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“Tough on Crime” or “Soft on Justice”: An Argument for the Mandatory Application of the Texas Juvenile Justice Code’s Progressive Sanctions Guidelines

Clifford MacKenzie

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**“TOUGH ON CRIME” OR “SOFT ON JUSTICE”:
AN ARGUMENT FOR THE MANDATORY
APPLICATION OF THE TEXAS JUVENILE
JUSTICE CODE’S PROGRESSIVE
SANCTIONS GUIDELINES**

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I. INTRODUCTION

Consider two scenarios. In the first, consider a child named Jack. Jack is sixteen years-old. He comes from a single-parent home, has an occasional drug habit, rarely attends school, and has been diagnosed with a medical condition requiring the use of Ritalin, which he discontinued using eight years ago. Jack, who has never been in any trouble with the law, commits a burglary and is subsequently caught. After his confession, followed by a rocky two-week period of trial probation, Jack comes before the judge for disposition. His fate hangs in the balance.

In the second scenario, consider Jill.¹ She has the same background and characteristics of Jack: single-parent home, drug habit, medical condition, and spotty school attendance. She too commits a burglary, her first offense, and comes before the judge.

Jack's judge looks at the record, hears from the parties involved, and consults the Texas Family Code (the Code) to consider the Progressive Sanctions Guidelines (PSGs) laid out therein.² He follows the guidelines, determines that burglary is a second degree felony, or a sanction level four offense, and determines that the suggested range of disposition is six to twelve months in an intensive services probation (ISP) program, followed by six to twelve months of supervised probation.³ Additionally, the judge determines that the Code suggests that he require Jack or Jack's parent to participate in services and programs that address Jack's problems.⁴ The judge decides that even though Jack is a first-time offender, he needs the help of the system to get on track and orders Jack to the maximum under the guidelines: twelve months ISP, twelve months supervised probation, and attendance in a drug treatment program, in addition to psychological and family counseling for Jack and his mother. Jack leaves court with his mother after having been given the appropriate phone numbers for his new probation officers and literature concerning the treatment programs he has been ordered to attend. He's back in school the next morning.

Jill's judge has had a bad day. He too has the Code on the bench but rarely looks at the sentencing guidelines because his wealth of experience pervades the need for such "fill in the blank justice." He peers over the bench at Jill who is sitting smugly in her seat with a smirk that betrays the trouble that she may be in. The judge hears from all parties, admonishes Jill several times to stop laughing, and

1. Prior to writing this Comment, the Author co-wrote, with Richard A. Gladstone, Attorney-at-Law, the appellate brief for J.J.N. (known as "Jill" in this Comment) for consideration by the Second Court of Appeals (Fort Worth).

2. TEX. FAM. CODE ANN. §§ 59.001-.015 (Vernon 2002 & Supp. 2004).

3. TEX. FAM. CODE ANN. § 59.007 (Vernon 2002 & Supp. 2004); TEX. PEN. CODE ANN. § 30.02(c) (Vernon 2002).

4. TEX. FAM. CODE ANN. § 59.007.

finally decides her fate. She will be immediately taken into custody and sent to the Texas Youth Commission (TYC) facility for an indeterminate period of time. She will be released when the TYC determines that she is ready for release, or her twenty-first birthday, whichever comes first.⁵ Jill is led from the courtroom and summarily shipped off to the TYC in-processing center en route to her ultimate destination, a TYC confinement facility.

While Jack is a purely hypothetical character, the treatment he received is that which is suggested under the Code.⁶ The Code provides Progressive Sanctions Guidelines (PSGs) that match a juvenile's crime with a corresponding sanction level.⁷ Conversely, Jill's situation and treatment is analogous to an actual case, involving a boy, that occurred in Texas in 2002.⁸ Today, the child in Jill's situation sits in the TYC confinement facility for a first-offense conviction that will potentially leave him there until his twenty-first birthday, sometime in 2006. How did Jill's judge get around the PSGs? The answer to that question is easy—by statute.⁹ Yes, after a full thirteen sections of the Code announce the intricate system that should guide the disposition of juveniles in Texas, section 59.014 operates to forbid a child from appealing his disposition on grounds that the judge did not follow the sanctions guidelines.¹⁰ This provision accounts for the disparity between the dispositions received by Jack and Jill.¹¹

Jack's treatment is akin to that meted out in the federal criminal system every day under the mandate of the Federal Sentencing Guidelines (FSGs).¹² In the federal system, there is not a statutory, non-appealable "trap door" through which a judge can depart in his quest to impose his own version of justice.¹³ Mandatory application of statutorily established juvenile progressive sanctioning guidelines in Texas will, as they do in the federal sentencing regime, strike an equitable

5. See TEX. HUM. RES. CODE ANN. § 61.084(e) (Vernon 2002 & Supp. 2004). This provision requires the TYC to release anyone not falling within other sections of the code requiring transfer to the Texas Department of Corrections to be released on their twenty-first birthday. Thus, under a sentence for an indeterminate period of time, the offender must be released by his or her twenty-first birthday. *Id.*

6. See TEX. FAM. CODE ANN. § 59.007 (establishing the range of punishment recommended for a second degree felony); TEX. PEN. CODE ANN. § 30.02(c) (establishing burglary as a second degree felony).

7. See TEX. FAM. CODE ANN. § 59.003 (Vernon 2002 & Supp. 2004).

8. *In re J.J.N.*, No. 2-02-204-CV, 2003 WL 253660 (Tex. App.—Fort Worth Feb. 6, 2003, no pet.) (mem. op.) (not designated for publication).

9. See TEX. FAM. CODE ANN. § 59.014 (Vernon 2002 & Supp. 2004).

10. See TEX. FAM. CODE ANN. § 59.014(2)–(3).

11. See *id.*

12. See generally, Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187, 193 (1993) ("The Guidelines expressly prohibit the judge, when choosing the appropriate sentencing range, from considering certain factors about the individual offender.").

13. *Id.*

balance between the crime committed and the sanction imposed.¹⁴ Thus, Texas should repeal Texas Family Code section 59.014 and allow the juvenile progressive sanctioning guidelines to operate as written, while allowing the safeguard of appellate review for deviation from the guidelines.¹⁵ In Part II of this Comment, the history and operation of the Texas Juvenile PSGs will be explored. Part III will include an analysis of the FSGs to include a discussion of the strengths and weaknesses. The analysis of the FSGs will be applied to the Texas Juvenile System in Part IV. Finally, the argument will be made for the mandatory application of the Texas Juvenile PSGs.

II. ANALYSIS OF RELEVANT TEXAS STATUTES

A. *Texas Gets Tough on Crime—The Beginnings of the Texas Juvenile Justice Code*

1. How the PSGs Came into Being

The PSGs are largely a product of the new “get-tough” spirit that swept the nation in the early to mid-1990s.¹⁶ “In 1973, juvenile offenders were seen as less culpable than adults and deserved to be given the chance to reform. Over the last twenty years, the rise in serious juvenile crime has moved Texas lawmakers toward a more punitive punishment model.”¹⁷ Texas was one of many states that was growing concerned with the dramatic increase and severity of juvenile offenses.¹⁸ As a result, there was a marked shift in the conventional thinking concerning the way juvenile offenders were handled.¹⁹ In the past, juveniles were treated as children of the state.²⁰ Consequently, the state acted as a parent and sought to rehabilitate their wayward charges.²¹ However, in line with the new problems of increased numbers and severity of juvenile offenses, the public began to clamor for a more accountability-based approach in the treatment of juvenile offenders.²² In response, states across the nation, including Texas, en-

14. See generally TEX. FAM. CODE ANN. § 59.001 (Vernon 2002 & Supp. 2004) (establishing the purposes of progressive sanctions guidelines); Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 30–31 (2000).

