). Mandatory minimum sentences were seldom used in U.S. history until the Congress created 100 separate mandatory minimum provisions in the 1980's and early 1990's. Gun and drug statutes consisted of 44 % of all Guidelines cases.

From the beginning, the Commission has always opposed mandatory minimum sentences. Many of the country's legal scholars, lawyers, and judges believe that mandatory minimum sentences are imprudent and unjust (Breyer, 1999). Mandatory minimums upset the uniform balance in sentencing that the Guidelines were meant to establish. Statutory mandatory minimum sentences prevent the Commission from carrying out the congressionally mandated task of creating a uniform set of punishments. Mandatory minimums make it impossible for the Commission to consider the amount of cocaine involved in any particular case and to adjust the sentence accordingly. Mandatory minimums also make it difficult for the Commission to take into consideration the minimal role an offender may have played in a drug case. The Congress rarely considers exceptional drug cases like these, and the blanket provisions that were created on the floor of the House and Senate later tied the hands of the Commission in the courtroom.

Mandatory minimum sentences are often circumvented by federal prosecutors. Mandatory minimum sentences appear to have failed in achieving the goals of lengthy and uniform prison sentences (Breyer, 1999). In 1991, a study by the Commission determined that in nearly 40 % of the cases involving a crime where a mandatory minimum sentence was obligatory, the offender received a sentence lower than the mandatory minimum statute. This stems from the prosecutor having

to create a safety valve for unusual cases. For example, federal prosecutors may agree to a substantial assistance departure in order to use those offenders who have minimal involvement in cases to convict those who have had a more substantial involvement in cocaine trafficking. Mandatory minimum defendants received downward departures 21.6 % of the time compared to 14.4 % downward departure rate for the general offender population. The Congress is asking for Guideline sentences and mandatory minimum sentencing at the same time. These are simply two opposing forces that are pulling in opposite directions and undermining the goal of fair, coherent, and uniform federal sentencing reform.

In 1994, the Congress enacted a safety valve to give first time nonviolent drug offenders relief from excessively harsh mandatory minimum sentences. This safety valve is an inadequate response to the Guidelines controversy and mandatory minimum sentences must be appropriately integrated into the new Guidelines by the Congress or be eliminated.

In their study entitled, "Modeling the Effects of Relevant and Extralegal Factors under Sentencing Guidelines: The Rules Have Changed," Rodney L. Engen and Rodney R. Gainey (2000) apply new linear regression methodology. They believe that racial, gender, and ethnic disparity present in determinate sentencing is due to fair differentiation. Fair differentiation is when offenders receive different treatment based upon legally relevant characteristics needed to achieve the purposes of sentencing.

According to Engen and Gainey (2000), when conducting linear regression on Guidelines data, researchers should include the legally relevant factors of offense

seriousness and the offender's criminal history score as it is defined by the Guidelines, along with offender characteristics and other factors. Studies using this data have found that offense seriousness and prior offenses determine the type of sentence and sentencing length. These legally relevant factors explain 50 % and 60 % of the variance in sentencing length. Most of the studies on the Guidelines have also determined that race, sex, and other social factors effect sentencing outcomes, but these effects appear to be rather small when compared with legally relevant factors.

Engen and Gainey (2000) assert that most studies have not controlled fully for the effects of offense seriousness and criminal history (seriousness x criminal history score) on sentencing outcomes. Most studies predicting sentencing length under the Guidelines are not accurate because they incorrectly assume linear, additive or *unchanged* relationship between legally relevant factors and sentencing length. Ordinarily, regression models assume a uniform change in the dependent variable with each unit increase of the independent variable, but Guidelines typically increase the severity of the variables radically for more serious offenses, including offenders with drug and weapons related criminal histories. The combined influence of offense seriousness and criminal history is not additive. The impact that prior offenses have on the Guidelines is based upon the seriousness of the current offense being considered by the judge, and it increases as offense seriousness increases. In other words, the effects of legally relevant factors like offense seriousness and criminal history are nonlinear. Since there is interaction between offense seriousness and criminal history present in any system of

determinate sentencing, including the Guidelines, linear regression models that assume linear, additive relationships between seriousness, criminal history, and sentence length are “misspecified” (p. 1209).

Social science methodology that applies standard linear, additive regression to determinate sentencing grids do not accurately account for the interaction between the legal factors of offense seriousness and criminal history. As a result of this imprecise methodology, legal factors are profoundly underestimated within the determinate sentencing process and the factors of gender and race are significantly distorted. When taking into consideration the legal factors of offense seriousness and criminal history, the legal factors account for 80 % of the variance in the study (Engen & Gainey, 2000). The standard linear regression model only accounts for 51% of the variance in the study.

Chapter 9

The Second Coming of Sentencing Reform

After years of controversy over federal cocaine sentencing, the Commission bowed to pressure from academics, lawyers, judges, and minority rights advocates to make changes in cocaine based sentencing. On May 1, 2007, the Commission submitted to the Congress amendment 9, which makes changes to federal sentencing policy for cocaine based violations of the law. These changes are based upon 28 U.S.C 994 (a) and (p). Amendment 9 lowers the guideline sentencing range for certain categories of cocaine based offenses and offenders (*Retroactive Report*, 2007). Amendment 9 will become effective on November 1, 2007, unless the Congress feels that it is necessary to make further changes in this sentencing policy.

The new crack cocaine amendment formulated by the Commission and presented to the Congress adjusts downward by two levels the base offense level for each quantity level of crack cocaine. These quantity levels are listed in the Guidelines Drug Quantity Table 2D1.1. The Drug Quantity Table deals with the unlawful manufacturing, importing, exporting, or trafficking of crack cocaine. The Drug Quantity Table also applies to possession, distribution, and conspiracy (*Retroactive Report*, 2007). The amendment applies to crack cocaine base level offenses that correspond with Guideline ranges that include the statutory mandatory minimum penalties for cocaine base. For example, according to amendment 9, 5 grams of cocaine base are assigned a base level offense 24. This amounts to 51 to 63 months at Criminal History Category One (which includes the 60 month

mandatory minimum penalty). The possession of 50 grams of cocaine is assigned a Guidelines base level offense of 30. This amounts to a sentence of 97 to 121 months at Criminal History Category One (which includes the 120 month mandatory minimum penalty). Amendment 9 will be applied retroactively.

