MANSLAUGHTER WORKING GROUP

REPORT TO THE COMMISSION

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Manslaughter Working Group
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Purpose

In response to concerns expressed by the Department of Justice (DOJ) and others,[1] the Commission determined in May 1997 that it should assess sentencing policy for manslaughter offenses. Subsequently, a staff working group was established to study the Voluntary and Involuntary Manslaughter guidelines, §§2A1.3 and 2A1.4, with the objective of assisting the Commission in determining whether the current guideline penalties are appropriate relative to other violent offenses.[2] The group was tasked to consider: (1) whether current base offense levels adequately account for the variety, severity, and ranges of offense behavior, (2) whether specific offense characteristics or other changes are needed to capture certain offense behaviors, and (3) whether the Commission should recommend to Congress any changes to the statutory penalties.

Procedure

The working group presented its initial work plan to the Commission in July 1997. The group studied federal and state sentencing data and assisted the Commission in conducting a hearing at which experts testified on manslaughter sentencing issues.

First, the working group examined three years of Commission monitoring data (FY 94-96) and actual sentencing case files for 148 defendants sentenced in those same three years (54 for voluntary manslaughter and 94 for involuntary manslaughter). The group also reviewed selected legal and social science literature on manslaughter and related sentencing issues[3] and consulted with

[1]Chief Judge Richard Battey of South Dakota, a member of the Judicial Conference Committee on Criminal Law, is one individual who has forcefully articulated to the Commission on a number of occasions that the guidelines and statutory penalties for manslaughter offenses should be raised. The Commission has also received victim impact testimony expressing concerns about the inadequacy of current federal penalties.

[2]These tasks derive directly from the Commission's statutory mandate. *See* 28 U.S.C. §§ 994(o): "The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines . . . ."; 995(a)(20): "The Commission . . . shall . . . make recommendations to Congress concerning modification . . . of statutes relating to sentencing . . . ."; and 994(r): "The Commission . . . whenever it finds it advisable, shall recommend to Congress that it . . . modify the maximum penalties of those offenses for which such an adjustment appears appropriate."

[3]*See* Appendix 1 for a reference list. A separate research paper, appended to this Report, was prepared by the working group's member from the Office of Policy Analysis to address additional underlying concerns about the relationship between DUI offenses and vehicular manslaughter. *See* Appendix 4.

outside experts. At the September 18, 1997, Commission meeting, the working group briefed the Commission on its preliminary analysis of guideline sentencing data. The group also briefed the Commission's Probation Officers' Advisory Group and prepared a questionnaire for that group to administer to probation officers in Arizona, Montana, New Mexico, and South Dakota—the four federal districts that account for over 60 percent of the federal manslaughter caseload.

Second, after consulting with Staff Director John H. Kramer in his role as a nationally recognized expert on state sentencing systems and practices, the group selected nine states with which the federal sentencing standards and practices could be compared. The selected states included two non-guideline states with a high incidence of manslaughter sentencings and good data sets (New Mexico and South Dakota) and seven other states (Kansas, Minnesota, North Carolina, Pennsylvania, Oregon, Virginia, and Washington) that were known to have "truth-in-sentencing" systems and good data sets. Typical manslaughter sentencing scenarios were then prepared and submitted to the appropriate sentencing officials in the selected states.[4] After extensive coordination with the state sentencing commissions and statistical analysis centers, the group analyzed the sentencing information it received, and presented its findings comparing the federal system with the various state systems at the Commission's October 15, 1997, meeting.

On November 12, 1997, the Commission held a public hearing at which subject matter experts discussed the manslaughter issues in detail. The Commission hosted Chief Judge Richard Battey from the District of South Dakota, Thomas LeClaire, the Director of Tribal Justice at the Department of Justice, Jon Sands, Assistant Federal Public Defender for the District of Arizona, and Randy Bellows, Assistant United States Attorney for the Eastern District of Virginia. Following the public hearing, the Commission discussed policy options and directed that a report be submitted setting forth the group's salient findings. The Commission also asked that issues for comment covering various options be prepared and submitted for Commission consideration at its December meeting.

Voluntary Manslaughter

A. Statutory and Guideline Penalties

Under federal statutes, the offense of voluntary manslaughter exists in a continuum of three intentional killing offenses. The most serious of the continuum offenses are first and second degree murder, codified at 18 U.S.C. § 1111. The statutory penalty for first degree murder (*i.e.*, premeditated murder and murder committed during certain named felonies) is death or, alternatively, a mandatory sentence of life imprisonment. For those first degree murder cases in which the death penalty is not imposed, the guidelines prescribe a guideline base offense level of 43. Second degree murder (*i.e.*, unlawful killing with malice aforethought, but without premeditation) is punishable by a maximum statutory penalty of life imprisonment and

[4]The group consulted with the executive directors of the state sentencing commissions. For the non-guideline states, the group consulted with experts at the statistical analysis divisions for the state Departments of Corrections. The information-gathering methods were similar to those employed by Commission staff in conducting an earlier Re-sentencing Project.

a guideline base offense level of 33. Voluntary manslaughter, codified at 18 U.S.C. § 1112, is an unlawful killing which differs from murder in that the element of malice is negated because the killing occurred in the heat of passion or upon sudden quarrel with just provocation.[5] It is punishable by a maximum of ten years imprisonment and has a guideline base offense level of 25. The Voluntary Manslaughter guideline, §2A1.3, has no specific offense characteristics and no interpretive application notes.

B. Primary Issues for Consideration

The working group focused its study of voluntary manslaughter sentencing policy around the following specific issues:

- whether the statutory maximum is unduly constraining;
- whether the guideline penalties are appropriate relative to other homicide and violent offenses;
- whether criminal history may be under-represented in a substantial number of cases due to the exclusion of Indian tribal convictions in calculating the defendant's criminal history score;[6]
- whether specific offense characteristics are needed to better distinguish dissimilar voluntary manslaughter offenses; and
- whether commentary inviting departure from the guideline range in certain circumstances should be added.

C. Principal Findings

1. Analysis of Commission Monitoring Data and Case Information

The monitoring data for voluntary manslaughter offenses sentenced in fiscal years 1994-96 were analyzed to determine, among other things, the median sentence imposed and median time served, or likely to be served, for these offenses, criminal history category of the defendant, percentage of cases receiving an adjustment for Acceptance of Responsibility and other Chapter Three adjustments, percentage of,

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[5]*See* United States v. Paul, 37 F.3d 496, 499 (9th Cir. 1994) (explaining that if a defendant kills with the mental state required for murder, but does so in the "heat of passion" caused by adequate provocation, the defendant is guilty of voluntary manslaughter—the finding of "heat of passion" and adequate provocation negates the element of malice.)

[6]Guideline §4A1.2(i) states that "[s]entences resulting from tribal court convictions are not counted, but may be considered as a basis for upward departure under §4A1.3 (Adequacy of Criminal History Category)."

and stated reasons for, upward and downward departures, defendant demographics, and jurisdiction where the offense occurred.

The three fiscal years yielded 60 voluntary manslaughter cases, of which case files of 54 defendants were further analyzed to determine the charges, plea agreement (if applicable), real offense conduct, whether the defendant had a past pattern of similar conduct, and whether alcohol was a factor in the offense.[7] District court departure decisions on these cases, and all appellate decisions involving the Voluntary Manslaughter guideline, were analyzed for judicial commentary on guideline application.

As indicated in Figure 1, 68 percent of the defendants sentenced for voluntary manslaughter in FY 94-96 were Native Americans. Ninety percent were male and almost 17 percent were under 21—an unusually large representation given that the under 21 age group makes up about 4 percent of federal defendants generally (Figures 2 and 3). The median sentence for the 60 voluntary manslaughter defendants was 57 months. In the 54 cases examined, almost 82 percent of the deaths resulted from fights, followed by 9 percent from child abuse (Figure 4). About 50 percent of the offenses involved alcohol. Over one-half of the victims were family members or friends (Figure 5). About 12 percent of the sentences involved upward departures, while 13 percent involved downward departures. Upward departures were most typically based on the heinous nature of the offense conduct. Among the reasons cited for downward departure were the victim's conduct, the defendant's remorse, and extraordinary circumstances. Over 28 percent of those sentenced within the guideline range were sentenced within the highest quarter of the guideline range (Figure 6). Approximately 70 percent of the defendants were determined to be in Criminal History Category I. Analysis of the presentence reports indicated that some defendants had uncounted acts of prior criminal conduct, most commonly involving assault and battery and public intoxication (Figure 7).

2. Inter-jurisdictional Comparison

One type of information that can be used to help assess the need for revisions to a particular guideline is a comparative analysis of how the relevant federal guideline sentences compare with those in the states. The value of this analysis is dependent upon ensuring that the penalties are measured in comparable terms. For example, some states have high statutory maximum penalties,[8] but relatively low sentences. To ensure valid comparisons, the working group obtained the state statutory maximum sentence, the median sentence imposed, and the median time served or expected to

[7]Six voluntary manslaughter case files were missing.

[8]Forty states and the District of Columbia have Voluntary Manslaughter statutes. Of those states, 72.5 percent have a higher statutory maximum than the federal statutory maximum. Twenty of the 40 states have a statutory maximum of 20 years or higher, 9 states have a statutory maximum of 11-19 years, 11 states have a statutory maximum of 10 or less years.

be served.[9] Typical manslaughter sentencing scenarios were prepared and sent to state sentencing officials for sentencing under their statutes and guidelines.

Results of the comparative analysis of state and federal sentences for voluntary manslaughter offenses are shown in Table 1. New Mexico, a non-guideline state, had the lowest statutory maximum at six years, and the lowest median sentence (43 months) and time served (29 months). The federal system currently has the third lowest statutory maximum (Table 1).[10] The state of Oregon has a 20-year statutory maximum, with a mandatory minimum sentence of ten years. The state of South Dakota, a non-guideline state, had the highest sentences, with a statutory maximum of life imprisonment and a median time served of life (Table 1).

3. Comparison with Other Chapter Two Violent Offense Guidelines

The Voluntary Manslaughter guideline was compared to guidelines for some other violent offenses in Chapter Two of the Guidelines Manual to provide context and help assess the proportionality of guideline sentencing for this offense in relation to sentences imposed for other Chapter Two violent offenses. Under the current guidelines, an individual sentenced for voluntary manslaughter receives a maximum offense level under Chapter Two of 25, derived entirely from the base offense level. In contrast, an individual convicted of attempted murder may receive an adjusted offense level (base offense level plus aggravating specific offense characteristics) of up to 36; an individual convicted of aggravated assault who receives the maximum increase for available specific offense characteristics will have an adjusted offense level of 30. Kidnapping carries a base offense level of 24, and specific offense characteristics added for aggravating factors short of killing the victim can boost the offense level above level 40. Thus, as this comparison indicates, current offense conduct that does not result in victim death may be graded under the relevant guidelines as more serious than a voluntary manslaughter offense involving an intentionally caused victim death (Table 2).

Guideline ranges for selected violent offenses across all criminal history categories are shown in Figure 8. Sentences range downward in severity from a mandatory life sentence for first degree murder (when the death penalty is not imposed) to 6-30

[9]Virginia was not used in the Voluntary Manslaughter comparison because median sentences could not be provided, and the state of Washington was not used for this part of the study because that state only recently increased the statutory maximum to life imprisonment (in July 1997), and data on median sentences under the revised statute were not available.

[10]At the time these data were gathered, North Carolina actually had the third lowest statutory maximum at 8.2 years; however, North Carolina's statutory maximum was increased to 19.1 years effective December 1, 1997. Thus, the federal maximum now ranks as third lowest among the studied jurisdictions.

months for negligent involuntary manslaughter. Of these violent offenses, the guideline ranges for voluntary and involuntary manslaughter are the lowest.

Similarly, the median sentences for voluntary and involuntary manslaughter are also low relative to all other violent offenses (Figure 9).

Obviously, the current guideline structure reflects prior Commission judgments as to the proportionality among the various violent offenses in terms of the inter-relationship between intent and harm (*e.g.*, there is a gap such that the most serious second degree murder offense is sentenced below first degree murder). Any increase in the manslaughter penalties, in the absence of increases in the adjacent offenses (*e.g.*, second degree murder) would lessen the distinction among these offenses. Any changes to the guideline structure should also consider the relevant purposes of sentencing, including deterrence, incapacitation, and just punishment.

4. Comparison with Other Statutory Maximum Penalties

The ten-year statutory maximum sentence for voluntary manslaughter was also compared to potential statutory maximum sentences for several other federal offenses. As indicated in the list that follows, a number of federal offenses, including violent offenses where death has not occurred, have the same or a higher statutory maximum sentence than voluntary manslaughter.

Attempted or Aggravated Sexual Abuse	18 U.S.C. § 2241	life
Kidnapping	18 U.S.C. § 1201	life
Bank Robbery	18 U.S.C. § 2113	20 years
Interstate Domestic Stalking	18 U.S.C. § 2261	20 years
Money Laundering	18 U.S.C. § 1956	20 years
Embezzlement	18 U.S.C. § 641	10 years
Mailing Sexual Advertisements (second offense)	18 U.S.C. § 1735	10 years
Aggravated Assault[11]	18 U.S.C. § 113	10 years

[11]About 82 percent of voluntary manslaughter deaths result from fights. An assault with a dangerous weapon, 18 U.S.C. § 113, is subject to a ten-year statutory penalty when no death occurs. Thus, when the assault results in a voluntary manslaughter offense, there is no additional statutory punishment to account for the death of the victim.