15. This action would also require amendment of Texas Family Code section 56.01, the statute outlining a juvenile’s permitted grounds for appeal, to add “deviation from the Progressive Sanctions Guidelines” as a permitted ground for appeal. TEX. FAM. CODE ANN. § 56.01 (Vernon 2002).

16. See Justice Ed Kinkeade, *Appellate Juvenile Justice in Texas—It’s a Crime! Or Should Be*, 51 BAYLOR L. REV. 17, 22–44 (1999).

17. *Id.* at 45.

18. See *id.* at 22.

19. See *id.* at 22–23.

20. *Id.* at 23.

21. *Id.*

22. *Id.* at 22–23.

acted legislation seeking to satisfy the public's desire for a more punishment-based approach.²³

In addition to public demand for a punishment-based juvenile justice system, problems within the Texas juvenile justice system of the 1960s and 1970s had grown to a critical point.²⁴ In response to these needs, the Texas Legislature enacted Title 3 of the Texas Family Code, more commonly referred to as the "Texas Juvenile Justice Code."²⁵

In Texas, the PSGs were part of the legislation passed under then-Governor George W. Bush in an effort to stem the tide of juvenile offenses.²⁶ The PSGs came into being under the 1995 amendments to the Code designed to revise Title 3 of the Texas Family Code and were promulgated by the legislature in the new "get-tough" spirit of juvenile punishment.²⁷ The PSGs were one part of a package of new provisions enacted in the Juvenile Justice Code.²⁸ In addition to enacting the PSGs, the Code addressed eight areas in an effort to move to a more punitive model.²⁹ The changes enacted in the Juvenile Justice Code "reflect the legislature's move from rehabilitation for serious juvenile offenders to making the punishment fit the crime. This trend is analogous to the national trend to 'get tough' with juveniles."³⁰ Thus, the PSGs were enacted with the intent of focusing punishment on accountability in an effort to reverse the trend of rising juvenile offense rates.³¹

B. Discussion of the Purpose of PSGs

In addition to the fulfillment of a campaign promise to "get tough" on crime made by George W. Bush when he was campaigning for the Governorship of Texas,³² PSGs serve other, more utilitarian purposes.³³ First, "[t]he guidelines attempt to link the penalty to the of-

23. See *id.* at 22–23, 26–44.

24. *Id.* at 45.

25. *Id.* at 43–44.

26. *Id.* at 43.

27. Tex. H.B. 327, 74th Leg., R.S. (1995).

28. *Id.*

29. The eight areas are: goals and focus, accountability, progressive sanctions, violent/habitual offenders, determinate sentencing, files and records, job program, and victim's rights. Kinkeade, *supra* note 16, at 43–44.

30. *Id.* at 45.

31. See *id.* at 43–45.

32. *Id.* at 43.

33. The purposes of the progressive sanctions model are to:

- (1) ensure that juvenile offenders face uniform and consistent consequences and punishments that correspond to the seriousness of each offender's current offense, prior delinquent history, special treatment or training needs, and effectiveness of prior interventions;
- (2) balance public protection and rehabilitation while holding juvenile offenders accountable;
- (3) permit flexibility in the decisions made in relation to the juvenile offender to the extent allowed by law;

fense, based on the severity of the crime.”³⁴ Second, “[t]he purposes of the guidelines are to ensure uniform punishment, while trying to balance public safety and juvenile rehabilitation.”³⁵ Finally, the PSGs were established to provide a range of punishment that allows the court some degree of “flexibility in the decisions made in relation to the juvenile offender to the extent allowed by law.”³⁶ Thus, there were four main ideas behind the legislature’s establishment of the PSGs: (1) make the punishment fit the crime; (2) rehabilitate the offender to the extent that it does not harm the public’s safety; (3) ensure uniformity in punishment; and (4) permit flexibility.³⁷

C. Discussion of the Operation of PSGs

The PSGs operate as a tiered system that matches the crime committed with the corresponding sanction level.³⁸ Courts first look to Texas Family Code section 59.003 to determine which sanction level corresponds to the crime the juvenile has committed.³⁹ This section of the Code converts various types of crimes (that is, misdemeanors, misdemeanors committed with a firearm, first degree felonies, etc.) into sanction level assignments.⁴⁰ For example, the Code indicates that Jill would be assigned to sanction level four because burglary is a second degree felony in Texas.⁴¹

Once the court has determined which sanction level applies to the crime committed by the juvenile, the court looks within the assigned sanction level for the suggested range of punishment.⁴² Briefly, the levels are as follows.

1. Sanction Level One

Sanction Level One is the lowest level of punishment provided for in the Code.⁴³ The sanctions in this level are usually applied to first-

(4) consider the juvenile offender’s circumstances;

(5) recognize the departure of a disposition from this model is not necessarily undesirable and in some cases is highly desirable; and

(6) improve juvenile justice planning and resource allocation by ensuring uniform and consistent reporting of disposition decisions at all levels.

TEX. FAM. CODE ANN. § 59.001 (Vernon 2002 & Supp. 2004); see Kinkeade, *supra* note 16, at 43–44.

34. Marcia Johnson, *Texas Revised Juvenile Justice and Education Codes: Not All Change is Good*, 19 J. JUV. L. 1, 11 (1998).

35. *Id.*

36. TEX. FAM. CODE ANN. § 59.001(3).

37. TEX. FAM. CODE ANN. § 59.001; see Johnson, *supra* note 34, at 11.

38. See TEX. FAM. CODE ANN. § 59.003 (Vernon 2002 & Supp. 2004).

39. *Id.*

40. *Id.*

41. See TEX. FAM. CODE ANN. § 59.003(a)(4); TEX. PEN. CODE ANN. § 30.02(c) (Vernon 2002).

42. See Johnson, *supra* note 34, at 11–13.

43. See TEX. FAM. CODE ANN. §§ 59.004–.010 (Vernon 2002 & Supp. 2004).

time offenders and generally require the juvenile "to participate in counseling or in a community-based citizen intervention program, or she may be released into the custody of her parents."⁴⁴ Offenses punished under this level are those that are not severe enough to be classified as Class A or B misdemeanors, but are still offenses that indicate some need for supervision.⁴⁵ An example of this type of offense is the Class C misdemeanor offense of disorderly conduct.⁴⁶

2. Sanction Level Two

Juveniles sanctioned under this level are subject to various degrees of probation, requirements to provide restitution for the victim,⁴⁷ performance of "community service restitution,"⁴⁸ participation in a "community-based citizen intervention program,"⁴⁹ and "[are] subject to any appropriate conditions of probation."⁵⁰ One possible option of probation includes attendance at a Youth Boot Camp.⁵¹ This program emphasizes discipline through "physical and correctional training" in a military-style environment.⁵² Offenders punished under this level are those that are expelled from school for violation of a school policy and those that commit Class A or B misdemeanor offenses.⁵³ Examples of Class A or B misdemeanors are assault and terroristic threat.⁵⁴

3. Sanction Level Three

Sanction Level Three largely focuses on the length of time and conditions of probation.⁵⁵ This level introduces the option of closely monitoring the child's activities and behavior.⁵⁶ Offenders punished under this level are those that use a firearm in the commission of a misdemeanor or those that commit a state jail felony or third degree

44. Johnson, *supra* note 34, at 11.

45. "[F]or conduct indicating a need for supervision, other than conduct described in Section 51.03(b)(5) or a Class A or B misdemeanor, the sanction level is one." TEX. FAM. CODE ANN. § 59.003(a)(1) (Vernon 2002 & Supp. 2004).