In order to implement the provisions in amendment 9, the Commission promulgated sentencing guidelines rule 1B1.10. This sentencing policy addresses a reduction in sentencing due to the new amendment to the Guidelines (*Retroactive Report, 2007*). Subsection (a) of 1B1.10 specifies when an 18 U.S.C 3582 (c) (2) reduction is authorized.

Analysis regarding the effect that amendment 9 will have retroactively on offenders sentenced for cocaine based violations was produced by the U.S. Sentencing Commission. The office of Research and Data (ORD) is the research arm of the U.S. Sentencing Commission. They estimated that 19,500 offenders sentenced between October 1, 1991 and June 30, 2007, would be eligible to seek a reduced sentence if amendment 9 is implemented on November 1, 2007 (*Retroactive Report, 2007*).

The ORD examined the federal government's fiscal year from 1992 through the 3rd quarter of 2007. The Offenders that would be considered eligible under amendment 9 would be those that involved crack cocaine and were assessed at an offense level greater than 12. The base level offense of offenders eligible for sentence reduction under the new amendment should have no involvement in homicide (level 43). The quantity of the drugs found in the offender's possession at the time of arrest must be less than 4, 500 grams.

In order to include all offenders who were sentenced between fiscal year 1992 and 2006, the ORD conducted a cross-reference study with the United States Bureau of Prisons (BOP). The ORD conducted a cross-reference study with the BOP to insure that those that were still incarcerated and eligible under the new amendment were properly considered for sentence reduction (*Retroactive Report, 2007*). Some of the offenders who were being sentenced while the study was taking place had not been entered into the ORD or BOP data base. This will result in the total number of offenders being somewhat higher than was estimated in the study.

The ORD and the BOP were able to come to a conclusion based upon the number of offenders who were sentenced before June 30, 2007. The ORD and the BOP determined that 31, 323 offenders (97.9 %) were eligible under the new amendment. Of these 31, 323 cases, the BOP were able to determine that 26, 383 offenders (84.2 %) were still incarcerated (*Retroactive Report, 2007*). The remaining 4, 940 cases were former federal prisoners that were no longer incarcerated: due to expiration of their sentence (48.5 %); early release due to completion of a drug treatment program (22.5 %); poor record keeping on released offenders (22.9 %); release for reasons other than drug related policy issues (2.2 %); and 3.9 % had died in custody.

In order to determine the total number of offenders sentenced under the drug guidelines the ORD and BOP tallied the total number of offenders sentenced under the Guidelines since 1992. The total number of offenders sentenced under the guidelines was 875, 368. Based upon the 875, 368 that were sentenced, 341, 338 (39.0 %) were sentenced under the drug guidelines (*Retroactive Report, 2007*). Of

the 341, 338 that were sentenced under the drug guidelines 75, 978 (22.3 %) involved crack cocaine. Taking into consideration the total number of crack cases, 26, 383 of these cases met the standard under the new amendment for crack cocaine based sentence reduction. After the BOP was completed, the ORD removed an additional 4,914 offenders from the total number of offenders sentenced under the crack cocaine guidelines due to career criminal and armed career criminal violations of the law. This last calculation left the Commission with 21, 469 offenders that were eligible for sentence reduction under the crack cocaine guidelines.

The ORD also accumulated demographic information on the offenders that are eligible for sentence reduction. Due to missing data on 2, 824 offenders who appear to be eligible for sentence reduction under the new amendment, the actual number of offenders who were analyzed in the ORD study was reduced to a final total of 19, 500 (*Retroactive Report*, 2007). Of the 19, 500 offenders considered in the ORD study, 94.5 % were U.S citizens, 94.2 % were male, 5.8 % were white, 7.6 % were Hispanic, and 85.9 % were black offenders.

The average sentence reduction for those offenders who are eligible for sentence reduction under the new amendment is 27 months (from 152 to 125 months). According to the ORD study, 10, 605 offenders would receive a sentence reduction of 24 months (63.5 %) or less (*Retroactive Report*, 2007). The ORD study also indicates that 4, 776 (28.6 %) of offenders would be receiving a sentence reduction of one year or less. Finally, the study indicates that 1, 315 offenders (7.9 %) would receive a sentence reduction of 49 months.

With *United States v. Booker* and amendment 9, the federal criminal justice system continued to chip away at the legal, structural causes of minority sentencing disparity by hearing *Kimbrough v. United States*. On December 10, 2007, The Court upheld the federal district court's discretion when imposing prison sentences for crack cocaine related offenses in *Kimbrough v United States (Kimbrough, 2007)*. The Court used its' decision in *United States v Booker* to further clarify the rapidly changing federal sentencing philosophy concerning crack cocaine violations of federal law.

In September 2004, Derrick Kimbrough was indicted in the United States District Court of the Eastern District of Virginia and charged with distribution of cocaine and possession of a firearm (*Kimbrough, 2007*). He pled guilty to these charges. The Guidelines determined that he should serve 19 to 22.5 years in prison for possession of crack cocaine and a firearm. Instead of receiving the sentence outlined by the Guidelines, Kimbrough received a sentence of 15 years to life. The district court determined that a sentence of more than 15 years would have been a greater penalty than was required to accomplish the purpose of sentencing as it is outlined in 18 U.S.C. 3553 (a).

The majority of the Court, led by Justice Ginsburg, determined that Kimbrough's case was a prime example of the disparity in sentencing between crack and powder cocaine. Kimbrough possessed both powder and crack cocaine. If he had only possessed powder cocaine, his Guideline Sentence would have been between 8 and 9 years. The District Court decided that the statutory minimum sentence of 15 years was sufficient to accomplish the federal criminal justice

system's goals (*Kimbrough*, 2007). The Fourth Circuit vacated Kimbrough's sentence because they felt that handing down a decision outside the Guidelines was unreasonable and only served to further create controversy and confusion within the federal court system. The Court granted certiorari in order to examine the *Kimbrough* case and its' relationship to *United States v. Booker*.

One issue examined by the Court was the chemical elements of crack cocaine and powder cocaine. It has already been discussed in this study that crack and powder cocaine are similar in their content, but what is most significant regarding crack and powder cocaine is the issues raised by the Court regarding the manner in which these two drugs are consumed. In her opinion, Justice Ginsburg writes that while the two drugs are similar in physical chemical make-up, they are used in very different ways. She wrote "smoking crack cocaine allows the body to absorb the drug much faster than inhaling powder cocaine, and thus produces a shorter more intense high" (*Kimbrough*, 2007, p.6).

