Make Probation a Real Option at Sentencing[1]

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My advice to the Commission is to amend the Guidelines to establish probation as a distinct type of sentence with independent value, rather than as merely a lenient option to be used only in extraordinary cases. In order to accomplish this goal, the Commission should reexamine the applicable statutes and legislative history that discuss probation and then, with these original documents as guidance, draft a new Guidelines chapter that provides the district courts with meaningful assistance on the question of when to impose probation. Also, the Sentencing Table should be amended to ensure that probation, not zero months of imprisonment, is often available as a sentencing option.

Congress directed the Commission to "promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case, including . . . a determination *whether* to impose a sentence to probation, a fine, *or* a term of imprisonment."[2] Congress also directed the Commission, "in the guidelines promulgated pursuant to subsection (a)(1)," to "establish a sentencing range that is consistent with *all* pertinent provisions of title 18."[3] In Title 18, Congress directed sentencing judges, "in determining *whether* to impose a term of imprisonment," to "consider the factors set forth in section 3553(a) to the extent that they are applicable."[4] Thus, Congress intended the courts to first determine *whether* to imprison in light of the characteristics of the defendant, the circumstances of the offense, and all of the purposes of sentencing, considering probation as one of the "kinds of sentences available," unless expressly excluded by some other statute.[5] Despite these clear directives, no chapter, or even section of the Guidelines points the sentencing court to factors that should be considered in answering the threshold question of whether to imprison. As a result, incarceration has become the default sentence, with disastrous consequences for society at large and for individual defendants, their families, and their communities.[6]

Congress further directed both the Commission and the courts not to impose a sentence of incarceration for the purpose of rehabilitation, when not required by another purpose of sentencing.[7] Congress also charged the Commission with "insur[ing] that the guidelines reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense[.]"[8] The Commission has recognized the need to act on this directive, but never has done so.[9] The Guidelines offer no option that does *not* include a term of imprisonment, and no option that reflects the general appropriateness of imposing a sentence other than imprisonment in cases involving first offenders convicted of nonviolent or similarly less serious offenses. In fact, the Sentencing Table provides no combination of offense level and criminal history category that creates a heartland of probation-only sentence and excludes the possibility of imprisonment, even in cases involving first offenders and nonviolent offenses. Every one of the 258 specified ranges, even the range triggered by an offense level of 1 and a criminal history score of zero, includes imprisonment as a suggested option.

These failures spring from two basic errors that were made at the birth of the Guidelines system. First, the Commission misread the legislative history of the Sentencing Reform Act (SRA) and, second, in promulgating the Guidelines, the Commission omitted significant qualitative and quantitative data from its analysis of past practices.

As to the first error, the intellectual cornerstone of the SRA is the statement of four principal purposes of sentencing: punishment, deterrence, incapacitation, and rehabilitation.[10] Congress specifically noted that, because incarceration is not rehabilitative, a reasonable likelihood of rehabilitation should lead a court to impose a sentence of probation if the other purposes of sentencing do not require imprisonment.[11] The Commission, however, misunderstood the directions of Congress to consider rehabilitation equally with the other three purposes of sentencing. This misunderstanding is evident in the Commission's report assessing fifteen years of the Guidelines:

> The SRA directs judges to consider each defendant's need for educational and treatment services when imposing sentence. However, the SRA and the guidelines make rehabilitation a lower priority than other sentencing goals . . . The Commission was directed to ensure that "the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." 28 U.S.C. § 994(k). Despite the relatively low priority

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given rehabilitation, judges are still required to assess a defendant's need for treatment or training when they decide whether to impose any special conditions of probation or supervised release. *See* USSG § 5D1.3(d).[12]

The Commission's interpretation of section 994(k) as establishing a relatively low priority for the purpose of rehabilitation is incorrect. Congress did not say that imposing a sentence for rehabilitative purposes is inappropriate; to the contrary, it said a sentence to a *term of imprisonment* is inappropriate for the purpose of fostering rehabilitation in cases where deterrence, punishment, and incapacitation do not otherwise require incarceration. The Commission's belief that Congress placed a low priority on rehabilitation was not supported by the statute or its legislative history.[13] In cases where the three purposes of sentencing other than rehabilitation did not require prison, Congress intended probation to be the default sentence.[14] The Commission's incorrect conclusion that rehabilitation was a less important purpose of sentencing had a snowball effect: The Commission created mandatory Guidelines shaped by its erroneous beliefs and the courts were required to apply them. Digression from the Guidelines was all but prohibited by the now-excised section 3553(b) and, until *United States v. Booker*,[15] a lack of precedential support.