46. TEX. PEN. CODE ANN. § 42.01(d) (Vernon 2002 & Supp. 2004).

47. TEX. FAM. CODE ANN. § 59.005(a)(2) (Vernon 2002).

48. *Id.*

49. TEX. FAM. CODE ANN. § 59.005(a)(6).

50. Johnson, *supra* note 34, at 11.

51. *Id.*

52. *Id.*

53. "[F]or conduct indicating a need for supervision under Section 51.03(b)(5) or a Class A or B misdemeanor, other than a misdemeanor involving the use or possession of a firearm, or for delinquent conduct under Section 51.03(a)(2), the sanction level is two." TEX. FAM. CODE ANN. § 59.003(a)(2) (Vernon 2002); *id.* § 51.03(b)(5).

54. TEX. PEN. CODE ANN. § 22.01(b) (Vernon 2003 & Supp. 2004) (stating that assault is classified as a Class A misdemeanor); TEX. PEN. CODE ANN. § 22.07(b) (Vernon 2002 & Supp. 2004) (stating that a terroristic threat is classified as a Class B misdemeanor).

55. Johnson, *supra* note 34, at 12.

56. TEX. FAM. CODE ANN. § 59.006(a)(4) (Vernon 2002 & Supp. 2004).

felony.⁵⁷ Examples of offenses that could result in level three assignment are using a firearm in conjunction with a terroristic threat⁵⁸ or impersonating a public servant.⁵⁹

4. Sanction Level Four

Sanction Level Four intensifies the conditions of probation.⁶⁰ This level focuses on discipline and provides a highly structured program that uses the tools of “discipline, physical fitness, social responsibility, and productive work” to create a regimented environment for the child.⁶¹ Offenders punished under this level are those who commit a second degree felony.⁶² An example of second degree felony conduct that would be punished under level four is the commission of a robbery.⁶³

5. Sanction Level Five

Sanction Level Five allows for the confinement of the child in a “post-adjudication secure correctional facility” for a period of six to twelve months.⁶⁴ Level five sanctions include the sanctions of the lesser four levels.⁶⁵ Offenders punished under level five are those who commit less serious first degree felonies.⁶⁶ An example of a first degree felony punished under level five is a specific act of arson that does not injure people but damages a “habitation or a place of assembly or worship.”⁶⁷

6. Sanction Level Six

Sanction Level Six allows the child to be placed in the custody of the TYC.⁶⁸ Following release from the TYC facility, the court may require that the child be enrolled in varying degrees of parole pro-

57. “[F]or a misdemeanor involving the use or possession of a firearm or for a state jail felony or a felony of the third degree, the sanction level is three.” TEX. FAM. CODE ANN. § 59.003(a)(3) (Vernon 2002 & Supp. 2004).

58. *See id.*; TEX. PEN. CODE ANN. § 22.07(b) (Vernon 2002 & Supp. 2004).

59. *See* TEX. FAM. CODE ANN. § 59.003(a)(3); TEX. PEN. CODE ANN. § 37.11(b) (Vernon 2002).

60. *See* TEX. FAM. CODE ANN. § 59.007 (Vernon 2002 & Supp. 2004).

61. “Children whose conduct subjects them to level-four sanctions may be required to participate in a highly intensive and regimented program where discipline, physical fitness, social responsibility, and productive work are involved.” Johnson, *supra* note 34, at 12.

62. “[F]or a felony of the second degree, the sanction level is four.” TEX. FAM. CODE ANN. § 59.003(a)(4).

63. TEX. PEN. CODE ANN. § 29.02(b) (Vernon 2002).

64. TEX. FAM. CODE ANN. § 59.008(a)(1) (Vernon 2002 & Supp. 2004).

65. Johnson, *supra* note 34, at 12.

66. “[F]or a felony of the first degree, other than a felony involving the use of a deadly weapon or causing serious bodily injury, the sanction level is five.” TEX. FAM. CODE ANN. § 59.003(a)(5).

67. TEX. PEN. CODE ANN. § 28.02(d)(2) (Vernon 2002).

68. TEX. FAM. CODE ANN. § 59.009(a) (Vernon 2002).

grams.⁶⁹ "The [TYC] may discharge the child from the commission's custody on the date the provisions of this section are met or on the child's 19th birthday, whichever is earlier."⁷⁰ Offenders punished under this level are those who commit an "aggravated controlled substance felony," a capital felony, or a first degree felony with the aid of a deadly weapon or "causing serious bodily injury."⁷¹ Examples of conduct that would be punished under level six are murder⁷² or some more serious drug offenses.⁷³

7. Sanction Level Seven

Sanction Level Seven is the maximum sentencing tier available under the Code.⁷⁴ This level allows the court to commit the child to the TYC for a residential program lasting from one to ten years.⁷⁵ Following release from the TYC facility, the court may assign probation along with any of the other measures from the previous sanction levels.⁷⁶ Offenders punished under level seven are those who commit level six offenses but have a petition for transfer to the criminal court pending.⁷⁷ Additionally, those whose petitions have been approved by the grand jury are punished under level seven.⁷⁸ Examples of these offenses are the same as those for level six but have the additional factor of the pending transfer to criminal court or a grand jury approval of the petition.⁷⁹

Additionally, in keeping with the express goal of allowing the court some degree of flexibility in its decision-making, sanction levels two through seven allow added flexibility for the court.⁸⁰ The court may "impose additional conditions on probation,"⁸¹ "additional sanctions,"⁸² or "any other appropriate condition of supervision"⁸³ that

69. Johnson, *supra* note 34, at 11; TEX. FAM. CODE ANN. § 59.009(b).

70. TEX. FAM. CODE ANN. § 59.009(c).

71. "[F]or a felony of the first degree involving the use of a deadly weapon or causing serious bodily injury, for an aggravated controlled substances felony, or for a capital felony, the sanction level is six." TEX. FAM. CODE ANN. § 59.003(a)(6).

72. TEX. PEN. CODE ANN. § 19.02(c) (Vernon 2003).

73. See TEX. FAM. CODE ANN. § 59.003(a)(6).

74. See TEX. FAM. CODE ANN. §§ 59.003–.010 (Vernon 2003 & Supp. 2004).

75. TEX. FAM. CODE ANN. § 59.010(a)(1) (Vernon 2003 & Supp. 2004).

76. TEX. FAM. CODE ANN. § 59.010(b).

77. [F]or a felony of the first degree involving the use of a deadly weapon or causing serious bodily injury, for an aggravated controlled substance felony, or for a capital felony, if the petition has been approved by a grand jury under Section 53.045, or if a petition to transfer the child to criminal court has been filed under Section 54.02, the sanction level is seven.

TEX. FAM. CODE ANN. § 59.003(a)(6)–(7).

78. *Id.* § 59.003(a)(7).