Another important issue addressed by Justice Ginsburg in her majority opinion was the impact of the Anti-Drug Abuse Act of 1986 upon sentencing disparity. According to Ginsburg, when the Congress Drafted the 1986 Act they felt that crack cocaine was an inexpensive, yet potent street drug, that was highly addictive, promoted violence, and created birth defects. Once the Congress established that crack cocaine was much more dangerous than powder cocaine, they used the Anti-Drug Abuse Act of 1986, based upon the weight of the cocaine seized, to determine whether the defendant was a "major drug dealer or a serious trafficker" (*Kimbrough*, 2007, p. 6). In the process of identifying major drug dealers and

serious traffickers, the Congress further applied the Act to create a mandatory minimum sentence of 10 years for major drug dealers and a 5 year mandatory minimum for serious traffickers. It is within this political climate, Justice Ginsburg asserts in her *Kimbrough* decision, that the crack and powder cocaine disparity was created. Ginsburg discusses the adaptation of the 100:1 ratio that treated every gram of crack cocaine as being equivalent to 100 grams of powder cocaine. The 5 year mandatory minimum applies to those offenders who are caught with 5 grams of crack cocaine or 500 grams of powder cocaine. The 10 year mandatory sentence contained within the Act applies to those defendant's who are caught with 50 grams of crack cocaine or 5,000 grams of powder cocaine.

Instead of using past sentencing practices for drug trafficking offenses, as was done for other offenses, the Commission failed to apply research to drug trafficking offenses when formulating the Guidelines. According to the majority opinion of the Court, the Commission decided to base the drug trafficking sentences upon the weight of the illegal substance confiscated by federal law enforcement officials. Instead of relying upon the historical, legal precedent of past sentencing practices, the Commission "adjusted and modified" (*Kimbrough*, 2007, p. 7) the past sentencing scheme based upon instructions from the Congress to place more emphasis on rationality and proportionality as it related to drug charges. In other words, drug offenses were formulated differently under the Guidelines than penalties for other federal crimes. In the *Kimbrough* decision, Justice Ginsburg made it clear that this modified approach to drug sentencing combined with the Commission's weighted drug quantity table was excessive.

Beginning in 2002, the Commission issued reports that challenged the disparity between crack and powder cocaine offenses. According to Justice Ginsburg's opinion in the *Kimbrough* case, the Commission determined that there were problems with the crack and powder cocaine disparity. In the *Kimbrough* decision, first, Justice Ginsburg believed that the relative harmful nature of the drug and the violence that was allegedly associated with it could no longer be supported with empirical evidence. Second, she wrote that the U.S. Sentencing Guidelines were unfairly targeting low-level street dealers and failing to arrest and punish major drug dealers. (Major drug dealers usually deal in powder cocaine, while street level dealers usually breakdown powder cocaine into crack cocaine). Finally, according to Justice Ginsburg, the Commission came to the conclusion that the 100:1 cocaine standard undermined the public's confidence in the criminal justice system, since many legal scholars and law enforcement officials maintain the *perception* that the Guidelines create racial sentencing disparity (*Kimbrough*, 2007). Though the Court revealed that the Commission still felt that crack cocaine sentencing disparity was warranted because of the addictive nature of the drug and the weapons and violence associated with it, the Court, as well as the Commission believed that the 100:1 ratio was still somewhat excessive and that a reduction in sentencing disparity was necessary. As a result of these factors, the Court determined that *Kimbrough's* 4.5 year sentence reduction was not an abuse of the judicial discretion allegedly committed by the District Court.

Influenced by the Court's decision in the *Kimbrough* case the previous day, on December 11, 2007, the Commission voted to give retroactive effect to amendment

9. Amendment 9 to the Guidelines would reduce penalties for crack cocaine offenses retroactively. Retroactivity of the crack cocaine amendment went into effect on March 3, 2008, but not every offender will be eligible for a sentence reduction under this new rule. The Commission has implemented a review process that will allow federal judges to evaluate each particular offender and consider their potential threat to the public (*Retroactive Report, 2007*). If the reviewing judge considers the offender to be a potential danger to the community, they will not be eligible for sentence reduction under the retroactive rule. This process will be carried out over a 30 year period because many of the offenders will still be required to serve mandatory minimum sentences of 5 and 10 years due to the amount of crack cocaine involved in their original drug offense.

On November 1, 2007, amendment 9 to the Guidelines designed to reduce sentencing disparity between crack cocaine and powder cocaine offenses were implemented. This new amendment took effect after a 6 month Congressional review regarding the controversy surrounding federal sentencing for crack cocaine offenses. Authorization by the Commission for a reduction in sentencing for certain classes of offenses and offenders are authorized by the SRA (*Retroactive, 2007*).

The Commission decided to make the new crack cocaine amendment retroactive after considering commentary from stakeholders within the criminal justice system. Approximately 33, 000 letters were received by the Commission and a full day of hearings were held on the proposed retroactive action. Most prominent stakeholders within the federal criminal justice supported retroactivity (*Retroactive, 2007*). The Commission considered any burden that would have been placed on the federal

court system and any public safety issues surrounding the action. Based upon the information obtained through commentary, hearings, and testimony, the Commission decided that retroactivity was the best statutory solution to the issue of crack cocaine sentencing disparity. The Commission reminded the federal judiciary that this was a limited action and when considering each individual case, public safety was to be the primary concern.

The original amendment initiating a reduction in crack cocaine sentencing and the retroactivity that has followed are the first 2 steps in reducing the disparity between powder and crack cocaine sentencing. The Commission continues to look to the Congress to resolve the 100:1 cocaine sentencing standard that is the source of controversy surrounding federal cocaine sentencing. It is left to the Congress to take the last step in resolving powder and crack cocaine disparity (*Retroactive*, 2007).

Chapter 10

The Crack Cocaine Controversy: The Individual v. Community

As a result of making amendment 9 retroactive, a debate has ensued within the federal criminal justice system regarding the affect that the release of 19,000 inmates over the next 30 years will have on communities across the United States. In a segment of the *McNeil/Lehrer News Hour*, hosted by *PBS* correspondent Jeffrey Brown (2007), Judge Reggie Walton and U.S. Prosecutor Gretchen Shappert debated the crack cocaine controversy. Judge Reggie Walton, an active federal judge on the United States District Court for the District of Columbia, believes that more emphasis should be placed on the rights of the offenders. Gretchen Shappert, an active U.S. Attorney for the Western District of North Carolina, believes that the potentially negative affect on communities should carry more weight when considering the fate of crack cocaine offenders.

