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NATIONAL ASSESSMENT OF STRUCTURED SENTENCING FINAL REPORT

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TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION	1
CHAPTER 2: HISTORICAL TRENDS AND ISSUES IN STRUCTURED SENTENCING	6
I. INTRODUCTION	6
II. HISTORICAL DEVELOPMENTS LEADING TO STRUCTURED SENTENCING	7
A. THE INDETERMINATE PERIOD	7
B. ATTACKS ON INDETERMINACY	9
C. EARLY GUIDELINE DEVELOPMENTS	13
III. THE HISTORY AND NATURE OF STRUCTURED SENTENCING REFORMS	15
A. VOLUNTARY/ADVISORY SENTENCING GUIDELINES	16
B. DETERMINATE SENTENCING	22
C. SENTENCING COMMISSIONS AND PRESUMPTIVE SENTENCING GUIDELINES	28
CHAPTER 3: AN OVERVIEW OF CURRENT SENTENCING PRACTICES IN THE UNITED STATES	32
I. SURVEY OF SENTENCING PRACTICES IN THE UNITED STATES	32
II. MANDATORY MINIMUM INCARCERATION SENTENCES IN THE UNITED STATES	35
III. CURRENCY OF STATE CRIMINAL CODES	40
IV. USE OF PAROLE AND GOOD TIME	41
V. SENTENCING COMMISSIONS IN THE UNITED STATES	42
CHAPTER 4: SENTENCING COMMISSION STRUCTURES AND THEIR MANDATES	47
I. INTRODUCTION	47
II. PURPOSES OF REFORM	48
A. FAIRNESS AND SENTENCING DISPARITY	49
B. TRUTH IN SENTENCING	51
C. PRISON CROWDING	52
III. SENTENCING COMMISSION STRUCTURE, MANDATES, AND ORGANIZATION	54
A. COMMISSION MEMBERSHIP	54
B. SENTENCING COMMISSION'S MANDATE/PURPOSES	59
C. CORRECTIONAL CAPACITY MANDATE	66
D. METHOD OF ADOPTION	68
E. FINANCIAL SUPPORT	73
F. COMMISSION SUPPORT STAFF ORGANIZATION	74
G. COMMISSION MEETINGS	75
H. GUIDELINE IMPLEMENTATION	76
I. GUIDELINE ENFORCEMENT	76
IV. POLITICAL AND LEGAL CONTEXT	83
A. ON-GOING MONITORING OF THE GUIDELINES	85
B. LOCAL COURT CULTURE	86
C. POLITICAL ACCEPTANCE	87
V. SUMMARY	89

TABLE OF CONTENTS
(CONTINUED)

CHAPTER 5: WRITING SENTENCING GUIDELINES	91
I. INTRODUCTION	91
II. OFFENSE SERIOUSNESS	93
A. ARTICULATED OFFENSE RANKING PRINCIPLES	96
B. NUMBER OF OFFENSE LEVELS	96
C. NUMBER OF MATRICES	98
D. COMPREHENSIVENESS OF OFFENSE COVERAGE	101
E. SUBCLASSIFICATION OF STATUTORY DEFINITIONS	101
F. REAL OFFENSE VERSUS CONVICTION OFFENSE	104
III. CRIMINAL HISTORY	106
A. PURPOSE	106
B. MEASUREMENT OF CRIMINAL HISTORY	106
C. JUVENILE ADJUDICATIONS	110
D. LAPSING OF PRIOR CONVICTIONS	111
E. PRIOR RECORD AND DISPARITY	111
F. DEFINING PREVIOUS CONVICTION	112
IV. OTHER FACTORS	113
V. DEVELOPING SENTENCING RECOMMENDATIONS	115
A. DESCRIPTIVE VS. PRESCRIPTIVE GUIDELINES	116
VI. DETERMINING SENTENCE LENGTHS	117
A. WIDTH OF GUIDELINE RANGES	121
B. LINK OF GUIDELINE RECOMMENDATIONS TO MANDATORY PENALTIES	122
C. MULTIPLE CONVICTIONS	123
D. SENTENCING EVENT	124
E. AGGRAVATING AND MITIGATING CIRCUMSTANCES	125
VII. SUMMARY	129
 CHAPTER 6: THE IMPACT OF SENTENCING GUIDELINES ON SENTENCING DISPARITY, USE OF INCARCERATION, PRISON CROWDING, FUTURE PRISON POPULATIONS, AND PUBLIC SAFETY	130
I. INTRODUCTION	130
II. METHODOLOGICAL ISSUES IN ASSESSING IMPACT	131
III. IMPACT ON SENTENCING DISPARITY	133
A. UNITED STATES SENTENCING GUIDELINES	136
B. MINNESOTA SENTENCING GUIDELINES	144
C. WASHINGTON SENTENCING GUIDELINES	148
D. OREGON SENTENCING GUIDELINES	151
E. PENNSYLVANIA AND DELAWARE	154
F. SUMMARY OF DISPARITY FINDINGS	155
IV. IMPACT ON PLEA BARGAINING	157
V. IMPACT ON INCARCERATION RATES	158
VI. IMPACT ON PRISON CROWDING	162
VII. PROJECTED PRISON POPULATIONS FOR GUIDELINE STATES	170
VIII. IMPACT ON PUBLIC SAFETY	175
IX. SUMMARY	184

**TABLE OF CONTENTS
(CONTINUED)**

CHAPTER 7: SUMMARY	189
I. MAJOR FINDINGS	189
A. CURRENT SENTENCING PRACTICES	189
B. SENTENCING GUIDELINE MODELS	190
II. POLICY IMPLICATIONS	192
A. REDUCING DISPARITY WHILE MAINTAINING DISCRETION	192
B. DISPLACEMENT OF DISPARITY	193
C. PRISON CROWDING	194
III. RECOMMENDATIONS	194
BIBLIOGRAPHY	199

LIST OF TABLES

TABLE 2-1: ILLINOIS DETERMINATE SENTENCING CATEGORIES AND SENTENCING RANGES 24

TABLE 2-2: EXAMPLES OF FELONY CATEGORIES AND RANGE OF PENALTIES IN CALIFORNIA INITIAL DETERMINATE SENTENCING LAW 27

TABLE 3-1: SENTENCING PRACTICES IN THE UNITED STATES AS OF FEBRUARY 1994 AS REPORTED BY STATES 34

TABLE 3-2: CLASSIFICATION OF THE STATES BY TYPE OF SENTENCING PRACTICE AS OF FEBRUARY 1994 37

TABLE 3-3: OFFENSES FOR WHICH MANDATORY MINIMUM SENTENCES OF INCARCERATION ARE PROVIDED FOR BY STATES AS OF FEBRUARY 1994 39

TABLE 3-4: SUMMARY OF KEY SENTENCING LAW ATTRIBUTES IN THE UNITED STATES AS OF FEBRUARY 1994 43

TABLE 3-5: SENTENCING GUIDELINE STATES IN THE UNITED STATES AS OF FEBRUARY 1994 44

TABLE 4-1: SENTENCING GUIDELINE COMMISSION MEMBERSHIP 55

TABLE 4-2: PURPOSES OF SENTENCING FROM ENABLING LEGISLATION FOR SELECTED STATES 60

TABLE 4-3: LEGISLATIVE DIRECTION REGARDING CONSIDERATION OF PRISON CAPACITY 67

TABLE 4-4: EXAMPLES OF MODE OF SENTENCING GUIDELINES ADOPTION 72

TABLE 4-5: APPELLATE REVIEW AND STANDARDS FOR OVERTURN OF SENTENCE FOR SELECTED STATES 79

TABLE 5-1: OVERVIEW OF SENTENCING GUIDELINE STRUCTURES FOR SELECTED STATES 95

TABLE 5-2: CLASSIFICATION CRITERIA USED BY NORTH CAROLINA IN THE RANKING OF OFFENSE SERIOUSNESS 97

TABLE 5-3: MINNESOTA SENTENCING GUIDELINES GRID 100

TABLE 5-4: OREGON SENTENCING GUIDELINES GRID 109

TABLE 6-1: MINNESOTA SENTENCING PATTERNS, 1978-1983 147

TABLE 6-2: STATE OF WASHINGTON AVERAGE SENTENCE LENGTH BY ETHNIC GROUP, DEPARTURE RATES BY ETHNIC GROUP AND DEPARTURE RATES BY GENDER, 1987 149

LIST OF TABLES
(CONTINUED)

TABLE 6-3:	STATE OF OREGON IMPRISONMENT RATE AND PRESUMPTIVE PRISON RATE BY RACE AND GENDER IN 1992	153
TABLE 6-4:	DEPARTURE RATES, AMERICAN GUIDELINES SYSTEMS RECENT YEARS (IN PERCENT)	156
TABLE 6-5:	STATES AT OR BELOW RATED CAPACITY, 1992	169

LIST OF FIGURES

FIGURE 3-1:	TYPES OF SENTENCING PRACTICES IN THE UNITED STATES IN 1993	36
FIGURE 3-2:	STATUS OF SENTENCING GUIDELINE COMMISSIONS IN THE UNITED STATES IN 1993	45
FIGURE 6-1:	UNWARRANTED DISPARITY FOR THE NO PRISON/PRISON OUTCOME	146
FIGURE 6-2:	UNWARRANTED DISPARITY FOR THE PRISON LENGTH OUTCOME	146
FIGURE 6-3:	ANNUAL CHANGES IN INCARCERATION RATES PENNSYLVANIA/MINNESOTA/FLORIDA/WASHINGTON AND U.S.	160
FIGURE 6-4:	ANNUAL CHANGES IN INCARCERATION RATES: WASHINGTON AND COMPARISON STATES	163
FIGURE 6-5:	ANNUAL CHANGES IN INCARCERATION RATES: MINNESOTA AND COMPARISON STATES	163
FIGURE 6-6:	PRISON POPULATION AS A PERCENT OF PRISON CAPACITY 1983-1992, PENNSYLVANIA/MINNESOTA/FLORIDA/WASHINGTON	165
FIGURE 6-7:	PRISON POPULATION AS A PERCENT OF PRISON CAPACITY 1983-1992	168
FIGURE 6-8:	BUREAU OF PRISONS PROJECTED PRISON POPULATION AND CAPACITY	171
FIGURE 6-9:	TOTAL PROJECTED PRISON POPULATION VS CAPACITY OF SELECTED STATES	176
FIGURE 6-10:	NC PROJECTED PRISON POPULATION	177
FIGURE 6-11:	ANNUAL CHANGES IN TOTAL CRIME RATES, PENNSYLVANIA/MINNESOTA/FLORIDA/WASHINGTON/NATIONAL, 1970-1992	180
FIGURE 6-12:	ANNUAL CHANGES IN TOTAL CRIME RATES, GUIDELINE VS. COMPARISON STATES	181
FIGURE 6-13:	ANNUAL CHANGES IN TOTAL CRIME RATES, FLORIDA VS. COMPARISON STATES	182
FIGURE 6-14:	ANNUAL CHANGES IN VIOLENT CRIME RATES	183

CHAPTER 1

INTRODUCTION

The past two decades have witnessed considerable reforms in criminal justice sentencing. Fueled by criticisms of excessive disparity and the rehabilitative ideal, indeterminate sentencing structures have been replaced in some jurisdictions by more "structured sentencing" schemes. Structured sentencing provisions have included such methods as determinate sentencing, mandatory minimums, and sentencing guidelines. Despite these trends, most states have retained indeterminate sentencing structures, but continue to be interested in whether they should adopt such reforms themselves.

The goals, let alone the basic definitions of "structured sentencing," continue to lack clear consensus within the criminal justice community. Indeed, states that have adopted various forms of structured sentencing have done so with multiple goals and expectations. Those most frequently cited are increasing sentencing fairness, reducing unwarranted disparity, establishing truth in sentencing, and establishing policy for the use of limited correctional resources. These purposes are not all or universally accepted, and the means used to implement them vary considerably from jurisdiction to jurisdiction.

"Unwarranted" disparity can occur either in the decision to imprison (disposition) and/or in setting the sentence length (duration). Structured sentencing reforms can also be used to meet

the goals of increasing the certainty of punishment and mandating the period of imprisonment to deter potential offenders and to incapacitate "dangerous" offenders. At the same time, sentencing reforms can be used to reduce the likelihood and length of imprisonment for the so-called "non-dangerous" offender. Finally, some state officials hope that these reforms can help them avoid a severe prison crowding situation by regulating prison population growth according to available correctional resources.

This study funded by the Bureau of Justice Assistance (BJA) and jointly conducted by the National Council on Crime and Delinquency (NCCD), the Pennsylvania Commission on Crime and Delinquency (PCCD) and the Pennsylvania Commission on Sentencing (PCS) reviews what has been learned over the past two decades in the diverse attempts to structure sentencing.

In examining the various forms of structured sentencing, one is initially confronted with the lack of consensus in basic terms. Determinate sentencing, sentencing guidelines, voluntary sentencing guidelines, presumptive guidelines, and advisory guidelines are among the basic terms that are commonly used. Ironically, as we prepared this report we found that each of us had a different idea of what these terms mean. Therefore, we developed a series of definitions of what we mean by these and other terms as used throughout the report. We hope that the following definitions will help to bring some consistency to the meaning of these terms and help the reader follow our discussion.

DETERMINATE: Sentences of incarceration in which the offender is given a fixed term which may be reduced by good time or earned time. There are usually explicit standards specifying the amount of punishment. There is a set release date for which there is no review by an administrative agency (i.e., parole board). Post incarceration supervision (i.e., parole) may or may not be a part of the sentence.

INDETERMINATE: Unlike determinate sentencing structures, the primary attribute of an indeterminate sentencing structure is that, an administrative agency, generally a parole board, has the authority to release the offender and to determine whether the offender's parole will be revoked for violations of the conditions of release.

There are two forms of indeterminate sentencing structures. In one form, the judge specifies only the maximum sentence length of incarceration, the associated minimum sentence is automatically implied but not within the judge's discretion.

The second type is the more traditional form of indeterminate sentencing, where the judge specifies a maximum and minimum sentence that is set by statute. The sentencing judge has discretion on the minimum and maximum sentence.

**MANDATORY
MINIMUM:**

A minimum sentence of incarceration which is specified by statute. This may be applied for all convictions of a particular crime or a particular crime with special circumstances (e.g., robbery with a firearm, selling drugs to a minor within 1,000 feet of a school, etc.).

**PRESUMPTIVE
SENTENCING
GUIDELINES:**

Sentencing which meets all the following conditions: (a) The appropriate sentence for offenders in individual cases is presumed to fall within a range of sentences authorized by sentencing guidelines. Sentencing judges are expected to sentence within the range or explain any departure. (b) The guidelines require written justification for departure. (c) The guidelines provide for some review, usually appellate, of the departure. (d) The guidelines were adopted by a legislatively created sentencing body, usually a sentencing commission. Presumptive guidelines may

utilize determinate or indeterminate sentencing structures.

**VOLUNTARY/ADVISORY
SENTENCING**

GUIDELINES: Recommended sentencing policies that are not required by law. They serve as a guide to judges and are usually based on past sentencing practices (i.e., are descriptive). The legislature has not mandated their use. Voluntary/advisory guidelines may utilize determinate or indeterminate sentencing structures.

In the course of completing the study, a number of states were visited by the researchers to collect a wide variety of information regarding the structure of a state's sentencing system and to document the process of structured sentencing implementation. Major studies of current structured sentencing systems in terms of their impact on disparity, the use of incarceration and prison crowding were reviewed and synthesized.

Chapter 2 provides the reader with a summary of the historical trends in sentencing reforms that have developed since 1970. It begins with a discussion of those factors or issues underpinning the structured sentencing movement such as the disillusionment with indeterminate sentencing and rehabilitation. Then it reviews three major forms of sentencing reforms - voluntary/advisory guidelines, determinate sentencing, and sentencing commissions - each embellished by an example of a state that has attempted such reform.

Chapter 3 presents the results of the national survey of the 50 states and the District of Columbia. It represents the first major national assessment of the various sentencing schemes that now exist throughout the nation. Included is a detailed matrix

that lists the key sentencing law attributes for each state including the use of parole and mandatory sentencing provisions.

The focus on Chapter 4 is on sentencing guidelines and the use of sentencing commissions. This chapter describes the foundation on which a sentencing commission and its guidelines are built – the political and legal context, the state's purposes or goals for the reform, the specific legislative structure of the commission, and the legislative mandates included in the enabling legislation.

Chapter 5 describes the complex decision-making and technical aspects of writing sentencing guidelines. This chapter provides detailed information about how various states have made decisions in writing sentencing guidelines.

Chapter 6 is an analysis of the relative effects of sentencing reforms on a number of key areas including sentencing disparity, incarceration rates, prison crowding, and future prison population growth. It summarizes the findings of studies that have been completed on the issue of disparity. We add to this literature analysis of national criminal justice data to compare trends in incarceration, prison crowding and crime rates between some of the early guideline states with comparable non-guideline states.

The last chapter summarizes the major findings of this study and its policy implications. Specific recommendations are offered on how the progress that has been achieved to date via sentencing reforms can be further advanced by the federal government with the provision of additional technical assistance to the states as they seek to improve the enterprise of criminal justice sentencing.

CHAPTER 2

HISTORICAL TRENDS AND ISSUES IN STRUCTURED SENTENCING

I. INTRODUCTION

One of the quandaries for the criminal justice system throughout this century and particularly during the past 20 years has been the issue of controlling discretion. Samuel Walker, in his comprehensive review of discretion within the criminal justice system, makes the following statements:

...the criminal justice "system" is nothing more than the sum total of a series of discretionary decisions by innumerable officials... (the real problem) ...is not discretion, but its misuse (Walker, 1993, p. 4).

The "misuse" of discretion by police was the focus of much attention during the 1960's. Later, during the 1970's, concern over the discretion exercised by the courts, parole and corrections gained momentum as crime rates escalated. Over the past 20 years, there have been many accusations but few studies that documented the misuse of discretion by judges, parole boards and corrections officials, resulting in unwarranted sentencing disparity such as undue leniency or excessive harshness or unfairness in terms of the unpredictability and uncertainty of sanctions.¹

The "solution" to the problem of unwarranted disparity was to structure sentencing discretion. But the employment of a variety of mechanisms to structure discretion has resulted in a patchwork

¹ By sentencing we mean the totality of the sentences imposed and the sentences served as carried out by administrative units, particularly by parole boards and prison officials.

of structured sentencing models that include determinate sentencing, voluntary/advisory guidelines, and guidelines developed by sentencing commissions. What follows is a historical overview of these various reforms efforts all of which were intended to remove disparity in sentencing as well as improve the credibility of the criminal justice system.

II. HISTORICAL DEVELOPMENTS LEADING TO STRUCTURED SENTENCING

A. THE INDETERMINATE PERIOD

Towards the end of the 19th century in the United States, sentencing reform involved the replacement of the flat sentence with indeterminate sentences. Pressures on the criminal justice system caused by an expanding population of immigrants and transients, increased efficiency of the police and court apparatus, the fixed sentence, and other factors contributed to a rapidly increasing number of inmates. Overcrowded prisons and the mere warehousing of inmates resulted (Shane-DuBow et al., 1985).

At first, piecemeal reforms – the use of pardons, good time, and probation – provided needed flexibility to grapple with a diversifying prison population, gradually leading to increased indeterminacy of sentences given by 19th century judges. The movement towards indeterminate sentences was spurred by the Declaration of Principles of the First Congress of the National Prison Association which met in Cincinnati in 1870. It urged that "preemptory sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof

of reformation should be substituted for those measured by the mere lapse of time" (Zalman, 1978 quoted in Shane-DuBow et al., 1983, p. 5).

Under indeterminate sentences, offenders receive a minimum and maximum sentence of, for example, one to five years with the parole board determining the time of actual release. Dershowitz (1976) later characterized this shift as one from a judicial to an administrative model of sentencing. The parole board's determination of when the sentence was served, in turn, depended upon the parole board's judgment of whether the prisoner had been "reformed," "cured," or simply had served enough time.

With indeterminate sentencing, discretion was distributed not only among the prosecutor, defense counsel, and judge, but also, for those imprisoned, prison officials and the parole board. The latter two agencies had considerable influence over an offender's length of stay. Prison officials had discretion over the amount of good time an inmate could earn which would dictate the prisoner's parole eligibility and/or discharge dates. Parole Boards controlled the actual release decision for most inmates. The result was a system of sentencing in which there was little understanding or predictability as to who would be imprisoned and for how long.

B. ATTACKS ON INDETERMINACY

Under indeterminate sentencing, the sentence was to be individualized so that the punishment would fit the criminal rather than the crime. This led to accusations of disparity in sentencing and, over time, protests from inmate groups, penologists, and other critics of the penal system.

One of the most influential reports critical of indeterminate sentences was the 1971 American Friends Service Committee's work entitled Struggle For Justice. The authors consisted of "scholars working in the field of criminal justice" and "those who have been on the receiving end of the justice system" (American Friends Service Committee, 1971).

The report utilized anecdotal evidence, prison riot studies, and personal testimony from inmates to critique the function of punishment and reject the rehabilitation model. Specifically, the report questioned the assumption that crime was a product of individual pathology and that rehabilitation could be effected within a prison system designed to punish and not treat inmates. It also criticized the assumption that penologists had the knowledge to effect treatment or to accurately predict recidivism to justify discretion in determining when an inmate should be released.

Two other important works, also critical of indeterminate sentencing and which drew upon Struggle For Justice, were the Report of the Twentieth Century Fund's Task Force on Criminal Sentencing, entitled Fair and Certain Punishment (1976),

particularly the background paper by Alan Dershowitz, and the Report of the Committee for the Study of Incarceration published as Andrew Von Hirsch's Doing Justice (1976). Both Dershowitz and Von Hirsch argued for a shift from indeterminate to more determinate sentencing, and both argued for what has been termed the "presumptive sentence". They believed that these concepts, if implemented, would lead to greater predictability in terms of determining the proper disposition (prison versus probation) and the length of imprisonment. However, there were important differences between the two authors in the scope of their suggested reforms.

Dershowitz's "presumptive sentence" would require the legislature to set penalties for crimes in very specific language. The judge would be obliged to impose a statutorily set penalty which could be raised or lowered through the application of aggravating or mitigating factors by the court. The legislature would have the responsibility for determining the seriousness of offenses and would then establish as the presumptive sentence that penalty which was appropriate for a given offense when its severity was compared with other penalties. His proposals called for the retention of parole but with limitations.

While Dershowitz called for a shift in emphasis from administrative sentencing to a greater legislative and judicial role, Von Hirsch argued for a more radical departure by rejecting the value of general deterrence, rehabilitation and incapacitation as punishment justifications. States should base their sentencing

schemes on a "just deserts" or, "commensurate desert" paradigm. Sentencing should be narrowly based on only the seriousness of the offense and the culpability of the offender rather than his/her need for "treatment" or in the naive hope that sentencing would somehow impact crime rates.

Such a sentencing system should focus not on individualization of punishment but on structuring the system of punishment. That meant sharply reducing judicial sentencing discretion by establishing punishment categories within which penalties for comparably serious offenses could be grouped on a scale. By using only two factors, offense severity and prior criminal history, a presumptive sentence would be determined. Judicial discretion would thus be limited to setting a presumptive term within a specified sentencing range or justifying departures by applying allowable aggravating or mitigating factors. Departures would be monitored and somewhat circumscribed by allowing judicial review of sentencing, a process which was previously almost non-existent. Von Hirsch insisted that discretionary release by parole boards be abolished.

Another influential voice in the early discussions of structured sentencing was Judge Marvin Frankel and his book, Criminal Sentences. In 1972, when Judge Frankel's book was published, there were no models for sentencing guidelines. Frankel's book challenged value of judicial discretion because he was a judge and because he made such a strong case for controlled discretion. Moreover, he foresaw the need to develop a regulatory

approach and articulated the principle on which his proposal rested:

We boast that ours is a 'government of laws, not men.' We do not mean by the quoted principle that men make no difference in the administration of law. Among the basic things that we do mean is that all of us, governors and governed alike, are or ought to be bound by laws of general and equal application. We mean, too, that in a just legal order, the laws should be knowable and intelligible so that, to the fullest extent possible, a person meaning to obey the law may know his obligations and predict within decent limits the legal consequences of his conduct (1972:1).

The problem according to Frankel was that "...the sweeping power of a single judge to determine the sentence, as a matter of largely unreviewable 'discretion' is a - perhaps 'the' - central evil in the system" (1972:69). One part of the solution was the development of appellate review of sentencing. At the time of Frankel's writing, there was "in practical effect *no appeal* from the trial judge's sentence" (1972:76).

Frankel, like the other authors cited above, also attacked the indeterminate sentence, particularly on the grounds of cruelty and injustice. However, he suggested that indeterminate sentences may be appropriate for dangerous offenders, drug users, some sex offenders, and juvenile offenders.

Frankel recommended that the legislature should provide direction as to the purposes and justifications of criminal sanctions. He proposed the establishment of a "Commission on Sentencing" which would be a permanent agency that would study sentencing, corrections and parole, formulate rules and laws based on the studies it conducted, and enact rules subject to checks by Congress, state legislatures and the courts.

Moreover, Frankel did not propose the establishment of a sentencing commission to meet an expectation that it would escalate the use of imprisonment which he regarded already as too severe in the United States. He hoped that a sentencing commission could act as a buffer by shielding the legislature from political pressures to respond to ever increasing demands for more punitive sanctions and to help control prison population growth.

C. EARLY GUIDELINE DEVELOPMENTS

At the same time as the publication of these important works, researchers who had been experimenting for some time with developing parole release guidelines for the U.S. Board of Parole were beginning to experiment with applying this methodology to sentencing decisions (Wilkins et al., 1978). Parole guidelines had been developed in the 1960s by using a two-dimensional matrix table relating the seriousness of the instant offense and the probability of recidivism (or salient factor score) to an expected time to be served before release on parole. A small range was provided within which parole hearing examiners usually set the expected length of incarceration. Departures were permitted but written reasons were required for such departures. Because the parole guidelines were judicially supported and strongly commended by the judiciary, it was believed that the concept of guidelines had value and could be adapted to sentencing.

The first experimental application of a parole guidelines model for sentencing was tried in four jurisdictions between 1974

and 1976. Two sites were treated as active participants (Denver and the State of Vermont) and two as "observers" (Essex County, New Jersey, and Polk County, Iowa). This feasibility study was described as an "action" research project where the researchers studied existing sentencing processes. The judiciary was involved in all phases of the project from the gathering of all information relevant to sentencing discretion to the analysis of factors that accounted for the greatest variation in the judges' sentencing decisions. The researchers did not attempt to develop prescriptive notions of what would be a "right" sentence. Instead, they were trying to understand what underlying factors influenced the sentencing decision.²

The analysis indicated that although there was considerable disparity among the judges, two factors (seriousness of the current offense and the extent of the offender's prior record) explained the greatest amount of variation in sentencing decisions. More importantly, the judges that participated in the research expressed support for the concept of guidelines to better help them reach sentencing decisions.

Based on this study five preliminary sentencing guideline models were designed which attempted to demonstrate what the average, or "modified" average sentence of all the judges in a particular jurisdiction would have been in a particular case. The models were then applied to a one-hundred case sample, correctly

² It is interesting to note that Von Hirsch's sentencing scale also relies most heavily upon current offense severity and offender history based upon prior record.

"predicting" approximately 80 percent of the "in" and "out" part of the sentencing decision. Toward the end of the feasibility stage, the Denver judges received a guidelines sentence some two to three days after sentencing. They, then, provided the research team with feedback as to why they thought the actual sentence differed from the model sentence in those cases in which such a result occurred. This feasibility study provided three tentative conclusions:

- It is feasible to structure judicial discretion by means of sentencing guidelines;
- It is desirable to do so, since totally unfettered judicial discretion and/or completely indeterminate sentencing are generally regarded as necessarily leading to inequities; and
- An operational guidelines system would have valuable by-products such as the attainment of desirable criminal justice standards and goals.

Further, the researchers noted a high degree of acceptability by judges of the guideline model which, in that study, was to be voluntarily employed by judges at their discretion.

III. THE HISTORY AND NATURE OF STRUCTURED SENTENCING REFORMS

Since the late 1970's, nearly all state sentencing practices have fallen into four broad categories: 1) "voluntary/advisory" sentencing guidelines, usually developed after examination of past sentencing practices as revealed by empirical research, sometimes developed by a commission, which prescribes sentencing "targets" lacking legal enforcement (Tonry, 1988); 2) determinate sentencing in which the offender is given a fixed term which may be reduced by good time or earned time and where discretionary release by a

parole board is abolished; 3) presumptive sentencing guidelines which are legislatively enacted, usually administered by a commission and which have the force of law; and, 4) traditional indeterminate sentencing, which allows for the greatest judicial discretion (Nelson, 1992; Shane-DuBow, Brown, and Olsen, 1985; Tonry, 1991). While there are many variations of each of the first three models, they, along with mandatory sentencing, represent the most common forms of structured sentencing.

In the remainder of this chapter, we present a historical overview of structured sentencing efforts to date. The purposes of the overview, are: 1) to identify the key issues in sentencing reform that are addressed by this project and 2) to identify key attributes of a prototype sentencing system that other jurisdictions have considered or incorporated in developing their own structured sentencing system. As will be shown here and throughout the report, "structured sentencing", is not a single or unified concept. Instead, it represents a variety of ways in which jurisdictions have attempted to identify the particular goals of sentencing and to achieve those goals by structuring the discretion of sentencers (judges, parole boards, prosecutors, and prison officials) at various points within the criminal justice system.

A. VOLUNTARY/ADVISORY SENTENCING GUIDELINES

Among the earliest sentencing innovations in the United States was the experiment with voluntary/advisory guidelines. The sentencing guidelines were "voluntary" because judges were not

required to comply with them. Their emergence was, in part, a counter to the increasing use of mandatory minimums and determinate sentencing reforms that were adopted in California, Illinois, and Indiana in 1977.

The earliest voluntary/advisory guidelines projects originated with a 1974 National Institute of Justice multi-year funded project to study the feasibility of empirically based guidelines for sentencing (Tonry, 1988; Wilkins et al., 1978; Kress 1980). Support was provided to researchers who had been instrumental in the development of parole guidelines to field test guidelines in Denver, Newark, New Jersey, Chicago, Phoenix, Philadelphia, from 1975 to 1980.

There were also two statewide experiments with voluntary/advisory guidelines in Florida and Maryland that later became institutionalized. In Florida, voluntary/advisory guidelines were revised by a sentencing commission and converted into presumptive guidelines in 1983. In the same year Maryland formally adopted voluntary/advisory guidelines. Voluntary/advisory guideline systems were also experimented with at varying levels in Massachusetts, Michigan, Utah, Rhode Island and Wisconsin (Tonry, 1988; Shane-DuBow, Brown, and Olsen, 1985).

Several evaluations were conducted on these early efforts with discouraging results (Cohen and Helland, 1982; Carrow et al., 1985; Sparks et al., 1982, and Rich et al., 1982) According to Tonry (1988) all four evaluations concluded that the guidelines had few

significant impacts on sentencing outcomes or sentencing processes in the courts studied.

Sparks et al., (1982) found that the early Massachusetts guidelines were poorly conceived, poorly developed, and not effectively implemented. The National Center for State Courts in its comprehensive assessment of the development and impact of voluntary/advisory guidelines in Denver, Chicago, Newark and Phoenix also found difficulties in their implementation (Rich et al., 1982). Specifically, the researchers found major methodological and analytical defects in the development of the Denver guidelines. Furthermore, the Denver guidelines had no important influence on judicial decisions whether to incarcerate and that compliance rates for lengths of prison terms were disappointingly low. They concluded:

"The various measures employed... converge on a single conclusion: sentencing guidelines have had no detectable, objectively manifested impact on the exercise of judicial sentencing discretion." (Rich et al., 1982 p. xxiv).³

These disappointing results were often linked to implementation difficulties and the lack of enforcement. In some instances there was not enough time allowed for the guidelines to take hold. More importantly, the guidelines were voluntary, judges could simply ignore them. Nonetheless, they were an important step in the sentencing reform process in the change from indeterminate to determinate sentencing. As shown later, by 1994 there are six states which have adopted either voluntary/advisory guidelines

³ For a contrary view, see Gottfredson and Gottfredson, 1994.

(Arkansas, Louisiana, Maryland, Michigan, Virginia, and Wisconsin), with several of these states being the early experimenters with voluntary/advisory guidelines. However, a review of all the major studies conducted on voluntary/advisory guidelines have shown low compliance by judges and, hence, little impact on reducing disparity (Cohen and Tonry, 1983).