79. See *id.* § 59.003(a)(6)–(7).

80. See TEX. FAM. CODE ANN. § 59.005(a)(7) (Vernon 2002), § 59.006(a)(6) (Vernon 2002 & Supp. 2004).

81. TEX. FAM. CODE ANN. §§ 59.005(a)(7), .006(a)(6).

82. TEX. FAM. CODE ANN. §§ 59.007(a)(7), .008(a)(7) (Vernon 2002 & Supp. 2004).

the court deems necessary. Thus, the legislature built in a flexibility provision that allows juvenile courts to deviate from the established guidelines.⁸⁴

D. *The Problem—Texas Family Code Section 59.014: A Catalyst for Divergent Treatment*

There remains a separate provision following the PSGs in the Code that allows for an unchecked avenue of deviation from the PSGs providing the juvenile no substantive recourse.⁸⁵ Section 59.014 provides that a child cannot appeal a ruling by the court on the basis that the court did not follow the PSGs, did not make a sanction level assignment in accordance with the PSGs, and did not report deviations from the PSGs.⁸⁶

This single provision of the Code acts to negate any requirement on the part of the juvenile court to follow the PSGs as laid out in the previous thirteen subsections of the Code.⁸⁷ In short, section 59.014, while not expressly giving courts license to deviate wildly from the PSGs without cause, certainly gives courts extreme flexibility without the accountability that appellate review would provide.⁸⁸

In light of section 59.014, appellate courts appear to either quickly dismiss an appellant's point of error under the cloak of section 59.014 or use an analysis of the disposition based on the sufficiency of the evidence to determine that the trial court has abused its discretion.⁸⁹ In the case of *In re C.C.*,⁹⁰ the court affirmed a disposition sending a minor to the TYC for an indeterminate period of time for possessing one to four grams of a controlled substance, an offense that called for

83. TEX. FAM. CODE ANN. § 59.010(b)(3) (Vernon 2002); accord TEX. FAM. CODE ANN. § 59.009(b)(3) (Vernon 2002).

84. See TEX. FAM. CODE ANN. § 59.001(3) (Vernon 2002 & Supp. 2004).

85. See TEX. FAM. CODE ANN. § 59.014 (Vernon 2002 & Supp. 2004).

86. A child may not bring an appeal or postconviction writ of habeas corpus based on:

- (1) the failure or inability of any person to provide a service listed under Sections 59.004–59.010;
- (2) the failure of a court or of any person to make a sanction level assignment as provided in Section 59.002 or 59.003;
- (3) a departure from the sanction level assignment model provided by this chapter; or
- (4) the failure of a juvenile court or probation department to report a departure from the model.

Id.

87. See *id.*

88. See *id.*

89. See *In re C.C.*, 13 S.W.3d 854, 857–58 (Tex. App.—Austin 2000, no pet.) (illustrating the sweepingly broad discretion allowed to trial courts in the Texas juvenile system.); *In re A.S.*, 954 S.W.2d 855, 861–63 (Tex. App.—El Paso 1997, no pet.) (demonstrating that the court is attempting to employ a “liberal” approach to the use of the PSGs for the purpose of determining the equity of the trial court’s sentence).

90. 13 S.W.3d 854 (Tex. App.—Austin 2000, no pet.).

six to twelve months probation under the PSGs.⁹¹ In *C.C.*, the court first hung its hat on section 59.014 in denying a point of error that alleged the disposition deviated from the PSGs and then affirmed the disposition under the sufficiency of the evidence analysis.⁹² In contrast, in *In re A.S.*,⁹³ the court first recognized that deviation from the PSGs was not a recognized ground for appeal but quickly determined that the disposition sending the minor to the TYC was not supported by the evidence.⁹⁴ In *A.S.*, the court suggested a merger of the PSGs deviation appeal and the sufficiency of the evidence analysis in stating that the court "liberally construed the [PSGs deviation argument] raised under this point of error as challenging the factual sufficiency of the evidence to support the trial court's findings that permit *A.S.*'s commitment to the T.Y.C. . . ." ⁹⁵ The *A.S.* court used the sufficiency of the evidence analysis to determine that the trial court's disposition of the child to the TYC was not proper and constituted an abuse of discretion.⁹⁶ Thus, there is authority in Texas that the PSGs' deviation appeal has been "liberally construed" as a segue into an analysis of the sufficiency of the evidence to support the trial court's disposition.⁹⁷ It appears logical that mandatory application of the PSGs with an accompanying right to appeal deviations from the standard would lead courts into analysis of the sufficiency of the evidence that they already undertake, but would provide a bright-line measuring stick in the form of concrete standards against which to measure the trial court's disposition.⁹⁸ Therefore, the argument remains: Why not allow the PSGs to function as a mandatory guideline that forces trial courts to provide just dispositions and allow for an appeal measured by the standards set forth in the PSGs?

III. ANALYSIS OF FEDERAL SENTENCING GUIDELINES

A. *The Beginnings of the Federal Sentencing Guidelines (FSGs)*

1. How FSGs Came into Being

Just as the "get-tough" on crime mentality was largely to credit for the legislation that created the Texas juvenile PSGs, the same idea can be credited with the creation of the FSGs.⁹⁹ The enactment of the sentencing guidelines in the federal system, like the Texas juvenile system, signaled that society had given up on rehabilitation as a goal of the system and instead resorted to a system focused on "retribution

91. *Id.* at 857.

92. *Id.* at 857-59.

93. 954 S.W.2d 855 (Tex. App—El Paso 1997, no pet.).

94. *Id.* at 861-63.

95. *Id.* at 861.

96. *Id.* at 861-63.

97. *See id.* at 861.

98. *See id.*

99. *See* Berlin, *supra* note 12 at 187.

and deterrence.”¹⁰⁰ In fact, in 1984, the Senate of the United States determined that there was not a reliable way in which to cause or measure the rehabilitation of a prisoner.¹⁰¹ This determination was a departure from nearly a half-century of following the theory of indeterminate sentencing, which focused on using the corrections system to rehabilitate offenders.¹⁰² Additionally, for the better part of the 1900s, courts enjoyed a great deal of discretion when sentencing offenders.¹⁰³ Politicians were moved to act on the issue of crime as they felt pressure from their constituents to move away from a soft approach to crime.¹⁰⁴ Additionally, “desert-oriented”¹⁰⁵ changes enacted in the state criminal codes in the 1960s and the 1970s and Model Penal Code reforms signaled a shift in criminal theory.¹⁰⁶ The reforms changed the traditional utilitarian model of punishment into a system based on determinate sentencing¹⁰⁷ and “truth in sentencing.”¹⁰⁸ Indeed, as early as 1976, a report of the Twentieth Century Fund Task Force on Criminal Sentencing found that “discretionary sentencing schemes” created a great deal of sentencing disparity and that there was a need for reforms that addressed both the justice and effectiveness of the sentences.¹⁰⁹ The result of the new “get-tough” mentality in the federal system was the enactment of the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984.¹¹⁰ The Act created the United States Sentencing Commission, which was “an independent commission in the judicial branch” charged with the job of creating guidelines for sentencing.¹¹¹

2. Discussion of the Purpose of FSGs

The calls for an independent commission to enact sentencing guidelines resulted from Congress’s desire to accomplish four tasks: (1) pro-

100. *Id.* at 189; see Kinkeade, *supra* note 16, at 23.