Walton believes that the willingness of the Commission to address the disparity between powder cocaine and crack cocaine with the new amendment confirms that the disparity in sentencing between these two substances unfairly targets black males. He believes that many minorities live in poor neighborhoods and there are socioeconomic reasons for the disproportionate number of black males associated with crack cocaine arrests (Brown, 2007). Walton asserts that crack is cheap and that it is often sold in disadvantaged minority neighborhoods. He believes that as a result of the socioeconomic underpinnings of crack cocaine enforcement, 86 % of those who are serving time in federal prison for crack cocaine violations are black.

Walton also expressed his opinion regarding the specifics surrounding the retroactive action of amendment 9. He believes that the crack amendment should be retroactive because applying the amendment in any other manner would amount to petty legal wrangling over deadlines and fundamental fairness in sentencing (Brown, 2007). For example, the rule would not apply to those who were sentenced on October 31st, but those who were sentenced on November 1st would benefit from the new amendment.

Shappert believes that applying the crack cocaine amendment in a retroactive manner will have a devastating affect on communities all over the United States. She asserts that U.S. Attorney General Mukasey spoke out against the crack cocaine amendment, and the Justice Department did not want this rule applied retroactively. Shappert believes that crack cocaine is associated with violence and that the 19, 000 offenders that are eligible for resentencing will greatly increase the crime rate while ravaging communities (Brown, 2007). The 19,000 offenders in question represent 10 % of the federal prison population. She asserts that this 10 % is actually a very unique element within the U.S. prison population. Studies conducted by the Sentencing Commission regarding this 10 % demonstrate that those convicted in the federal criminal justice system for crack cocaine violations are more likely to be recidivist based upon their criminal histories. Shappert believes that the willingness of these offenders to act as leaders in drug organizations is a disturbing factor that supports her position.

Shappert is concerned about the effect the retroactive amendment will have on the courts and the communities. She asserts that the new retroactive application of

the amendment will pack federal courts with these retroactive cases and will place and undue burden on federal judges. She also believes that as a result of the retroactive action, offenders will be released from the federal prison system and allowed to commit additional crimes in fragile communities that have already been ravaged by crack cocaine and the violence that is associated with this form of the drug. The BOP claims that it takes approximately 30 months to prepare a federal inmate to be returned back into the community after they have been incarcerated for a long period of time. Inmates in the federal prison system receive 450 hours of training in BOP programs, such as anger management and drug counseling. They may also earn degrees or obtain jobs within the prison that will give them skills that may be used upon release (Brown, 2007). Shappert asserts that releasing these offenders prematurely before they have benefited from the social services and programs offered by the BOP will have a negative impact on communities. She also asserts that 2, 500 offenders with a history of crack cocaine violations will be placed back into their communities within the 1st year of the retroactive action, and they will be returning back to communities that are still coping with a number of drug epidemics. Shappert believes that *cocaine destroys and individual, but crack cocaine destroys a community*.

Walton believes that the issue of recidivism can be addressed through judicial case review on an individual basis. He does not believe that potentially violent offenders should benefit from the retroactive action and career criminals should not receive a get out of jail free card (Brown, 2007). Walton is attempting to make the public aware that there are individuals who are incarcerated for crack cocaine

violations that are not violent career criminals. He asserts that federal judges will consider the potential danger of each individual offender and will apply the review process established by the Commission in a just and responsible manner.

Shappert believes that the review process established by the Sentencing Commission may not be properly carried out in an efficient and just manner. She asserts that the convictions obtained by the Department of Justice are valid and the large number of the cases being reviewed will lessen the opportunity for judges to make sound legal decisions in a great number of the cases (Brown, 2007). She also asserts that cases will have to be reopened in situations where agents have retired, prosecutors may have taken employment elsewhere, and files may be missing or destroyed. These are issues that will directly affect the efficiency of the judicial review process.

Walton believes that the retroactive action taken by the Sentencing Commission is just because many of the sentences are simply too harsh. He asserts that federal judges should take on the extra workload to insure equity in federal sentencing (Brown, 2007). Walton sees no point in warehousing nonviolent federal prisoners for inordinate periods of time at a cost to the American taxpayer of \$24, 000 a year. He believes that instead of burdening tax payers, some of the nonviolent crack offenders could be released and could eventually become productive members of society.

Walton asserts that the current state of federal law as it relates to crack cocaine sentencing is having a demoralizing affect on minority communities. He expressed his concern that potential jurors are hesitant to serve jury duty and those jurors who

do actually serve when they are called are reluctant to convict defendants who are standing trial for crack cocaine violations because they believe that the sentencing disparity is egregiously unfair (Brown, 2007). Walton asserts that this apparent disparity also affects the police and their ability to secure witnesses and information on crack cocaine cases in the black community. He believes the black community has lost respect for the criminal justice system.

It is Shappert's position that these convictions are not based upon race. She asserts that the federal criminal justice system does not use race to hand down excessively harsh sentences to black offenders for crack cocaine violations of the law. For example, Shappert claims that those who are arrested for methamphetamine and liquid methamphetamine are predominantly Hispanic or white. She also asserts that the federal criminal justice system "charges based upon criminal conduct, not based upon race" (Brown, 2007). Shappert claims that *mandatory minimum sentences were passed, based upon the law and order necessity seen by the Congress, at the time that the powder and crack cocaine disparity issue was being considered*. It is the Department of Justice's job to uphold the laws as they were passed by the Congress.

