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Sentencing Guidelines: Recommendations for Sentencing Reform

Barbara S. Barrett

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# Sentencing Guidelines: Recommendations For Sentencing Reform

*Barbara S. Barrett*

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The views expressed in this Article do not necessarily represent the views of the Department of Justice or the Criminal Division.
I. INTRODUCTION

For the last twenty years, much of the discussion about the criminal justice system has focused on criminal sentencing. Prior to 1970, the states and the federal government used indeterminate sentencing, a method whereby judges and parole boards exercised a great deal of discretion over the length of criminal sentences. Since 1970, many states and the federal government have shifted to determinate sentencing. Determinate sentencing is appealing because it offers truth in sentencing, which means the sentence that the judge gives is actually served. In addition, determinate sentencing creates uniformity and proportionality in sentencing. Sentencing guidelines are a popular manifestation of determinate sentencing.

This Article discusses the reasons why sentencing guidelines are the best way to achieve proportionality and uniformity in the sentencing of criminal offenders. Sentencing guidelines have been implemented in a number of states and the federal system, and, thus, the successes and failures of those reforms offer lessons for future reforms of criminal justice sentencing systems. The Article examines presumptive sentencing and sentencing guidelines in detail and explains those factors that should be considered when establishing sentencing guidelines. The final section of the Article analyzes the experiences of states and the federal courts with sentencing guidelines in an effort to show how their experiences can be applied in other states.

II. THE TREND TOWARD DETERMINATE SENTENCING

For nearly two hundred years, indeterminate sentencing was the predominant form of sentencing in the United States. Under indeterminate sentencing, legislatures establish very broad policies by creating statements of purpose, by establishing maximum sentences (often without corresponding minimums) and by authorizing general sentencing procedures. Judges and parole boards have vast discretion in determining the appropriate amount and type of punishment for each offender. The underlying purpose of this scheme is to incarcerate the offender until he or she has become rehabilitated. Accordingly, the length of incarceration depends more on the characteristics of the individual offender than on the nature of the crime. In addition, disparity in sentence length for individuals convicted of the same crime is an accepted part of the system of individualized treatment for offenders. For many years indeterminate system satisfied the needs of those involved with the criminal justice system. Liberals were pleased with the rejection of the notion

1. The author wishes to thank the Honorable John Cratsley, Justice of the Massachusetts Superior Court and Lecturer of Law, Harvard Law School, for his helpful comments on earlier drafts of this Article.
4. Forst, supra note 3, at 17.
of retribution as well as the possibility of speedy release for offenders amenable to rehabilitation; judges enjoyed vast discretion but were relieved of the responsibility for release decisions; prison administrators had flexibility in controlling hostile inmates; and politicians could appear "tough on crime" by raising statutory penalties without affecting prison population or the actual time served.5

In the early 1970s, support for indeterminate sentencing began to crumble. Civil libertarian groups initiated the attack, claiming that the system was based on inadequate and biased assumptions to predict future behavior, and that judges and parole boards had unchecked discretion.6 In addition, the perception that crime rates were out of control led some officials to demand stiffer sanctions against criminals as a means of preventing crime.7

While these two groups disagreed about the appropriate sanction for individual offenders, they both believed that more explicit standards would structure the discretion of officials and reduce disparity in the length of sentences.8 The call for uniformity was furthered by empirical evidence showing that different sentences were imposed on defendants who had committed similar offenses.9

A change in sentencing philosophy accompanied the demand for reform. The sentencing purposes of legislators shifted from an emphasis on utilitarian aims, particularly treatment, toward a greater focus on deserved punishment, on the proportionality of sanctions to harms done, and on equity.10 This shift in philosophy reflects a shift from rehabilitation as the main goal of sentencing to retribution or "just deserts" as the core theory underlying sentencing.

Rehabilitation refers to the effects of a sentence or other treatment on changing the behavior of the convicted offender subsequent to release. Because rehabilitation was the goal of the criminal justice system, sentencing methods favored discretion at both the front end with the judge and at the back end with the parole board. This discretion allowed the judge to determine the maximum amount of time necessary for rehabilitation, and the parole board could decide when rehabilitation had been completed.11 For years a commitment to rehabilitation was the dominate force shaping sentencing policy.

The predominant view today is that rehabilitation fails and should not be the goal of sentencing.\(^{12}\) Evidence eventually showed that recidivism was unaffected by rehabilitation programs. Harvard University criminologist James Q. Wilson examined over a hundred studies on the effect of treatment programs and concluded that "evidence supporting the efficacy of correctional treatment is slight, inconsistent and of questionable reliability.\(^{13}\) The United States Senate, in its report on the Comprehensive Crime Control Act of 1984, declared that the rehabilitation theory underlying indeterminate sentencing simply had not worked and was not "an appropriate basis for sentencing decisions.\(^{14}\)

The declared purposes of sentencing reform reflect this move to retribution as the dominant sentencing goal. For example, a Senate Judiciary Committee report declared in 1984, "This purpose—essentially the 'just deserts' concept—should be reflected clearly in all sentences; it is another way of saying that the sentence [should] reflect the gravity of the defendant's conduct.\(^{15}\) Retribution requires proportional punishment, that is, punishment proportional to the crime. The moral judgment of blameworthiness must be translated into a sentence for each particular crime. Public outrage over the increasing crime rate often leads to the use of retribution as a justification for punishment. As Baltimore Circuit Court Judge Marshall Levin, chairperson of the Maryland Sentencing Guidelines Board, said, "Judges are sentencing to prison more, longer and avowedly for purposes of retribution. They seem to do so partly out of response to public outrage over crime and partly because of their own concern and frustration about increasing crime."\(^{16}\) Judge Levin explained that retribution is justified: "I think sometimes the sentence must reflect the public outcry over crime and the way it was committed. Some crimes and the manner of their commission cry out for retribution."\(^{17}\)

Courts and legislators have also commented on this movement toward retribution. The California Supreme Court stated that "the purposes of imprisonment [under the old system] were deterrence, isolation and rehabilitation. . . . Not the least of these was rehabilitation. . . . The [new law] marked a significant change in the penal philosophy of this state regarding adult offenders.\(^{18}\) Legislators' views are reflected in the purposes they put forth in sentencing reform bills. For example, the Minnesota Sentencing Guidelines Commission, established by the state legislature, declared flatly that retribution had finally become "the primary sentencing goal.\(^{19}\) Pennsylvania did not

16. Id.
17. Id.
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go that far, but instead has adopted an approach that includes a variety of considerations: retribution as well as rehabilitation.20

This shift from rehabilitation toward retribution underlies the shift from indeterminate sentencing toward determinate sentencing. Over the last decade the trend has led to larger and more sweeping reform with more states and the federal government adopting presumptive sentencing or sentencing guidelines.

III. DEFINITIONS

In order to clarify the terms used when describing sentencing systems, some definitions should be provided. The definitions are taken from the Bureau of Justice Statistics (BJS) Bulletin entitled Setting Prison Terms.21 The advantage of these definitions is that they treat "determinateness" and "mandatoriness" as separate issues. Thus, the analysis is divided into two parts: sentencing structures that limit post-sentencing discretion and sentencing structures that limit judicial discretion.

20. Id.

First, structures that limit post-sentencing discretion control how determine the sentence is. The more tightly the sentence imposed by a judge constrains post-sentencing discretion, the more "determinate" the sentence. A totally indeterminate system is one in which the sentence specifies that the defendant is to be incarcerated, but the term of incarceration and the length of time under parole supervision are left to the discretion of correction officials. At the opposite end, the totally deterministic system would be one in which the sentence imposed by a judge specifies the precise length of incarceration and the time under parole supervision. Most states have adopted systems that allow intermediate degrees of post-sentencing discretion. Figure 1 above shows the different degrees of post-sentencing discretion.  

22. BRUCE C. FREDERICK ET AL., supra note 21, at 14. The definitions used in the chart are as follows:

Parole Guidelines—Parole guidelines are procedures and standardized criteria to be used by a parole board in determining the length of time that an offender should remain in prison. Criteria typically include measures of offense seriousness, criminal history, and institutional behavior. Parole guidelines can generally be used in conjunction with min/max sentencing, but are incompatible with determinate sentencing, for which post-sentencing discretion regarding sentence lengths is definitionally excluded.

Min/max Sentencing—Min/max sentencing is a system wherein the court specifies a minimum and maximum term of incarceration, but the parole board determines the actual release date, within the limits of the court imposed sentence. The degree to which a min/max sentence limits post-sentencing discretion depends on the specified range. If the minimum is "zero" and the maximum is "life," the sentence is totally indeterminate. If the minimum equals the maximum, the sentence is "determinate." Systems vary as to whether "good time" may be deducted from the minimum, the maximum, or both.

Fixed Sentencing—The term "fixed sentencing" is used differently in different states. A definition that encompasses all these usages views fixed sentencing as a special case of min/max sentencing. Only a single term is specified by the court, but it is treated as a maximum period of incarceration for which an associated minimum is automatically implied. The implied minimum is equal to the maximum in determinate systems, but for an indeterminate system it might be "zero" for all sentences, one year for all sentences, or some constant fraction of the maximum (e.g., 1/3). Not all fixed sentences are determinate, but all determinate sentences are fixed.
Structures that limit judicial discretion explain the degree to which sentences are "mandatory." Discretion may be unfettered, with sentencing decisions made solely by a judge, or there may be no discretion at all, when sentences are fixed by statute. In practice, most states have mandatory provisions for some categories of offenses or offenders and then permit judges more discretion in cases outside of the targeted categories. Figure 2 above explains this discretion. The terms

\[\text{Figure 2}\]

\textit{Determinate Sentencing}—Determinate sentencing is a system in which the court specifies a fixed term of incarceration that must be served in full (minus good time). The influence of correctional authorities on actual time served in prison is limited to awarding (or revoking) good time credits on the basis of institutional behavior; there is no discretionary parole release. Bureau of Justice Statistics, supra note 21, at 2.


24. Bruce C. Frederick et al., supra note 21, at 18. The diagram uses the following terms:

\textit{Statutory Limits}—In most states the legislature has placed constraints on judicial discretion by establishing upper limits, lower limits, or ranges for each offense. The court may not impose terms of incarceration that are shorter than specified by the lower limits or longer than specified by the upper limits. The limits could apply to the fixed terms in a determinate system; they could apply to the fixed terms, maximum terms, or minimum terms in an indeterminate system. Statutory lower limits on terms of incarceration do not necessarily imply mandatory incarceration; the court may have the discretion to impose either a non-incarcерative sentence or an incarcерative sentence within the allowable range.

\textit{Mandatory Sentences}—Mandatory sentencing involves a minimum incarcerative sentence that must be imposed for certain crimes or categories of offenders, without an option for probation, suspended sentence, or immediate parole eligibility. Mandatory provisions can apply to the "in/out" determination, the minimum term, the maximum term, or some combination of these. Mandatory provisions can be incorporated into both determinate and indeterminate systems.