In addition to failing to adhere to Congress's direction that probation be considered as an acceptable alternative to imprisonment in specific categories of cases, the Commission created sentencing ranges that are unduly harsh and skewed in favor of imprisonment. This harshness is the result of the second error described previously: the Commission's use of incomplete data in setting the original guidelines ranges. As the Commission noted, it "analyzed data drawn from 10,000 presentence investigations" to create an "empirical approach that use[d] data estimating the existing sentencing system as a starting point" in developing the Sentencing Table.[16] However, *none of the 10,000 pre-Guidelines cases used in creating these tables was a case in which the defendant had received a sentence of probation*.[17] The proportion of federal defendants sentenced to a purely probationary sentence in 1984 was approximately 38 percent.[18] By relying exclusively on cases in which a prison sentence had been imposed, the Commission was using only the most serious offenses as a benchmark. This discarding of a significant percentage of the data essentially undermines the Commission's claim that the Guidelines are an initial benchmark that reflects an accurate assessment of prior practices.[19]

The choices made in this empirical approach and the resulting harshness in the Sentencing Table directly removed any possibility that probation could be an important component of the new sentencing system, as envisioned by Congress.[20] Indeed, Congress intended that the Commission would create a system in which options could be creatively combined with probation to meet all of the purposes of sentencing implicated in the case,[21] including such alternatives to imprisonment[22] as requiring "a high fine and weekends in prison for several months instead of a longer period of incarceration."[23] In short, Congress intended the Commission to create a system that required judges to first consider *whether* to imprison the defendant—in light of his individual characteristics, the nature of the offense, and the purposes of sentencing.[24]

From the beginning, the Commission, ignoring the clear language of the statutes and relying on flawed data, failed to design or provide options for offenders for whom probation met all of the purposes of sentencing and for whom imprisonment should be the exception, not the norm. As a result, no guideline advises the courts how to reach a probation-only range, ignoring the fact that Congress authorized probation for a broad range of offenders and offenses. Statutorily, probation is available for almost any felony with a statutory maximum below twenty-five years.[25] Given how high the statutory eligibility for probation reaches, it is patently unreasonable—and contrary to the statutory structure of federal sentencing as a whole—to focus on a guideline chart that treats probation as only possibly appropriate in the most trivial or extremely mitigated of cases.

The Commission has recently turned to the laudable study of alternatives to incarceration, partially to address the problems created by the exponential growth in the prison population, especially in the federal system.[26] This important work should be augmented by two amendments to the Guidelines: a new chapter that provides guidance to courts in the first part of their sentencing determination—whether to impose probation or incarceration—and a revamped Sentencing Table to provide for probation with conditions of confinement or financial penalties in a far broader range of cases. These innovations will be salutary in many respects: They will slow the growth of the prison population by increasing probation sentences for first-time nonviolent and other deserving offenders; they will mitigate the effect that incarceration has on the families and communities of the incarcerated; and they will assist judges seeking to avoid the harshness of the narrow range of options provided by the Guidelines through variances and result in fewer unwarranted disparities.

Notes

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1 The analysis that forms the basis of these recommendations was first set forth in an amicus brief filed by the National Association of Criminal Defense Lawyers in *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009). The brief was drafted by Peter Goldberger, Ardmore, Pa.; Ellen C. Brotman, Montgomery, McCracken, Walker & Rhoads, LLP, 123 South Broad Street, Philadelphia, Pa.; Lawrence S. Lustberg and Kevin McNulty, Gibbons P.C., One Gateway Center, Newark, N.J.; Peter D. Hardy, Post & Schell, Four Penn Center, 1600 John F. Kennedy Boulevard, Philadelphia, Pa.; Amy Baron-Evans,

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[2] 28 U.S.C. § 994(a)(1)(A).

[3] 28 U.S.C. § 994(b)(1).

[4] 18 U.S.C. § 3582(a).

[5] 18 U.S.C. § 3553(a)(1), (2), (3).

[6] The federal prison population was 48,300 in 1987. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1988 (Katherine M. Jamieson & Timothy Flanagan eds., 1989), tbl.6.34. It currently is approximately 210,093. *See* http://www.bop.gov/news/quick.jsp#1.

[7] *See* 28 U.S.C. § 994(k) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.").

[8] 28 U.S.C. § 994(j) (emphasis added).

[9] U.S. SENTENCING COMMISSION, RECIDIVISM AND THE "FIRST OFFENDER" 1–2 (May 2004), http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf.

[10] 18 U.S.C. § 3553(a)(2).

[11] *See* S. REP. 98-225, 71, 1984 U.S.C.C.A.N. 3182, 3254, n.531 (1983). ("[I]f an offense does not warrant imprisonment for some other purpose of sentencing, the committee would expect that such a defendant would be placed on probation . . . [A] defendant should not be sent to prison only because the prison has a program that 'might be good for him.'"); *Id*. at 91–92, 3274–75 ("[T]he Committee expects that in situations in which rehabilitation is the only appropriate purpose of sentencing, that purpose ordinarily may be best served by release on probation subject to certain conditions.").

[12] U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 13 (2004).

[13] *See* S. REP. 98-225, 67–68; 1984 U.S.C.C.A.N. 3250–3251. (1983) ("While the bill, as reported, contains a congressional statement of four purposes of sentencing, the committee has not favored one purpose of sentencing over another except where the sentence involves a term of imprisonment. . . . [T]he committee believes that each of the four stated purposes should be considered in imposing sentence in a particular case. The committee also recognizes that one purpose may have more bearing on the imposition of sentence in a particular case than another purpose has. For example, the purpose of rehabilitation may play an important role in sentencing an offender to a term of probation with the condition that he participate in a particular course of study, while the purposes of just punishment and incapacitation may be important considerations in sentencing a repeated or violent offender to a relatively long term of imprisonment.").

