

UNITED STATES SENTENCING COMMISSION

Staff Discussion Paper

Sentencing Options Under the Guidelines

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Introduction

The federal guidelines' approach to sentencing options has been a subject of study, debate, and calls for change since the system was created. Academic critics have argued that the guidelines do not encourage the use of intermediate sanctions in appropriate cases, control prison crowding, or achieve other purported goals of sentencing reform.¹ Federal judges have recommended amendment of the guidelines to permit the use of alternatives in a wider variety of cases.² The Commission itself has convened several working groups to study this issue, including an advisory panel of criminal justice professionals, scholars, and judges, and two subsequent staff study groups.³ In 1992, the Commission amended the guidelines to expand the number of offenders for whom options are available. The expansion was less, however, than had been recommended by the Judicial Conference and by the Commission's advisory panel and working group.

This paper describes the current guidelines and the statutory directives and structural choices that underlie them. It assesses the guidelines' current operation, briefly reviews the available literature evaluating sentencing options, and outlines several broad options for how these guidelines might be simplified and improved.

Statutory Directives

Prison population. The Sentencing Reform Act (SRA) says relatively little about how the federal guidelines should incorporate sentencing alternatives. The guidelines are to include "a determination whether to impose a sentence to probation, a fine, or a term of imprisonment" as well as the length of any such term. 28 U.S.C. § 994(a)(1)(A). In addition:

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) ... shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any

¹ An extended discussion of criticisms of the federal guidelines approach to options is found *infra* pp. 5-7.

² See *e.g.*, Judicial Conference of the United States, Recommendations for Amendments to the Sentencing Guidelines, (1990) (recommendations 1 -3); Judicial Conference of the United States, Long Range Plan for the Federal Courts, (December, 1995) (recommendation 30b, "The United States Sentencing Commission should be encouraged to develop sentencing guidelines that ...(1) afford sentencing judges more alternatives to imprisonment.").

³ An extended discussion of the work of these groups is found *infra* pp. 19-20.

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change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated under this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.”

Some have suggested that the Commission has not focused sufficiently on its mandate to control prison crowding by regulating the flow of offenders into the prison system.⁴ Others have noted, however, that these provisions were weakened in the final Act from earlier versions that had required the Commission to *assure* that the prison capacity not be exceeded.⁵

Alternatives encouraged. The SRA also directs that:

(j) The Commission shall insure 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, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

This section appears to discourage imprisonment of nonviolent and less serious first-time offenders and to encourage imprisonment of violent offenders who seriously injure their victims. It is left to the Commission, however, to determine what crimes are “otherwise serious.” The Guidelines Manual explains at page 7 how the Commission made this determination :

Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, anti-trust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are “serious.” The Commission’s solution to this problem has been to write guidelines that classify as serious many

⁴ Charles J. Ogletree, Jr. *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938 (1988); Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 Yale L. J. 1773 (1992).

⁵ Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223 (1993).

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offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases.

Other sections of the SRA encourage imprisonment for many federal offenders. The SRA requires “a sentence to a substantial term of imprisonment” for three-time offenders, managers or supervisors of racketeering activity, offenders who derive a “substantial portion” of their income from crime, or those who traffic in a “substantial quantity” of a controlled substance, or commit a violent crime while on bail release. *See* 28 U.S.C. § 994(I)(I)-(5). Other directives to the Commission, subsequent to the Sentencing Reform Act, also require that guideline offense levels be set to ensure imprisonment. Probation is excluded by statute for Class A or B felonies and certain other crimes. *See* 18 U.S.C. § 3561(a). And of course, mandatory minimum penalty statutes require incarceration for certain classes of offenders, regardless of the applicable guidelines.

The 25-percent rule. Some commentators have argued that the 25-percent rule affects the Commission’s ability to incorporate alternatives into the sentencing guidelines. This may, however, be due to particular features of the current guideline structure, as described more fully in the next section, and may not be inherent in the SRA. The 25-percent rule requires that the maximum term of imprisonment not exceed the minimum by more than 25 percent or six months. The guidelines treat probation as zero months of imprisonment and provide no presumptive sentences without the possibility of imprisonment. Thus, under the present structure, probation cannot be available in any cell with a maximum greater than six months.⁶

A different guideline structure that made alternatives the presumptive sentence for some offenders could avoid this limitation. For example, the guidelines could specify that for certain non-violent, non-serious first-time offenders, judges should select an alternative sentence from a schedule of substitute punishments separate from the current sentencing table. Since the presumptive sentence in these cases would not include a term of imprisonment, the 25-percent rule would not come into play.

How the Guidelines Define and Allocate Sentencing Options

⁶ Note that for purposes of satisfying the 25-percent rule, intermediate confinement is currently treated as a form of imprisonment, even though it is technically a condition of probation. For example, Zone B offenders need serve no time in prison (though the maximum term of imprisonment in the cells in this zone is 10-12 months), but at least four to six months must be served in intermediate confinement.

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Zones of sentencing options. Sentencing options are treated in Chapter Five of the Guidelines Manual. This chapter contains the Sentencing Table (Part A), and separate sections on probation (Part B), imprisonment (Part C), supervised release (Part D and F), and sentencing options (Part F). The rules in these sections create “zones” in the sentencing table based on the minimum months of imprisonment in each cell. The types of sentencing options available depend on the zone in which the defendant falls. The options available under the guidelines are as follows:

Zone A – Offenders with sentencing ranges of 0-6 months

- straight probation;
- probation with confinement conditions (*i.e.*, intermittent confinement, community confinement, or home detention); or
- imprisonment;
- a fine as the sole sanction.

Zone B – Offenders with minimum terms of at least one but not more than six months

- probation plus a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment;
- imprisonment of at least one month plus supervised release with a condition that substitutes community confinement or home detention for imprisonment; or
- imprisonment.

Zone C – Offenders with minimum terms of eight, nine, or ten months

- imprisonment of at least one-half of the minimum term plus supervised release with a condition that substitutes community confinement or home detention for imprisonment; or
- imprisonment.

Zone D – Offenders with minimum terms of 12 months or more

- imprisonment

Several features of the current guidelines should be noted. First, as used here “straight probation” refers to probation without any confinement conditions, such as home detention or

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community confinement. Policy statement 5B1.4 lists several “standard” and “special” conditions that may be imposed in cases of straight probation (or as part of probation with confinement or supervised release following confinement). These include payment of restitution and fines, performance of community service, and participation in substance abuse treatment. While these conditions are sentence enhancements, with the exception of community confinement and home detention, they are not linked to any of the zones.

Second, there are three “intermediate confinement” conditions provided in the guidelines – community confinement, intermittent confinement, and home detention.⁷ Technically, these are conditions of probation (if served in lieu of imprisonment), or conditions of supervised release (if served after a period of imprisonment as part of a split sentence). These intermediate sanctions are defined as follows:

Community confinement means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility; and participation in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar programs. Community confinement may be imposed as a condition of probation or supervised release. (§5F1.1).

Home detention means a program of confinement and supervision that restricts the defendant to his or her place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance (*e.g.*, electronic monitoring). Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment.⁸ (§5F1.2).

Intermittent confinement means custody for intervals of time, such as weekends. It may be ordered as a condition of probation. (§5B1.3(d)).

⁷ The concept of “intermediate confinement” was popularized in NORVAL MORRIS AND MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990).

⁸ Training and Technical Assistance staff report that the phrase “but only as a substitute for imprisonment” generates some confusion among guideline users. This phrase appears to reflect the statutory directive found in 18 U.S.C. § 3563(b)(20) which lists home detention as one of many discretionary conditions of probation “except that [it] may be imposed only as an alternative to incarceration.” At the time that home detention was added to this list there was concern that it would be used to “widen the net”, *i.e.*, increase supervision of offenders who would otherwise have received straight probation, rather than replace prison sentences for offenders who would otherwise have been incarcerated.

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Third, note that the guidelines provide for two types of split sentences. Both require that the offender's minimum term of imprisonment be completed with a combination of imprisonment and confinement conditions. Zone B requires that only one month of imprisonment be served. Zone C requires that one-half of the minimum term be served in prison before switching to intermediate confinement.

Fourth, although the zones on the sentencing table extend across every Criminal History Category, guideline commentary provides that substitutes for imprisonment are "not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives." USSG §5C1.1, comment (n.7).