5. Probation Officers' Survey

Results of the survey from the districts of Arizona, Montana, New Mexico, and South Dakota are found in Appendix 1. Overall, the respondents indicated an interest in raising base offense levels and adding specific offense characteristics. There was no consensus with regard to increasing the statutory maximum.

D. Public Hearing Testimony

The statements of the participants in the public hearing are set forth in Appendix 3. The major points of the participants are summarized here.

Chief Judge Battey suggested that the statutory maximum limits a judge's ability to fashion an appropriate punishment in heinous cases. He noted that, with the higher statutory maximum for aggravated assault with intent to kill (20 years), "it is conceivable that a defendant would receive a lesser sentence for killing a victim than for assaulting a victim." In addition to recommending a substantial increase in the statutory maximum, he suggested that the Commission might look to the specific offense characteristics in the Aggravated Assault guideline, "adding perhaps a [higher] base offense level for acts committed against a spouse or other family member." "Should the Commission be unsuccessful in getting Congress to raise the statutory maximum, the base offense level should be raised somewhere near the statutory maximum, or in the alternative, use the specific offense characteristic found in §2A2.2 for aggravated assault, adding perhaps a base offense level for acts committed against a family member." In addressing whether departures for particular conduct should be added, Assistant Federal Public Defender, Jon Sands, suggested that the current §5K departures cover most circumstances. The testimony from the Department of Justice representative, Tom LeClaire, was that DOJ has recommended to Congress an increase in the maximum term of imprisonment from 10 to 20 years. However, DOJ would like to focus on the interaction of these homicide guidelines as a whole, and in particular on the penalties for second degree murder, inasmuch as the "various homicide offenses, from first degree murder to involuntary manslaughter, are all part of a continuum of seriousness."

E. Options

Set forth below are a range of options for possible changes in the applicable statutes and/or sentencing guidelines. Of course, in addition to these options for possible changes, the Commission could elect to make no changes in current sentencing policy.

1. Increased Statutory Maximum Penalty

The Commission could recommend to Congress that the statutory penalty for voluntary manslaughter be increased from 10 to 20 years. The letter should note that other intentional homicides (*i.e.*, first and second degree murder) carry a maximum prison sentence of life. For first degree murder, the sentence is death or mandatory life. Also, the maximum penalty for assault with intent to commit murder where no life was taken is 20 years imprisonment. 18 U.S.C. § 113(a)(1). By contrast, the

sentence for voluntary manslaughter, an intentional killing in the heat of passion or upon sudden quarrel, is ten years. Currently, the effective sentencing range across criminal history categories for voluntary manslaughter is 57-120 months (63 months) because the statutory maximum caps the range. Without the constraint of the current ten-year statutory maximum, the effective range over criminal history categories would be 57-137 months (80 months). By contrast, the sentencing range across criminal history categories for second degree murder at base offense level 33 is 135-293 months (158 months). Thus, voluntary manslaughter defendants in the two most serious criminal history categories (*i.e.*, categories V and VI), may not receive sentences that appropriately reflect the seriousness of their criminal history. Moreover, because of the statutory maximum constraint, there is little or no room within the available statutory range for upward departure in egregious cases.

2. Base Offense Level Increase

   a. Voluntary Manslaughter—The Commission might consider raising the base offense level from 25 (guideline range of 57-71 months for defendant in Criminal History Category I, no adjustments) to a higher offense level. For example, base offense level of level 28 would produce a guideline range of 78-97 months for such a defendant. While increasing the base offense level from level 25 to a higher level such as 28 would bring it closer to second degree murder, such a move would result in the sentence being capped at Criminal History Category III unless the statutory maximum was raised from the current ceiling of ten years.

   b. Second Degree Murder —To maintain proportionality, the Commission might consider raising the base offense level for second degree murder from 33 (135-168 months for a defendant in Criminal History Category I with no adjustments) to a higher offense level. For example, a base offense level of level 36 would produce a guideline range of 188-235 months for such a defendant.

3. Specific Offense Characteristics/Encouraged Upward Departure

   The Commission might consider whether specific offense characteristics, or an application note inviting upward departure, should be added to account for prior violent conduct, such as a pattern of domestic abuse.

4. Supervised Release

   The Commission might consider whether an application note should be added requiring a minimum period of supervised release following imprisonment whenever alcohol is involved in the offense. The supervised release should include a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse that includes testing to determine whether the defendant has reverted to the use of alcohol or drugs.

Involuntary Manslaughter

A. Statutory and Guideline Penalties

Involuntary Manslaughter, as set forth in 18 U.S.C. § 1112, is the unlawful killing of a human being without malice that occurs either: (1) during the commission of an unlawful act not amounting to a felony, or (2) during the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death. The offense has a maximum penalty of six years imprisonment.[12] Under the applicable guideline, §2A1.4, the base offense level is 10 for criminally negligent conduct and 14 for reckless conduct. As with the Voluntary Manslaughter guideline, the guideline for involuntary manslaughter has no specific offense characteristics. There is an application note which instructs the court to use the higher base offense level of 14 for reckless conduct, including involuntary homicides resulting from driving under the influence of drugs or alcohol.

B. Primary Issues for Consideration

The working group focused its study around the following specific issues:

- whether vehicular homicide offenses are appropriately punished;
- whether the guideline penalties are appropriate relative to corresponding state penalties;
- whether criminal history may be under-represented due to the exclusion of tribal convictions in calculating the defendant's criminal history score;[13] and
- whether specific offense characteristics are needed to address frequently occurring aggravating factors.

C. Principal Findings

1. Analysis of Commission Monitoring Data and Case Information

The monitoring data for involuntary manslaughter offenses sentenced in fiscal years 1994, 1995, and 1996 were analyzed to determine, among other things, the median sentence imposed and median time served for these offenses, criminal history category of the defendant, percentage of cases receiving an adjustment for Acceptance of Responsibility and other Chapter Three adjustments, percentage of and stated reasons

[12]The maximum penalty was increased from three to six years in 1994. *See* section 604 of Pub. L. 104-294 (Sept. 13, 1994). This action implemented an earlier recommendation by the Commission pursuant to 28 U.S.C. §§ 994(r) and 995(a)(20).

[13]Guideline 4A1.2 states that "[s]entences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category)."

for upward and downward departures, defendant demographics, and jurisdiction where the offenses occurred.

The three fiscal years yielded 100 involuntary manslaughter cases, of which case files of 94 defendants were further analyzed to determine the charges, plea agreement (if applicable), the real offense conduct, whether the defendant had a past pattern of similar conduct, and whether alcohol was a factor in the offense.[14] District court departure decisions on these cases, and all appellate decisions involving the Involuntary Manslaughter guideline, were analyzed for judicial commentary on guideline application.

As indicated in Figure 10, almost two-thirds of the involuntary manslaughter defendants were Native Americans; the next largest group was white (27 percent). Eighty percent were men, and one-third were 36 years old or older; only 8 percent were 21 years or younger (Figures 11 and 12). Over 60 percent of the 94 cases examined were vehicular manslaughters (Figure 13) and of those, 80 percent involved alcohol. Thus, the "heartland" of involuntary manslaughter offenses is alcohol-related, vehicular homicides. Nine percent of the vehicular manslaughter cases involved more than one victim.

Seven percent of the involuntary manslaughter sentences involved upward departures, and 19 percent involved downward departures. Among the reasons cited for upward departures were death (§5K2.1), multiple deaths (§5K2.0), physical injury (§5K2.2), use or possession of a weapon (§5K2.6). Among the reasons cited for downward departure were the defendant's physical condition (§5H1.4), victim's wrongful conduct (§5K2.10), and defendant's family and community ties (§5H1.6).

Approximately one-half of the victims were friends or family members (Figure 14). Of those cases sentenced within the range, 31 percent were sentenced in the lowest quarter of the range, and 25 percent were sentenced at the highest quarter of the range (Figure 6). Approximately 74 percent of the defendants were determined to be in Criminal History Category I. Analysis of the presentence reports indicated that approximately one-half of the vehicular manslaughter defendants had prior offenses involving alcohol (Figure 15).

2. Inter-jurisdictional Comparison

As indicated, the Commission's sentencing information indicates that the heartland of involuntary manslaughter is alcohol-related, vehicular homicide. In order to assess the comparative severity of this subset of federal involuntary manslaughter offenses, the working group obtained sentencing information from the seven "truth-in-sentencing" states previously noted (Kansas, Minnesota, North Carolina, Oregon, Pennsylvania, Virginia, and Washington) and two non-guideline states (New Mexico

[14]Six involuntary manslaughter case files were missing.

and South Dakota).[15] Officials in these states were asked to sentence three involuntary manslaughter scenarios: (1) involuntary manslaughter by vehicle without alcohol involvement, (2) involuntary manslaughter with alcohol involvement, and (3) involuntary manslaughter with alcohol involvement and a prior conviction for DUI. The results are presented in Table 3. As illustrated, the federal system had the lowest median sentence (15 months) and median time served (13 months). Seven of the nine comparison states had a median time served of 24 or more months.

3. Comparison with Other Chapter Two Violent Offense Guidelines

The Involuntary Manslaughter guideline is compared to other Chapter Two violent offense guidelines in Table 2. The comparison indicates that involuntary manslaughter is currently graded as one of the least serious violent offenses. This is so even through the culpable mental state in alcohol-related or drug-related vehicular homicide offenses may involve such an egregious state of recklessness that it approaches the mental state for murder.[16]

4. Guidelines Structural Issues

Offenses resulting in multiple deaths also appear to raise a concern vis-à-vis the Guidelines' multiple count rules. Currently, a second convicted count of involuntary manslaughter yields a two-level increase in the base offense level. A third convicted count would add one additional level, up to a maximum of five levels for five counts (for the sixth and any additional counts, there is no additional punishment). Furthermore, a two-level increase in the base offense level of 14 makes the otherwise qualified defendant eligible for an additional, one-level decrease (total reduction of three levels) for full acceptance of responsibility. Thus, for the defendant who fully accepts responsibility for the offense, conviction of a second count of involuntary manslaughter effectively adds only one offense level, or about two months, to the guideline sentence (Table 4).

Eight of the 94 (nine percent) involuntary manslaughter cases available for analysis for the years 1994-96 involved two or more deaths. Descriptive characteristics, including sentencing information, for these cases are summarized in Table 4. Multiple deaths were most commonly associated with vehicular accidents.

[15]Forty-two states have a separate statute for vehicular homicide.

[16]In May 1997, in North Carolina, a defendant was convicted of first degree murder and sentenced to life in prison without parole for killing two Wake Forest University students in a drunk driving collision.

Table 4. Descriptive Characteristics for Involuntary Manslaughter by Number of Deaths

Number of Deaths	Type	BOL	Multiple Counts	Acceptance	Final Offense Level	Prison Sentence (mos.)
2	Vehicle	14	+2	-3	13	0
2	Vehicle	14	+2	-3	13	12
2	Vehicle	14	+2	-3	13	16
2	Vehicle	14	+2	-3	13	18
2	Mining Accident	10	+1	-2	8	0
3	Alien Smuggling	14	+2	0	16	30*
3	Vehicle	14	+3	-3	14	16
3	Vehicle	14	+3	-3	14	36*
1†						$\bar{x}$ = 15.5 Median = 13.5

* Upward departure (5K2.1, 5K2.2, respectively).
† n=66; excludes 21 persons with probation, 5 with 924(c), and 8 with multiple deaths.

The sentence for the five cases involving two deaths, following application of the multiple counts rule, ranged from no prison time to 18 months. The prison sentences for the three cases involving three deaths were 16, 30, and 36 months, respectively. It should be noted that the latter two sentences were the result of upward departures.

The mean and median sentences for the 66 cases involving one death were 16 and 14 months, respectively. Thus, there was little or no appreciable difference in actual sentence for cases involving one death compared with cases involving two or more deaths.

5. Probation Officers' Survey

Results of the survey from the districts of Arizona, Montana, New Mexico, and South Dakota are found in Appendix 2. Overall, the respondents indicated an interest in raising the base offense level for both negligent and reckless involuntary manslaughter. There was a consensus that the multiple counts rule was inadequate in dealing with additional deaths. All respondents indicated a need for the inclusion of specific offense characteristics. There was general agreement that application notes inviting departures would be appropriate. Respondents were divided regarding the appropriateness of an increase in the statutory maximum.

D. Public Hearing Testimony

Chief Judge Battey mentioned a specific case he had sentenced in which the defendant had killed a grandfather and one grandson, and severely injured another grandson, when his truck collided head-on with another vehicle. The speed of the defendant's vehicle was an estimated 77 miles per hour, and tests showed a blood alcohol level of .318. Applying the guidelines, the adjusted guideline range was 10-16 months. Judge Battey departed up to 60 months, and this sentence was affirmed on appeal. Judge Battey suggested that specific offense characteristics could have been of assistance, perhaps obviating the need for such a substantial departure and appeal. AFPD Sands contended that the Commission should not introduce specific offense characteristics. He stated that the district court's ability to depart in atypical cases is sufficient under the current guidelines. DOJ's LeClaire urged the Commission to "consider the inclusion of specific offense characteristics for such factors as the offender's past driving history and current license status for cases involving vehicular involuntary manslaughter." He also noted that serious past driving violations not resulting in a conviction for careless or reckless driving, or prior conduct not counted for criminal history, should be considered. "The exclusion of tribal criminal history understates the need for punishment in many cases," he stated. He also noted that, in addition to vehicular homicide resulting from drunk driving, the new type of vehicular homicide, "road rage," is of concern. AUSA Randy Bellows testified about a particular case he had prosecuted involving this type of offense conduct. Mr. Bellows offered insights into the issues in sentencing under the Involuntary Manslaughter guideline when multiple deaths occur. He explained that the case he tried involved three deaths, and the judge struggled with the appropriate means to account for the heinousness of the offense through departures.