101. Berlin, *supra* note 12, at 189–90.

102. Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 623 (2002) (supplemental volume). This Comment focuses on the disparity in sentencing in the federal system and how the FSGs have not corrected the sentencing disparity based on the mandatory application of narrow sentence ranges without accounting for certain offender characteristics.

103. Berman, *supra* note 14, at 25.

104. Driessen & Durham, Jr., *supra* note 102, at 623–24.

105. *Id.* at 624–25.

106. *See id.*

107. Determinate sentencing is “[a] sentence for a fixed length of time rather than for an unspecified duration.” BLACK’S LAW DICTIONARY 634 (2d pocket ed. 2001).

108. *See* Driessen & Durham, Jr., *supra* note 102, at 625.

109. “[D]iscretionary sentencing schemes created ‘unexplained and seemingly inexplicable sentencing disparity’ and [the Task Force] called for structural reforms in sentencing to construct a ‘system that is both more just to individual defendants in terms of fairness and more effective in terms of reducing crime.’” Berman, *supra* note 14, at 27.

110. Berlin, *supra* note 12, at 191.

111. *Id.*

vide courts with guidelines for sentencing; (2) move away from a rehabilitative approach; (3) provide consistent sentences; and (4) ensure that sentence lengths for given offenses are not uncertain.¹¹² In short, Congress created the Sentencing Commission for the completion of three main goals: "honesty, uniformity and proportionality in sentencing."¹¹³ In reducing the disparity in sentencing, Congress envisioned "a new system in which defendants with similar characteristics who committed similar crimes received similar sentences."¹¹⁴ In November of 1987, the Sentencing Commission placed into effect the sentencing guidelines they formulated under this charge from Congress.¹¹⁵

3. Discussion of the Operation of FSGs

The FSGs represent a compromise between a "charge offense" system and a "real offense" system.¹¹⁶ A "real offense" system considers the circumstances surrounding the case in determining an appropriate punishment.¹¹⁷ A "charge offense" system is a more uniformly applied system, as all crimes of a certain type are punished in a similar manner.¹¹⁸ The Sentencing Commission's work resulted in a set of FSGs that are "closer to a charge offense system with a number of real offense elements."¹¹⁹ Thus, the FSGs create a framework that is influenced by the circumstances of the criminal event but seeks to sentence criminals within similar classifications in a more uniform manner.¹²⁰

The essential tool required to employ the FSGs is the Guidelines Manual.¹²¹ "The [FSGs] are, in a sense, simply a long set of instructions for one chart—the Sentencing Table."¹²² The guideline is composed of "eight chapters, each with a particular focus."¹²³ The

112. "[Congress sought] to eliminate the lack of sentencing guidance to the judiciary, the imprisonment for the purpose of coercive rehabilitation, the disparity in sentencing, and the uncertainty about the amount of time an offender would actually serve on a prison sentence . . ." *Id.*

113. *Id.* at 192; accord THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE (2004) (containing the complete FSG along with commentary to guide the reader through the employment of the FSGs).

114. William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 495 (1990).

115. *Id.* at 496.

116. Berlin, *supra* note 12, at 194.

117. *Id.*

118. *Id.*

119. *Id.* at 193–94.

120. *See id.*

121. *See* THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE, at III (2004) (noting that "[e]very participant in the federal criminal justice system must be knowledgeable about the guidelines . . . because the guidelines affect every stage of the process, including plea negotiations, trial strategy, sentencing, and appeals").

122. Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 305 (2000).

123. Driessen & Durham, Jr., *supra* note 102, at 631.

chapters relevant to this Comment are as follows. Chapter one provides the reader with some introductory material, including instructions on the use of the manual, relevant definitions, and principles of guideline application.¹²⁴ Chapter two explains the offense guidelines that govern each category of offense.¹²⁵ Under each offense guideline, there is a base level offense and appropriate specific offense characteristics that are used to “add (and sometimes subtract) levels to the base offense level.”¹²⁶ Chapter three allows for general adjustments of the base level by adding or subtracting from the base level offense determined in Chapter two.¹²⁷ Chapter four deals with the determination of the “offender’s criminal history category.”¹²⁸ Chapter five instructs the user on the determination of the “sentence, including probation, prison, conditional release, fines, and restitution.”¹²⁹

In applying the FSGs, the judge engages in a fairly mechanical process that renders a sentence on the far end of the judge’s analysis.¹³⁰ The judge first determines the base offense level from Chapter Two of the Guidelines Manual.¹³¹ Then, the base offense level is adjusted under the applicable “offense or offender characteristics” listed in Chapter Three.¹³² Next, the judge turns to Chapter Four and determines the offender’s criminal history score and places the offender in one of six criminal history categories.¹³³ Finally, the judge turns to the sentencing table in Chapter Five and determines the sentence range by finding the intersection of the criminal history category (horizontal axis) and resulting offense level (vertical axis) on the table.¹³⁴ This process yields a sentencing that is narrow in range and, by statute, cannot exceed six months or twenty-five percent in range from minimum to maximum sentence in that specific sentencing range.¹³⁵ Overall, the FSGs “invoke a harm-based penology, which concentrates more on the nature and extent of the injury or harm resulting from the defendant’s acts than on the nature of the offense or on the defendant’s character and mental processes.”¹³⁶

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 632.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* For example, if the total possible range of sentencing for a particular offense is ten years, a specific range within the total possible range cannot exceed two and one-half years.

136. Berlin, *supra* note 12, at 195.

B. FSGs' Strengths & Weaknesses

1. Not a Perfect System—FSGs' Weaknesses

Critics of the FSGs believe that the guidelines create an unfair system that does not do what it was intended to do.¹³⁷ The main thrust of the sub-components of the body of criticism essentially boils down to the idea that lack of emphasis on offender culpability creates an unfair system.¹³⁸ Critics feel that the system is unfair because, based on the lack of offender culpability analysis, it dispenses sentences that are *anything but* uniform.¹³⁹ When viewed from the critics' "culpability-based" penology, the cases within sentencing ranges are not necessarily alike, thus contributing to the problem of sentencing disparity.¹⁴⁰ More simply put, the fact that offenders of a similar crime are lumped into narrow sentencing ranges, while dishing out relatively similar sentences, fails to adequately take into account important differences in the offenders that are based on critical offender characteristics not addressed by the FSGs.¹⁴¹

There are three main categories of criticism concerning the operation of the FSGs.¹⁴² First, the FSGs are said to "unwisely intrude upon and unduly restrict the sentencing court's discretion."¹⁴³ One component of the "loss of discretion" criticism is the idea that the process engaged in through the FSGs is too mechanical and does not adequately consider the culpability of the offender.¹⁴⁴ Instead, say critics, the process focuses on the harm created by the crime, which is "an insufficient measure of the punishment deserved."¹⁴⁵ The FSGs represent a significant break from the traditional model of sentencing, characterized by "unfettered discretion in sentencing" that took into account the totality of the offender's characteristics, which lend themselves to the culpability of the offender.¹⁴⁶ Thus, following this line of criticism, the FSGs are an unwise solution to the problems of sentencing because they employ "deliberately impersonal sentencing rules," which are inappropriate given the need for judges to assess not only the harm created by the offender's conduct but also the culpability of the offender.¹⁴⁷ Critics argue that the old system's characteristically wide span of "judge's discretion" made a better vehicle for measuring an equitable level of punishment for each offender, in light of the spe-

137. *See id.* at 199–200.