The appearance that the Guidelines may unfairly target minorities has been a large part of the powder and crack cocaine controversy for years. Legals professionals, like Walton, as well as legal scholars like Mustard and Albonetti, believe that the 100:1 cocaine standard is racially discriminatory and may be considered a violation of the equal protection guarantees under the Constitution. In his essay, "Cocaine, Race, and Equal Protection," David Slansky (1995), a law

professor at the University of California at Los Angeles, writes that when race is taken into consideration, the American criminal justice system sees what it wants to see. In a series of race related crack cocaine cases that appear to be mysteriously uniform in their language and reasoning, Slansky asserts that the Court has created a legal doctrine that refuses to properly consider race and cocaine sentencing. He writes in his essay that the rule established by the Court directed the lower courts to conduct a rational basis enquiry when assessing crack cocaine sentences unless the statute in question reveals “an out-and-out-racial animus- an affirmative desire to hurt blacks” (p.1303). None of the federal drug statutes demonstrate such overt racism. Slansky explains that the Court further instructed the lower courts to ask whether the Congress pursued a legitimate goal of curbing drug abuse. If classifications formulated by the Congress are related to achieving this goal, the courts may only conduct a rational basis review of the Guidelines based upon sentencing philosophy alone.

The possession, use, and distribution of crack cocaine have had a devastating effect on the community. The large sums of quick money obtained through crack cocaine distribution places a low value on the conventional ways of making a living. Labor and fast food jobs are seen to be a waste of time and many who are engaged in this type of employment within poor, urban environments are often mocked, while those who sell crack cocaine make fast money and are given an unjustified respect on the streets (Johnson, et al., 1990). Family members who often disapprove of the dangerous occupation of selling crack cocaine are also shunned by their crack dealing relatives. Disrespect within this type of subculture often

breaks down the family unit in disadvantaged urban areas. A lack of disrespect is also extended to competitors, resulting in a need to respond with violence.

The crack cocaine operations conducted within disadvantaged urban areas are often protected through violence. Successful crack dealers are expected to demonstrate their wealth and power with flashy cars, lavish parties, and expensive clothing. Since the dealers identify themselves through material means, the scramble for power, money, and territory is magnified (Johnson, et al., 1990). Large scale dealers often reward street-level dealers with sneakers, jewelry, and large amounts of disposable income in order to perpetuate their loyalty and productivity within the crack distribution hierarchy.

Crack cocaine distribution also undermines housing and legitimate businesses. For example, crack dealers may intimidate business owners and landlords, moving from apartment to apartment, building to building, and using otherwise legitimate housing for crack cocaine operations. Dealers may create permanent safe houses in order to provide a place to distribute and use crack cocaine: apartments, abandoned buildings, shooting galleries, after hour clubs, and base houses where the crack is actually cooked and packaged for street level distribution (Johnson, et al., 1990). Crack cocaine dealers may also deal on the street in front of reputable businesses, subsequently driving legitimate consumers and much needed entrepreneurs out of America's inner cities.

Chapter 11

Just Desert v. Crime Control

The Commission failed to formulate a sound and well balanced sentencing rationale. The Commission failed to reconcile the application of just dessert and crime control. Just Dessert is based in morality, the culpability of the offender, and the harm done to the victim during the commission of the crime. Just dessert implies that if the offender has more culpability, they should receive more punishment. Under a just dessert system of criminal sentencing, the offender is sentenced for the most recent criminal violation under consideration as well as their criminal history. Within a just dessert framework, three other issues are also considered at sentencing: (1) the increasing severity of the offender's violations are considered; (2) an apparent lack of respect for the law demonstrated through recidivism; and (3) the fact that the offender received ineffective, lenient punishment in the past (Morris, 1982). A just dessert sentencing rationale does not ordinarily consider extralegal factors into the sentencing process. For example, an offender who is married and is the sole provider for his family would not be taken into consideration during the sentencing process. Extralegal factors are one of the primary sources of controversy swirling around the modified just dessert sentencing philosophy and the Guidelines.

Crime control implies that the offender should receive the punishment that would most likely prevent future violations of the law. In a perfect world, this could be accomplished by deterring others with stiff penalties for crack cocaine violations

or simply incapacitating the offender in question with a lengthy prison sentence, but the sentencing philosophy of incapacitation is the fatal flaw in the just dessert sentencing model (*Guidelines Manual*, 2006, p. 3; Morris, 1982). Imposing harsh penalties upon an offender for crack cocaine violations and incapacitating them for long periods of time in prison will not reduce crack cocaine violations committed by other offenders. Incapacitation within a just dessert sentencing framework also creates a lack of confidence in the criminal justice system among minority populations, increases prison overcrowding, and places an unnecessary strain on public expenditures.

The Commission could have resolved issues between the just dessert and the crime control sentencing rationales by relying upon the standards of past sentencing practices within the federal court system, but the Congress insisted that drug related penalties should be formulated in a more strenuous manner based upon the *type* of illegal substance and the quantity of the drug seized (*Guidelines Manual*, 2006). Those who are left to ponder the opposing principles of just dessert and crime control are directed by the *Guidelines Manual* to apply some kind of vague, unspoken local or regional standard, which has resulted in an uneven application of federal sentencing rationale all over the United States.

The Guidelines clearly has conflicting goals. The CCCA contained provisions that called for punishment, deterrence, incapacitation, and the rehabilitation of the offender. The Commission believed that the goals of the Congress were to enhance the ability of the criminal justice system to reduce crime through effective and fair sentencing (Champion, 1989).

Just dessert can be easily distinguished from other sentencing rationale.

Retribution is concerned with the personal suffering of the offender, while just dessert places more emphasis upon fairness and balance. The sentencing rationale of just dessert consists of two methods of weighing the facts of any particular case and coming to a conclusion by balancing these various interests. First, just dessert consists of a between-offender balancing operation that requires the judge to compare the case being considered with other “similar and dissimilar cases” (Austin, 1979, p. 165) and to insure that a graduated system of punishments is applied. The between-offender comparison is carried out to insure that similar cases are adjudicated in a similar manner and that the punishment fits the *crime*. Second, just dessert consists of a balancing operation carried out to insure that the punishment fits the *criminal*. When attempting to insure that the punishment fits the criminal, the judge is attempting to obtain a balance between the amount of harm done to the victim and the ultimate penalty that is eventually imposed on the offender. When attempting to find the appropriate fit, the judge may exercise her discretion by considering extralegal factors. When the judge has insured that the punishment fits the crime and the criminal, a presumptive sentence has been imposed upon the offender.

Since just dessert is proportionate, it creates respect for the law so that other sentencing goals can be accomplished, such as moral disapproval for crack cocaine possession, use, and distribution and the affirmation of productive, positive drug free principles and values (Austin, 1979). One problem with just dessert is that it does not look to the future, but dwells in repairing past wrongs. Just dessert

sentencing rationale has the future potential to deter crime if applied fairly, but sentencing disparity must remain limited. The tempered benefits of just dessert are one reason for the implementation of the Guidelines.