E. Options

1. Base Offense Level Increase

   The Commission could consider a somewhat higher base offense level (an increase, for example, from level 14 to 16-18) for all reckless involuntary manslaughter offenses or, alternatively, for vehicular homicide offenses involving drugs or alcohol. This would help address concerns about under-punishment in heartland involuntary manslaughter cases due to uncounted past criminal conduct, and alleviate some of the problems in multiple death cases.

2. Specific Offense Characteristics

   The Commission could consider adding specific offense characteristics for one or more of the following factors:

   a. prior DUI conduct not counted in criminal history (approximately 50 percent of the cases);

   b. driving without a license (in a jurisdiction where a license is required), or driving with a revoked or suspended license;

c. multiple deaths (nine percent of the cases);

d. causing a substantial risk of harm to innocent "bystanders"; and

e. "road rage" that proximately resulted in a vehicular homicide.

3. Additional Issues

The Commission could consider whether the applicable guidelines or commentary should be amended to address the following concerns:

a. prior similar conduct (*i.e.*, if the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted);

b. substantial risk (*i.e.*, if the offense created a substantial risk of serious bodily injury to more than one person, an upward departure may be warranted);

c. multiple deaths (whether or not resulting in multiple counts of conviction).

Amendment approaches that might address this issue include:

- adding levels to the multiple counts rule for Chapter Two, Part A offenses;
- imposing a separate, consecutive sentence on each count (*i.e.*, do not use the multiple counts rule);
- adding an application note inviting upward departure in the event of multiple deaths; and
- permitting a maximum two-level reduction for acceptance of responsibility in the event of multiple deaths.

d. the need for a minimum period of supervised release following imprisonment whenever alcohol is involved. The conditions of supervised release should include a requirement that the defendant participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.

4. Investigate Strategies for Deterring Drunk Drivers

As an alternative, or in addition, to amending the Involuntary Manslaughter guideline, the Commission might investigate and pursue strategies for directly deterring driving under the influence of alcohol or drugs, particularly in Native American jurisdictions. A separate staff paper discussing these strategies is attached to this Report. *See* Appendix 4.

Fig. 8. Relationship Among Guideline Ranges

For Selected Violent Offenses

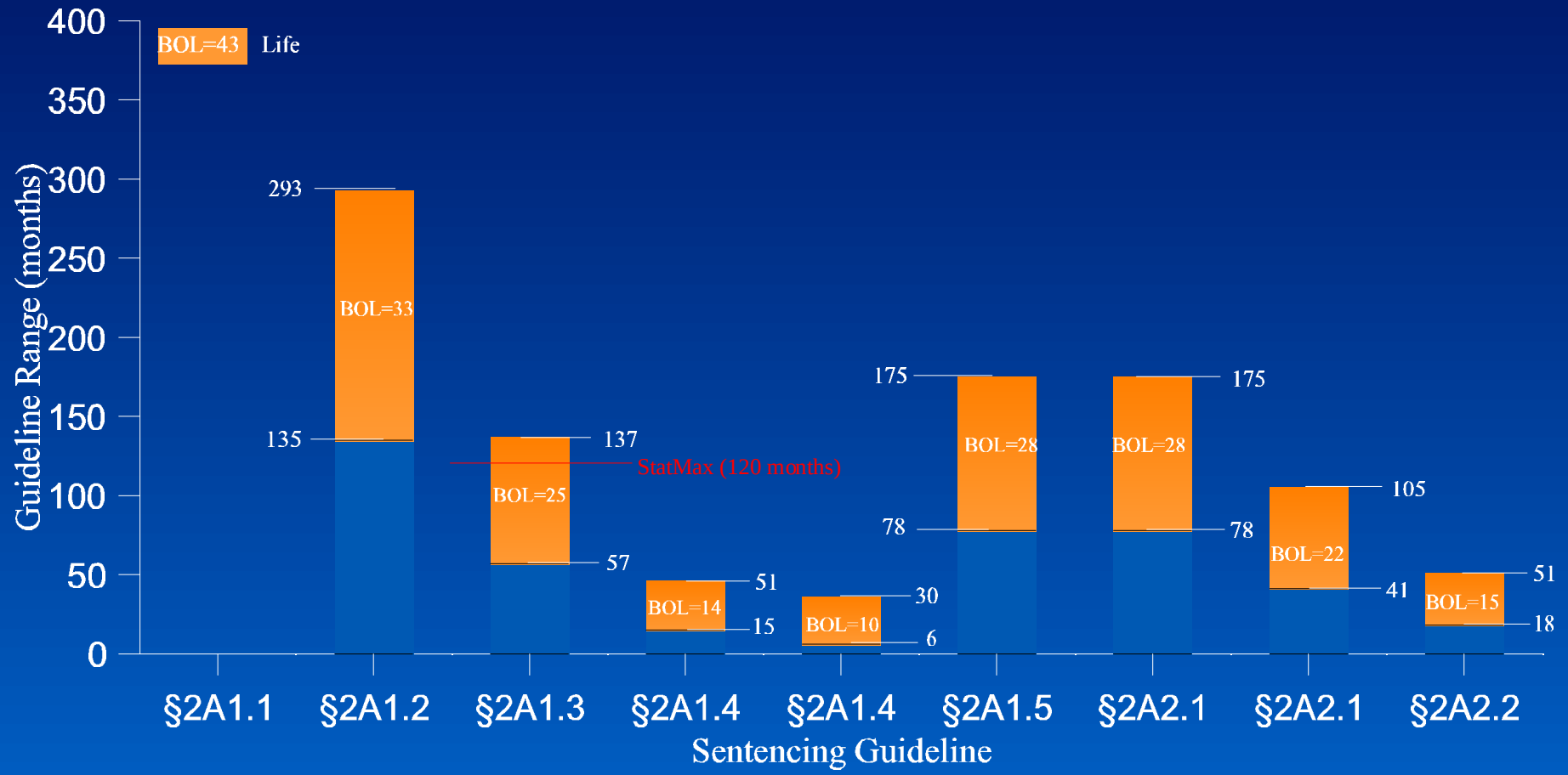


Table 1. Comparison of Federal and State Sentencing Penalties for Voluntary Manslaughter

Statutory Max. (Years)	Median Sentence (Months)	Median Time Served (Months)
6 (NM)	43 (NM)	29 (NM)
7 (KS)	49 (KS)	36 (NC)
8 (NC)	➜ 51 (Fed.)	42 (KS)
➜ 10 (Fed.)	71 (PA)	➜ 43 (Fed.)
15 (MN)	82 (MN)	67 (MN)
20 (PA)	95 (NC)	75 (PA)
20 (OR)	120 (OR)	120 (OR)
Life (SD)	Life (SD)	Life (SD)

Table 2. Comparison of Chapter 2 Violent Offense Guidelines

Sentence Guideline	BOL	Max. Potential SOC	Possible Level
First Degree Murder (§2A1.1)	43	--	43
Second Degree Murder (§2A1.2)	33	--	33
Attempted Murder (§2A2.1)	28, 22	8	36
Voluntary Manslaughter (§2A1.3)	25	--	25
Kidnapping (§2A4.1)	24	20	44 (43)
Robbery (§2B3.1)	20	26*	43
Aggravated Assault (§2A2.2)	15	9 max	24
Involuntary Manslaughter (§2A1.4)	14, 10	--	14
Minor Assault (§2A2.3)	6, 3	4	10

* This number does not include the 7 levels that may be added under the loss table.

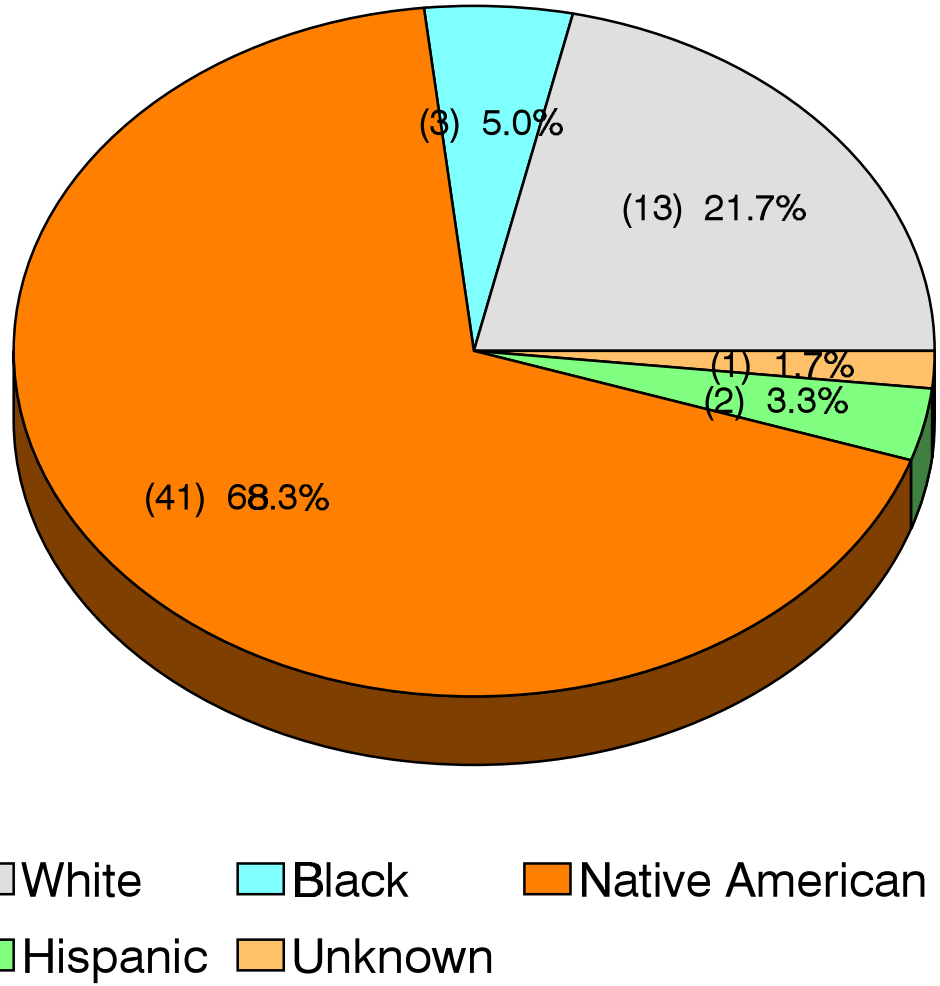
SOURCE: U.S. Sentencing Commission, Guidelines Manual, (Nov. 1997.)

Table 3. Comparison of Penalties for Alcohol-Related Vehicular Homicides

Statutory Max. (Years)	Median Sentence (Months)	Median Time Served (Months)
3 (NM)	→ 15 (Fed.)	→ 13 (Fed.)
5 (NC)	16 (NC)	15 (NC)
→ 6 (Fed.)	20 (VA)	17 (VA)
10 (PA)	36 (PA)	24 (WA)
10 (MN)	36 (WA)	24 (NM)
10 (OR)	36 (NM)	32 (MN)
10 (VA)	41 (KS)	35 (KS)
14 (KS)	42 (MN)	36 (PA)
15 (SD)	70 (OR)	36 (SD)
Life (WA)	90 (SD)	70 (OR)

Fig. 1. Ethnicity Distribution, 1994-1996

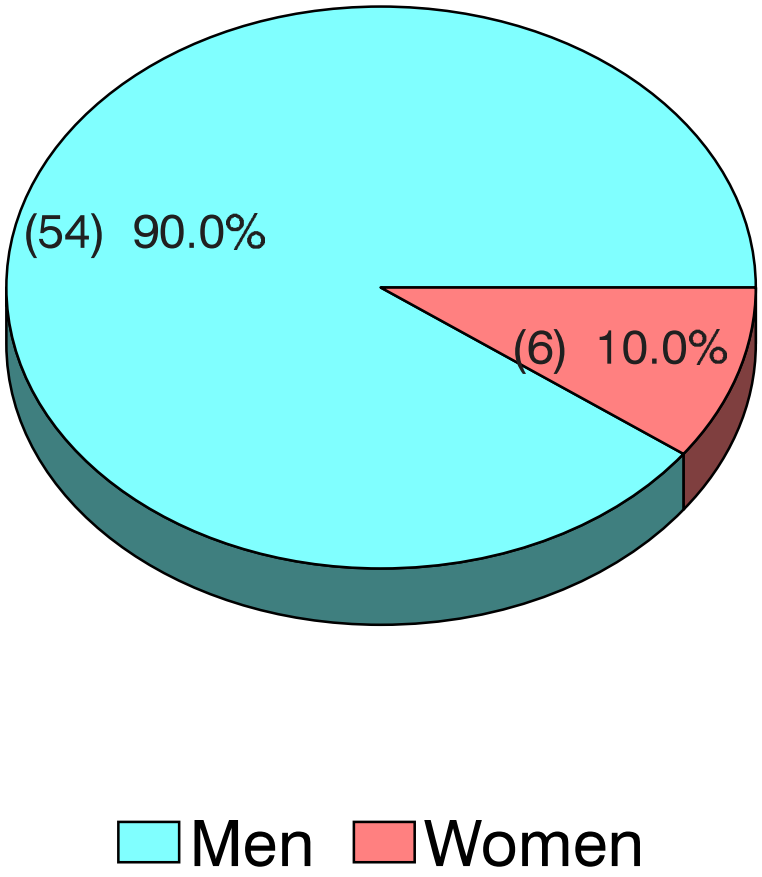
Voluntary Manslaughter (§2A1.3)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96