138. *See id.*; Driessen & Durham, Jr., *supra* note 102, at 633–34.

139. *See* Berlin, *supra* note 12, at 199–200.

140. *See id.*

141. *See id.* ("By treating unlike cases alike, the Guidelines violate rather than promote equality and fairness.")

142. Driessen & Durham, Jr., *supra* note 102, at 633.

143. *Id.*

144. *See* Berlin, *supra* note 12, at 196–97.

145. *Id.* at 197.

146. *Id.*; Driessen & Durham, Jr., *supra* note 102, at 633.

147. Driessen & Durham, Jr., *supra* note 102, at 633; Berlin, *supra* note 12, at 197.

cific characteristics of culpability that each offender brings before the bench.¹⁴⁸

The second major criticism of the FSGs is that the “structure and content” of the FSGs do not reflect good policy choices on the part of the Sentencing Commission, the promulgator of the FSGs.¹⁴⁹ These criticisms address both action taken on the part of the Sentencing Commission and the absence of action in other areas.¹⁵⁰ Generally, this class of commentary addresses specific criticisms regarding the form and substance the FSGs have taken under the stewardship of the Sentencing Commission.¹⁵¹ In short, there is a major body of general criticism that posits that the Sentencing Commission has gone about its reforms in the wrong manner and has not crafted a functional system for establishing justice.¹⁵²

Finally, critics posit the notion that FSGs are ineffective in their operation because they address only “one potential source of the unwarranted disparity they were designed to address.”¹⁵³ Basically, this argument revolves around the idea that while the FSGs instruct the court in how to mete out punishment, the FSGs do not take into account other factors that affect the end result of the sentencing process: namely police and prosecutor actions and discretion.¹⁵⁴ The actions of the police in investigating and prosecutors in choosing how to charge the offense, say the critics, “form the starting point in the court’s determination of the ultimate sentence.”¹⁵⁵

2. A Departure from the Status Quo—FSGs’ Strengths

When considering the utility of the FSGs, there is a great deal of opinion regarding whether or not the guidelines have achieved their purpose or, as some critics argue, have made sentencing problems worse.¹⁵⁶ As one scholar has noted: “Few of those who believe that the evolving Guidelines system represents a significant advance in sentencing practice and is workable in the day-to-day administration of justice have put pen to paper.”¹⁵⁷ However, a number of scholars note strengths within the FSG system. Next, some of the strengths of the FSGs’ regime will be considered.

148. Berlin, *supra* note 12, at 197; Driessen & Durham, Jr., *supra* note 102, at 633.

149. Driessen & Durham, Jr., *supra* note 102, at 633.

150. *Id.*

151. *See id.*

152. *See id.*

153. *Id.*

154. *See id.* at 633–34.

155. *See id.*

156. *See* Julie R. O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 Nw. U. L. REV. 1342, 1343–44 (1997); Driessen & Durham, Jr., *supra* note 102, at 633.

157. O’Sullivan, *supra* note 156, at 1344 (referring to the idea that there is a limited amount of scholarship devoted to the pronouncement of positive aspects and effects of the FSGs).

First, advocates for the FSGs argue that the guidelines relieve the system of the degree of judicial discretion that, in the past, led to the widespread sentencing disparity that riddled the pre-FSGs system.¹⁵⁸ There are two main thrusts of argument on this point.¹⁵⁹ First, the FSGs advocates argue that judges have maintained a respectable degree of discretion under the FSGs because they are allowed to depart from the guidelines if "there exists some circumstance, aggravating or mitigating, to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines."¹⁶⁰ However, it must be noted that deviation from the FSGs is tightly restrained and judges must refer to various approved factors for consideration listed in the guidelines.¹⁶¹ This creates a somewhat difficult standard as it prevents the use of "factors such as age, employment record, or family ties that judges formerly used to 'individualize' sentences."¹⁶² Next, advocates argue that the limitation of the traditional "unbridled sentencing discretion that judges enjoyed" prior to the enactment of the FSGs acts as a much-needed check on the ever-growing realm of prosecutorial discretion.¹⁶³ In addition to establishing sentencing ranges, the FSGs also establish standards for charging offenders and negotiating plea agreements.¹⁶⁴ Under this line of thinking, the strength of the FSGs is its ability to temper the discretion enjoyed by prosecutors under the modern criminal Code.¹⁶⁵

Second, the FSGs provide a fairly straightforward standard.¹⁶⁶ However, many critics of the FSGs argue that the guidelines are too complex and unwieldy for the average practitioner to proficiently manage.¹⁶⁷ Advocates for the FSGs, however, disagree with this statement and offer empirical evidence that the system is actually quite simple to maneuver through.¹⁶⁸ As explained above, the FSGs essentially take two characteristics into account in determining the sentence: offense severity and offender characteristics.¹⁶⁹ The complicated part of the process, critics argue, is in the application of the myriad number of adjustments available in the guidelines manual.¹⁷⁰

158. Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 Nw. U. L. REV. 1574, 1590–92 (1997). Whiteside advocates for the FSGs in a piece that discusses and dismisses many of the criticisms of the FSGs. While an advocate for the FSG scheme, Whiteside states that there is still room for a great deal of improvement and refers to the current system of FSGs as a "foundation." *Id.* at 1598.

159. *See id.*

160. *Id.* at 1590.

161. Bowman, III, *supra* note 122, at 308.

162. *Id.*

163. Whiteside, *supra* note 158, at 1591.

164. *Id.* at 1591–93.

165. *See id.*

166. *Id.* at 1585.

167. *Id.*

168. *See id.* at 1587.

169. Driessen & Durham, Jr., *supra* note 102, at 631.

170. *See* Whiteside, *supra* note 158, at 1586–87.

However, statistics show that “most offenders require only the simplest of adjustments and have little or no prior criminal record.”¹⁷¹ Thus, advocates appreciate the mechanical application of justice to offenders as a simple solution to a complex set of variables.¹⁷²

Finally, advocates of the FSGs argue that the FSGs strike an equitable balance between the rigidity of a “charge-based” system and the subjectivity and non-uniformity of punishment in the “real-offense” system.¹⁷³ In other words, the modern FSGs factor in enough offender characteristics to prevent being overly insensitive to the characteristics of the offender, without focusing on offender characteristics to the extent that the subjective discretion of the judge is allowed to create a wide body of disparate sentences that do not, on the whole, paint a uniform picture of sentencing.¹⁷⁴ Thus, the strength of the modern FSGs is their effectiveness in decreasing the range of sentences for a given offense while, at the same time, considering various offender characteristics that warrant a stiffer or more relaxed sentence within the guideline-mandated range.¹⁷⁵

IV. APPLICATION OF THE FEDERAL ANALYSIS TO THE TEXAS JUVENILE SYSTEM

In light of the above discussion, this Comment will next explore a vision of how the Texas juvenile PSGs could fare if sections 59.002 thru 59.013 were made mandatory and were allowed to operate without the disclaimer found in section 59.014.

A. *Applying the Strengths*

As stated above, advocates for the operation of the FSGs argue that some key strengths of the FSGs system are that the guidelines allow for an appropriate amount of judicial discretion, that they are a straightforward standard with few areas of complexity, and that they strike a good balance between the seriousness of the offense and the characteristics of the offender.¹⁷⁶ If allowed to operate as a mandatory sanction guideline, the PSGs would demonstrate these same strengths.¹⁷⁷ Consider the following arguments under the assumption that section 59.014 of the Texas Family Code was not in operation and the PSGs were mandatory.