Equality is another legal, philosophical concept that is associated with just dessert. Equality is the adjudication of like cases in a like manner. The Guidelines are a determinate system of criminal sentencing based in just dessert, proportionality, and equality. In a determinate system of sentencing based upon a just dessert sentencing rationale, equality is difficult to achieve since it is at odds with just dessert (Morris & Tonry, 1990). Once again, the goal of a just dessert sentencing system is to determine the harm done to the victim and to place a proportionate condign penalty upon the offender according to their culpability in the crime committed. When harm to the offender is assessed and applied in a just dessert determinate sentencing system, it can only be done in roughly formed groups of offenders according to the sentencing category and the appropriate place in the sentencing grid. A determinate sentencing process that is based in just dessert violates the concept of equality and creates undue sentencing disparity. If the elements of just dessert, proportionality, and equality present in the Guidelines are to function harmoniously, there must be another regulating principle added to the federal sentencing landscape that will allow for greater elasticity between these legal concepts.

Many critics believe that the Guidelines place too much emphasis on harm rather than culpability. Culpability lies at the heart of the just dessert sentencing philosophy (Hafer & Allenbaugh, 2003). The sentencing philosophy of just dessert

asserts that offenders are independent moral agents who actually deserve the punishment they receive. Legal scholars and critics believe that the Guidelines place too much emphasis on harm rather than placing emphasis on the actual knowledge of the offender and their participation in the crime. Harm based criteria is often dramatic and may often be exaggerated. Considering the culpability of an offender in any one particular criminal act is a more precise way of applying the appropriate penalty.

The Congress and the Commission made the fundamental mistake of assuming that the crime control and just desserts approach to sentencing could be accomplished simultaneously. The Congress, through the CCCA, failed to realize that crime control and just desserts were incompatible. For example, offender characteristics that are relevant to the crime control model of sentencing would consist of prior work record, family relationships, age, and other social characteristics (Champion, 1989). A just desserts approach to sentencing is designed to simply punish offenders in regards to the seriousness of the crime and the harm that was done by committing the offense. Demographic and social characteristics have no relationship to the violation of the criminal statute or the harm done by the offender during the commission of the crime. The only information that is taken into consideration in the just dessert model of sentencing is the offense-related information.

Though the ideas of crime control and just deserts are incompatible there may be a way to properly consider both rationales simultaneously. Such an approach would consist of “all convicted offenders who committed the same type of offense and

shared similar demographic and social characteristics receiving similar sentences” (Champion, 1989, p. 33). In order to create fair and proportionate sentencing, the Congress and the Commission would have to consider both legal and individual factors simultaneously.

The Guidelines place more emphasis on the just dessert rather than the crime control model of sentencing. While the Commission has often played “lip service” (Champion, 1989, p. 33) to the crime control model in the form of deterrence and incapacitation, their main focus has been on the offense itself, the harm done by the offense, and the criminal history of the offender. The Commission has essentially placed emphasis on the just dessert approach to sentencing. There is no consideration given to demographic or social characteristics that have any proven connection to deterrence, incapacitation, or recidivism.

The primary goal of the Commission is the promulgation of sentences that sanction offenders based upon their offense, the harm they have inflicted upon others, and their criminal history. The emphasis is placed upon just dessert with no consideration for social theory or demographics (Champion, 1989). In order to understand the Commission’s responsibilities and the application of the Guidelines, it is important to further examine deterrence in light of the theory of just dessert.

Deterrence is often a position espoused by those who maintain a “get tough” (Champion, 1989, p.33) approach to crime. Johannes Andenaes (1966) is an expert on the issue of deterrence. Deterrence is defined as influencing by fear. Fear consists of being apprehended or punished for violations of the law. Andenaes believed that there was a basic distinction between the effects of the man being

punished, known as individual prevention or special prevention, and the effects of punishment upon the members of society in general. The elements of special prevention are described as deterrence, reformation, and incapacitation. General prevention or the effects of punishment upon the members of society may be described as “the restraining influences emanating from the criminal law and legal machinery” (p. 949). Through the application of the criminal law, messages are sent to members of a society. The criminal law gives a detailed list of those unacceptable acts that are subject to prosecution and clearly outlines the penalties for these particular acts. A legal decision by the courts, and enforcement carried out by police and prison officials, emphasize the fact that there is a price to be paid for violations of these codes and determines specifically what the potential penalties may be in specific cases. When citizens are restrained from taking part in socially unacceptable behavior, which they otherwise might have committed, a general preventative effect is accomplished.

Essentially, the effects of special prevention are dependent upon the individual implementation of the law in each case. General prevention takes place as a result of the law itself and its subsequent enforcement (Andenaes, 1966). In the past, executions were used to secure deterrence and insure that law and order was maintained in isolated communities. In modern times, deterrence is accomplished by emphasizing the threat of any given potential penalty. It is important to take into consideration that the criminal law does not operate within a cultural vacuum. The function of the criminal laws varies according to the kind of culture in which they serve. A good way of clarifying this point is to compare the criminal law in Europe

and the United States. In a smaller, more slowly changing community, informal social norms are strong enough to establish conformity without the presence of harsh criminal penalties. In an expanding urbanized society, with accelerated mobility, social norms are often weakened and criminal penal codes must be implemented and strictly enforced to maintain law and order.

Even in countries that are economically developed, cultural differences may exist. For example, criminologist found that the culture in 1930's America was much different than cultural and legal issues that were taking place in Europe at the same time. Many of these experts determined that there was *a lack of legal conscience in the United States regarding changes in the legislature that affected American's daily life*. Social scientists and legal experts determined that penal laws had very little influence on public opinions and morals. Americans were not influenced by laws that were being produced in the national legislature. The American conscience, as it related to the criminal law, was formed through association and interaction with family, friends, fellow workers, acquaintances, and social clubs (Andenaes, 1966). The problem with securing deterrence in today's modern society is that many people are not motivated to conform to the law through the use of abstract threats. Many potential offenders are not moved by threats, but only respond to the harsh reality of those who are actually being punished. The effect of the criminal law could be seen as nothing more than deterrence.