Finally, note that the guidelines at section 5F1.7 state that the court may recommend that a defendant who meets criteria set forth in 18 U.S.C. § 4046 participate in a shock incarceration program ("boot camp"). Shock incarceration program participants are required to adhere to a highly regimented schedule that includes strict discipline, physical training, hard labor, job training and educational programs, and counseling. Section 4046 states that the Bureau of Prisons may place into the program inmates who have received a sentence of more than 12, but not more than 30 months and who have consented to placement in the program.⁹

Sanction units and substitute punishments- a brief history. The earliest drafts of the federal guidelines included a concept of "sanction units" to measure the total amount of punishment that should be imposed on an offender. (*See* Preliminary Draft, September 1986). The draft allowed for each offender's total punishment to be satisfied in a variety of ways – such as payment of fines, intermediate confinement, or community service, as well as imprisonment – so long as the total number of required sanction units were imposed. The preliminary draft asked for comment on the equivalencies among the various sentencing options. A goal of the equivalency approach was to ensure comparable punishment among similar defendants even if that

⁹ "The Bureau of Prisons has issued an operations memorandum (174-90 (5390), November 20, 1990) that outlines eligibility criteria and procedures for the implementation of this program (which the Bureau ... has titled 'intensive confinement program'). Under these procedures, the Bureau will not place a defendant in an intensive confinement program unless the sentencing court has approved, either at the time of sentencing or upon consultation after the Bureau has determined that the defendant is otherwise eligible. In return for the successful completion of the 'intensive confinement' portion of the program, the defendant is eligible to serve the remainder of his term of imprisonment in a graduated release program comprised of community corrections center and home confinement phases." USSG §5F1.7, comment. In addition, the BOP will permit offenders with initial sentences of greater than 30 months to participate once they have only 30 months remaining to serve.

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punishment is imposed in different forms. For example, an unemployed offender without a home might be given a combination of community service and confinement in a half-way house. Another offender deserving similar punishment, but possessing a job and a home, might be given a fine and home detention.

The sanction unit concept was not adopted for reasons that included its complexity and mathematical character. However, portions of the concept survived. In today's guidelines, the measure of minimum required punishment is the minimum months of imprisonment in the cell of the sentencing table applicable to a defendant. This minimum defines the zones and the available sentencing options. In addition, guideline 5C1.1(e) contains a "Schedule of Substitute Punishments" that provides equivalencies between months of imprisonment and the three intermediate confinement conditions. At present, for substitution purposes, a month of each type of confinement is considered equal. (No equivalencies to prison are provided for fines, restitution, community service, or other sanctions.) The rules in Parts B and C of Chapter Five require that when intermediate confinement is an available option, the total length of all sentencing options combined should satisfy the schedule of substitute punishments.

Criticisms of the Current Approach

Probation as zero imprisonment. Commentators have criticized the guideline's current approach to sentencing options on both structural and policy grounds.¹⁰ As mentioned previously, one criticism concerns the guideline's treatment of probation as zero months of imprisonment. The reasoning is that by using months of imprisonment as the measure of severity, and treating probation as zero months of imprisonment, the guidelines reinforce the misconception that probation is not deemed punishment. This is particularly misleading, say the critics, because significant punishment, such as curtailment of travel, association, and other liberties, payment of fines and restitution, and lengthy hours of community service may be imposed as part of a "mere" probation sentence.

Prison is always an option. No guidelines make an alternative to imprisonment the presumptive sentence. For all federal offenders, no matter how non-dangerous or how minor their crime, the guidelines permit up to six months imprisonment. In FY 1995, judges imposed simple probation in 67 percent of cases in Zone A (*see* analysis below). But to help prevent

¹⁰ See e.g., Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 Albany L. Rev. 1 (1987); Marc Miller and Daniel J. Freed, *Developing Intermediate Sanctions*, 4 Fed. Sent. Rep. 3 (1991); MICHAEL TONRY, *SENTENCING MATTERS* (1996) Chapter 3.

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disparity in the “in-out” decision and to help control prison populations, some commentators had hoped the guidelines would make an alternative the presumed sentence for some cases and require judges to justify departing from this presumption. To some, this approach might seem well-suited for the non-violent and less serious offenders described in 28 U.S.C. § 994(j).

Limited range of options. Critics have noted that the federal guidelines do not address the full range of alternative punishments that have been used across the country. The Commission’s 1994 Alternatives Working Group surveyed the variety of intermediate sanctions available in 46 states and the District of Columbia. In addition to the options that are covered by the guidelines, at least half of the states provide for Intensive Supervision Probation and Day Reporting Centers. A small number of states also use day fines. The guidelines do not provide for these sentencing options.

Further, some of the options that are addressed by the guidelines are not integrated into the punishment structure. For example, fines, restitution, and community service are merely additions to a defendant’s sentence under the guidelines. They do not “count” as punishment (*i.e.*, they do not offset any required months of imprisonment under the current schedule of substitute punishments).¹¹ Application Note 2 to the Commentary at §5C1.1 does state that “[i]n some cases, a fine appropriately may be imposed as the sole sanction” for offenders in Zone A.

Limited availability. Finally, some liberal critics believe that the guidelines are too stingy with alternatives for many persons for whom they may be appropriate.¹² Non-dangerous offenders who can be adequately punished using sanction packages of restitution, fines, community service, and intermediate confinement are mentioned in particular.

¹¹ For criticism of the Commission’s approach, *see*, MORRIS AND TONRY, BETWEEN PRISON AND PROBATION (OXFORD UNIVERSITY PRESS 1990). (“...the Commission has done nothing, it seems to us, to encourage a wider use of the fine as a criminal sanction in this country or to bring the calculation of fines onto a fairer basis. There seems to be no provision in the guidelines for the fine to be imposed alone except for trifling crimes. Considering the range of federal crimes, felonies, misdemeanors, violations, and breaches of regulations, this is an absurd result, and one that the Congress can hardly have intended in adopting the Sentencing Reform Act of 1984.”)

¹² Terence F. MacCarthy, et al., *Individualized Sentences and Alternatives to Imprisonment*, 5 FED. SENT. REP. 211 (1993); Weinstein, *supra* note 13.

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Controlling prison populations is a primary purpose of some state guideline systems, and has been accomplished with some success.¹³ The federal prisons, however, were above capacity at the time the guidelines were implemented and have remained so. As of May 20, 1996, the Bureau of Prisons reported an institutionalized population of 93,075 — 23 percent above their rated capacity. The U.S. Sentencing Commission has not attempted to use the guidelines to reduce prison population growth. Commission projections at the time the guidelines were implemented predicted that federal prison population, even under a scenario of low growth in prosecutions, would reach about 92,000 by 1997. Most of this increase, however, was attributed to drug offense mandatory minimums and to career offender provisions. The guidelines themselves were projected to contribute three percent to this growth.¹⁴

Conservative commentators, on the other hand, have encouraged growth in prison populations. They attribute recent drops in the crime rate to higher incarceration rates.¹⁵ In 1992, the Department of Justice released “The Case for More Incarceration,” which pointed to the high incidence of crime among probationers and parolees and encouraged imprisonment in lieu of these alternatives.¹⁶ This report, and others,¹⁷ argued that in many cases the cost of incarceration is less than the cost of the crimes an offender would commit if left in the community. These analyses focus on state probationers and parolees, however, and not on federal probationers, who historically have had a lower recidivism rate than state offenders. (*See* discussion on page 19.)

How the Use of Sentencing Options has Changed Under the Guidelines

¹³ Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 *Journal of Criminal Law and Criminology* 696 (1995).

¹⁴ U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, (June 18, 1987), p. 71.

¹⁵ John J. DiIulio, Jr., *Prisons Are a Bargain, by Any Measure*, *NEW YORK TIMES*, January 16, 1996, at A17.

¹⁶ U.S. Department of Justice, Office of Policy Development, *The Case for More Incarceration* (1992).

¹⁷ Edwin W. Zedlewski, *Making Confinement Decisions*, National Institute of Justice (July 1987). *But see* Franklin E. Zimring and Gordon Hawkins, *The New Mathematics of Imprisonment*, 54 *CRIME & DELINQUENCY* 425 (1988)(discussing anomalies in estimation procedures used by Zedlewski).

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Changes in the percentage of offenders receiving alternatives to imprisonment Figure 1 (See Appendix A) shows the percentage of offenders receiving prison, probation, and alternative sentences from 1984 to the present. The percentage of offenders sent to prison has risen steadily throughout this period, increasing 11 percent over the past 11 years. The most dramatic change has been in the percentage of offenders receiving simple probation, which has decreased from 33 percent in 1984 to 14 percent in 1995. During this same period, the use of alternatives to imprisonment has grown, especially the use of home and community confinement as a supplement to probation.

The remaining figures show changes in the portion of drug, violent, and white collar offenders who receive various types of sentences. Both drug and violent offenses show about a ten percent shift from probation to imprisonment at the time the guidelines were implemented. In the case of drug offenses, much of that shift appears to have been lost in subsequent years when the percentage of drug offenders receiving prison returned to a trend line similar to that in pre-guidelines years. The percentage of violent offenders receiving prison has remained about five to ten percent higher in the guideline era.

