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EVALUATION OF MINNESOTA'S FELONY SENTENCING GUIDELINES

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EXECUTIVE SUMMARY

INTRODUCTION

Few issues in criminal justice have generated more controversy than the ongoing debate about the relative merits of various sentencing philosophies. In the early 1970s, these debates were especially lively, fueled by several influential publications that seriously questioned the rehabilitative ideal and highlighted the disparities in the application of punishments under indeterminate sentencing systems (see, generally, American Friends, 1971, Frankel, 1972; Martinson, 1974; Fogel, 1975; von Hirsch, 1976). Out of this context, determinate sentencing and sentencing guidelines gained considerable support from diverse political factions as a means of addressing these problems. These sentencing reform efforts offered "liberals" a means of reducing disparities and improving the quality of justice, while they appealed to "law and order" advocates as a way to "get tough" on crime and escalate the severity of criminal sanctions (see Moore and Miethe, 1986, Greenberg and Humphries, 1980). Over the last decade, nearly all states have proposed or enacted some type of sentencing reform.

It is important to note, however, that sentencing reform has taken various forms. For instance, states with sentencing guidelines vary considerably in terms of who establishes the sentencing norms (legislatively, commission, or judicially imposed), whether sentencing practices are legally mandated or only advisory, the degree to which current sentences are based on prior sentencing norms, the underlying political and correctional ideology, and the specific criteria to be used when affixing criminal penalties. Yet, regardless of their particular structure, these diverse efforts share a common desire to constrain judicial discretion and to increase the uniformity, socioeconomic neutrality, and predictability of criminal sanctions.

Despite the popularity of these reform efforts, evaluations of determinate sentencing systems and sentencing guidelines reveal little decrease in disparities and little change over pre-reform practices. For instance, evaluations of California's pioneering effort have revealed only modest changes in sentencing practices attributable to its Uniform Determinate Sentencing Law (see Cohen and Tonry, 1983; Casper et al., 1982). Evaluations of determinate sentencing and sentencing guidelines in other states tell a similar story. Many of these reform efforts, however, have resulted in substantial increases in prison populations and subsequent strains on correctional resources. Drastic increases in prison populations have been projected or observed in Colorado, New Mexico, Pennsylvania, Indiana and most other states under their sentencing structures.

The most widely cited exception to this general pattern is Minnesota's felony sentencing guidelines. The 1983 Panel on Sentencing Research (Blumstein et al., 1983) cited Minnesota's determinate sentencing system as the only reform effort to date that substantially altered sentencing practices. Indeed, in the first two years of implementation, Minnesota's sentencing guidelines appeared to have brought about significant reductions in pre-guideline disparities and to have done so without placing additional burdens on correctional resources (see Miethe and Moore, 1985; Moore and Miethe, 1986; Knapp, 1984, 1982; MSCC, 1984, 1982). As a result of these initial successes, the Minnesota guidelines have attracted national attention. To date, at least one state (Washington) has adopted a similar system, while sentencing commissions similar to Minnesota's have been proposed or established in several others (e.g., Florida, Illinois, Michigan, Pennsylvania, South Carolina, Vermont, Wisconsin).

The general purpose of this study is to examine the degree to which the Minnesota felony sentencing guidelines have achieved their explicit goals and maintained their integrity in the face of a changing social and legal environment. After examining the structure and scope of authority of the guidelines, charging, plea bargaining and sentencing practices are compared over time to assess the degree to which the goals of sentencing uniformity, neutrality and proportionality have been achieved and, if so, whether earlier successes have continued through 1984 (i.e., four years after implementation of the guidelines). Given the popularity of determinate sentencing and that adaptations to structural changes usually occur over time, it is important to examine whether the Minnesota guidelines have survived the test of time and thus are a viable model of sentencing reform.

THE MINNESOTA SENTENCING GUIDELINES

Minnesota's felony sentencing guidelines took effect on May 1, 1980. Like several other states, Minnesota adopted a "commission approach" to implement sentencing reform. However, the particular structure of the determinate sentencing system developed by the Minnesota Sentencing Guidelines Commission (MSGC) differs in significant ways from those found in other states. Below, we focus on the structural features of the guidelines and critical choices exercised by the Commission which, in combination, contribute to the uniqueness of the Minnesota reform movement.

1. The General Structure of the Guidelines

As in other states, the enactment of the Minnesota Felony Sentencing Guidelines was the product of an intensive debate between various political factions, criminal justice officials and citizen-action groups. After a three year struggle characterized by "procedural maneuvering, emotionalism, and misunderstanding" (Appleby, 1982:301), a joint House-Senate committee in 1978 recommended the creation of a sentencing commission to whom authority to establish guidelines would be delegated. The Commission was authorized to establish "the circumstances under which imprisonment is proper" and "a presumptive, fixed sentence for the duration of such confinement based on reasonable offense and offender characteristics" (Minn. Stat. 244.09, 1978). However, the enabling legislation also afforded the Commission a great deal of authority and flexibility to dictate the nature and scope of the sentencing guidelines. How the Commission exercised its authority in several areas set the stage for a unique experiment in sentencing reform.

The sentencing guidelines established by the Commission embodied the principles of uniformity, neutrality, and proportionality of punishments, and are designed to make more rational use of available correctional resources. As discussed below, the Minnesota guidelines are both "presumptive" and "prescriptive", regulate both dispositional and durational decisions (but allow for departures from the presumptive sentence), mandate that the severity of convicted offense and the offender's prior criminal history be the two principal bases for sentencing decisions, and are calibrated in accordance with available correctional capacity.

A convicted felon's location in the "sentencing grid" determines the presumptive disposition (i.e., whether or not a prison term is imposed) and the duration of imprisonment. The sentencing grid has two dimensions: a vertical axis representing the seriousness of the convicted offense and a horizontal axis corresponding to a weighted index of the offender's prior criminal history (see Table 1). A line is drawn across the grid (called the dispositional line) to represent the combination of offense

seriousness and criminal history for which a prison sentence is either stayed or executed. A restricted range for the duration of prison confinement (about 7% above or below the presumptive sentence) is also provided in each cell of the matrix. Judges can impose any sentence within this range without necessitating a departure from the guidelines.

---Insert Table 1 about Here---

Both dispositional and durational decisions under the authority of the guidelines are considered "presumptive" in the sense that they carry the weight of law and are to be applied unless there are "substantial and compelling reasons" for departure. A judge is required to justify any departure from the presumptive disposition or duration with written statements outlining the circumstances for the departure. Furthermore, in this departure statement, it must be shown why the imposed sentence is "more appropriate, reasonable, or equitable than the presumptive sentence" (MSGC, 1982:13). By carrying the weight of law, presumptive sentences under the Minnesota guidelines are quite different from the voluntary or advisory standards used in most other states.

The Minnesota guidelines are also unique in terms of the Commission's choice of a prescriptive approach to establish sentencing standards. Most states have used a "descriptive" approach by relying upon statistical analyses of past sentencing practices to derive average sentences, and then using these normalized sentences as the basis for current practices. However, the MSGC chose to establish sentencing standards on the basis of policy choices concerning what should be appropriate sanctions. The "modified deserts" philosophy selected by the Commission meant that a premium would be placed on proportionality in sentencing (i.e., the punishment is commensurate with the gravity of the criminal act) and that sentence severity would be primarily determined by the seriousness of the convicted offense and, to a lesser extent, the offender's prior criminal behavior. The greater weight afforded offense severity is in sharp contrast to previous sentencing norms in Minnesota which placed greater emphasis on the offender's criminal history. However, under a descriptive approach to guideline construction and calibration, the critical question of the appropriate basis and amount of punishment is largely ignored by the reaffirmation of previous practices.

