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SIMPLIFYING THE U.S. SENTENCING COMMISSION'S OFFENSE SCALE

PETER B. HOFFMAN*

A common criticism of the Federal Sentencing Guidelines has been that they are too detailed and complex, and give the impression of a mechanical "sentencing machine."[1] The forty-three level offense (seriousness) scale has been the focal point of this criticism. A number of commentators have suggested a substantial reduction in the number of offense levels.[2] These commentators cite various other guideline systems having from eight to fourteen offense levels (*e.g.*, the sentencing guidelines of Minnesota, Washington, Pennsylvania, and Oregon, and the federal parole guidelines) as appropriate examples to follow. This article discusses the origin of the Sentencing Commission's forty-three-level offense scale and the advantages of reducing the number of offense levels. It then describes a straightforward way in which the Commission could substantially reduce the number of offense levels without making any major change to the overall structure of the guidelines. This proposal would result in an offense scale with about half the current number of offense levels (twenty-two compared to forty-three)–an offense scale that would appear simpler and less mechanical, and would be easier to apply.

DEVELOPMENT OF THE FORTY-THREE-LEVEL OFFENSE SCALE

The current forty-three-level offense scale was not the product of extensive research by the original Sentencing Commission. The Commission's initial proposal had an astoundingly complex structure with 360 offense levels.[3] Proponents of this proposal justified the number of levels on a retributive

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1. *See, e.g.*, MICHAEL TONRY, SENTENCING MATTERS 98-99 (1996).

2. *See, e.g.*, Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 184 (1995) (suggesting the appropriateness of "at least a 50 percent" reduction in the number of levels); Kay A. Knapp & Dennis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679 (1992).

3. This proposal, drafted by one Commissioner and assigned staff, was labeled "Tentative Draft (July 10, 1986)."

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philosophy that "every harm must count" and thus a finely graded system was necessary so that each "harm" caused by the defendant would have a discrete, additive punishment. In July 1986, the Commission circulated this proposal informally to a selected group of judges and academics for comment. The comment received was quite negative regarding the practicality of the proposal.

Shortly thereafter—and with the clock rapidly ticking toward the date on which the original Guidelines had to be promulgated–the Commission adopted the current forty-three-level offense scale as a compromise between the initial 360-level proposal and an eighteen-level offense scale proposed by this writer, then a staffer at the Sentencing Commission. Mathematically, eighteen offense levels is the minimum number of levels that will provide a guideline system in which (1) the guideline ranges taken together cover the spectrum of zero months to life imprisonment; (2) each guideline range contains at least one point in common with the adjoining guideline range, thereby avoiding "cliffs" between the guideline ranges; and (3) each guideline range conforms to the statutory restriction on the width of the guideline range. This writer argued for an eighteen-level offense scale for the following reason. Although more offense levels than the eight offense levels used by the U.S. Parole Commission in its guidelines[4] were clearly needed because (1) the legislation creating the Sentencing Commission required narrower guideline ranges,[5] and (2) the Sentencing Guidelines had, in addition, to cover misdemeanor offenses, the Parole Commission's eight–level offense scale had been criticized by practitioners as complex. This seemed a strong argument for the selection of the least complex alternative adequate to the task.

The compromise adopted by the Commission–a forty-three-level offense scale having overlapping guideline ranges drafted by another Commission staffer–is, in essence, the eighteen-level offense scale with (1) three additional even-numbered offense levels at the lower end of the scale (addressing minor offenses); (2) one additional odd-numbered offense level at the upper end of the scale (providing life imprisonment only); and (3) twenty-one additional odd-numbered offense levels placed on either side of, and substantially overlapping with, the twenty-one even numbered offense levels.