As described above, the Commission intended for the use of probation to be reduced for “white collar” offenses and it is here that we see the most dramatic shift. In 1984, more than half of these offenders received simple probation. Last year only a quarter did. Of this shift from straight probation, about half was to sentences involving a term of imprisonment (ten percent increase in prison and five percent increase in split sentences). The remaining half was to intermediate confinement sentences such as home detention. Thus, the shift away from straight probation for white collar offenders was accomplished, but the shift was only partly to the “short period of imprisonment” contemplated by the Commission.

Complexity of the Current Guidelines

To assess the degree to which the rules in Chapter Five concerning sentencing options are complex, the working group talked to members of the technical assistance staff and analyzed calls from the hotlines.

Examination of Number of Hotline Calls Received. Using 1988-1995 annual report data, the working group examined the number of sentencing options hotline calls received compared to the number of other types of hotline calls received. From 1988 to 1995, the Commission received

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a total of 17,008 calls.¹⁸ Calls regarding sentencing options/imprisonment totaled 516 (3.0%) over this time period. The percent of these calls ranged from a low of 1.2 percent in 1991 to a high of 6.4 percent in 1995. Since §5C1.1 was amended – part of the amendment dealt with reformatting for clarity – effective November 1, 1992, 3.6 percent (230 out of 6,412) of the hotline calls pertained to sentencing options/imprisonment.¹⁹ Prior to the November 1, 1992, amendment, 2.7 percent (286 out of 10,596) of the hotline calls related to sentencing options/imprisonment.²⁰

Content Analysis of Hotline Calls. The working group analyzed a sampling of 90 judge/probation officer hotline calls relating to §5C1.1 (Imposition of a Term of Imprisonment).²¹ Calls were analyzed for content to see what issues were being raised by probation officers and whether certain guideline sections were posing interpretation problems. Hotline calls were designated as referring to Sentencing Table Zone A, Zone B, Zone C, Zone D, or a general issue.²² Of the 90 calls in the sample, 29 (32.2%) dealt with Zone C, 13 (14.4%) with Zone B, 9 (10.0%) with Zone A, and 8 (8.9%) with Zone D. Thirty-one questions dealt with issues that applied to more than one zone or that were miscellaneous in nature.

The most common hotline question asked (17 times, 18.9%), was: "In the split sentence available in Zone C (*i.e.*, a sentence in which one-half of the minimum term must be prison, while the other half may be satisfied by community confinement or home detention), may one further substitute a sentencing alternative (*e.g.*, home confinement, intermittent confinement, community confinement, work release, or community service) for the half of the minimum term that requires prison? An additional three calls (3.3%) inquired about the split sentence in Zone B and asked whether one may substitute an alternative punishment for the required one month in prison. Four calls (4.4%) asked whether in Zone D the court may substitute a sentencing alternative for

¹⁸ 1994 and 1995 data include calls from both the judge/probation officer and attorney hotlines. Figures for all other years include only calls to the judge/probation officer hotline.

¹⁹ Figures include one extra month, October 1992.

²⁰ Figures exclude October 1992.

²¹ This sample included all recorded priority one calls and all priority two calls received after 10/1/92 for which written descriptions were available.

²² The category "General Issues" included, but were not limited to, hotline calls whose issues applied to more than one zone.

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one-half the minimum term of the sentencing range; another two (2.2%) asked whether the court could substitute time served in community confinement for the entire Zone D sentence.

In all, 26 (28.9%) of the hotline calls in the sample indicated some uncertainty about when and to what extent the court could substitute an alternative sentence for prison. No other topic appeared to consistently pose a problem.

How Sentencing Options are Implemented by the BOP

BOP policy does not correspond to the guidelines' sentencing options Community confinement centers (CCCs) and home confinement are conceived under the guidelines as *alternatives* to imprisonment. But technically, CCCs and home confinement are sometimes conceived by judges and BOP as a *form of imprisonment*. Some or all of an offender's term of "imprisonment" may be served in one of these options.

The BOP typically moves appropriate offenders into community and home confinement during the final 12-18 months of their prison term as part of pre-release preparation. But more importantly, BOP may designate a CCC as the place of service for an offender's entire sentence, even if the sentence is imprisonment. Likewise, judges may recommend that an offender serve the entire prison term in a CCC, which BOP generally honors, for sentences of up to 12 months. The BOP does not necessarily ensure that these placements are consistent with the guidelines. Because the guidelines and BOP policy appear to be inconsistent, we document these policies in some detail below.

Judicial recommendations and BOP designation policy. According to BOP policy, judges may recommend that an offender serve his or her prison term entirely in a CCC.²³ The

²³ "Federal judges may recommend that offenders be committed (designated) to CCCs to serve short-term (ordinarily less than one year) sentences. CCMs [Community Corrections Manager s] will carry out such recommendation if they determine that this designation is appropriate. If space is not available or a CCC would not be an appropriate designation for an offender, an appropriate designation will be made. Under the guidance of the CCRA [Community Corrections Regional Administrator], the CCM will then notify the court with a written response to the sentencing judge as noted in the Program Statement on Judicial Recommendations and U.S. Attorney Reports." BUREAU OF PRISONS, CHANGE NOTICE TO COMMUNITY CORRECTIONS MANUAL, P.S. 7300.08, CN-03, APRIL 11, 1995, CHAPTER 5, PAGE 8.

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BOP tries to honor these recommendations.²⁴ Further, even when judges impose a prison sentence without such a recommendation, the offender may be designated to a CCC. When a prison term is imposed, the offender is bound over to the custody of the Bureau of Prisons.²⁵ Federal statutes give BOP considerable discretion in deciding where an offender will serve his or her term of imprisonment.²⁶ The Department of Justice and the Bureau interpret “penal or correctional facility” to include community corrections centers.²⁷ The Bureau’s policy appears to be that they will designate prisoners to serve their entire sentence in community corrections centers only with the concurrence of the sentencing judge.²⁸

The effect of these statutes, policies, and practices is that community confinement is technically available as a sentencing option in a broader number of cases than the guidelines recognize. A sentence to imprisonment with a recommendation for placement in a CCC is functionally equivalent to a sentence of probation with a condition of community confinement. The latter is available under the guidelines only for offenders with minimum guideline ranges of up to six months (Zones A and B). The former appears to be available under BOP policy for appropriate offenders with prison terms of up to 12-15 months, which extends into Zone D.

²⁴ “When practical, the Bureau of Prisons will follow the Court’s recommendation to place a federal offender in a non-federal facility. When the [CCM] has questions concerning the appropriateness of the recommendation the Regional Designator shall be consulted. If the Court’s recommendation is not followed, the Regional Designator shall notify the Court in writing of the reasons, as indicated in Chapter 7.” BUREAU OF PRISONS, SECURITY DESIGNATION AND CUSTODY CLASSIFICATION MANUAL, DESIGNATIONS TO NON-FEDERAL FACILITIES, P.S. 5100.05, JUNE 16, 1994, CHAPTER 5, PAGE 1.

²⁵ A judge sentencing a defendant to a non-probationary sentence commits the defendant “to the custody of the Bureau of Prisons to be imprisoned for a term of ___ months.” FEDERAL JUDICIAL CENTER, BENCH BOOK, 5.02-5 (JULY 1993).

²⁶ “The Bureau of Prisons shall designate the place of the prisoner’s imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau... that the Bureau determines to be appropriate and suitable....” 18 U.S.C. § 3621(b).

²⁷ “A CCC meets the definition of a ‘penal or correctional facility’.” BUREAU OF PRISONS PROGRAM STATEMENT ON COMMUNITY CORRECTIONS CENTER (CCC) UTILIZATION AND TRANSFER PROCEDURE, 7310.03, MARCH 25, 1996, PAGE 3.

²⁸ “If an offender appears to be a candidate for a CCC and it appears that the Court did not consider placement in a CCC, the CCM shall contact the Court for concurrence of such placement. Ordinarily, contact with the Court will be made through the Probation Officer.” BUREAU OF PRISONS, SECURITY DESIGNATION AND CUSTODY CLASSIFICATION MANUAL, DESIGNATIONS TO NON-FEDERAL FACILITIES, P.S. 5100.05, JUNE 16, 1994, CHAPTER 5, PAGE 2.

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To investigate whether this inconsistency in policy is reflected in actual practice, data from the BOP's Sentry system and the Commission monitoring data were combined. On the day the cases were drawn from the Sentry system, 443 offenders were serving prison terms in a CCC. Just over half of these (54%) could be matched with Commission records. (The remainder were recent cases not yet in the Commission database or were unmatchable for other reasons.) Among the matched cases, 186 (82%) were offenders in Zones C or D. These offenders appear likely to serve their entire sentence in a CCC, providing they are not transferred to a prison for a rule infraction. On any given day, several hundred federal offenders are serving sentences in community confinement centers, even though they do not fall in the guideline zones which permit such sentences.