In addition to the "in/out" decision and the duration of prison confinement, the Minnesota guidelines also regulate the use of consecutive sentencing in cases of multiple convictions and departures from the presumptive sentence. Specifically, in cases of multiple current convictions, the presumptive sentence under the Minnesota guidelines is concurrent sentencing. However, consecutive sentences are permissible under any of the following situations: (1) when a current person offense occurs prior to expiration of a previous sentence for a crime against a person, (2) when there are multiple person offenses (i.e., multiple behavioral incidents) involving different victims, and (3) when one of the current convictions is for escape from lawful custody (see MSGC Commentary, 1983). The primary rationale for this policy is that if the severity of sanctions is to be proportional to the severity of the offense, consecutive sentences (which involve longer periods of confinement) should be reserved for more severe offenses. Under all other situations, the use of consecutive sentences involves a departure from the guidelines.

Dispositional and durational departures are the means by which the potential rigidity of uniform sentencing is ameliorated under the Minnesota guidelines. Departures from the guidelines are governed by both specific and general legal standards. While the general legal standard is "substantial and compelling reasons", the specific legal bases for departures involve proscribed factors (e.g., those factors which

cannot be used as reasons for departure) and a nonexclusive list of permissible reasons for departure. For instance, in furtherance of the goal of sentencing neutrality, the Commission prohibits aspects of the offender's socioeconomic status (e.g., race, gender, employment status, educational attainment, marital status) from being used as grounds for a departure. Whether or not defendants exercise their constitutional right to a trial is also prohibited as a basis for a departure. The nonexclusive list of reasons for departure include both mitigating factors (e.g., offender played minor role, victim was aggressor, offender lacked substantial capacity) and aggravating factors (e.g., victim was especially vulnerable, excessive cruelty to victim, the offense was a major economic crime).

The decision to calibrate sentences in accordance with available correctional capacity also distinguishes the Minnesota guidelines from other determinate sentencing systems. This decision was motivated by several practical and policy concerns. First, the concern with correctional resources and achieving a financially manageable system was apparent from the onset of the reform movement. The enabling legislation reaffirmed this goal by directing the Commission to "take into consideration" correctional resources when establishing the guidelines. Second, several commentators have noted the chances of ratification of the guidelines would have been lessened if the Commission proposed guidelines which placed undue strain on correctional resources (see Knapp, 1984; von Hirsch, 1982).

The Commission's decision to go beyond "taking into consideration" correctional resources by imposing a firm constraint, coupled with their choice of a retributive philosophy for punishment, had major implications on the development of sentencing standards. Specifically, the prison constraint insulated the Commission from legislative pressure to escalate criminal penalties across the board. Given the selection of a "modified deserts" approach and its commitment to proportionality in sentencing, demands for increased penalties for any particular offense or class of offenses would also necessitate increases in all other offense categories. Either of these proposed increases in sentence severity would have to be weighed against its impact on future prison populations. Again, this approach stands in sharp contrast to determinate sentencing in other states, where sentencing "reform" has been associated with escalating penalties and rising prison populations.

The end result of the Commission's efforts was the creation of a highly centralized, legally mandated, and fiscally manageable system of sentencing reform. The Minnesota guidelines reflect a broad commitment to the goals of reducing sentencing disparities and increasing the uniformity, socioeconomic neutrality, and proportionality of punishments.

Although considered one of the most rigorous and systematically crafted determinate sentencing systems (see Blumstein et al., 1983), the Minnesota guidelines are actually rather modest in scope in several respects. First, the guidelines apply only to felony convictions; offenders convicted of misdemeanors or gross misdemeanors fall outside the authority of the guidelines. Second, even though the "in/out" decision and the length of prison confinement is under their authority, the Minnesota guidelines do not regulate the type, conditions, or length of sentence imposed on felons who receive a stayed prison sentence. Given that over 80 percent of all felons in Minnesota receive a stayed prison sentence, judges still retain considerable discretion over sentencing decisions. Finally, as in other determinate sentencing systems, the Minnesota guidelines do not cover the critical area of prosecutorial discretion in charging and plea negotiation practices. Consequently, the major goals of the guidelines (i.e., uniformity, neutrality, and proportionality of punishments) may be subject

to circumvention through these non-regulated charging and plea negotiation practices.

2. Adjustments to the Sentencing Guidelines

A major criticism of current sentencing reform efforts is that their goals are easily circumvented by charging, plea bargaining, and sentencing decisions not under the authority of the guidelines. This criticism is based on the assumption that a "hydraulic" transference of discretion from judges to prosecutors will take place after implementation of sentencing guidelines. It is further assumed that this transference of discretion is especially apt under Minnesota-like guidelines which exert rather rigid control over judicial discretion, but do not regulate charging and plea negotiation practices (see, for review, Miethe and Moore, 1986). If this hydraulic effect characterizes post-guideline practices, gains in sentencing uniformity, neutrality, and proportionality may be offset by greater disparities in prosecutorial charging and plea negotiation practices. Under such conditions, the ability of the Minnesota guidelines to implement meaningful reform would be severely questioned.

Legislative and Commission-initiated changes, as well as evolving case law, have also increased the discretionary power of judges and prosecutors and may affect goal attainment under the guidelines. These changes include legislative increases in the mandatory minimums for weapons offenses, Commission-based changes in the computation of criminal history scores for "same day" sentencing, the use of amenability or unamenability to probation as a grounds for a departure from the guidelines, and the ability to depart from the presumptive sentence in cases of intrafamilial sexual assault when it is deemed in the best interest of the victim and family.

A major legislative change after implementation of the guidelines was the enhancement of the mandatory minimum sentences for the use of a firearm in the commission of other felonies (Minn. Stat. 609.11). Mandatory minimums in 1981 were increased from one year and a day to three years for first offenses, and from three to five years for subsequent firearm offenses. This statute (as amended) also provided prosecutors discretion to enter a motion to sentence apart from the mandatory minimum. Subsequent case law (Olson [1982]) extends the same discretionary authority to judges, pursuant to a written statement outlining why substantial mitigating factors exist.

Prosecutors have several options available to avoid the mandatory sentence and to entice defendants to enter guilty pleas to other charges. For instance, the firearm can be "swallowed" in cases of aggravated robbery and plead out as simple robbery, a second degree assault involving a weapon can be amended to making a terroristic threat, or the felony weapon charge can be reduced to a gross misdemeanor or misdemeanor. In each of these cases, the mandatory minimum and presumptive prison sentences can be avoided through charging and plea bargaining practices. If only particular types of persons receive this type of plea concession, the goals of uniformity, neutrality, and proportionality of punishments would be threatened by prosecutorial adjustments to this legislative change.

A more pervasive and potentially more serious adjustment to the sentencing guidelines stems from the Commission's modification in the way criminal history scores are computed for "same day" sentences. This policy was a direct result of the Hernandez decision in 1981.

Prior to the Hernandez decision, an offender's criminal history score was computed on the basis of prior sentences imposed before the current date of sentencing. Under this procedure, if a person was sentenced for two or more felony convictions on the same day, these "current" convictions could not be successively "read in" to

increase the criminal history score. Current convictions could only be used to enhance the felon's criminal history score for convictions at some later date. However, the Hernandez decision allows for "prior" criminal history points to be added for purposes of current sentencing decisions even when these felony points accrue from sentences pronounced on the same day. For instance, under the Hernandez procedure, a person with no prior record who is charged with seven counts of selling marijuana could end up with a criminal history score of 6 for the last conviction and, consequently, a presumptive prison sentence of 21 months. Yet, if one or more of these charges were dropped, the presumptive sentence would be a stayed prison sentence.