\textit{Presumptive Sentencing}—In some states, judges' decisions are constrained by a legislatively established "presumptive" sentence. It is presumed that a specific sentence identified by statute (e.g., a determinate sentence of three years minus good time for house burglary) will be the sentence imposed in all exceptional cases. If mitigating or aggravating circumstances
presumptive sentencing and sentencing guidelines are often used interchangeably. The difference established here is that sentencing guidelines allow a judge to depart with written reasons, while presumptive sentencing only allows mitigating or aggravating circumstances to change the presumptive sentences. This difference is really a matter of degree because different states have different departure standards that may fall in between these two definitions. In addition, presumptive sentencing is established by the legislature, while sentencing guidelines can be established by the legislature or a commission. The analysis in this Article would apply to both types of determinate sentencing.

IV. THE FUTURE OF SENTENCING REFORM

States considering sentencing reform generally choose to enact either mandatory minimum sentences or sentencing guidelines. Mandatory minimum sentencing dramatically limits judicial discretion. Because sentencing discretion is almost completely taken away from the judge, judges generally disfavor mandatory minimum sentencing even more than presumptive or guideline sentencing. For example, when the sentencing guideline bill was being discussed in the Pennsylvania legislature, there were other bills filed that would have established mandatory minimum sentences.25 Thus, while some judges were not truly in favor of sentencing guidelines, they felt that the guidelines were better than the mandatory minimum sentencing bills, which might have been passed had the guidelines failed. Mandatory minimum sentences tend to "put cuffs on the judges."26 With such minimums, judges cannot give shorter sentences than those imposed by the legislature. With

exist, the sentence usually may be lengthened or shortened within specific boundaries, but a judge cannot impose a prison sentence outside the specified range. Presumptive sentencing is similar to mandatory sentencing in that the sentencing prescriptions carry the force of law. It differs from mandatory sentencing in that presumptive sentencing provides explicit procedures for exceptional handling of legitimately exceptional cases.

Sentencing Guidelines—Sentencing guidelines can be implemented through legislation, judicial decree or by voluntary judicial adoption. Guidelines generally specify a narrow range of sentencing options from which a specific sentence is to be selected for unexceptional cases. The range of sentences specified is typically determined by the seriousness of the offense, the offender's criminal history, prevailing sentencing practices, or various combinations of these elements. Compliance with guidelines may be voluntary or presumptive. "Descriptive guidelines" merely provide empirical information about past practice in the hope that judges will examine more carefully their justification for sentences that depart drastically from the norm. Alternatively, guidelines may be prescriptive and presumptive, holding judges strictly accountable for sentences outside the specified ranges. For example, judges may be required to justify exceptional sentences in writing, or such sentences may be subject to automatic appellate review. Bureau of Justice Statistics, supra note 21, at 4.

guideline sentencing, judges can go outside of the presumed range as long as they record their reasons.

In addition, guideline sentencing reforms the entire criminal sentencing system, while mandatory minimums tend to reform one offense at a time. Although mandatory minimum sentencing would face strong judicial opposition, it is attractive to politicians, who can tell their constituents that they are "tough on crime" and have imposed mandatory minimum sentences.

Guideline sentencing provides the most promising and broadest reform of a criminal sentencing system. Because guideline sentencing is the most comprehensive way to deal with all aspects of criminal sentencing, the remainder of this Article examines guideline sentencing. This examination will explain many issues that jurisdictions must consider in order to adopt effective sentencing guidelines. Because guidelines affect many different crimes, care and time must be devoted to their development. This Article should provide legislators or guideline commissions with a start on that process.

First, in order to present some examples of the type of reform this Article addresses, an explanation of sentencing guidelines systems, which have been adopted in states and the federal system, is provided. Next, the Article explores the issues which must be considered when drafting guidelines. Finally, the Article examines the effects of sentencing guidelines in an attempt to draw some conclusions about whether a state should follow the lead of other states and the federal system and adopt wholesale sentencing reform.

V. EXAMPLES OF DETERMINATE SENTENCING

In 1983 the Bureau of Justice Statistics classified sentencing structures as "determinate" in nine states. 27 Since then, several more states, such as Maryland, 28 Florida, 29 New York, 30 District of Columbia, 31 and the federal system, 32 have joined the original group of nine. The sentencing structures of these jurisdictions vary; a few of them will be briefly explained.

A legislatively established program was set up in North Carolina. The Fair Sentencing Act created sentencing guidelines; it required judges to either

27. Bureau of Justice Statistics, supra note 21, at 6. The states with determinate sentencing were California, Colorado, Connecticut, Illinois, Indiana, Maine, Minnesota, New Mexico, and North Carolina. See supra notes 22, 24 for definitions used by the Bureau of Justice Statistics.


30. See Frederick et al., supra note 21.


impose the presumptive prison term or to give reasons in writing for imposing a different term, unless the sentence was imposed pursuant to a plea bargain approved by the judge. The judge’s reasons could be drawn from the statutory aggravating and mitigating factors or from any circumstances relevant to just punishment, rehabilitation or incapacitation of the offender, or to the deterrence of crime. Parole was eliminated, and automatic appeal was allowed for sentences outside the presumptive range, unless pursuant to a plea bargain.\textsuperscript{33}

Many state legislatures have established commissions to develop sentencing guidelines. California adopted a sentencing structure that combines presumptive guidelines with determinate sentencing. The California Legislature has defined lower, middle and upper prison terms for specified offenses. In the case of burglary, for example, the permissible terms of incarceration are two, three or four years. The middle term is presumed, unless aggravating or mitigating circumstances justify the upper or lower term.\textsuperscript{34} In Florida the process of developing sentencing guidelines began with four circuits selected to participate in a study using guidelines. The legislature then passed a bill creating the Sentencing Guidelines Commission. This commission established the present guidelines used in the state.\textsuperscript{35}

Minnesota’s sentencing guidelines, one of the earliest reforms, have served as a model for other jurisdictions.\textsuperscript{36} The Minnesota Sentencing Guideline Commission was established in 1978 by the Minnesota Legislature.\textsuperscript{37} In Minnesota the legislature decided that sentencing discretion would be exercised by the courts within the constraints of the sentencing guidelines. The commission chose the specific sentencing ranges and then submitted them to the legislature. When the legislature took no action, the guidelines became law. The guidelines provide a range from which the judge can deviate if the judge justifies it with written reasons.\textsuperscript{38} By using a table which combines facts about the crime and the criminal history of the offender, the judge determines a sentence. To establish the offender’s criminal history "score," the sentencing judge gives the offender one point for each prior felony conviction, one point if the offender was on probation or parole at the time of the offense, one-half point for each prior gross misdemeanor conviction, and one-quarter point for each prior misdemeanor conviction.\textsuperscript{39}

\begin{flushleft}


\textsuperscript{35} Holton, \textit{supra} note 29, at 20-23.

\textsuperscript{36} Panel on Sentencing Research, National Research Council, 1 Research on Sentencing: The Search for Reform 61 (1983).


\end{flushleft}
In the District of Columbia the sentencing guidelines are unique because the Superior Court rather than a legislative body authorized the guidelines. These guidelines allow the parole board to release offenders at its discretion.\textsuperscript{40}

Reform has also taken place at the national level with Congress establishing the United States Sentencing Commission to create sentencing guidelines for federal crimes. Under the federal guidelines, the convicted offense establishes the "base offense level." The judge then examines the specific offense characteristics and adjusts the initial base offense level. Next, the judge checks to see whether other, general adjustments apply and if the offender's criminal history affects the sentence. All of this is then translated into a final numerical offense level. Lastly, this number is translated into a sentence by consulting a table. If the judge thinks the sentence is too light or too severe, the judge can impose a different sentence if the judge justifies it with written reasons, which that are reviewable by the appellate court for reasonableness.\textsuperscript{41}

VI. CONSIDERATIONS WHEN DRAFTING SENTENCING GUIDELINES

This Section describes factors which should be considered when drafting sentencing guidelines. The material in this Section comes from the experiences of many different states as well as the federal system, which use sentencing guidelines. These varying experiences should allow states to learn from the successes and mistakes of other states and the federal courts.

A. Commission-Developed Guidelines versus Legislatively Developed Guidelines

The first question in the formation of sentencing guidelines is whether to form a commission to develop the sentencing guidelines, as was done in the federal system, or to have the state legislature develop the guidelines. A sentencing commission would consist of participants who represent various parts of the criminal justice system. The commission would develop the sentencing guidelines, and the legislature would have the opportunity to veto the guidelines.

An advantage of the commission system is the involvement of many participants of the criminal justice system. A commission would provide a forum for the expression of many viewpoints, including those opposed to sentencing guidelines, so as to create a system that participants in the criminal justice system favor or at least can live with. On the other hand, one disadvantage of the commission system is that the commission is one more step away from the public, whereas the legislators are directly elected by the people. Since sentencing reform impacts citizens, the direct accountability of the reformers may be preferred.

\textsuperscript{40} Knapp, \textit{supra} note 31, at 48.

\textsuperscript{41} Judge Stephen Breyer, Member of the Sentencing Comm'n, Address at Harvard Law School (Apr. 2, 1990); \textit{see} U.S. Sentencing Comm'n, \textit{Guidelines Manual} § 5K2.0 (Nov. 1991).
Commission-developed guidelines may be easier for the legislature to pass due to the two-step process such guidelines involve. First, the legislature passes a bill that establishes a sentencing commission. A legislator who is on the fence may go ahead and vote to set up the commission knowing that later he or she can always reject the commission's recommendations. After a period of time during which the commission holds meetings and public forums, the commission reports its recommendations to the legislature. If the legislature does not act, these recommendations become law. Thus, in order to stop the sentencing guidelines, those opposed to reform must generate support against the guidelines. This situation probably acts to the advantage of those who favor the guidelines because legislators can take no action and the guidelines become law. In addition, the guidelines would have been developed by a commission made up of representatives of participants in the judicial system—judges, prosecutors, and public defenders—resulting in a legislature deferring to the commission's collective judgment.

B. Establish a Purpose and General Philosophical Basis for Sentencing

Before actually drafting the guidelines, the legislature or the sentencing commission must determine what aspects of indeterminate sentencing should be changed and what goals are to be achieved by sentencing reform. The legislature, as the people's representative, is the preferable body to establish these goals. The process and the outcome of sentencing reform will be unsuccessful without clear, established goals. Even though sentencing goals may be lofty and vague, "the alternative is purposelessness or arbitrary action." As one commentator has noted, "some statement of purposes serves as a checklist in organizing the thoughts of advocates, judges, and legislators, and usefully prevents blind pursuit of a single goal where multiple goals are plainly involved."43

The established goals should be as specific as possible. Underlying much of the sentencing reform movement is the shift away from rehabilitation toward a "just deserts" type of punishment. Yet, the goal of sentencing reform must go beyond this general theory of punishment. Treating similar cases alike is a common purpose of sentencing reform; that is, a "soft" judge or a "hard" judge should give the same sentence to similar offenders. This uniformity goal promotes fairness and avoids inconsistent treatment, which may undermine deterrence "by creating a perception among potential offenders that they may escape a threatened sanction if they get a 'soft' judge."44 The federal Sentencing Reform Act is evidence that uniformity has become a goal in and of itself. The Act's stated purpose is "to avoid unwarranted sentence

43. Id.
disparities among defendants with similar records who have been found guilty of similar conduct.\textsuperscript{45}

In addition to uniformity and retribution, other goals include insuring proportionality in sentencing (more serious offenses should result in more serious sanctions), increasing judicial accountability in sentencing, and providing more severe penalties for violent crimes and repeat offenders.\textsuperscript{46} Minnesota added an additional goal to its guidelines: to avoid exceeding current prison capacity; however, this goal is ignored by most states.\textsuperscript{47}

Once the sentencing reform goals are established, the sentencing commission\textsuperscript{48} must assess current sentencing practices. The commission must know and examine the current sentencing trends. The commission should assess the sentences imposed as well as the prison terms actually served.\textsuperscript{49} This evaluation should provide the commission with a barometer to gauge whether current sentencing practices would be consistent with the defined sentencing purposes embodied in the new statute. Once this is complete, the state must decide if its guidelines will be prescriptive or descriptive.