Although all voluntary/advisory guideline systems are not alike, Virginia represents a recent and interesting example of a voluntary/advisory guideline model and the process for adopting such a sentencing system. In Virginia, unlike presumptive sentencing guideline states, the guidelines were not legally mandated, there was no enabling legislation that set up a sentencing commission to develop the guidelines, and they were based on historical sentencing practices (descriptive versus prescriptive). Because the process of guideline development in Virginia exemplifies descriptive guideline development, it is described here in some detail.

Virginia's guidelines were developed and administered by the Judicial Sentencing Guidelines Committee (JSGC) which is accountable to the Judicial Conference of Virginia (JCV). In 1982, then Virginia Governor Charles Robb appointed a task force to examine statewide sentencing practices and to recommend any necessary changes. During the years 1983-1988, the JSGC developed a set of voluntary/advisory guidelines. The guidelines were descriptive in that they were developed through statistical analyses of past sentencing practices and then tested in six pilot

districts for one year in 1988-1989. The JSGC determined these guidelines to be effective and favorably received by judges in the six pilot districts, then voted to expand the use of the guidelines throughout the state.

In 1990, the state legislature commended the JCV for its work and urged adoption of the guidelines. A permanent Judicial Sentencing Guidelines Committee (composed of seven circuit court judges) was formed in 1990. It decided to base the statewide guidelines on sentencing practices from 1985-1989, agreeing that the guidelines should be revised at one-year intervals in accord with analyses of the previous year's sentencing practices.

The primary purpose of the guidelines is the establishment of rational and consistent sentencing standards which reduce unwarranted sentencing disparity. However, Virginia's guidelines are not intended to impact prison populations, change the severity of sentences, change the philosophy of sentencing or restrict judicial discretion. Instead, the guidelines are intended to provide an historical picture, descriptive of past sentencing practices for a variety of offenses.

Virginia's guidelines do not rank offenses according to a severity scale and do not base recommendations on a matrix of offense severity and criminal history scores. The guidelines consist of separate scoring schemes, factors to be considered, and sentence recommendations for eight categories of offenses: homicide, assault, robbery, sexual assault, burglary, larceny, drugs, and fraud. They are bifurcated in structure to reflect two

sets of decisions: whether to imprison and the duration of imprisonment, and whether those not imprisoned should go to a local jail (and for how long), or receive probation.

In developing the guidelines, any factors influencing sentences that were deemed inappropriate (e.g., race, gender, age) were removed from consideration in setting the guideline sentence. In this sense, Virginia's model is not purely descriptive because they specifically eliminate from the guidelines certain factors that historically influenced sentencing in Virginia, but were deemed inappropriate.

The court has significant power to decide who should be incarcerated by always providing the option to incarcerate. In all the cells of the Virginia matrices, the court is given a range of sentences based on the past five years of sentencing practices. Every year the oldest year is discarded and is replaced by the most recent year of data available. This establishes a process in which the data are updated and the guideline ranges are adjusted every year to reflect the most recent sentencing patterns.

Since Virginia's guidelines were only implemented in 1991, there is no major research on the degree to which the guidelines have reduced disparity or how they are used in court decision-making. However, the 1989 report on the test guidelines in effect in the six pilot districts stated that the guidelines fostered greater uniformity, less unwarranted disparity, and that judges complied with guideline recommendations at a rate of 78 percent. It should be noted that compliance with the overall

policy is not the same as compliance with a "guideline recommendation" since departures (i.e., exceptions) may be permitted or encouraged by the general policy. Thus, a 100 percent compliance with the policy might be accomplished by a 78 percent rate of acceptance of the suggested decision outcome.

Virginia is currently in the midst of great controversy with a newly elected governor establishing a commission to study the abolition of parole and the development of a presumptive sentencing system. The legislature has also established a committee to make recommendations for the appropriate role of parole and presumptive sentencing guidelines. Both of these committees are scheduled to release their recommendations in September 1994. The future role of the current sentencing guidelines in Virginia is therefore uncertain.

B. DETERMINATE SENTENCING

Determinate sentencing is one of the most generally used terms to refer to the sentencing reforms of the late 1970's in which the legislatures of California, Illinois, Indiana, and Maine abolished the parole release decision, replaced indeterminate penalty structure with a fixed (flat) sentence which could be reduced by a significant good time provision. The only state to adopt a true determinate sentencing system since 1980 is Arizona which enacted a "truth in sentencing law" on January 1, 1994. Although no other states have adopted such a structured sentencing scheme, none of these states have rejected their determinate sentencing models.

Determinate sentencing was initially spurred by two opposing political forces. "Liberals" attacked the disparities of unfettered judicial discretion which resulted in sentencing biases against the socially disadvantaged (Nelson, 1992; Frankel, 1971; Messinger and Johnson, 1978). On the other hand, the advocates of "law and order" and "get tough" policies on crime saw unfettered judicial discretion as too lenient. Nelson (1992) argues "that this twofold drive helps determine what type of determinate sentencing system, if any, will develop in a given jurisdiction since the resultant sentencing will largely be a product of both drives."

In three of the states (California, Illinois, and Indiana) the legislators provided presumptive ranges of confinement. But, those in Illinois and Indiana were so wide as to provide the court with extensive discretion on sentence length. For many offenses there was no presumptive lead as to whether the sentence should be for or against incarceration. Thus, courts were left with extensive discretion in terms of both length of incarceration and whether to incarcerate. It is arguable that the discretion attacked in these reforms was mainly that of parole boards and that the discretion parole boards lost was largely shifted to the courts, or to the prosecutors who control the charging function (Alschuler, 1988).

The Illinois law provides a clear example of these points (Table 2-1). The legislation, passed on July 1, 1977, created six major classes of offenses for which convicted felons could be sentenced to prison: Class M (murder), Class X (robbery, assault,

TABLE 2-1

**ILLINOIS DETERMINATE SENTENCING CATEGORIES
AND SENTENCING RANGES**

FELONY CATEGORY	REGULAR TERMS	EXTENDED TERMS	EXAMPLES
Murder	life or 20-40 years		Murder
Class X	6-30 years	30-60 years	Rape; armed robbery; aggravated kidnapping
Class 1	4-15 years	15-60 years	Dealing in major narcotics
Class 2	3-7 years	7-14 years	Burglary; arson; robbery
Class 3	2-5 years	5-10 years	Theft (over \$150); child abuse; involuntary manslaughter; aggravated battery; sale of cannabis
Class 4	1-3 years	3-6 years	Possession of cannabis (30-50 grams); sale of child pornography; theft (under \$150)

Source: Austin, 1986.

rape, kidnapping), Class 1 (attempted robbery, rape, and drug sale), and Classes 2, 3, and 4 that represent property (burglary, theft, fraud, and so on), drug offenses (possession and sale), and simple robbery. Class X was the most significant sentencing category as it mandated that judges sentence offenders convicted of these crimes to prison with a range of 6 to 30 years with possible enhancements of 30-60 years. Offenders sentenced for these offenses began serving longer terms under the new law despite the fact that inmates were also being awarded increased amounts of statutory good-time (day for day statutory good-time as opposed to the previous 1/3 statutory good-time system). The parole board's authority to grant release was abolished while parole supervision was retained.

A determinate sentencing system may be premised upon either a "just desert" or utilitarian mode, or, some combination of sentencing goals, and, depending upon a jurisdiction's choice, individual offenders will be treated very differently. A purely utilitarian model of punishment, e.g., concerned with recidivism, incapacitation and deterrence, would have little emphasis on the crime that the offender commits and would demand longer sentences for crimes where consequences associated with incarceration are of most concern (Pincoffs cited in Nelson, 1992). A pure "just deserts" model, on the other hand, would emphasize the criminal act itself to the exclusion of utilitarian goals (Pincoffs cited in Nelson, 1992; Von Hirsch, 1990).

California is one well known example of a "determinate sentencing" model. For a better understanding of this model, we explore the history and outcome of California's adoption of the determinate sentencing option. Initially, although numerous subsequent amendments have changed the statute considerably, California adopted a "just desert" sentencing model. The enabling legislation clearly stated that the "purpose of imprisonment is punishment" (California Penal Code Section 1170 (a)(1)). The legislature determined that offenses should be placed into four categories of crimes based on general severity, then presumptive lengths of incarceration were established for each category. In addition, for each presumptive incarceration length, the legislature provided a range for aggravating and mitigating circumstances. Table 2-2 shows the initial ranges provided for the four classifications and the ranges for aggravation and mitigation under California's determinate sentencing law. These ranges apply only if the court selects incarceration.

The California model and the experience of the state in the first few years of its administration strongly influenced a reversal of direction of the development of structured sentencing reform models. The initial determinate sentencing law was projected to have no impact on prison population growth. But Messinger and Johnson (1978) report that during the first year there were 43 amendments to the legislation, all increasing the severity of sentences and thus increasing the demand for prison space. The large number of amendments to the original law, they

TABLE 2-2

EXAMPLES OF FELONY CATEGORIES AND RANGE OF PENALTIES IN CALIFORNIA
INITIAL DETERMINATE SENTENCING LAW

PRESUMPTIVE SENTENCE	RANGE IN AGGRAVATION	RANGE IN MITIGATION	EXAMPLE(S)
2 years	+ 1 year	- 8 months	Burglary, Grand Theft
3 years	+ 1 year	- 1 year	Robbery (unarmed), Manslaughter
4 years	+ 1 year	- 1 year	Rape, Sale of Heroin
6 years	+ 1 year	- 1 year	Murder (second degree)

Source: California Penal Code 1978.

interpreted, was the result of the legislature's attempting to control sentencing. In their view, California set an example of how not to develop structured sentencing - where the results are strongly influenced by the politics of crime. In a 1983 evaluation of the impact of the reform, Casper and Brereton (1984) concluded that the amended legislation, as intended, increased the likelihood of incarceration and resulted in a phenomenal growth in prison populations.

C. SENTENCING COMMISSIONS AND PRESUMPTIVE SENTENCING GUIDELINES

By the early 1980's, states began to experiment with a commission-developed sentencing guidelines approach. Unlike the determinate and voluntary/advisory guideline experiments, these structured sentencing models were different in three respects. First, the guidelines were not developed by the legislature but by a sentencing commission that often represented a diverse array of criminal justice and even private citizen interests. Second, the guidelines were explicit and highly structured relying upon a quantitative scoring instrument. Third, the guidelines were not voluntary/advisory. Judges had to adhere to the sentencing system or provide a written rationale for departures.

Similar to the move to determinate sentencing and voluntary/advisory guidelines, the driving forces stimulating presumptive sentencing guidelines were the issues of fairness, including disparity, certainty and proportionality, and, prison crowding. These concerns provided the impetus for states to adopt

guidelines, to replace indeterminate sentencing with determinate sentencing and to abolish or at least curtail discretionary parole release. With the tremendous growth in prison populations during the last decade, however, another major purpose behind establishing sentencing commissions is to provide a mechanism to regulate prison population growth. However, this latter goal was often controversial and not always made explicit by the states.

The first four states to adopt presumptive sentencing guideline systems were Minnesota (1980), Pennsylvania (1982), Washington (1983) and Florida (1983). The Minnesota model in particular, with its focus on controlling prison population growth, was often cited in the literature as a successful example of how a state could control disparity and the rising costs of corrections via sentencing guidelines. For example, The American Bar Association, through its Criminal Justice Standards Committee's **Sentencing Alternatives and Procedures**, as adopted by the ABA House of Delegates, has endorsed sentencing commission based guidelines. In making such an endorsement, the Standards Committee "relied heavily upon the system of presumptive/ordinary offender sentencing pioneered, in a guidelines system, in Minnesota" (American Bar Association).

Based on the early successful results of Minnesota (see Chapter 6), more states became interested in adopting guideline models similar to Minnesota's. By 1994, the following five states had adopted presumptive sentencing guidelines: Delaware (1987), Oregon and Tennessee (1989), Kansas (1993), and North Carolina

(1994). The U.S. Sentencing Reform Act of 1984, reflective of the general sentiments of the time, abolished parole and instituted a system of determinate sentencing by 1987. During this same time period, the U.S. Department of Justice via the Bureau of Justice Assistance made grant funds available to selected states to help them implement the guidelines (Tennessee, Oregon and Louisiana, to name a few).

By 1994, a total of 16 states and the federal government had established sentencing commission based sentencing guidelines. Using the definitions presented in Chapter 1, ten of the 16 states are classified as presumptive sentencing guideline states with the remaining six voluntary/advisory guideline models. Another six states have guidelines and/or a sentencing commission under study.⁴

The extent of this activity is almost unprecedented for legislation that requires the creation of a new agency and the delegation of extensive power to that agency to influence sentencing and correctional policy. Nonetheless, sentencing commissions and guidelines still reflect the minority of states with most states having determinate or indeterminate sentencing laws. Moreover, five states (New York, Nevada, South Carolina, Texas, and Oklahoma) have attempted but failed to implement guidelines.

In Chapters 4 and 5, detailed descriptions of these guidelines and the commissions that have written them is presented.

⁴ The identification of these states is presented in the national survey data in Chapter 3.

Consequently, we will not present this same information here. Suffice it to say that sentencing guidelines authored by legislatively created sentencing commissions are now the most popular form of "structured sentencing". A current listing of those states that have adopted guidelines, as well other state sentencing structures, whether they be guidelines, determinate sentencing, or indeterminate sentencing is the subject of the next chapter.

CHAPTER 3

AN OVERVIEW OF CURRENT SENTENCING PRACTICES IN THE UNITED STATES

I. SURVEY OF SENTENCING PRACTICES IN THE UNITED STATES

This chapter presents the results of a national survey of sentencing practices in the United States. It represents the first major national assessment of the various sentencing practices that now exist throughout the nation. The survey was conducted in late 1993 and early 1994 and is current as of February 1994.

In developing the information for the chapter, several other data sources were used in addition to the national survey. The Pennsylvania Commission on Sentencing maintains an extensive library containing documents regarding sentencing practices in a number of the states. The United States Sentencing Commission (USSC) recently conducted a national survey regarding mandatory sentencing for drug offenses. Also, follow-up telephone calls were made to some states in order to speak directly to those individuals who have the most detailed knowledge of sentencing practices in their states. Finally, information was supplemented by site visits to some states. It should be noted that some of the information found in this chapter generalizes some very complex state sentencing statutes.

A primary objective of the national survey was to classify the states according to their sentencing structure. In order to do this, we established operational definitions of sentencing practices (see Chapter 1) and asked the state survey respondent to

check-off as many of these sentencing practice types as apply in describing sentencing practices in the state.

Table 3-1 shows how the responding states classified themselves according to determinate, indeterminate, and/or sentencing guideline structures. Most states (including the District of Columbia) reported having indeterminate sentencing (29).

Twenty states indicated that they have determinate sentencing and 16 states have sentencing guidelines (including North Carolina which is in the process of implementing guidelines). All states reported having a variety of mandatory minimum incarceration sentencing.

As indicated above, the states could check all the sentencing practices that apply to the state and Table 3-1 reflects this multiple checking (14 states checked multiple sentencing practices excluding mandatory sentencing). For example, there are states that have determinate sentencing for one classification of offenses and indeterminate sentencing for another offense classification. Or, a state may have checked both indeterminate sentencing and presumptive sentencing guidelines to indicate that it uses guidelines within an indeterminate sentencing structure. Several states checked the presumptive sentencing guidelines type when in fact they meant the state has presumptive sentencing (guidance or presumptions that must be considered by the court in sentencing),

TABLE 3-1

**SENTENCING PRACTICES IN THE UNITED STATES
AS OF FEBRUARY 1994 AS REPORTED BY STATES***

STATE	DETERMINATE SENTENCING	INDETERMINATE SENTENCING	SENTENCING GUIDELINES	MANDATORY MINIMUM PRISON SENTENCING**
Alabama	X	X		X
Alaska	X	X		X
Arizona	X			X
Arkansas	X		X	X
California	X			X
Colorado	X			X
Connecticut	X			X
Delaware			X	X
Florida			X	X
Georgia		X		X
Hawaii		X		X
Idaho	X			X
Illinois	X			X
Indiana	X			X
Iowa		X		X
Kansas			X	X
Kentucky		X		X
Louisiana	X		X	X
Maine	X			X
Maryland			X	X
Massachusetts		X		X
Michigan		X	X	X
Minnesota	X		X	X
Mississippi	X			X
Missouri	X			X
Montana		X		X
Nebraska		X		X
Nevada		X		X
New Hampshire		X		X
New Jersey		X		X
New Mexico	X			X
New York		X		X
North Carolina		X	X***	X
North Dakota		X		X
Ohio	X	X		X
Oklahoma		X		X
Oregon			X	X
Pennsylvania		X	X	X
Rhode Island		X		X
South Carolina		X		X
South Dakota		X		X
Tennessee	X		X	X
Texas		X		X
Utah		X	X	X
Vermont		X		X
Virginia			X	X
Washington	X		X	X
West Virginia	X	X		X
Wisconsin		X	X	X
Wyoming		X		X
District of Columbia		X		X
TOTALS	20	29	16	51

* As reported by each state responding to the national sentencing survey.

** Although all states reported having mandatory sentencing, this term has a very broad definition and varies state by state.

*** North Carolina's guidelines took effect in October, 1994.

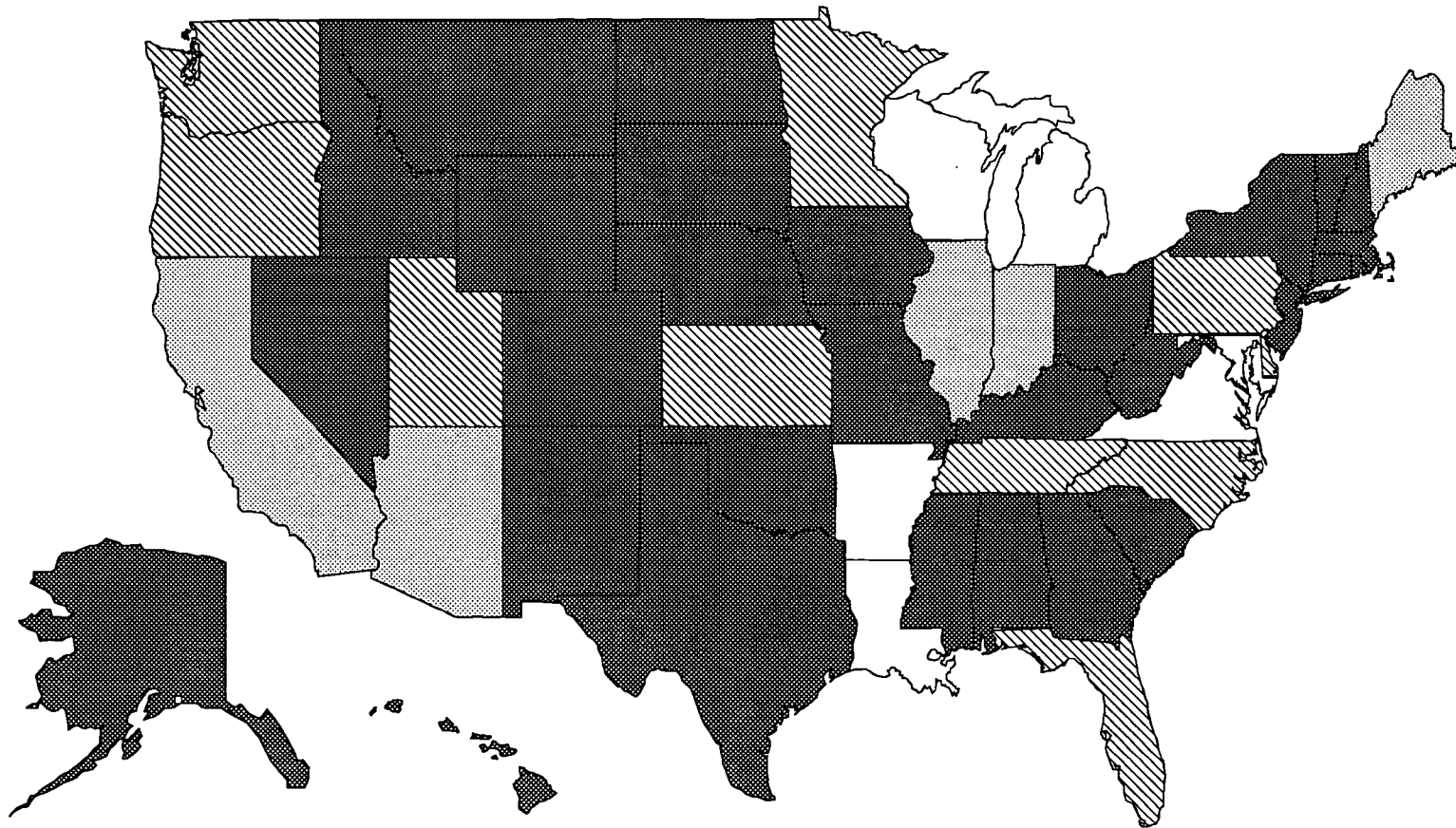
or that only some judicial districts within the state used informal guidelines. This confusion was clarified through follow-up contacts with these states.

Figure 3-1 and Table 3-2 summarize the primary forms of sentencing practices in the United States based on the definitions presented in Chapter 1. For this figure and table, states were classified according to their primary sentencing structure based upon all of the information we had received via the survey and follow-up contacts. For example, if a state has sentencing guidelines and indeterminate sentencing, it is placed in the sentencing guidelines category. If a state has both indeterminate and determinate features, like Ohio, Alabama, and Alaska, it was classified as indeterminate if the majority of inmates are sentenced under the indeterminate structure. Therefore, Figure 3-1 and Table 3-2 show 30 states including the District of Columbia as indeterminate sentencing types, 16 states including North Carolina (guidelines are effective October 1994) as sentencing guidelines types, and five states as determinate sentencing types.

II. MANDATORY MINIMUM INCARCERATION SENTENCES IN THE UNITED STATES

The national survey asked the states several questions regarding mandatory minimum sentences. The states were asked to indicate if they have mandatory sentences and if so for what offenses. The states were also asked to provide more detailed information on any mandatory minimums they have for controlled substances. They were requested to report by drug type, the amount

FIGURE 3.1: Types of Sentencing Practices in the United States in 1993



= Determinate



= Indeterminate



= Presumptive
Guidelines



= Voluntary/Advisory
Guidelines

TABLE 3-2

CLASSIFICATION OF THE STATES BY TYPE OF SENTENCING PRACTICE
AS OF FEBRUARY 1994*

DETERMINATE	INDETERMINATE		SENTENCING GUIDELINE	
			VOLUNTARY/ADVISORY	PRESUMPTIVE
1. ARIZONA	1. ALABAMA	16. NEVADA	1. ARKANSAS	1. DELAWARE
2. CALIFORNIA	2. ALASKA	17. NEW JERSEY	2. LOUISIANA	2. FLORIDA
3. ILLINOIS	3. COLORADO	18. NEW YORK	3. MARYLAND	3. KANSAS
4. INDIANA	4. CONNECTICUT	19. NEW MEXICO	4. MICHIGAN	4. MINNESOTA
5. MAINE	5. DISTRICT OF COLUMBIA	20. NEW HAMPSHIRE	5. VIRGINIA	5. NORTH CAROLINA***
	6. GEORGIA	21. NORTH DAKOTA	6. WISCONSIN****	6. OREGON
	7. HAWAII	22. OHIO		7. PENNSYLVANIA
	8. IDAHO	23. OKLAHOMA		8. TENNESSEE
	9. IOWA	24. RHODE ISLAND		9. UTAH
	10. KENTUCKY	25. SOUTH CAROLINA**		10. WASHINGTON
	11. MASSACHUSETTS	26. SOUTH DAKOTA		
	12. MISSISSIPPI	27. TEXAS		
	13. MISSOURI	28. VERMONT		
	14. MONTANA	29. WEST VIRGINIA		
	15. NEBRASKA	30. WYOMING		

For states that checked multiple sentencing types on the survey, the above listing places each state in its main classification. South Carolina is in a state of flux. Early in 1994 its sentencing commission was designated to go out of business and the guidelines not implemented. However, very recent information indicates that the commission has been given another year of life and that guidelines might still be implemented.

* North Carolina's guidelines took effect in October, 1994.

** Wisconsin's guidelines have presumptive provisions for non-violent property offenses.

of the drug and the penalty for which the mandatory applies. Also, states were asked to submit a copy of their state statutes concerning all mandatory minimums.

It was difficult to collect mandatory minimum incarceration data from the states. Our original intent was to collect data on states with mandatory minimum periods of incarceration for selected crimes. However, we found several states that initially reported no mandatories either because (a) they have them in statute but do not use them, (b) an offender may receive the mandatory but is still eligible for early release via good time and parole, or (c) the sentence is only mandatory because incarceration cannot be suspended. We decided to include all these possibilities in our data presentation.

Table 3-3 summarizes the results of the survey regarding mandatory minimum sentencing. As indicated earlier, all states have some form of mandatory sentencing provisions. The most popular application of mandatories are for repeat or habitual offenders (41 states) and for crimes accompanied by the possession of a deadly weapon (41 states).

Survey responses from Hawaii, Kansas, Kentucky, Louisiana, Maine, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming indicate these states do not have any drug mandatory minimums. Pennsylvania, Colorado, Illinois, Wisconsin, and Rhode Island are states for which the data indicated a mandatory minimum for all the offenses listed in Table 3-3.

TABLE 3-3

OFFENSES* FOR WHICH MANDATORY MINIMUM INCARCERATION SENTENCES ARE PROVIDED FOR BY THE STATES AS OF FEBRUARY 1994

STATE	MANDATORY MINIMUM OFFENSE					
	REPEAT/ HABITUAL	DRUNK DRIVING	DRUGS	POSSESSION OF WEAPONS	SEX OFFENSES	OTHER
Alabama	Y	Y	Y	Y		
Alaska	Y		Y	Y		Y
Arizona	Y	Y	Y	Y	Y	
Arkansas	Y		Y	Y		
California	Y		Y	Y	Y	Y
Colorado	Y	Y	Y	Y	Y	Y
Connecticut		Y	Y	Y	Y	
Delaware	Y		Y	Y		
Florida	Y		Y	Y		
Georgia	Y	Y	Y	Y	Y	
Hawaii	Y			Y		Y
Idaho	Y	Y	Y	Y	Y	
Illinois	Y	Y	Y	Y	Y	Y
Indiana	Y		Y	Y		
Iowa	Y		Y	Y		
Kansas		Y				
Kentucky	Y	Y		Y	Y	
Louisiana	Y			Y		
Maine		Y		Y		
Maryland	Y		Y	Y		
Massachusetts		Y	Y	Y		
Michigan	Y	Y	Y	Y		
Minnesota	Y		Y	Y		
Mississippi	Y		Y	Y		
Missouri	Y		Y	Y		
Montana	Y	Y	Y	Y		
Nebraska	Y	Y			Y	
Nevada	Y		Y	Y		
New Hampshire	Y	Y		Y	Y	
New Jersey	Y	Y	Y	Y	Y	
New Mexico	Y	Y		Y		
New York	Y					
North Carolina	Y	Y	Y		Y	
North Dakota		Y	Y	Y		
Ohio	Y	Y		Y		
Oklahoma	Y			Y		
Oregon		Y				
Pennsylvania	Y	Y	Y	Y	Y	Y
Rhode Island	Y	Y	Y	Y	Y	Y
South Carolina	Y		Y	Y		
South Dakota			Y	Y		
Tennessee		Y				
Texas	Y	Y		Y		
Utah	Y				Y	
Vermont	Y			Y		
Virginia		Y		Y		Y
Washington	Y				Y	Y
West Virginia	Y		Y	Y		
Wisconsin	Y	Y	Y	Y	Y	Y
Wyoming	Y					
Washington D.C.			Y	Y		Y

* Not all offenses are felonies, especially drunk driving.

It is not possible to summarize in this chapter all the information collected on the mandatory minimum drug offenses. The type of drug, the amounts required for the mandatory to apply, and the penalties vary widely. Approximately 20 states have implemented mandatories for sale to minors and sales within a certain distance (usually 1,000 feet) of a school. One state has a provision in its statute that the mandatory minimum does not apply if it is shown that the offender is a "drug dependent person".

III. CURRENCY OF STATE CRIMINAL CODES

The states were asked in the survey to report when the most recent comprehensive revision to or rewriting of its criminal code to change the elements of offenses took place. Most states have not significantly revised their codes since the 1970s. This question proved difficult to answer for states in which criminal code revision is an on-going process with basically yearly revisions. Several large states reported that their codes have not been revised for some time: California in 1872, Michigan in 1935, and New York in 1967. Only nine states reported major revisions occurring in the 1990s and six states reported major revisions in the 1980s.

The states were also asked to indicate if any commissions, task forces, or committees have been formed recently to study and/or make recommendations to change the states' current sentencing practices. Indications are that the following states are in the midst of studying changes:

Alaska - established a Sentencing Commission in 1990 that is charged with addressing sentencing reform and prison overcrowding. The Commission released a report in December 1992 making a number of recommendations in areas such as the use of alternative punishments, parole, and inmate classification.

Hawaii - a committee has been formed to review any needed changes to the penal code and report to the legislature.

Iowa - has established an Intermediate Crime Sanctions Task Force to make recommendations on sentencing reform.

Kentucky - the Governor's Commission on Quality and Efficiency has recommended the implementation of sentencing guidelines for the state.

Massachusetts - has a proposal pending to move to a determinate sentencing structure, has very recently created a sentencing commission, and is considering sentencing guidelines.

Michigan - has established a Sentencing Commission to study the feasibility of developing sentencing guidelines. A specific goal of the Commission is to further the concept of "truth in sentencing".

Missouri - has established a Sentencing Commission to study the state's sentencing practices and to identify sentencing disparity.

Ohio - a Sentencing Commission was established in 1991 to study the state's sentencing laws and correctional resources. A legislative bill was introduced to eliminate parole and good time and create flat sentences (with a series of presumptions).

Oklahoma - a determinate "truth in sentencing" guideline structure is currently under consideration by the legislature. A commission has been established to develop recommendations for the legislature by 1995.

IV. USE OF PAROLE AND GOOD TIME

The survey asked questions regarding discretionary release from correctional facilities and the use of good-time in these facilities (Table 3-4). Most states (48) reported having parole or

some other form of post-release supervision and 48 states reported having good-time for inmates at either or both the local and state levels. Three states (Hawaii, Pennsylvania, and Utah) reported they do not have good-time provisions for inmates. Only three states (Arizona, Florida, and Maine) do not have parole supervision, except for inmates who are still under the old sentencing structures or for a small number of offenders sentenced to life with the possibility of parole. However, to the best of our knowledge, only Maine and the federal system have abolished parole for all offenders.

In some states (such as Delaware, California, Oregon and Illinois) parole in its pure sense has been eliminated, but has been replaced by some form of post-release supervision which is not called parole.