There are several fundamental ways that the Hernandez rule can be used by prosecutors to systematically determine the presumptive sentence under the guidelines. First, prosecutors can "target the dispositional line" by the number of separate behavioral incidents retained through conviction. If the charges involve separate and distinct acts (i.e., multiple behavioral incidents), entering a sufficient number of charges to guarantee a prison sentence upon conviction offers significant leverage in plea negotiations. Second, if these charges involve violent crimes against multiple victims, the ability to impose consecutive sentences upon conviction for multiple counts is also a major plea consideration. In each of these cases, the ability of prosecutors to dismiss, reduce, or aggregate additional charges provide enormous leverage to entice a defendant into a plea agreement. Since charging and plea bargaining decisions can determine the presumptive sentence, the selective use or threat of "Hernandezing" the charges may seriously undermine the goals of uniformity, neutrality, and proportionality of punishments under the guidelines.

Finally, the appellate courts have accepted "amenability or unamenability to probation" as a grounds for departure and the legislature has provided the opportunity to stay a prison sentence in cases of intrafamilial sexual assault if it is in the best interest of the family and victim. Both of these decisions have increased the discretionary power of judges and pose potential conflicts with the explicit goals of the Minnesota guidelines. For instance, given the prohibition against using social factors as a basis for either sentencing decisions or departures, the strong association between amenability to probation and the felon's social characteristics (e.g., employment, marital and educational status) means that departures on these grounds directly challenge the goals of sentencing uniformity and neutrality. The same is true of intrafamilial sexual assault (Minn. Stat. 609.3641.2), where social factors are likely to influence the determination of what is in the "best interests" of the victim and family.

OBJECTIVES OF THE CURRENT STUDY

The major purpose of the present study was to perform a comprehensive analysis of charging, plea bargaining, and sentencing practices at various stages in the evolution of the Minnesota guidelines. By examining aggregate trends in charging, plea bargaining and sentencing practices and estimating time-specific models of each of these practices, temporal changes in the nature, rates, and determinants of these decisions were identified. The specific research questions are outlined below:

- (1) Have changes in case-processing, charging, plea negotiation, and sentencing decisions occurred over pre- and post-guideline time periods?

- (2) Have the factors which had previously influenced sentencing, charging, and plea negotiation practices changed after the passage of the guidelines? If so, is there any indication of greater disparities over post-guideline periods?
- (3) Have legal changes which enhance prosecutorial and judicial discretion significantly altered charging, plea negotiation, and sentencing decisions? And, what effect, if any, do these changes have on the explicit goals underlying the guidelines?

DATA DESCRIPTION AND RESULTS

Three primary data sources were used to evaluate changes in charging, plea bargaining, and sentencing practices after implementation of the Minnesota guidelines. First, statewide data over various post-guideline periods (1981, 1982, 1984) collected as part of the Commission's monitoring function and a statewide sample of felony cases processed in 1978 were used to compute general trends in case processing and sentencing outcomes over time. Second, indepth data collected previously by the Commission for three time periods (1978, 1981, 1982) were supplemented with data on felony cases in 1984 collected as part of the present study. These indepth samples were drawn from the eight most populous urban and rural counties in the state of Minnesota and included extensive information on case attributes, case processing, plea negotiation practices, sentencing decisions, and offender characteristics. There was complete information on 1268, 1330, 1716, and 1673 convicted felons processed in this eight county region during the respective pre- and post-guideline periods. These county subsamples were the primary data source used in the current study.

The final dataset involves the results of a mail survey distributed to criminal court judges, prosecutors, and defense attorneys (mostly public defenders) in the same eight county region. The survey contained questions about the officials' perceptions of the attainment of goals under the guidelines, whether they believed that prosecutorial and judicial discretion had increased or decreased under the guidelines, and their perceptions of the major changes, benefits, and limitations of the guidelines. The overall response rate for the survey was 57.8% (200/346) and did not differ appreciably by type of criminal justice official. The survey results were used primarily to supplement and inform the quantitative analysis of charging, plea bargaining, and sentencing practices under the Minnesota guidelines.

1. Trends in Charging and Sentencing Practices Over Time

A comparison of the descriptive statistics from the statewide data and the eight county subsamples revealed some fundamental changes in sentencing decisions, case attributes, case processing, and offender characteristics over pre- and post-guideline periods. These trends are summarized below.

Sentencing Trends. Although lower than the pre-guideline level of 20.3%, the imprisonment rate has steadily increased over post-guideline periods, from 15.0% in 1981 to 19.6% by 1984. The average length of prison confinement increased over post-guideline periods up to 1982, but decreased again by 1984. Rates of dispositional departures from the presumptive sentence (especially mitigated departures) increased appreciably over post-guideline periods, with dispositional departure rates of 6.2% in 1981, 7.0% in 1982, and 9.9% by 1984. Although rates of mitigated durational departures are twice as high as aggravated departures at each post-guideline

period, overall rates of durational departures have decreased somewhat since 1981. Rates of consecutive sentencing and the imposition of stays of execution (versus stays of imposition) have remained fairly stable over pre- and post-guideline periods. However, among felons who received a stayed prison sentence, there has been a sharp increase in the use of jail time as a condition of a stayed sentence, rising from 44.7% in 1978 to 66.1% by 1984.

The rise in imprisonment rates over post-guideline periods and length of confinement up to 1982 posed a serious threat to correctional capacity. However, a potential crisis was averted by a reduction in the volume of crime, greater rates of mitigated dispositional departures, and some adjustments by the Commission in 1983 in the length of presumptive sentences. Nevertheless, the growth in the use of jail as a condition of a stayed sentence and the subsequent rise in jail populations has created an economic burden and potential crisis for many local jurisdictions. Increases in jail confinements and changes in criminal offending patterns represent a growing problem in an otherwise fiscally manageable correctional system.

Charging and Plea Bargaining Trends. The data from the eight county subsamples reveal some fundamental changes in charging and plea bargaining practices over time. In terms of charging practices, several trends are noteworthy. First, the average severity of the most serious charge filed by prosecutors did not increase appreciably over time, suggesting that prosecutors were not necessarily more likely to engage in "vertical" charging after passage of the guidelines. Second, both charges and convictions for multiple behavioral incidents increased steadily over post-guideline periods. However, an independent assessment of the criminal complaint revealed that the "potential" to charge for multiple counts per defendant had also increased over time. Third, the criminal complaint contained fewer references to the use or possession of a dangerous weapon over time, but separate convictions for dangerous weapons were especially high in 1982, the year after legislative increases in the mandatory minimums for these offenses.

Although trial rates have remained stable over time (around 5%), there has been a shift in the type of plea concessions granted after implementation of the guidelines. Plea agreements involving charge dismissals have steadily increased (from 32.5% in 1978 to 42.7% by 1984), while charge reductions were more common before the guidelines and have stabilized over post-guideline periods. Plea bargains involving a sentence concession are less common after the guidelines, but have steadily risen over post-guideline periods to a level comparable to the pre-guideline base (53.9% in 1978 compared to 41.7%, 47.1%, and 48.6% over the respective post-guideline periods). While not necessarily indicative of circumvention, these general changes in charging and plea bargaining practices nonetheless are suggestive of several adjustments in prosecutorial practices after passage of the guidelines.