How Judges Use the Currently Available Options

Percentage of offenders who qualify for alternatives and get them. Table 1 shows the percentage of offenders in each zone of the Sentencing Table who receive various types of sentences. About 13 percent (12.8%) of federal offenders in 1995 fell into Zone A and qualified for simple probation. Of these, 69.5 percent actually received simple probation, 7.8 percent received probation with confinement, one percent received a split sentence, and 21.6 percent were sentenced to prison.

About ten percent (10.2%) of offenders fell into Zone B, qualifying them for probation with confinement or a split sentence which includes a minimum of one month of incarceration. Of these, 45 percent received probation with confinement, 8.3 percent received a split sentence, and 35.7 percent were imprisoned. Eleven percent were sentenced to simple probation. (Whether these are "improper" sentences – outside the applicable guideline range but *not* involving a departure – is discussed in the next section.) About seven percent (6.9%) of offenders fell into Zone C, qualifying them for a split sentence that includes at least half of the time in prison. Thirty-two percent (32.3%) of these received such a sentence. Ten percent received probation with confinement (10.2%) or simple probation (10.1%).

These numbers show that judges often do not impose alternative sentences although they are available under the guidelines. Judges exercise their discretion by sending to prison some offenders who qualify for simple probation or probation with confinement. Shortly, we discuss what factors indicate when judges choose to recommend an alternative when it is available.

The number of offenders receiving "improper" alternative sentences. Offenders sometimes receive sentences less severe than required by the guidelines. We examined these cases to determine if the sentences were "improper" (*i.e.*, if they did *not* involve an express departure

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from the guidelines). Between 1992-1994, no more than 16 cases a year were improper by this definition. In 1995, 29 such cases were found. Four cases in Zone C received simple probation and four received a split sentence with less than half of the guideline minimum in prison. Eight cases in Zone D received a split sentence, ten involved simple probation, and three involved probation with alternatives. Judges generally honor the guidelines by rarely imposing alternatives that are unavailable or granting departures for illegitimate reasons.

Factors that Account for Use or Non-Use of Available Options

Judges do not use alternative sentences for all offenders who technically qualify for them. What accounts for this? Are alternatives not widely available in practice? Are judges exercising their discretion and adding unwritten exclusionary criteria to the rules already in the guidelines? To answer these questions, we studied (1) the availability of alternative programs and (2) case factors that differentiate offenders who receive an available alternative from those who do not.

Program availability Interviews and data from the Bureau of Prisons suggest that nationally there is an adequate number of community confinement facilities to handle offenders who qualify for community confinement under the guidelines. Not every large city always has beds available (New York or Philadelphia, for example, may fill up), and some remote locations do not have community confinement facilities nearby. But a bed would generally be available somewhere for every qualified offender.

The AO's Division of Corrections and Supervision coordinates a nationwide contract to supply electronic monitoring services for district-based home confinement programs. The Division reports that home confinement is available in every district but that electronic monitoring is not available in the Southern District of California and the Central and Southern Districts of Illinois. Mental health, drug, or alcohol treatment facilities are somewhat less available. Districts report that they sometimes lack sufficient funds to provide residential treatment as an alternative to imprisonment for all appropriate offenders.

In summary, availability does not appear to be the primary reason judges do not often impose the least restrictive alternative sentence permitted under the guidelines.

Case and offender characteristics. To investigate what case and offender characteristics are associated with receiving an alternative sentence, staff conducted a probit analysis of all 1995

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cases falling in Zone A, B, or C.²⁹ Many factors that may explain judges' decisions, such as family responsibilities or the availability of a suitable residence, were not available for this analysis. However, we were able to study the effects of criminal history, offense type, role in the offense, disposition type (trial or plea), age, race, gender, and citizenship of the defendant, employment status, educational achievement, and geographical region.

Criminal history had a clear and consistent effect on the likelihood of a defendant receiving an alternative sentence. Offenders in Criminal History Category VI have a 66 percent less chance of receiving an alternative sentence than do those in Category I (holding other factors constant at their average values). Application Note 7 of the guideline commentary to §5C1.1 states that the use of alternatives to incarceration is not recommended for most defendants with a criminal history category of III or above if they have fallen into Zones B or C. Of the 308 defendants in 1995 who met this criteria, 75 (24%) received an alternative sentence (including split sentences). This is a much lower rate than for other offenders in Zones B and C, indicating that judges generally take the commentary into account.

Non-citizens are less likely to receive an alternative than are U.S. citizens, reflecting perhaps the impending deportation of the defendant and the absence of a local residence suitable for home confinement. Higher imprisonment rates for non-citizens and for immigration offenders appeared to account for the higher aggregate imprisonment rates for Hispanic defendants. No differences in the use of alternatives were found between Whites, Blacks, and Hispanic defendants after controlling for all other factors in the model. Women, however, were nine percent more likely than men to receive an available alternative sentence. Defendants in the Northeast were nine percent more likely to receive an alternative sentence than those in other regions.

Offenders who were viably employed were 21 percent more likely to receive an alternative sentence than unemployed offenders. No differences in the likelihood of receiving an alternative

²⁹ Probit analysis is a technique for studying the relationship between a set of inter-related "predictor" variables, such as case and offender characteristics, and a dichotomous "outcome" variable, such as whether or not defendants received alternative sentences. A predictor variable is significant in this probit analysis if it is associated with the outcome, *after controlling for the effects of the other predictor variables*. For example, if gender is found to be significant, it means that women and men have different probabilities of receiving alternative sentences, after taking into account differences due to the different types of crimes they commit. In addition, only variables that were "statistically significant" at the .01 level are included, *i.e.* the probability of the association being due to chance must be 1% or less. The outcome variable in this analysis divided all Zone B and C defendants into two groups: those who received at least the minimum term of imprisonment required for their guideline range, and those who received an alternative sentence such as probation, intermediate confinement, or a split sentence. Of the 7,389 offenders in this analysis, 5,072 received an alternative.

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were found among offenders with different educational levels. Offenders who received the mitigating role adjustment were seven percent more likely to receive an alternative. Those who pleaded guilty were 22 percent more likely to receive an alternative sentence than those who went to trial.

Availability, Costs, and Benefits of Alternatives Used in the Federal System

Relative restrictiveness of the federal system. As described above, the state survey conducted by the 1994 Commission working group found that the federal system uses a smaller variety of alternatives than do most of the states. In January 1994, the General Accounting Office completed *Intermediate Sanctions in the Federal Criminal Justice System*. The report reviewed the eligibility requirements for federal intermediate sanctions and concluded that: “The U.S. Code, the sentencing guidelines, and Bureau of Prisons regulations (regarding boot camps) limit the availability and use of intermediate sanctions.”³⁰ The GAO report made no recommendation, however, as to whether the use of alternatives should be expanded.

Cost of alternatives compared to prison. The GAO report contains perhaps the most sophisticated attempt to estimate the cost of various penal sanctions in the federal system. Attached to this report is Table VI.2 from the GAO report. It shows the average monthly cost for a variety of sanctions. Alternatives are less expensive than imprisonment, although high-supervision alternatives can cost significant amounts. Home confinement with drug treatment costs \$900 per month, compared with about \$1,500 for minimum security prison. Community confinement costs about \$1,149. Intensive probation supervision costs from 50 percent to 85 percent as much as prison. Use of options can also reduce some of the collateral social costs of imprisonment (e.g., foster care for an offender’s dependent children).

Incapacitative effects of alternatives Non-prison alternatives cannot guarantee that offenders will not commit new crimes while under supervision. The likelihood of new crimes varies with the recidivism risk of the offender and the intensity of supervision.³¹ (Offenders under intensive supervision sometimes show *higher* violation and recidivism rates than less-supervised

³⁰ General Accounting Office, *Sentencing: Intermediate Sanctions in the Federal Criminal Justice System*, GAO Briefing Report to the Chairman, Subcommittee on Intellectual Property and Judicial Administration, Committee on the Judiciary, HOUSE OF REPRESENTATIVES (January 1994), at 2.

³¹ Kathryn D. Morgan, *Factors Influencing Probation Outcome: A Review of the Literature*, FEDERAL PROBATION, June 1993, page 23.

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offenders, not because they commit more violations, but because their violations are more often detected.) Offenders under close supervision such as home confinement with electronic monitoring may still engage in crimes such as domestic violence or drug dealing in their home. Offenders not behind bars can easily escape to commit new crimes. However, the supervising officer is generally notified immediately of escapes from electronically-monitored home confinement or CCCs and can take steps to protect the public.

*Violation rates of probationers and supervised releasees*The violation rates for federal offenders placed on simple probation or home confinement have historically been low, particularly violations for commission of new crimes.³² In recent years, about 15 percent of persons placed on probation were found to violate the conditions of their probation over the course of their supervision. Most of these were for technical violations, such as a positive drug test. About 2.7 percent of probationers were charged with a new offense or absconded while under supervision.