Fig. 2. Distribution by Gender

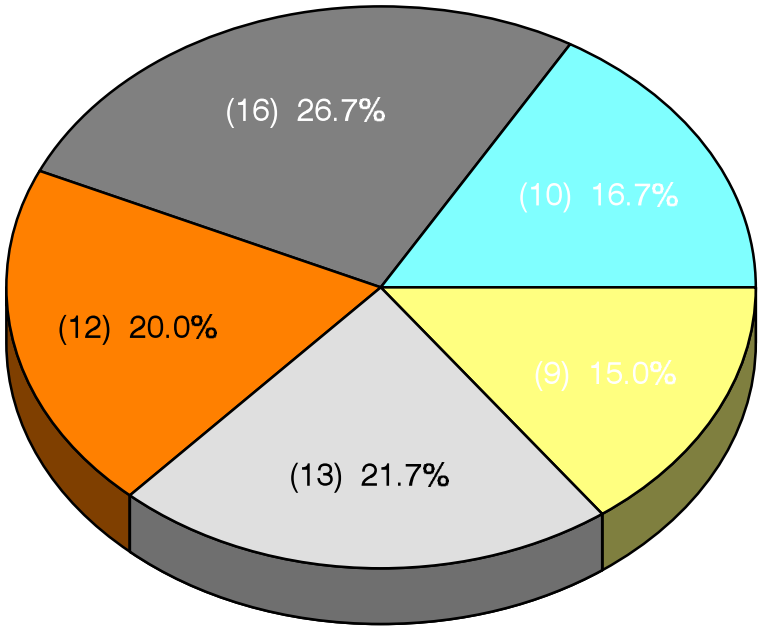
Voluntary Manslaughter (§2A1.3)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96.

Fig. 3. Age Distribution (1994-1996)

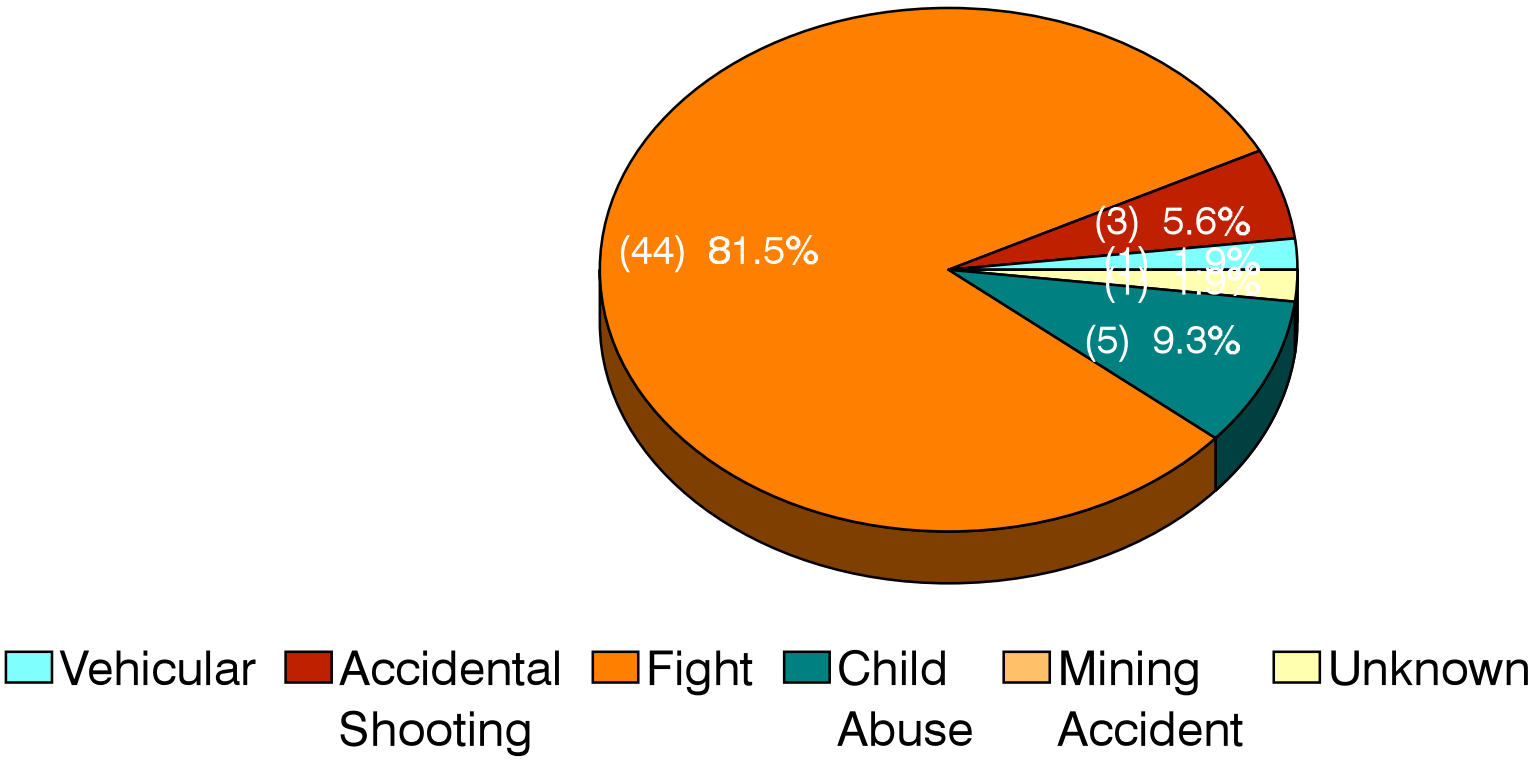
Voluntary Manslaughter (§2A1.3)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96.

Fig. 4. Offense Conduct

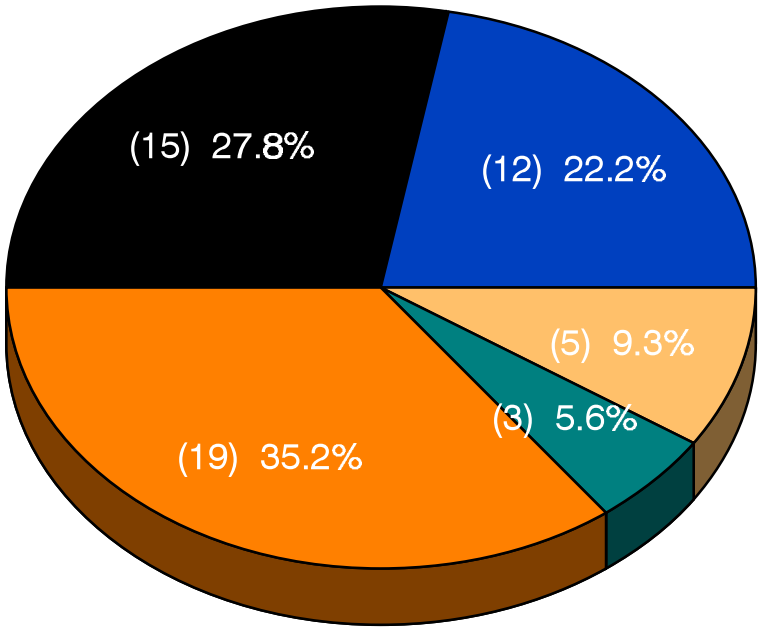
Voluntary Manslaughter (§2A1.3)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96.

Fig. 5. Relationship Between Defendant & Victim

Voluntary Manslaughter (§2A1.3)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96.

Fig. 6. Distribution of Cases Sentenced Within the Guideline Range

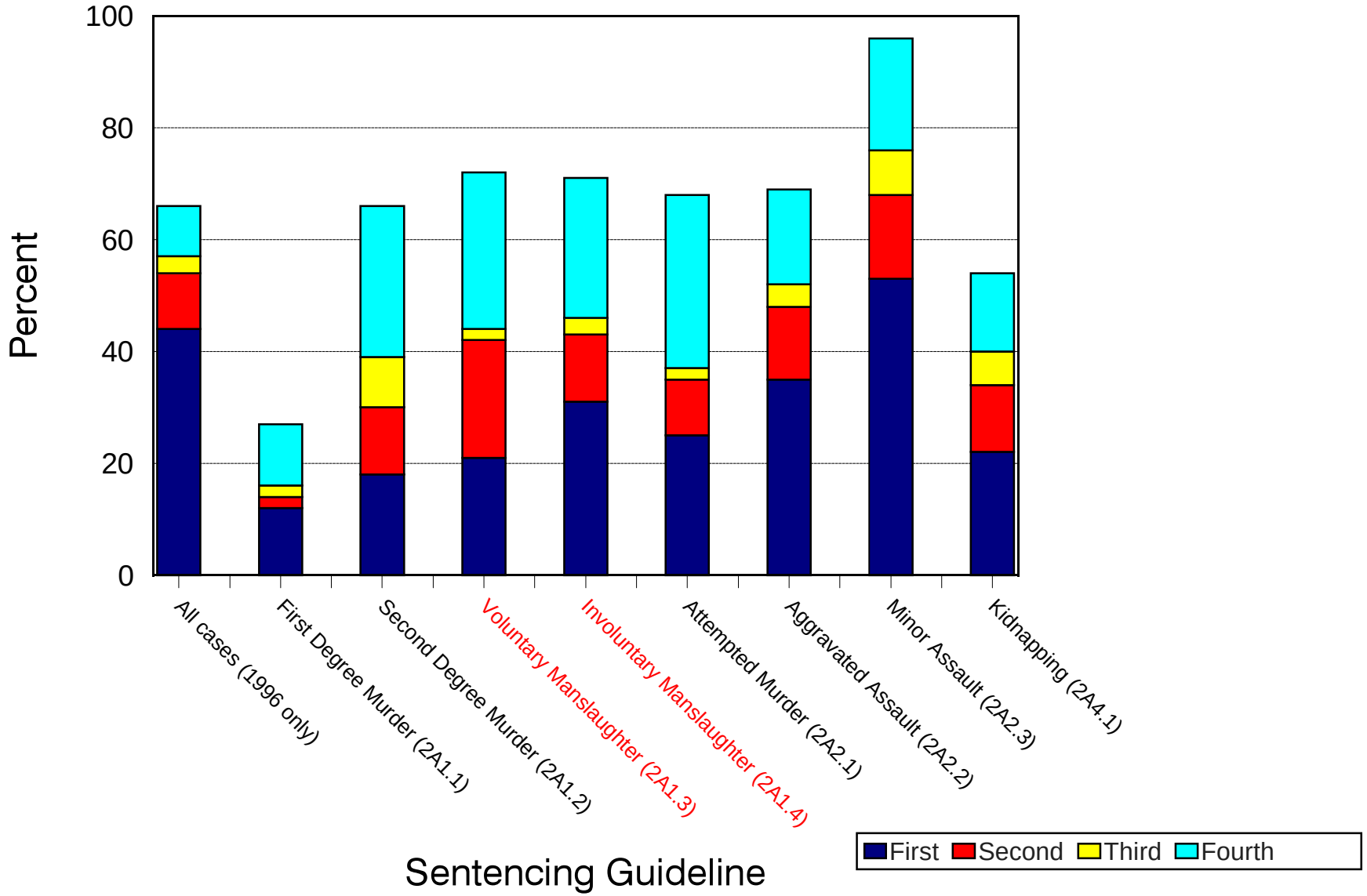
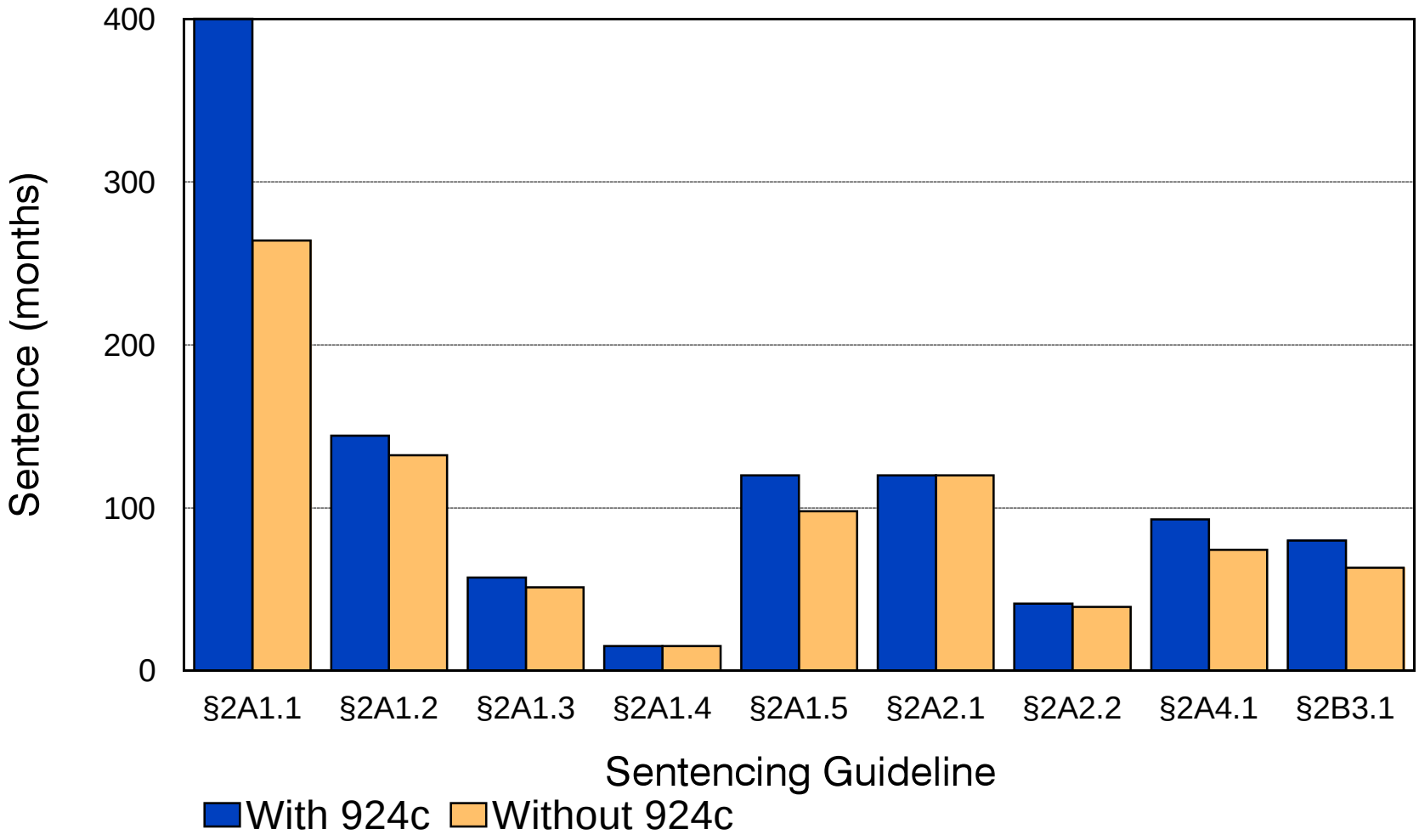