V. SENTENCING COMMISSIONS IN THE UNITED STATES

Table 3-5 summarizes, and Figure 3-2 portrays, states that have adopted sentencing guidelines and have sentencing commissions. It should be noted that our use of the term commission is a generalization and that some entities may be called something else

TABLE 3-4

**SUMMARY OF KEY SENTENCING LAW ATTRIBUTES IN THE UNITED STATES
AS OF FEBRUARY 1994**

STATE	TYPE OF SENTENCING PRACTICE	SENTENCING GUIDELINE COMMISSION	MANDATORY SENTENCING	POST RELEASE SUPERVISION*		GOOD TIME
				DISCRETIONARY RELEASE BODY	POST RELEASE SUPERVISION	
Alabama	INDET	N	Y	Y	Y	Y
Alaska	INDET	N	Y	Y	Y	Y
Arizona	DET	N	Y	N	N	Y
Arkansas	SG	Y	Y	Y	Y	Y
California	DET	N	Y	N	Y	Y
Colorado	INDET	N	Y	Y	Y	Y
Connecticut	INDET	N	Y	Y	Y	Y
Delaware	SG	Y	Y	N	Y	Y
Florida	SG	Y	Y	N	N	Y
Georgia	INDET	N	Y	Y	Y	Y
Hawaii	INDET	N	Y	Y	Y	N
Idaho	INDET	N	Y	Y	Y	Y
Illinois	DET	N	Y	N	Y	Y
Indiana	DET	N	Y	N	Y	Y
Iowa	INDET	N	Y	Y	Y	Y
Kansas	SG	Y	Y	N	Y	Y
Kentucky	INDET	N	Y	Y	Y	Y
Louisiana	SG	Y	Y	Y	Y	Y
Maine	DET	N	Y	N	N	Y
Maryland	SG	Y	Y	Y	Y	Y
Massachusetts	INDET	Y	Y	Y	Y	Y
Michigan	SG	Y	Y	Y	Y	Y
Minnesota	SG	Y	Y	N	Y	Y
Mississippi	INDET	N	Y	Y	Y	Y
Missouri	INDET	N	Y	Y	Y	Y
Montana	INDET	N	Y	Y	Y	Y
Nebraska	INDET	N	Y	Y	Y	Y
Nevada	INDET	N	Y	Y	Y	Y
New Hampshire	INDET	N	Y	Y	Y	Y
New Jersey	INDET	N	Y	Y	Y	Y
New Mexico	INDET	N	Y	Y	Y	Y
New York	INDET	N	Y	Y	Y	Y
North Carolina	SG	Y	Y	N**	N**	Y
North Dakota	INDET	N	Y	Y	Y	Y
Ohio	INDET	N	Y	Y	Y	Y
Oklahoma	INDET	N	Y	Y	Y	Y
Oregon	SG	Y	Y	N	Y	Y
Pennsylvania	SG	Y	Y	Y	Y	N
Rhode Island	INDET	N	Y	Y	Y	Y
South Carolina	INDET	Y	Y	Y	Y	Y
South Dakota	INDET	N	Y	Y	Y	Y
Tennessee	SG	Y	Y	Y	Y	Y
Texas	INDET	N	Y	Y	Y	Y
Utah	SG	Y	Y	Y	Y	N
Vermont	INDET	N	Y	Y	Y	Y
Virginia	SG	Y	Y	Y	Y	Y
Washington	SG	Y	Y	N	Y	Y
West Virginia	INDET	N	Y	Y	Y	Y
Wisconsin	SG	Y	Y	Y	Y	Y
Wyoming	INDET	N	Y	Y	Y	Y
Washington D.C.	INDET	N	Y	Y	Y	Y

* Although several states reported that they do not have parole supervision, to our knowledge only Maine has actually fully abolished parole. In the other states parole in its pure usage has been eliminated, but it has been replaced by some other form of post-release supervision which is not called parole; or parole still exists, but only for inmates sentenced under a former sentencing policy.

** As of October 1994.

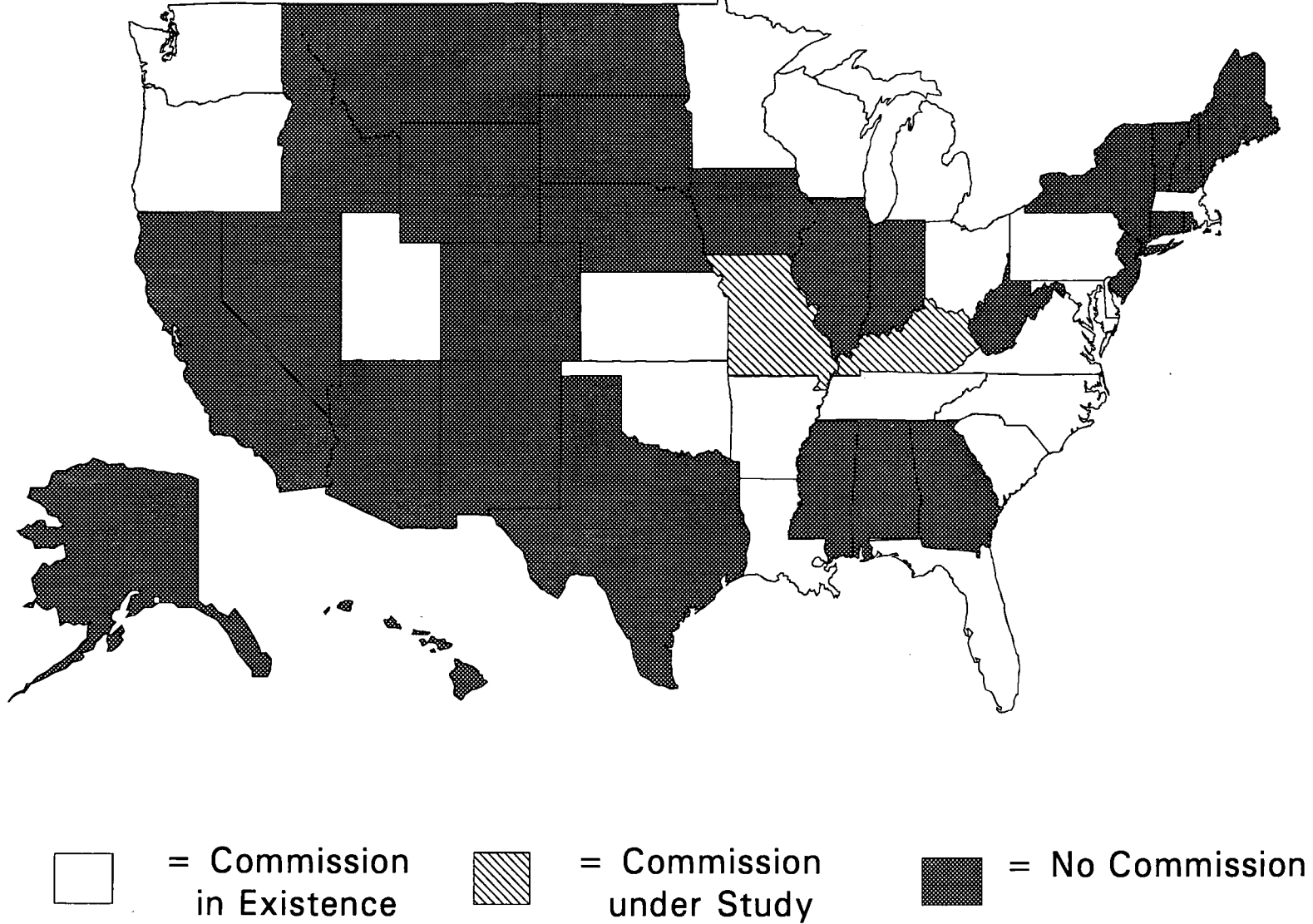
TABLE 3-5

**SENTENCING GUIDELINE STATES IN THE UNITED STATES
AS OF FEBRUARY 1994**

SENTENCING GUIDELINE STATES	TYPE OF GUIDELINES	YEAR OF GUIDELINES IMPLEMENTATION	TYPE OF SENTENCING STRUCTURE
1. Arkansas	Voluntary/Advisory	1994	Determinate
2. Maryland	Voluntary/Advisory	1983	Determinate
3. Michigan	Voluntary/Advisory	1981	Indeterminate
4. Virginia	Voluntary/Advisory	1991	Indeterminate
5. Louisiana	Voluntary/Advisory	1992	Determinate
6. Wisconsin	Voluntary/Advisory*	1985	Indeterminate
7. Delaware	Presumptive	1987	Determinate
8. Florida	Presumptive	1983	Determinate
9. Kansas	Presumptive	1993	Determinate
10. Minnesota	Presumptive	1980	Determinate
11. North Carolina	Presumptive	1994	Indeterminate
12. Oregon	Presumptive	1989	Indeterminate
13. Pennsylvania	Presumptive	1982	Indeterminate
14. Tennessee	Presumptive	1989	Indeterminate
15. Utah	Presumptive	1993	Indeterminate
16. Washington	Presumptive	1983	Determinate

* With some presumptive provisions.

FIGURE 3-2: Status of Sentencing
Guideline Commissions in the
United States



in the state such as a committee. As indicated earlier, 16 states have sentencing commissions and sentencing guidelines. In ten of these states, the guidelines are presumptive while the remaining six have voluntary/advisory guidelines (Louisiana, Wisconsin, Arkansas, Maryland, Michigan, and Virginia).

In addition to the 16 states listed above, at least five other states have guidelines and/or a sentencing commission under study (Missouri, Ohio, Massachusetts, Kentucky, and Oklahoma). Michigan, although it already has voluntary/advisory guidelines, recently established a sentencing commission to further study its sentencing practices and to propose a more structured sentencing scheme. In South Carolina, the status of guidelines remain in a state of flux. Initially our information indicated that the guideline commission would go out of business in June 1994 and that guidelines would not be implemented. Now, very recent information indicates that the commission has been given another year of life and guidelines might still be implemented.

Although sentencing guidelines have been the dominant form of sentencing reform during the past two decades, it is also true that the majority of states have not adopted such a sentencing structure and several others have tried but failed to implement them. Some of the factors that serve to impede or facilitate a state's ability or capacity to adopt sentencing guidelines are addressed in the following two chapters.

CHAPTER 4

SENTENCING COMMISSION STRUCTURES AND THEIR MANDATES

I. INTRODUCTION

The sentencing commission's socio-political environment and legislative mandate strongly influences the role of the commission, the quality of its guidelines, and its ability to implement and obtain conformance to its sentencing guidelines. In this discussion a sentencing commission is a state agency that issues guidelines for the sentencing court. In this chapter we focus on: 1) the purposes of the reform; 2) the specific legislative structure of the commission and the legislative mandates included in the enabling legislation; and 3) the political and legal context.

In developing the information for this report, we studied documents provided by all the state guideline systems and the United States Sentencing Commission. Second, we visited North Carolina, Louisiana, Washington, Tennessee, South Carolina, Kansas, Maryland, Virginia, and Delaware. In these states we interviewed key individuals involved in the development of the sentencing guidelines. Finally, where guidelines have been implemented, we reviewed available data on the impact of the guidelines. Yet, we found that because of the dynamic quality of sentencing, sentencing commissions and sentencing guidelines in particular that important changes occurred constantly so that we regularly had to update the material. Further, we have simplified the classification of state

sentencing systems on various dimensions such as the degree of determinateness and the degree of presumptiveness for purposes of presentation. This means that some will disagree or argue that their state is more complex. We are sure they are correct. However, we want to communicate general trends, and we want to communicate these trends to legislators and others who may know little about sentencing. To do this we have simplified the discussion.

II. PURPOSES OF REFORM

States create sentencing commissions for many reasons. Our investigation found that those most frequently cited reasons are to increase sentencing fairness, to reduce unwarranted disparity, to establish "truth in sentencing," to reduce or control prison crowding, and to establish standards for appellate review of sentence. These purposes are not all or universally accepted, and the means used to implement them vary considerably from jurisdiction to jurisdiction. The purposes outlined by commissions influence nearly every aspect of the guideline development process. Therefore, when evaluating various guideline structures, it is important to recall the goals and purposes of the drafters and evaluate each guideline system against its stated goals. In this discussion we describe the issues and the various approaches that many states and the federal government have taken in attempting to address their specific purposes.

A. FAIRNESS AND SENTENCING DISPARITY

Fairness covers a number of issues that sentencing reforms have addressed over the past twenty years. It refers to reducing unwarranted sentencing disparity, increasing the proportionality of sentences to be commensurate with the seriousness of the offense, and increasing certainty and predictability (Goodstein et al., 1984). For purposes of this discussion, we label certainty and predictability as issues related to what is commonly referred to as *truth in sentencing* described in the next section.

Sentencing disparity is the primary fairness concern but it is difficult to define. Generally, disparity is defined as "similarly situated" offenders being sentenced differently or dissimilar offenders being sentenced similarly. However, "similarly situated" can mean different things. For some (Singer, 1979), it means that sentences should be proportionate to the severity of the offense. For others, it means that sentencing should focus on "culpability" or seriousness of the offense with some consideration of prior record (von Hirsh, 1976). Guidelines have generally provided detailed measures of offense severity and criminal history and relied on the court to consider other relevant sentencing factors.

Proportionality is one of the most important principles in establishing a fair and equitable sentencing system. In setting sentences that are proportional, there are two dimensions that drafters of guidelines consider. The two forms of proportionality are referred to as an *ordinal* and *cardinal* proportionality. Ordinal proportionality refers to the setting of punishments to

offenses relative to each other while cardinal proportionality refers to the "absolute severity levels...chosen to anchor the penalty scale" (von Hirsch, 1984).

Sentencing commissions generally begin the process of drafting the guideline structure by placing offenses into severity levels and then assigning penalties (prison, intermediate punishment, or probation and sentence lengths) to these severity levels. In so doing commissions establish sentences proportionate to each other. Andrew von Hirsch referred to as ordinal proportionality. For example, if the sentencing commission establishes a two-year term of incarceration for assault with serious bodily injury and a one-year term for assault with bodily injury, the assault with serious bodily injury is twice as severe as the assault with bodily injury.

On the other hand, cardinal proportionality determines the overall penalty structure. For example, the United States Sentencing Commission (USSC) used as its benchmark for drug offenses the mandatory penalties established by the Congress. Consequently the overall scale of sentencing guidelines for federal drug sentences is the drug mandatories set by Congress.

Similarly, the state of Washington's Sentencing Guidelines Commission (WSGC) chose its mandatories for violent offenses to establish their most severe sentence recommendations. The WSGC worked down from these when establishing other penalties.

B. TRUTH IN SENTENCING

A recent theme of the structured sentencing reform movement is what is referred to as *truth in sentencing*. Truth in sentencing attacks sentencing models that allow offenders to serve only a portion of their imposed sentence. According to the U.S. Department of Justice, the average sentence imposed in 1990 was 65 months while the average time served in prison was 22 months or 34 percent of the sentence (BJS, 1993, Table 2-7). Truth in sentencing is a legislative means of restoring public confidence in their criminal justice system by requiring offenders to serve their full or almost full sentences. This brings certainty and predictability to sentencing.

There are several key ingredients that most truth in sentencing systems adopt. First, they generally eliminate the indeterminate sentence and replace it with a determinate sentencing format. Second, the sentence reflects the actual amount of time an offender will serve with very limited amounts of good or earned time deducted from the sentence. Third, the parole release decision is eliminated, but post-release supervision is usually retained.

A sentencing system such as this increases certainty and predictability for the duration of confinement. However, most such systems leave the decision as to who will be incarcerated less structured, and less predictable. The discussion of the California and Illinois determinate sentencing systems in Chapter 2 exemplify

the uncertainty of the confinement decision under these determinate sentencing systems.

Sentencing guideline systems when combined with statutorily enacted truth in sentencing provisions can reduce disparity and increase certainty for the incarceration decision. Because sentencing commissions often concern themselves with both correctional resources and unwarranted sentencing disparity they generally address both the length of incarceration and who gets incarcerated. Moreover, as sentencing guideline systems have evolved over time they are focusing on the vast array of intermediate punishments that states are developing. This often comes in the form of exchanges between incarceration with intermediate punishments such as house arrest, intensive supervision, and drug treatment.

C. PRISON CROWDING

Severe prison crowding stimulated the growth of sentencing commissions and sentencing guidelines in many states. The crisis of prison crowding strains state budgets and requires states to reassess the use of correctional resources. In several of our data collection trips to states with guidelines, they indicated that the problem became so severe that it was one of the driving force for the creation of a sentencing commission and capacity-linked sentencing guidelines. Who gets incarcerated and for how long was not just an issue of fairness, but it was also an issue of economics.

Many state correctional systems are under pressure to relieve overcrowding. In response, some states have implemented emergency release measures, accelerated parole release, and instituted other methods to control prison populations. Moreover, states that have built additional space and avoided court intervention have found themselves facing skyrocketing correctional budgets. State legislatures face many demands on tight budgets. With correctional growth taking an increasingly greater share of state budgets, legislators have been looking for a means to manage the growth in correctional populations and, thus, the growth in the correctional budget.

As a consequence, some states have turned to commission-authored sentencing guidelines and reform of sentencing structures to control who should go to prison and for how long. The guideline systems, which are the focus of this and the next chapter, offer the ability to project future prison populations. Within the guidelines, policy choices that are resource sensitive can be made, and if necessary, adjusted to manage expensive correctional capacity. The experiences of Minnesota, Washington, and Oregon are instructive in that they have developed guidelines to manage who goes to prison and for how long. Consequently, these states can anticipate future needs and can focus prison resources on certain offenders. These states focus on conserving prison resources, ensuring space for the violent offender.

This issue is not divorced from the issue of fairness. Overcrowded prison populations can create dangerous and unlawful

environments for the management and treatment of offenders. The principles of fairness and humanity require that offenders be provided a reasonable living environment. Thus, many states, both guideline and non-guideline, have established capacity limits to reflect fairness as well as economic concerns.

III. SENTENCING COMMISSION STRUCTURE, MANDATES, AND ORGANIZATION

Well-conceived enabling legislation is crucial if the commission and its guidelines are to be successful. First, it establishes who participates in developing the sentencing guidelines (membership). Second, it sets forth the legal mandates for the commission such as factors that must be considered in writing guidelines. Third, it sets forth the implementation process and enforcement mechanism of the guidelines. Finally, it communicates the political agenda to the commission. In this section we review these and other aspects of a sentencing commission's structure and organization.

A. COMMISSION MEMBERSHIP

Table 4-1 identifies examples of states that have established a sentencing commission, as of this writing, and the membership and size of each commission. These data illustrate the range in size (from seven on the United States Sentencing Commission to twenty-eight in North Carolina) and the diversity of membership. It should also be noted that with the exception of the USSC, all of the state sentencing commission members serve as part-time members.

TABLE 4-1

SENTENCING GUIDELINE COMMISSION MEMBERSHIP

STATE	NUMBER OF VOTING MEMBERS ¹	GENERAL TYPE OF MEMBERS	
Arkansas ²	9	3 Judges 2 Citizens	2 Defense Attorneys 2 Prosecuting Attorneys
Delaware ³	11	1 Attorney General 2 Citizens 3 Judges 1 Attorney	1 Public Defender 1 Board of Parole 1 Chief Magistrate 1 Commissioner of Corrections
Florida	15	4 Legislators 2 Public Citizens 2 Defense Attorneys	5 Judges 1 Prosecution Attorney 1 Attorney General
Kansas	13	3 Judges 1 District Attorney 1 Public Defender 1 Private Defense Attorney 1 Attorney General	2 Private Citizens 1 Community Corr. Director 1 Corrections 1 Parole Board 1 Chief Court Services Officer
Louisiana	18	8 Judges 2 Defense Attorneys 4 Legislators	2 Prosecution Attorney 2 Law Enforcement
Michigan	10	3 Judges 1 Prosecutor 1 Defense Attorney 1 Law Enforcement	3 Private Citizens 1 Corrections 1 Miscellaneous
Minnesota	11(9)	3 Judges 3 Public Member 1 Corrections 1 Local Government	1 Defense Attorney 1 Parole Board 1 Prosecutor
North Carolina ⁴	28(23)	4 Judges 1 Prosecutor 1 Defense 3 Law Enforcement 1 Attorney General 1 Private Citizen 1 Business Rep. 1 Victim Assistance 1 At Large	1 Parole Board 1 Corrections 1 County Commissioner 6 Legislators 1 Former Inmate 1 Academic 1 Community Corrections 1 Bar Association 1 Justice Fellowship
New York	14	2 Judges 1 Prosecutor 3 Defense Attorneys	1 Probation 1 Sentencing Researcher 6 Public Members
Ohio	15	6 Judges (Counting Chief Justice) 1 Prosecuting Attorney 1 Defense Attorney 2 Law Enforcement	1 Victim 4 Legislators 2 Ex Officio

¹ Numbers in parentheses represent previous number of commissions.

² Arkansas has two advisory members: the chair of the Senate Judicial Committee and the chair of the House Judicial Committee.

³ In Delaware, the structured sentencing program is implemented by the Sentencing Accountability Commission (SENTAC).

⁴ The original commission membership in Minnesota was 9 and has since been expanded to 11.

⁵ The original commission membership in North Carolina was 23. In 1992, the Commission added 2 additional members of the House of Representatives and 2 additional members of the Senate. In 1993 the twenty-eighth member was added.

TABLE 4-1 (CONTINUED)

SENTENCING GUIDELINE COMMISSION MEMBERSHIP

STATE	NUMBER OF VOTING MEMBERS	GENERAL TYPE OF MEMBERS
Oregon ⁵	13	1 Public Member 1 Attorney General 1 Rep. from OR Council on Crime and Delinquency 2 District Attorney 1 Mental Health Rep. 1 County Commissioner 1 Psychiatric Review Board 2 Attorneys 1 Parole Board 1 Law School Faculty 1 Corrections 1 Sheriff
Pennsylvania	11	4 Judges 1 Defense Attorney 1 Academic 1 Prosecutor 4 Legislators
Tennessee	15	4 Judges 1 Prosecutor 1 Defense Attorney 1 Corrections 1 TN Code Revision Representative 1 Law Enforcement 2 Legislators 3 Citizens 1 Parole Board
Texas	25	5 Senators 3 Attorneys 2 Appellate Judges 2 Corrections 1 Secretary of State (Ex Officio) 1 Law School Dean 1 Board of Criminal Justice Representative 4 Representatives 4 Judges 1 Sheriff 1 Warden
United States Federal System	7	3 Judges 4 Public Members
Utah ⁶	27(19)	2 House 1 Corrections 1 Board of Pardons 1 Appellate Judge 2 Public Defenders 1 Prosecutor 1 Chief of Police 2 Private Citizens 1 Juvenile Prosecutor 1 Defense Attorney for Minors 1 Youth Parole Authority Rep. 1 Director of Youth Corrections 1 Rehab. Specialist for Juveniles 2 Senate 1 Criminal Justice Council 2 Trial Judges 1 Defense Attorney 1 Attorney General 1 Sheriff 1 Rehabilitation Specialist 1 member at large 1 Juvenile Court Judge
Virginia	7	7 Judges
Washington	16	4 Judges 2 Prosecuting Attorneys 2 Defense Attorneys 1 Law Enforcement 3 Public Citizens 1 Corrections 1 Parole Board 1 Exec. Director 1 Dir. of Financial Management
Wisconsin	17	4 Judges 1 Prosecutor 2 Defense Attorneys 1 Attorney General 3 Victim Representatives 1 Secretary DOC 1 Parole Commission Chair 2 Legislators 1 State Public Defender 1 Private Citizen

⁶ Oregon's Sentencing Guidelines Board is comprised of members who also participate on the Oregon Criminal Justice Council. In order to avoid violating separation of governmental powers issues, judges and legislators may not sit on the Sentencing Guidelines Board. However, they do participate in the decision making process.

⁷ In 1994 Utah added 8 members to its sentencing commission.

There are advantages and disadvantages to large and small commissions and to a wide diversity of members. In part, membership and size represent the interest of the state in creating the commission and the groups that are defined as significant in writing sentencing guidelines.

For example, on Pennsylvania's eleven-member sentencing commission, which is not mandated to manage or consider prison population size, corrections is not represented. Judicial and legislative appointments represent more than three fourths of its membership. In Pennsylvania the lack of correctional participation resulted from its lack of crowding when the commission was created. The significant role for judges and legislators arose from the view that they were the major sentencing constituents.

Susan Martin (1983) juxtaposed Pennsylvania's judicial/legislative-focused commission with Minnesota's representation, which included private citizens and correctional representation. She identified this difference in membership as a key reason for Minnesota's sensitivity to correctional resources versus Pennsylvania's greater sensitivity to a political agenda.

Kramer et al., (1989) assessed the impact of this difference in their study of the policy choices. They applied the Washington, Minnesota, and Pennsylvania guidelines to over 8,000 felony cases. They found that Minnesota and Washington, with their focus on correctional capacity, established guidelines that preserved resources in the state system for violent offenders. Pennsylvania, with no capacity constraint, had, overall, a more punitive

guideline system, but Pennsylvania's severity was based primarily on its more severe sentences for non-violent offenders. The most obvious reasons for these differences are the legislative mandate for the Washington and Minnesota sentencing commissions to consider prison capacity and their commissions correctional representation. Pennsylvania had neither and consequently wrote guidelines increasing certainty and length of incarceration.⁵

The type and breadth of representation influences the quality of the guidelines that are written and the ability of the commission to get the guidelines implemented. For example, in an interview with Robin Lubitz of the North Carolina Sentencing and Policy Advisory Commission, he felt that their 28-member commission was a tremendous asset in developing support for both the concept of sentencing guidelines and the guidelines themselves:

...although that size made it very difficult in the beginning, when it coalesced it was a potent force. So in retrospect if I were to do it again, I would probably have a Commission about the same size even though if you had asked me that a couple of years ago I would have said it was much too big to be effective.

Broad participation in the guideline process both cultivates commitment to the promulgated guidelines and improves the quality of the guidelines that are developed.

Oregon's guideline development process is another example of how building a broad-based constituency through inclusive participation fostered commitment to the guidelines among

⁵ However, it is also noted that Wisconsin has correctional representation on its commission but was not specifically charged to restrict prison populations.

representatives of different criminal justice interests. Kathleen Bogan (1990, 478), the then Executive Director of the Commission, indicated that:

The strength of Oregon's approach was that all three branches of government, including judges and legislators, participated in the development of the guidelines at the council level, while at the same time avoiding any unconstitutional mix of the three branches in a promulgating body, thus broadening support for and understanding of the guidelines.

The membership of the Oregon Commission consisted of judges, defense attorneys, prosecutors, legislators, and criminal justice professionals (including corrections officials). The Oregon experience illustrates the principle that if various interest groups have input into the development of a guideline system, they will more likely take a proprietary and supportive interest in the final product.

B. SENTENCING COMMISSION'S MANDATE/PURPOSES

Table 4-2 sets forth mandates for many state sentencing commissions and the United States Sentencing Commission. As a review of this information will indicate, there are several important themes that legislatures adopt as principles under which the commission is to operate and several principles that the commission's guidelines are to fulfill. In this section we discuss some of these themes for states considering the creation of a commission, or states with commissions that may consider revising their commission's mandate.

Purposes of Sentence. Judges have historically been given the responsibility to craft sentences that fulfill diverse and

TABLE 4-2

PURPOSES OF SENTENCING FROM ENABLING LEGISLATION* FOR SELECTED STATES

<p>Arkansas</p>	<p>PURPOSES OF SENTENCING. The primary purposes of sentencing a person convicted of a crime are:</p> <ol style="list-style-type: none"> 1. To punish an offender commensurate with the nature and extent of the harm caused by the offense, taking into account factors that may diminish or increase an offender's culpability; 2. To protect the public by restraining offenders; 3. To provide restitution or restoration to the victims of crime to the extent possible and appropriate; 4. To assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and 5. To deter criminal behavior and foster respect for the law.
<p>Delaware</p>	<p>The goals of SENTAC, in priority order, include:</p> <ol style="list-style-type: none"> 1. Incapacitation of the violence-prone offender; 2. Restoration of the victim as nearly as possible to his or her pre-offense status; and 3. Rehabilitation of the offender.
<p>Louisiana</p>	<ol style="list-style-type: none"> A. The purpose of the Louisiana Sentencing Guidelines, hereinafter referred to as "guidelines" is to recommend a uniform sanctioning policy which is consistent, proportional, and fair for use by the Louisiana judiciary in felony cases in which the sentencing court must determine the sentence imposed. B. The guidelines do not apply to capital cases, cases punishable by a mandatory sentence of life imprisonment, or misdemeanor cases. C. The guidelines do not apply to convictions for felony offenses for which no crime seriousness level has been determined. In such cases, the court may be guided by the guideline range for a ranked offense which the court determines to be analogous to the offense of conviction. D. The guidelines are intended to ensure certainty, uniformity, consistency and proportionality of punishment, fairness to victims, and the protection of society. E. The guidelines are intended to provide rational and consistent criteria for imposing criminal sanctions in a uniform and proportionate manner. <ol style="list-style-type: none"> 1. Uniformity in sentencing requires that offenders who are similar with respect to relevant sentencing criteria should receive similar sanctions, and that offenders who are substantially different with respect to relevant sentencing criteria should receive different sanctions. 2. Proportionality in sentencing requires that the severity of the punishment be proportional to the seriousness of the offense of conviction and the severity of the offender's prior criminal history. F. The guidelines are intended to assist the court in stating for the record the considerations taken into account and the factual basis for imposing sentence.
<p>Minnesota</p>	<ol style="list-style-type: none"> 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 purposes 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.

* This information was taken verbatim from original legislation as forwarded to NCCD.

TABLE 4-2 (CONTINUED)

PURPOSES OF SENTENCING FROM ENABLING LEGISLATION FOR SELECTED STATES

<p>North Carolina</p>	<ol style="list-style-type: none"> 1. Sentencing policies should be consistent and certain: Offenders convicted of similar offenses, who have similar prior records, should generally receive similar sentences. 2. Sentencing policies should be truthful: The sentence length imposed by the judge should bear a close and consistent relationship to the sentence length actually served. 3. Sentencing policies should set resource priorities: prisons and jails should be prioritized for violent and repeat offenders, and community-based programs should be used for non-violent offenders with little or no prior record. 4. Sentencing policies should be supported by adequate prison, jail, and community resources.
<p>Oregon</p>	<ol style="list-style-type: none"> A. The primary objectives of sentencing are to punish each offender appropriately, and to insure the security of the people in person and property, within the limits of correctional resources provided by the Legislative Assembly, local governments and the people. B. Sentencing guidelines are intended to forward the objectives described in section (1) by defining presumptive punishments for post-prison or probation supervision violations, again subject to deviation. C. The basic principles which underlie these guidelines are: <ol style="list-style-type: none"> 1. The response of the corrections system to crime, and to violation of post-prison and probation supervision, must reflect the resources available for that response. A corrections system that overruns its resources is a system that cannot deliver its threatened punishment or its rehabilitative impact. This undermines the system's credibility with the public and the offender, and vitiates the objectives of prevention of recidivism and reformation of the offender. A corrections system that overruns its resources can increase the risk to life and property within the system and to the public. 2. Under sentencing guidelines the response to many crimes will be state imprisonment. Other crimes will be punished by local penalties and restrictions imposed as part of probation. All offenders released from prison will be under post-prison supervision for a period of time. The ability of the corrections systems to enforce swiftly and sternly the conditions of both probation and post-prison supervision, including by imprisonment, is crucial. The use of state institutions as the initial punishment for crime must, therefore, leave enough institutional capacity to permit imprisonment when appropriate, for violation of probation and post-prison supervision conditions. 3. Subject to the discretion of the sentencing judge to deviate and impose a different sentence in recognition of aggravating and mitigating circumstances, the appropriate punishment for a felony conviction when compared to all other crimes and the offender's criminal history. 4. Subject to the sentencing judge's discretion to deviate in recognition of aggravating and mitigating circumstances, the corrections system should seek to respond in a consistent way to like violations of probation and post-prison supervision conviction.

TABLE 4-2 (CONTINUED)

PURPOSES OF SENTENCING FROM ENABLING LEGISLATION FOR SELECTED STATES

<p>Tennessee</p>	<p><u>40-35-102 Purposes</u> The foremost purpose of this chapter is to promote justice, as manifested by section 40-35-103 consistent with the mandate of section 40-37-101 et seq. which section defines the duties of the Tennessee Sentencing Commission. In so doing, the following principles are hereby adopted.</p> <ol style="list-style-type: none"> 1. Every defendant shall be punished by the imposition of a sentence justly deserved in relation to the imposition of a sentence justly deserved in relation to the seriousness of the offense; 2. This chapter is to assure fair and consistent treatment of all defendants by eliminating unjustified predictability of the criminal law and its sanctions; 3. Punishment shall be imposed to prevent crime and promote respect of the law by: <ol style="list-style-type: none"> a. Providing an effective general deterrent to those likely to violate the criminal laws of this state; b. Restraining defendants with a lengthy history of criminal conduct; c. Encouraging effective rehabilitation of those defendants, where reasonably feasible, by promoting the use of alternative sentencing and correctional programs that elicit voluntary cooperation of defendant; d. Encouraging restitution to victims where appropriate 4. Sentencing should exclude all considerations respecting race, gender, and social status of the individual; 5. In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and 6. Defendants who do not fall within the parameters of paragraph (e) and receive a sentence of eight (8) years or less are presumed in the absence of evidence to the contrary to possess capabilities for rehabilitative alternative sentencing options in the discretion of the court and these are specifically encouraged.
<p>U.S. Sentencing Commission</p>	<p><u>§ 3553 Imposition of a sentence</u> (a) Factors to be considered in imposing a sentence. - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, , shall consider--</p> <ol style="list-style-type: none"> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed-- <ol style="list-style-type: none"> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
<p>Washington</p>	<ol style="list-style-type: none"> 1. Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history. 2. Promote respect for the law by providing punishment which is just; 3. Be commensurate with the punishment imposed on other committing similar offenses; 4. Protect the public; 5. Offer the offender an opportunity to improve himself or herself; and 6. make frugal use of the state's resources.

conflicting purposes of sentencing including sentences that rehabilitate, deter, incapacitate, restore, and punish. Table 4-2 shows that many commissions have been mandated to continue to fulfill these purposes while others have prioritized the purposes that the commission's guidelines are to meet. For example, Arkansas, a state recently implementing guidelines, endorses all of these purposes in its legislation and leaves to the guidelines and the discretion of the judge implementing its guidelines to determine exactly how these purposes will be fulfilled. It is clear that many of these purposes are contradictory such that to the degree that one purpose takes priority it may diminish the ability to fulfill another purpose. For example, for cases in which the purpose is to "punish an offender commensurate with the nature and extent of the harm caused by the offense, taking into account factors that may diminish or increase an offender's culpability," how will these commensurate punishments be consistent with policies that attempt to rehabilitate the offender? In some cases it may be that commensurate punishments will be consistent with rehabilitative sentences. However, it is unlikely that this will be consistently true and it is likely that more often than not the sentence given to fulfill a punishment goal will be inconsistent with one attempting to rehabilitate the offender.