2. Goal Attainment under the Minnesota Guidelines

The Minnesota guidelines embody the principles of uniformity, neutrality, and proportionality of punishments and were predicated on the belief that sentencing standards will result in a reduction in disparities and a more rational use of existing correctional resources. Various analyses were performed to assess the degree to which these explicit goals were achieved over time or circumvented through non-regulated charging and plea bargaining practices. The results are summarized below.

Uniformity/Neutrality in Sentencing Decisions. The major sentencing decisions under the authority of the guidelines (i.e., the "in/out" decision, length of prison confine-

ment) generally exhibit greater uniformity and social neutrality than was true in pre-guideline practices. However, there is also some indication that disparities in regulated sentencing practices have increased over post-guidelines periods.

As measured by the overall grid variance and the proportion of variance accounted for by prescribed (e.g., offense severity, criminal history) and proscribed variables (e.g., other offender and case processing attributes), the decision to imprison has become far more uniform under the guidelines. Although there was a slight increase in the grid variance over post-guideline periods (which indicates greater non-uniformity), the variance in the "in/out" decision by 1984 still remained far below the pre-guideline level. Similarly, the estimation of time-specific regression models of the "in/out" decision revealed that a far greater proportion of the variation was explained by prescribed variables in post-guideline periods. Regardless of time period, little additional variation was accounted for by proscribed offender, case, and case processing attributes. A similar pattern was observed when time-specific models of the length of prison confinement were estimated, but the gains in uniformity and predictability in post-guideline practices were less dramatic. However, there was still some indication of socioeconomic disparities in regulated sentencing decisions. For instance, felons who were white, employed, and received a sentence bargain were generally more likely than their counterparts to receive a stayed prison sentence over each post-guideline period. Felons who were black and unemployed were especially likely to receive longer prison terms in 1984.

The low rate of departures from the presumptive sentence gives a further indication of the level of uniformity in post-guideline practices. While the growth in rates of dispositional departures over time suggests declining uniformity, these increases are less dramatic when one excludes departures which stem from a defendant's request to execute a prison sentence. However, rates of mitigated dispositional departure were found to be higher, *ceteris paribus*, among persons who are over 30 years old, employed, and processed in Hennepin county. Contrary to the intent of the Guidelines, this latter finding suggests that dispositional departures are being used in a manner which decreases uniformity and social neutrality by enhancing the role of socioeconomic and case processing factors in sentencing decisions. On the other hand, durational departures from the presumptive sentence were largely independent of offender and case processing characteristics.

Although greater uniformity and neutrality were generally achieved in regulated sentencing decisions, this was not the case for sentencing decisions outside the scope of the guidelines. Both the decision to stay the execution of a sentence (versus stay of imposition) and to impose jail time as a condition of a stayed sentence were strongly influenced by offender characteristics. For instance, a jail term was more likely to be given to felons who were male, not currently married, and unemployed than their counterparts at each time period. Although socioeconomic disparities in these non-regulated sentencing decisions did not increase over time, neither did they diminish. Unregulated sentencing decisions continue to be influenced by offender attributes and reflect an ongoing commitment to individualistic and utilitarian sentencing philosophies.

Proportionality of Punishments. There are several ways of assessing whether the Minnesota guidelines have achieved the goal of proportionality in the assignment of criminal penalties. Here, proportionality of punishment was evaluated by comparing rates of imprisonment among person offenders (in contrast to non-person offenders) and the retention of potential and initial charges for particular types of offenses through conviction. Included in this latter category are charges for multiple behav-

ioral incidents, aggravated robbery, first degree burglary, and first degree assault. A reduction of the imprisonment rate for person offenders and a greater gap between potential charges, initial charges, and convictions for particular offenses would suggest a decline in proportionality over time.

Consistent with the goal of proportionality, a higher proportion of imprisoned felons are convicted of crimes against the person in post-guideline periods. However, over post-guideline periods, the proportion imprisoned who are person offenders has declined (from 56.9% in 1981 to only 44.6% in 1984) to nearly its pre-guideline level of 43.9%. Similarly, among person offenders, the imprisonment rate increased steadily from 41.1% in 1978 to 44.2% in 1981 and 49.9% in 1982, but decreased to only 37.8% in 1984. The corresponding imprisonment rate among non-person offenders (mostly property offenders) were 16.4%, 10.4%, 13.8%, and 15.5% over the respective time periods. The decrease in incarceration rates among person offenders and the increase among non-person offenders in 1984 suggests a significant loss in proportionality.

When imprisonment rates are computed separately among person and property offenders with low (0-1 points), moderate (2-4 points), and high (5 or more points) criminal histories, person offenders are found to have far higher imprisonment rates than property offenders at each level of criminal history. Yet, imprisonment rates among person offenders with low to moderate criminal histories dropped in 1984 below their pre-guideline level. On the basis of imprisonment rates for person offenders, it is clear that proportionality has diminished in later years under the Minnesota guidelines.

A similar pattern is observed when one examines the gap between potential charges (based on an independent assessment of the criminal complaint), charges actually filed by prosecutors, and convictions (i.e., cases in which the person is convicted of the same crime as charged or alleged). However, these retention rates varied considerably by time and type of crime. Retention rates of potential charges through conviction are higher for aggravated assaults before the guidelines (indicative of less proportionality), but are higher after the guidelines for first degree burglary, aggravated robberies, and cases of multiple behavioral incidents. Yet, retention rates in cases of 1st degree burglary and aggravated robbery dropped by 1984 to a point near or below the pre-guideline level. Although comparable pre-guideline charging data was not available, this pattern also holds when the gap between actual charges filed and convictions for these offenses is examined over post-guideline periods. If one assumes that a greater gap between potential behavior, filed charges, and convictions is indicative of losses in proportionality, our crime-specific analysis suggests that earlier gains in proportionality for some crimes (i.e., first degree burglaries and aggravated robberies) have diminished considerably by 1984. For other types of offenses, within-offense proportionality has either remained below the pre-guideline level (aggravated assaults) or improved slightly over post-guideline periods (multiple counts).

3. Adjustments to the Sentencing Guidelines

A number of commentators have suggested that Minnesota-like guidelines will be circumvented through greater disparities in non-regulated prosecutorial charging and plea bargaining practices. For instance, reductions in disparities in regulated sentencing decisions under the Minnesota guidelines may be offset by greater socioeconomic disparities in charging and plea bargaining practices. Similarly, through their charging authority, prosecutors may use changes in case law and statutory changes (e.g., the Hernandez rule, weapons charges) as means to entice particular types of defendants to enter into plea agreements. Given that charging and plea

bargaining decisions can determine the presumptive sentence, adjustments in prosecutorial practices may introduce disparities which are antithetical to the general thrust and explicit goals of the guidelines.

Plea Bargaining Practices over Time. As reported earlier, rates of various types of plea bargaining have changed after passage of the guidelines. These trends give some indication of changes over time, but it is especially important to determine whether factors that influence these decisions have also changed over time. Consequently, time-specific models of charge dismissals, charge reductions, and sentence concessions were estimated to examine whether various case and offender attributes have become more important in post-guideline practices.

While there were some fluctuations in the importance of particular variables, the major conclusion from the regression analysis of types of plea bargaining is that little change in the determinants of these decisions has occurred over time. For each type of plea bargaining, there is considerable county variation and offense (rather than offender) attributes were the major determinants of each type of plea concession. In fact, one of the few significant changes over time involved plea negotiation practices in Ramsey County (St. Paul). For example, after passage of the guidelines, there was a notable shift in Ramsey County from sentence negotiations to charge dismissals as the major plea concession. The shift toward charge bargaining was far less dramatic in other counties. However, similar to the aggregate models, separate analyses for each county revealed no signs of greater socioeconomic disparities over time in the types of persons who receive plea concessions. Consequently, while county variation is a type of disparity antithetical to the general intent of the guidelines, the goal of social neutrality in punishments was not undermined indirectly through the selective granting of plea concessions even within particular counties.