The Commission's stated reason for the choice of the 43-level system was that:

> "[b]y overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference

4. The Parole Commission Guidelines were a precursor of the Sentencing Guidelines.

5. Under 28 U.S.C. § 994, "[i]f a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." 28 U.S.C. § 994(b)(2) (1994).

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> between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud."[6]

The assertion that the additional offense levels will reduce litigation seems questionable. Assuming more than minimal planning, a two-level enhancement for a leadership role, no other Chapter Three adjustments, and no prior criminal history, a $10,000 fraud results in a guideline range of twelve to eighteen months. In the same circumstances, an $11,000 fraud results in a guideline range of fifteen to twenty-one months. The lower guideline range clearly will be preferred by the defendant because (1) a sentence at the lower end of the twelve to eighteen month guideline range means three months' less imprisonment than a sentence at the lower end of the fifteen to twenty-one month guideline range, and (2) the defendant is assured that his or her sentence will not exceed fifteen months, rather than eighteen months, absent a departure from the guidelines. From the defendant's perspective, it seems unlikely that a three-month difference in imprisonment would be seen as inconsequential. At higher offense levels, the differences are more pronounced. The Commission's statement that a one-level difference in offense level will not necessarily make a difference in the sentence imposed is only true if the court imposes a sentence within the overlap of the two-guideline ranges and would have imposed the same sentence regardless of which guideline range applied. Moreover, certain one-level differences authorize or prohibit alternatives to imprisonment.[7] Thus, contrary to the import of the Commission's statement, one-level increments are not likely to reduce litigation substantially before the district court or at the appellate level.

Moreover, the Commission has made inconsistent choices regarding one- or two-level offense seriousness increments among different offense types. This can be seen by comparing the Commission's offense levels for fraud and theft offenses with the offense levels for drug distribution offenses. Both money and drug quantities are what are known as "continuous" variables, in that they can vary in very small increments. For offenses such as theft and fraud, the offense levels in the loss table increase in one-level increments.[8] In contrast, the offense levels in the drug quantity table increases in two-level increments.[9] Why is there this difference? In an early staff draft of the drug quantity table, one-level increments were used to conform to the logic set forth in §1A4(h). The Commission, concerned with the sheer length of the proposed drug quantity table, rejected this approach and adopted a drug quantity table

6. U.S. SENTENCING GUIDELINES MANUAL § 1A4(h) (1998).
7. *See* U.S.S.G. § 5C1.1.
8. *See* U.S.S.G. §§ 2B1.1(b)(1), 2F1.1(b)(1).
9. *See* U.S.S.G. § 2D1.1(c)(1).

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with two-level increments. But this raises an important question–if two-level increments are appropriate for drug quantities, why are they not adequate for monetary loss or any other sentencing factor? That is, if a two-level increment is acceptable for the difference between 999.99 grams of cocaine and 1,000 grams of cocaine, why are smaller, one-level increments necessary for the theft and fraud loss tables, or for any other sentencing variable? Logically, the answer is that they are not.

REASONS FOR REDUCING THE NUMBER OF OFFENSE LEVELS

There are three basic reasons for substantially reducing the number of offense levels. First, the current forty-three offense levels make the Guidelines look extremely complex and mechanical. This is probably because the human mind cannot readily establish a series of reference points, or benchmarks, for common offenses in the face of such a large number of offense levels. Having worked with both the Federal Sentencing Guidelines and the Federal Parole Guidelines, this writer sees the following difference. In the eight-offense-level Federal Parole Guidelines, the number of offense levels was small enough so that a person could keep in mind one or two examples of the heartland of each offense level; *e.g.*, level 8 included murder,[10] level 7 included robbery with serious bodily injury,[11] level 6 included robbery with bodily injury,[12] and level 5 included robbery without bodily injury.[13] In contrast, the federal sentencing guidelines have so many offense levels that a person often will have little idea of a typical level 27 offense, level 29 offense, or level 37 offense - even if he or she deals with the guidelines regularly. It seems that the ability of the user to keep in mind common "benchmark" offenses reduces the perception of a guideline system as a sentencing machine because the user can more readily see the underlying logic of the seriousness scale. Using the Federal Parole Guidelines as an example, if a person knows that the heartland of level 5 is bank robbery with no injury (a common offense), it makes sense that a bank robbery with bodily injury has a higher offense level–level 6; a bank robbery with serious bodily injury has an even higher offense level–level 7; and that murder has an even higher offense level–level 8. A guideline system that allows the internalization of benchmark offenses makes the logic of the system more understandable.[14] A more understandable system, in turn, looks less like

10. 28 C.F.R. § 2.20.2.201 (1999).

11. *Id.* § 2.20.2.211(a).

12. *Id.* § 2.20.2.211(b).

13. *Id.* § 2.20.2.321(a).