Minnesota's enabling legislation seems to recognize the potential dissonance between the goals of sentencing and sets forth a mandate stating that "[d]evelopment 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." While the reference to criminal history may have taken the commission in the direction of developing an incapacitative model, the commission used this mandate to adopt a modified just desert model of sentencing.

More recently Pennsylvania has adopted modifications to its sentencing guidelines that articulate purposes of sentencing that vary depending on the severity of the offense and the severity of the defendant's prior record. While the overall emphasis in the Pennsylvania matrix is on punishment, the commission prioritizes other purposes among the four levels that it has created in the guidelines. For example, Pennsylvania with its broad-based purposes including all of the purposes noted above indicates that for offenders with sentences that call for relatively short terms of incarceration and in some cases that allow for non-confinement options, the commission states: "Many offenders in this level suffer from drug and/or alcohol problems and the court should consider a treatment component to address the rehabilitative needs of such offenders (Pennsylvania Commission on Sentencing 1994)."

The important issue to note in the development of the commission's mandate is that legislatures have failed in most circumstances to prioritize the purposes of sentencing and this has left the commission with the difficult responsibility of drafting sentencing guidelines that must address conflicting purposes. In most cases, except in Minnesota, this has meant that the

commissions have developed the guidelines using measures of offense severity and criminal history and have left to the court the discretion to aggravate and mitigate the sentence as a means of considering rehabilitation and other sentencing purposes.

Fairness and Certainty. Table 4-2 indicates that many states provide their sentencing commission with specific direction that sentences should be fair and certain. There are two components to this part of commission's mandates. In part this is inherent in the reform of the sentencing model such as the replacement of the indeterminate sentencing model with the determinate sentencing model. This usually involves the elimination of parole release, the allowance of good time that varies from approximately 33 percent in Minnesota to a 15-percent reduction in the federal determinate sentencing guideline system.

A second component of fairness and certainty is the guideline system constructed by the commission. These include the width of the ranges within the guidelines, the standard on appeal when the court departs from the guidelines, and the consideration of factors that may allow the court to consider what social scientists call extra-legal factors, such as education level, employment status, and other such factors. Minnesota's enabling legislation directed that "[s]entencing should be neutral with respect to race, gender, social, or economic status of convicted felons." The federal system and Tennessee's enabling legislation contained similar mandates. Other states generally are silent on these issues and thus the consideration of factors such as education and employment

status, which may be indirectly racially linked, are allowed unless the commission itself in the guidelines sets forth such a policy.

C. CORRECTIONAL CAPACITY MANDATE

Many state legislatures direct the sentencing commission to consider the limitation of prison capacity in the development of the guidelines (Table 4-3). This suggests the importance of prison crowding in the creation of sentencing commissions. In many instances, the enabling legislation requires the commission to estimate the fiscal impact of the guidelines on correctional resources.

Minnesota, Oregon, and Washington are examples of states with enabling legislation directing that guidelines consider correctional resources. Minnesota's legislation set a precedent in 1978 by specifying that "...the commission shall take into substantial consideration ...correctional resources...", while Oregon's legislation states that "factors relevant to appropriate sentencing include...effective capacity of state and local corrections facilities..." (Bogan, 1990, p. 469).

Washington was specifically mandated to make "frugal use of the state's resources." Its enabling legislation requires that: 1) the sentencing commission study state correctional capacity, project the impact of guidelines on that capacity, and 2) if guidelines are projected to result in exceeding prison capacity, the commission must prepare alternative sentence recommendations that do not exceed capacity. Further, the legislation enables

TABLE 4-3

LEGISLATIVE DIRECTION REGARDING CONSIDERATION OF PRISON CAPACITY

STATE	QUOTE
Arkansas	"The Arkansas sentencing commission shall be in charge of strategic planning for a balanced correctional plan for the state...(and) assess (sentencing standards') impact on the correctional resources of the state..." Arkansas A.C.A. 16-90-802 (4) (A, C)
Delaware	"The commission shall develop sentencing guidelines...with due regard for resource ability and cost." (Delaware Code 1984 § 6580 Subchapter X(c))
Florida	"Use of incarceration sanctions is prioritized toward offenders convicted of serious offenses and certain who have long prior records, in order to maximize the finite capacities of state and local correctional facilities. (Laws of Florida 1993 - Ch. 93-406.)
Kansas	"...The commission shall take into substantial consideration current sentencing and release practical and correctional resources, including but not limited to the capacities of local and state correctional facilities." (Laws of Kansas 74-9101)
Louisiana	"...coordinate state sanctioning policy with state correctional policy and resources." (Louisiana revised statutes 1987 15:321-329)
Minnesota	"...The commission shall take into substantial consideration current sentencing and release practices and correctional resources..." (Laws of Minnesota 1978, Chapter 723-S.F. No. 65--Subdivision 5)(2)).
North Carolina	"Sentencing policies should be supported by adequate prison, jail, and community resources."
Ohio	"The sentencing structure shall...assist in the management of prison overcrowding and correctional resources..." (Ohio statute § 181.24 (A)).
Oregon	"Factors relevant to appropriate sentencing include...effective capacity of state and local corrections facilities and other sentencing sanctions available: (Enabling Legislation, cited in Bogan 1990).
Tennessee	"The sentencing commission shall include with each set of guidelines a statement of its estimate of the effect of the guidelines on the Department of Corrections both in terms of economic resources and inmate population." (Tennessee Sentencing Commission Act of 1986)
U.S. Federal System	"The Commission...shall take into account the nature and capacity of the penal, correctional and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities...as a result of guidelines...the sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons..." (U.S. Code Title 289 Chap. 58 § 994 (g))
Utah	"(one) purpose of the commission shall be to...relate sentencing practices to correctional resources..." (Utah code annotated 1953 Section 63-89-4;1993)
Washington	"While the commission need not consider [correctional] capacity in arriving at its recommendations, the commission shall project whether the implementation of its recommendations would result in exceeding such capacity: if...this result would probably occur, then the commission shall prepare an additional list of standard sentences which shall be consistent with such capacity" (Washington Sentencing Reform Act of 1981, 9.94A, subsection 6)

Washington's governor to declare a state of emergency regarding state prison crowding and to call the sentencing commission into emergency meetings to deal with the crowding situation.

The issue of capacity restraint is important in establishing a limit on the severity of sanctions (number incarcerated and length). Susan Martin's (1983) research on the guideline process in Pennsylvania and Minnesota concludes that Minnesota's adoption of a capacity agenda imposed reasonable restrictions on the commission's ability to rely on imprisonment as a sentencing option and as a foil to critics who pushed for greater severity. She argued that the Minnesota Commission set a rationale for a reasonable restraint upon the capacity of the system to punish. On the other hand, Pennsylvania, acting without a prison capacity limit on its guidelines, struggled to counter arguments for harsher penalties.⁶

D. METHOD OF ADOPTION

Adoption of guidelines is important because it defines who is the final author of the guidelines and how strictly they are to be applied to a case. There are three basic approaches. The first approach entails the creation of a commission mandated to draft guidelines that must be submitted in bill form to the legislature

⁶ Our data in Chapter 6 comparing incarceration rates between Minnesota and Pennsylvania since each has implemented sentencing guidelines indicate that each have significantly altered incarceration rates as they intended, although there are certainly other factors such as conviction numbers, decisions by others in the system, and the adoption of mandatory minimum sentencing provisions that will influence the incarceration rate.

as is true of any other piece of legislation. An example of a state adopting guidelines in this manner is Washington where the legislature may adopt the guidelines as submitted, reject them, or amend them.

The second approach is to delegate to the commission the authority to write guidelines that become law absent some further action on the part of the legislature. For example, in Pennsylvania, ninety days after the guidelines are submitted to the legislature, they become law absent a concurrent resolution to reject.

A third approach is the use of administrative rules or administrative order. Wisconsin's guideline, enabled in bill form and legislated, are adopted through administrative rules, promulgated by the commission and approved by the legislature. Delaware's guidelines on the other hand are issued by an administrative order from the Supreme Court.

There are advantages and disadvantages to each approach. First, guidelines legislatively passed in bill form become law and obtain the standing of law. The major concern with such a process is the risk that the legislature will neglect to act on the bill or to amend it during its passage. For example, New York's sentencing commission's guidelines were submitted in bill form, but were never passed by the legislature and the commission's funding was eventually discontinued, causing its dissolution (Griset, 1991). Some blame such guideline failures primarily on the commission's inability to develop commitment to its guidelines (Martin, 1983).

More recently, Tonry (1988) has recognized the political problems facing commissions.

The political advantages of legislatively enacted guidelines results from the explicit support of the legislature and the governor as an outgrowth of direct legislative action. Legislative enactment dissolves any constitutional concerns – such as those involving judicial participation in a legislative body (Pennsylvania) or delegation of authority by the Congress to a commission whose members are all appointed by the President (U.S. Sentencing Commission) are overcome (see Misretta v. U.S. 488 U.S. 361(1989) for federal examination of the issue). Moreover, appellate courts reviewing sentencing under legislatively adopted guidelines are, perhaps, more likely to review sentences on substantive and not just procedural issues, although this is not yet established (Del Sole, 1993).

By contrast, under the "adopted unless rejected" approach (e.g., Pennsylvania), guidelines are enacted by the legislature's failure to reject them. While such commissions are delegated much more significant power, the guidelines may have less standing under appellate review, and there may be constitutional concerns with legislative delegation to a commission with members of the judiciary and appointments by the governor.

The third approach, implementation through administrative rules or orders, also has advantages and disadvantages. Delaware, a state whose guidelines are issued through administrative order by its Supreme Court, finds that this process allows substantial

flexibility. Implementation of and amendments to their recommendations are possible within a relatively short time frame and amendments do not face as great a risk of rejection or alteration by their Supreme Court. However, sentences imposed under guidelines issued by administrative order generally are not appealable and thus the guidelines are merely voluntary.

The choice as to which is the best model may reflect the willingness of legislatures to delegate authority and/or to become more significantly involved in establishing sentences. North Carolina, with the guidelines submitted in bill form, has a tradition of strong legislative control and its legislature was averse to delegating broad-based power to the sentencing commission (Lubitz, 1993). However, legislative enactment risks amendments to the guidelines or failure to implement. The New York experience (Griset, 1990) where the legislature thwarted the guideline movement by failure to pass proposed guidelines has been rare, but it demonstrates the risks involved in requiring legislative enactment.

The most common approach is to require the adoption of guidelines in bill form (Table 4-4). It is interesting to note that at the time of this writing Florida moved from a "failure to reject" approach to legislatively adopting its guidelines. The state of Washington, on the other hand, was researching moving from legislatively adopting its guidelines to the "failure to reject" approach.

TABLE 4-4

EXAMPLES OF MODE OF SENTENCING GUIDELINES ADOPTION

STATE	MODE OF ADOPTION
Arkansas	Legislative mandate and adoption of guidelines in bill form
Delaware	Administrative order from Supreme Court
Florida	Legislative mandate and adoption in bill form (NEW 1994) Legislature may reject by concurrent resolution (old - 1983)
Kansas	Legislative mandate, guidelines adopted in bill form
Louisiana	Legislative mandate. Promulgated as administrative rules
Michigan	Judicial direction, development and endorsement (but recent legislative mandate for new guidelines)
Minnesota	Legislative mandate, legislature may reject by resolution
North Carolina	Legislative mandate and adoption in bill form
Ohio	Legislative mandate and adoption (in process)
Oregon	Criminal Justice Council promulgates guidelines as administrative rules, legislature may reject or amend by resolution
Pennsylvania	Legislature may reject by concurrent resolution within 90 days
Tennessee	Legislative mandate and adoption in bill form, as part of criminal code
U.S. Federal System	Legislative mandate for commission promulgated guidelines as administrative rules, legislature may reject by resolution
Utah	Legislative mandate and adoption (guideline re-development in process) in bill form
Washington	Legislative mandate and adoption in bill form
Wisconsin	Legislative mandate and promulgation by administrative rule

E. FINANCIAL SUPPORT

Strong legal and broad-based political support are important aspects of the ability of a sentencing commission to write guidelines. However, it is critical that adequate financial support is necessary if a commission is to be able to study past sentencing practices in the state; study what other states have done; prepare reports and proposals for the commission to consider; pay for the commission to meet regularly; hire consultants when necessary; provide the ongoing feedback to the court and other governmental agencies; monitor and evaluate the impact of guidelines; and conduct other basic and applied research on a wide variety of sentencing issues.

Cost varies considerably from state to state depending on the needs of the commission. However, the annual costs for states range between \$250,000 and \$650,000. If insufficient resources are provided for the commission's work, the risk of failure increases. The commission needs independence to hire adequate staff, to pay for travel, and to support other basic functions and activities. It is crucial that the commission's ongoing functions of monitoring, revising guidelines, and assessing the impact of legislation and other functions that it will take on as part of its sentencing function be fully considered and that adequate funding be provided.

As a side note, a number of commissions that have successfully implemented guidelines have realized increases in budget and in staff size in the post-implementation years. This is due to

continually increasing responsibilities imposed on the commissions by the legislature and the cost of monitoring and evaluating guidelines.

F. COMMISSION SUPPORT STAFF ORGANIZATION

The size and composition of staff to support the work of the Commissions is relatively similar among the state commissions. The one exception to this is the USSC. In 1991, the USSC had 100 full-time staff and an appropriation of close to 8.5 million dollars. Other states have implemented guidelines systems with anywhere from three to twenty-two full time staff members. The majority of states have had between five and seven full-time staff members during the implementation and development stages. Washington and Pennsylvania initially had five and a half staff members and Minnesota had seven. More recently North Carolina has been operating with a staff of seven.

The staff composition in the states has been heavily weighted toward social science researchers (Knapp, 1987). Staffs are generally comprised of an executive director, a policy director, a research director, an administrative assistant and a secretary. Additionally, states have hired research associates (usually at least one with statistical experience) and data coders/input operators to supplement the research efforts.

Generally, commission staffs are called upon to do any number of the following: design and implement a data collection system; provide information regarding the current status of sentencing

patterns; project the impact of any changes that guidelines might have on current trends; draft guideline policies; monitor appellate court decisions; conduct training and education seminars related to the guidelines; answer questions over the phone relating to guideline application issues; and prepare meeting materials for the commission. Typically, at least one staff member maintains regular contact with legislators and legislative staff members.

G. COMMISSION MEETINGS

The frequency with which commissions meet varies from state to state. In the initial stages of guidelines development, meetings are held with much more frequency than in stages after implementation. In fact, it is not uncommon in the early drafting stages for commission members to spend evenings, weekends, and sometimes multi-weekdays in meetings.

Some states have defined the minimum frequency of meetings in their enabling legislation. For example, in Arkansas and Pennsylvania, the enabling legislation indicates that the commission shall meet at least quarterly. After the initial stages, some states have regularly scheduled meetings. For example, the state of Washington schedules full commission meetings for the second Friday of the month unless they are specifically cancelled.

It is important to budget adequate travel funds to support the frequent meetings and overnight stays required for the commission to meet its deadlines.

H. GUIDELINE IMPLEMENTATION

Commissions vary in terms of the enabling legislation's empowerment of the commission to implement the sentencing guidelines and to monitor the guidelines. However, the commission's enabling legislation should give the commission the authority to train judges, prosecuting attorneys, defense attorneys, probation officers, and others in the sentencing process.

In addition, strong enabling legislation provides commissions with authority to establish statistical monitoring system. A statistical monitoring system allows the commission to assess the impact and the quality of the implementation of the guidelines and to identify areas that need revision. For example, a commission may be dependent upon the courts to accurately interpret the guidelines and to review justifications for departures from the guidelines. The ABA standards state that the commission "should also be charged with responsibility to collect, evaluate and disseminate information regarding sentences imposed and carried out within the jurisdiction" (American Bar Association, 1993, p. 5).

I. GUIDELINE ENFORCEMENT

The presumptiveness of guidelines ultimately rests on the process by which sentences are reviewed. Without an enforcement mechanism, guidelines are merely voluntary and as such may have little impact on changing sentencing practices. The common

procedure is to provide for appellate review, and for the appellate review to be initiated by either the defense or prosecution.

The term presumptive is often used to describe guideline systems that have appellate review as an enforcement mechanism. Those guidelines with no review such as Arkansas are referred to as voluntary to reflect that the guidelines must be considered but judges are free to depart without challenge. The general discussions regarding voluntary and presumptive guidelines suggest that this is a dichotomy, but this is misleading. It is more accurate to think of this as a continuum from voluntary to very presumptive. The degree of presumptiveness is based on whether there is some form of appellate review and, if there is appellate review, the standards to which the courts are held on appellate review.

There has been relatively little research or discussion of this issue, which is interesting in view of the early hope that guidelines would stimulate a common law of sentencing. Two exceptions to this are the works of McCloskey (1986) and Del Sole (1993). The least presumptive (voluntary) form of guidelines are those like Arkansas and Virginia which have no appellate review of sentences.

Among those states with some form of review, there are two factors that affect the presumptiveness of the guidelines. One of the most significant factors is the standard that is established in the statutory mandate. The enabling legislation may establish a standard of unreasonable such as Pennsylvania or a much higher

standard for departure such as Minnesota with its clear and convincing standard. The second issue is the interpretation that the appellate courts place on the terms. Obviously, the higher the standard the greater the likelihood that the appellate courts will hold the lower court to a higher accountability level in terms of departures. Similarly, the lower the standard, the greater the likelihood that the appellate court will allow greater latitude in the decision to depart from the guidelines.

During the 12 years that the Minnesota and Pennsylvania guidelines have been in effect, significant differences have arisen over how appellate courts review guideline cases. A comparison of appellate review in Minnesota and Pennsylvania concluded that the Minnesota appellate courts **substantively** reviewed sentences under guidelines for the quality of the sentencing decision in terms of reducing sentencing disparity. Pennsylvania's appellate courts, on the other hand, established a **procedural** appellate review approach that merely asks whether the trial court followed the proper procedures in applying the guidelines (Del Sole, 1993; McCloskey, 1986) (see Table 4-5).

In part, enforcement determines the presumptiveness of the guidelines. In general, voluntary guidelines and those without some explicit enforcement mechanisms like Virginia's and Michigan's guidelines, are considered voluntary to reflect that judges are expected to consider them, but there is no appellate review if they do not conform to them. On the other hand, guidelines such as Pennsylvania's, which have a relatively low standard under

TABLE 4-5

**APPELLATE REVIEW AND STANDARDS FOR OVERTURN OF SENTENCE
FOR SELECTED STATES**

STATE	APPELLATE REVIEW	STANDARD
Delaware	No	"...substantial and compelling reasons justifying an exceptional sentence" Must exist. (Delaware Sentencing Accountability Commission. <u>Bench Book</u> 1991 p. 49)
Florida	Yes	"Failure of a trial court to impose a sentence within the sentencing guidelines is subject to appellate review...A court may impose a departure sentence...based upon circumstances or factors which reasonably justify the aggravation or mitigation of the sentence." (<u>Laws of Florida</u> Ch. 93-406, Section 924.06)
Kansas	Yes	"The appropriate review standard for a departure sentence is whether there are substantial and compelling reasons for the departure."*
Louisiana	Yes	"No sentence shall be declared unlawful, inadequate, or excessive solely due to the failure of the court to impose a sentence in conformity with the sentencing guidelines..."***
Minnesota	Yes	Appellate review can determine "...whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact..."**
North Carolina	Yes	Both the defendant and the state may appeal of the sentence results from an incorrect finding of the defendant's prior record level or contains a sentence disposition or length not authorized by the structured sentencing law. This defense may appeal whether a sentence imposed outside the presumptive range (within the aggravated range) is supported by the evidence. The state may appeal whether a finding of "extraordinary mitigation" is supported by the evidence or is sufficient as a matter of law. See G.S. § 15A - 1415(b), § 15A - 1441, § 15A - 1444, and § 15A - 1445.
Ohio	Yes	"The court of appeals may (remand or overturn) the sentence if any of the following clearly and convincingly appears: The sentence is 1) not supported by sufficient evidence; 2) substantially inconsistent with sentences imposed upon other defendants with similar characteristics who have committed similar offenses, 3) the sentence is not reasonably calculated...4) the sentence violates the sentencing principles stated in (statute);...and 5) the sentence is contrary to law."** (Ohio revised codes § 2929,19(G))
Oregon	Yes	"...Substantial and compelling reasons" must be present to warrant departure from guidelines. (Oregon Criminal Justice Council (O.C.J.C.) 1989 <u>Oregon Sentencing Guidelines Manual</u>)

* Kansas Sentencing Guidelines Manual 1993, p. 32.

** Laws of Minnesota 1978 CA. 723 Sec. 244.11.

*** Louisiana revised statutes, article 15:321-329, 1987.

TABLE 4-5 (CONTINUED)

APPELLATE REVIEW AND STANDARDS FOR OVERTURN OF SENTENCE

STATE	APPELLATE REVIEW	STANDARD
Pennsylvania	Yes	<p>The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:</p> <ol style="list-style-type: none"> 1. the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously; 2. the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or 3. the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable. <p>In all their cases the appellate court shall affirm the sentence imposed by the sentence court. (Title 42 Pa.C.S. § 9781)</p>
Tennessee	Yes	<p>"The court may vary from the presumptive sentence if there are either mitigating or aggravating factors...the court must place on the record, either orally or in writing, the enhancing and mitigating factors found." (Tennessee Sentencing Commission, 1990 <u>Sentencing in Tennessee</u> p. 9)</p>
U.S. Federal System	Yes	<p>"Court of appeals shall determine whether...(the departure sentence) is unreasonable..." In light of the factors to be considered at sentencing by statute and the facts of the case [18 U.S.C. ch. 235 § 3742 (e)]</p>
Washington	Yes	<p>"To reverse a sentence which is outside the sentence range, the...court must find: A) either that the reasons supplied but the sentencing judge are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offered, B)...sentence impose was clearly excessive or...too lenient" (Washington Sentencing Reform Act of 1981 Chapter 9.94A.210)</p>
Wisconsin	Yes (limited)	<p>If the court does not impose a sentence in accord with the recommendations in the guidelines, the court shall state on the record its reasons for deviating from the guidelines. There shall be no right to appeal on the basis of the trial court's decision to render a sentence that does not fall within the sentencing guidelines.</p>

appellate review (Del Sole, 1993), are certainly less presumptive than Minnesota's guidelines with their appellate standard of clear and convincing.

Sentencing guidelines constrain judicial discretion to consider various factors and to determine the specific sentence. The jurisdictions with enacted sentencing guidelines approach the setting of a standard to depart from the guidelines differently. Some have left that issue to the enabling legislation. Other commissions took the initiative and established their own standards. Minnesota's commission, for example, established the standard of **clear and convincing** evidence to depart from the guidelines. Similarly, Oregon's commission articulated a **substantial and compelling** standard for departures.

North Carolina addressed this issue with a somewhat different approach. North Carolina's guidelines provide a standard range and a range of sentences for aggravating and mitigating circumstances. The guidelines provide for three types of penalties. The first is active punishment which is a sentence in the state prison system. The second is intermediate punishment including at least one of the following: residential facilities, electronic house arrest, or intensive supervision. The third sentencing option is community punishment which is supervised or unsupervised probation that may include: out-patient treatment, treatment alternatives to street crime, community service, restitution, or fines. If the guidelines call for an active prison sentence, the court may impose intermediate punishment, but only when the court finds "that

extraordinary mitigating factors of a kind significantly greater than the normal case exist and that they substantially outweigh any factors in aggravation" (North Carolina Sentencing and Policy Advisory Commission, 1993:15). The effect of this in North Carolina is to draw a firmer line around the active prison sentence in order to increase the likelihood that the guidelines will in fact incarcerate more serious violent offenders as intended in the guidelines. Presumptiveness has an important impact on a state's ability to project prison populations.

For many reasons, the issue of enforcement and presumptiveness of sentencing guidelines is an important issue for a legislature to consider when it creates a commission. For example, the more presumptive the guidelines, the greater the confidence that the guidelines will control judicial discretion and achieve the goals of the legislation including controlling prison populations. The more constrained judges are to the guideline ranges, the more predictive are the state's prison populations. Moreover, the more presumptive the guidelines, the stronger the argument that mandatory penalties are not necessary. On the other hand, the more presumptive the guidelines the higher the risk that the "invisible side" of criminal justice will become greater with prosecutors bargaining on charges or prior record to avoid the commission's guideline range in favor of the local criminal justice culture's range (Savelsberg, 1992). This is a complex issue and one for which there is not a clear-cut best policy. However, it is a policy issue to which drafters of guideline-enabling legislation

need to be sensitive and consider when writing the enabling legislation.

IV. POLITICAL AND LEGAL CONTEXT

Reform efforts build on existing political and legal structures. The more successful national efforts consider the political environment and build into the commission's mandate and authority the power and resources to fulfill its responsibilities. However, a state's statutory structure may not be conducive to building sentencing guidelines. With the tendency for states to consolidate their criminal statutes into broadly defined offenses over the past century, the imposition of sentencing guidelines on broadly defined offenses makes the problem of reducing sentencing disparity very difficult. Tennessee officials realized this and many other problems with its code and the Tennessee Sentencing Commission undertook the complex task of revising the criminal code as part of its responsibilities.

The criminal justice system brings together local and state agencies. The success of state guideline systems may well rest on the willingness of courts to implement the guidelines as intended.⁷ This process may seem simple: adopt guidelines and they will be implemented. Foresight, planning, and careful coordination to

⁷ Local courts have been studied in detail and one of the overwhelming findings is the role of informal norms that guide local courts and the extent to which these norms vary across jurisdictions within a particular state. See Eisenstein, Flemming and Nardulli, 1988 and Nardulli et al, 1988 for a complete discussion.

ensure the quality of sentencing guidelines, as well as consideration of those who must implement them is crucial to success. In fact, these factors should be evaluated and considered early, as early in the drafting of the enabling legislation, as possible.

We should not, however, expect too much from criminal justice reforms (Eisenstein et al., 1988). Eisenstein et al., conclude from their study of court communities in three states that "implementation of reform is not perfect" (1988:296). The court community resists change as do other groups upon which change is imposed. Guidelines are viewed as attempts to change the "going rates" for particular offenses. These guideline rates may not be consistent with the rates that have been developed in the local court.

While local going rates are not always invariant, going rates provide rewards to the court community. They meet their sense of justice; they are efficient; and, from their viewpoint, they are effective. In fact, Eisenstein et al., conclude from their research that the "more radical a proposed change the less likely is its adoption" (Eisenstein et al., 1988, p. 294). This conclusion is contradicted by Spohn and Horney (1992) in their study of legal reforms of rape laws. They conclude that the more significant the reform, the more likely it is to impact on court behavior. Thus, the research is contradictory and each state must determine the best mode of approaching the problem depending on the relative autonomy of judges and the political context. But each

state must thoroughly consider the implementation of its guidelines, if it is to be successful at meeting its goals.

A. ON-GOING MONITORING OF THE GUIDELINES

Resistance to reform parallels the resistance noted in the organizational literature. This literature suggests that participation in the development and implementation of guideline reforms by those who must implement the changes increases the likely impact of the changes.

Frequently, sentencing reforms demonstrate immediate changes only to have practices return to pre-reform levels in short order (H. Lawrence Ross, 1984; 1992). There are several arguments as to why this frequently occurs. One argument is that when the law is implemented, there is much attention and publicity around the new law, but over time this attention diminishes and the behavior of the offender and the system returns to pre-reform patterns. Another concern is that these changes are often mandated by a state agency. If the state agency fails to cultivate the commitment to address the practical concerns of local officials who must implement the reform, there is little chance of sustained effect.

These are important issues in the development of guidelines, emphasizing that the participation of those who must implement the reforms is crucial and the implementation and ongoing monitoring of the reform is necessary to sustain the reform. Even with these systems in place, Minnesota's guideline system which experienced strong conformity for initial implementation, experienced

backsliding (but not to pre-guideline levels) during the second and third year after implementation (Miethe and Moore, 1989; Stolzenburg and D'Alessio, 1994).

B. LOCAL COURT CULTURE

Guideline systems are vulnerable to being undermined by local practitioners if the local practitioners disagree with the guideline system. This returns to one of the themes that underscores the entire structured sentencing movement, the issue of discretion. While guideline systems are intended to structure discretion, local practitioners may undermine the implementation of the guidelines. For example, trying to change the sentencing practices for offenses based on the offense of conviction may result not in a change in sentencing, but in a shift in prosecutorial practices to "adjust" to the intended change, thus keeping the end result the same. In order for a guideline system to be effective, the enabling legislation and the guideline advocates need to consider the local legal culture and how guidelines will "fit in."

Defining the stakeholders in the system and including them in the conceptualization and development of the guidelines facilitates acceptance. This is important in the early stages of development as the creators of the guidelines often take ownership of the project and serve as educators and marketers of the guidelines. The importance of involvement by stakeholders and their commitment to the system that emerges has been identified by a number of those

interviewed during our project. For example, a former executive director of the Washington state guidelines commission indicated that serious thought should be given to ways of maintaining the involvement of stakeholders past the initial stages and developing commitment from new stakeholders as positions turn over (Lieb, 1993).

Moreover, if change requires financial investment on the part of local government, resistance by county commissioners or local government officials should be anticipated. One way to increase local court commitment is to include representation of local criminal justice systems on the commission. By soliciting and carefully considering local input in the guideline writing process, the potential for guidelines to fulfill their goals is enhanced. The commission's ability to gain acceptance of the guidelines and ensure smooth guideline implementation is enhanced if broad-based support has been generated during the writing of the guidelines.

C. POLITICAL ACCEPTANCE

It is also important that the political acceptability of guidelines be considered when creating a sentencing commission. The credibility of the commission and the acceptability of its guidelines are diminished when there is minimal support for the goals of the commission or when a commission is established solely to forestall other agendas (Martin, 1983). There has been little research on the political context of sentencing guidelines (see Griset, 1990; and Kramer and McCloskey, 1988 for exceptions to

this). However, commissions have struggled to gain acceptance for guidelines where there is little commitment to values such as truth in sentencing, reducing discretion, appellate review of sentences, or controlling prison populations. While once a commission is created it can help generate support for itself, the experiences in New York and to some degree South Carolina where commissions have been unsuccessful indicate that this is not necessarily adequate.

A relatively new approach to politics and sentencing is the recent 1994 Oregon referendum on sentencing. In the 1994 election Oregon passed referendums that significantly affect Oregon's sentencing guidelines. These referendums established mandatory minimum sentences for a wide range of offenses including robbery, assault, murder, rape and numerous other offenses. In a conversation with staff to the Oregon Sentencing Guideline Commission it was indicated that the mandatory would apply to approximately 1,200 offenders. Previous sentencing practices under the guidelines had 61 percent of the offenders going to prison and 39 percent receiving an alternative to incarceration sentence. The mandatory sentencing provisions also increase the length of incarceration. For example, the average incarceration sentence for the robbery covered under the referendum is 57 months but the new mandatory sentence will be 90 months. They anticipate that this will have a major impact on the state correctional system. Further the ballot measure established that juveniles committing certain crimes will be remanded to the adult justice system. They anticipated that this measure will have a significant impact on the

courts as well as on the correctional system. This may foreshadow other states taking this approach to obtaining citizen input into sentencing and other criminal justice issues.

V. SUMMARY

This chapter has reviewed the context and authority of the commission. These provide the springboard from which the commission must fulfill its responsibilities. In general, successful commissions were created in a more supportive environment and they were given stronger legislative mandates. They were also provided with adequate funding to hire trained staff and allow the commission to meet on a regular basis. These factors assisted, although they did not assure, their success.