The descriptive approach uses past practice as a basis for establishing sentencing ranges and views the construction of sentencing guidelines primarily as a technical matter. Under this approach, sentencing reform models the sentences after current sentencing practices. In New York, for example, the sentence ranges were designed to maintain the level of

\begin{itemize}
\item \textsc{Frederick et al., supra note 21, at 10.}
\item The Minnesota Legislature set forth the following goals for their Sentencing Commission:
1. Sentencing should be neutral with respect to the race, gender, social, or economic status of convicted felons.
2. While commitment to the Commissioner of Corrections is the most severe sanction that can follow conviction of a felony, it is not the only significant sanction available to the sentencing judge. Development of a rational and consistent sentencing policy requires that the severity of sanctions increase in direct proportion to increases in the severity of criminal offenses and the severity of criminal histories of convicted felons.
3. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purpose of the sentence.
4. While the Sentencing Guidelines are advisory to the sentencing judge, departures from the presumptive sentences established in the Guidelines should be made only when substantial and compelling circumstances exist.
\item The term "commission" will be used to imply the use of a sentencing commission to devise the sentencing guidelines. In the case of a state, where the legislature establishes the guidelines, the legislature would complete these tasks.
\item Brian Forst et al., Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines, 7 Hofstra L. Rev. 355, 368 (1979).
\end{itemize}
punishment produced under the indeterminate system, and, thus, the time actually served by defendants became the benchmark for establishing sentence ranges under the guidelines.  

A descriptive approach is attractive because it (1) utilizes the expertise of the sentencing judges by basing guidelines on what they actually do; (2) minimizes disruptions in the criminal justice system by constructing sentence ranges around established sentencing norms; (3) bases sentencing guidelines on two well-established sentencing criteria: the characteristics of the offense committed and those of the offender; and (4) provides judges with a concise picture of their decisions and an opportunity to examine, to evaluate, and to modify their decisions as they see fit. Basing guidelines on the "implicit policies" of the past makes this method more attractive to the judiciary because judges feel they have a "say" in the development of the guidelines.

Critics of the descriptive approach claim that it institutionalizes the biases and injustices associated with an indeterminate system, rather than seeks to rectify those ills. Some critics claim that it is irrational to assume that one sentencing norm can be derived from multiple sentencing goals without at least evaluating the individual merits of these contending philosophies.

The prescriptive approach focuses on the philosophies and policy issues that underlie sentencing, based upon the belief that current sentences should be considered on par with other available sentencing options. Minnesota used this approach, believing that the development of guidelines should be shaped by policy concerns, not by the application of a mathematical formula. In Minnesota sentencing was viewed as a normative problem of how punishment should be allocated given limited resources. The criticisms of this approach are that it is difficult to translate crime seriousness into a specific sentence or to qualify a moral concept such as deservedness of punishment.

Despite the differences between these two theories, the line between them is quite blurred. This blurring occurs because the research, on which the guidelines are based, is essentially descriptive, yet the very term "guidelines" implies prescriptive. In addition, a complete prescriptive approach is impossible unless the commission is able to operate under Rawls' veil of ignorance. An example of such line blurring is the Federal Sentencing

54. Alberghini, supra note 32, at 198.
57. Rawls' approach hypothesizes that people are placed behind a "veil of ignorance," so
Guidelines. The United States Sentencing Commission by and large followed past practice, yet altered the punishments when it felt that past practice was inaccurate or unfair. This alteration was especially common for crimes when there were few past cases on which to base the guidelines. The United States Sentencing Commission Guidelines Manual explains the process of determining sentencing ranges in this way: "While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone." The federal commission did deviate from past practice in certain areas, such as white collar crimes, when past practice generally showed straight probationary sentencing. The guidelines now provide for short terms of confinement. The result is an approach that combines descriptive and prescriptive elements.

A state adopting sentencing guidelines must first establish its purposes and goals in reforming its criminal sentencing system. This guidance will provide a mandate to the legislative committee or guidelines commission to follow when developing guidelines. In addition, goal-setting will force the legislature to explain its reasons for sentencing reform, including setting important goals such as how sentencing guidelines will affect prison population. These goals can then be translated into policy by the sentencing commission.

C. Develop Crime Seriousness Scales

A three-step process takes place in the development of sentencing guidelines. First, an assessment of the seriousness of the criminal conduct is completed, and different categories are created for each offense. These categories are called "base offense levels." Second, these base offense levels are adjusted for relevant conditions and characteristics of the offense or offender. These adjustments result in a sanction level, which in the third step is translated into a sentence. In this subsection, step one of the process is examined.

Generally, these three steps are completed by the sentencing commission established by the legislature. In the case of legislatively developed guidelines, these three steps take place in the legislative committee.

In order to develop categories of criminal conduct, sentencing guidelines commissions tend to begin with the present state criminal code and then redefine each crime to create more categories for each offense. Developing enough categories so that the guidelines are workable and the punishment "fits" the crime can be a difficult problem. If the punishment for each offense

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that they do not know what their place in society will be. From this "original position," they must make the distributional rules under which they will live. See John Rawls, A Theory of Justice (1971).


60. See Knapp, supra note 31, at 49; Robinson, supra note 44, at 41.
is based upon the "worst case" offense, the punishment may be perceived by judges as too harsh for a particular offender.\textsuperscript{61} For example, North Carolina defined crimes so broadly that formulating penalties commensurate with the harmfulness of the defendant's conduct was difficult.\textsuperscript{62} A small number of broad categories, furthermore, creates a large jump in punishment between categories. For instance, the maximum sentence may jump ten or fifteen years from one class of felonies to the next.\textsuperscript{63} Broad categories can exacerbate the effect of the specific crime with which the defendant is charged on the defendant's sentence. More categories with narrow definitions can help eliminate those problems.

Commissions should work to increase the number of categories in order to lessen sentencing differences among categories. This goal must be tempered with a small enough number of categories so that the system remains workable. In order to achieve these contradicting goals, Paul Robinson, a member of the United States Sentencing Commission, recommends that the components of the crime be defined as generically as possible, so long as the definition isolates and accurately identifies the characteristic that makes the conduct harmful or antisocial.\textsuperscript{64} Robinson recommends that generic terms be used as building blocks to define a crime. For example, a commission may wish to have a separate crime for unlawful takings from banks by employees. Instead of identifying a new component for "unlawful takings from a bank by an employee," the better approach would be to designate unlawful taking as a generic component used to define many crimes and to add breach of trust as a second generic component to define the offense.\textsuperscript{65}

\textit{D. Adjustments Based on Offense and Offender}

The second step involves making adjustments to the general offense categories that have been developed. Adjustments are made based upon the specific offense and the specific offender. The manner, in which these adjustments affect the sentencing system, varies from state to state.

In the federal system, the defendant is assigned a number called a "base offense level" according to the convicted offense. The sentencing judge looks at the specific offense characteristics, such as whether a gun was used and the role of the defendant in the crime. These characteristics are given values which are added to the base offense level. The judge then considers the offender's criminal history and adds points for past crimes in order to

\begin{itemize}
  \item\textsuperscript{61} Knapp, \textit{supra} note 31, at 49.
  \item\textsuperscript{62} Clarke, \textit{supra} note 33, at 142.
  \item\textsuperscript{63} Schwartz, \textit{supra} note 42, at 642-43.
  \item\textsuperscript{64} Robinson, \textit{supra} note 44, at 32-33.
  \item\textsuperscript{65} \textit{Id.} at 33. Some examples of Robinson's definitions of crimes: Robbery—(1) unlawful taking, and (2) causing, risking, or threatening personal or psychological injury, with (3) an aggravating adjustment because the offender caused, risked, or threatened injury for pecuniary gain; Kidnapping—(1) unlawful restraint, and (2) causing, risking, or threatening personal or psychological injury; Burglary—(1) a trespass, and (2) an attempt to cause another offense component such as unlawful taking or unconsented intercourse. \textit{Id.} at 41-42.
\end{itemize}
calculate a final number that will determine the sentence.\textsuperscript{66} This system mirrors the way a judge thinks by looking at both the specific crime committed and factors of the particular offense and offender.

Robinson recommended that these aggravating and mitigating adjustments be stated in general terms that adequately define the conduct so that practicality and efficiency are promoted.\textsuperscript{67} For example, the sentencing system could incorporate a general adjustment that sentences an attempt at a certain percentage less than the completed offense, all other things being equal.\textsuperscript{68} Robinson explained, "Other factors that might be stated in general terms include: the extent of an offender's lack of meaningful exercise of free choice (as in insanity or duress), the existence or believed existence of justifying circumstances such as a mistaken belief that one is using defensive force, the reasonableness of a mistake of law, and the degree of sincere remorse."\textsuperscript{69} Sentencing systems also often make adjustments for cooperation with authorities as a way of almost codifying plea bargaining.

Additional advantages of these general adjustments include deterrence and simplification of the system. Defendants will know the effect of additional "bad" conduct on their sentence. For instance, they will know that if they complete the crime, their sentence will be a certain percentage higher than if they stop and only commit an inchoate offense. They will also know the additional effect of using a gun to commit a crime. In addition, because general adjustments can be used to apply to many different crimes, the sentencing code will be of a manageable length.

When dealing with adjustments for past crimes, the commission must decide how much the base offense level should be increased for different types of past crimes and if a past crime of a similar nature should cause more of an increase. Another problem is how much each additional past crime should increase the sentence. It is unworkable to have each new offense increase the sentence by the same amount; therefore, the commission must devise a chart or formula to show how much a sentence or offense value would be increased for each prior offense.

Minnesota has developed a matrix which codifies adjustments. One side of the matrix specifies the offense, taking into account the factors discussed above dealing with the particular offense characteristics. The other side of the matrix contains numbers that account for the specific characteristics of the defendant, that is, the offender’s criminal history.