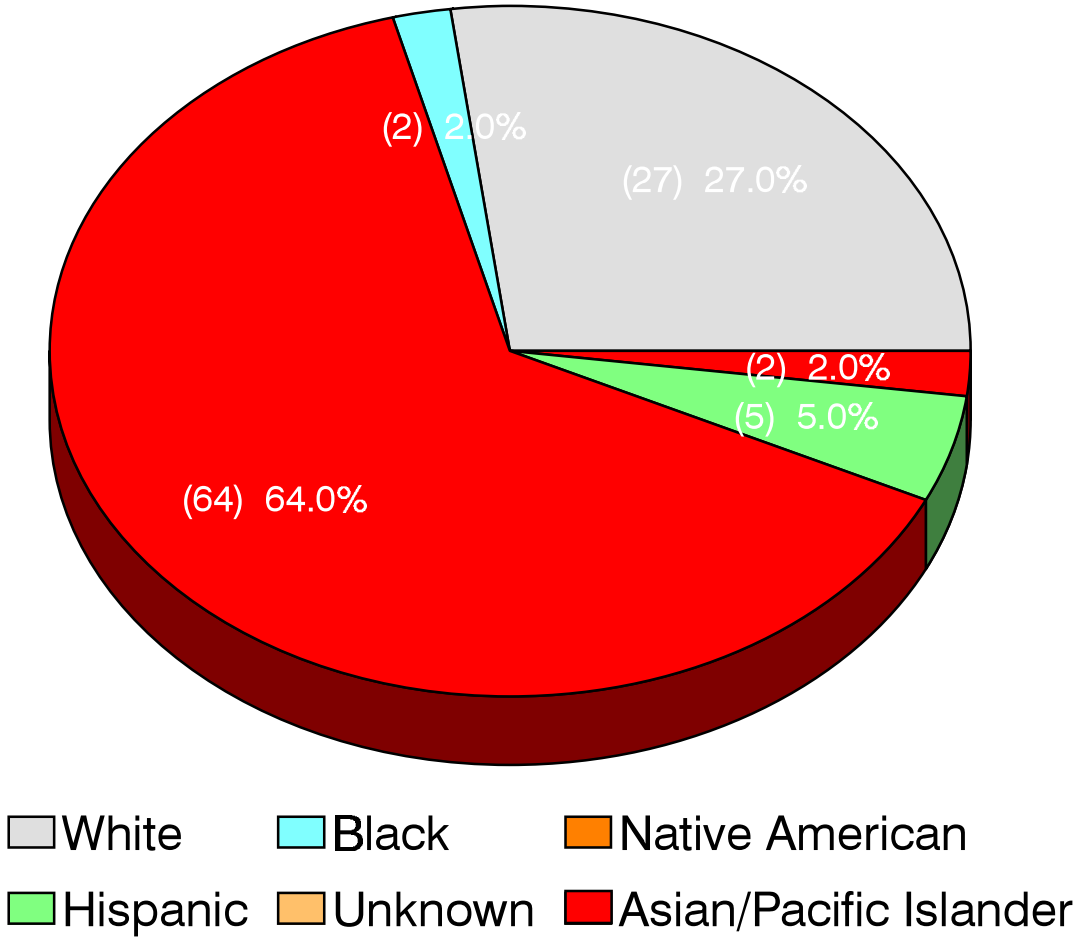
Fig. 9. Median Sentence for Various Violent Offenses (1994-1996)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96.

Fig. 10. Ethnicity Distribution, 1994-1996

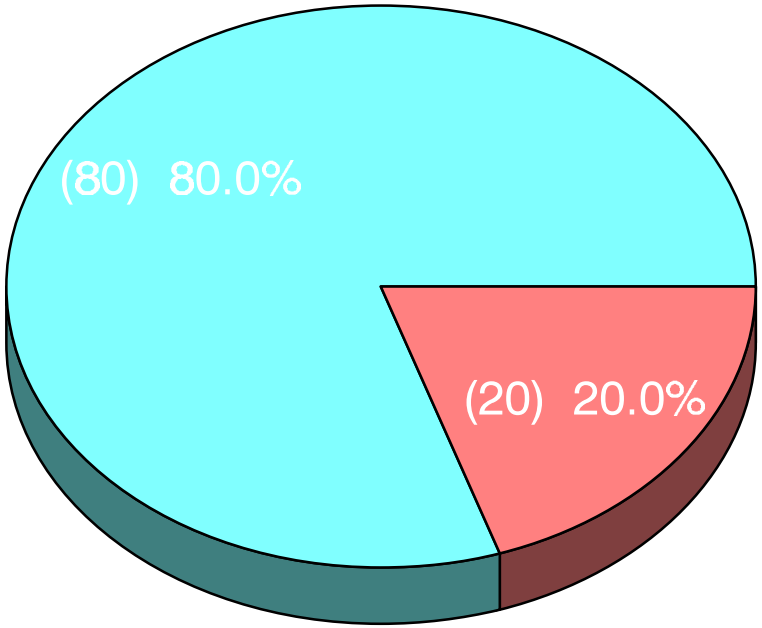
Involuntary Manslaughter (§2A1.4)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96.

Fig. 11. Distribution by Gender

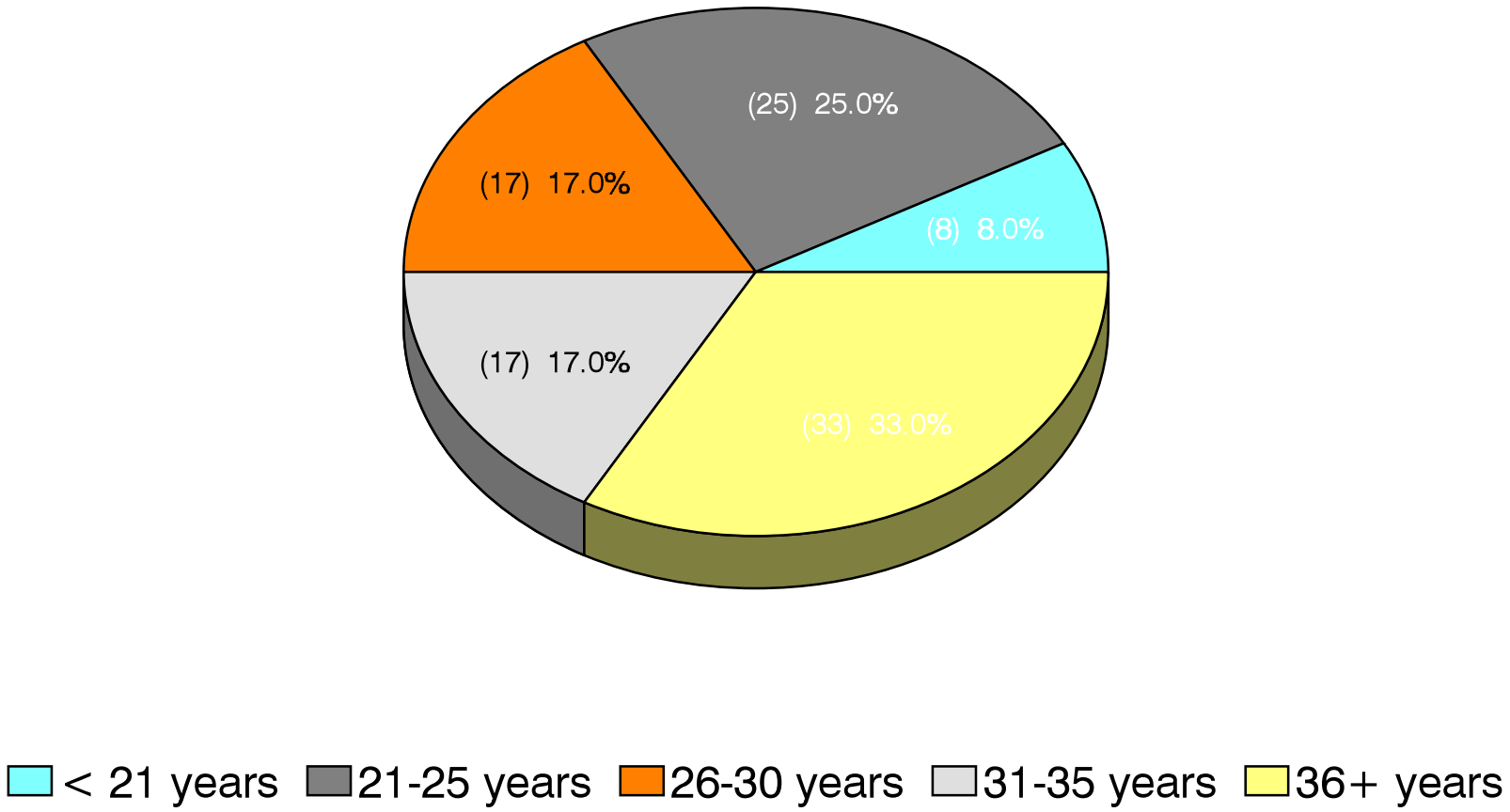
Involuntary Manslaughter (§2A1.4)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96.