14. In addition, the ability to remember benchmark offenses associated with each offense level provides assistance when considering whether there are aggravating or mitigating factors sufficient to warrant a departure. That is, knowing common examples of "heartland" level 12, level 13, or level 14 offenses, for example, makes it easier to judge–by comparison–whether there

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a sentencing machine and thus is likely to engender less psychological resistance to its use.

Second, a large number of offense levels obscures the underlying logic of the offense scale and increases the likelihood that inconsistencies in the Commission's grading of offenses will creep into the scale. For example, in the current guidelines, fraud with more than minimal planning has a base offense level of 8; blackmail (generally a misdemeanor) has a base offense level of 9; commercial bribery has a base offense level of 8; offering a gratuity to–or receiving a gratuity by–a public official has a base offense level of 7; and payment to obtain public office (a misdemeanor) has a base offense level of 8. The reasons for the one-level differences in the offense levels assigned to these offenses are not readily apparent. Had the Commission opted for a guideline system with half the number of levels, these offenses likely all would have been rated as level 8, a result that would be easier to understand.

Third, reducing the number of offense levels will simplify the guidelines by reducing the number of factual disputes requiring resolution (primarily in cases involving the loss tables in the theft, fraud, antitrust, money laundering, and tax guidelines).[15] It also will remove an inconsistency in the current guidelines between the structure of the drug tables on the one hand and the theft, fraud, and tax tables on the other. As noted earlier, the guidelines currently use two-level increments in the drug quantity table[16]—a table that determines the offense level in a substantial proportion of cases. That there has not been any noticeable clamor from the field demanding an expanded drug quantity table with one-level increments indicates that two-level increments are perceived as adequate even for a factor that can vary in very small increments. If a two-level increment is adequate to distinguish 39.99 grams of heroin from forty grams of heroin, it would seem equally adequate, for example, to distinguish a loss of $10,000 from a loss of $10,001. But, the monetary loss tables use one-level increments.[17] This is structurally inconsistent. Reduction of the number of offense levels would both eliminate this inconsistency and simplify the guidelines by reducing the number of cutting points in guidelines adjustments–such as the theft and fraud loss tables–that currently contain one-level increments.

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are sufficient aggravating factors associated with a particular level 12 offense to warrant an upward departure, and if so, to determine the appropriate extent of that departure.

15. Currently, for example, the loss table in the theft guideline adds four levels if the loss is between $5,001 and $10,000 and five levels if the loss is between $10,001 and $20,000. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (1998). Thus, a dispute as to whether the loss was $9,500 or $12,000 affects the guideline range. With two-level increments, the loss adjustments would be collapsed into broader ranges (*e.g.*, $5,001 to $20,000) and the above factual dispute would no longer affect the guideline range.

16. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1998).

17. *See* U.S.S.G. §§ 2B1.1(b), 2F1.1(b), 2T4.1.

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HOW MANY OFFENSE LEVELS SHOULD THERE BE?

In the opinion of this writer, reducing the number of offense levels from forty-three offense levels to twenty-two offense levels would be the most appropriate change. Appendix 1 contrasts the current forty-three-offense level scale with a proposed twenty-two-offense scale. But why not reduce the number of offense levels even more–to the eight to fourteen levels found in various state guideline systems and the federal parole guidelines? The reason is that the federal sentencing guidelines appropriately address important sentencing factors that the other guideline systems do not. For example, the Federal Sentencing Guidelines have proportional adjustments to cover vulnerable victims,[18] role in the offense,[19] obstruction of justice,[20] and acceptance of responsibility.[21] This requires a greater number of offense levels than in guideline systems that address these issues only by departure. It does not, however, mean that forty-three offense levels are necessary. Even with the statutory restriction on the width of the guideline ranges,[22] only eighteen offense levels are required to move from zero to six months imprisonment to 360 months to life imprisonment with overlapping guideline ranges (each range having at least one point in common with the next range).[23] Having adjoining or overlapping ranges is required to avoid the "cliffs," that are one of the negative features commonly found in mandatory minimum sentences.

But why not then use an eighteen-level offense scale? Having a somewhat greater overlap at the lowest offense levels, as in the current guidelines, moderates what otherwise would be the rather dramatic impact of a single-level difference in offense level for offenders with low seriousness offenses, particularly those with high criminal history scores. For this reason, the twenty-two offense-level scale is preferable.