Sentencing commissions must deal with the important, but difficult question of what factors should affect sentences. When examining prior records, a commission must decide whether to count all misdemeanors and how to treat juvenile records. Most systems have either declined to take juvenile records into account or have taken into account only serious felonies committed after a certain age. Arrest records generally do not affect the presumed sentence range. Arrest records do correlate with the tendency to

\textsuperscript{67} Robinson, supra note 44, at 34.
\textsuperscript{68} For a detailed statistical example, see id. at 44-45.
\textsuperscript{69} Id. at 34-35.
commit future crimes, but commissions tend to ignore arrest records when calculating offender scores for due process reasons.\textsuperscript{70}

E. Attach Specific Punishments to the Scales Developed

Determining which specific punishment "fits" the crime raises the unanswerable question of how much a robbery is worth, a life is worth, and so on. The philosophical discussion of descriptive versus prescriptive sentencing takes on a practical meaning when answering this question. To help formulate the federal sentencing guidelines, Judge Breyer, a member of the United States Sentencing Commission, explained that a probation officer looked at 10,000 cases over the last three years to develop the data on which the commission based its sentences.\textsuperscript{71} This descriptive method of basing sentences on past practice was used because it was politically more acceptable and exerted some control on the commission's development of sentences. While past practice was the baseline for sentences, the commission did deviate from past practice in two main ways. First, in crimes such as treason, when there was little data, the commission did not necessarily follow the data. Second, the sentences for white collar criminals were increased ten to twenty percent so that the sentences were equal with theft.\textsuperscript{72} In the act establishing the commission, Congress placed some constraint on the ranges developed by the commission. The sentence range imposed for each category of offense and offender was subject to a twenty-five percent limitation on the difference between the maximum and minimum terms of imprisonment recommended.\textsuperscript{73}

Breyer recognized an academic argument presented by a fellow commission member, Paul Robinson, that prescriptive sentencing is superior.\textsuperscript{74} Breyer responded to this argument by examining the possible alternative methods for developing prescriptive sentences. One popular method in academic circles proposed by Robinson was to rank order crimes by seriousness under a just deserts model. Difficulty in agreeing on the ranks is a problem with rank order. For example, when the District of Columbia Sentencing Commission tried this method, one member had strong feelings about how horrible incest was; therefore, incest was ranked at the same level as aggravated rape.\textsuperscript{75} In addition, this method replaces the views of all judges as indicated by their past practice with the views of the members of the sentencing commission. There is no reason to assume that the seven United States Sentencing Commission members are better at determining the relative rank of various crimes than all federal judges.

A second alternative to descriptive sentencing is the use of the amount of punishment necessary to deter future unlawful conduct. The problems with this approach are obvious; evidence shows that the deterrent effect of

\textsuperscript{70} Breyer, supra note 41.

\textsuperscript{71} Id.; see U.S. Sentencing Comm'n, Guidelines Manual, Ch.1, Pt.A(3) (Nov. 1991).

\textsuperscript{72} Breyer, supra note 41.

\textsuperscript{73} 28 U.S.C. § 994(b) (1988).

\textsuperscript{74} See Robinson, supra note 44.

\textsuperscript{75} Breyer, supra note 41. See generally Gottfredson & Gottfredson, supra note 56.
punishment is extremely difficult to assess. Studies highlight the great variability in recidivism rates and the difficulty of determining what deters criminals.

Determining the "correct" amount of incarceration for a particular offense can be extremely difficult. The sentencing commissions have a great deal of power to increase or decrease sentences, but this power may not be as broad as it appears initially. The public pressures commissions to increase the sentencing ranges, while corrections and government officials pressure commissions not to make the sentences so high that they will seem ridiculous or cost the state too much money. These opposing forces constrain the commission.

Early sentencing reform overlooked the use of intermediate and non-incarcerative sanctions. These sanctions are less costly than a prison or jail sentence and can often result in some rehabilitation, a goal which has essentially been abandoned in prisons. Guidelines, which do not utilize such sanctions, force judges who want to impose intermediate sanctions to depart from the guidelines.

Significant innovations in the development of intermediate sanctions have occurred in recent years. Besides the traditional use of short jail terms, options such as community service, residential treatment, non-residential treatment, fines, restitution, home detention, electronic monitoring and drug testing schedules, as well as various levels and forms of probation supervision, are commonly used. These options, however, have yet to be included in a comprehensive sentencing system.

In order for the options to be incorporated into a workable system, they must be included in the sentencing guidelines, and resources must be allocated to fund the programs. Due to the many obstacles to implementation, states have neglected these options. The first problem is the availability of correctional resources. Many non-imprisonment sanctions are funded locally. When state legislatures mandate the use of locally funded programs, this mandate often triggers a demand for state funding assistance. Therefore, states avoid mandating such programs. Second, certain sanctions are more amenable to urban than to rural settings; therefore, establishing a state-wide policy becomes complicated. Third, there are few completed studies and data that assess the impact of such policies. Finally, it is difficult to determine the appropriateness of a specific sanction, like home detention, in a structured sentencing policy. Such sanctions are used for various purposes, and the

76. Blumstein, supra note 11, at 133. See also ALFRED BLUMSTEIN ET AL., DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978).


78. Knapp, supra note 31, at 50.

79. Id. at 51.
precise assessment of the fit between a category of offenders and a specific sanction of sentencing guidelines is probably not possible.\textsuperscript{80}

Kay Knapp, former executive director of the Minnesota Sentencing Guidelines Commission, recommends that these obstacles can be overcome by the use of sanctioning levels and exchange rates. Sanctioning levels would be substituted in the guideline system for traditional sanctions. For example, instead of defining six-months imprisonment as the proper presumptive sentence for a particular category of offenses, the policy would prescribe a sanction level of six units. These units would be translated into specific sanctions through the concept of exchange rates. One unit, for example, translates into forty community-service hours, a month in jail, two months on probation, or two weeks in residential treatment.\textsuperscript{81} Judges could choose from the array of sentencing options available in their area, but the sentencing guidelines still provide state-wide proportionality in sentencing. This type of a system has been used for juvenile sentencing in Minnesota.\textsuperscript{82} Washington state and the District of Columbia have utilized some alternative sentencing in their guidelines, but not with the explicit exchange rate plan that Knapp proposes.\textsuperscript{83}

The United States Sentencing Commission grappled with the problem of how to allow judicial flexibility to use alternative sanctions, while maintaining proportionality by insuring that each judge imposes the merited amount of sanction. Paul Robinson recommended a system, similar to Knapp’s, that uses sanction units. After determining the number of sanction units appropriate for a particular criminal defendant, the judge could choose from different types of sanctions as long as the sanction units add up to the correct total. For example, one sanction unit would equal two-weeks imprisonment, four-weeks structured residence in a community treatment center or in the eligible offender’s home, eight-weeks intensive probation or intensive supervised release, twelve weeks of probation or supervised release, 160 hours of community service, a fine equal to three percent of total assets or $2,000 (whichever is greater,) or six months of occupational disqualification as a condition of probation.\textsuperscript{84} The guidelines need not leave a judge entirely free to select among sanctioning methods. The system may place limitations on judicial discretion such as requiring that the offender make restitution whenever he or she can afford to, or that drug offenders always receive an extended period of supervision after release, or that all victims of fraud receive notice of the offender’s conviction.\textsuperscript{85} The state or federal government may determine that certain sanctions are inappropriate in certain cases. House confinement, for example, is not an appropriate sanction for a child abuse offender or a drug dealer who sold drugs from his home.\textsuperscript{86} These non-

\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Robinson, supra note 44, at 53-55.
\textsuperscript{85} Id. at 55-56. See 18 U.S.C. §§ 3556, 3583(a), 3555 (1988).
\textsuperscript{86} Robinson, supra note 44, at 56. See ILL. ANN. STAT. ch. 38, para. 1005-5-3(c)(2)
imprisonment sanctions are an alternative to building new prisons. In response to the fear that such sanctions are too lenient, Morris and Tonry respond that the present system is both too lenient and too severe, and the use of various intermediate sanctions results in the "appropriate" sanction.87

F. Coordinate Sentences With Correctional Resources

Determining what effect sentencing guidelines will have on prison population is an important, but often overlooked step in the development of sentencing guidelines. States should use the number of prison cells available to aid in the determination of the length of sentences. State legislatures must decide how much money they are willing to spend on prisons. When prisons cost $50,000 to $75,000 per cell to construct,88 and operating costs are $10,000 to $15,000 per year,89 the economic costs of incarceration are far from irrelevant. Moreover, many prisons are already overcrowded and facing judicial orders to alleviate this overcrowding.

In order to determine the length of sentences, states should begin with a projection of prison population without any change in sentencing procedures. Prison populations must be estimated to avoid either overcrowding or to prevent prosecutors and judges from informally trying to limit prison population by circumventing the guidelines.90 Demographic data, such as a rising number of teenagers who are the age group most likely to commit crime, must also be taken into account by projection studies. The technical difficulty in making such impact estimates is the central reason why so few of these studies have been done.91

The second step is an analysis of how the proposed sentencing reform will effect prison population. The U.S. Sentencing Commission study, which included both steps, suggested that the federal prison population would increase from 45,000 to 105,000 inmates in ten to fifteen years.92 This entire increase would not have resulted from the new guidelines since some of the increase would have been caused by mandatory minimum sentencing93 and

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(Smith-Hurd Supp. 1987); N.C. GEN. STAT. § 15A-1340.4(a) (1988); TEX. CRIM. PROC. CODE ANN. art. 42.12, § 3g (West Supp. 1992).


88. Gail S. Funke, Who's Buried in Grant's Tomb? Economics and Corrections for the Eighties and Beyond 3 (1983). These numbers have probably increased due to inflation.

89. Bruce Cory & Stephen Gettinger, Time to Build? The Realities of Prison Construction 15 (1984). These numbers have probably increased due to inflation.


92. Breyer, supra note 41.

93. Provision in federal statute that third time drug and violent crime offenders must be at or near the maximum sentence. Id.
the increase in drug crimes. The study estimated that six to twelve percent of the increase would have been attributable to the guidelines.\textsuperscript{94} Despite the availability of such studies, their accuracy is questionable. An impact study is based on many assumptions, such as how many people will be arrested, how fast those people will move through the system, and what kinds of sentences they will receive. A change in any of these assumptions will change the projection for prison population.