Supervision authorities note that the violation rates for persons under supervised release following a term of imprisonment are generally higher than for persons on probation. In 1995, 36.1 percent of supervised releasees violated the conditions of their supervision; 9.1 percent faced new charges or absconded. Thus, from a crime control perspective, intensive supervision resources perhaps are better spent on the higher-risk supervised releasees than on relatively low-risk probationers.

Many federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release. Several statistical tools exist to help identify offenders with the lowest risk.³³ The best candidates are offenders with little criminal history, who have a good recent employment record and presently have a job or are attending school, who have no history of substance abuse or are not presently using drugs, and who have a stable living arrangement with a spouse.

³² Data supplied by the Administrative Office of the United States Courts, Federal Corrections and Supervision Division. Figure SE.29 from the 1997 Congressional Submission of the Judiciary. Note that comparisons of violation rates among different forms of supervision are complicated by the different types of offenders and varying amount of time spent under each type of supervision. For example, home confinement generally involves less dangerous offenders and lasts less than six months. Supervised release involves more serious offenders and lasts several years. Raw violation rates give policy makers a sense of the risk of failure for a typical offender who receives an option for an average length of time. Annualized failure rates for similar types of offenders would be needed to address other questions, such as evaluating each type of supervision's success at reducing risk.

³³ Miles D. Harer, *Recidivism Among Federal Prison Releasees in 1987: A Preliminary Report*, FEDERAL BUREAU OF PRISONS, March 11, 1994. This study concerns releasees from prison, but most risk prediction research generally identifies similar factors. The Federal Judicial Center is updating the probation Risk Prediction Score.

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Deterrent and rehabilitative effects of alternatives. The evidence for the effectiveness of community-based programs remains mixed, depending in part on whether the programs are adequately supported.³⁴ At the very least, however, alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties.

The evidence is clearest for the effectiveness of rehabilitation in two areas – employment training and drug treatment. Drug treatment of all varieties has been shown to be somewhat effective in reducing drug use and drug-related crime. However, relapses are common and the length and intensity of treatment and subsequent testing and supervision are crucial factors. There is little evidence that other rehabilitation efforts significantly reduce recidivism. In many cases, it appears that offenders would do as well under simple probation supervision as they do in a rehabilitation program.³⁵

Literature in Brief: Evaluation of the Effectiveness of Particular Alternatives

Community Confinement Centers. The General Accounting Office,³⁶ the Bureau of Prisons, and academic researchers have evaluated CCCs. These “halfway houses” include a wide variety of programs. Some resemble minimum-security prisons while others resemble residential mental health, alcohol, or drug treatment centers. The BOP requires halfway house operators to complete individualized plans for residents within the first two weeks of arrival to address all areas of residents’ needs. The GAO found that between 14 to 67 percent of halfway house residents participate in drug testing and treatment programs.

Studies have not found differences between offenders placed on simple probation and those placed in CCCs in terms of recidivism or social adjustment.³⁷ The GAO found that 83

³⁴ Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections*, SPECTRUM (Summer, 1995).

³⁵ JAMES M. BYRNE ET AL., *SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS* (SAGE PUBLICATIONS 1992).

³⁶ General Accounting Office, *Prison Alternatives: Crowded Federal Prisons Can Transfer More Inmates to Halfway Houses*, GAO Report to the Chairman, Subcommittee on Intellectual Property and Judicial Administration, Committee on the Judiciary, HOUSE OF REPRESENTATIVES (November 1991).

³⁷ James M. Byrne, et al, *supra*, note 33.

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percent of CCC residents got jobs in the communities in which they expected to live when released and had access to counseling, drug and alcohol treatment. Halfway houses did not appear to create problems for their communities. In sum, CCCs serve primarily to house offenders less expensively than in prison and to give them access to community-based treatment and employment opportunities.

Home confinement. The federal home confinement program has been formally evaluated for use with parolees and pre-trial releasees. The Administrative Office also collects data on probationers placed on electronic monitoring.³⁸ Among the 4,370 probationers who were removed from home confinement by mid-1994, 93.5 percent successfully completed their term of probation. About six percent (5.9%) were terminated for violating program rules. The most common reason for a violation was repeated unauthorized absence from home (2.1% of all probationers in the program), followed by a positive drug test (1.9%), and tampering with the electronic equipment (1.0%). Only 1.5 percent of the offenders committed new offenses or absconded from the program.³⁹

Offenders feel that home confinement is at least, if not more, punitive than prison.⁴⁰ Offenders sometime refuse placement in home confinement, preferring to spend their time in jail where social and recreational activities are more available. Those who are employed while on home confinement tend to work longer hours and overtime because they want to get out of the house as much as possible.⁴¹ “The evidence to date indicates that home confinement may be a viable intermediate sanction, and electronically monitoring compliance with home confinement orders appears to work at least as well as manual methods of monitoring.”⁴²

³⁸ James L. Beck, et. al, *Home Confinement with Electronic Monitoring with Federal Parolees*, FEDERAL PROBATION, Dec. 1990, at 22. See also PAUL J. HOFER AND BARBARA MEIERHOEFER, HOME CONFINEMENT: AN EVOLVING SANCTION IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, Federal Judicial Center (1987).

³⁹ Data provided by Robert Altman, Federal Corrections and Supervision Division, A.O.U.S.C., March 8, 1996.

⁴⁰ Joan Petersilia, *When Probation Becomes More Dreaded Than Prison*, FEDERAL PROBATION, March 1990, at 23-7.

⁴¹ KATE HAMILTON & MICHAEL TONRY, EDS., INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES (NORTHEASTERN UNIVERSITY PRESS 1995).

⁴² James M. Byrne, et al., *supra*, note 33.

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Boot Camps. The BOP is expanding the availability of boot camps, both as a front-end sentence and an early release option. Modeled after military basic training where physical activity and discipline are stressed, most camps also provide academic training and substance abuse treatment. The camps appear to be no more effective, however, than traditional prisons in preventing future crimes. In a 1992 study of 172 federal ICC-Lewisburg graduates who were transferred to CCC's, 18 failed.⁴³ This compared to 14 failures among 159 inmates in a control group. Violations were generally for CCC rule violations or for positive drug tests; very few were for new offenses.⁴⁴ Most boot camps cost as much or more than traditional prisons. Any savings that derive from the use of boot camps in lieu of prison comes from the reduced length of time offenders are incarcerated.⁴⁵

Community Service. Several federal districts have implemented and evaluated community service orders as a significant form of alternative punishment. Program developers in the Northern District of Georgia report that only one out of 54 offenders sentenced to 40 hours of weekly community service failed to complete the work successfully. "[The] program has given the community millions of dollars in services and tangible products not otherwise affordable. The correctional system has saved millions in incarceration costs.... Most importantly, families have been kept together, and relationships between offenders and ordinary citizens have been touched in positive and significant ways."⁴⁶

In the Northern District of California, substantial numbers of hours of service are sometimes ordered. Results from a formal evaluation indicated that almost all participants successfully fulfilled their obligations. Community service is neither more nor less likely to increase recidivism than is probation with confinement or straight probation. It is substantially cheaper than prison. A formal evaluation of this program concluded that, "[T]he federal courts seem to be an especially promising laboratory for experimentation with community service punishments.... [T]hese findings are certainly encouraging. At a minimum they suggest the value

⁴³ Jody Klein-Saffran, et al., *Interim Report: ICC Lewisburg Graduates and Comparison Group Members -- After Release to Community Supervision*, (1992) at 4.

⁴⁴ Jody Klein-Saffran, et al., *supra*, note 41; *see also* Doris Layton MacKenzie, *Boot Camp Prisons: Components, Evaluations, and Empirical Issues*, FEDERAL PROBATION, September 1990, at 44-57.

⁴⁵ General Accounting Office, *Prison Boot Camps, Report to the Chairman, Subcommittee on Intellectual Property and Judicial Administration, Committee on the Judiciary*, HOUSE OF REPRESENTATIVES, April 1993.

⁴⁶ Richard J. Maher, *Community Service: A Good Idea that Works*, FEDERAL PROBATION, June 1994, at 23.

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of additional assessments of the efficacy of community service punishments.... We hope that the U.S. Sentencing Commission chooses to encourage such an agenda.”⁴⁷

Fines and day fines. Advocates of increased use of fines generally argue for “day fines,” where the fine amount is based on the offender’s ability to pay. This helps avoid the inequity of only wealthy persons getting fines instead of being sent to prison. In Sweden, for example, “day-fine units” are determined by an analysis of the offender’s financial situation; generally they are about 0.1 percent of the offender’s annual income. The number of these units (*i.e.*, installments) that the defendant must pay is determined by the seriousness of the offense and the offender’s criminal history.⁴⁸ Experiments in Staten Island and Milwaukee indicate that a workable day-fine system can be implemented in American courts.⁴⁹ As compared to normal fines, however, the use of day fines did not significantly reduce the rate of non-payment. Apparently federal courts have not yet experimented with day fines.