The Hernandez Rule and Multiple Counts. The Hernandez rule for computing criminal history scores for "same day" sentencing was incorporated into the sentencing guidelines in late 1981. As mentioned earlier, the Hernandez rule can be used by prosecutors in cases of multiple behavioral incidents to "target the dispositional line" and to induce defendants to enter guilty pleas in exchange for charge dismissals. Since prosecutorial charging and plea negotiation practices are not under the authority of the guidelines, prosecutors' ability to systematically influence the presumptive sentence through the "Hernandezing" of charges is a serious threat to the integrity and the explicit goals of the guidelines.

Because information on the felon's criminal history prior to the current convictions was not available, the impact of the Hernandez rule could only be assessed indirectly. However, there is ample evidence which suggests that this rule is in fact being used to "target" prison sentences and to entice defendants into guilty pleas. For instance, there was a sharp growth in average criminal history scores and an increase in criminal history scores for those charged with multiple counts in 1982, the year immediately following the Hernandez decision. Furthermore, the rate at which potential multiple counts (based on an independent assessment of the criminal complaint) were actually charged out was only 42.7% in 1981, but increased 55.6% in 1982 and continued to rise to 59.0% by 1984. Yet, while a greater proportion of potential multiple counts are being charged out, a smaller percentage of these charges result in multiple convictions after the Hernandez decision, dropping from 72.3% in 1981 to only 56.3% in 1982. Since the major difference between charges and convictions for multiple counts (as well as the gap between potential counts and actual

charges) occurred from 1981 to 1982, we are confident that such effects are directly attributable to the Hernandez decision.

These results suggest a general process by which the Hernandez rule has influenced initial charging and plea bargaining practices. Specifically, the Hernandez decision appears to encourage the filing of more initial charges for multiple behavioral incidents. Yet, these multiple charges are more likely to be "given up" after the Hernandez decision as a condition of a guilty plea. This is evident by the appreciable decrease after 1981 in the percent of multiple charges which result in multiple convictions and the fact that in over 90% of the cases in which multiple charges did not result in multiple convictions, the other charges were dropped as part of a plea agreement. Thus, prosecutors seem to be using the Hernandez rule to target the dispositional line (by retaining multiple counts up to conviction) and threatening it as a means to induce guilty pleas in exchange for dismissals of associated counts. Although there is no indication that social factors influence the decision to charge or convict for multiple behavioral incidents, the selective use or threat of the Hernandez rule to adjust criminal history scores and the presumptive sentence is a practice which severely undermines the goals of uniformity and proportionality in punishments.

Change in Mandatory Minimums for Weapons Offenses. Contrary to the belief that prosecutors would be more apt to "swallow" the firearm as a bargaining tool, it appears that a higher percentage of charges for dangerous weapons were being retained through conviction in 1982, the year immediately following the legislative change in the mandatory minimums. However, while more weapons charges were being retained, prosecutors were also filing more motions in 1982 to sentence apart for the weapons conviction. After 1982, prosecutors seemed to move back toward dropping the weapon charge as a plea concession rather than filing motions to sentence apart from a weapon conviction. Specifically, before the legislative change, 55.1% of the potential weapon charges resulted in convictions, but this rate increased to 68.5% in 1982. By 1984, this retention rate had dropped back down to only 56.5%, a level similar to that prior to the legislative change. Prosecutors filed 63 motions to sentence apart from the weapon conviction in 1982 compared to only 29 such motions in 1984.

The attrition of potential weapon charges gives some indication of how criminal justice officials adjusted their practices to this externally imposed change. Specifically, there was a great deal of compliance to the mandatory minimum law during the first year, as indicated by the high rate of retention of these charges. Yet, as a possible enticement to enter a guilty plea, prosecutors also had to "give up" the weapons conviction by arguing for a mitigated sentence on this conviction. Possibly because filing motions to sentence apart from the mandatory minimum was less efficient or became less acceptable to defense counsel or judges (who must grant such motions), the "swallowed weapon" (rather than a sentence bargain) became the major enticement for a guilty plea in later years. In addition to indicating a loss in proportionality in punishment over time, the gap between those who could be potentially charged with using dangerous weapons and those convicted of such acts also indicates a loss in uniformity in punishments since like offenses are not treated similarly.

Departures from the Presumptive Sentence. One of the more obvious ways by which there can be major adjustments under the Minnesota guidelines is through an increase in rates of departures from the presumptive sentence. While departures can ameliorate the potential rigidity of sentencing standards, a high departure rate (e.g., > 20%) would indicate a serious loss in the uniformity and proportionality of punishments.

As reported earlier, dispositional departures have increased steadily over post-guideline periods due, in part, to the addition of several reasons as grounds for departures. In fact, the acceptance of a defendant's request for an executed prison sentence, the use of amenability or unamenability to probation as a grounds for a departure, and the opportunity in intrafamilial sexual assault cases to mitigate the presumptive sentence if it is in the family unit's "best interests" not only have increased departure rates, but also pose a major conflict with the explicit goals of the Minnesota guidelines.

Given that judgments about the amenability of a felon to probation are based on an overall assessment of the person (including in most cases community ties, stability of family and employment history), the acceptance of this reason as a grounds for dispositional departures clearly introduces prohibited social factors in sentencing decisions. The continued use of this factor as a reason for departure poses a serious threat to the goals of uniformity, neutrality, and proportionality of punishments since like offenders are not treated similarly and offender (rather than offense) attributes are the major determinants of such decisions.

Dispositional departure rates have also grown considerably because of the acceptance of defendants' requests to have their stayed prison terms "executed". Judges must execute a prison sentence under a defendant's request if the conditions of a stayed prison sentence are more onerous than an executed sentence (State v. Randolph [1982]). The frequency of use of this reason for a departure has decreased somewhat over time, from about 111 cases in 1983 to 84 cases in 1984. However, although accepted by the Supreme Court on the grounds of proportionality, the very fact that defendants would request an executed prison sentence suggests a fundamental deficiency in the calibration of punishments under the guidelines.

Finally, the intrafamilial sexual abuse statutes enacted in 1981 provide for a stayed prison sentence if it is in the best interest of the victim or family unit. While few cases fall under these statutes, rates of mitigated dispositional departures are extremely high in these cases and their numbers are increasing over time. Given that offenders convicted of sex offenses against children are disproportionately older, better educated, employed and white in comparison to other serious person offenders (see MSGC, 1984), the high departure rates for these offenses also results in a decrease in the uniformity and neutrality of punishments.

ATTITUDES OF CRIMINAL JUSTICE OFFICIALS

The survey responses of prosecutors, criminal court judges and defense attorneys (mostly public defenders) provided several additional insights about the effectiveness and limitations of the Minnesota guidelines. While generalizations based on a response rate of 57.8% should be viewed with some caution, the survey data also gives some indication of the level of support for the sentencing guidelines among officials who work with them on a daily basis.

The majority of respondents felt that the Minnesota guidelines were at least "somewhat successful" in achieving their goals of proportionality, uniformity, and neutrality of punishments. However, the perceived success of the guidelines in each area varied considerably by type of criminal justice official. Judges were more optimistic than other officials about goal attainment under the guidelines, with the percent of judges reporting that the guidelines were "very successful" in the areas of proportionality, uniformity, and neutrality being 36%, 48%, and 51%, respectively. As a group, prosecutors were the least optimistic about goal attainment under the guidelines, especially in the area of proportionality of punishments.