Fig. 12. Age Distribution (1994-1996)

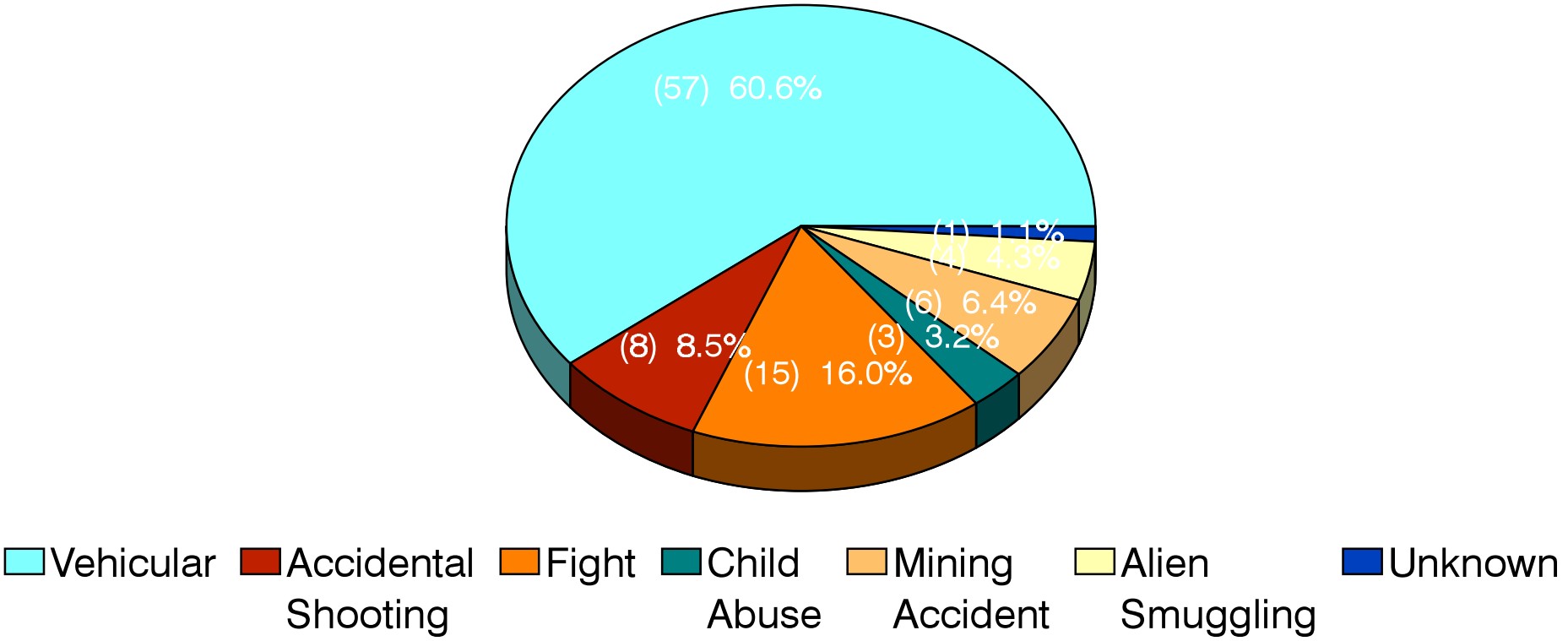
Involuntary Manslaughter (§2A1.4)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96.

Fig. 13. Offense Conduct

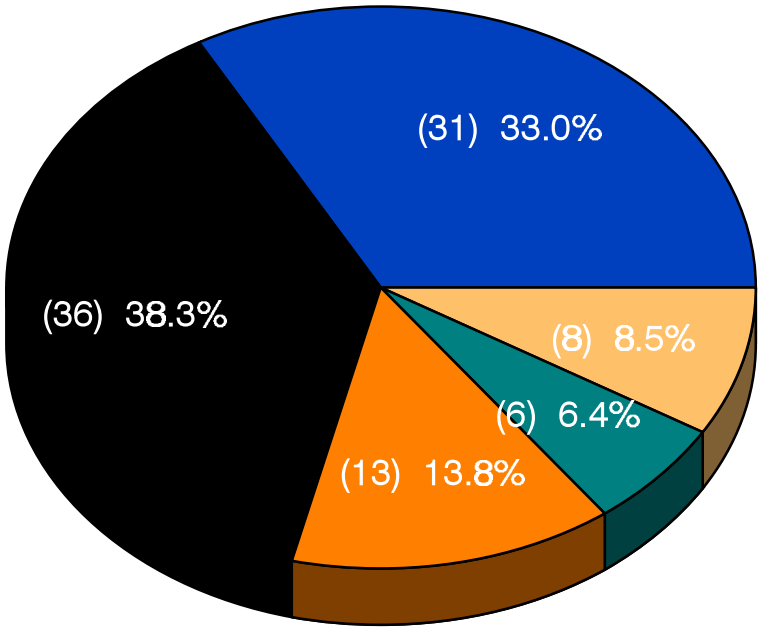
Involuntary Manslaughter (§2A1.4)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96.

Fig. 14. Relationship Between Defendant & Victim

Involuntary Manslaughter (§2A1.4)



SOURCE: U.S. Sentencing Commission, 1994-1996 Datafiles, MONFY94-MONFY96.

Fig. 15. Prior Similar Conduct

Among Persons Sentenced for Vehicular Manslaughter under (§2A1.4)

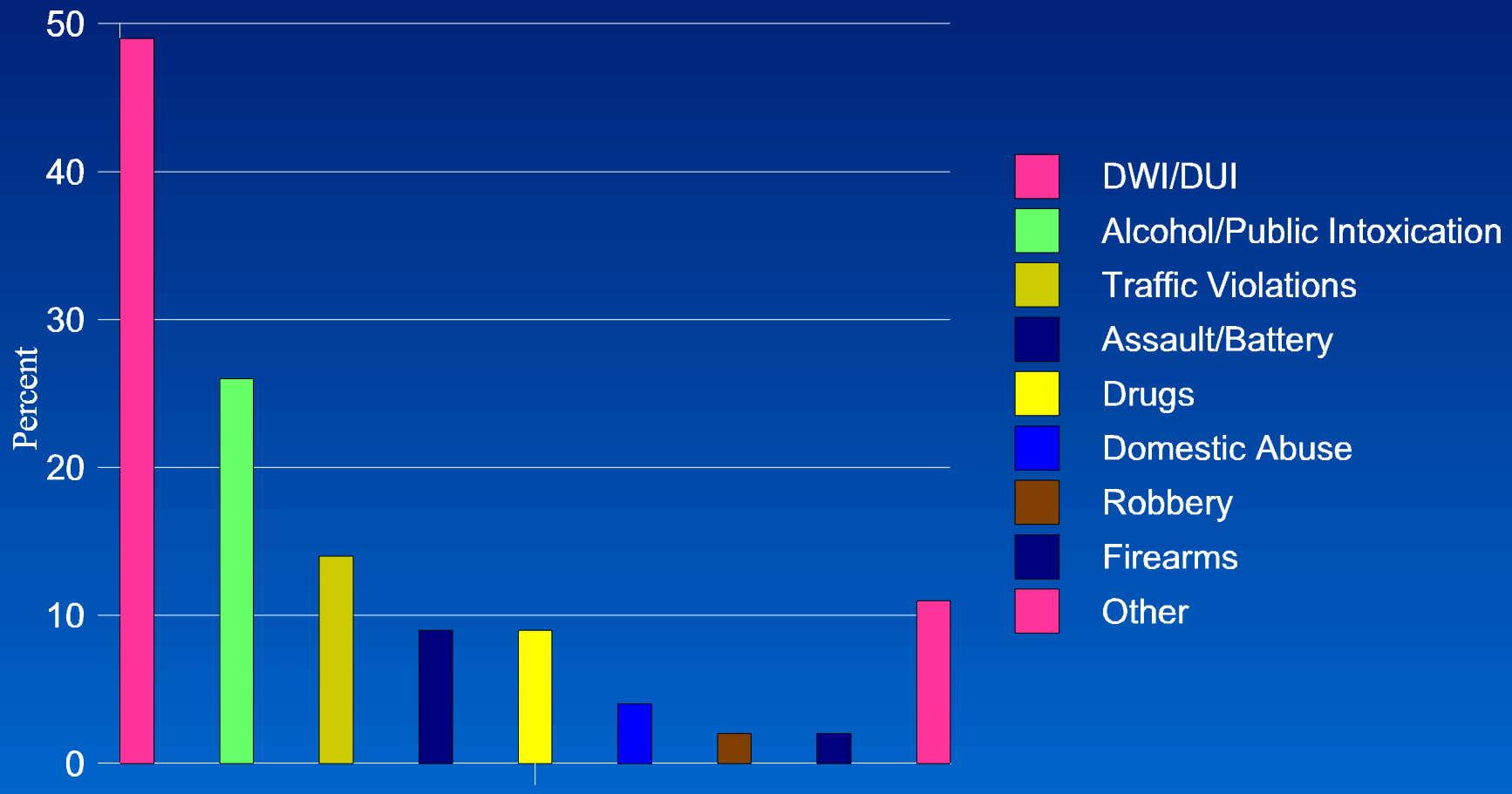
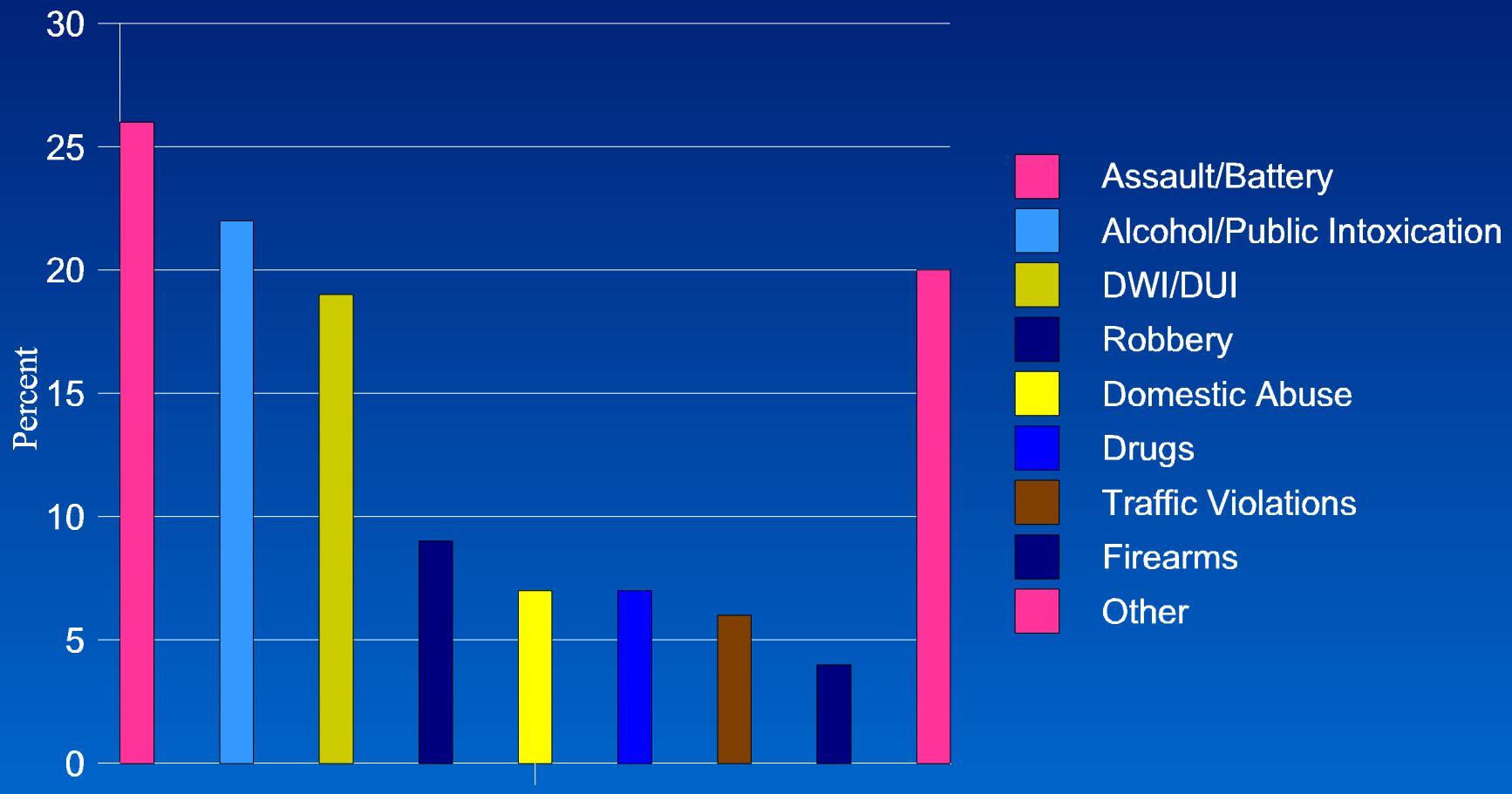


Fig. 7. Prior Similar Conduct

Among Persons Sentenced for Voluntary Manslaughter (§2A1.3)



Appendix 4:

Additional Factors Relevant to the Consideration of Vehicular Manslaughter: the role of DWI/DUI

EXECUTIVE SUMMARY

Increased penalties for vehicular manslaughter, in the absence of policies to prevent such offenses at an earlier stage in the process, may do little to further two goals of criminal punishment - deterrence and rehabilitation. It may be argued that a more complete effort at preventing future vehicular manslaughter cases would involve intervention prior to the manslaughter: i.e., at the DWI/DUI stage. The bulk of federal vehicular manslaughter cases occur among Native Americans. But Native American DWI/DUI cases are not handled under current federal sentencing rules because of the absence of federal statute as well as certain unique jurisdictional considerations. The effectiveness of tribal court penalties for DWI/DUI as well as broader public programs to combat drunk driving among Native Americans are unknown. Policies focused on decreasing the prevalence of drunk driving may achieve a greater benefit - a decrease in the number of vehicular manslaughter cases - than efforts that concentrate solely on increased *ex post facto* penalties for the taking of a life. The Commission may wish to consider a role in the recommendation of federal involvement in DWI/DUI cases with particular attention paid to its occurrence among Native Americans.

INTRODUCTION

> *Criminal events are outgrowths of complex social institutions. Such a view is less reassuring than the belief that these events are the outcomes of the actions of immoral people. A broad approach to their understanding is therefore critical. However, the psychological assumptions and the punishment and deterrence doctrines are intuitive in American culture. They are also less costly. By placing all responsibility on individuals we avoid the political and economic conflicts attendant on examining our institutions, our culture, and our technological assumptions. While punishment and law enforcement are expensive, they avoid the trauma of changing our social system (adapted from Gusfield, 1992).*

Deterrence and rehabilitation are two of the key purposes of criminal punishment (United States Sentencing Commission, 1995). Vehicular manslaughter presents a unique opportunity for the Commission to examine issues related to the furtherance of deterrence and rehabilitation through the investigation of issues that are not part of the crime of vehicular manslaughter *per se* but that, nevertheless, are of great relevance to its occurrence and prevention.