Legislatures have developed various approaches to achieve success in the design and implementation of their guidelines. Success is the key word here, and it means very different things to different legislators. The perceived problems of sentencing vary depending on the perspective of the observer. The solution depends on the problem.

Almost all states have adopted sentencing guidelines with the idea of imposing some constraints on unfettered discretion. Some have added to this the goal of increasing certainty and predictability. Others have included the goals of reducing prison overcrowding and increasing *truth in sentencing*. The point is that there is no "right" model or approach for all states to address all of these problems.

Both state and local legal culture and the political environment are important contextual factors to consider as a state proceeds to implement its guidelines. These are not immutable concepts; what may be inappropriate at one time may be appropriate at another. For example, sentencing guidelines may be politically overwhelming at one time, but as prison overcrowding reaches crisis levels and/or results in court-ordered constraints, their political acceptability may increase. At some point, the pressure of crowding and the financial cost of new constructions to accommodate rising prison populations may become overwhelming.

One issue that should not be ignored is that this process opens the sentencing decision to scrutiny and requires a commitment to develop coherent sentencing policy. Our research indicates that legislatures that have started this process have learned from the process. The fact that several states have failed to implement sentencing guidelines illustrates that the process is not without its pitfalls and that a state may learn that it does not want change. In almost all jurisdictions the commissions and their guidelines have flourished. They have flourished despite having diverse mandates and different approaches to writing sentencing guidelines.

CHAPTER 5

WRITING SENTENCING GUIDELINES

I. INTRODUCTION

Once a sentencing commission is established, it must confront the difficult task of writing sentencing guidelines. Sentencing is a complex issue. It involves the community, the court organization, and the purpose or purposes that the court is attempting to achieve through the sentence. The process does not end with the imposition of the sentence. Many will question whether the sentence was appropriate. Will it protect the public? Will it rehabilitate the offender? Writing guidelines for such a complex process is difficult, but as the discussion in this chapter indicates, many commissions have successfully written, adopted, and implemented guidelines. This chapter describes this complex decision-making process.

The writing of sentencing guidelines generally requires that the commission determine what factors should be considered in the guidelines; how the factors are to be measured in applying the guidelines (so that they are reliably applied by the court); and the appropriate sentences to be applied based upon those factors. Determining the appropriate factors may take one of two approaches. The first approach, the **descriptive** approach, looks at past sentencing practices and identifies the factors that judges have used in the past and, after eliminating inappropriate factors such as race and gender, incorporates them into the guidelines. Then,

the in/out decision and the sentence length decision are set based primarily on the measurable factors deemed substantively important and statistically significant in past sentencing practices. An alternative approach is the **prescriptive** approach in which the commission relies more on its own judgement in determining the factors that should be considered in sentencing. In reality, sentencing commissions use data on past sentencing practices to guide their decisions even if they adopt what we have referred to as the prescriptive approach. Past practices are generally used to determine the impact of the proposed changes, and as a reality testing of how the views of the commission members may compare to the actual sentencing practices of the judiciary. While the commission may use past practices as a guidepost they do not limit the commissions ability to change the guideline recommendation from previous sentencing practices. The implications of adopting these alternative approaches will be discussed in more detail later in the chapter.

There are certain consistencies, and also key differences, among the states that have written sentencing guidelines. States consistently identify the seriousness of the current offense and the defendant's prior record as the two major factors to be considered in sentencing. However, guideline systems vary considerably in how they incorporate these factors. For example, all states assess the seriousness of the conviction offense. However, Florida has separate guidelines for each general category of offense while Minnesota, Washington, and Oregon rank all

offenses on a single scale of seriousness. The result is that Florida has several different matrices while Minnesota, Washington and Oregon have one matrix.

A commission's product reflects the process that it uses to create the guidelines. The more groups involved, the greater the likelihood of broad-based support.

II. OFFENSE SERIOUSNESS

All states with sentencing guidelines utilize offense seriousness as the primary factor to be considered in making sentence recommendations. While it may seem obvious that this is the key ingredient in a guideline system, the measurement of offense is sometimes linked to factors other than seriousness. For example, some jurisdictions may find it appropriate to measure an offense according to likelihood of recidivism such as is often done in parole guidelines. If a sentencing guideline system were to adopt as its major purpose the prediction of recidivism, then the ranking of the current offense would be quite different than a measure targeting the most serious offenses. For example, murder is always the most serious offense when ranking offenses in terms of their severity. However, when ranking offenses in terms of recidivism, murder would be ranked low on a risk index because murderers have a relatively low risk of recidivism. Theft offenders, however, are more likely to recidivate and therefore are high on a risk measurement scale.

Sentencing commissions have unanimously determined that offense rankings should rest on the seriousness of the offense and not on the risk of recidivism. This suggests that one of the basic foundations for sentencing guidelines is focused on a retributive or "just deserts" model that determines penalties relative to the severity of the offense.

Table 5-1 presents an overview of the factors considered in most sentencing guideline systems and the number of categories for each state's measure of offense seriousness and criminal history. In considering the information in Table 5-1, it is important to remember that some state statutes may be very specific regarding bodily injury and weapon usage such that the guidelines do not have to provide special enhancements in order to take them into consideration in the guidelines. In addition, the table oversimplifies some guideline systems such as Wisconsin which has many different matrices and which varies the number of criminal history categories depending on the offense matrix. The methods for ranking offense severity range from reliance on statutory grading to the use of social science scaling techniques (e.g., Minnesota).

Most states use some combination of the two by beginning with the offense classification used in statutes and then making finer distinctions within those grades. For example, Pennsylvania has three statutory grades for felonies (felony 1, felony 2, and felony 3) and three statutory grades for misdemeanors (misdemeanor 1, misdemeanor 2, and misdemeanor 3). The commission made

TABLE 5-1

OVERVIEW
GUIDELINE SENTENCING STRUCTURES

	AR	DE	FL	KS	MN	NC	OR	PA	TN	WA	WI	USSC
I. Offense Factors												
Number of categories	10	21 ¹	9 (not ranked)	10	10	9	11	10	5	12	16	43
Convicted offense	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y (in general)
Multiple convictions provision	N	Y	Y	Y	Y	Y*	N	N	N	Y	N	Y
Articulated principles	N	N	N	Y	N	Y	Y	Y	N	N	N	(in general)
II. Enhancements												
Weapon	N	N	N	N	N	N	N	Y	N	Y	Y	Y
Drug enhancements	N	N	N	N	N	N	N	Y	N	N	Y	Y
Degree of bodily injury	N	N	Y	N	N	N	N	N	N	N	Y	Y
III. Criminal History												
Number of categories	6	7	NA	9	7	6	9	7	5	9		6
Convictions	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Sentence length of prior sentence	N	N	N	N	Y ³	N	N	N	N	N	N	Y
Weighing	Y	Y	Y	Y	F/M	Y	Y	Y	Y	Y	Y	Y
Current correctional status	Y	Y	Y	N	Y	Y	NA	N	N	N	Y	Y
IV. Aggravated/Mitigated factors listed	Y	Y	N	Y	Y	Y	Y	N	Y	Y	Y	Y

NA = Not Applicable

* For misdemeanor only

¹ Delaware has no matrix.

² Wisconsin has 16 different matrices.

³ If a misdemeanor sentence is given for a felony conviction then the offense is counted in criminal history score as a misdemeanor.

distinctions beyond the statutory classifications and ended up in its initial guidelines with 10 categories measuring offense seriousness. Moreover, Oregon and Pennsylvania actually subcategorized offenses in order to make the guideline measure of offense seriousness more reflective of the severity of the crime (Blumstein et. al. 1983; Bogan 1990).

A. ARTICULATED OFFENSE RANKING PRINCIPLES

Some states developed principles to guide the measurement of offense seriousness. In such states the commission begins the process of ranking offenses by identifying the factors that distinguish offenses such as the degree of injury to the victim, the amount of property loss, and the culpability of the offender. Once the factors are ranked, specific offenses are attached to the rankings. North Carolina, Louisiana, and Kansas used this approach in ranking offenses. The major advantage of this approach is it allows for the easy incorporation of newly created offenses into the rankings and provides a clear rationale to legislators, judges, and others as to the basis for the rankings. Table 5-2 presents North Carolina's offense ranking principles.

B. NUMBER OF OFFENSE LEVELS

The number of Offense Gravity Score levels generally range between nine (North Carolina) and fifteen (Washington) among the various states. This is in contrast to the United States Sentencing Commission's development of 43 categories. Commissions

TABLE 5-2

**CLASSIFICATION CRITERIA USED BY NORTH CAROLINA
IN THE RANKING OF OFFENSE SERIOUSNESS***

OFFENSE CLASS RANKING	CRITERIA
A	<ul style="list-style-type: none"> • Reserved for First Degree Murder <p><i>[Reasonably tends to result or does result in]:</i></p>
B	<ul style="list-style-type: none"> • Serious debilitating long-term personal injury
C	<ul style="list-style-type: none"> • Serious long term personal injury • Serious long term or widespread societal injury
D	<ul style="list-style-type: none"> • Serious infringements on property interest which also implicate physical safety concerns by use of a deadly weapon or an offense involving an occupied dwelling.
E	<ul style="list-style-type: none"> • Serious personal injury
F	<ul style="list-style-type: none"> • Significant personal injury • Serious societal injury
G	<ul style="list-style-type: none"> • Serious property loss: Loss from the person or from the person's dwelling
H	<ul style="list-style-type: none"> • Serious property loss: Loss from any structure designed to house or secure any activity or property Loss occasioned by the taking or removing of property Loss occasioned by breach of trust, formal or informal • Personal injury • Significant societal injury
I	<ul style="list-style-type: none"> • Serious property loss: All other felonious property loss • Societal injury
M	<ul style="list-style-type: none"> • All other misdemeanors

* Personal injury includes both physical and mental injury. Societal injury includes violations of public morality, judicial or governmental operations, and/or public order and welfare.

indicate that the number of categories is based on the goal of keeping the measure simple for implementation purposes, while at the same time trying to avoid too few categories to allow for differentiation among the seriousness of offenses. In addition, states indicate that since the current measures still group together offenses with some diversity of seriousness, judges are encouraged to depart from the guidelines when the recommendation is inappropriate for a non-typical offender.

C. NUMBER OF MATRICES

Another issue regarding offense measurement in the guidelines is whether the state adopts single or multiple matrices. Several states (e.g., Florida, Wisconsin, and Kansas) have multiple matrices. Kansas guidelines contain two matrices, one for drug offenses and another for non-drug offenses. Kansas developed a separate matrix for drug offenses for several reasons including: the complexity of attempting to distinguish drug amounts and other problems perceived to be peculiar to drug convictions; drug offenses represented a significant proportion (25 percent) of the offenses; and the commission wanted to provide relatively harsh penalties for drug offenses.

Wisconsin has developed 18 separate matrices which means that they can tailor the offense severity measure to the type of offense. This allows the guidelines to incorporate additional severity factors, such as weapon usage, when they are viewed as significant for a particular offense.

A problem with the multiple matrix approach is that it may result in no comprehensive system of offense seriousness. For example, Kansas' dual matrices allow for disproportionality between drug and non-drug offenses.

States have tended to imitate the matrix approach developed by Minnesota in 1980 (see Table 5-3) because of its simplicity. The matrix basically reads like a roadmap in which the offense severity measure is along one side of the table and the prior record measure is along the other side. This approach, however, has received criticism for oversimplifying the complexity of sentencing.

A recent innovation that does not rely upon matrices is the Swedish model. Sweden's Criminal Code did not establish numerical guidelines, but rather set forth principles for the court to consider in sentencing (von Hirsch, 1987; Ashworth, 1992). There are two phases to sentencing in this system. First, the court must develop its assessment of the seriousness of the offense, not numerically, but based on harmfulness such as the defendant's culpability, and other offense-related factors. The second phase assesses whether the offense justifies imprisonment or a fine based on the seriousness of the offense. Finally, if a fine is inappropriate and imprisonment is required, the court determines whether probation is an appropriate alternative to imprisonment. Again, the Code sets forth principles to guide this decision. Young offenders (under 21) require special justification to be imprisoned. For offenders who need treatment, the court is expected to place the offender on probation. Thus, Sweden's

TABLE 5-3

**MINNESOTA
SENTENCING GUIDELINES GRID**

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

CRIMINAL HISTORY SCORE

SEVERITY LEVELS OF CONVICTION OFFENSE	0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle Possession of Marijuana	12*	12*	12*	13	15	17	19 18-20
Theft Related Crimes (\$150-\$2500) Sale of Marijuana	12*	12*	13	15	17	19	21 20-22
Theft Crimes (\$150-\$2500)	12*	13	15	17	19 18-20	22 21-23	25 24-26
Burglary-Felony Intent Receiving Stolen Goods (\$150-\$2500)	12*	15	18	21	25 24-26	32 30-34	41 37-45
Simple Robbery	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
Assault, 2nd Degree	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
Aggravated Robbery	48 44-52	58 54-62	68 64-72	78 74-82	88 84-92	98 94-102	108 104-112
Assault, 1st Degree Criminal Sexual Conduct, 1st Degree	86 81-91	98 93-103	110 105-115	122 117-127	134 129-139	146 141-151	158 153-163
Murder, 3rd Degree	150 144-156	165 159-171	180 174-186	195 189-201	210 204-216	225 219-231	240 234-246
Murder, 2nd Degree	306 299-313	326 319-333	346 339-353	366 359-373	386 379-393	406 399-413	426 419-433

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

One year and one day.

Criminal Code favors a logical sequence of decision-making with principles set forth to guide each decision. This model could be applied to various sentencing options including probation, the range of intermediate penalties, county incarceration, boot camp, and state confinement.

D. COMPREHENSIVENESS OF OFFENSE COVERAGE

A significant issue in the measurement of offense severity is whether the measure integrates both felonies and misdemeanors. Most states focus on providing guidelines for felonies. But states must be cautious because this may provide the court the discretion to sentence misdemeanor offenders more harshly than felony offenders. This threatens the integrity of the guideline's attempt to achieve fairness and proportionality.

On the other hand, because sentencing commissions are state agencies with their major focus on state imprisonment, allowing total discretion for misdemeanors allows county jurisdictions greater freedom to consider local resources and provide a "local" sentencing standard. Thus, the decision concerning the breadth of guideline coverage has important philosophical and practical implications.

E. SUBCLASSIFICATION OF STATUTORY DEFINITIONS

One of the problems facing almost any commission attempting to rank offense seriousness is the problem of statutory definitions. Over the last century, there has been a tendency for statutes to

consolidate a broad range of criminal behaviors under one statutory definition (Singer, 1978). The premise of this consolidation rested on providing the court with extensive discretion to craft the appropriate sentence for the individual defendant. The only real limit on the courts authority for the worst case was the statutory maximum. It was the judge's responsibility to craft the sentence to the individual defendant. However, once a commission attaches presumptive guideline sentences to particular offenses for the typical offender, the breadth of the statutory definitions presents problems for the commission. One such problem is assigning a statutory offense a single rank on an offense seriousness scale when the behaviors in any particular offense can be very broad.

Guidelines address this problem in four ways. One method, utilized by the United States Sentencing Commission (USSC), adjusts the rank of crimes based on the behavior involved. In the USSC approach, the offense of conviction is the starting point, but the final rank of the offense is significantly "adjusted" based on the offender's conduct regardless of whether it was a part of the offense of conviction. This is referred to as "real offense" sentencing or "modified real offense" sentencing.

A second approach is to provide the court wider discretion to cover such circumstances. The difficulty with this approach is that it relies on similarity of practices among the judges to avoid significant sentencing disparity. This is reflected in either wider ranges in the guideline matrix such as Pennsylvania's matrix

or in wider discretion to depart for aggravating or mitigating circumstances.

A third approach, utilized by Oregon and Pennsylvania, is referred to as the "subcategorization" of offenses to reflect different degrees of severity. For example, in Pennsylvania, all burglaries have historically been classified as felony 1 offenses (the most serious statutory grading). The Commission decided to make distinctions beyond statute to reflect the various types of burglaries. Thus, the guidelines subcategorize the single statutory burglary into four categories. The guidelines then recommend different sentences based upon whether the burglary involved a residence or not and whether a person was present or not at the time of the burglary. It is significant that Pennsylvania, in creating the rankings for burglary, actually included a factor that was part of the statutory definition (whether the structure was occupied) and added a "real offense" factor (type of structure). It is also interesting to note that subsequent to the guidelines providing for these subcategorizations of burglary, the legislature created a felony 2 burglary which parallels the least serious of the burglary subcategorizations (i.e., non-residential burglary at which time no person was present).

A fourth approach, adopted by Florida and Wisconsin, provides specific guidelines for various offense types. Florida's guidelines, which are currently being revised, established eight offense types and developed special guidelines for each. While this is a more complex system, it allows a commission to

incorporate factors linked to particular offenses. Most guideline systems have rejected this model due to problems of maintaining proportionality among offenses.

F. REAL OFFENSE VERSUS CONVICTION OFFENSE

In general, the sentencing decision begins by focusing on the conviction offense. This, however, may result in sentencing disparity, the prevention of which is one of the most significant goals of guidelines. As an illustration, assume that an offender burglarizes a home and steals several valuable items. The offender is arrested and the prosecutor offers to reduce the charge to theft if the defendant will plead guilty. The defendant accepts the offer and enters a plea to theft. Under guidelines focusing on the conviction offense, the defendant is sentenced based on the theft, which normally is considered less serious than the burglary. In a similar case in a different court, the prosecutor might refuse to offer such a charge reduction as part of a plea bargain. The result is two similar cases being treated dissimilarly (i.e., sentence disparity). Many debate whether such a guideline system appreciably diminishes disparity when it allows considerable latitude to the prosecutor to determine the guideline range based on charge bargaining (Alschuler, 1978; 1988; Savelsberg, 1992).

An alternative to conviction-based guidelines is real offense sentencing guidelines (Robinson, 1987; Reitz, 1993). No commission has totally adopted a real offense sentencing guideline system. Perhaps the primary reason for this is the obvious appearance of

unfairness. A fairness issue arises when the court sentences are based on the defendant's alleged conduct which has a lower burden of proof than that required to convict the offender (Reitz, 1993).

Another concern is that the role of plea bargaining in producing "substantive justice" (see Eisenstein and Jacob, 1977; Nardulli et al., 1988) may be undermined if defendants realize that the bargain will not influence the sentence. That is, plea bargaining carries perceived advantages. Guideline states have basically adopted an offense of conviction approach under the presumption that this is the fairest system, although they recognize the difficulty presented by plea bargaining.

The USSC has addressed this issue by beginning with the offense of conviction and then adding numerous factors for the court to consider as enhancements such as degree of injury, weapon use, and role in the offense, and as mitigating factors such as substantial assistance to authorities. The extent to which these factors play a role in any particular sentence obviously depends on the circumstance of the crime, but it is clear that the USSC has established a system of guidelines in which the offense of conviction provides the beginning point for the role of the offense in the sentence, but the sentence is often modified by the non-conviction behaviors of the offender during the commission of the offense.

III. CRIMINAL HISTORY

A. PURPOSE

The purpose of prior record in sentencing is twofold. First, it may reflect increased culpability. That is, the previously convicted offender who commits another offense has clearly been informed that criminal behavior is wrong and has recidivated despite the warning. A second purpose of prior record is its use as a predictor of future criminality. Commissions have not explicitly articulated the prediction purpose of prior convictions. However, the sentencing guidelines in Washington do weigh offenses differently depending on the current offense. For example, if the current offense is burglary, prior convictions for burglary count three points each while prior convictions for murder count only two points. While not articulated, this seems to represent an incapacitative or risk assessment philosophy such that offenders with a current offense for burglary and with previous convictions for burglary should receive a more severe sentence.

B. MEASUREMENT OF CRIMINAL HISTORY

Criminal history, or prior record, is the second major ingredient in determining guideline sentences. The propriety of considering prior convictions has been a debatable issue. Those who espouse a just desert or retributive philosophy argue that prior record should play a very limited (von Hirsch, 1976), or no (Singer, 1979), role in sentencing. However, all guideline systems include criminal history on the widely accepted premise that prior

criminal activity demonstrates increased culpability and perhaps is an indicator of future criminality.

Table 5-1 indicates that most states measure both the number and seriousness of prior convictions and many states such as Minnesota include additional factors such as the offender's status (eg., on probation or other non-incarcerative sentences) at the time of the current offense. The total number of prior record score categories varies among the states with Washington having nine categories while Tennessee has only five.

The measurement of criminal history for purposes of guideline application presents many important issues. Among the most significant issues are how refined that categorization should be and whether the measure attempts to create a typology of offenders. Related to the first issue, some states have "numerical" prior record scores that measure the number and seriousness of prior convictions (e.g., Minnesota, Washington, Pennsylvania). Most states with numerical prior record scores weight prior convictions in a manner similar to Pennsylvania, where prior felony offenses are assigned one, two, or three points depending upon their severity. Prior misdemeanors, which are less serious, may count no more than two points in the total prior record score.

Other guideline states use "descriptive" prior record score categories that rely less on numerical scores or calculations (e.g., Oregon, Michigan, Kansas). Instead, criminal history categories differentiate types of offenders, such as those with violent prior convictions, those with multiple felony convictions,

and so forth (Table 5-4). Such descriptive labels are intended to convey to the court the type of offender. A major advantage of this approach is that the prior record categories are more homogeneous in terms of the types of offenders in each criminal history category. This increases the likelihood the guidelines built on such homogeneous measures will be better able to reduce unwarranted disparity. For example, in states such as Minnesota and Pennsylvania, offenders may be violent or non-violent and yet receive the same prior record score.

The USSC has a unique approach to scoring and weighing prior convictions. The federal guidelines incorporate the severity/length of prior sentences into the criminal history score, so that an offender who received a prison term for a given conviction would have a higher criminal history score than someone convicted of the same offense who received probation. This raises a problem, however, of perpetuating past disparity. That is, if one assumes disparity in pre-guidelines sentencing and guideline criminal history scores reflect the severity of past sentences, the criminal history score perpetuates the disparity of the past. On the other hand, the scoring allows for the weighing of the seriousness of prior convictions as they are reflected in past court decisions.

TABLE 5-4

OREGON SENTENCING GUIDELINES GRID

CRIME SERIOUSNESS SCALE		CRIMINAL HISTORY SCALE								
		MULTIPLE FELONY (3+) PERSON OFFENDER	REPEAT (2) FELONY PERSON OFFENDER	SINGLE (1) FELONY PERSON W/ FELONY NON-PERSON OFFENDER	SINGLE (1) FELONY PERSON OFFENDER	MULTIPLE (4+) FELONY NON-PERSON OFFENDER	REPEAT (2-3) FELONY NON-PERSON OFFENDER	SIGNIFICANT MINOR CRIMINAL RECORD	MINOR CRIMINAL RECORD	MINOR MISD. OR NO CRIMINAL RECORD
		A	B	C	D	E	F	G	H	I
CRIME SERIOUSNESS SCALE	11	225-269	196-224	178-194	149-177	149-177	135-148	129-134	122-128	120-121
	10	121-130	116-120	111-115	91-110	81-90	71-80	66-70	61-65	59-60
	9	66-72	61-65	56-60	51-55	46-50	41-45	39-40	37-38	34-36
	8	41-45	35-40	29-34	27-28	25-26	23-24	21-22	19-20	16-18
	7	31-36	25-30	21-24	19-20	16-18	180-90	180-90	180-90	180-90
	6	25-30	19-24	15-18	13-14	10-12	180-90	180-90	180-90	180-90
	5	15-16	13-14	11-12	9-10	6-8	180-90	120-60	120-60	120-60
	4	10-10	8-9	120-60	120-60	120-60	120-60	120-60	120-60	120-60
	3	120-60	120-60	120-60	120-60	120-60	120-60	90-30	90-30	90-30
	2	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30
	1	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30

e: In white blocks, numbers are presumptive prison sentences expressed as a range of months.
 In gray blocks, upper number is the maximum number of custody units which may be imposed; lower number is the maximum number of jail days which may be imposed.

C. JUVENILE ADJUDICATIONS

One of the decisions concerning prior record score measurement is whether to incorporate the consideration of juvenile adjudications and, if so, to what extent. Some would argue that offenders should have a clean slate when entering adulthood and, thus, juvenile adjudications should not count. This position rests in part on the juvenile court's more informal process and its emphasis on the juvenile's welfare and treatment. Moreover, it is argued that the juvenile court uses a lower standard for a finding of guilt than adult court. Finally, it has been argued that juvenile records are less reliable across counties than adult record keeping and this inconsistency results in disparity in guideline systems relying on juvenile records. Some jurisdictions (e.g., Pennsylvania), however, have noted an improvement in juvenile record keeping as a result of the incorporation of juvenile adjudications in the guidelines.

Most states, however, include juvenile adjudications in the measure of prior record. Perhaps the strongest argument is that an individual with a prior adjudication has increased culpability, which is a justification used for including prior adult convictions. Second, some also argue that juvenile record is important as an assessment of the offender's "risk" of future offending although no state we visited argued that the guidelines created the prior record score as a predictive instrument.

D. LAPSING OF PRIOR CONVICTIONS

An additional issue raised in measuring criminal history is whether to lapse prior convictions after some period of time crime-free. Several states provide for a lapsing or omitting of prior convictions after a number of years (e.g., Minnesota, Washington), while others do not (e.g., Pennsylvania, Oregon).

Two basic arguments have been offered in favor of lapsing prior records. First, a long period of conviction-free behavior may indicate diminished culpability/blameworthiness. Second, a long crime-free period may indicate that an old prior record has less value in predicting future criminality.

Others, such as members of the Oregon and Pennsylvania sentencing commissions, argue that while the age of a prior conviction may well be a mitigating factor, the principle of "truth in sentencing" demands that judges have information on all prior convictions at the time of sentencing.

States that include juvenile adjudications in the guidelines in almost all cases have a lapsing provision. For example, Minnesota lapses adjudications at age 21, Florida at age 23, and Maryland at age 25. Kansas lapses juveniles adjudications at age 25 except for serious personal offenses.

E. PRIOR RECORD AND DISPARITY

One significant issue for sentencing guideline systems is sentencing disparity. Disparity control requires that the guidelines be correctly applied to ensure that those with similar

prior records are treated similarly. Several concerns arise in this regard for criminal history. One issue is the establishment of a policy to address prior convictions from other jurisdictions. Most states have dealt with this by requiring the court to translate the previous conviction into the current code. If there is ambiguity as to the appropriate classification (e.g., whether the offense would be classified as a felony or misdemeanor), the court gives the defendant the benefit of the doubt and applies the least serious classification.

A second disparity issue is the availability of records. This may be a particularly serious concern with the USSC standard of relying on previous sentences. Historically, state record-keeping of dispositions and sentences have been inadequate. The more complex the measure of prior record, the greater the risk of disparity.

F. DEFINING PREVIOUS CONVICTION

An interesting issue at the forefront with guideline implementation is the definition of prior conviction. The way "previously convicted" is defined affects which prior convictions are counted in the prior record calculations and, thus, affects the sentence recommendations.

At one extreme, the definition of previous conviction could require that the commission of the offense, conviction for the offense, and sentence for the offense all occur prior to the commission of the current offense. At the other extreme, a

definition could include all offenses for which the defendant has been convicted, regardless of whether the conviction and sentence occurred prior to the current offense. These alternatives can result in very different prior record scores, and dramatically different sentence recommendations.

In some states, the definition of prior conviction has been subject to appellate review. For example, in Minnesota the state supreme court established that offenses sentenced on the same day could be included in the prior record score. This means that if a defendant is sentenced on the same day for three robberies, the first two count in the prior record of the third robbery. This has two basic impacts. First, it inflates the role of criminal history in sentencing. Second, it establishes a policy that assumes that the commission of prior offenses increases the culpability of the offender, regardless of whether the offenses are committed before or after the current offense.

There are many choices between the two extremes outlined above. The important point is that role of criminal history in the guidelines will be significantly influenced by the definition selected.

IV. OTHER FACTORS

Guideline systems across the country often incorporate many factors in addition to the seriousness of the current offense and the prior convictions of the defendant. These factors include the possession/use of a weapon, the degree of physical injury to the

victim, and whether a drug trafficking offense occurred in proximity to a school. The degree to which states include such factors seems to be linked to the extent to which statutes make these distinctions. If state statutes make such distinctions, the commission generally relies on the statute. However, in some states where these distinctions are not made and historically have been left to the discretion of the court, commissions have incorporated them into the guidelines. For example, Pennsylvania and the U.S. sentencing guidelines both incorporate numerous factors not included in statutes, but which the commissions thought necessary to establish fair guidelines.

The USSC guidelines incorporate a wide range of factors that are not a part of the conviction offense, but that the Commission thinks should be considered in sentencing and therefore in the guidelines. Table 5-1 indicates that the USSC incorporates many more factors than any other state attempts to systematically include in its guidelines. Moreover, the USSC measures these factors in greater detail than any of the states. For example, in their assessment of bodily injury for aggravated assault with intent to commit murder, the USSC breaks the degree of injury out into (1) bodily injury, (2) serious bodily injury, and (3) permanent or life-threatening bodily injury. The base offense level receives 2, 4, or 6 points depending upon the extent of injury the court believes occurred in the commission of the offense.

These enhancements to statutory factors reflect the USSC's intent to incorporate "real" offense sentencing factors into the sentencing guidelines. On the other hand, Minnesota decided not to create such enhancements in keeping with its decision to focus on conviction behavior. In general, the more detailed the statutory definitions, the less a commission will need to address proportionality concerns through enhancements and real offense sentencing.

V. DEVELOPING SENTENCING RECOMMENDATIONS

In establishing sentencing guideline ranges, commissions must make many difficult decisions. These decisions include:

- the role of past sentencing practices in establishing the guideline sentence recommendations;
- the amount of judicial discretion to be left to the court;
- the role of the guidelines in affecting correctional capacity;
- the decision whether or not to link guideline sentence recommendations to mandatory penalties;
- the relative role of enhancements to guideline ranges; and
- the extent to which the commission wants to specify non-incarceration options.

States have made very diverse decisions regarding these decisions depending on their confidence in the judiciary and their confidence in the ability of the guidelines to capture the appropriate sentencing standards for the typical case. Also, commissions are often influenced by the political environment.

This report does not allow for in-depth exploration of each of these issues. However, we do want the reader to have some basic familiarity with the importance of these decisions and the way various commissions address them.

A. DESCRIPTIVE VS. PRESCRIPTIVE GUIDELINES

As mentioned earlier in the chapter, the two basic approaches to the development of sentencing guidelines are referred to as descriptive and prescriptive. The focus of the **descriptive** approach is to reduce sentencing disparity by narrowing the range of variance of the cases that are similarly defined under the guidelines. This establishes a guideline for the court that takes into account the variables employed in constructing the guidelines and the general sentencing practices historically used by sentencing judges.

Most states, however, have rejected a pure descriptive approach because past practices do not necessarily reflect appropriate sentences. Further, changes in resource availability (e.g., correctional capacity), and changes in societal definitions of the seriousness of various crimes necessitate re-evaluation of past criteria. On the other hand, all commissions use past practices as an information base on which to consider whether they want to change practices through sentencing guidelines.

Thus, most states have adopted a more **prescriptive** model of sentencing. This approach encourages sentencing commissions to consider the appropriate role of deterrence, incapacitation,

rehabilitation, and retribution in the recommended guideline ranges, along with the available correctional capacity. The prescriptive model leaves more decisions for the commission and is necessary for those states that want to use the guidelines as a tool to reduce the growth of prison populations.

Though the favored approach is more prescriptive, this is not to suggest that the commissions choosing the prescriptive approach have not considered and been influenced by past practices. In fact, our interviews indicate that past practice is one of the building blocks of all sentencing guidelines. Commissions that develop prescriptive guidelines generally begin by compiling information on past sentencing practices. Examining past sentencing practices provides the commission with: 1) a benchmark against which to test the sentences being developed in the guidelines; 2) a measure to assess the potential impact of the guidelines on sentencing and thus on correctional resources; and 3) some idea of the extent of disparity in sentencing. Thus, although past practices may only be a beginning point for many commissions, they are a very important foundation for the beginning of the drafting of guidelines.