171. *Id.* at 1587.

172. *See id.* at 1585–90.

173. *See O’Sullivan, supra* note 156, at 1352–61.

174. *See id.*

175. *See id.*

176. *See Whiteside, supra* note 158, at 1585; O’Sullivan, *supra* note 156, at 1352–61.

177. *See TEX. FAM. CODE ANN.* § 59.003 (Vernon 2002 & Supp. 2004); Driessen & Durham, Jr., *supra* note 102, at 632; Whiteside, *supra* note 158, at 1585.

1. Judicial Discretion

The first point of discussion is the issue of judicial discretion. Currently in Texas, "[a] juvenile court has broad discretion in determining a suitable disposition for a juvenile who has been adjudged to have engaged in delinquent conduct."¹⁷⁸ The PSGs, like the FSGs, lay out a series of "sentencing ranges" within which a judge may choose an appropriate disposition.¹⁷⁹ Because the PSGs include options of various degrees of probation, confinement, mandatory counseling and treatment, and community restitution,¹⁸⁰ they establish a much broader range within each sanction level than that found within the FSGs. The sentencing ranges found in the FSGs are comparatively narrow, allowing for only a narrow range of confinement measured in months.¹⁸¹ Thus, the PSGs offer even more judicial discretion than that found in the FSGs.

2. Simplicity

The second point of discussion is the issue of simplicity of the PSG standards. The PSGs are codified in thirteen sections of the Code, occupying three to four pages of text, depending on the version of the Code that is in use.¹⁸² The FSGs, as codified in the 2002 edition of the *Federal Sentencing Law and Practice*, occupies 1,669 pages broken into eight chapters.¹⁸³ While the FSGs are arguably simple in application in the average case,¹⁸⁴ they are certainly a lengthier, more intricate system than that laid out in the PSGs.¹⁸⁵ Additionally, the PSGs are simpler in their operation concerning the consideration of offender characteristics.¹⁸⁶ Offender characteristics in the PSGs are considered within section 59.003 and are largely limited to previous delinquent history and circumstances of the act, such as the use of a firearm.¹⁸⁷ Alternatively, the FSGs allow adjustments to the "base offense" by considering such factors as "role in the offense, the amount of drugs

178. *In re J.D.P.*, 85 S.W.3d 420, 426 (Tex. App.—Fort Worth 2002, no pet.) (demonstrating a solid statement by the court that the discretion of the trial court is very broad in determining dispositions for juvenile offenders).

179. Driessen & Durham, Jr., *supra* note 102, at 632.

180. *See* Johnson, *supra* note 34, at 11–13.

181. *See* Driessen & Durham, Jr., *supra* note 102, at 632.

182. *See* TEX. FAM. CODE ANN. §§ 59.001–.013 (Vernon 2002 & Supp. 2004).

183. *See* HUTCHISON ET AL., *supra* note 113.

184. Whiteside, *supra* note 158, at 1585.

185. *See generally* TEX. FAM. CODE ANN. §§ 59.001–.013 (the PSGs); HUTCHISON ET AL., *supra* note 113.

186. *Compare* TEX. FAM. CODE ANN. § 59.003 (Vernon 2002 & Supp. 2004) (assigning a specific sanction level for a list of specified offenses), *with* Driessen & Durham, Jr., *supra* note 102, at 631–32 (noting that, depending on the offense characteristic, offense levels might be added or subtracted from the base offense in a myriad of chapters of the guidelines).

187. *See* TEX. FAM. CODE ANN. § 59.003.

or fraud . . . [and] criminal history.”¹⁸⁸ Thus, the PSGs offer an even simpler method of determining an offender’s disposition than that found in the FSGs.¹⁸⁹

3. Seriousness of Offense and Offender Characteristics

The final point of discussion is the issue of balancing the seriousness of the offense with the characteristics of the offender. Both the PSGs and the FSGs address these factors when determining the statutory punishment.¹⁹⁰ Both the PSGs and FSGs begin the punishment determination process with the designation of a “base offense.”¹⁹¹ The “base offense” represents the actual crime that was committed.¹⁹² Subsequent to the determination of the “base offense,” both the PSGs and FSGs enter into an adjustment phase that takes offender characteristics into account.¹⁹³ As stated above, the PSGs offer a simpler alternative to the consideration of these factors.¹⁹⁴ The PSGs integrate certain offender characteristics for consideration into section 59.003, which assigns the sanction level for each degree of crime while taking the offender characteristics into consideration.¹⁹⁵ Section 59.003 lists the sanction level for various degrees of crime, including misdemeanors, first degree felonies, and so on.¹⁹⁶ Further, section 59.003 takes into account such factors as whether or not a firearm was involved in the crime and whether the juvenile is a recidivist when assigning the appropriate sanction level.¹⁹⁷ These factors are used by the statute to mandate a higher or lower sanction level.¹⁹⁸ This regime is similar to that found in the FSGs and, arguably, provides a similar balance between the seriousness of the offense and the characteristics of the offender.¹⁹⁹

188. Hon. Paul D. Borman, *The Federal Sentencing Guidelines*, 16 T.M. COOLEY L. REV. 1, 6 (1999).

189. Compare TEX. FAM. CODE ANN. § 59.003 (assigning a specific sanction level for a list of specific offenses), with Driessen & Durham, Jr., *supra* note 102, at 631–32 (noting that, depending on the offense characteristic, offense levels might be added or subtracted from the base offense in a myriad of chapters of the guidelines).

190. See TEX. FAM. CODE ANN. § 59.003; Driessen & Durham, Jr., *supra* note 102, at 632.

191. See TEX. FAM. CODE ANN. § 59.003(a); Driessen & Durham, Jr., *supra* note 102, at 631–32.

192. See TEX. FAM. CODE ANN. § 59.003(a).

193. See TEX. FAM. CODE ANN. § 59.003(b)–(e); Driessen & Durham, Jr., *supra* note 102, at 631–32.

194. See TEX. FAM. CODE ANN. § 59.003; Driessen & Durham, Jr., *supra* note 102, at 632 (noting that the “federal sentencing structure is ostensibly a fairly mechanical, if not fairly complex undertaking”).

195. See TEX. FAM. CODE ANN. § 59.003.

196. *Id.*

197. *Id.*

198. *Id.*

199. See *id.*; O’Sullivan, *supra* note 156, at 1352–61.

Having considered the application of the strengths of the mandatory operation of the PSGs in light of the strengths of the somewhat similar existing sentencing system of the FSGs, this Comment will now address the weaknesses of the proposed mandatory operation of the PSGs in the Texas juvenile system.