Past Recommendations and Amendments Concerning Sentencing Options

The Corrothers Alternatives to Imprisonment Project. Shortly after the initial guidelines were promulgated, the Commission began a project on alternatives to imprisonment directed by Commissioner Helen Corrothers. An advisory panel was convened, chaired by Norman Carlson, former director of the Federal Bureau of Prisons, and including five judges, the directors of the National Institute of Corrections and the National Institute of Justice, and nine other leading experts. The project issued a report in 1990 containing a literature review, results of an opinion survey of federal judges, reports of site visits, and recommendations for guideline amendments.⁵⁰

⁴⁷ Malcolm M. Feeley, Richard Berk & Alec Campbell, *Between Two Extremes: An Examination of the Efficiency and Effectiveness of Community Service Orders and the Implications for the U.S. Sentencing Guidelines*, 66 S. CAL. L. REV. 155 (1992).

⁴⁸ Dennis M. Ryan, *Criminal Fines: A Sentencing Alternative to Short-Term Incarceration*, 68 IOWA L. REV. 1294 (1983).

⁴⁹ Douglas C. McDonald, et al., *Day Fines in American Courts: The Staten Island and Milwaukee Experiments*, THE NATIONAL INSTITUTE OF JUSTICE, April 1992.

⁵⁰ U.S. Sentencing Commission, *Alternatives to Imprisonment Project, THE FEDERAL OFFENDER: A PROGRAM OF INTERMEDIATE PUNISHMENTS*, December 28, 1990.

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The survey results indicated judicial support for expanded availability of alternatives to incarceration for first-time, non-violent offenders. A large majority (84%) *did not* want to see day fines added as an alternative, while majorities *did* want to see community service (62%), boot camps (53%), and intensive supervision (56%) added as options under the guidelines. Sixty-one percent of respondents thought that the 1:1 equivalency established between prison and intermediate confinement was appropriate.

The Corrothers report contained detailed recommendations for changes to the guidelines. It prescribed that offenders be excluded from consideration for any alternative if they were in a criminal history category above level III, if they had a history of violence, or a present offense involving violence, or if they had committed a new offense while in custody. In addition, to ensure prison for serious white collar criminals, it recommended that offenders receiving an adjustment for abuse of a position of trust or use of special skill be excluded from consideration. It further recommended that the available alternatives be expanded to include intensive supervision and public service work. Equivalencies were recommended; a day of imprisonment could be substituted for three days of intensive supervision, 12 hours of public service work, or two days of home confinement during non-working hours.

The committee recommended that what we now call Zones B and C be expanded. Under the committee's proposals, alternatives would be allowed to completely substitute for imprisonment for all eligible offenders with a minimum guideline range of 1-18 months (equal to offense level 15 for a Category I offender). A ½-minimum split sentence would be allowed for offenders with minimum terms from 21 to 24 months (offense levels 16 and 17).

The 1990 Judicial Conference recommendations. In 1990, the Judicial Conference, acting through the Criminal Law Committee, submitted seven recommendations, including three on sentencing options. The first concerned split sentences. At the time the recommendations were made, all split sentences were ½-minimum split sentences. The Conference suggested that all split sentences require only one month in prison. The second recommendation called for combining Zones B and C, thus allowing any alternative to substitute for prison, according to the schedule of substitute punishments. This would eliminate the requirement of some term of imprisonment as part of a split sentence for offenders in Zone C. The third recommendation called for changing the prison range in the Sentencing Table to 0-6 months for two additional offense levels in criminal history category I, thus permitting simple probation for an additional group of less serious offenders.

The 1991 Commission working group and the 1992 amendments Commission staff reviewed the two sets of proposals described above and made recommendations to the Commission for consideration in the 1992 amendment cycle. While generally favorable to the

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Judicial Conference’s recommendations, the group expressed concerns about the “cliffs” that would result if Zones B and C were combined. Further, it recommended expansion of the zones in ways different from either of the previous proposals.

In 1992, the Commission adopted the third Judicial Conference recommendation and added two new cells with 0-6 months of imprisonment at offense levels 7 and 8 in Criminal History Category I, thus expanding Zone A. The Commission partially adopted the first Conference recommendation by permitting 1-month minimum split sentences, but only in Zone B where other intermediate confinement conditions are also available. The Commission did not adopt the other recommendations of the Conference and the Corrothers committee.

Options for Simplification and Improvement

The Commission has several options for simplifying and improving the guidelines on sentencing options, ranging from minor revision within the current structure to more fundamental reorganization. Here we broadly describe this range of choices and offer examples of how they might be implemented.

1. *Redraw the zone lines on the sentencing table.* For example, use of alternatives might be permitted at higher offense levels in the lower criminal history categories, but prohibited altogether for repeat offenders in Category III or above. This would expand the number of offenders eligible for an alternative, while ensuring the incapacitation of the highest-risk offenders.
2. *Collapse some of the zones.* For example, Zones B and C both prohibit simple probation but permit alternatives to substitute for at least some of the required term of imprisonment. These zones might be collapsed to allow judges to use any combination of substitute punishments for offenders falling in these cells.
3. *Allow more alternatives to substitute for imprisonment.* For example, judges could be permitted to sentence offenders in Zones B or C to any combination of prison *or* home, community, or intermittent confinement, *or* community service *or* fines, according to an expanded Schedule of Substitute Punishments.
4. *Create a separate Sentencing Table for alternative punishments* Particularly if the 25-percent rule is seen as a constraint, the Commission might consider developing separate guidelines for the “in/out” decision. Offenders qualifying for a non-prison sentence would be sentenced under an Alternative Sentencing Table, which would prescribe the

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punishment range for each offense level. More serious offenses would be punished more severely, with higher fines, longer periods of home confinement, longer hours of community service, or combinations of these and other punishments.

5. *Rewrite Chapter 5 to simplify and clarify.* The guidelines in Chapter Five might be rewritten to improve their simplicity. For example, the separate parts of Chapter Five dealing with probation, imprisonment, supervised release, and sentencing options might be consolidated.

Staff will prepare proposals to implement any combination of these choices that the Commission wishes to explore. Once concrete proposals have been identified, their impact will be assessed in terms of (1) prison population and (2) the number and types of offenders who would be affected.

Appendix A

Table 1

SENTENCING ZONE BY TYPE OF SENTENCE IMPOSED ¹
(October 1, 1994, through September 30, 1995)

SENTENCING ZONE	TOTAL	Prison		Prison/Community Split Sentence ²		Probation and Confinement		Probation Only	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	32,756	24,480	74.7	1,524	4.7	2,591	7.9	4,161	12.7
Zone A (Sentence Min 0 Months)	4,193	906	21.6	44	1.0	329	7.8	2,914	69.5
Zone B (Sentence Min 1 - 6 Months)	3,342	1,194	35.7	276	8.3	1,503	45.0	369	11.0
Zone C (Sentence Min 8 - 10 Months)	2,256	1,070	47.4	728	32.3	231	10.2	227	10.1
Zone D (Sentence Min 12+ Months)	22,965	21,310	92.8	476	2.1	528	2.3	651	2.8

¹Of the 38,500 cases, the Commission received complete guideline application information for 32,855 cases. Of these, 99 were excluded due to one or more of the following reasons: missing zone (1), missing sentencing information (36), or cases in which defendant received no imprisonment or probation (62). The zones indicated above correspond to the offense levels and criminal history categories established by the court and do not indicate the impact of mandatory minimums or statutory maximums constricting the sentence. Descriptions of variables used in this table are provided in Appendix A.

²Prison/Community Split sentence includes all cases in which defendants received prison and conditions of confinement as defined in USSG §5C1.1.

SOURCE: U.S. Sentencing Commission, 1995 Datafile, MONFY95.