[14] *See* S. REP. 98-225, 76; 1984 U.S.C.C.A.N. 3259 (1983) ("Rehabilitation is a particularly important consideration in formulating conditions for persons placed on probation. Their participation in such programs as education or vocational training, or in treatment programs such as those for persons with emotional problems or drug or alcohol problems, might be made conditions of probation for rehabilitative purposes.").

[15] 543 U.S. 220 (2005).

[16] U.S.S.G. § 1A3.1(3) "The Basic Approach."

[17] *See* U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 17 (June 18, 1987) [hereinafter Supplementary Report], at 21–24 (revealing that when the Commission considered past practices in order to set sentencing levels for such offenses, it minimized any consideration of probationary sentences: "To overcome the second problem, the Commission asked the Bureau of Prisons to specify for each of the 10,500 cases one of the following: the length of time the defendant served in prison, the length of time he was scheduled to serve in prison if a parole date had been set, or the length of time he was expected to remain in prison according to rules that the Bureau routinely employs to estimate release dates.") The Supplementary Report is available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf.

[18] U.S. SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 2, 376 fig. 14 (1991).

[19] The Report states that the Commission did not ignore probationary sentences entirely, but they were clearly of minimal use in the development of the Sentencing Table: "The FPSSIS file, augmented as described above, satisfied most of the Commission's needs for current sentencing practices data. The FPSSIS data were too recent to provide adequate information about current probation and parole supervision practices. In addition, FPSSIS did not provide adequate information about time served following a parole revocation. The Commission relied on two sources for this information. The first was extant tabulations and statistical analysis of supervision histories. The second was a sample of reports of revocation hearings conducted by the Parole Commission since 1977." Supplementary Report at 21. However, the Report goes on to describe the analysis that was used in developing the Sentencing Table, and again makes no reference to an attempt to include probation in the calculus: "The Commission posed several related questions. How much time on average is served currently by convicted federal defendants? How does this average vary with characteristics of the offense, the background and criminal history of the defendant, and the method of disposition? How much of the variation about these averages cannot be attributed to the crime and the defendant; that is, how disparate is sentencing? What is the rate at which defendants are returned to prison following a parole revocation? How long do defendants remain in prison following a revocation? The information derived provided a numerical anchor for guideline development."). *Id.* at 22.

[20] The Senate Report accompanying the Sentencing Reform Act states that probation is an important component of any sentencing scheme. *See id*. at 50, 1984 U.S.C.C.A.N. at 3222–23 ("[T]he Committee feels that the best course is to provide no presumption either for or against probation as opposed to imprisonment."); s*ee also* 28 U.S.C. § 994(a)(1)(A) (directing the promulgation of "guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case, including . . . a determination *whether* to impose a sentence of probation, a fine, *or* a term of imprisonment") (emphasis added). The Commission, however, viewed probation as merely a "very lenient sentence[]," and thus outside the "broad range of sentences that may be . . . imposed." *See* Supplementary Report at 17.

[21] *See* Senate Report at 107, 1984 U.S.C.C.A.N. at 3290 (fines can provide a "clear form of punishment and deterrence"); *id.* at 55, 1984 U.S.C.C.A.N. at 3238 (rejecting the assumption that "a term of imprisonment . . . is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine").

[22] *See id*. at 50, 1984 U.S.C.C.A.N. at 3222–23.

[23] *Id*. at 77, 1984 U.S.C.C.A.N. at 3260. For example, in *United States v. Garcia*, a defendant who pled guilty to one count of

conspiracy to commit mail fraud was sentenced to five years' probation, despite a Guidelines range of 108 to 135 months of incarceration. No. 06-169, 2008 WL 4862453, at *1 (E.D.N.Y. Sept. 8, 2008). The district court also imposed a fine of $15,000, which, although at the bottom of the recommended range, was characterized by the district court as "relatively heavy" in light of the defendant's conduct. *Id*. at *2. As the court noted, the probation sentence and the fine were the least punishment necessary to achieve the goals of sentencing in light of the particular characteristics of the defendant, and that "[a]ny concern that a sentence of probation for this offense threatens to promote disrespect for the law is offset by the relatively heavy the fine imposed." *Id*.

[24] *See* 18 U.S.C. § 3582(a) (directing sentencing judges, "in determining whether to impose a term of imprisonment," to "consider the factors set forth in § 3553(a) to the extent that they are applicable").

[25] *See* 18 USC 3561(a)(1), referencing 3559(a). In addition, there are some "mandatory minimum" statutes that also expressly forbid probation. *See, e.g.*, 21 U.S.C. § 841(b)(1)(B).

[26] *See* U.S. SENTENCING COMMISSION, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 20 (Jan. 2009), http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf ("Effective alternative sanctions are important options for federal, state, and local criminal justice systems. For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.").