Drunk driving is the strongest antecedent factor associated with vehicular manslaughter. The argument can be made that the deterrence of DWI/DUI may result in a greater social good (i.e., a decrease in the number of persons killed through alcohol-related vehicular homicide) than an approach that focuses solely on after-the-fact punishment for the resulting death.

DETERRENCE AND PREVENTION

Deterrence, in the criminal justice world, relies on punishment to sensitize the offender, or potential offender, to the threat of punishment for committing a particular offense. However, there is little evidence that criminal punishment, *per se*, results in the deterrence of future drunk driving events (Ross, 1992).

Virtually synonymous with deterrence is a term used in the field of public health - prevention. Injury prevention represents an increasing area of study and public interest. Its focus is on saving lives and reducing injuries from any cause, including impaired driving. Preventive efforts attempt to achieve this goal with the recognition that, for complex social reasons, it may be difficult to significantly reduce the act of drunk driving itself. One of the leading figures in the field of injury prevention, Leon Robertson, summarizes the philosophy of the preventive approach by stating:

> *Engineering for people rather than trying to engineer people by changing their behaviors has the better record of success. Injury control programs that automatically protect people without their having to take any action are the most successful(Ross, 1992).*

A preventive approach to reducing the prevalence of drunk driving, with the obvious benefit

of decreasing the number of vehicular manslaughters, could incorporate elements from both the public health and criminal justice worlds. Importantly, such an approach would place an increased priority on the prevention of future deaths as opposed to the punishment for a life already taken.

THE NATURE OF THE PROBLEM

- Motor vehicle crashes remain the number one killer of individuals from ages 1-34. About half of all traffic fatalities (45% in 1992) were related to alcohol use (Isaac, et al., 1995).

- Alcohol-related traffic crashes cost society $45 billion annually in hospital costs, rehabilitation expenses, and lost productivity.

- In 1995, more than 1.4 million people were arrested for DWI, nearly 10% of all arrests that year (Hingson, 1996), making drunk driving the most commonly prosecuted offense in our lower criminal courts (Jacobs, 1989).

- Presence of measurable alcohol in drivers is statistically and causally associated with increased probabilities of highway crashes, especially of the more serious ones involving injuries and fatalities. This is due to alcohol's impairment of perception skills, its dulling of reaction time, degrading of judgment, and other characteristics (Ross, 1992; Jacobs, 1989).

- Deaths associated with highway crashes result in extraordinary number of years-of-potential-life-lost, owing to the relatively young age of those killed in crashes compared with those affected by other common causes of death (Ross, 1992).

- Two out of five people in the US will be involved in an alcohol-related motor vehicle crash at some time during their lives (Brewer, et al., 1994).

- Most drivers (up to 95%) in fatal crashes involving alcohol have never been previously convicted of drunk driving. And two-thirds of persons arrested for DUI have never been previously arrested for that offense (Hingson, 1996; Buntain-Ricklefs, et al., 1995).

- In 1995, approximately 17,000 people were killed due to alcohol-related driving fatalities. The federal goal is to reduce that number to 11,000 per year by 2005 (Cole, et al., 1995).

THE ROLE OF ALCOHOL IN MOTOR VEHICLE INJURIES AND FATALITIES

- Numerous studies have cited alcohol consumption as the primary factor that increases the risk of motor vehicle accidents (Steensberg, 1994). Other factors included high speed, inadequate use of seat belts and helmets, and technical defects (Mann, et al., 1996; Isaac, et al., 1995; Steensberg, 1994;

Ross, 1992; Mann, et al., 1988).

- People who drive after drinking are also more likely than other drivers to speed, run red lights, fail to yield to pedestrians, and fail to wear seatbelts. All of these behaviors increase the risk of crashing and/or being injured in a crash (Hingson, 1996).

- Arrests for DWI substantially increase the risk of eventual death in an alcohol-related crash. Aggressive intervention in the cases of people arrested for DWI may decrease the likelihood of a future alcohol-related crash (Brewer, et al., 1994).

- About ½ of all alcohol-related fatal crashes and 1/4 of all fatal crashes would have been avoided if all drivers had blood alcohol content (BACs) of zero (Ross, 1992).

- There is no lower threshold for alcohol effects: some performance degradation is observed at any measurable alcohol level and that degradation increases with increasing amount of alcohol; each .02% increase in BAC results in a doubling of the risk of being in a fatal crash (Hedlund, 1994); Karlson, 1992; Zador, 1991).

TWO CONTRASTING VIEWS OF THE DRUNK DRIVING PROBLEM

Ross (1992) has described two interpretations of the drunk driving problem - the Dominant and Challenging Paradigms.

Dominant Paradigm	Challenging Paradigm
Drunk driving seen as a criminal behavior controllable by the criminal justice system through a penalty-based approach.	Goal of policy should be reduction in deaths and injuries - righting the moral balance (i.e., punishment) is not the central concern of this paradigm. Policies based on increasing the severity of punishment for drunk driving have seldom been found effective. Rather, the emphasis is on deterrence in combination with swift and certain punishment. Drunk driving is a predictable byproduct of our social institutions, especially transportation and recreation. Drinking and driving represents a natural conjunction of two common behaviors.
Focus is on a blameworthy driver (the "killer drunk"). This stereotypical individual has a high BAC and has had prior criminal events involving vehicle and/or alcohol violations.	Although bulk of serious alcohol-related crashed involve drivers with high BACs, these drivers seldom fit the image of the "killer drunk." Their impairment is difficult to detect and most of them lack prior convictions for drunk driving.
A safe drinking level exists for driving and this level can be differentiated from "drunk driving." "Social drinking" is safe and responsible.	An increase in crash risk appears to begin with the lowest detectable BACs and the risk rises progressively with increasing BAC. At BACs produced by normative or "social" drinking, the risk of fatal crashes doubles, resulting in large numbers of fatal crashes in which alcohol impairment is involved and even causal, though not illegal (i.e., the *majority* of alcohol-related crashes involve drivers with relatively low BACs who do not fit the "killer drunk" profile).

Dominant Paradigm	Challenging Paradigm
Presumes presence of the "innocent victim" in alcohol-related crashes. The victim is viewed as a nondrinker. Belief that this describes the behavior of about ½ of the 40,000 annual crash-related fatalities in the U.S.	Most of the drunk drivers' victims are the drivers themselves, their often drunken passengers, and drunken pedestrians and cyclists.
Drunk drivers have long histories of prior arrests for similar behavior.	A recent study by the National Highway Traffic Safety Administration found only one out of six highly intoxicated drivers involved in a fatal crash had a prior drunk driving conviction. In other words, five out-of-six of those destined to kill in alcohol-related crashes, are not known to the authorities, and their behavior cannot be affected by techniques limited to convicted offenders. Thus the typical drunk driver involved in a fatal accident has not previously been caught and therefore could not have experienced criminal sanctions. Other methods must address the majority of individuals who commit vehicular manslaughter.
	Accumulated research fails to show support for claims of general deterrence as a consequence of jailing routine Drunk driving violators. For example, in July of 1982, the state of TN required mandatory 48 hour jail sentence for 1st time Drunk driving offenders, 45 days for 2nd offenders, and 120 days for 3rd time offenders. Although these sentences were fairly well known to public, they had negligible effect on fatal crash incidents involving alcohol. Similar results from AZ and OH. Considerable evidence that increasing the objective severity of the threat given a low likelihood of apprehension is often ineffective. Moreover, if the punishment is evaluated by those charged with its application as disproportionate in severity to the harm involved, (i.e., if it is unfair), the officials may refrain from applying it. Thus a severe threat (punishment) may have the unintended and unanticipated consequence of reducing the likelihood of any punishment at all for the behavior in question.
	Laws against drunk driving do not deal with the fundamental causes of the problem, merely with their result.

A VULNERABLE POPULATION

In Sentencing Commission data for the years 1994-1996, American Indians comprised 72% of all persons sentenced for vehicular manslaughter. Alcohol was present at the time of the instant offense in 93% of these cases. Moreover, of the 41 American Indians committing a vehicular manslaughter during the years in question, 71% had a history of alcohol offenses.

An American Indian is more likely to be involved, either as assailant or victim, in a fatal motor vehicle accident than a non-Indian. Alcohol intake has been proposed as a partial explanation. Other proposed explanatory factors include geographic factors related to the rural locale (e.g., road characteristics), speed, patterns of seat belt use, types of vehicles, availability and quality of emergency services, lax law enforcement, and the presence of unlicensed drivers (Campos-Outcalt, et al., 1997; Indian Health Service, 1997).

Concerns Unique to American Indians

- At any age, American Indians are at greater risk of dying in a motor vehicle accident, the majority of which are alcohol-related (Mahoney, 1991) or from alcohol-related causes, than persons of any other race (Indian Health Service, 1997)

- Public transportation on reservations is practically nonexistent and areas are generally too vast to cover by foot. It is therefore not surprising that many Indians regularly accept rides with drunk drivers (Oken, et al., 1995).

- As of 1995, the Northern Plains Reservation had no seatbelt law. The presence (and degree of enforcement) of seatbelt laws on other reservations is unknown. The benefits of tribally enforced seatbelt laws toward reducing motor-vehicle morbidity and mortality in American Indian populations has been dramatically demonstrated on the Navajo reservation. Unpublished data from New Mexico surveys show a lower use of seatbelts among the youth of some tribes as compared with non-Indian youth in the same schools (May, 1994). It could be expected that motor vehicle injury rates on other reservations would decline following enactment of a similar law (Oken, et al., 1995).

- Tribal Court penalties for drunk driving are unknown. It is therefore difficult to ascertain the degree to which such penalties might deter alcohol-related vehicular manslaughter

- The Navajo Reservation has no driver's license requirement. The extent to which other reservations lack this basic certification of competency is unknown. The absence of such a requirement makes moot license revocation/suspension - a common and effective penalty for drunk driving

- Alcohol involvement in motor-vehicle fatalities has been decreasing nationwide but it is unknown whether this overall decline is similarly affecting American Indians (Campos-Outcalt, et al., 1997). Like the general population, these fatal accidents have a dramatic impact on the family, as the deceased tend to be of younger age (15-45 years) and oftentimes the "breadwinner" of the family

(Porvaznik, et al., 1988)

WHY LEGAL SANCTIONS ALONE ARE NOT AN EFFECTIVE DETERRENT TO DRUNK DRIVING

Despite legislative mandates involving mandatory jail sentences for drunk driving, there is little reason for a driver to think that a given trip taken while illegally impaired by alcohol is likely to result in apprehension, much less prosecution and conviction, for drunk driving. In fact, it is estimated that the risk of apprehension for a driver with a BAC > 0.10% is about 1/1000 (Ross, 1992). The usual explanation - those inclined to drive drunk realize that the probability of being caught is about zero, even if the severity of the penalty has increased. Hence, drivers perceive a severe punishment *if* caught but a near-zero chance of *being* caught and choose to ignore the threat.

The low probability of apprehension (and thus punishment) is the Achilles' heel of deterrent policies aimed at drunk driving. Certainty of punishment must reach a critical threshold before a deterrent threat can be effective in reducing the crime rate. One may assume that thresholds for severity and swiftness of punishment are safely exceeded in the typical American jurisdiction, leaving certainty alone at issue (Ross, et al., 1992).

Therefore, strategies to combat drunk driving must reach beyond the drivers who have been arrested. Policies that are considered effective in reducing drinking and driving include laws that deal with the availability of alcohol in general and with drinking and driving in particular (Brewer, et al., 1994).

In a 1990 study, Americans exhibited less evidence of general deterrence from drunk driving laws than their Australian or Norwegian counterparts (e.g., 29% of Americans knew legal BAC limit for driving in their state, while 83% of Australians and 85% of Norwegians had this knowledge). Americans were much less likely than Australians to mention fear of arrests as a primary reason for decreasing drinking before driving, despite the fact that potential penalties for convicted drivers were generally more severe for Americans (Berger, et al., 1997).

Most legislation during the 1980s aimed at decreasing drunk driving increased the severity of penalties without allocating resources to increase the certainty of apprehension (Ross, et al., 1987). Consequently, there's no guarantee that the more severe penalties will be imposed.

- Public knowledge of drinking-driving legislation has tended to be low. Early studies suggested that only a minority of drivers knew the amount of alcohol necessary to reach the prescribed limit (Clayton, et al., 1986)

- Many motorists do not regard driving with a BAC above the prescribed limit as a serious offense, providing that no accident is involved (i.e., it appears that it is the consequences of the act, rather than the act itself, that result in social disapproval) (Clayton, et al., 1986). Thus the teaching of the moral

consequences of one's actions may act as a more effective deterrent.

- If deterrence is to be effective then both the risk of apprehension and the knowledge of the penalties on conviction must be high.

CULPABILITY IN VEHICULAR MANSLAUGHTER

Death associated with drunk driving is virtually never intended (Ross, 1992). Appropriate punishment for this offense is based on an evaluation of both culpability and harm. The degree of culpability for vehicular manslaughter, it may be argued, is quite similar to that of drunk driving; the increased punishment for the death coming primarily from the evaluation of the harm.