Following all of the studies, the final step is issuing a prison impact statement. This statement, issued by those formulating the sentencing reform, forces a consideration of the costs associated with any particular sentencing policy. Absent such consideration, politicians would feel free to posture by demanding tougher sentences.\textsuperscript{95}

Minnesota’s approach to prison population is unique.\textsuperscript{96} The consideration of correctional resources was one of the mandates to the Minnesota Sentencing Guidelines Commission (MSGC).\textsuperscript{97} The MSGC interpreted this legislative mandate to mean that prison populations, as a result of the guidelines, should not exceed prison capacity.\textsuperscript{98} In contrast, New York’s Commission, under a similar directive to consider correctional resources, did not interpret it as meaning that proposed sentences must conform to currently planned prison capacity.\textsuperscript{99}

This constraint forced the MSGC to limit the number of crimes that would result in imprisonment; if the commission wanted to increase the sentence for one crime, it would have to decrease the sentence for another crime. In order to determine what effects changes in the guidelines would have on prison population, the commission used a simulated model that estimated future prison population based on various sentencing schedules.\textsuperscript{100} The commission also set up a monitoring system so that sentences could be re-evaluated and adjusted to avoid overcrowding.\textsuperscript{101}

The commission felt consideration of corrections resources was legitimate because (1) the state has an obligation to avoid subjecting confined citizens to inhumane conditions and such conditions are likely to develop in overcrowded correctional institutions; (2) the MSGC is not a legislative body and cannot appropriate the funds required to provide additional prison bed space; (3) if the commission ignored the population impact of its decisions and the legislature did not appropriate additional funds, it would be the explicit public policy of Minnesota to operate prisons beyond their capacity.\textsuperscript{102}

\begin{thebibliography}{99}
\bibitem{94} Id.
\bibitem{95} Blumstein, supra note 11, at 139.
\bibitem{96} Minnesota is the only state to have such a policy. FREDERICK ET AL., supra note 21, at 10.
\bibitem{97} MINN. STAT. ANN. app. § 244 (West 1992). See infra note 102 and accompanying text.
\bibitem{98} Martin, supra note 2, at 45-46.
\bibitem{99} Alberghini, supra note 32, at 191-92.
\bibitem{100} Blumstein, supra note 11, at 138.
\bibitem{101} Knapp, supra note 37, at 184-85.
\bibitem{102} Id. at 183-84.
\end{thebibliography}
In contrast, Minnesota's critics allege that it is inappropriate to have a system that adjusts sentence ranges depending on the availability of prison beds. Resources alone should not drive punishment, and punishment should be more absolute. A problem with the critics' view is that it results in shifting discretion to the back door; that is, parole boards are used to release offenders to alleviate prison overcrowding. When legislatures and commissions are honest about the constraints of correctional resources, the reason for certain sentences are clear. When correctional resources are ignored and overcrowding results, "back door discretion" becomes common; parole boards or mechanisms such as good time, meritorious credits, program credits or administrative leave are used to alleviate overcrowding. Responsibility is shifted from judges to the back door, a situation similar to indeterminate sentencing.

G. Departures From Guidelines and Other Procedural Issues

Sentencing guidelines allow the trial judge to depart from presumptive ranges if the judge provides written findings to justify the departure. The standard which determines when the judge may depart varies from state to state. In the federal system, the rules governing departure restrict the judge's ability to sentence outside of the presumptive guideline range. The judge must base the departure on aggravating or mitigating circumstances that were not adequately taken into consideration by the commission when developing the sentencing ranges. The commission lists fourteen circumstances that it did not take into account, but this list is not exhaustive. 103 Congress and the commission have also stated that certain factors normally affecting sentencing cannot be used to justify departure: the age of the defendant; his educational and vocational skills or lack thereof; his mental, emotional or physical condition at the time of the offense; his drug or alcohol dependence; his employment record; his family responsibility; and his community ties. 104 The defendant's cooperation with prosecutors can be used to justify a decreased sentence. 105

Both Minnesota and Washington have adopted a standard that allows the judge to depart from the guidelines for substantial and compelling reasons. 106 The Minnesota Supreme Court had adopted a rule that the maximum sentence allowed was twice the presumptive sentence, 107 but the court later backed away from that rule saying that the only maximum limits

105. Glickman & Slaky, supra note 103.
106. Id.
were those set by statute.\textsuperscript{108} The Washington Supreme Court explicitly rejected the doubling standard.\textsuperscript{109}

Many procedural aspects of the sentencing guidelines must be considered to insure that the commission creates a workable plan. The commission must decide what to do with juveniles and, thus, structure a sentencing system designed for juveniles or maintain the current system with judicial discretion. Policy makers must also decide whether concurrent or consecutive sentences will be used. Under indeterminate sentencing the judge generally determines whether the sentences are concurrent or consecutive. In Minnesota the MSGC decided that concurrent sentences would be the norm with the most severe sentence dictating the sentence served. Consecutive sentences would be permissible, but not required, in limited circumstances such as multiple felony convictions that involve a crime against the person or when the conviction was for escape from lawful custody.\textsuperscript{110} Third, the commission must decide whether the use of "good time" in prisons will continue.

A fourth consideration for states is whether discretion should be eliminated at the back door: whether parole should be eliminated altogether. Most sentencing guidelines eliminate parole so as to create "real time" sentencing (subject in some states to deductions for "good time"). A minority of states retain parole.\textsuperscript{111} Eliminating parole achieves honesty in sentencing\textsuperscript{112} because parole completely undercuts the use of sentencing guidelines.\textsuperscript{113} Some guidelines allow limited back door discretion, but such discretion usually takes the form of a good time credit determined by a set formula, instead of the subjectivity of parole boards. Allowing some back door discretion may affect the length of sentences imposed, but does not affect the formulation of sentencing guidelines. Elimination of subjective parole creates "real time" sentencing and prevents sentencing guidelines from being circumvented at the back door. While this circumvention may keep politicians from having to make tough political decisions, it does not create honesty in sentencing.

In order to enforce the use of sentencing guidelines and to review the sentences imposed, most states use appellate review. In Minnesota, as in most states, both the defendant and the state have an automatic right of appeal for any sentence outside of the presumptive range.\textsuperscript{114} The result in Minnesota has been surprisingly few sentencing appeals. Only 130 opinions were issued from May 1980 through April 1984, yet the threat of review has served as an effective enforcement mechanism for judges.\textsuperscript{115}

\textsuperscript{108} State v. Mortland, 399 N.W.2d 92, 94 n.1 (Minn. 1987).
\textsuperscript{109} State v. Oxborrow, 723 P.2d 1123, 1127-28 (Wash. 1986).
\textsuperscript{110} Alberghini, \textit{supra} note 32, at 205.
\textsuperscript{111} FREDERICK ET AL., \textit{supra} note 21, at 15-16.
\textsuperscript{115} Knapp, \textit{supra} note 37, at 183.
H. The Importance of Feedback

As sentencing guidelines are a relatively recent phenomenon, constant feedback is necessary to reform and improve the guidelines. Minnesota pioneered a permanent feedback system when it created its sentencing guidelines. The Minnesota Commission collects data to determine how often the guidelines are followed and the reasons for departures. This data can be used by the legislature and the commission to modify sentencing policies and to coordinate sentencing practices and correctional resources. The feedback also forces participants in the system to be accountable for their sentencing decisions.\(^\text{116}\) Feedback allows the commission to further refine the system, so that the quality of sentencing will continue to increase. Any state developing sentencing guidelines should refer to the adjustments made by other states to avoid the same mistakes and then set up its own feedback system to constantly improve its guidelines.

I. Obtain Support for Sentencing Reform

Participants in the criminal justice system deal with the guidelines on a day-to-day basis and can exert pressure on the legislature. Thus, the designers of sentencing reform should examine the needs and interests of the individuals and groups that comprise the criminal justice system and see how best their needs can be met within the goals of system.

Judges, of course, are important participants in the criminal justice system. Judges' opinions on sentencing reform vary from state to state and among judges within the same state. Judge Breyer reports that a federal study showed that fifty percent of the federal judges favored sentencing guidelines.\(^\text{117}\) Judges sometimes dislike sentencing reform because their discretion is reduced, but with the elimination of parole, judges' discretion can actually be increased. The elimination of parole may help to alleviate judges' fears about sentencing reform by creating honesty in sentencing, one of the goals of the United States Sentencing Commission.\(^\text{118}\)

The support of those involved in the criminal justice system is crucial to the passage of sentencing reform. Promulgating new sentencing standards will result in institutional changes that affect many participants in the system, and the needs of these participants must be taken into account. Thus, "[t]hose jurisdictions that have made extensive efforts to obtain the understanding and support of all affected interest groups appear to have been more successful in gaining legislative approval when needed and fuller compliance when implemented than those that have not made such efforts."\(^\text{119}\)

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The public is also a key constituency. According to a Department of Justice survey, eighty-five percent of Americans believe that the courts in their local area are "not harsh enough" with criminals.\(^{120}\) Therefore, legislators face constituents who want harsher sentences but resist paying for more prison beds in which to put the criminals. The public can react harshly to the use of "real time" because it believes criminals are receiving a lighter sentence when actually that may not be case at all.\(^{121}\) By a two-to-one margin the public "place[s] a lot of blame" for the high crime rate on judges.\(^ {122}\) This loss of confidence in the judiciary may indicate one reason why the public supports the decrease of judicial discretion with sentencing reform.\(^ {123}\) Therefore, the public seems to send its elected officials contradictory messages: opposing reform when it leads to "real time" sentencing, but favoring reform when it decreases judicial discretion in sentencing.

VII. THE EFFECT OF SENTENCING GUIDELINES ON THE CRIMINAL JUSTICE SYSTEM

This final Section of this Article examines the effects of sentencing guidelines in the federal courts and states that have adopted them. This analysis should provide states with some idea of the effect that guidelines would have on their criminal justice systems.

A. Trials and Plea Bargaining

Sentencing guidelines may reduce plea bargaining and increase the number of trials, a concern judges often express. A sentencing scheme based on the facts of the criminal episode, rather than on whether the defendant pleads guilty, may result in a decrease in guilty pleas unless the system provides some explicit benefit for a guilty plea.\(^ {124}\) Even a slight reduction in the percentage of guilty pleas would cause a significant increase in the percentage of trials. For example, a reduction in guilty pleas from ninety percent to eighty percent requires the assignment of twice the number of judges, court reporters, bailiffs, clerks, jurors and courtrooms. A decrease to seventy percent triples this demand.\(^ {125}\)

The federal system specifically provides that a defendant is not entitled to a sentence reduction simply for pleading guilty. Therefore, it would appear that an increase in trials would result, but the system provides some advantages for pleading guilty. First, the guidelines offer a two-level reduction in the

\(^{120}\) John M. Greacen, What Standards Should We Use to Judge Our Courts?, 72 JUDICATURE 23, 24 (1988).

\(^{121}\) See FREDERICK ET AL., supra note 21, at 34.

\(^{122}\) Id.


\(^{124}\) Robinson, supra note 44, at 11.

offense level to defendants who manifest an "acceptance of personal responsibility."\textsuperscript{126} Second, the guidelines may actually penalize the unsuccessful presentation of a defense at trial. One guideline provides for a two-level sentence increase if the defendant "attempts to impede or obstruct the administration of justice during the ... prosecution of the instant offense."\textsuperscript{127} Thus, a possible four-level difference exists between pleading guilty and being found guilty at trial. Third, under the guidelines judges retain the discretion to sentence anywhere within the range, and a guilty plea may increase the likelihood of a sentence at the low end of the range. While there may be less room to negotiate, some room remains, and defendants will take what they can get. If the ranges are too small, such as three to four years, negotiation would become useless and the sentence advantage of pleading guilty before trial would be eliminated. To date, this has not been a problem because most ranges are larger. Fourth, the guidelines permit relatively unfettered plea bargaining over the charge or the facts. The charge and the facts become increasingly important in a determinative sentencing system where the charge and facts determine within which range the sentence presumptively falls. Bargaining over mitigating circumstances can also occur. Finally, the lawyer’s pressure on his or her client to plead guilty remains.