VI. DETERMINING SENTENCE LENGTHS

Historically, sentencing has been viewed as involving two decisions: should the offender be incarcerated and if so, for how long? This was the focus of the first states to adopt sentencing guidelines. For example, Minnesota's guidelines (which apply only

to felonies) focused almost exclusively on the state imprisonment decision and the length of such imprisonment. For offenders not recommended for state prison, the guidelines provided little guidance concerning appropriate lengths for county jail sentences or for community-based alternatives (Table 5-3).

However, in recent years, many innovations in sentencing guidelines have been developed. The crowding problem at both state and local levels pressured state sentencing commissions to search for means to encourage alternatives to incarceration. This interest was boosted by the 1990 book by Norval Morris and Michael Tonry, Between Prison and Probation. The result was a new conceptualization of alternatives to incarceration that clarified that they were more than merely a mechanism for relieving prison crowding. These alternatives were also important in providing an intermediate range of penalties between prison and probation. Morris and Tonry's book significantly changed the conceptualization of the programs, and it allowed those writing guidelines to more closely link the relatively expansive measures of offense seriousness and prior record with a range of penalties commensurate with these basic guideline factors.

Oregon and Louisiana were two states recognizing that over-reliance on incarceration could be redressed by developing alternatives that involved more punishment and restriction of liberty than traditional probation, but were cheaper than prison or jail cells. Further, these alternatives held the promise of greater opportunities for the offender to contribute to his/her

support and rehabilitation. Louisiana and Oregon have developed mechanisms of equating the amount of time necessary to spend in alternative programs that would be commensurate with a period of incarceration. Table 5-5 illustrates the concept of a penalty structure that ranges from probation to state incarceration as was developed by the Louisiana Sentencing Commission.

One of the important roles for guidelines in attempting to move sentencing toward greater utilization of non-incarcerative sanctions is their ability to identify offenders who are appropriate for such sanctions. Thus, Oregon and Louisiana express all non-state prison sentence recommendations in terms of "custody units" or "sanction units," and courts can select from a number of sentencing options such as jail, traditional probation, house arrest, community service, work release, or custodial treatment. Similarly, Washington's sentencing guidelines now express non-state prison sentence recommendations in terms of confinement time, but courts may decide the type of confinement or non-confinement programs in which time is to be served.

Having guidelines identify eligible offenders assures the public that such programs target appropriate offenders, such as non-violent offenders and those with the least serious prior records. Moreover, having guidelines target offenders for intermediate punishment sanctions reduces the risk that these programs will result in what is called "net widening." That is, the intermediate punishments are meant to target persons who

TABLE 5.5

LOUISIANA INTERMEDIATE SANCTION EXCHANGE

<u>Sanction</u>	<u>Duration</u>	<u>Sanction Unit Value</u>
Prison	1 Month	16
Jail	1 Month	16
Shock Incarceration	1 Week	4
Work Release	1 Week	4
Halfway House	1 Week	4
Periodic Incarceration	7 Days	4
Home Incarceration	1 Month	3
Intensive Supervision	1 Month	3
Day Reporting	1 Month	3
Treatment--Residential	1 Month	3
Treatment--Nonresidential	15 Hours	3
such as:		
Drug Counseling		
Alcohol Counseling		
Parent Counseling (child abuse/neglect cases)		
Aggressive Behavior Therapy		
Probation (Supervised with Standard Conditions)	1 Month	2
Community Service (Successfully Completed)	20 Hours	1
Rehabilitative Efforts (Successfully Completed)	20 Hours	1
such as:		
Adult Education		
Literacy Program		
GED Program		
Vo-Tech Training Program		
High School or College Courses		
Budgeting Courses		
Loss of Privilege (No violations)	90 Days	1
Drug Monitoring (Drug Free)	90 Days	1
Unsupervised Probation	1 Month	1
Economic Sanction	Amount of Average Monthly Income	10

USING THE INTERMEDIATE SANCTION EXCHANGE RATE TABLE

- A. Purpose of Intermediate Sanction Exchange Rates
 The purpose of Intermediate Sanction Exchange Rates is to provide the court maximum flexibility in fashioning appropriate sentences utilizing intermediate sanctions. Intermediate sanctions are intended for offenders convicted of less serious and nonviolent offenses who do not have an extensive prior criminal history. In addition to punishment, intermediate sanctions may be fashioned in several ways to meet the needs of society, the victim, and the defendant. Use of the Intermediate Sanction Exchange Rate Table preserves uniformity in the amount of punishment imposed on offenders with similar criminal history, circumstances, and offense of conviction.
- B. Goals of Intermediate Sanction Exchange Rates
 In fashioning an intermediate sanction sentence, the sentence court should consider the following goals:
1. Proportionality of the sanction imposed to the offense of conviction and the offender's prior criminal record;
 2. Restoration of the victim as nearly as possible to pre-offense condition;
 3. Specific deterrence of the offender from future criminal conduct;
 4. Rehabilitation of the offender;
 5. Maximizing the degree to which the offender is held responsible for the costs and conduct associated with the sanction.

would otherwise receive short jail sentences then the guidelines should target such offenders for intermediate punishment.

A. WIDTH OF GUIDELINE RANGES

Many questions have been raised concerning how much discretion guideline recommendations should allow judges. Some states, such as Minnesota, provide very narrow ranges in contrast to the relatively wide ranges provided in the Pennsylvania guidelines. Minnesota and Pennsylvania are the extremes in terms of the width of the ranges. Most jurisdictions have established ranges wider than Minnesota's but narrower than Pennsylvania's.

There are both practical and philosophical concerns related to wide ranges (Martin, 1984 and Tonry, 1988). First, wide ranges allow disparate sentences for similar offenders. For example, the Pennsylvania guideline recommendation for an offender convicted of rape (without prior record) would allow the judge to impose a minimum sentence ranging from three and a half to five years. Thus, similarly situated offenders can receive dissimilar sentences and still be within the guidelines.

Second, the width of the ranges is significant when the guidelines are intended to structure sentences to control prison populations. Wide ranges make it difficult to project where judges will sentence in the range. If judges sentence in the upper part of the range, the projected impact will likely be an underestimate.

Third, wide ranges allow for the consideration of factors that may be inappropriate in the sentencing process and in violation of

the intent of the guidelines. For example, wide ranges allow for county variations that contradict the guideline's intent to establish a statewide sentencing policy. Also, wide ranges allow for disparate sentences based on factors such as employment, age, race, and gender.

B. LINK OF GUIDELINE RECOMMENDATIONS TO MANDATORY PENALTIES

An issue of growing concern for sentencing commissions is whether mandatory sentencing penalties adopted by the legislature and the guidelines should be commensurate. The issue is whether the commission should take the prescriptive mandatory penalties as its benchmark and attempt to have a comprehensive and proportional system. The USSC guidelines adopted such a policy for drug offenses. This is perhaps the main reason for the significant impact of the federal guidelines on correctional populations. Other guideline systems, such as Pennsylvania's, view the guidelines as independent of the mandatories and have not attempted the linkage. The Pennsylvania Commission felt it should act as an independent agency and that the guidelines reflected differences not included in the mandatory statutes. This resulted in guidelines that were harsher than the mandatories for some offenses while more lenient for others.

Thus, some commissions reject the argument that guidelines should be written to be commensurate and proportionate to mandatory statutes because guidelines focus on different purposes (e.g., fairness) and provide for greater specification based on

consideration of more factors. Further, guidelines are written for the "typical" offender whereas mandatory minimum penalties are often addressing the worst cases.

C. MULTIPLE CONVICTIONS

Though a significant proportion of sentences involve multiple convictions, few states provide policy concerning whether the imposition of such sentences should be concurrent or consecutive. Most commissions leave this decision to the courts without any guidance. One notable exception, however, is the policy drafted by the Minnesota Sentencing Commission.

In Minnesota, the commission established policy that allowed for the imposition of consecutive sentences only under the following circumstances: 1) when at least one of the current offenses is a crime against the person, the sentence imposed is within the guidelines, and the sentence on a previous offense has not expired; 2) when the offender is convicted of multiple felony offenses against the person and is sentenced within the guidelines for the most serious offense; or 3) when the current conviction is for escape. In all other circumstances, imposition of consecutive sentences would be considered a departure requiring written justification. The rationale for this policy is that it provides separate retributive punishment for victims of serious violent crimes and provides for the severity of the sanction to be proportional to the severity of the offense.

The Canadian Sentencing Commission (1987) recommended sentencing guidelines for Canada, suggesting a different approach. It recommended that discretion be left to the court regarding the imposition of concurrent or consecutive sentences for multiple convictions. However, the commission suggested a policy to limit the total confinement for offenders convicted of multiple transactions. The purpose of such a policy basically rests on the view that the total sentence should be limited so that essentially life sentences would not be imposed for less serious offenses.

The Kansas Sentencing Commission is one of the few to establish a policy governing the total length of confinement for a "current conviction event." Its policy states that the total sentence cannot exceed twice the sentence recommended in the guidelines.

In general, however, commissions have left this sentencing issue to the discretion of the court. In view of the significant number of cases involving multiple convictions, however, leaving this area outside guidelines policy is to allow considerable discretion and the potential for considerable disparity.

D. SENTENCING EVENT

One of the issues a sentencing commission must address is how to define a "sentencing event" for the purposes of the guidelines. North Carolina, for example, defines a sentencing event as all sentences imposed on a defendant within a session of the court, which is generally within a week. Pennsylvania defines a

sentencing event in terms of criminal transactions based upon when the offenses occurred. That is, for each separate transaction, a separate guideline form is required. Separate transactions occur when there is law-abiding behavior between the offenses; if not, the offenses are considered to be part of the same transaction.

There are important implications for the way in which the sentencing event is defined. One implication is that the definition will influence the way the information is collected, and thus, have ramifications for use of the data. For example, data systems using criminal transactions must be corrected to make prison impact statements. In other words, prison impact assessments require identifying how many individuals are being sent to prison and for how long.

E. AGGRAVATING AND MITIGATING CIRCUMSTANCES

One of the advantages of a guideline sentencing system (in contrast to mandatory minimum sentencing) is that it provides recommendations for "typical" cases and allows judges to depart when extenuating circumstances exist. When judges do depart from the guideline recommendations, however, they are required to justify their sentences by providing reasons for sentencing above or below the sentence recommendation.

As indicated in Table 5-1, almost all of the guideline states provide a list of aggravating and mitigating reasons deemed appropriate for judges to consider in departing from the presumed sentence recommendation. This is true even in states where the

guidelines are not subject to appellate review, such as Arkansas. It is important to note that these lists are non-exclusive, leaving discretion to the court to consider other factors warranting departure.

Incorporating a list of non-exclusive reasons for aggravating or mitigating a sentence helps provide some direction to the court. It is intended to provide more consistency across the state with respect to the sentences that depart from the guidelines. This is in line with the goal of providing fairer and more equitable sentencing, which is one of the reasons states implement guidelines. Further, the reasons are useful in assisting commissions if they revise the guidelines at a later date. For example, the reasons can help determine why some offenses have high departure rates and how to make better recommendations.

The inclusion of such a list, however, can become a controversial decision for commissions, as illustrated by Pennsylvania. Pennsylvania is one of the few states that does not provide reasons for departure, which is particularly interesting in light of their enabling legislation requirement that the guidelines provide aggravated and mitigated sentence recommendations. The original set of proposed Pennsylvania guidelines in 1981 did include a list of aggravating and mitigating reasons though the Commission eventually decided to delete them from the initial guidelines. The decision to delay incorporation of aggravating and mitigating reasons into the guidelines was based on the need to have some data for use in the development of such reasons.

Recently, the Pennsylvania Commission revisited the issue of whether to incorporate a list into its guidelines. Aside from providing for more consistency among judges, a statewide survey had indicated that people who used the guidelines would appreciate having a list. Further, the reasons often received by the Commission were felt to be inadequate. However, the Commission eventually decided not to include a departure reasons list because of the concern that it would provide a crutch for judges and that such a list is unnecessary. There was also concern that it would result in more appellate litigation. Pennsylvania's stance is interesting in view of recent studies of race and gender which find that there is discrimination in departures from the guidelines (Kramer and Steffensmeier, 1993; and Steffensmeier and Kramer, 1993)

States that provide reasons for departure, however, have neither indicated problems with such a decision nor have advised against such a list. In the development of a list of appropriate departure reasons, caution should be exercised to maintain a balance between the number of aggravating and mitigating reasons provided so that the guidelines do not appear to favor defense or prosecution.

The number of formal reasons varies according to the state, with most states having ten or less reasons each for both aggravation and mitigation. The number of reasons provided range from four (aggravating reasons in Kansas; mitigating reasons in Minnesota) to 31 (aggravating reasons in North Carolina).

Washington reports over 50 reasons cited by judges in mitigating guideline sentences.

The type of factors allowed also varies by state. For example, Minnesota has developed a list of reasons considered inappropriate for departure, such as the race, sex, and employment status of the defendant. However, with respect to employment, other socio-economic factors, and other reasons in general, other states allow them to be used to justify a departure sentence. For example, North Carolina allows the following factors to be considered in making a departure:

- Defendant supports the defendant's family;
- Defendant has a positive employment or is gainfully employed;
- Defendant has a good treatment prognosis, and a workable treatment plan available;
- Defendant has a support system in the community; and
- Any other mitigating factor reasonably related to the purposes of sentences.

Similarly, among the reasons the Washington Sentencing Commission provides as possible justifications for departures below the guideline recommendations are:

- Defendant's rehabilitation or treatment;
- Defendant is remorseful;
- Defendant is employed, in school, or has had commendable employment record or military service;
- Defendant's age; and
- Assisted law enforcement/agreed to help in prosecution of codefendant.

Clearly, the extent to which these subjective factors are used to depart from the guidelines will have much to do with meeting the goal of reducing unwarranted disparity.

VII. SUMMARY

The drafting of sentencing guidelines is a complex and lengthy process. How the guidelines are written will have important consequences for their impact on sentencing disparity, the use of incarceration for various offenders, and prison crowding. The complexity results from balancing diverse and conflicting values with the knowledge obtained through social science research concerning sentencing decisions and their effectiveness at deterring, incapacitating, punishing, and treating the offender. Couple this with limited correctional resources and the commission faces a tremendous challenge.

CHAPTER 6

THE IMPACT OF SENTENCING GUIDELINES ON SENTENCING DISPARITY, USE OF INCARCERATION, PRISON CROWDING, FUTURE PRISON POPULATIONS, AND PUBLIC SAFETY

I. INTRODUCTION

As indicated throughout the report, structured sentencing reforms are designed to change how the criminal justice system operates. For example, sentencing guidelines are expected to reduce "unwarranted" disparity at the sentencing phase. Specifically, both the disposition decision (prison versus probation or other community sanctions) and duration (length of sentence or time to serve in prison or in the community) will become more predictable and equitable. Furthermore, some (but not most) states have implemented guidelines to minimize the potential for prison crowding by requiring the state to impose imprisonment sanctions that can be managed in a more diligent manner.

These expectations suggest that states that have adopted presumptive sentencing guideline schemes might look different on a number of key outcome measures such as sentencing disparity, use of incarceration, and prison crowding, as compared to states that have not adopted such reforms. The task of this chapter is to review published studies and data that examine the extent to which sentencing guidelines have had any discernable effect on these and other key issues.

II. METHODOLOGICAL ISSUES IN ASSESSING IMPACT

The task of determining the impact of sentencing guidelines or any form of sentencing reform is confounded by a number of methodological issues. For example, measuring disparity and its sources can be a very complex task. Prison crowding and incarceration rates are the result not only of sentencing decisions but also law enforcement, prosecutorial, and budget policies that are not under the control of the courts or sentencing guidelines. In this section we try to isolate the major factors that confound one's capacity to determine the impact of sentencing guidelines.

First, there is a lack of consensus within the criminal justice community concerning the purpose and goals of structured sentencing. Consequently, it is not clear that all states that have implemented guidelines should show impact on all of the above dimensions. For example, Minnesota, Washington, North Carolina, and Oregon have been fairly explicit that guidelines are to be used to regulate the use of prison space and to help avoid prison crowding. Conversely, Florida, Pennsylvania and the USSC made no such claim.

Second, because the structure of guidelines adopted by the states varies substantially, it is very difficult to hold all sentencing guideline states equally accountable for demonstrating a similar effect on a particular outcome measure. For example, in assessing disparity in sentencing decisions, it will be easier for a state that has rather broad criteria (like Pennsylvania) to

achieve success as compared to a state with rather narrow guideline criteria (like Minnesota).

A third complication relates to the lack of stability in the structure and content of sentencing guidelines over time. Each year, many of the states modify their guidelines. These modifications may either diminish or enhance the state's ability to achieve success in a particular area. For example, there have been several substantial modifications to the original Minnesota, Washington, and Pennsylvania sentencing guidelines. Such modifications in sentencing policy makes it difficult to conduct meaningful time series analysis.

Fourth, the objective of establishing "control" states (i.e., states that have not adopted structured sentencing) whose results can be compared with the structured sentencing states is not a clear cut task. Many states that we have defined as not true guideline states do include varying degrees of determinate and mandatory sentencing provisions. Some non-guideline jurisdictions, similar to some guideline states, have eliminated the use of discretionary parole release and instituted a large number of mandatory minimum sentencing provisions.

In assessing the impact of guidelines on sentencing disparity, we relied exclusively on a review of the major studies published by independent researchers or sentencing commission staffs themselves. To examine trends in the use of incarceration, prison crowding and public safety, historical trend analyses were conducted for the four states (Pennsylvania, Minnesota, Florida and Washington) that

have had guidelines in place for the longest period of time and the federal guideline system. These statistical trends were compared with "non-guideline" states over the past two decades.⁸

In selecting states to be compared with the four guideline states, the following methodology was used. For a given outcome measure (e.g., incarceration rates, crime rates, etc.) trend data for the years preceding the adoption of the four guideline states, as well as all other non-guideline states, were analyzed. Non-guideline states that had similar historical trends on these outcome measures were selected as comparison or "control" states. For example, in assessing incarceration rate trends for Minnesota, we analyzed Minnesota's incarceration rate from 1971-1980. States that had a similar incarceration rate over that time frame were used as comparison states. This selection process minimizes the error of lumping all non-guideline states into a single group.

III. IMPACT ON SENTENCING DISPARITY

Although jurisdictions may vary in their intentions in initiating a sentencing guideline system, almost all would argue that a primary goal of sentencing guidelines is to reduce "unwarranted" disparity in sentencing practices. Every sentencing commission has claimed that its guidelines have achieved some reduction in sentencing disparities.

⁸ States and years of implementation of sentencing guidelines: Minnesota, 1980; Pennsylvania, 1982; Florida, 1983; Washington State, 1984.

In evaluating disparity reduction, the preferred research design would consist of a simple pre- and post-test comparison of two samples of offenders. The first sample represents offenders who were sentenced under the pre-sentence guideline sentencing structure with the second sample being "similarly situated" offenders who were sentenced under the newly instituted guideline structure. Statistical comparisons are first made between the two samples on comparable offense categories (as well as other relevant factors such as prior criminal record and victim attributes) to ensure that both samples are statistically equivalent. Analyses can then be made to determine if the imposition of sentences has become more standardized for the guideline cases as opposed to the pre-guideline sample (i.e., less variance in case disposition and sentence length).

Although this design seems quite straightforward, there are several problems with its execution. In a recent review of a number of the limited studies on sentencing disparity, Tonry (1993) pointed out three major methodological problems. First, sentencing practices may have changed so drastically since the promulgation of guidelines that similarly labeled offenses may not mirror each other before and after the use of guidelines. For example, to circumvent the guidelines through plea bargaining, less serious second-degree aggravated assaults could result in less serious charges and the residual convictions for these crimes resulting in a more homogenous pool than existed before guidelines were enacted. This increase in homogeneity will give the appearance of increased

uniformity in sentencing practices. But, the guideline assault cases will not be truly representative of the pre-guideline assault cases.

Second, since it is not possible to use an experimental design where a pool of offenders are randomly assigned to either a guideline or non-guideline system, one can never fully control for the possibility that reductions in disparity would have occurred independent of the passage of guidelines. This is especially likely considering the growing popularity of numerous legislative actions like mandatory terms (e.g., "three strikes and you're out," "use a gun go to prison," etc.) that require offenders convicted of specific crimes to be imprisoned and to spend a specific amount of time incarcerated. In the passage of such sentencing provisions, a great deal of determinacy may already have been achieved prior to the adoption of guidelines.

The studies also tend to rely upon simplistic comparisons of crime and prior criminal history categories now used by the guidelines for both samples (before and under guidelines) rather than a more sophisticated analysis of those sentencing factors that were relevant prior to the pre-guideline cohort. For example, the offender's employment status and age may have been relevant under an indeterminate/rehabilitative sentencing model but are now to be excluded under guidelines. Excluding these factors from the comparative analyses almost ensures that the pre-guideline sample will appear to be more disparate in relation to the guideline sample.

Finally, few sophisticated and independent evaluations have been completed with the exception of the Minnesota and the U.S. Guidelines. There have been no independent evaluations published to date on disparity reduction for Florida, Oregon, Pennsylvania, Washington, and Delaware. Instead, these states have relied upon their own analyses to reach conclusions that disparity has been reduced. In some instances, the claim is based upon a simple analysis of whether the court is complying with the current guidelines rather than upon changes in sentencing decision practices based upon a pre-guideline cohort.

A. UNITED STATES SENTENCING GUIDELINES

One of the most detailed and sophisticated studies on disparity to date was released by the USSC in 1991. It examines the "short-term impacts" of the federal guidelines system on unwarranted disparity in sentencing, use of incarceration, and prosecutorial discretion and plea bargaining (USSC, 1991). Using a variety of analytic techniques, the Commission concluded that the federal guidelines have indeed reduced disparity and that the guidelines were generally well accepted by a majority of the judges, prosecutors, and probation officers. Only federal and private attorneys believed otherwise. Nonetheless, the study has been the object of controversy as some have questioned the soundness of the Commission's methodology and its conclusions.

The Commission's study attempted to answer the following question:

"Does the range of sentences meted out for defendants with similar criminal records convicted of similar criminal conduct narrow as a result of guideline implementation?" (U.S. Sentencing Commission, 1991, p. 279).

To answer this question, eight categories of offenses representing a cross section of federal crimes were selected for quantitative analyses of disparity reduction: four categories of robbery (with or without weapon combined with no criminal history or moderate criminal history), two categories of embezzlement (\$10,000-\$20,000 loss and \$20,000-\$40,000 loss), heroin trafficking and cocaine trafficking. Two samples were drawn representing pre- and post-guideline cases.

In assessing disparity, two measures of sentence lengths were examined: actual sentences imposed by the court and time served (or to be served). Actual time served was not always attainable because some cases had not served their entire sentences. For those cases, length of stay was estimated by using the presumptive parole date for pre-guidelines cases and the sentence less the maximum amount of credit for good behavior for guidelines cases. The researchers found that the range of sentences (as indicated by the middle 80 percent of cases) had indeed narrowed for all eight crime categories although only three were statistically significant.

These results were generally positive, demonstrating that under the federal guidelines, disparity had been reduced and for some crimes the reduction was substantial. However, there were a number of methodological issues that limit the strength of the

findings. First, because the USSC was attempting to ensure that the pre and post guideline offender groups were properly matched on all relevant dimensions, the sample sizes for the disparity analyses were quite small. Even though the total sample of cases was approximately 6,000 cases, the sample sizes for offense categories ranged from 13 to 44 cases for pre-guidelines samples and 24 to 81 cases for post-guidelines cases.

Second, cases where the judges were allowed to depart from the guidelines for the reason of "substantial assistance to the government" were excluded from the analysis. In 1991, approximately 12 percent of all disposed cases resulted in "downward departures for substantial assistance". The same type of departures reached 21 percent for drug offense cases while the overall departure rate was 19 percent (U.S. Sentencing Commission, 1992, table 55). By excluding these cases from the analysis, the level of disparity is understated.

Third, the fact that only three of the offense categories showed statistically significant reductions in disparity suggests that the pre-guideline cases were already exhibiting a relatively high degree of uniformity in court disposition. Further declines in sentencing discrepancy might have happened independent of the introduction of guidelines and may be the product of random chance.

Fourth, the Commission's survey of court officials found that while federal prosecutors and probation officers believed that disparity had decreased (51 and 52 percent respectively), a majority of judges (56 percent), federal defenders (68 percent),

and private attorneys (50 percent) reported that disparity had either increased or was about the same (1992, Table 29).

Fifth, as noted by Senior Circuit Judge Gerald Heaney (1991), the issue of disparity reduction becomes more complicated to assess since the decision as to whether a case is handled by either a state or federal court was not part of the study. Heaney notes that local law enforcement agencies have the option of filing cases in federal court for certain crimes (especially drug crimes) because they know that defendants were likely to receive a longer term in the federal courts if convicted. This discretionary local jurisdictional filing decision has not been analyzed by any of the studies of the U.S. guidelines, yet it can represent a major form of disparity in criminal justice decision-making.

Finally, the USSC recognized that its study was a very preliminary assessment. At the time of the study, the guidelines had been in effect for only two and a half years. Consequently, at the time of selecting the post guideline implementation cases, only 43-75 percent of federal offenders were sentenced according to the guidelines (USSC 1991:2).

The second major study of the federal guidelines was conducted by the U.S. General Accounting Office (GAO) which consisted of a re-analysis of the USSC data. Employing different statistical methods, the GAO agreed with the USSC that there was preliminary evidence that disparity had been reduced. But due to the limitations of the data used for analysis, it was not possible to determine whether overall sentencing disparity had been reduced.

The GAO was especially interested in whether the influence of demographic factors such as race, gender, and education had been diminished. But due to data limitations, this issue could not be fully assessed:

Congress was particularly interested in reducing or eliminating disparity caused by demographic factors such as an offender's race, gender, and education. However, limitations and inconsistencies in the data available for pre-guidelines and guidelines offenders made it impossible to determine how effective the sentencing guidelines have been in reducing overall sentencing disparity (U.S. General Accounting Office, 1992, p. 10).

The GAO analysis attempted to decompose the differences in sentences into parts based on discrimination and legitimate factors. To do this, the GAO devised two regression models, a "constrained model" which reflects sentences under the guidelines, and an "unconstrained model" which used only statistically significant variables available to sentencing judges and left out of the guideline scoring system. Under the constrained model, 25 percent of the racial gap in sentences among bank robbers was caused by discrimination, while 48 percent of the difference was caused by discrimination when the unconstrained model was used. The GAO findings suggest that while the federal guidelines are responsible for reducing a degree of racial disparity in sentencing, the problem of discrimination persists.

Samuel Myers (1993) was especially concerned with the racial disparity issue. His review of the Commission's and the GAO's analyses led him to conclude that racial inequities still persist although not always in a consistent manner:

The GAO computed odds ratios for the chances that a black versus a white offender received a sentence which fell below the guideline minimum for the convicted crime, or at the top, bottom or middle of the guideline range.... [The] report suggests wide variations across crimes, with blacks more often than whites receiving top of the range and above the range sentences for robbery, but at the same time within range and bottom of the range sentences for cocaine distribution...The GAO also performed a residual difference analysis of federal sentences for black and white bank robbers sentenced in the fiscal year of 1990. On average, blacks served about ten percent longer sentences than whites. In jury trials the reverse was true; whites received longer sentences (Myers, 1993, pp. 793-794).

Two very recent studies (Berk and Campbell, 1993, and, McDonald and Carlson, 1994) have shed further light on the issue of racial disparity under the USSC guidelines. Both studies center on USSC penalties imposed for possession or sale of crack cocaine. Under the Anti-Drug Abuse Act of 1986 and prior to the implementation of the guidelines, Congress modified the penal code to allow for far more severe sentences for drug crimes consisting of crack cocaine as opposed to powdered cocaine. In general, persons convicted of possessing or trafficking in 50 grams or more of crack cocaine would receive a prison term of no less than 10 years. If they had a prior drug conviction, the sentence would be not less than 20 years. If the amount of crack cocaine was at least five grams but less than 50 grams, the sentence was to be at least five years, or ten years if the offender had a prior drug crime conviction. Most significantly, these same penalties would apply to offenders if they had 100 times these amounts of powdered cocaine. The USSC eventually adjusted its guidelines to take into account the mandatory minimum penalties for crack versus powdered cocaine (Ogletree, 1994).

Berk and Campbell analyzed federal charging practices in the Los Angeles for crack cocaine (1993). In California, the federal crack cocaine penalties are far more severe than under the state's determinate sentencing laws. Consequently, the prosecutor's discretion to choose whether a case will be tried in federal court represents a major source of unwarranted disparity. The researchers found that in Los Angeles, while Blacks represent 58 percent of all arrests and state prosecutions for crack cocaine, they account for 83 percent of federal prosecutions. In contrast, Whites represented three percent of arrests and state prosecutions, but zero federal prosecutions.

McDonald and Carlson did a pre and post guideline analysis of sentencing in the federal courts by race (1994). They found that prior to the guidelines being implemented, there were no differences between race/ethnicity and sentences imposed:

Fifty-four percent of all white as well as black offenders in these cases were given prison sentences, which were comparable in length; a maximum of 50 months, on average, for whites, and 53 months for blacks. Hispanics were more likely to be imprisoned (69 percent), but their sentence lengths averaged approximately the same length: 52 months (1994, p. 223).

However, since the guidelines were adopted, the proportion of Blacks and Hispanics sentenced to prison by 1990 had grown to 78 and 85 percent respectively as compared to 72 percent for Whites. Blacks sentenced to prison received an average sentence length of 71 months as compared to 50 months for Whites and 48 months for Hispanics.

The researchers attribute most of these differences to the 1986 drug sentencing laws and the USSC guidelines. Between 1986

and 1990, the proportion of Blacks sentenced for drug trafficking grew from 19 percent to 46 percent, as compared to 26 percent to 35 percent for whites.

In evaluating the source of this disparity among Blacks and Whites, the two authors identified the source of disparity as the crack cocaine drug laws:

Among cocaine traffickers, however, there were substantial differences, Blacks were imprisoned somewhat more frequently than whites (96.7 percent versus 94.1 percent), and their sentences were significantly longer, on average: 102 months versus 74 months – a 37 percent difference (1994, p. 224).

Since Blacks constituted 83 percent of the crack cocaine trafficking cases, they were disproportionately sentenced to prison and received far longer prison terms than Whites:

These and other analyses not reported here lead us to conclude that the source of the differences in sentencing of black and whites under the guidelines was not invidious discrimination by judges at the point of sentencing. Instead, the primary reasons were the predominance of blacks in federal crack trafficking cases, and Congress's decision to punish crack cocaine severely (1994, pp. 225-6).

The widespread use of mandatory minimums illustrates how sentencing reforms external to the guidelines themselves can negate gains in reducing disparity. The USSC conducted a study of the effects of these mandatory minimums on sentencing disparity and found that they were not applied in a uniform manner. Based on its analysis, the USSC reached the following conclusion:

Despite the expectation that mandatory minimum sentences would be applied to all cases that meet statutory criteria of eligibility, the available data suggest that this is not the case. The lack of uniform application creates unwarranted disparity in sentencing, and compromises the potential for the guidelines sentencing system to reduce disparity (1991, p. ii).

Collectively, all of these studies suggest that the USSC guidelines have reduced disparity but that more research is needed to better understand the overall impact on sentencing disparity reduction. The extent of racial disparity in the use of incarceration has worsened under the USSC guidelines by dramatically increasing the penalties of drug offenses for which Blacks are disproportionately arrested and convicted. This disturbing trend is not due to the guidelines alone, but to broader changes in the laws for drug crimes.

B. MINNESOTA SENTENCING GUIDELINES

Much research has been conducted on the effects of Minnesota's guidelines with the most thorough study completed by the Minnesota Sentencing Guidelines Commission (MSGC) in 1984. The MSGC evaluation used a pre-guideline sample (1978) and several post-implementation samples (1981-1983) to assess the impact on sentencing practices. Using a measure of "grid variance", the MSGC found that greater uniformity was achieved by the guidelines when compared to the previous indeterminate system (see Table 6-1). Part of this achievement was attributable to the low level of departures from the prescribed guideline-based dispositions (i.e., high compliance rates). Initially, only 6.2 percent of the cases departed from the guidelines and in no singular direction. However, departure rates increased slightly during the succeeding two years (from 6.2 percent to 8.9 percent).

A recently published article by Stolzenberg and D'Alessio (1994) provide further evidence that the early gains in reducing disparity have slowly eroded. In their analysis of sentencing practices from 1977-1989, they found that disparity in the length of sentence decision has been reduced by 60 percent. However, for the prison disposition decision, substantial gains that were realized immediately after the guidelines were implemented have not been maintained over time. The estimated reduction for the in/out decision is only 18 percent and is approaching pre-guideline levels (see Figures 6-1 and 6-2).