When asked how much of an improvement the Minnesota guidelines were over the previous indeterminate system, nearly half of the judges and defense attorneys thought that the guidelines were a "major" improvement over the previous system, but less than one-tenth of the prosecutors were so inclined. A clear majority (over 66%) of the judges and public defenders viewed the guidelines as an improvement over the indeterminate system, whereas over half of the prosecutors felt that the guidelines were less effective than the previous system. Similarly, over half of the public defenders and judges were in favor of enacting Minnesota-like guidelines at the federal level, compared to only about one-fourth of prosecutors.

Although views about the effectiveness of the guidelines varied by group, a majority of all respondents were strongly opposed to efforts to extend the guidelines by either establishing jail guidelines for cases involving a stayed prison sentence or introducing prosecutorial guidelines for charging and plea bargaining decisions. In each of these cases, the level of opposition was over 70% among each group.

When asked about their impact on judicial decision-making, it was also clear that a vast majority of each group of officials (over 80%) viewed the guidelines as limiting judicial discretion. However, this was perceived as both a virtue and limitation. On the positive side, numerous officials, in their elaboration on this question, noted that the guidelines had enhanced judicial accountability and increased the "uniformity", "equality", and "predictability" of sentencing decisions. In contrast, several officials commented that the guidelines had turned judges into "computers" and had created "a bastion for non-thinking judges". Generally, judges complained that the guidelines were "too rigid and inflexible", had "tied their hands", and expressed their frustration with trying to depart from the guidelines since "if we depart, we're overturned". However, there was little mention of efforts on the part of judges to "side step" or circumvent the guidelines. Rather, the general impression was that judges acquiesced to the guidelines primarily because their compliance was mandated by law and departures "aren't worth the effort". Thus, it is clear that criminal justice officials felt that the guidelines had reduced judicial discretion in sentencing decisions. The dissensus pertained to whether they felt this was a good idea or not. Public defenders were more likely to focus on the positive aspects of reducing judicial discretion than were other groups.

The survey also contained a question about the manner in which the guidelines had affected prosecutors' ability to influence sentencing decisions. Here, the responses were quite varied, depending upon whether the respondent interpreted the question to mean "sentence negotiations" or "charging practices". A majority of all groups felt that the guidelines had reduced prosecutor's ability to "grandstand" and give passionate appeals during the sentencing hearing. In this context, prosecutors' felt their hands were tied similar to judges. However, all groups noted that prosecutors had the ability to determine the presumptive sentence through initial charging and plea bargaining practices. Consequently, their ability to influence sentencing decisions through these unregulated charging practices was thought to have drastically increased.

The written comments to this question clearly revealed that most officials thought prosecutors were manipulating the guidelines by "targeting the dispositional line" in charging and plea bargaining practices. Regardless of the particular group, a large minority of officials noted explicitly that prosecutor's "Hernandez" the counts to get the desired criminal history score and presumptive sentence. However, given the widespread opposition to prosecutorial guidelines for charging and plea negotiation practices, the perception that prosecutors can determine the presumptive sentence does not seem to be particularly bothersome to criminal justice officials in

Minnesota. In fact, according to the comments to our question about charging guidelines, prosecutorial discretion is viewed largely as a "sacred cow" which should be regulated only by public scrutiny and the ballot box. Furthermore, opposition to prosecutorial guidelines also stems from a belief that such standards are unworkable. It is interesting to note that such arguments were also made in opposition to the establishment of the Minnesota sentencing guidelines.

Criminal justice officials share similar views about the major contribution of the Minnesota sentencing guidelines. There was a general consensus across groups that the guidelines had reduced sentencing disparities by increasing the uniformity, social neutrality, and predictability of punishments. The guidelines were also viewed as providing greater "truth in sentencing" through the greater certainty of dispositional and durational decisions. In addition to being viewed as a "just" system, there was also a general feeling that the guidelines were a fiscally sound and manageable system of punishments which kept the lid on state correctional facilities and reserved imprisonment to those person offenders who are a danger to the public. In short, what these opinions reflect is a general belief among different criminal justice officials that the Minnesota guidelines have achieved their explicit goals.

Although generally viewed as achieving their desired goals, nearly all respondents made extensive written comments to a question about the "major limitations of the current sentencing guidelines". The major limitations identified were that the guidelines are "too inflexible" and "too lenient", but the extent to which each limitation was noted also varied by group.

As might be expected, judges were especially troubled by the lack of flexibility and the loss of their discretion. Several judges made direct references to "computerized" sentencing, but many mentioned this inflexibility as it related to sentences for particular types of cases (e.g., child abuse, violent and habitual criminals, and drug offenses). Most judges seemed amenable to some general constraints on sentencing discretion (which they thought made the whole system fairer and less biased), but also felt in these particular cases that the inflexibility of presumptive sentencing had created injustices. Furthermore, several judges mentioned being "second guessed" or overturned by the appellate court if they depart as a limitation of the guidelines. However, it was not necessarily appellate review which bothered them, but rather a belief that the appellate courts had not executed its role in a reasonable or logical fashion.

The major limitation mentioned by prosecutors was clearly that the guidelines are "too lenient" and "coddling criminals". Prosecutors were especially critical of the "failure of the guidelines to provide imprisonment for repeat property offenders". They were also concerned with the lack of flexibility under the guidelines, especially as it related to the ability to impose aggravated dispositional and durational departures. This opinion was clearly echoed in the response of one prosecutor who noted that the "appellate courts are unwilling to allow departures even when there are good reasons to depart".

Major opposition to the guidelines among defense attorneys was also directed at the "inflexibility" of the guidelines. However, as one might expect, this criticism usually centered on the "failure to give certain defendants a break when it would benefit society in the long run". These comments were usually made in reference to giving defendants who were employed or had strong community ties a stayed prison sentence. Several defense attorneys explicitly noted that the punishments were too severe for some defendants (e.g., drug violators and first offenders) and also reinforced the view that departures should be more easily achieved as a means of reducing the "rigidity" of the guidelines.

Finally, we asked each group of officials to write in their preferred changes to the guidelines. The type and magnitude of the preferred changes also varied by group. Major changes (e.g., across the board increases in punishment, doing away with good time, greater discretion) were mentioned by 41% of the prosecutors, 38% of the judges, and 24% of the defense attorneys. An additional 16% of the prosecutors and 20% of the judges advocated "abolishing the guidelines" compared to only 7% of the defense attorneys. Together, a clear majority of prosecutors and judges desired major revisions in the structure of the Minnesota guidelines compared to less than one-third of the public defenders. Even though most officials believe that the guidelines have achieved their explicit goals, our survey results clearly indicate that there is substantial opposition to the guidelines among prosecutors and criminal court judges. Defense attorneys were the least critical and generally the most receptive to sentencing guidelines.

CONCLUSIONS AND IMPLICATIONS

Our most general conclusion is that the Minnesota guidelines were quite successful in achieving their explicit goals during the first two years of implementation, but have become less effective by 1984. While there has been a decline in goal attainment over time, sentencing uniformity, neutrality, and proportionality in 1984 are still above pre-guideline levels. Given the level of opposition to the guidelines (as reflected in comments to our survey), the level of success they have achieved in these domains is even more impressive. In this final section, we address the possible causes of the decline in goal attainment over time, how to rectify such trends, and what other states considering sentencing reform can learn from the Minnesota experience.