Three requirements must be met for deterrence to be properly applied. First, the punishment must have such an impact that potential offenders will not act in a manner that will bring about adverse consequences to them personally. The second

element of deterrence is the certainty of punishment (Champion, 1989). The lack of enforcement would mean that offenders could act according to their own will without fear of reprisal. The swiftness of punishment, known as celerity, is the final requirement for deterrence. The punishment must be proximate to the crime. The existence of these three factors will bring about deterrence.

It is important to examine the deterrent effects of the Guidelines. In order to properly consider the impact of the Guidelines, it is necessary to pose some questions in light of the principles of deterrence. For example, to what extent has the Guidelines incorporated the three principles of deterrence? How have the Guidelines addressed the sentencing philosophies of severity of punishment, certainty of punishment, and celerity?

The Commission failed to give the appropriate weight of the law to factors that usually are related to criminal activity and deviant behavior. Chapter 5 part H of the Guidelines explicitly states that “age, education and vocational skills, race, sex, socioeconomic status, employment, and other demographic factors are not relevant in the determination of a sentence or are not ordinarily relevant in determining whether a sentence should be outside the guidelines” (Champion, 1989, p. 33). The Commission felt that the Guidelines would become too complex and exacting if demographic factors were considered. *It appears that the Commission considered effective guidelines to mean that similar offenses are punished in a similar manner rather than acting as a deterrent to future criminal conduct.* The Commission’s willingness to exclude certain demographic factors such as employment history, family relationships, educational achievement, and age are clearly undermining the

success of ex-offenders who are attempting to remain in good standing on probation or parole. These factors are not considered by federal judges on a regular basis. Consideration of these kinds of demographic factors only takes place on rare occasions when the judge departs from the Guidelines. This kind of departure must be documented and fully explained and justified in writing. The Commission has clearly placed emphasis on just dessert rather than the deterrence/crime control model. The just dessert approach is a much simpler sentencing philosophy to implement. The deterrence and crime control model is more difficult to maintain because of the numerous individual factors that must be taken into consideration. Since the Commission decided to place emphasis upon just desert, the Guidelines are one dimensional. When taking into consideration the principals of just dessert, deterrence, and crime control, one philosophy must dominate the other. It appears that the Commission has chosen to implement guidelines that place emphasis upon inflicting gratuitous pain and suffering upon offenders and draining public finances.

Chapter 12

Limiting Retributivism and Just Dessert

Gaining some insight into the theory of limiting retributivism formulated by Norval Morris (1993) may shed some light upon the problems that are taking place with the just dessert sentencing rationale present in the Guidelines. Modified just dessert derives from limiting retributivism. The primary purpose of a modified just deserts rationale is to “match the severity of the punishment to the seriousness of the crime” (Hofer, 2006, p.14). Placing emphasis upon determining the seriousness of a crime committed by an offender promotes respect for the law and provides adequate punishment for the offense. These are primary goals that are related to punishing criminal offenders. Though the Guidelines possess the basic elements of limiting retribution, by establishing upper and lower limits of punishment, the theory of limiting retribution has not been developed fully within the Guidelines. Implementing the theories of Norval Morris would help the Commission adapt the Guidelines to a post-*Booker* world.

In his article, “Sentencing Principles in Theory and Practice,” Professor Richard S. Frase (1997), a law professor at the University of Minnesota School of Law, discusses Norval Morris’ theory of limited retributivism. Norval Morris (1993), a professor at the University of Chicago School of Law, maintains a theory of limiting retributivism. Limiting retributivism is a theory of criminal sentencing where the concepts of just dessert are used to set upper and lower limits on sentencing policy. After establishing this rigid platform to work from, other

purposes and principles are applied to make this system of determinate sentencing more flexible. Some of the other elements surrounding his approach to just dessert are crime control, uniformity, and parsimony. In legal terms, parsimony is selecting the least severe alternative that will achieve the purposes of the sentence being considered by the sentencers. In religious terms, parsimony is referred to as mercy. Morris' theory of limiting retributivism and the flexible elements that surround it allow determinate sentencers the opportunity to react to different legal trends and issues. He believes that a balance should be established between just dessert and equality when sentencing similar criminals. In order to obtain this balance when sentencing similar criminals, he insists that the ideas of social protection, consideration for scarce public resources, and the minimization of pain and suffering inflicted upon the offender should be carefully assessed by the federal court system (Morris & Tonry, 1990) Morris' legal theory of parsimony will insure that determinate sentencing systems will weather the storms of political and legal trends as they come and go over long periods of time.

Norval Morris (1993) is a realist. He believes that sentencing theory should not be just some written collection of esoteric thoughts and concepts. He believes that sentencing theory should be directly related to sentencing practice. Morris is concerned with the actual day-to-day functioning of the penal system and the intergovernmental structure in which it is housed (Frase, 1997). He wants to know how judges actually think and act in the courtroom to avoid implementing temporary rules that may later be eroded by the opinions of legal scholars and the sands of time.

Morris (1993) recommends parsimony in the form of compulsory, community based drug rehabilitation programs as a fine tuning mechanisms for crack cocaine violations and the elements of just dessert, proportionality, and equality present within the Guidelines. He proposes a more flexible just dessert approach to criminal sentencing. Morris believes that past prison behavior cannot be predicted by in-prison conduct of the offender. He also believes that programs that are focused toward reform within the prison walls are seen as nothing more than coercion and a waste of public resources (Frase, 1997). The prison environment is much too restrictive for drug rehabilitation programs to be effective. With this kind of community based approach in mind, Morris asserts that compulsory, intermediate punishments for drug offenders are crucial to the future success of the Guidelines. Compulsory community based drug rehabilitation programs insure that the offender stays committed to the program for longer periods of time. The longer offenders remain enrolled in the program, the higher the success rate. He insists that closely monitored community based treatment programs and structured parole programs that are directly related to the nature of the offense is the most effective way to decrease prison populations and to make offenders, especially drug offenders, productive citizens once again.

Morris (1993) has a limited view toward the application of incapacitation. He asserts that it is too difficult to predict which offenders may be dangerous. The willingness to attempt to predict future behavior will too often result in the government overcompensating and over incarcerating offenders (Frase, 1997).

Morris (1993) also believes that increased sentences are justified when other lesser sanctions have been applied to the same offender previously. Theories such as this one could be seen as specific or individual deterrence. He believes that specific deterrence may be necessary to get the offender's attention and that sentencing of this kind may go beyond the required minimum. Although he disagrees with individualized predictors of future disruptive and violent behavior, he does believe in parole release decisions being based upon actuarial data. He also believes that similar increases in sentencing severity may be justified based upon mathematical basis for future recidivism.