Many judges fear sentencing guidelines will increase the number of trials. According to a survey of federal judges by the Federal Courts Study Committee, nearly three out of four judges believe that the guidelines have reduced incentives to plead guilty and that, as a result, their caseloads are rising.\textsuperscript{128} Most of the evidence to date shows that the number of trials has not increased. For example, in North Carolina sentencing guidelines did not increase the number of trials. In fact, among defendants who pled guilty to felonies pursuant to a formal plea bargain, the percentage who obtained a prosecutor’s promise to any sort of sentence recommendation decreased from fifty-nine percent before the guidelines were instituted to forty-five percent afterwards.\textsuperscript{129} Professor Clarke suggests this implies that some defendants, who formerly would have received a jury trial and been convicted of felonies, were more willing to plead without a prosecutor’s sentence recommendation after the guidelines were in place.\textsuperscript{130} Clarke’s study compared the years 1970 through 1980 (before the guidelines), with the years 1981 through 1982 (after the guidelines). He discovered that the number of trials in district courts decreased from 1.08 percent to 0.76 percent and in superior court from 5.71 percent to 3.20 percent.\textsuperscript{131}

Minnesota experienced a similar effect. Despite the primary concern that an increase in trials would result, approximately five percent of felony convictions were achieved by means of a trial in 1978, compared to four

\textsuperscript{126} Glickman & Slaky, \textit{supra} note 103, at 3.
\textsuperscript{127} Id. at 4.
\textsuperscript{129} Clarke, \textit{supra} note 33, at 146.
\textsuperscript{130} Id. at 146-47.
\textsuperscript{131} Id. at 146.
percent of felony convictions in the 5500 guideline cases.\textsuperscript{132} In Florida both bench and jury trial rates declined in two of the three circuits studied.\textsuperscript{133}

An additional effect on caseloads is the timing of guilty pleas. A study of determinate sentencing in California showed that guilty pleas were made earlier in the trial process after the sentencing reform.\textsuperscript{134}

Sentencing reform poses increasing complexity for judges. A study of federal judges found that one-third of the judges surveyed reported that the time necessary to sentence felons had increased by at least fifty percent under the guidelines.\textsuperscript{135} Commissions must create a sentencing system that is easy for the judges to use and master, or the judges may become frustrated and circumvent the guidelines. In Florida, for example, the guidelines divided all felonies into nine categories. A separate set of guidelines and a matrix was established for each category.\textsuperscript{136} The confusion created by these nine matrices led the Florida Sentencing Commission to formulate a revised structure that used a single sentencing grid.\textsuperscript{137}

Beyond an increase in complexity and the number of trials, critics are concerned that more sentences will be appealed. Some anecdotal evidence shows that this has occurred, but there are no extensive, clear studies on the subject to date. A study of several states with sentencing guidelines found an increase in the numbers of appeals raising sentencing issues, yet most of those appeals involved other issues as well. For instance, sentencing issues were considered by the Appellate Court in Springfield, Illinois, in fifty-three percent of their cases in 1983.\textsuperscript{138} Yet, in Rhode Island the percentage of cases involving sentencing issues was only nine percent for 1983 to 1984.\textsuperscript{139} This study found that sentencing issues were rarely the cause for reversal of sentences, but did result in cases being sent back to the trial court for resentencing.\textsuperscript{140} A different result occurred in Minnesota, where there was no increase in appeals after the imposition of sentencing guidelines. Through February 1982, 8500 sentences had been issued under the guidelines, with about 1000 of those involving either dispositional or durational departures. Yet, there were only seventy sentencing appeals.\textsuperscript{141}

\begin{thebibliography}{9}
\bibitem{132} Knapp, \textit{supra} note 55, at 254.
\bibitem{133} Holten & Handberg, \textit{supra} note 113, at 261-62.
\bibitem{135} Cilwick, \textit{supra} note 128, at 17.
\bibitem{136} Holten & Handberg, \textit{supra} note 113, at 261.
\bibitem{137} \textit{Id.} at 267.
\bibitem{139} \textit{Id.}
\bibitem{140} \textit{Id.}
\bibitem{141} Knapp, \textit{supra} note 55, at 254-55.
\end{thebibliography}
B. Prison Population

As discussed earlier, prison population is a constant problem in the United States. In July 1977, prisons in twenty-nine states and territories were either under court order for prison overcrowding or were involved in litigation likely to result in such a court order. By February 1980, this figure had risen to thirty-two states and territories, and by the end of 1981 the number was forty.\textsuperscript{142} These statistics on prison population illustrate the importance of examining the impact of sentencing reform on prison population.

Minnesota coordinated sentencing policy and correctional resources, as described above;\textsuperscript{143} the effect on prison population shows that Minnesota's plan was successful. During 1981, the first year of the guidelines, incarcerations to prison were close to the level of incarcerations anticipated by the guidelines. As a result, prison populations dropped from almost 100 percent of capacity to approximately ninety-three percent of capacity.\textsuperscript{144} Incarcerations in 1982 increased and prison population grew to capacity. A possible crisis existed; however, the legislature and commission worked together in 1983 to avert the projected crisis in prison population. The legislature extended the "good time" statute to mandatory minimum sentences that had previously been excluded.\textsuperscript{145} Minnesota's program is a "success" when looked at from a prison population perspective, but critics argue that such changes in the sentencing rules based on prison population are not good for the criminal justice system. In Minnesota critics point out that the length of a defendant's sentence could depend on prison capacity. For example, those imprisoned under mandatory minimum sentences prior to the application of good time served a longer sentence that those imprisoned today. Critics fear that more changes such as this one will further harm the goal of proportionality in sentencing.

Overall, the imprisonment rates in Minnesota are lower after the guidelines; nineteen percent of felons were imprisoned prior to the sentencing guidelines and fifteen percent after their implementation.\textsuperscript{146} However, the length of sentences did increase. After the guidelines, the average period of imprisonment was 25.6 months and the average pronounced sentence was 38.3 months; this represents a 19.9 month increase in pronounced sentences.\textsuperscript{147} The decrease in imprisonment of property offenders, who tend to serve shorter sentences, and the increase in sentences for violent offenders and those with long criminal histories produced the increase in the length of sentences imposed. For example, forty-five percent of serious person offenders were sent to prison in the pre-guideline period; after the guidelines, this number was


\textsuperscript{143} See supra text accompanying notes 96-102.

\textsuperscript{144} Knapp, supra note 37, at 187-88.

\textsuperscript{145} Id. at 188.

\textsuperscript{146} Knapp, supra note 55, at 249.

\textsuperscript{147} Id.
seventy-eight percent, a seventy-three percent increase.\textsuperscript{148} For those offenders with low offense severity levels and low criminal history scores, there was a seventy-two percent reduction in prison sentences, from fifty-four percent to fifteen percent.\textsuperscript{149}

North Carolina’s post-guideline data reveals different results, with the percentage of convicted felons receiving a prison sentence increasing from fifty-five percent in 1979 to sixty-three percent in the post-guideline years of 1981 through 1982.\textsuperscript{150} After the guidelines, sentencing became generally less severe and less varied. In 1979 the difference between the length of sentences in the twenty-fifth percentile and the seventy-fifth percentile was eighty-four months; while in 1981 through 1982, the difference was only forty-eight months.\textsuperscript{151} In terms of severity, sentences for the twenty most frequent felonies showed a slight decrease in sentencing length. Yet, for most offenses the changes were not statistically significant.\textsuperscript{152} The study also examined North Carolina’s prison population and predicted that five years after the guidelines were in place, the post-guideline prison population would be about 900 inmates less than it would have been under the pre-guideline system.\textsuperscript{153}

In Florida the commission did not take prison population into account in formulating its guidelines. In part, this omission has led to a crisis situation.\textsuperscript{154} Historical sentencing practices were used in formulating the guidelines so that the effect on prison population would be "neutral."\textsuperscript{155} However, Florida has experienced an explosion of drug crime prosecutions, which strains the entire judicial system, including prisons. With prison overcrowding reaching crisis proportions, the Florida Sentencing Guidelines Commission has begun a re-examination of the sentencing guidelines.\textsuperscript{156}

Florida’s experience illustrates two points. First, it is important to consider the effect of guidelines on prison population, including how demographics and other factors will affect prison population in the absence of guidelines. Second, guidelines will not by themselves solve a prison population problem; either new prisons must be built or sentences must be shorter.

\textbf{C. Prosecutorial Discretion}

Critics claim that sentencing reform shifts discretion and power from the judge to the prosecutor because prosecutors determine what criminal charge or charges will be brought. Under sentencing guidelines, critics explain that

\begin{itemize}
  \item \textsuperscript{148} \textit{Id.} at 240.
  \item \textsuperscript{149} \textit{Id.}
  \item \textsuperscript{150} Clarke, \textit{supra} note 33, at 148.
  \item \textsuperscript{151} \textit{Id.} at 150.
  \item \textsuperscript{152} \textit{Id.} at 149.
  \item \textsuperscript{153} \textit{Id.} at 151.
  \item \textsuperscript{154} Holten & Handberg, \textit{supra} note 113, at 260.
  \item \textsuperscript{155} \textit{Id.} at 261.
  \item \textsuperscript{156} \textit{Id.} at 260.
\end{itemize}
the sentence depends most heavily on the particular statutory offense or offenses of conviction and less heavily on the defendant’s actual conduct underlying the offense or offenses. This criticism is championed by the defense bar, whose members fear that the importance of the charge under guideline sentencing results in too much prosecutorial power.157

The United States Justice Department’s November 1, 1987, Prosecutors Handbook on Sentencing Guidelines confirms some of this criticism. This handbook instructs federal prosecutors that it is "imperative" for them to consult the guidelines before choosing what offense or counts to charge, particularly in multi-count cases, in order to obtain the "best," that is the longest, sentence.158 The handbook suggests that "if an aggravating factor is present in a particular case but is not included in the guideline for a specific offense, the prosecutor should consider whether an alternative way to charge the offense exists so that the factor will be recognized in the guideline sentence itself without the need for departure."159 Especially problematic, from the perspective of defense counsel, is the handbook’s alleged endorsement of sentence enhancement by "splitting counts" between two indictments or between federal and state prosecutions. For example, if two unrelated offenses of equal gravity are charged together in the same indictment, they will result under the guidelines in an offense level "only" two levels greater than the offense level for one of the offenses alone. If the prosecutor charges them separately, the defendant could face consecutive sentences.160

Some evidence of this increase in prosecutorial power is seen in jurisdictions that have adopted sentencing guidelines. Federal judges note this increase in prosecutorial power and report that the guidelines’ rigidity is "causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor."161 Evidence in Minnesota confirms that prosecutors are using this power. For instance, if an offender with a limited criminal history commits an aggravated robbery, but is charged only with simple robbery, the offender would receive a presumptive stayed sentence upon conviction instead of a presumptive commitment to prison.162 Analysis of evidence from Minnesota shows that some charge manipulation occurs, especially in aggravated robbery, assault and criminal sexual conduct cases. For example, in cases where the most serious offense alleged was aggravated robbery, only 49.2 percent of offenders with criminal history scores of zero were convicted of that charge, and the majority were convicted of sentences that did not carry presumptive imprisonment.163 Approximately sixty percent of alleged aggravated robbery offenders with a criminal history score

157. See Glickman & Slaky, supra note 103.
158. Id. (quoting U.S. DEP’T OF JUSTICE FEDERAL SENTENCING GUIDELINE MANUAL (1987)).
159. Id.
160. Id.
161. Cilwick, supra note 128, at 17 (quoting The Federal Courts Study Committee survey of judges).
163. Id.
of one were convicted of that offense, and 65.9 percent of alleged aggravated robbery offenders with a criminal history score of two were convicted of aggravated robbery.\textsuperscript{164} This data indicates that prosecutors are more likely to allow charge reduction for aggravated robbery among offenders with limited criminal histories.