1. Causes of the Changes over Time

As is true of any reform effort, the Minnesota guidelines have had to respond to changing legal and social conditions. After the implementation of the guidelines in 1980, there was a period of rapid change in and revision of guideline standards in late 1981 and 1982. While the direct consequence of each of these actions is difficult to isolate, legislative changes in mandatory minimums and sexual abuse statutes, changes in the computation of criminal history score, and the more passive role adopted by the Sentencing Commission seem to have contributed to a decline in goal attainment over time.

Legislative changes in the mandatory minimums for weapons offense and the Commission's incorporation of the Hernandez rule into the guidelines as the method for computing criminal history score greatly enhanced the discretionary power of prosecutors and judges to affect sentencing decisions. Although prosecutorial discretion in charging and plea bargaining decisions has always posed a threat to the guidelines, prosecutors gained additional leverage in plea negotiations after these changes. Prosecutors can now more easily determine sentencing outcomes by their decision to "swallow" weapons charge or the number of counts retained in cases of multiple behavioral incidents. However, there is no indication that offender characteristics influence these decisions any more than before the guidelines and, thus, sentencing neutrality has not yet been threatened by these changes. Yet, the simple fact that prosecutors can use their charging authority to determine the presumptive sentence by the type and number of charges retained through conviction raises serious questions about the attainment of uniformity and proportionality of punishments under the guidelines.

The most obvious solution to this problem is to introduce statewide policies or guidelines governing prosecutorial charging and plea bargaining practices. However, we feel that statewide prosecutorial guidelines would be largely ineffective in dealing with this problem for several reasons. First, given the level of opposition to such standards (based on our survey data), prosecutorial guidelines would need to be presumptive rather than voluntary. Without a legal mandate for compliance, such standards would be easily circumvented. Second, even if there was support for charging guidelines, it is unclear what these prosecutorial guidelines would look like and how they would be implemented. As another practical matter, it is difficult to imagine how such prosecutorial standards would address evidentiary matters and how they would be enforced. Finally, regardless of the forcefulness and comprehensiveness of these standards, prosecutors would probably learn (as they have with the sentencing guidelines) how to adjust their practices to such constraints and move back to previous charging and plea bargaining norms. If this latter proposition is true, prosecutorial charging and plea bargaining guidelines may have some short term benefits, but would be largely ineffective in the long run.

A more reasonable solution would be to incorporate limits on prosecutor's ability to influence sentencing decision within the sentencing guidelines themselves. For instance, to thwart efforts to influence sentencing decisions through the Hernandez rule, the Commission could push for maximum limits on the accrual of criminal history points for "same day" sentences. Regardless of the number of separate behavioral incidents or separate personal victims, placing a cap of two additional criminal history points for "same day" sentences, for example, would limit the ability of prosecutors to target the dispositional line for minor property offenders. This might also be accomplished by weighting criminal history points according to the gravity of the prior conviction, so that property offenses would count less than convictions for person offenses. On the other hand, the Commission might draft, with the assistance of the County Attorneys Association, a set of informal statewide guidelines which are recommended for particular offenses. While such guidelines are already used in the large urban jurisdictions and are not likely to generate major changes over previous practices, the establishment of advisory prosecutorial guidelines may be at least partially effective in unifying charging and plea bargaining practices across the state. Through the initiation of such projects by the Commission, the potential advantages of uniform prosecutorial standards may also become more obvious to all practitioners and, therefore, diminish opposition to such efforts.

Another potential cause of the decline in goal attainment is what has been termed "a decline in the innovative spirit" (see Knapp, 1984). Regardless of their explicit goals, all reform efforts go through a series of stages. Initially, there is a great deal of enthusiasm about the reform effort, followed by a period of compliance with the objectives, a series of adjustments to the reform effort, and countermoves to ward off threats to the integrity of the new system. If there is a high level of resistant to the original changes, practices tend to revert back to previous norms unless there is a continuous effort to preserve the spirit of the reform movement.

The history of the Minnesota guidelines parallels this general process. The Sentencing Commission took an active policy role at the onset of the reform effort and played a pivotal part in both the acceptance and implementation of the guidelines. Various educational workshops, public meetings, and conferences were held in order to inform all affected parties of the intended changes and rationales for guideline policies. This active role in educational and policy matters continued throughout the first two years of the guidelines, but after 1981 the Commission's activity shifted away from larger policy decisions and more toward "fine-tuning" and technical ad-

justments to the guidelines. Even changes which had major policy implications (e.g., the Hernandez rule) were viewed more in terms of "technical" adjustments rather than as sweeping policy directives.

There are several factors which may account for this changing orientation of the Commission. First, the composition of the Sentencing Commission had changed by the end of 1982, with five new members and a new Chair appointed. This change in Commission membership also introduced less consensus on sentencing philosophy. Second, there were budget cuts in the research division of the Minnesota Sentencing Guidelines Commission during this same time period. Since one of the Commission's primary function is to monitor sentencing practices, these budgetary cuts give some indication of the current level of Legislative commitment to the guidelines. Together, the change in operation and orientation of the Commission may account for some decline in the effectiveness of the guidelines after their first two years of implementation.

It is important to recall that decisions regarding the type and severity of sanctions, as well as the general philosophical orientation which guide those decisions, are policy choices. At present, charging and sentencing practices are moving away from the initial policies adopted by the Guidelines, and the relatively passive and "technical" role assumed by the current Commission gives at least tacit approval to these changes. If the Commission and other related policy-makers wish to counter current trends, it must rekindle its earlier activist spirit. There are several ways this might be accomplished.

As an initial recommendation, it must be recognized that the maintenance of any reform effort is an ongoing process. The original Commission laid a strong foundation for sentencing reform, but there are numerous issues which require immediate attention and an active policy role by the new Commission. Increases in criminal history scores, the seriousness of offending, and the use of jail time as a condition of a stayed prison sentence pose serious threats to state and local correctional resources. In addition, increases in rates of dispositional departures, the introduction of utilitarian rationales as a basis for departures, and the lack of constraints on prosecutorial charging and plea bargaining practices are obstacles to the attainment of uniformity and proportionality of punishments. Coupled with legislative support for their efforts, the adoption of a more proactive role by the Commission in educational and policy matters related to these issues may do much to refurbish the innovative spirit of the Minnesota guidelines. However, such efforts are likely to be futile unless members of the criminal justice community, the legislature, and the general public in Minnesota are again convinced of the virtues of uniform and proportional sentences and the maintenance of a fiscally manageable and humane correctional system.

2. Implications for Other Jurisdictions

The direct application of our results to other jurisdictions is somewhat problematic because the state of Minnesota is unique in several respects. It has a strong progressive political tradition, has always had a lower than average rate of imprisonment, and is rather homogenous in composition. Although these structural features may limit generalizations, much can be still be learned from the Minnesota experience. In fact, the policy recommendations summarized below have direct implications for other states that are considering the adoption of Minnesota-like guidelines or other types of sentencing reform.