Some believe it necessary to establish degrees of culpability based upon the individual circumstances of the case (e.g., degree of intoxication, presence of traffic including pedestrians, extremely reckless actions, evidence of recidivism or prior similar conduct, deliberate effort to become intoxicated, or actually drinking while driving (Ross, 1992; Jacobs, 1989). A contrary view would hold that persons with the most serious history of alcohol abuse may be *least* able to control their drinking and, arguably, be less culpable than the average first-time offender (Jacobs, 1989).

Proportionality is an important component of sentencing practice. As the primary antecedent event to vehicular manslaughter, the punishment for drunk driving should bear some proportional relationship to the penalty for vehicular manslaughter. While in recent years the Federal government has stipulated that states enact relatively strict drunk driving laws, there is currently no *Federal* statute dealing with drunk driving (Table 1). Hence, there is no direct Federal ability to gauge the appropriateness of vehicular manslaughter relative to drunk driving nor is there an ability to deter drunk driving - and the resulting manslaughter.

PREVENTIVE MEASURES TO ADDRESS THE PROBLEM

International Efforts

- From 1970 onward, public awareness of and tolerance for the problem of alcohol-impaired driving in Japan changed dramatically. A national effort involved legislation of lower legal alcohol limits, progressive penalties for those above the limit, and a strong public education program. Much of the current reduction in alcohol-related fatalities and morbidity reflects that Japanese society has largely endorsed alcohol-impaired driving as a socially undesirable behavior (Deshapriya, et al., 1996).

- The British Road Safety Act of 1967 set a 0.08% BAC limit in England and Wales. The law was heavily publicized and enforced. Following the law's implementation, serious injury and fatal crashes dropped 66% on weekend nights, the times associated with substantial drinking and driving (Hedlund,

1994).

● In 1982, the Australian state of New South Wales began an extensive random breath testing program. Police stopped drivers at random and required a breath test; the driver was subject to arrest if his/her BAC was > 0.05%. The program was heavily publicized. In the first year, about 1/3 of all New South Wales drivers were tested. The program reduced total traffic fatalities by about 19% and reduced the proportion of fatal crashes involving alcohol from 28% to 22% (Hedlund, 1994).

Domestic Efforts

Progress has been made in the last 16 years to reduce the proportion of fatally injured drivers with high blood alcohol concentrations (BACs at or above 0.10%) (Insurance Institute for Highway Safety, 1997). This change coincides with the imposition of more severe DWI/DUI laws in most states.

● License suspension has led to a general reduction in fatal crashes in states where the threat of this sanction has been made (Insurance Institute for Highway Safety, 1997).

● Research has shown the number of fatal crashes has decreased as a result of three types of drunk driving laws (Zador, et al., 1989):

1) *per se* laws that define driving under the influence using BAC thresholds

2) laws that provide for administrative license suspensions or revocation prior to conviction for DWI/DUI

3) laws that mandate jail or community service for first convictions of DWI/DUI

● Over a 10-year period, California made substantial progress in efforts to control alcohol-impaired driving through increases in both general deterrence (fear of punishment) and general prevention (moral inhibitions and socialization of preventive habits), especially the latter (Berger, et al., 1997)

GENERAL APPROACHES TO DECREASING THE PREVALENCE OF DRUNK DRIVING

● Place greater emphasis on the swiftness and certainty of punishment (e.g., mandatory license suspension or revocation). The National Highway Traffic Safety Administration estimated that 364 additional lives would have been saved in 1989 in the 21 states lacking administrative license revocation laws had such laws been adopted in the prior year. NHTSA recommends that administrative license suspension (ALS) laws impose at least a 90-day suspension or a 30-day suspension followed by 60 days of restricted driving (Insurance Institute for Highway Safety, 1997)

● Paradoxically, it may be advisable to *reduce* the severity of punishment for at least some drunk

drivers by eschewing jail sentences, so their punishment can be handled administratively. This would maximize the swiftness and certainty of penalties in routine cases and free the criminal justice system from the burden of routine so it can concentrate resources on more extreme and problematic cases.

- Increased probability of arrest should have a deterrent effect. Increase jail time, fines, mandatory license suspensions and revocations, community service, public condemnation, vehicle impoundment, forfeiture, house arrest, and electronic surveillance are other options (Jacobs, 1989).

- It is reasonable to expect some lag-time before any significant preventive effects are manifested. This is due to the time required for people to perceive that the costs of a particular behavior have risen. Hard-core offenders may be particularly inattentive and unresponsive to changing legal threats. Such a long-term approach would be expressed in support for strong public policy and, more importantly, in internal inhibitions against drunk driving and in the propensity of individuals to stop their friends and acquaintances from driving while drunk (Jacobs, 1989).

- The use or nonuse of seat belts is generally a simple matter for police to observe and therefore relatively easy to enforce. The high likelihood of apprehension for violators would, in theory, result in high levels of compliance. Mandatory seatbelt use laws have been shown to save lives. However, there remains a segment of the population that is less likely to observe such mandatory laws. It includes teenagers, speeders, and drunk drivers. Targeting of noncompliers to a seatbelt law would have the additional benefit of placing drunk drivers under increased scrutiny.

Additional social strategies to reduce traffic fatalities associated with drunk driving include (Gruenewald, et al., 1996; Brewer, et al., 1994; Karlson, 1992; Hingson, 1988): reducing the availability of alcohol, making vehicles less accessible or necessary, increase the safety of vehicles and roads, and increase public's awareness of the hazards of drunk driving.

CONCLUSIONS

The success of laws against alcohol-impaired driving depends largely on deterrence, or keeping potential offenders off the roads in the first place. A 1996 study showed that about 3 out of every 100 drivers on US roads on weekend nights had a BAC of 0.10% or greater. With so many offenders, it is not possible to apprehend more than a relatively small proportion. (Increased) public perception that punishment for alcohol-impaired driving is likely to occur and will be swiftly applied and appropriately severe is necessary to deter potential offenders (Insurance Institute for Highway Safety, 1997).

As the bulk of Federal vehicular manslaughter cases occur on Indian Territory among Indians, the inability of the Federal government to deal with drunk driving on these lands and the lack of information on how drunk driving is currently dealt with impede the effort to prevent such behavior - behavior that is so critical to the prevention of vehicular manslaughter.

Vehicular homicide in the presence of alcohol is the regrettable endpoint of drunk driving behavior. A complete examination of vehicular homicide penalties must consider the manner in which drunk driving in the absence of death is dealt with in the Federal system and whether appropriate efforts are being made to decrease the prevalence of this behavior.

To accomplish this task, certain areas must be addressed:

- Examination of the laws of jurisdiction that preclude Federal intervention with respect to DWI/DUI on Indian Territory

- Knowledge of the

  extent of, and punishment for, DWI/DUI on Indian Territory and
  current programs and policies seeking to combat drunken driving on Indian Territory

Following study of these materials, the Commission may wish to consider recommending

- establishment of a Federal DWI/DUI statute

- extension of such a statute to cover DWI/DUI events occurring on Indian Territory

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Table 1. Penalties for DUI/DWI as of July 1997 (Insurance Institute for Highway Safety, 1997)

Jurisdiction	BAC Defined as Illegal per se*. All drivers[1]/Special Provisions for Young Drivers[2]	Administrative License Suspension** (1st Offense[3])	Restore Driving Privileges During Suspension?[3,4]	Do Penalties Include Interlock†/ Forfeiture?[5]
Federal	-	-	-	-
Alabama	0.08/0.02	90 Days	No	No/No
Alaska	0.10/0.00	90 Days	After 30 Days	Yes/Yes
Arizona	0.10/0.00	90 Days	After 30 Days	No/Yes
Arkansas	0.10/0.02	120 Days	Yes	Yes/Yes[6]
California	0.08/0.01	4 Months	After 30 Days	Yes/Yes[6]
Colorado	0.10/0.02	3 Months	No	Yes/No
Connecticut	0.10/0.02	90 Days	Yes	No/No
Delaware	0.10/0.02[1]	3 Months	No	Yes/No[6]
D.C.	0.10/0.02	2-90 Days	Yes	No/No
Florida	0.08/0.02	6 Months	Yes	Yes/No[6]
Georgia	0.10/0.02	1 Year	Yes	Yes/Yes
Hawaii	0.08/0.02 (as of 12/1/97)	3 Months	After 30 Days	Yes/No
Idaho	0.08/0.02	90 Days	After 30 Days	Yes/No
Illinois	0.08/0.00	3 Months	After 30 Days	Yes/No
Indiana	0.10/0.02	180 Days	After 30 Days	Yes/No[6]
Iowa	0.10/0.02	180 Days	Yes	Yes/No[6]
Kansas	0.08/0.02	30 Days	No	Yes/No[6]
Kentucky	0.10/0.02	-	-	No/No
Louisiana	0.10/0.02	90 Days	After 30 Days	Yes/No
Maine	0.08/0.00	90 Days	Yes	Yes/No[6]
Maryland	0.10/0.02	45 Days	Yes	Yes/No[6]

Table 1(cont.). Penalties for DUI/DWI as of July 1997 (Insurance Institute for Highway Safety, 1997)

Massachusetts	none[1]/0.02	90 Days	No	No/No
Michigan	0.10/0.02	-	-	Yes/No
Minnesota	0.10/0.00	90 Days	After 15 Days	No/Yes[6]
Mississippi	0.10/0.08	90 Days	No	No/Yes
Missouri	0.10/0.02	30 Days	No	Yes/Yes
Montana	0.10/0.02	-	-	Yes/Yes[6]
Nebraska	0.10/0.02	90 Days	After 30 Days	Yes/No
Nevada	0.10/0.02	90 Days	After 45 Days	Yes/No
New Hampshire	0.08/0.02	6 Months	No	No/No[6]
New Jersey	0.10/0.01	-	-	No/No
New Mexico	0.08/0.02	90 Days	After 30 Days	No/No
New York	0.10/0.02	variable[7]	yes	Yes/Yes[6]
N. Carolina	0.08/0.00	10 days	No	Yes/Yes
N. Dakota	0.10/0.02	91 Days	After 30 Days	Yes/Yes[6]
Ohio	0.10/0.02	90 Days	After 15 Days	Yes/Yes[6]
Oklahoma	0.10/0.00	180 Days	Yes	Yes/No
Oregon	0.08/0.00	90 Days	After 30 Days	Yes/No[6]
Pennsylvania	0.10/0.02	-	-	No/Yes
Rhode Island	0.10/0.02	-	-	Yes/Yes
S. Carolina	none[1]/-	-	-	No/Yes
S. Dakota	0.10/-	-	-	No/No[6]
Tennessee	0.10/0.02	-	-	Yes/Yes
Texas	0.10/0.00	60 Days	Yes	Yes/Yes
Utah	0.08/0.00	90 Days	No	Yes/No[6]
Vermont	0.08/0.02	90 Days	No	No/No

Table 1(cont.). Penalties for DUI/DWI as of July 1997 (Insurance Institute for Highway Safety, 1997)

Virginia	0.08/0.02	7 Days	No	Yes/No[6]
Washington	0.10/0.02	-	-	Yes/Yes
W. Virginia	0.10/0.02	6 Months	After 30 Days	Yes/No
Wisconsin	0.10/0.02[2]	6 Months	Yes	Yes/Yes
Wyoming	0.10/-	90 Days	Yes	No/No

[*] All but 2 states (Massachusetts and S. Carolina) and the District of Columbia have per se laws defining it as a crime to drive with a blood alcohol concentration (BAC) at or above a proscribed level, usually 0.10%.

[**] Under administrative license suspension, licenses are taken before conviction when a driver fails or refuses to take a chemical test. Because such laws are independent of criminal procedures and are invoked right after arrest, they've been found to be more effective than traditional post-conviction sanctions. Forty states and the District of Columbia have such laws.

† Thirty-five states permit some offenders to drive only if their vehicles have been equipped with ignition interlocks. These devices analyze a driver's breath and disable the ignition if the driver has been drinking.

[1] Laws in Massachusetts and S. Carolina aren't per se laws. A BAC of 0.10% in S. Carolina and 0.10% in Massachusetts is evidence of alcohol impairment but isn't illegal per se. In Delaware, the 0.02% BAC law for young drivers isn't a per se law.

[2] Special BAC for young drivers applies to people younger than 21 except in Wisconsin (19).

[3] Information pertains to drivers in violation of the BAC defined as illegal per se for all drivers, not the special BAC for young drivers.

[4] Drivers usually must demonstrate special hardship to justify restoring privileges during suspension, and then privileges are often restricted.

[5] In 20 states, multiple offenders may forfeit vehicles that are driven while impaired by alcohol. Provisions for temporary vehicle impoundment or suspension of vehicle registration or license plates exist in 20 states, and in 9 of these (Florida, Indiana, Maryland, Minnesota, N. Dakota, Ohio, S. Dakota, Utah, and Virginia) the provisions may apply to first as well as multiple offenders. Some states have provisions for both temporary impoundment and vehicle forfeiture.

[6] An offender's vehicle may be impounded or immobilized, the registration may be suspended, or the license tags may be confiscated. In New York, registration suspension applies only to offenders younger than 21. In Montana, impoundment applies only to offenders younger than 18.

[7] In New York, administrative license suspension lasts until prosecution is complete.