Regarding sentencing neutrality, "there were only marginal gains" (Parent, 1988, p. 196). While dispositions for black and Native Americans were more uniform than before the guidelines, reductions in sentencing variations for these minorities were less than for whites (Table 6-1). Minority offenders continued to receive somewhat harsher sanctions than white offenders even when controlling for offense severity and criminal history. Employment status continued to associate with sentence length and sentences for imprisoned women averaged seven months less than similarly situated male prisoners. Nonetheless, it is generally agreed that racial and gender disparity have declined modestly under the guidelines (Miethe and Moore, 1985; 1986; 1988; Moore and Miethe, 1986; Miethe, 1987; Frazee, 1993).

FIGURE 6-1

UNWARRANTED DISPARITY FOR THE NO PRISON/PRISON OUTCOME

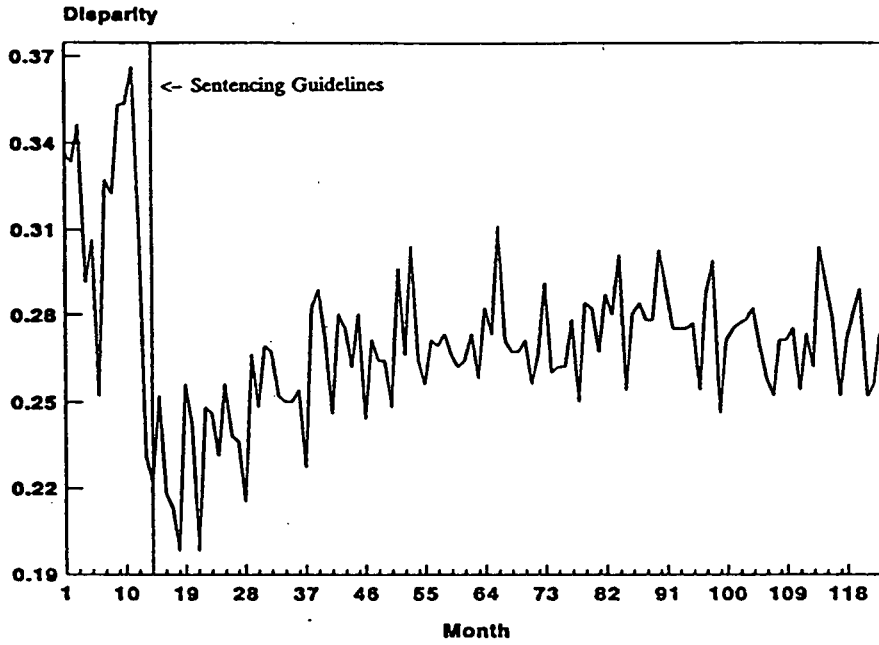


FIGURE 6-2

UNWARRANTED DISPARITY FOR THE PRISON LENGTH OUTCOME

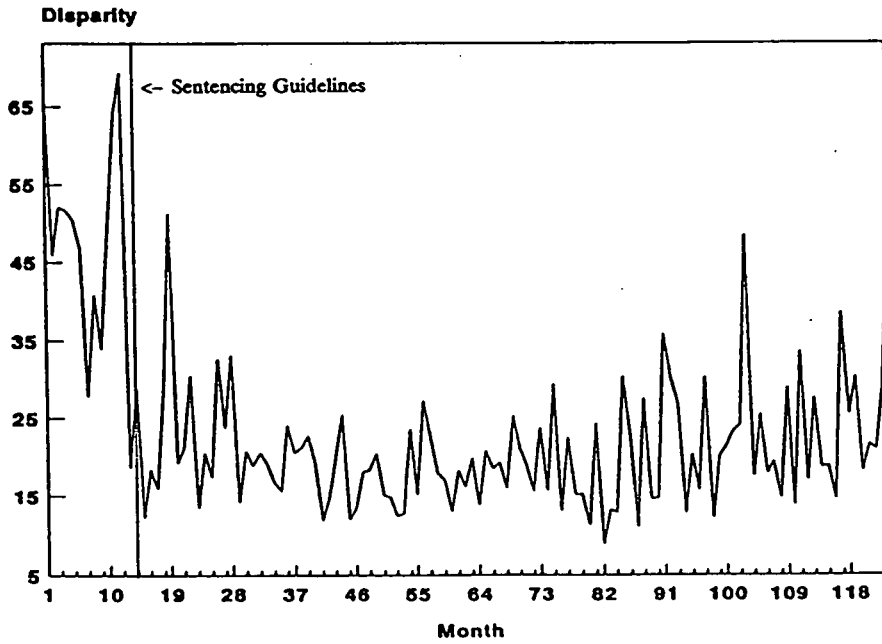


TABLE 6-1

MINNESOTA SENTENCING PATTERNS
1978-1983

	PRE	GUIDELINE YEARS		
	1978 (n=4369)	1981 (n=5500)	1982 (n=6066)	1983 (n=5562)
Prison Dispositional Uniformity				
Total	.1041	.0499	.0586	.0647
Whites	.1000	.0408	.0586	.0646
Blacks	.0779	.0674	.0512	.0573
Native Americans	.1040	.0847	.0783	.0799
Other Minorities	.0315	.0463	.0855	.0475
Departure Rates				
Total	N/A	6.2%	7.0%	8.9%
Upward	N/A	3.1%	3.4%	4.5%
Downward	N/A	3.1%	3.4%	4.5%

Note: The formula for the variance of a dichotomous variable is:

$$\text{Variance} = p(1-p),$$

where p = the probability of one of the dichotomous outcomes. When p = 1 (for example, when all offenders get either prison or probation), the variance equals zero:

$$\text{Variance} = 1(1-1) = 0.$$

(Parent, 1988, p.194)

Source: Minnesota Sentencing Guideline Commission, 1984.

C. WASHINGTON SENTENCING GUIDELINES

The Washington guidelines were intended to ensure long-term imprisonment for violent offenders, community sanctions for property offenders and greater equity in the sentencing process. Neutrality in sentencing was a major goal stated in the SRA which requires the guidelines to be applied to all offenders equally without regard to any offender characteristics except for the offense severity and the offender's criminal record.

Reviewing the state's first ten year's experience with sentencing guidelines, the Washington Sentencing Guidelines Commission (WSGC) concluded:

The high degree of compliance with sentencing guidelines has reduced variability in sentencing among counties and among judges. Moreover, the great majority of sentences fall within the standard ranges, and they tend to be gender and ethnicity neutral (WSGC, 1992, p. 12).

This conclusion was supported by earlier findings in 1987 that little disparity was found in the length of sentences imposed for non-departure sentences (87 percent of all sentences fell within the standard sentencing range) (Fallen, 1987). In general, the guidelines have produced their desired results: higher probabilities and longer sentences for persons convicted of violent crimes, less imprisonment for property crimes, and high compliance with the guidelines.

Black offenders did receive longer sentences than whites, but these differences were attributed to ethnic differences in the offense seriousness level and overall offender score patterns (Table 6-2). This was tested by imposing the average sentence

TABLE 6-2

**STATE OF WASHINGTON
AVERAGE SENTENCE LENGTH BY ETHNIC GROUP
1987**

NONDEPARTURE SENTENCES ONLY

ETHNIC GROUP	AVERAGE SENTENCE	NUMBER
WHITE	7.5 months	6,720
BLACK	9.0 months	1,370
OTHER MINORITIES	6.8 months	765

DEPARTURE RATES BY ETHNIC GROUP: ALL CONVICTIONS

	WHITE N = 8,144	BLACK N = 1,584	OTHER N = 874
EXCEPTIONAL (ABOVE)	1.5%	1.5%	1.0%
EXCEPTIONAL (BELOW)	2.4%	2.0%	1.4%
EXCEPTIONAL (WITHIN)	0.2%	0.1%	0.2%
FIRST-TIME OFFENDER (BELOW)	5.0%	1.6%	3.4%
SSOSA (BELOW)	3.4%	0.9%	1.7%
TOTAL (BELOW)	10.9%	4.5%	6.5%

DEPARTURE RATES BY GENDER: ALL CONVICTIONS

	FEMALE N = 1,465	MALE N = 9,162
EXCEPTIONAL (ABOVE)	1.2%	1.5%
EXCEPTIONAL (BELOW)	1.9%	2.3%
EXCEPTIONAL (WITHIN)	0.2%	0.2%
FIRST-TIME OFFENDER (BELOW)	8.9%	3.7%
SSOSA (BELOW)	0.5%	3.3%
TOTAL (BELOW)	11.3%	9.2%

lengths received by whites in various crime and criminal history categories on similarly-situated black offenders.

While there was a lack of evidence to show systematic ethnic disparity among non-departure cases, substantial disparity along ethnicity and race was revealed in the use of the First-Time Offender Waiver (FTOW) and the use of the Special Sexual Offender Sentencing Alternative (SSOSA)⁹ (Table 6-2). Both of these sentencing dispositions can be used by the judge to depart from the guideline-based sentences. While these are not viewed as "departures," they are frequently invoked. For example, in FY 1992, 13 percent of all sentences were FTOW with another 2 percent being SSOSA (SGC, 1992:21). In 1987 only eight percent of all cases received such a sentence.

Whites had an advantage over minorities in the application of these two provisions by the court: Whites were three times as likely as Blacks and half as likely as other minorities to receive a FTOW sentence below the standard sentencing range. Whites were also four times as likely as blacks and twice as likely as other minorities to receive a suspended sentence under SSOSA. The disparity in FTOW and SSOSA departures could be partly explained by the lack of treatment programs and other resources provided for minority defendants and defense attorneys, but non-treatment alone

⁹ First-time offenders not convicted of a sex offense or a violent offense can be sentenced under a broader range of sentence conditions permitted by the First-Time Offender Waiver. The Special Sexual Offender Sentencing Alternative allows a determinate sentence to be suspended so that treatment programs can be imposed. If the offender fails to comply with the sentence conditions, the suspension will be revoked and the original sentence imposed.

could not account for most of the disparity in the frequency of these departures.

The Washington report also examined gender disparity in sentencing and found that females systematically received shorter sentences even when crime severity and criminal history were controlled. Females were more than twice as likely as males to receive a downward departure through the FTOW (Table 6-2).

D. OREGON SENTENCING GUIDELINES

Oregon's Criminal Justice Council (OCJC) has also made comparisons between cases sentenced prior to (1986) and after guidelines went into effect. The first year report on Oregon's sentencing guidelines compared the two samples and reached the following conclusion:

"... guidelines have increased uniformity in sentencing substantially. Dispositional variability for offenders with identical crime seriousness and criminal history scores has been reduced by 45 percent over the variability under the pre-guidelines system" (Ashford and Mosbaek, 1991, p. viii).

This statement was based upon a computation of the same "grid variance" used by Minnesota and Washington in their evaluations. Similar to Minnesota, the researchers applied the guideline grid criteria to both the pre and post guideline implementation samples. For the 1986 sample, the grid variance equalled .100 while the guideline cases had a grid variance of .045. Based on these two statistics, the OCJC concluded that "...since the guidelines went into effect, the degree of dispositional uniformity has increased by 55 percent" (1991:17). This level of improvement in

dispositional uniformity, according to the OCJC, was similar to the levels reported by Minnesota and Washington (54 percent and 73 percent respectively) (1991:72). There were no pre- and post-tests made on variance reductions in sentence length or estimated time served.

The first report found that sentencing disparity by race and gender had been reduced. However, "significant racial and gender disparity continues" for those cases that are based on the two sentencing options that judges have discretion over: optional probation and sentencing departures (approximately nine percent of all cases sentenced were under one of these two options).

The third year report is based on 1992 cases sentenced under the guidelines and notes that the departure rate has steadily increased (from six percent in 1990 to 10 percent in 1992). The report also makes a more definitive statement that racial and gender disparity persists under the guidelines:

Generally, men were convicted of more serious offenses and had more serious criminal histories than women. Minorities were convicted of more serious offenses and had more serious criminal histories than whites. Under guidelines, the presumptive sentence is based on an offender's crime seriousness and criminal history classification. Thus, male and minority offenders were more likely to have a presumptive sentence of prison. And, actual imprisonment rates were higher for men and minorities (Mosbaek, 1993, p. 67) (see Table 6-3).

The report also found that:

Sentencing disparity is not entirely due to differences in current and prior conviction offenses. More details are needed on the crimes of conviction to determine if the specifics of the offender's criminal acts are the source of the disparity in sentencing (Mosbaek, 1993, p. 67).

TABLE 6-3

STATE OF OREGON
 IMPRISONMENT RATE AND PRESUMPTIVE PRISON RATE
 BY RACE AND GENDER IN 1992

	NUMBER SENTENCED	PERCENT TO PRISON	PERCENT WITH PRESUMPTIVE PRISON SENTENCE
Race			
White	8,674	16.7	19.3
Hispanic	1,621	22.1	19.7
Black	1,183	27.2	25.4
Native American	185	20.0	22.7
Asian/Oriental	72	25.0	27.8
Other	28	17.9	32.1
		p < .0001	p < .0001
Gender			
Male	10,343	20.7	22.0
Female	1,997	6.0	9.1
		p < .0001	p < .0001

Source: Mosbaek and Craig, Tables 39 and 42.

Finally, while differences between the regions of the state in sentencing severity have been reduced, they still persist.

E. PENNSYLVANIA AND DELAWARE

Neither Pennsylvania nor Delaware has conducted a pre- and post-guideline implementation study. Rather, they have focused on consistency within the state and/or compliance to the guideline criteria. Studies completed by the commission staffs show that these trends have indeed occurred. In Delaware, three studies have found that the guidelines have succeeded in sentencing more violent offenders to prison and at the same time increasing the number of non-violent offenders sentenced to intermediate sanctions (Gebelein, 1991 and Quinn, 1990, 1992).

In Pennsylvania, the Commission staff found high levels of compliance and that disparity among the counties had declined over time since the guidelines were implemented (Pennsylvania Commission on Sentencing, 1984; and Kramer and Lubitz, 1985). Several recent analyses of sentencing under Pennsylvania's guideline showed a pattern similar to that in Washington and Oregon (see Kramer and Steffensmeier, 1993; Steffensmeier et al., 1993; Ulmer, 1993; Kramer and Ulmer, 1994). Although the factors prescribed by guidelines (offense severity, prior record) were overwhelmingly the strongest predictors of sentencing outcomes, significant differences exist by race, gender, region of the state (e.g., rural vs. urban), and sentencing differences are especially great between those who plead guilty and those convicted by jury trial.

Dispositional departures below guidelines were a substantial contributor to differences in gender and race. This trend was especially true for certain offenses.

F. SUMMARY OF DISPARITY FINDINGS

There is substantial evidence that disparity has been reduced by presumptive guidelines in several jurisdictions. However, there is also evidence that some of the early progress achieved in these states may be slowly eroding over time. Tonry concludes that although sentencing disparity has "most likely" been reduced "...the evaluation research evidence on this question is less definitive than it appears or than its celebrants claim" (1993:154-5).

One common theme is that guideline departures, especially departures below guidelines, are a significant contributor to disparity and especially race and/or gender sentencing disparities (see the summary by Tonry, 1993 and the research of Kramer and Steffensmeier, 1993; Steffensmeier et al., 1993; Kramer and Ulmer, 1994; and Griswold, 1987). That is, Whites and females are more likely to receive departures below guidelines and less likely to receive departures above guidelines. Similarly, Whites are more likely to receive options that are not officially labelled as departures but serve the same function.

Table 6-4 summarizes the departure rates for five states and the federal guidelines as assembled by Tonry (1994). Here one sees that "standard" sentences are applied to about 75-80 percent of all

TABLE 6-4
DEPARTURE RATES, AMERICAN GUIDELINES SYSTEMS
RECENT YEARS (IN PERCENT)

STATE	AH HOC AGGRAVATED DEPARTURES	APPROVED AGGRAVATED SENTENCES	STANDARD SENTENCES	APPROVED MITIGATED SENTENCES	AD HOC MITIGATED SENTENCES
Federal (1991)	1.7%	—	80.6%	11.9%	5.8%
Minnesota (1989*)	6.4%	—	80.9%	—	12.7%
Minnesota (1989**)	6.8%	—	75.3%	—	17.9%
Oregon (1991)	3.0%	—	94.0%	—	3.0%
Pennsylvania (1991)	2.0%	2.0%	74.0%	8.0%	13.0%
Washington (1991)	1.6%	—	80.7%	15.4%	1.7%

Source: Ashford and Mosbaek (1991), pp. 31, 37; Minnesota Sentencing Guidelines Commission (1991a), figs. 10, 13; Pennsylvania Commission on Sentencing (1993), table 4; U.S. Sentencing Commission (1992b), table 56; Washington Sentencing Guidelines Commission (1992a).

* Dispositional departures only (state incarceration or not).

** Durational departures (length of sentence).

cases and that the vast majority of departures are below the guidelines. As long as departure rates remain at this level and in a "downward" direction, the question of disparity reduction remains somewhat clouded.

IV. IMPACT ON PLEA BARGAINING

Some feared that guidelines would cause a displacement of disproportionate sentencing discretion to prosecutors through greater charge bargaining (see Alschuler, 1978; 1988; Tonry, 1987; Tonry and Coffee, 1987; Savelsberg, 1992). However, limited research as well as anecdotal evidence indicates that this fear has apparently not been born out for guidelines.

For example, Miethe (1987) reports that, overall, prosecutors in Minnesota did not engage in greater charge bargaining, and that the sentence bargaining cases they analyzed did not show greater race or class disparity than prior to guidelines. Cirillo (1986), Ulmer and Kramer (1992) and Ulmer (1993) also found that Pennsylvania's "looser" guidelines allowed many "windows of discretion" beyond the charging stage, such as mitigated and aggravated range sentences and relatively easy departures, that allowed judges to retain ample sentencing discretion and power in the courtroom. In Washington, there has not been any noticeable increase in trial rates (Tonry, 1988).

There is greater evidence that mandatory minimums, however, do produce greater charge bargaining, disproportionate prosecutorial power, and hidden disparity. The USSC concluded that mandatory

minimums are not being applied in a uniform manner and have granted more discretion to the prosecutors (1991). Austin (1993) found that Florida's habitual sentencing law was applied in 20 percent of the cases that met the criteria for being "habitualized" and that Blacks were nearly twice as likely as Whites to receive such a sentence.

There is a trade-off between allowing courts the discretion necessary to alter sentences to reflect unusual circumstances and defendants, and the goal of disparity reduction. Radically constricting judicial discretion, like mandatory minimums do, severely constrain the sentencing process and simply moves the locus of disparity to the charging stage, where it is less visible.

V. IMPACT ON INCARCERATION RATES

All of the presumptive guideline states and the USSC have shown higher incarceration rates since the guidelines were implemented. But, as will be shown here, all states, regardless of their sentencing structure, have had increases in their incarceration rates as well. Major contributing factors to this growth have been increases in the certainty and length of incarceration of persons convicted of violent crimes and drug violations. At the same time, some states have designed their guidelines to divert or reduce the length of imprisonment for the "non-violent" offender to offset the effects of more punitive sentences for violent, drug and repeat offenders on prison population growth. In the following pages we examine and compare

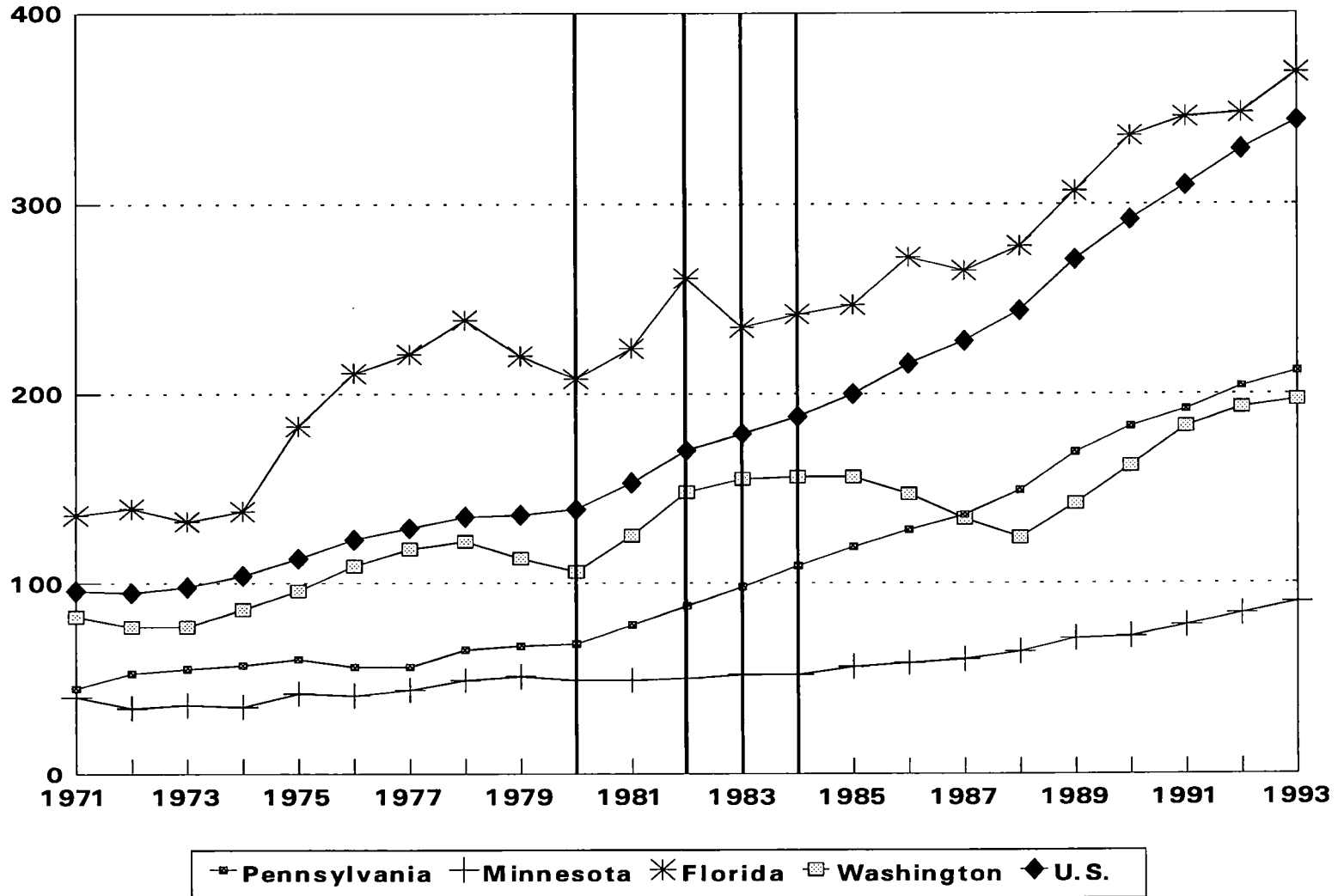
historical trends in incarceration rates for four states that have had sentencing guidelines in place with those states that have not adopted guidelines.

Before we proceed with this analysis it must be remembered that prison population growth is driven by two basic forces -- admissions and length of stay (LOS). Sentencing guidelines have much to do with admissions and LOS, but they do not have absolute control. Prison admissions are also influenced by demographic trends, crime rates, arrest practices, and prosecutorial policies. In some guideline states, the offender's LOS is regulated by good-time (both statutory and discretionary) and parole boards which are outside the domain of sentencing commissions. Also, there may be considerable legislative activity such as mandatory prison terms and/or adoption of "truth in sentencing" provisions that impact admissions and LOS. For these reasons, one should not expect sentencing guidelines or the sentencing structures of other states to be the sole "cause" of incarceration rates.

Figure 6-3 summarizes rates of incarceration (the number of persons in prison on any given day per 100,000 U.S. population) for the nation and the four guideline states. On a national level, incarceration rates have increased dramatically over the past two decades. The four guideline states have also increased their incarceration rates, but not always in line with the national trends.

The guideline states vary substantially with respect to their pre-guideline incarceration rates. Florida has traditionally had

FIGURE 6-3
ANNUAL CHANGES IN INCARCERATION RATES
PENNSYLVANIA/MINNESOTA/FLORIDA/WASHINGTON AND U.S.
 MN PA FL WA



NOTE: RATES ARE CALCULATED PER 100,000 TOTAL POPULATION.
 SOURCES: BUREAU OF JUSTICE STATISTICS, SOURCEBOOK 1992, TABLE 6.59.
 BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1992, TABLE 2, PRISONERS IN 1993, TABLE 1.

very high incarceration rates, Pennsylvania and Washington reported fairly moderate rates, and Minnesota has traditionally had a low incarceration rate. After each state adopted its guidelines, these long-standing historical trends have persisted, with some variations.

Washington, to date, had a very modest increase since its guidelines were introduced in 1983. This low-growth pattern, however, masks a long-term trend that has not yet materialized. Washington's guidelines, along with several state supreme court rulings, were intended to reduce the rate and length of imprisonment for persons convicted of property and drug possession crimes. Counteracting that trend was the policy of substantially increasing prison terms for inmates convicted of violent and sex crimes. The overall effect was an immediate decline in prison population followed by a substantial increase that is projected to continue well into the future as the violent offenders sentenced for longer terms begin to "stack up" in the prisons.

Florida has substantially increased its incarceration rate since adopting guidelines. The Florida trends would have been even higher were it not for a consent decree and subsequent legislation that required the state to maintain its inmate population at 98.5 percent of its prison bed capacity. This restriction has resulted in Florida's well-publicized early release program (referred to as controlled release) to keep the prison population within its rated capacity (Austin, 1993).

Pennsylvania, while maintaining relatively moderate incarceration rates compared to Florida, has substantially increased its incarceration rate after adopting guidelines. This high growth pattern is not surprising since Pennsylvania's guidelines were not designed to address prison crowding.

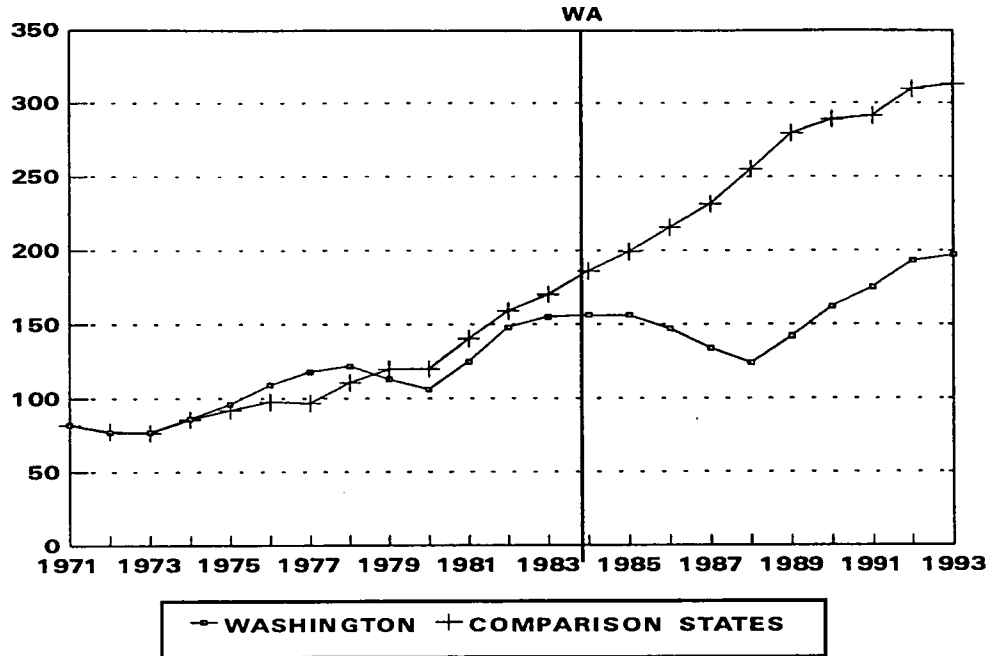
Minnesota did link its guidelines to correctional resources and has shown the lowest rate of growth. In fact there was virtually no growth until 1985. Since then its incarceration rate has increased in line with major revisions to the guidelines that were adopted in 1988. These changes were intended to make the guidelines more punitive for offenders convicted of violent crimes (xxxxx, 1994).

To better assess the impact of guidelines on incarceration rates, we have selected the two states that linked their guidelines to correctional resources (Washington and Minnesota) and contrasted their rates with states that have comparable pre-guideline incarceration rate trends (Figures 6-4 and 6-5). Here one can see that both of these states fared far better than the non-guideline states. These data provide evidence that guidelines can have a moderating effect on the use of imprisonment if they are so designed to accomplish that goal.

VI. IMPACT ON PRISON CROWDING

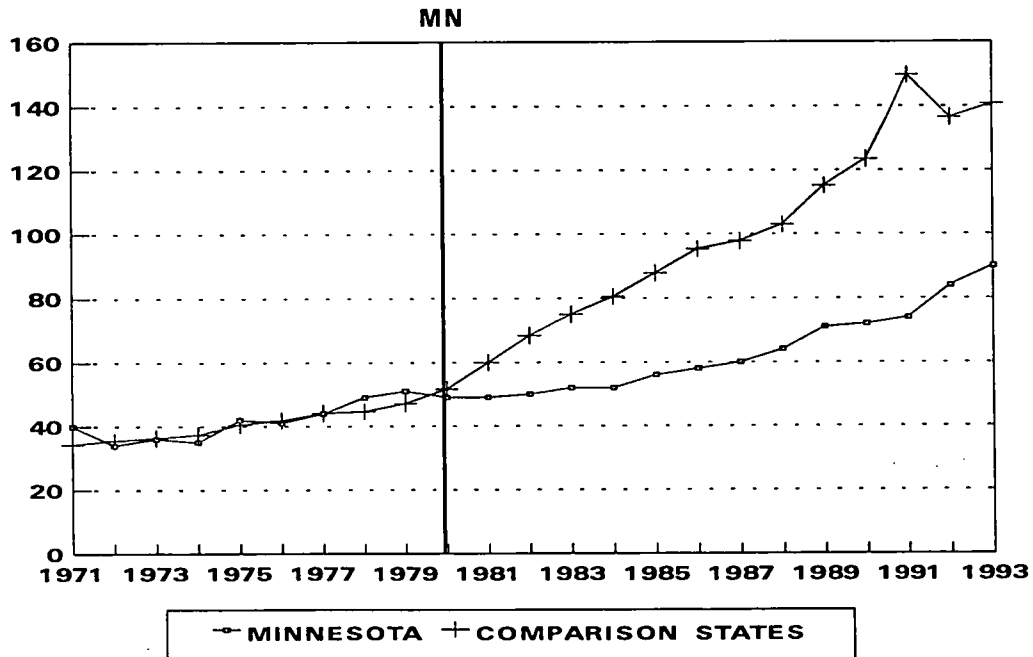
As incarceration rates have increased, what has been the effect on prison crowding? Do sentencing guidelines have any

FIGURE 6-4
ANNUAL CHANGES IN INCARCERATION RATES
WASHINGTON AND COMPARISON STATES



SOURCES: BUREAU OF JUSTICE STATISTICS, SOURCEBOOK 1992.
 BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1992, TABLE 2, PRISONERS IN 1993, TABLE 1.

FIGURE 6-5
ANNUAL CHANGES IN INCARCERATION RATES
MINNESOTA AND COMPARISON STATES



SOURCES: BUREAU OF JUSTICE STATISTICS, SOURCEBOOK 1992.
 BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1992, TABLE 2, PRISONERS IN 1993, TABLE 1.

effect on prison overcrowding? Do they exacerbate or relieve the problem?