THE MECHANICS OF REDUCING THE NUMBER OF OFFENSE LEVELS

The mechanics of converting the current forty-three-level offense scale to a twenty-two-level offense scale are straightforward. The twenty-two-level-offense scale shown in Appendix 1 was constructed by taking the following steps. First, all the odd-numbered offense levels from 1 through 41 were deleted. Second, each even-numbered offense level from 2 through 42 was divided by two. Thus, offense level 2 became offense level 1, offense level 4 became offense level 2, and so forth. Third, offense level 43 was redesignated

18. U.S.S.G. § 3A1.1.

19. U.S.S.G. §§ 3B1.1, 3B1.2.

20. U.S.S.G. § 3C1.1.

21. U.S.S.G. § 3E1.1.

22. *See supra* note 4.

23. Nineteen offense levels are required if the Commission's offense level requiring life imprisonment (offense level 43) is included.

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as offense level 22. In addition, the guideline ranges at the upper levels of the twenty-two-level offense scale were rounded to even numbers (*e.g.*, 121 months was rounded to 120 months). Although this is not necessary to reduce the number of offense levels, it helps reduce the mechanical, over-precise appearance of the current guidelines. People are accustomed to think of sentencing lengths in round numbers, *e.g.*, 120 months. Consequently, a guideline range of "121 months," for example, seems over precise, mechanical, and artificial in contrast to a guideline range of "120 months."

Appendix 2 describes the amendments to the guidelines that would be required to implement this proposal.

CONCLUSION

Reducing the number of offense levels from the current forty-three levels to twenty-two levels would have substantial benefits. First, it would make the Guidelines appear simpler and less like a "sentencing machine." Second, it would reduce the number of factual disputes requiring resolution. Third, it would make the logic of the offense scale more visible and allow Guidelines users to remember "benchmark" offenses more easily. Fourth, it would reduce the likelihood of inconsistent Commission offense-seriousness judgments becoming embedded in the offense scale. Finally, by making the Guidelines look less like a "sentencing machine" and making the logic of the sentencing scale more visible, it likely would reduce some of the psychological resistance to the current Guidelines.

Appendix 1
Current Offense Level Table and Simplified Offense Level Table

Current Guidelines - 43 Offense Levels		Simplified Guidelines- 22 Offense Levels	
Offense Level	*Guideline Range (in months)*	*Offense Level*	*Guideline Range (in months)*
1	0-6	1	0-6
2	0-6		
3	0-6	2	0-6
4	0-6		
5	0-6	3	0-6
6	0-6		
7	0-6	4	0-6
8	0-6		
9	4-10	5	6-12
10	6-12		
11	8-14	6	10-16
12	10-16		
13	12-18	7	16-22
14	15-21		
15	18-24	8	22-28
16	21-27		

17	24-30	9	28-34
18	27-33		
19	30-37	10	34-42
20	33-41		
21	37-46	11	42-52
22	41-51		
23	46-57	12	52-64
24	51-63		
25	57-71	13	64-78
26	63-78		
27	70-87	14	78-96
28	78-97		
29	87-108	15	96-120
30	97-121		
31	108-135	16	120-150
32	121-151		
33	135-168	17	150-188
34	151-188		
35	168-210	18	188-234
36	188-235		
37	210-262	19	234-290

38	235-293		
39	262-327	20	290-360
40	292-365		
41	324-405	21	360-life
42	360-life		
43	life	22	Life

Appendix 2 - Amendments Required to Convert the Current System to Twenty-Two Offense Levels

What revisions would be required to the individual guidelines to reduce the number of offense levels to twenty-two levels? Revisions would be required to various Chapter Two base offense levels, Chapter Two specific offense characteristics, and Chapter Three and Four adjustments.

There are 148 Chapter Two offense guideline sections. Approximately one-third of these contains at least one base offense level having an odd number (not counting level 43). The first step would be to convert these odd-numbered base offense levels to even numbers by increasing or decreasing each by one level. For example, a base offense level of 23 would have to be converted to a base offense level of 22 or 24. Whether to increase or decrease a particular offense level by one level would, of course, be a "policy decision" for the Commission.