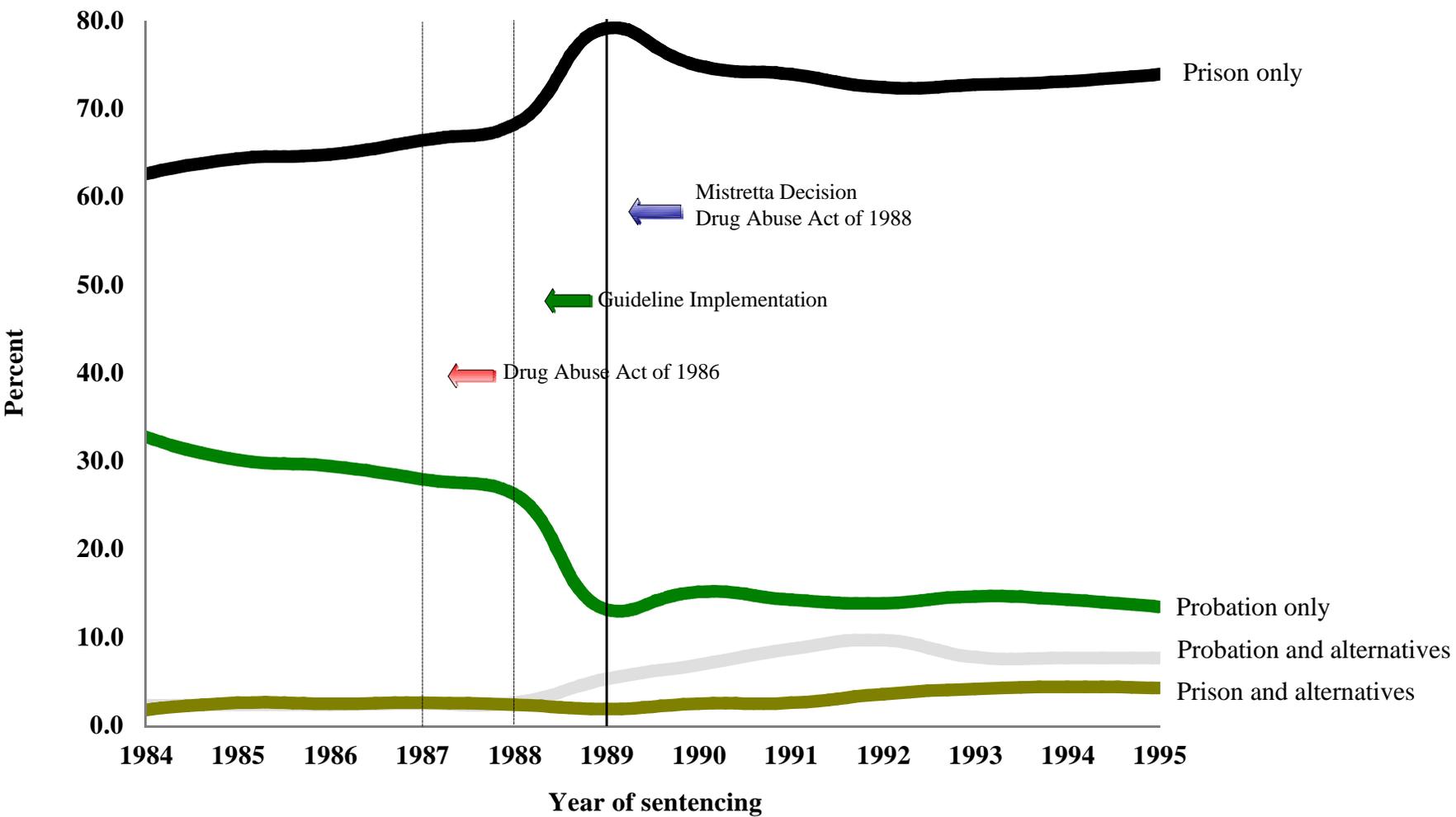
**Average Monthly Offender Costs of Sentencing
Components and Who Pays (Rounded to the Nearest Dollar)**

Components of sentences	Cost	BOP	Probation
Simple probation	\$187		X
Supervised release	\$187		X
Probation with a condition of substance abuse treatment	\$410		X
Probation with a condition of mental health treatment	\$346		X
Probation with a condition of community service	\$214		X
Intermittent confinement – custody component only	\$1,279*	X	
Probation or supervised release with a condition of home confinement	\$575		X
Home confinement with a condition of substance abuse treatment	\$900		X
Home confinement with a condition of mental health treatment	\$835		X
Home confinement with a condition of community service	\$637		X
Community confinement – custody component only	\$1149	X	
Prison, minimum security (without supervised release)	\$1497	X	
Prison, low security (without supervised release)	\$1549	X	
Boot camp			
prison	\$1,877	X	
community confinement	\$1,149	X	
home confinement	\$636	X	
supervised release	\$187		X

*Cost represents 30 days intermittent confinement.