Some evidence from guideline states demonstrates that sentencing guidelines have not increased prosecutorial power, but have instead shifted the area for negotiation. The new type of plea bargaining is charge and fact bargaining. As Professor Charles Ogletree explains, "we still have bargaining, \textit{but} it's fact bargaining and charge bargaining.\textsuperscript{165} In charge bargaining, the prosecution agrees to dismiss some charges in exchange for a plea of guilty to others. Because it is the offense of conviction that determines the presumptive sentence, this plea can result in a sentence reduction. Fact bargaining involves a stipulation to the operative facts which will be used for sentencing. Because the facts of the crime, such as whether a gun was used, contribute to the length of the sentence, the parties can stipulate to the facts of the offense and, thereby, affect the sentence even under a guideline system. Provided the operative facts are not misleading, the parties may stipulate to them.\textsuperscript{166}

While an increase in prosecutorial power was a concern of the Minnesota Commission, the commission chose not to deal with the issue specifically until the guidelines went into effect and the situation could be studied.\textsuperscript{167} Minnesota continues this monitoring, but has not taken any action.\textsuperscript{168} New York established a similar monitoring program, but found no evidence that its determinate sentencing has resulted in a significant increase in prosecutorial power.\textsuperscript{169} No specific evidence has shown the effect of this bargaining or the influence on prosecutorial power beyond the aforementioned inferences, and no state has established any type of policy to handle such problems.

\textbf{D. Judicial Discretion}

Sentencing guidelines take the human element out of sentencing. Judges and others critical of sentencing reform often make this statement.\textsuperscript{170} Prior to sentencing reform, with little statutory guidance and virtually no appellate review, sentencing judges in most jurisdictions were left to themselves to decide what facts about a crime or offender were relevant for sentencing and how those facts ought to affect sentence length.\textsuperscript{171} Sentences were based upon a judges' personal philosophy of criminal law, thus creating a sentencing

\textsuperscript{164} Id.

\textsuperscript{165} Charles Ogletree, Assistant Professor of Law, Harvard Law School, Address at Harvard Law School (Apr. 2, 1990).

\textsuperscript{166} See Glickman & Slaky, supra note 103.

\textsuperscript{167} Martin, supra note 2, at 57.

\textsuperscript{168} Alberghini, supra note 32, at 201-02.

\textsuperscript{169} Id. at 202.

\textsuperscript{170} See Holton, supra note 29, at 19.

\textsuperscript{171} Pope, supra note 38, at 1258-59.
system varying from judge to judge. Former Judge Marvin Frankel has stated, "[S]weeping penalty statutes allow sentences to be 'individualized' not so much in terms of defendants, but mainly in terms of the wide spectrum of character, bias, neurosis, and daily vagary encountered among occupants of the trial bench."172 Judge Breyer explains that disparity was a problem before sentencing reform: "If we have a lottery wheel to assign judges, there must be disparity."173

Sentencing reform, with presumptive sentencing ranges, decreases judicial discretion. Judges' discretion is not completely eliminated, however, because they may depart from the guidelines. Departure standards still place limits on judicial discretion. As discussed above, the Federal Sentencing Guidelines allow judges to depart only when a factor not adequately taken into account by the Sentencing Commission is present.174 Critics claim that the essential qualities of the judge, as a professional in the criminal justice system, make judges most qualified to sentence offenders. Stripping the judge of this power relegates the judge to an undeserved inferior position by replacing him with other professionals, such as prosecutors.175

Judges consider many factors when sentencing, a process which sentencing guidelines cannot duplicate. The sentencing ritual is multi-faceted; the judge examines the character and mental make-up of the offenders and the circumstances under which the crime was committed. One Justice Department study claims that judges consider more than two hundred separate factors when making sentencing decisions.176 The authors of the study explained, "Of course, a judge will not consider all of them in any one case, and different judges have different views as to whether a given factor should be considered in sentencing a particular defendant."177

One commentator tells the story of a defendant named Henry Roth who pled guilty to aggravated sexual assault. The sentencing judge felt that presumptive sentence for this offense was too harsh for this offender, but when the judge tried to depart from the guidelines, he was reversed by the appellate court.178 Evidence showed that Roth was under the influence of drugs when he committed the assault and that this crime was "out of character" for Roth. Rather than send Roth to prison, the judge wanted to sentence Roth to probation upon the condition that Roth attend an inpatient rehabilitation center and continue his visits to Alcoholics Anonymous.179 It is impossible to determine whether this sentencing judge was "correct" in

173. Breyer, supra note 41.
175. Fleet, supra note 123, at 369-70.
176. Id. at 376 (citing NATIONAL INST. OF LAW ENFORCEMENT AND CRIM. JUST., LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, REPORT OF THE FEASIBILITY STUDY 39-44 (1976)).
177. Id. at 370.
178. Bainbridge, supra note 15, at 60.
179. Id.
giving this defendant probation or if Roth deserved the four-year prison sentence he received, but it does show a judge who disagreed with the presumed range and was unable to depart.

Others favor the decrease in discretion. Because guidelines are based in part on historical sentencing practices, the sentencing criteria are evaluated on a state-wide, rather than local level. A state-wide system creates equity and fairness in sentencing in the minds of supporters.180 Whether the goals of equity and fairness are actually met is examined in the next Section, but the key is that sentencing reform does not decrease discretion as much as critics would believe. Judges want discretion, and part of this discretion means certainty that the sentence they give will actually be served. Sentencing reform is usually combined with an elimination of parole or the use of "real time" sentences. Thus, while the judges may be forced to operate in a system that creates a presumptive range, the "back door" sentencing discretion of the parole board is eliminated.

E. The Goal of Decreasing Disparity and Achieving Proportionality

To determine the success of sentencing reform, the goals of the reform must be clearly spelled out. Many state legislatures or sentencing commissions state their goals in enabling legislation. Two of the dominant and most common goals, which were the catalyst to the reform movement, are decreasing disparity between sentences of similar offenders and achieving proportionality among all sentences.

One indirect measurement of how well these goals, as well as all others, are being achieved is the percentage of cases in which the presumptive sentence is followed. The resulting data may also provide some insight into how well the guidelines are drafted. If a large percentage of the cases involve departures, it may indicate that some factors or circumstances are missing from the guidelines. As of November 1989, 81.4 percent of all sentences under the federal sentencing guidelines fell within the presumptive ranges.181 In 1984 and 1985, between 78.9 percent and 84.4 percent of the sentences in Florida were within the recommended guidelines.182 Later data reveals that this trend continued in Florida. Eighty-one percent of all guideline-recommended sentences through 1986 were ultimately imposed.183 Through 1988, 85.2 percent of the sentences in Florida adhered to the guidelines.184 Leonard Holton, director of the Florida Sentencing Guideline Commission, indicates that this high percentage illustrates that equity and fairness in sentencing can be achieved.185

181. Cilwick, supra note 128, at 17.
182. Holton, supra note 29, at 22.
183. Id.
185. Holton, supra note 29, at 22.
North Carolina found that written reasons were used in only seventeen percent of its cases.\textsuperscript{186} For the first 5500 cases in Minnesota, the departure rate was 6.2 percent, with half of the departures upwards and half downwards.\textsuperscript{187} The numbers are not as low for executed sentences. The departure rates for those receiving sentences were 23.9 percent, with 7.9 percent receiving longer sentences than recommended and 16.1 percent receiving shorter sentences than recommended.\textsuperscript{188}

The evidence in North Carolina shows that aggravating circumstances were more commonly found than mitigating circumstances.\textsuperscript{189} In Minnesota the rates of aggravating and mitigating circumstances were even for imposed sentences, but mitigating circumstances were more common for executed sentences.\textsuperscript{190} In Florida mitigating circumstances were more common. Through 1988 in Florida, 14.9 percent of the sentences varied from the guidelines, with 10.4 percent finding mitigating circumstances and 4.5 percent finding aggravating circumstances.\textsuperscript{191} Two Florida professors indicate that the imbalance of mitigating and aggravating factors reflects prosecutors agreeing to sentence reductions in exchange for guilty pleas.\textsuperscript{192}

Evidence on the decrease in sentencing disparity is generally favorable for reformers. Norval Morris and Michael Tonry report that Minnesota and Washington state have shown significant decreases in disparities. North Carolina and California have also shown decreased disparity.\textsuperscript{193}

Uniformity in sentencing increased in Minnesota after the guidelines went into effect in 1978. This uniformity was especially noticeable in the disposition of offenders sentenced to prison, with a fifty-two percent increase in uniformity in 1981.\textsuperscript{194} In 1982 and 1983, sentencing was more uniform than before the guidelines, but less so than in 1981. In 1982, dispositions were forty-four percent more uniform than before the guidelines, and in 1983 the percentage was thirty-eight.\textsuperscript{195} Durational uniformity was more difficult to measure in the early days of sentencing guidelines, but evidence in 1983 discloses an increase in uniformity due to the use of "real time" sentencing.\textsuperscript{196}

Additional evidence of the increase in uniformity is found by comparing pre-guideline data with Minnesota’s post-guideline departure rate of 6.2 percent. In 1978, state imprisonment practice in Minnesota would have yielded a dispositional departure rate of 19.4 percent, with twelve percent

\begin{itemize}
\item 186. Clarke, \textit{supra} note 33, at 147.
\item 188. \textit{Id.} at 244.
\item 189. Clarke, \textit{supra} note 33 at 147.
\item 190. Knapp, \textit{supra} note 55, at 244.
\item 191. Holten & Handberg, \textit{supra} note 113, at 262.
\item 192. \textit{Id.}
\item 193. Morris & Tonry, \textit{supra} note 9, at 10.
\item 194. Knapp, \textit{supra} note 37, at 187. The author provides no information as to how these statistics were calculated or what data was used to determine the statistics.
\item 195. \textit{Id.}
\item 196. \textit{Id.}
\end{itemize}
departing upwards and 7.4 percent downward. Thus, the 6.2 percent departure rate indicates increased uniformity in sentencing. Thus, the 6.2 percent departure rate indicates increased uniformity in sentencing. It is impossible to determine whether there has been any increase in durational uniformity for executed sentences because there is no pre-guideline data with which the durations under the guidelines can be usefully compared. The elimination of parole also makes this comparison difficult. Despite these problems, an attempt was made to develop comparative data. Due to the difficulties enumerated above, this data is questionable, but it estimates a pre-guideline departure rate of thirty-eight percent. The resulting data indicates a more uniform sentencing system following sentencing reform in Minnesota.