B. *Mitigating the Weaknesses*

As stated above, there are three general categories of criticisms of the FSGs that could potentially echo through the Texas juvenile system if the PSGs were legislated into mandatory operation: 1) over-intrusiveness on judicial discretion; 2) bad policy and inaction on the part of the promulgator of the guidelines; and 3) lack of focus on other elements of the charging or sentencing regime (*i.e.*, prosecutorial discretion).²⁰⁰

1. Over-Intrusiveness on Judicial Discretion

The first issue of discussion is the intrusion of the guidelines on traditionally broad judicial discretion. This issue takes into account both the history of broad judicial discretion that has been the legacy of judges in this country, and the need for judges to have some freedom to maneuver outside the guidelines for the sake of those offenders that are treated unfairly under the statutory guidelines.²⁰¹ The PSGs offer the judge broad discretion in the language of sanction levels two through seven, allowing the court to impose additional "conditions on probation,"²⁰² "additional sanctions,"²⁰³ or "any other appropriate condition of supervision"²⁰⁴ that the court deems necessary. These sections of the PSGs offer the judge an opportunity for broad discretion within the guidelines that cannot be said to be intrusive.²⁰⁵ Thus, the weakness detected in the FSGs concerning the intrusion into the area of judicial discretion is not valid with respect to the PSGs, given the mechanisms for the exercise of judicial discretion found within the guidelines.²⁰⁶

2. Policy

The second issue of discussion is policy. The PSGs, like the FSGs, are vulnerable to a criticism that the rule-making body is not acting on

200. See Driessen & Durham, Jr., *supra* note 102, at 633–34.

201. *See id.*

202. TEX. FAM. CODE ANN. § 59.005(a)(7) (Vernon 2002), § 59.006(a)(6) (Vernon 2002 & Supp. 2004).

203. TEX. FAM. CODE ANN. §§ 59.007(a)(7), .008(a)(7) (Vernon 2002 & Supp. 2004).

204. TEX. FAM. CODE ANN. § 59.010(b)(3) (Vernon 2002); *accord* TEX. FAM. CODE ANN. § 59.009(b)(3) (Vernon 2002).

205. *See* TEX. FAM. CODE ANN. §§ 59.005(a)(7), .006(a)(6), .007(a)(7), .008(a)(7), .009(b)(3), .010(b)(3).

206. *See id.*

good policy²⁰⁷ and is not responsive to changes that need to be enacted.²⁰⁸ Where the PSGs vary from the FSGs, however, is the fact that the PSGs were promulgated by the Texas Legislature,²⁰⁹ whereas the FSGs were created by an independent commission operating under a charter from Congress.²¹⁰ Because the PSGs were promulgated by a political entity that bears direct accountability to the people of Texas, the legislature arguably has more of a vested interest in acting on sound policy decisions and responding to criticisms than does an independent commission.²¹¹ Thus, because the promulgators of the Texas PSGs are elected legislators who can be voted out of office by their critics, the criticisms against the FSGs based upon policy choices and organizational responsiveness arguably are mitigated in the Texas PSGs by the direct link between the electorate, the legislators, and the PSGs.²¹²

3. Scope

The final issue for discussion is the scope of the regulations. Critics of the FSGs argue that the FSGs fail to limit sentencing disparity because they do not address other elements within the system (*i.e.*, investigators and prosecutors).²¹³ The PSGs are also vulnerable to such criticism.²¹⁴ However, the Texas juvenile judge's broad range of discretion to mete out varying combinations of punishment and treatment²¹⁵ acts as a check on the power of the investigator and prosecutor. In short, the PSGs' broad range of options available in each category allows the judge to compensate for an "over-charged" offender, with latitude to deviate from the guidelines altogether.²¹⁶ The FSGs also contain a provision for deviation from the guidelines,²¹⁷ but because the sentencing range within each tier of the guideline is so narrow,²¹⁸ in a situation where the prosecutor has over-charged an offender, the federal judge has few options other than deviation from the guidelines.²¹⁹ Thus, the PSGs are better equipped to deal with an over-zealous investigator or prosecutor.

207. See Driessen & Durham, Jr., *supra* note 102, at 633.

208. See *id.* at 633-34.

209. Kinkeade, *supra* note 16, at 43-44.

210. Berlin, *supra* note 12, at 191.

211. See Kinkeade, *supra* note 16, at 43, 45.

212. See *id.*

213. Driessen & Durham, Jr., *supra* note 102, at 633-34.

214. See TEX. FAM. CODE ANN. §§ 59.001-.015 (Vernon 2002 & Supp. 2004).

215. See Johnson, *supra* note 34, at 11-13 (explaining the PSGs punishment sanction levels).

216. See *id.*

217. Whiteside, *supra* note 158.

218. See Driessen & Durham, Jr., *supra* note 102, at 632.

219. See *id.* at 627-32.

V. CONCLUSION / PROPOSED ACTION

The repeal of Texas Family Code section 59.014 would allow the PSGs to operate as intended, provide an adequate level of judicial discretion, and give a child like Jill²²⁰ an avenue for appeal when the system does not offer a proportionate disposition as measured by the PSGs. The Texas legislature clearly laid out its purposes for the PSGs in section 59.001.²²¹ The inclusion of section 59.014, while not giving a court a blank check and denying children all grounds for appeal, certainly gives the court free latitude to dispose of juvenile cases in manners that may bear no resemblance to the purposes called for by the legislature in the PSGs. Thus, in keeping with the purposes laid out in section 59.001, it is logical that the standard enumerated in sections 59.002–59.013 be allowed to operate as written. To do otherwise appears to controvert the intent behind the PSGs and leaves children disproportionately sentenced outside of the guidelines of the PSGs without recourse on this ground.²²²

The PSGs are a set of guidelines surprisingly intricate for their compact size. In reading the PSGs, one gains a sense that they were designed with their purposes in mind and inoculated with various safety mechanisms to prevent abuse.²²³ The guidelines match offenses with sanction levels and allow for some adjustment.²²⁴ Further, the inclusion of provisions that allow a judge to add “appropriate” measures in most sanction levels invites judges to exercise some reasonable degree of discretion.²²⁵

Finally, in considering Jill’s case, it only seems logical that she be allowed to appeal on a point of error that specifies that the court punished her in accordance with a sanction level that appears several levels above that which was called for in the guidelines. What clearer measuring stick that a disposition was “against the great weight of the evidence” than that which is used to match offenses with dispositions while considering certain characteristics of the offender? If the Texas juvenile courts are not held to some semblance of standard concerning juvenile disposition, citizens of Texas run the inevitable risk that the TYC will continue to be filled with children such as Jill, while others are allowed to roam the streets. This outcome is not what the Texas Legislature hoped for when codifying the purposes for the PSGs.²²⁶ Additionally, it is not the outcome that provides the fairness that all citizens of Texas, children included, deserve. Jill will continue to serve her indeterminate sentence with the TYC. Her disposition was ulti-

220. See *infra* Part I.

221. TEX. FAM. CODE ANN. § 59.001 (Vernon 2002 & Supp. 2004).

222. See TEX. FAM. CODE ANN. §§ 59.001–.015 (Vernon 2002 & Supp. 2004).

223. See *id.*

224. See *id.*

225. See *id.*

226. See TEX. FAM. CODE ANN. § 59.001.

mately affirmed on appeal with the ringing phrase, “[a] juvenile court’s decision is guided by the [PSGs], but the guidelines are not mandatory.”²²⁷ If section 59.014 is allowed to continue to operate as a goaltender for the appellate courts for those judges that do not comply with the PSGs, the phrase “tough on crime” might well be amended to add the postscript “. . . soft on justice.”

Clifford MacKenzie

227. *In re J.J.N.*, No. 2-02-204-CV, 2003 WL 253660, at *4 (Tex. App.—Fort Worth Feb. 6, 2003, no pet.) (mem. op.) (not designated for publication).