Morris (1993) asserts that equality in sentencing is not a primary concern, but that it should be simply seen as a guiding principle. He believes that equality in sentencing is used as a secondary fine tuning mechanism rather than a primary sentencing goal (Frase, 1997). He believes that punishment may be unequal, but still considered to be just. Morris gives examples of unequal punishment as those offenders who turn state's evidence, those who receive pardon and amnesty, or those who benefit from the use of early parole to avoid prison overcrowding.

Finally, Morris (1993) asserts that the least restrictive penalty should be applied to each case in order to achieve defined social purposes. Often times, "punishment policies are based upon the most villainous of offenders in mind" (Morris & Tonry, 1990, p. 105). He believes that parsimony represents the least restrictive sanction within the realm of sentencing. Morris asserts that parsimony contains elements of both utilitarianism and humanism. Jeremy Bentham created the penal philosophy of utilitarianism. He believed that punishment itself may be considered evil and it

should only be applied in instances where it will prevent a greater evil (Frase, 1997). For all intents and purposes, Bentham's theory of utilitarianism is used, in part, to form the theory of limited retributivism. Morris's theory of parsimony combined with the changes made by the Commission in amendment 9 should result in a less harmful system of criminal sentencing that will compensate for past racial and ethnic discrimination while mitigating the harsh sentencing rationale of just dessert, equality, and proportionality. In addition to promoting fairness, equality, and efficiency, the theory of parsimony also promotes the application of mercy in criminal sentencing. Although mercy may not be calculated through the use of a determinate sentencing grid, mercy may be the element that promotes balance, equality, proportionality, and true justice. Legislators and members of the Commission, who continue to draft and implement drug legislation based upon just dessert, equality, and proportionality, without the fine tuning mechanism of parsimony, will continue to find themselves in direct opposition with sentencers who feel obligated to circumvent these harsh penalties in search of a better system of criminal sentencing. Parsimony in the form of compulsory, community based drug rehabilitation programs will punish offenders in a proportionate manner, according to the goals of the criminal justice and society.

Morris' (1993) theory of parsimony through intermediate sanctions appears to be a call to return to the old era of rehabilitation, but this is not necessarily true. Throughout American history, the federal pendulum of justice has swung from the extreme liberal view of rehabilitation to the harsh conservative view of just dessert. It is time for the federal criminal justice system to consider intermediate sanctions.

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Appendix A
United States Sentencing Commission
Sentencing Table

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

Historical Note: Effective November 1, 1987.

PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

| Offense Level | Criminal History Category (Criminal History Points) | | | | | |
|---------------|---|----------------|------------------|-----------------|-------------------|--------------------|
| | I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
| 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| 2 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| 3 | 0-6 | 0-6 | 0-6 | 0-6 | 2-8 | 3-9 |
| 4 | 0-6 | 0-6 | 0-6 | 2-8 | 4-10 | 6-12 |
| 5 | 0-6 | 0-6 | 1-7 | 4-10 | 6-12 | 9-15 |
| 6 | 0-6 | 1-7 | 2-8 | 6-12 | 9-15 | 12-18 |
| 7 | 0-6 | 2-8 | 4-10 | 8-14 | 12-18 | 15-21 |
| 8 | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 | 18-24 |
| 9 | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 | 21-27 |
| 10 | 6-12 | 8-14 | 10-16 | 15-21 | 21-27 | 24-30 |
| 11 | 8-14 | 10-16 | 12-18 | 18-24 | 24-30 | 27-33 |
| 12 | 10-16 | 12-18 | 15-21 | 21-27 | 27-33 | 30-37 |
| 13 | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 | 33-41 |
| 14 | 15-21 | 18-24 | 21-27 | 27-33 | 33-41 | 37-46 |
| 15 | 18-24 | 21-27 | 24-30 | 30-37 | 37-46 | 41-51 |
| 16 | 21-27 | 24-30 | 27-33 | 33-41 | 41-51 | 46-57 |
| 17 | 24-30 | 27-33 | 30-37 | 37-46 | 46-57 | 51-63 |
| 18 | 27-33 | 30-37 | 33-41 | 41-51 | 51-63 | 57-71 |
| 19 | 30-37 | 33-41 | 37-46 | 46-57 | 57-71 | 63-78 |
| 20 | 33-41 | 37-46 | 41-51 | 51-63 | 63-78 | 70-87 |
| 21 | 37-46 | 41-51 | 46-57 | 57-71 | 70-87 | 77-96 |
| 22 | 41-51 | 46-57 | 51-63 | 63-78 | 77-96 | 84-105 |
| 23 | 46-57 | 51-63 | 57-71 | 70-87 | 84-105 | 92-115 |
| 24 | 51-63 | 57-71 | 63-78 | 77-96 | 92-115 | 100-125 |
| 25 | 57-71 | 63-78 | 70-87 | 84-105 | 100-125 | 110-137 |
| 26 | 63-78 | 70-87 | 78-97 | 92-115 | 110-137 | 120-150 |
| 27 | 70-87 | 78-97 | 87-108 | 100-125 | 120-150 | 130-162 |
| 28 | 78-97 | 87-108 | 97-121 | 110-137 | 130-162 | 140-175 |
| 29 | 87-108 | 97-121 | 108-135 | 121-151 | 140-175 | 151-188 |
| 30 | 97-121 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 |
| 31 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 |
| 32 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 |
| 33 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 |
| 34 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 |
| 35 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 |
| 36 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 |

| | | | | | | |
|-----------|----------|----------|----------|----------|----------|----------|
| 37 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life |
| 38 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life | 360-life |
| 39 | 262-327 | 292-365 | 324-405 | 360-life | 360-life | 360-life |
| 40 | 292-365 | 324-405 | 360-life | 360-life | 360-life | 360-life |
| 41 | 324-405 | 360-life | 360-life | 360-life | 360-life | 360-life |
| 42 | 360-life | 360-life | 360-life | 360-life | 360-life | 360-life |
| 43 | life | life | life | life | life | life |

Commentary to Sentencing Table

Application Notes:

1. The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 270); November 1, 1991 (see Appendix C, amendment 418); November 1, 1992 (see Appendix C, amendment 462).