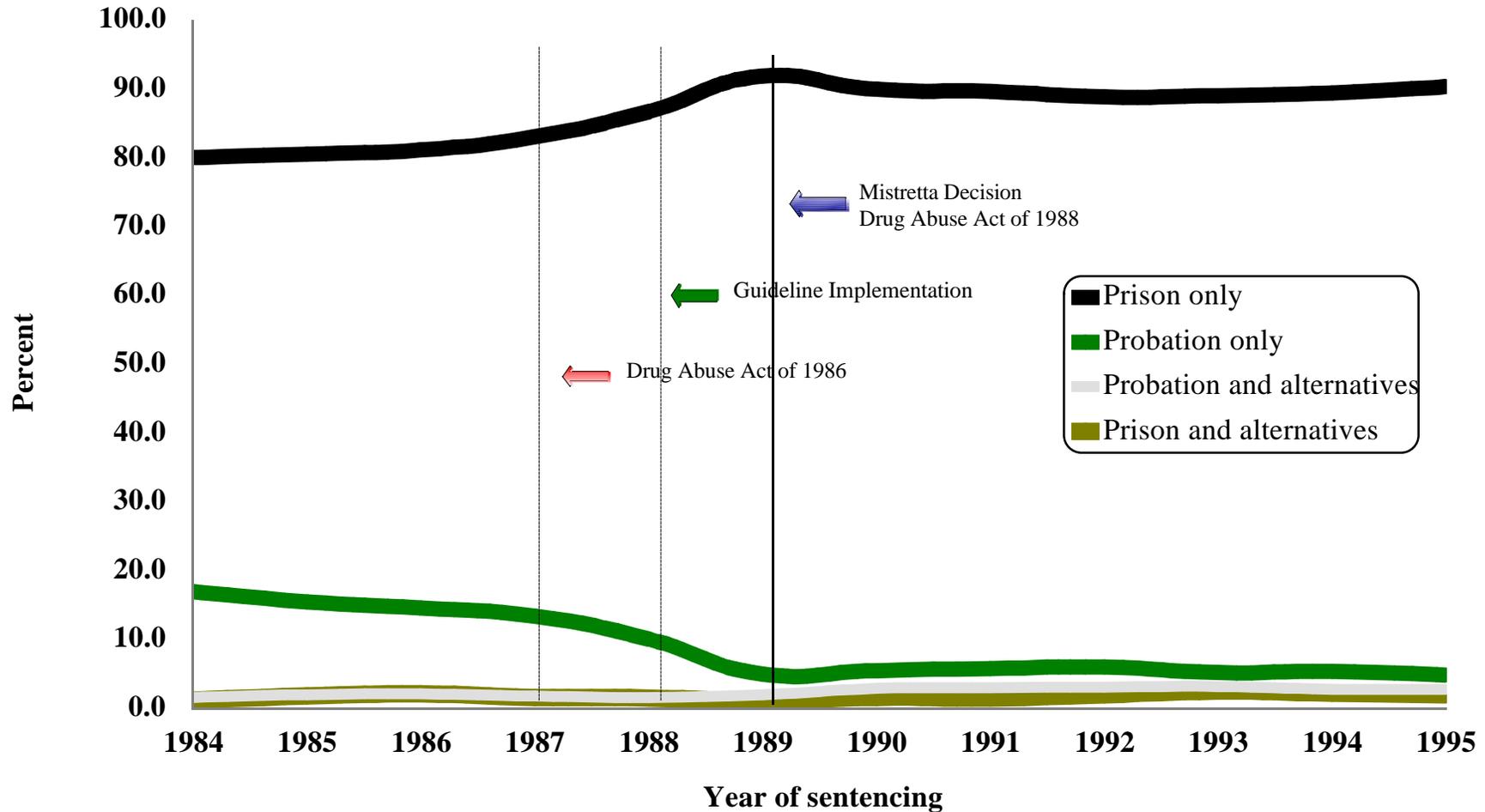
Source: AOUSC & BOP

TYPE OF SENTENCE IMPOSED FOR ALL OFFENSES, 1984 - 1995¹



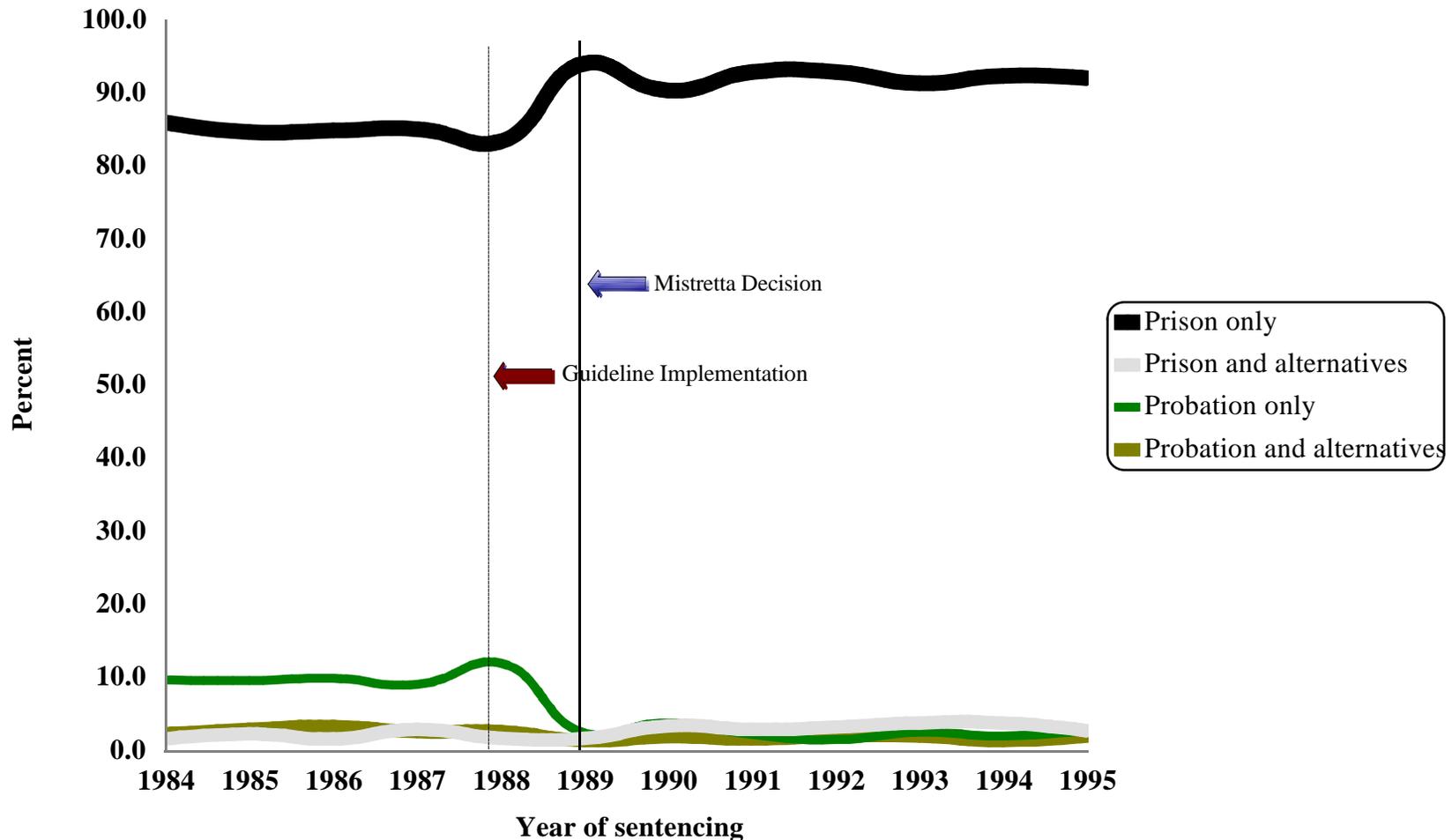
¹ For 1984-1988, the Federal Probation, Sentencing, and Supervision Information System (FPSSIS) file was used. This data was collected by the Administrative Office of the United States Courts. For 1989-1995, the United States Sentencing Commission data files MONFY89, MONFY90, OPAFY91, OPAFY92, OPAFY93, OPAFY94 and OPAFY95 were used.

TYPE OF SENTENCE IMPOSED FOR DRUG OFFENSES, 1984 - 1995¹



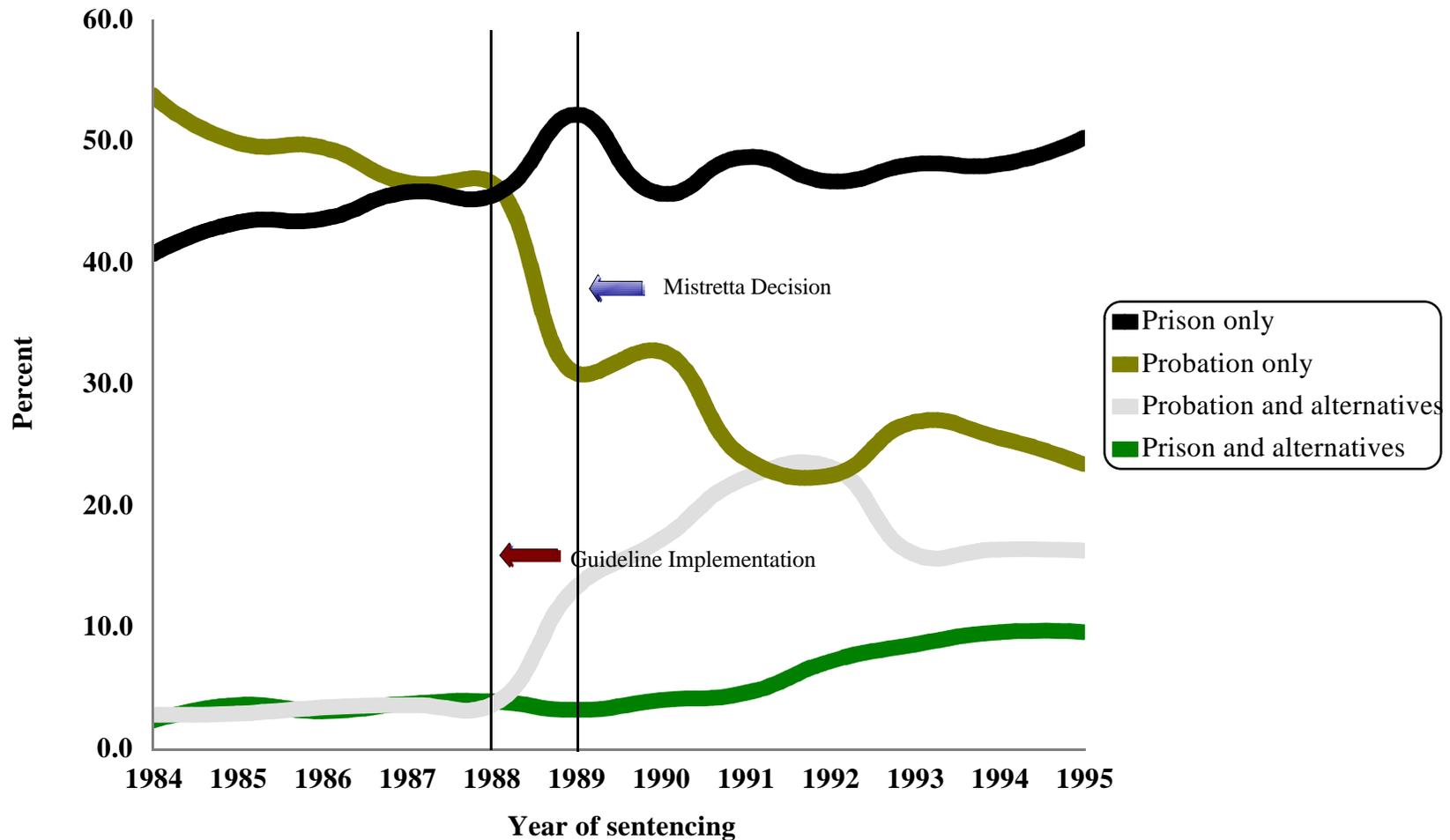
¹ For 1984-1988, the Federal Probation, Sentencing, and Supervision Information System (FPSSIS) file was used. This data was collected by the Administrative Office of the United States Courts. For 1989-1995, the United States Sentencing Commission data files MONFY89, MONFY90, OPAFY91, OPAFY92, OPAFY93, OPAFY94 and OPAFY95 were used. Drug offenses include the following offense types: Drug Trafficking, Drug Communication Facilities and Simple Drug Possession.

TYPE OF SENTENCE IMPOSED FOR VIOLENT OFFENSES, 1984 - 1995¹



¹ For 1984-1988, the Federal Probation, Sentencing, and Supervision Information System (FPSSIS) file was used. This data was collected by the Administrative Office of the United States Courts. For 1989-1995, the United States Sentencing Commission data files MONFY89, MONFY90, OPAFY91, OPAFY92, OPAFY93, OPAFY94 and OPAFY95 were used. Violent offenses include the following offense types: Murder, Manslaughter, Kidnapping/Hostage Taking, Sexual Abuse, Bank Robbery and Arson.

TYPE OF SENTENCE IMPOSED FOR WHITE COLLAR OFFENSES, 1984 - 1995¹



¹ For 1984-1988, the Federal Probation, Sentencing, and Supervision Information System (FPSSIS) file was used. This data was collected by the Administrative Office of the United States Courts. For 1989-1995, the United States Sentencing Commission data files MONFY89, MONFY90, OPAFY91, OPAFY92, OPAFY93, OPAFY94 and OPAFY95 were used. White Collar Offenses include the following offense types: Fraud, Embezzlement, Forgery/Counterfeiting, Bribery, Tax Offenses, and Money Laundering.