The next step would be to examine those Chapter Two specific offense characteristics that increase the offense level by an odd number. There are not very many of these. There are monetary loss tables with one-level increments in the theft,[24] fraud,[25] antitrust,[26] money laundering,[27] and tax offense guidelines.[28] These appropriately might be changed to two-level adjustments with broader monetary ranges. Such a change to the monetary tables would simplify guideline application because there would be fewer cutting points that

24. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1((b)(1) (1998).
25. U.S.S.G. § 2F1.1(b)(1).
26. U.S.S.G. § 2R1.1(b)(2).
27. U.S.S.G. § 2S1.1(b).
28. U.S.S.G. § 2T4.1.

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would impact the guideline range. As noted previously, the drug quantity table would not need to be changed as it already has two-level increments. There are very few other odd-numbered adjustments. In the robbery guideline, for example, there is a one-level increase if a firearm, destructive device, or controlled substance was taken.[29] This could either be deleted or converted to a two-level increase. There are odd level (intermediate) adjustments for bodily injury that are easily deleted without causing any significant change because they actually apply to a null set and should be eliminated anyway. There are several three-level specific offense characteristics (*e.g.*, for sexual abuse in the kidnapping guideline,[30] and substantial interference with the administration of justice in the obstruction of justice guidelines[31]). These would have to be changed to either two- or four-level adjustments. Similarly, a specific offense characteristic for weapon possession or use is found in a number of guidelines that has three-, five-, and seven-level adjustments.[32] These would have to be converted to even-numbered adjustments.

Many guidelines, such as 2A1.1, 2A1.4, 2A1.5, 2A2.1, 2A3.4, 2A6.1, 2C1.1, and 2D1.1, currently use all even-numbered offense levels or level 43. In such cases, no policy changes are required–the offense levels would simply be one-half of the current offense levels, except that level 43 would be designated as level 22.

In Chapter Three, Part A, there is an official victim adjustment of three levels and a hate crimes adjustment of three levels.[33] These levels would have to be changed to either two- or four-level adjustments.

In Chapter Three, Part B, there are two role adjustments of three levels each.[34] The three-level aggravating role adjustment is infrequently used. The three-level mitigating role adjustment, which literally applies to a null set, is almost never used and should be eliminated.

In Chapter Three, Part D, the multiple count rule[35] would have to be changed from one-, two-, three-, four-, and five-level adjustments to even-numbered adjustments.

In Chapter Three, Part E (Acceptance of Responsibility), there is a three-level adjustment. This adjustment would either have to be changed to a four-level adjustment or combined with the current two-level adjustment.

In Chapter Four, the career offender[36] offense levels of 37, 29, and 17 would have to be increased or decreased by one level. Similarly, the criminal

29. U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(6) (1998).
30. U.S.S.G. § 2A4.1(b)(5).
31. U.S.S.G. § 2J1.2(b)(2).
32. *See e.g.*, §§ 2A2.4(b)(1), 2B3.1(b)(2).
33. U.S.S.G.. §§ 3A1.2, 3A1.1.
34. U.S.S.G. §§ 3B1.1(b), 3B1.2 (1998).
35. U.S.S.G. § 3D1.4.
36. U.S.S.G. § 4B1.1.

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livelihood[37] offense levels of 11 and 13 would have to be increased or decreased by one level. Lastly, the armed career criminal[38] offense level 33 could be changed to level 32 and the offender category modified from a minimum of Category IV to a minimum of Category V, producing a closely equivalent result.

Once the individual Chapter Two, Three, and Four guidelines are amended so they contain only even-numbered offense levels, transformation to the twenty-two-level offense scale is straightforward. All of the numbers are simply divided in half. There are no offense-level adjustments in the remaining chapters of the guidelines.

Finally, the category of "life" only in the twenty-two-level table might appropriately be deleted or changed to a "360 months to life imprisonment" category. Currently, for example, a Chapter Three adjustment, such as whether the defendant receives a two-level increase for being a supervisor in a four-person conspiracy or three levels for being a supervisor in a five-person conspiracy can determine whether the guideline range is "360 months to life" or "life," a substantial difference. The Commission could address this issue by either deleting offense level 22, making a twenty-one-offense-level table, or changing the guideline range for offense level 22 from "life" to "360 months to life."[39]

37. U.S. SENTENCING GUIDELINES MANUAL § 4B1.3.

38. U.S.S.G. § 4B1.4.

39. This change would not override a statute requiring life imprisonment because, when a statute requires a term of life imprisonment, the statute will control.