A study of the guidelines in Maine also showed a reduction in disparity. The more formalized system of sentencing resulted in less judicial discretion, which in turn reduced disparity.

In other states the inferences drawn from the data is less clear. A study of burglary cases in Florida shows that the guidelines did not reduce sentence disparity, and variation in sentencing remained substantially unchanged after introduction of the guidelines. A study of Florida’s guidelines by two Florida professors concluded that the guidelines had reduced disparities between jurisdictions. This study also revealed that the guidelines were more lenient on property crimes, especially burglaries, and harsher with violent offenders. This result may cast some doubt on the study of burglaries. Evidence on burglary cases in Maryland is more ambiguous. At most, the guidelines may have resulted in a modest decrease in disparity in some test cites.

A second type of disparity that guidelines sought to address was disparity based on the race, gender, social and economic status of the convicted felon. Some states that have studied the effect of their guidelines have found that sentencing disparity based on these illegitimate factors decreased, but did not disappear, after the guidelines were put into place. Yet, other states have found that sharp racial differences have remained under sentencing reform.

198. Id.
199. Id. at 244-45.
200. Id. at 245-46.
202. Carrow, supra note 52, at 163.
204. Id.
205. Carrow, supra note 52, at 163.
206. See Clarke, supra note 33, at 149; Knapp, supra note 55, at 249-54.
An example of decreasing disparity is North Carolina where the disadvantage to blacks nearly disappeared after sentencing guidelines were implemented. Before the guidelines, felony sentences of blacks were estimated to be ninety-two months longer than for whites; after the guidelines, the difference dropped to nearly nothing.\textsuperscript{207} After the guidelines were in place in Minnesota, the sentences for whites were on average three months less than for blacks, 37.8 months for whites as compared to 40.8 months for blacks.\textsuperscript{208} One problem with the state-wide analysis in Minnesota is that ninety percent of the blacks are sentenced in two counties, Hennepin and Ramsey. Within those counties, the differences among the races are even more startling; in Hennepin, for example, the average sentence is 5.4 months longer for blacks than for whites.\textsuperscript{209} Native American sentences in Hennepin were 13.3 months longer than sentences for whites.\textsuperscript{210}

Minnesota's study also found that sentences for unemployed defendants were higher than sentences imposed on those who were employed at the time of their sentence. The imprisonment rate for employed offenders was 4.9 percent, while for unemployed offenders the rate was 24.4 percent.\textsuperscript{211} Eighty percent of black offenders and ninety percent of Native Americans were unemployed, while only sixty-three percent of whites were unemployed.\textsuperscript{212} Thus, the employment disparity may actually be the cause of the racial differences.\textsuperscript{213} On the issue of gender, Minnesota found that females received a sentence of 7.6 months less on average than men.\textsuperscript{214}

Post-guideline data generally points to an improvement in proportionality. In developing crime-seriousness scales on which to base the sentencing guidelines, a state's criminal code must be reviewed. This review would improve proportionality, even if indeterminate sentencing remained. Sentence proportionality is achieved by developing crime-seriousness scales and substantial compliance with the guidelines. Evidence of problems with proportionality from pre-guideline data is more anecdotal than statistical because, until crime seriousness scales were developed, proportionality could not be measured.

Proportionality is not served when a departure is warranted but not made, or conversely, when a departure is made but not warranted. In Minnesota an in-depth review of 1728 cases from the eight most populous counties was completed to determine if substantial and compelling circumstances existed to support departures.\textsuperscript{215} This analysis showed that in approximately one percent of the cases a dispositional departure would have been justified and

\textsuperscript{207} Clarke, supra note 33, at 149.
\textsuperscript{208} Knapp, supra note 55, at 250-51. This study was conducted by comparing those defendants who fell in each cell of the matrices. \textit{Id.} at 249-50.
\textsuperscript{209} \textit{Id.} at 251-52.
\textsuperscript{210} \textit{Id.} at 252.
\textsuperscript{211} \textit{Id.} at 253.
\textsuperscript{212} \textit{Id.} at 253-54.
\textsuperscript{213} See Blumstein, supra note 11, at 135.
\textsuperscript{214} Knapp, supra note 55, at 253.
\textsuperscript{215} \textit{Id.} at 247.
would have increased proportionality, but instead, a presumptive disposition had been imposed.\textsuperscript{216} Most of these cases were found to warrant aggravated dispositions. Further, presumptive durations were imposed in approximately two percent of state imprisonment cases that were deemed to have warranted durational departures.\textsuperscript{217} When dispositional departures were made, twenty-eight percent of these departures were judged to be necessary to maintain proportionality by the researchers studying sentencing decisions. A departure was not considered essential for the other seventy-two percent. Approximately half of the aggravated dispositions were deemed to be non-essential for achieving proportionality, and approximately ninety percent of the mitigations were judged non-essential to achieve proportionality.\textsuperscript{218} The above figures for executed sentences illustrate that fifteen percent of the durational departures were necessary to achieve proportionality, while the other eighty-five percent were non-essential.\textsuperscript{219} Approximately seventy percent of the aggravated departures and approximately ninety percent of the mitigations were also deemed to be non-essential to achieve proportionality.\textsuperscript{220} Overall, this study concludes that in most cases departures were non-essential to achieve proportionality, but it must be remembered that in some respects proportionality is a subjective standard and this study only reflects one group of researchers' views of proportionality.

VIII. CONCLUSION

Many states still have sentencing systems that are a result of piecemeal legislation that requires different sentencing systems for different offenses. For example, a state may have a sentencing scheme in which some offenses have mandatory minimums, others presumptively result in prison sentences, and others simply provide a broad range for sentences and leave sentencing decisions to judicial discretion. Reform of this piecemeal system is needed. Reform would decrease the disparity in sentencing and create uniformity throughout the state.

Many experts agree that sentencing guidelines are the most promising type of sentencing reform.\textsuperscript{221} Mandatory minimums are inflexible and tie the hands of judges. Experts report that such laws have no deterrent effect, induce circumvention by judges, prosecutors, and defense attorneys, and sometimes result in the imposition of unduly harsh sentences on minor offenders.\textsuperscript{222} In addition, mandatory minimums shift more discretion from the parole boards and the judges to the prosecutors,\textsuperscript{223} while sentencing

\textsuperscript{216} Id. at 248.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} See Morris & Tonry, supra note 87, at 27; Knapp, supra note 37, at 181.
\textsuperscript{222} Morris & Tonry, supra note 9, at 10. See also Structuring Sentencing Decisions, supra note 119, at 179.
\textsuperscript{223} Franklin E. Zimring, Sentencing Reform in the States: Lessons from the 1970s, in
guidelines allow judges to retain some discretion. Mandatory minimums also lead to large increases in prison populations, but are politically popular because they make the legislators appear to be "tough on crime." Despite their appeal, they are ineffective and have many negative consequences.

Sentencing guidelines are more promising. They may not be politically popular and may take more time to develop, but they are a comprehensive approach to sentencing. In developing guidelines, it is best if the legislature appoints a commission to develop the guidelines instead of developing them itself. Commission-developed guidelines tend to be more specific and more refined than legislatively defined sentences. Developing detailed guidelines takes a considerable amount of time, and a commission is better equipped to dedicate the necessary time to a legislative committee, which deals with many issues. In addition, a commission with representatives of many groups in the criminal judicial system enables those various representatives to assist in the development of the guidelines. This cooperative participation may aid in the acceptance of the guidelines by participants in the justice system and the legislature.

The legislature should provide the commission with specific purposes and goals that the guidelines are supposed to achieve, so that the purposes are clear to the public. This propels criminal sentencing decisions out into the open instead of hiding in the back door with parole boards.

In developing crime seriousness scales, adjustments, specific punishments and departure standards, commissions must examine all of the impacts which the guidelines will produce, including the effect on prison population. The legislature must tell the commission what effect on prison population the state is willing to accept; for example, whether the state is willing to build new prisons or whether prison population should remain stable. Guidelines do not have to result in an increase in prison population if a study of prison population is pursued and guideline punishments are formulated so that prison population does not exceed capacity. The difference between this method and indeterminate sentencing is that under indeterminate sentencing, prison overcrowding is dealt with by the back door policy of releasing inmates on parole. Sentencing guidelines create integrity in sentencing by being honest about the length of a defendant's imprisonment. Some structured discretion can remain with sentencing guidelines, such as early release if certain programs are completed or good time credit. Finally, after the guidelines are developed, further review is necessary to ensure refinements are constructed to deal with problems and to improve the guidelines.

Sentencing guidelines are often criticized for increasing the resources necessary to run the criminal justice system. This argument is unfounded. Sentencing reform forces legislators to be straightforward about how many resources they want to devote to the criminal justice system and then to devise guidelines to meet those needs. As this Article has demonstrated, guidelines can be structured that do not decrease plea bargaining or increase trials but

REFORM AND PUNISHMENT 113 (Michael Tonry & Franklin E. Zimring eds., 1983).
225. Knapp, supra note 31, at 47.
rather require the same amount of resources as under indeterminate sentencing. In determining what resources to devote to the criminal justice system, the legislature can also determine what resources to devote to matters such as intermediate sanctions and drug programs.

Finally, it must be remembered that guidelines can create uniformity in sentencing, but they will not solve all of a state's criminal justice problems. In Florida, for example, there are many complaints about the guidelines. Yet, those complaints are in part due to the large increase in drug crimes, which have swamped the entire judicial system, including prisons. This situation has nothing to do with the guidelines, and guidelines will not solve the problems created by the increasing drug cases. Florida may need more prosecutors and judges to deal with the influx of drug cases, but guidelines have no effect on the need for more prosecutors and judges. There is no evidence that the guidelines in Florida have increased the number of trials, and, in fact, evidence shows that the guidelines have actually decreased the number of trials. It is possible that the complex structure of the Florida guidelines with nine matrices is partially to blame, but restructuring the guidelines, not getting rid of them all together, may provide the solution. A second complaint in Florida is that sentences are too short. Once again, the guidelines are not to blame. Guidelines establish a structure in which to sentence, but the commission or legislature decides what sentences to impose. If the state wants to increase sentences, simply increasing the guideline sentences will accomplish this goal. Of course, then the state must deal with the consequences, such as prison overcrowding.

Overall, states should take the first step toward criminal sentencing reform and create a sentencing commission to formulate guidelines. Sentencing guidelines have proved successful in states that have enacted them, and the example of these states and the federal courts should be followed. Guidelines provide the best hope of sentencing reform by increasing uniformity and proportionality without the negative impacts of mandatory minimum sentencing.

227. See supra note 133 and accompanying text.
228. See Holton & Handberg, supra note 113, at 264.