As an initial recommendation, firm limits need to be placed on judicial discretion if states are serious about implementing meaningful reform. This means that sen-

tencing guidelines must be presumptive in nature and regulate both the decision to imprison and the length of prison confinement. Voluntary guidelines and those that retain judicial discretion in the "in/out" decision are politically safe because they preserve a significant amount of judicial discretion, but such guidelines are largely ineffective for the same reason. By contrast, Minnesota-like guidelines are likely to receive more opposition because they exert substantial control over judicial discretion and judges are required by law to comply with these sentencing standards. Yet, the widespread opposition to the Minnesota guidelines by criminal justice officials in our survey is telling in several respects. First, the common complaint that the guidelines are "too inflexible" suggests that they have indeed reduced sentencing disparities. Second, the fact that there is vocal opposition to the guidelines is a strong indication that they represent a significant change over previous sentencing practices. In short, many criminal justice officials do not like the Minnesota guidelines, but most practitioners agree that they have achieved their goals and are an improvement over the previous system. If the Minnesota guidelines were not presumptive, there would be less opposition and the gains in sentencing uniformity, neutrality, and proportionality would be far less dramatic. Viewed in this light, sentencing guidelines that receive widespread support from all affected parties are likely to be ineffective in achieving any substantial change. One immediate consequence of any effective change over previous practices is vocal opposition to that reform effort.

A second recommendation has to do with the nature of reform and the need to continue the "innovative spirit" which helped initiate changes in the first place. At the very least, there must be a recognition that reform efforts do not end with the passage of sentencing guidelines. As we have mentioned, there will continue to be major external pressures and challenges to the guidelines which a sentencing commission or comparable body must address. By being advocates for social change and proactive in policy areas, sentencing commissions or other policy bodies will be better able to overcome the cumulative inertia of years of deeply ingrained alternative practices that may work to undermine sentencing reform.

As implied in the previous comments, we also see great merit in the commission approach to guideline construction and implementation. Yet, the success of a sentencing commission depends on the level of autonomy and the powers granted this body. For instance, the enabling legislation in Minnesota provided general options for the Commission to consider, but left them considerable leeway to determine the nature of control over judicial discretion, the philosophy underlying the calibration of sentencing norms, and whether the guidelines should be tied to available correctional resources. This can be contrasted with sentencing commissions in other states (e.g., Wisconsin), where the Commission was designed at the onset to be more a source of administrative or technical advice than an active policy-making body.

A commission approach for guideline construction and implementation has a further advantage in that it is less susceptible to changing political tides and more insulated from various pressures to escalate criminal sanctions and "get tough" on crime. However, when granting a commission broad powers to establish sentencing guidelines, one runs the risk of turning sentencing policy over to a small cadre of "experts" and, in turn, isolating the general public and elected officials from the policy process. Clearly, democratic norms require that a balance be struck between the need for an autonomous commission and the desires and sentiments of the public. As in Minnesota, the reform effort should include various hearings which allow for public input about the guidelines, and a commission membership which includes a cross-section of the criminal justice community and public representatives. No reform ef-

fort can produce sentencing policies acceptable to all. However, those policies should not be unilaterally imposed upon the public and criminal justice practitioners.

Another recommendation has to do with the "hydraulic" effect and the circumvention of sentencing guidelines through non-regulated prosecutorial practices. Specifically, Minnesota and other states with determinate sentencing need to devote greater attention to the adverse affects of unregulated charging and plea bargaining practices. Efforts to control prosecutorial discretion directly through guidelines for charging and plea negotiation decisions is one solution to this problem. However, a more reasonable approach may be to incorporate elements within the sentencing guidelines themselves (e.g., cap "Hernandezing" to two points) to limit the systematic manipulation of the guidelines by prosecutors.

We also strongly recommend that states considering sentencing reform develop guidelines within the confines of current correctional resources. Calibrating sentencing guidelines to correctional capacity may be politically unpopular, but seems advantageous for several fundamental reasons. First, a firm prison constraint is likely to guarantee the fiscal manageability of the system and insulates the guidelines from continuous pressure to escalate sanctions. Second, it forces criminal justice officials, legislatures, and members of the public to make critical choices concerning what types of offenses or persons should be treated more severely and what is the fundamental rationale for gradations of punishment (i.e., retribution, incapacitation, rehabilitation, deterrence). Finally, it seems that goals such as uniformity and neutrality of punishments are given only secondary importance when states are facing immediate fiscal crises due to rising crime rates and escalating prison populations. In one sense, uniformity and socioeconomic neutrality in sentencing decisions may only be luxuries afforded when the immediate threat from prison overcrowding is controlled. If this assessment is true, a calibration of sentencing standards to current correctional resources may be a vehicle for obtaining both a fiscally manageable system and one that is also able to make major advances in the elimination of sentencing disparities.

A final recommendation concerns provisions for appellate review of sentencing practices. It has long been held that substantive sentencing policies can receive additional clarification and elaboration through appellate review. In Minnesota, however, the results of appellate review have been mixed. Although the appellate courts in Minnesota have taken an "activist" role in sentencing reform, the rulings issued by the appellate courts have frequently been viewed by criminal justice officials (according to our survey results) as either "arbitrary" or a usurpation of legislative or the Commission's authority.

What this tension means for other states contemplating sentencing reform is difficult to predict. Clearly, appellate review of sentencing practices is a necessary and desirable component in sentencing reform. Only through appellate review can "substantive due process" in the application of sentencing guidelines be fully developed. On the other hand, if rulings handed down by the courts are viewed with consternation or disdain, the legitimacy of those rulings will be called into question and, in all likelihood, circumvented if possible.

The only apparent way to ameliorate this dilemma is to encourage a close working relationship among the legislature, the sentencing commission (if any), and the appellate courts. Appellate courts must act as independent bodies in the interpretation and enunciation of sentencing policies. However, for the appellate courts to function effectively, legislatures and sentencing commissions must also maintain an active level of involvement in the evolution of sentencing guidelines. Substantive sentencing standards are, after all, matters of policy, not of law. If legislatures and sentencing commissions shirk this responsibility (and, in effect, delegate it to the

courts), the results could prove disastrous for the long term viability of sentencing reform.

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State v. Olson, 325 N.W.2d 13 (Minn. 1982)

State v. Randolph, 316 N.W.2d 508 (Minn. 1982)

TABLE 1: MINNESOTA'S SENTENCING GUIDELINES GRID¹

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						6 or more
		0	1	2	3	4	5	
<i>Unauthorized Use of Motor Vehicle</i>	I	12*	12*	12*	13	15	17	19 18-20
<i>Possession of Marijuana</i>								
<i>Theft Related Crimes (\$250-\$2500)</i>	II	12*	12*	13	15	17	19	21 20-22
<i>Aggravated Forgery (\$250-\$2500)</i>								
<i>Theft Crimes (\$250-\$2500)</i>	III	12*	13	15	17	19 18-20	22 21-23	25 24-26
<i>Nonresidential Burglary</i>	IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
<i>Theft Crimes (over \$2500)</i>								
<i>Residential Burglary</i>	V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
<i>Simple Robbery</i>								
<i>Criminal Sexual Conduct, 2nd Degree (a) & (b)</i>	VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
<i>Aggravated Robbery</i>	VII	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
<i>Criminal Sexual Conduct 1st Degree</i>	VIII	43 41-45	54 50-58	65 60-70	76 71-81	95 89-101	113 106-120	132 124-140
<i>Assault, 1st Degree</i>								
<i>Murder, 3rd Degree</i>	IX	105 102-108	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
<i>Murder, 2nd Degree (felony murder)</i>								
<i>Murder, 2nd Degree (with intent)</i>	X	120 116-124	140 133-147	162 153-171	203 192-214	243 231-255	284 270-298	324 309-339

Notes:

¹ The numbers in the table refer to the length and range of the presumptive sentence. Cells above the dark line represent the area of the grid in which the presumptive sentence is a stayed prison term. Below the dark line a prison term is the presumptive sentence. The presumptive durations of confinement are in months.

* One year and one day

Source: Minnesota Sentencing Guidelines Commission (1984:2).