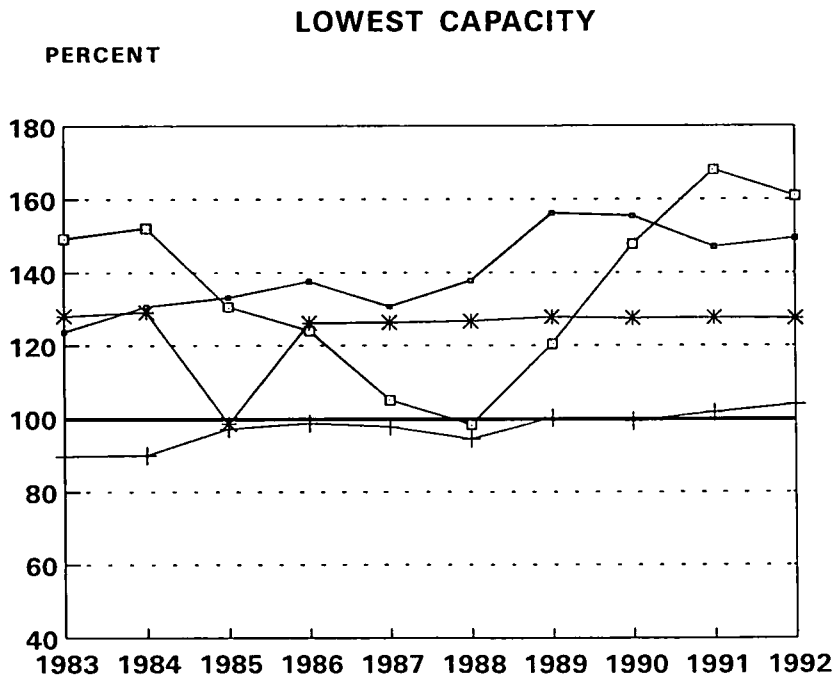
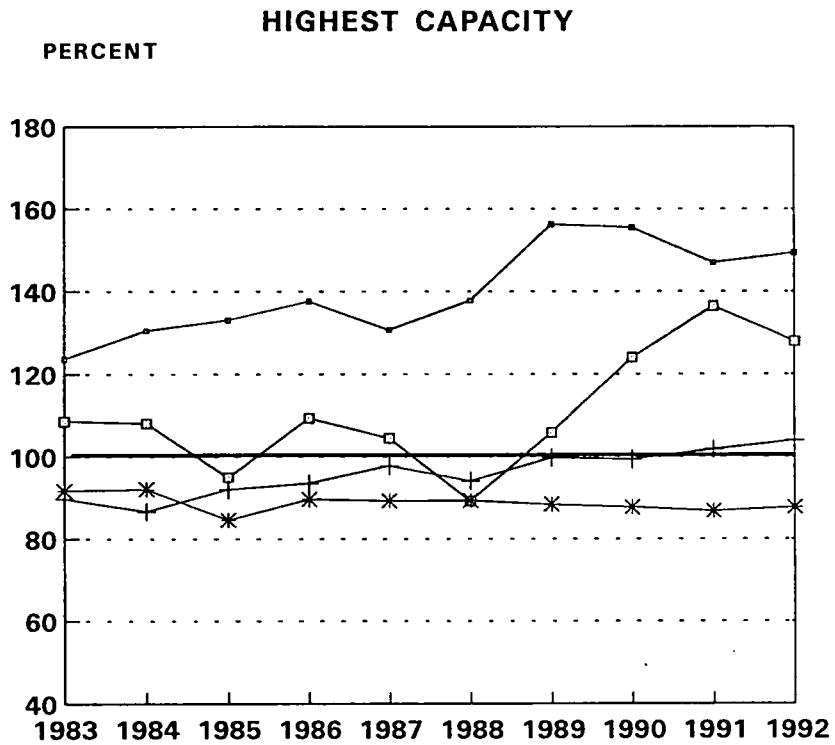
To answer these questions, we examined the rates of crowding using data provided by the U.S. Department of Justice's Bureau of Justice Statistics (BJS). Unfortunately, national and individual state prison capacity data were not reported in a standardized format until 1983. Consequently, it is not possible to compare the magnitudes of overcrowding pre- and post- the implementation of guidelines as was done for incarceration rates.

The BJS data use two measures of prison capacity. One is based on the state's "highest" bed capacity figure that may represent a state's temporary, operating or emergency bed capacity. The "lowest" capacity figure often reflects the design capacity of the system. However, in some instances, states have reported to BJS the same figure for both lowest and highest bed capacity figures.¹⁰

Figure 6-6 reports the crowding ratios (prison population divided by prison capacity) for the four guideline states since 1983 (ratios above 100 reflect a crowding situation). Here again there are important differences among the four states. Pennsylvania, which did not require the guidelines to take capacity

¹⁰ From a prison management perspective, relying on the highest capacity figure may understate the state's crowding problem because prisons generally require reserve capacity (five percent) to operate efficiently and safely. For instance, prison dormitories and cells need periodic maintenance, extra cells are needed for protective custody, disciplinary cases and other emergencies. Therefore, operating a prison at its highest capacity level may already indicate a crowding situation.

FIGURE 6-6
PRISON POPULATION AS A PERCENT OF
PRISON CAPACITY 1983-1992
PENNSYLVANIA/MINNESOTA/FLORIDA/WASHINGTON



Pennsylvania
 + Minnesota
 * Florida
 □ Washington

SOURCE: BUREAU OF JUSTICE STATISTICS, PRISONERS 1983-1992

into account, has had the worst overcrowding problem; its prison population has always exceeded its prison capacity starting at 122 percent and climbing to approximately 150 percent.

Prison crowding in Washington has been a direct function of the wild fluctuations of its prison population that have been caused both by its guidelines, two state supreme court decisions (Phelan and Myers), and numerous amendments to the SRA itself that have served to increase penalties. As indicated earlier, there was a considerable drop in the inmate population during the first few years of the SRA through 1988. Supreme Court decisions and the guidelines functioned to allow many inmates to serve shorter prison or no prison terms at all. Consequently, Washington initially had excess capacity and became well known throughout the nation as a state that had excessive capacity and was renting cells to other states to keep its prisons full and to make money. But, as the long term effects of its sentencing guidelines began to take hold, its crowding situation worsened and is expected to continue to deteriorate over the decade. Since 1988, its crowding problem has worsened considerably as the prison population continues to grow. Furthermore, the WSGC has also noted that jail crowding has worsened under the guidelines. For these reasons, the WSGC has concluded that the objective of making "frugal use of the state's resources" has not been met (WSGC, 1993).

Florida has had success in keeping its prison system from becoming crowded, but it cannot be linked to its guidelines. As we have already noted, a court order later embodied in statute

requires that the prison population not exceed bed capacity. Indeed, the system has remained uncrowded despite prison crowding pressures created by the guidelines and mandatory minimum sentencing laws, that were circumvented by its massive early release program (Austin, 1993).

Only Minnesota has been able to provide adequate prison capacity for their inmates for a sustained period of time. However, its early success seems to be waning as the prison population began to exceed its rated capacity in 1991. Moreover, one must also recognize that Minnesota never had a prison crowding problem to be solved. An earlier review by Austin (1986) pointed out that before guidelines were enacted, Minnesota was not experiencing a crowding problem:

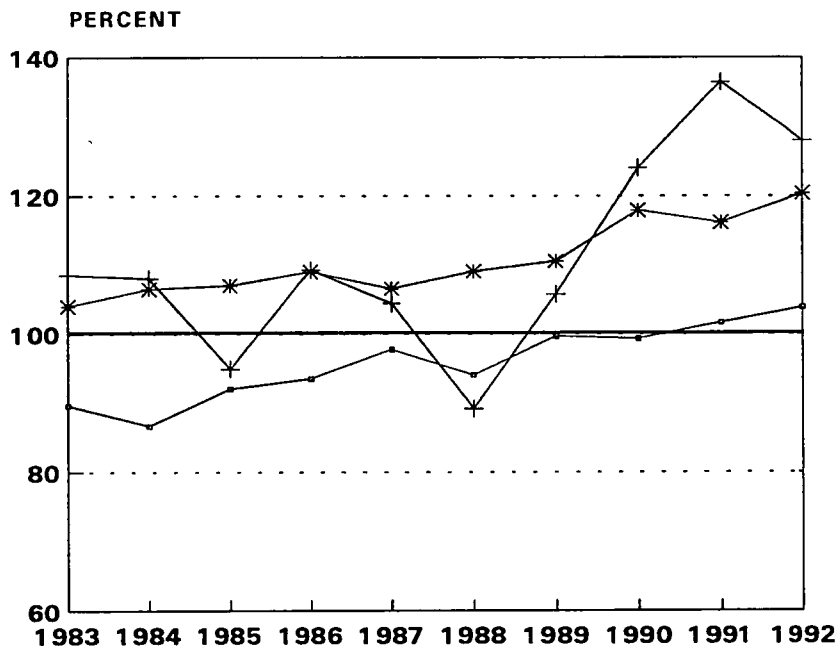
Prior to the implementation of the guidelines, Minnesota's prison population had never exceeded its bed capacity and has traditionally reported one of the nation's lowest state incarceration rates. Due to a surplus of beds, the state has been housing several hundred inmates from Wisconsin and the Federal Bureau of Prisons in their facilities since 1980. A new maximum security facility (Oak Park Heights) was brought on line in 1983 which further added capacity to the state prison system. Thus, in many ways, the inclusion of prison capacity as a basis for setting guideline criteria may have reflected a long standing Minnesota tradition to not overcrowd its prisons regardless of sentencing structure (1986:45-6).

Figure 6-7 pools the results of Minnesota and Washington with the rest of the nation's prison systems and shows little difference between the guideline and non-guideline states.

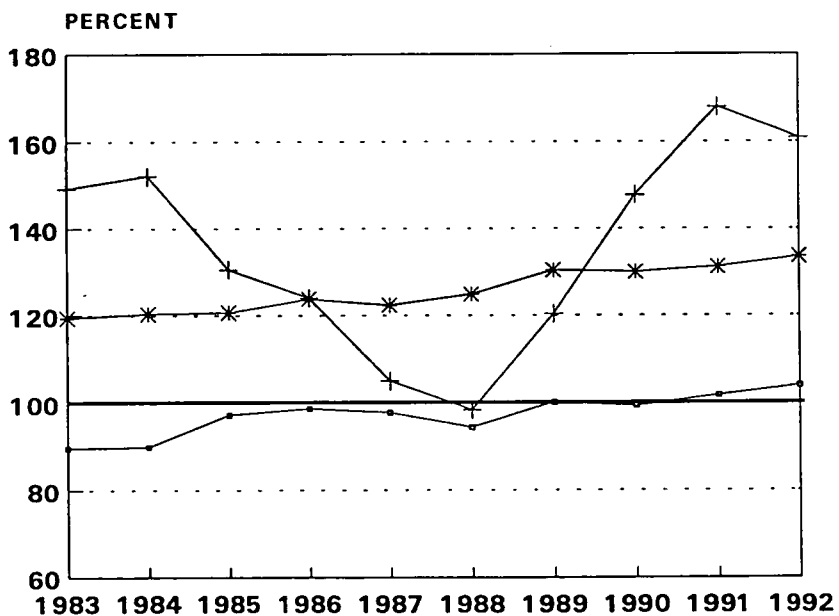
The finding that guidelines by themselves is not a sufficient condition for controlling prison crowding is made more clear in Table 6-5 which presents states that have prison populations below their rated capacity. Of the 15 states listed, five were guideline

**FIGURE 6-7
PRISON POPULATION AS A PERCENT OF
PRISON CAPACITY 1983-1992**

HIGHEST CAPACITY



LOWEST CAPACITY



○ MINNESOTA + WASHINGTON * NATIONAL

SOURCE: BUREAU OF JUSTICE STATISTICS, PRISONERS 1983-1992

TABLE 6-5
STATES AT OR BELOW RATED CAPACITY
1992

STATES	SENTENCING STRUCTURE	HIGHEST CAPACITY	LOWEST CAPACITY
Indiana	Determinate	95	110
New Mexico	Partial Determinate	95	99
Rhode Island	Indeterminate	84	84
Kansas	Indeterminate	91	91
Missouri	Indeterminate	100	104
North Dakota	Indeterminate	81	81
District of Columbia	Indeterminate	95	121
Georgia	Indeterminate	100	100
Mississippi	Indeterminate	89	95
North Carolina	Indeterminate	98	114
Delaware	Guidelines	99	136
Florida	Guidelines	88	127
Louisiana	Guidelines	95	95
Tennessee	Guidelines	94	99
Utah	Guidelines	81	89

Source: U.S. Department of Justice, 1993.

states. Of the five guideline states, two (Utah and Louisiana) were voluntary/advisory guidelines as of 1992. Clearly, prison crowding can be controlled with or without guidelines.

VII. PROJECTED PRISON POPULATIONS FOR GUIDELINE STATES

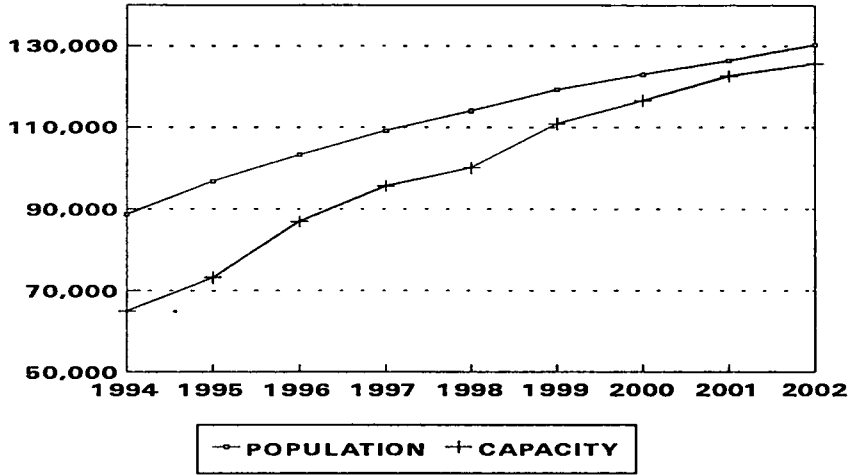
To what extent will guideline states experience future prison population growth and crowding? To answer this question, prison population projections or forecasts that were available for seven different sentencing guideline states and the Federal Bureau of Prisons were examined. These population projections are the latest official forecasts of prison growth for each system (see Figure 6-8).

Each of the eight guideline states prison populations are expected to grow under these projections, and, most will continue to remain crowded unless capacity is increased. The specific trends for each jurisdiction are as follows:

- The Federal Bureau of Prisons is projected to increase by 22,546 inmates from 1995 to 1999, and by 33,635 inmates by 2002. The Federal system projected to decrease the level of overcrowding by increasing its bed capacity by 37,714 beds from 1995 to 1999, and by 52,500 beds for 2002. Nonetheless, the federal system will have 4,657 fewer beds than required by 2002.
- Florida is projected to reach 83,802 inmates by 1998 from its projected 1995 population of 74,669. However, its bed capacity is projected to only reach 59,556 in 1998 or a shortfall of 24,246 beds.
- Minnesota's prison population will grow to 5,848 inmates in 2002 but will only have a capacity of 4,105 beds. Unless substantial increases are made to the state's bed capacity, Minnesota will soon break its long tradition of being uncrowded.

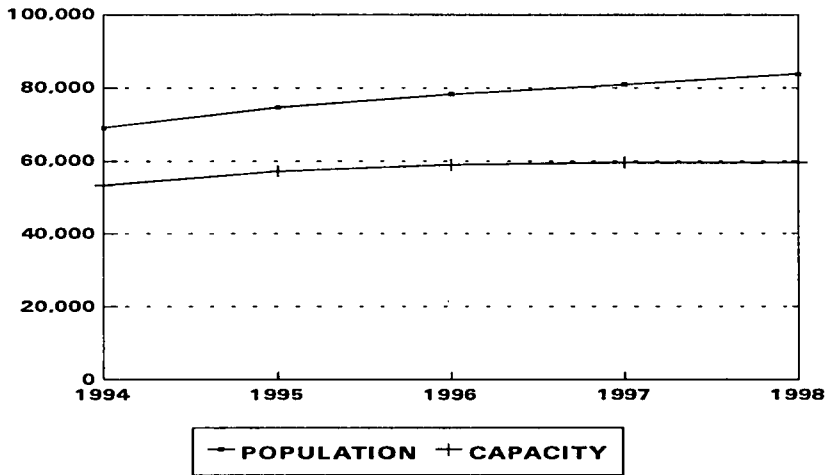
FIGURE 6-8

BUREAU OF PRISONS PROJECTED PRISON POPULATION AND CAPACITY



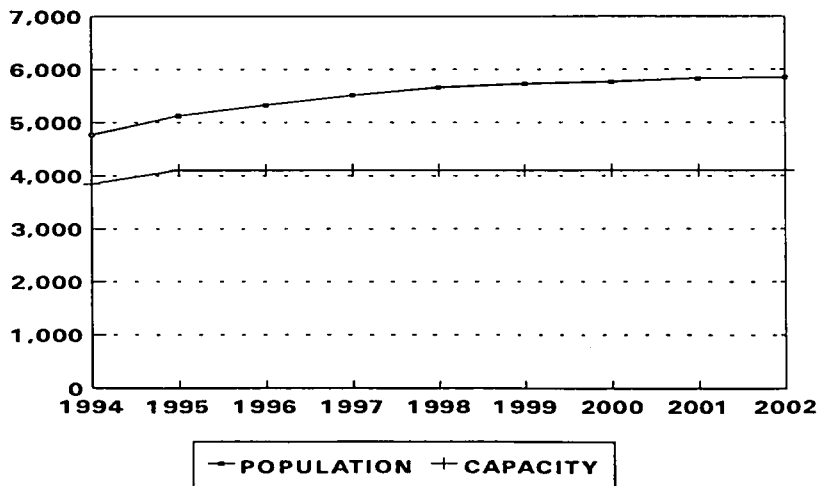
SOURCE: FEDERAL BUREAU OF PRISONS

STATE OF FLORIDA PROJECTED PRISON POPULATION VS CAPACITY



SOURCE: FLORIDA DEPARTMENT OF CORRECTION

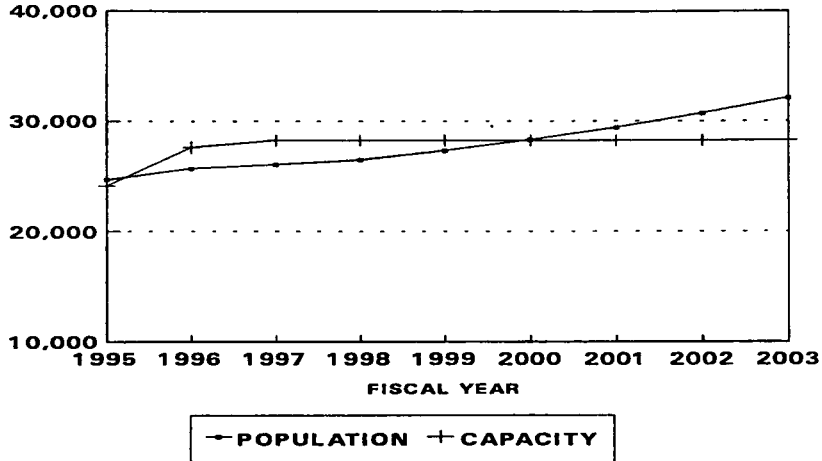
STATE OF MINNESOTA PROJECTED PRISON POPULATION VS CAPACITY



SOURCE: MINNESOTA DEPARTMENT OF CORRECTIONS

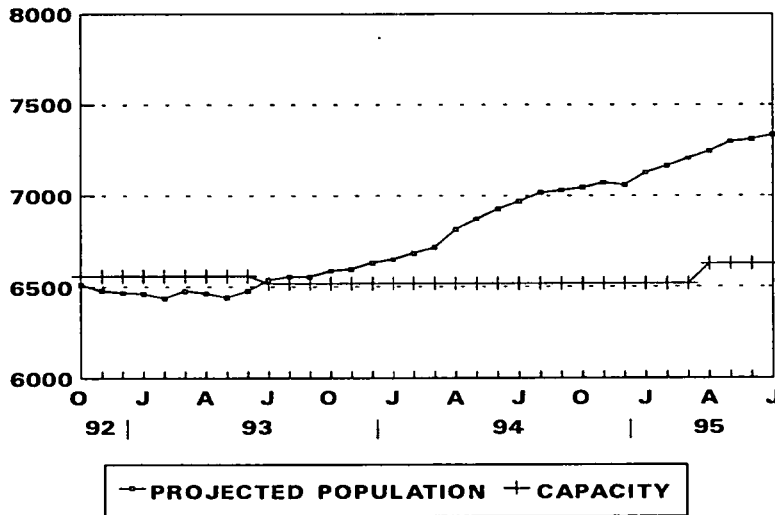
FIGURE 6-8 (CONT)

STATE OF NORTH CAROLINA PROJECTED PRISON POPULATION VS CAPACITY



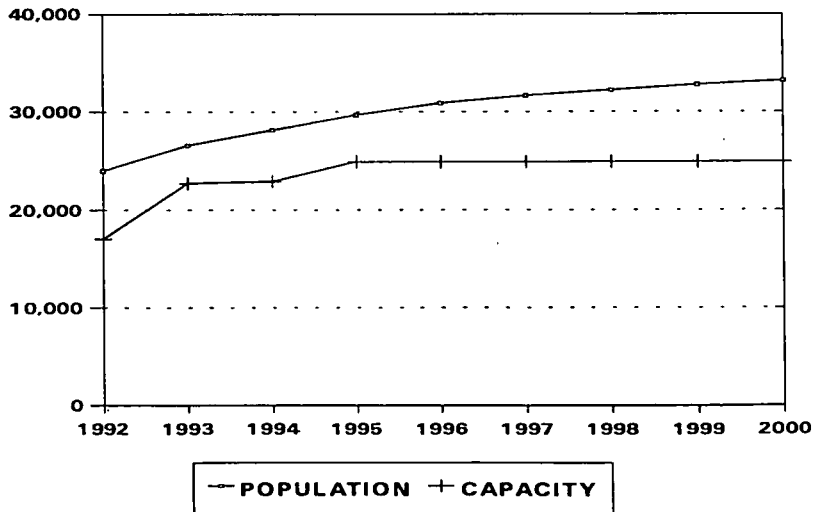
SOURCE: NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION

STATE OF OREGON PROJECTED PRISON POPULATION VS CAPACITY



SOURCE: OREGON DEPARTMENT OF CORRECTIONS

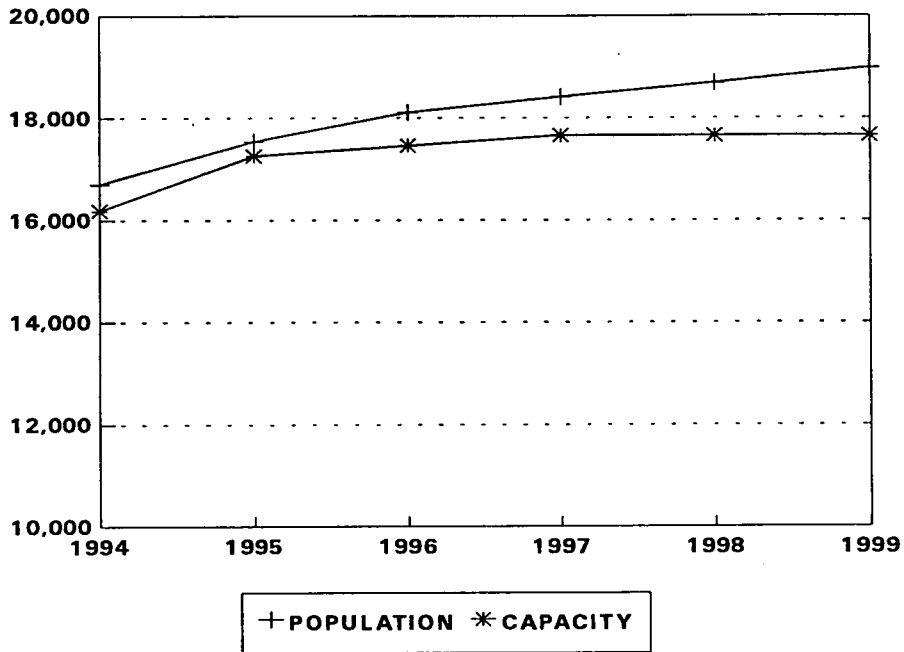
STATE OF PENNSYLVANIA PROJECTED PRISON POPULATION VS CAPACITY



SOURCE: PENNSYLVANIA DEPT OF CORRECTION

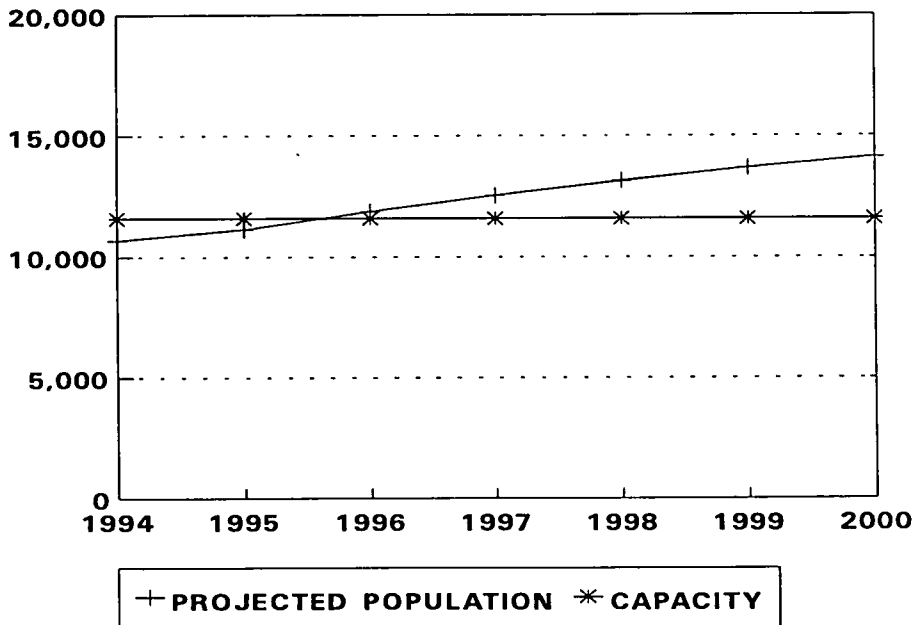
FIGURE 6-8 (CONT)

STATE OF TENNESSEE PROJECTED PRISON POPULATION VS CAPACITY



SOURCE: TENNESSEE DEPARTMENT OF CORRECTION

STATE OF WASHINGTON PROJECTED PRISON POPULATION VS CAPACITY



SOURCE: WASHINGTON STATE OFFICE OF FINANCIAL MANAGEMENT,
WASHINGTON STATE DEPT OF CORRECTIONS

- North Carolina is projected to increase from 24,968 inmates in 1995 to 32,084 inmates by 2003. The 1995 capacity of 24,136 beds is projected to increase to 28,247 beds by 1997 and remain constant, resulting in a beds shortage of 3,837 in 2003.
- The prison population in Oregon is projected to grow from 6,555 in October, 1993 to 7,333 inmates in July, 1995.
- Pennsylvania is projected to grow from 29,667 in 1995 to 33,154 by 2000. The projected bed capacity for the same year is 24,910 or a shortfall of 8,244 beds.
- The prison population for Tennessee will grow from 14,571 inmates in 1993 to 17,328 in 1996. The projected capacity will be 15,979 in 1996, creating a shortfall of 1,349 beds.
- Washington is projected to grow from 10,683 in 1994 to 14,121 inmates by the year 2000. Unless more bed capacity is planned and constructed, there will be a shortfall of 2,528 beds.

At least two of these guideline states have been forced to utilize "early release" programs in the past to relieve overcrowding. As indicated earlier, Florida has a program called "Controlled Release". While a number of legislative restrictions apply to this program to keep many inmates from being released early, the program does award release credits to some inmates on a discretionary basis to accelerate release dates and thereby reduce length of stay. Tennessee uses a "Safety Valve" program that reduces length of stay until first parole eligibility, thereby reducing time served for inmates released to parole.¹¹

In summary, unless prison capacity is significantly increased or their current sentencing laws modified, guideline states will be forced to either live with overcrowded facilities or implement

¹¹ Only inmates granted parole will benefit from the safety valve program since the sentence discharge date is not affected.

early release programs that invariably erode the objective of reducing disparity (Figure 6-9). However, one can argue that these trends would have been far worse had guidelines not been in place. There have been no published studies to verify this claim. However, the North Carolina sentencing commission did provide us with Figure 6-10, showing that without guidelines its future crowding problem would have been far greater than under guidelines.

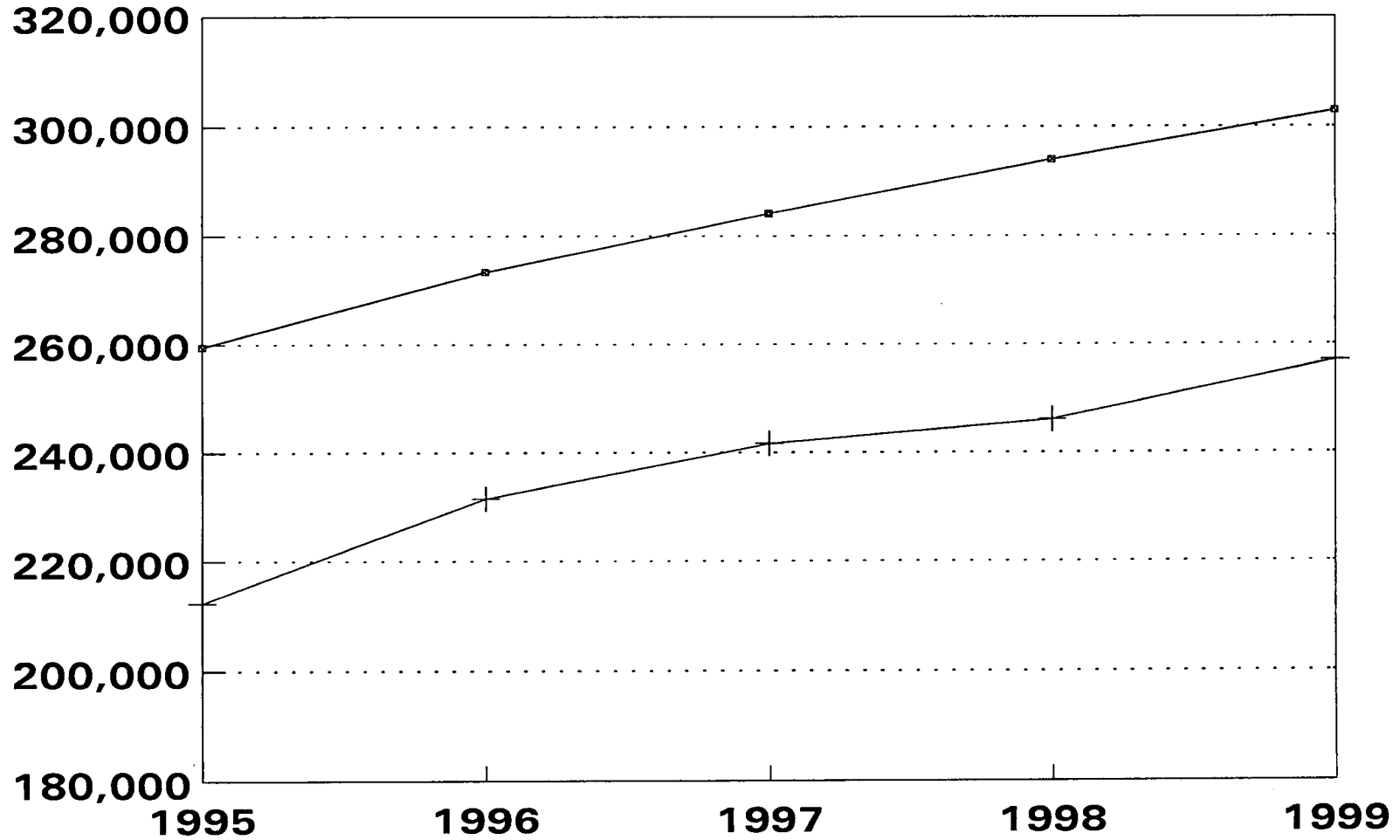
VIII. IMPACT ON PUBLIC SAFETY

On a far more controversial level, it has been implied that sentencing guidelines (or other forms of structured sentencing) could impact crime rates. The logic of this argument goes as follows: by adopting a more careful and selective process for applying the wide variety of sanctions available to the courts, the criminal justice system can target those offenders who pose the greatest risk to public safety; or by incarcerating them more frequently or for a longer period of time. Reductions in crime rates may follow based upon deterrent and/or incapacitation effects.

It is not our intent to hold guidelines accountable to having a direct impact on public safety. No states have formally stated that guidelines or any other structured sentencing reform would reduce crime. Yet, many politicians have stated that sentencing reform, and in particular the increased use of incarceration via sentencing will reduce crime (Dillingham, 1993, Harer, 1994, Irwin and Austin, 1993, and Tonry, 1994). The current move toward "three

FIGURE 6-9

**TOTAL PROJECTED PRISON POPULATION VS CAPACITY
OF SELECTED STATES**

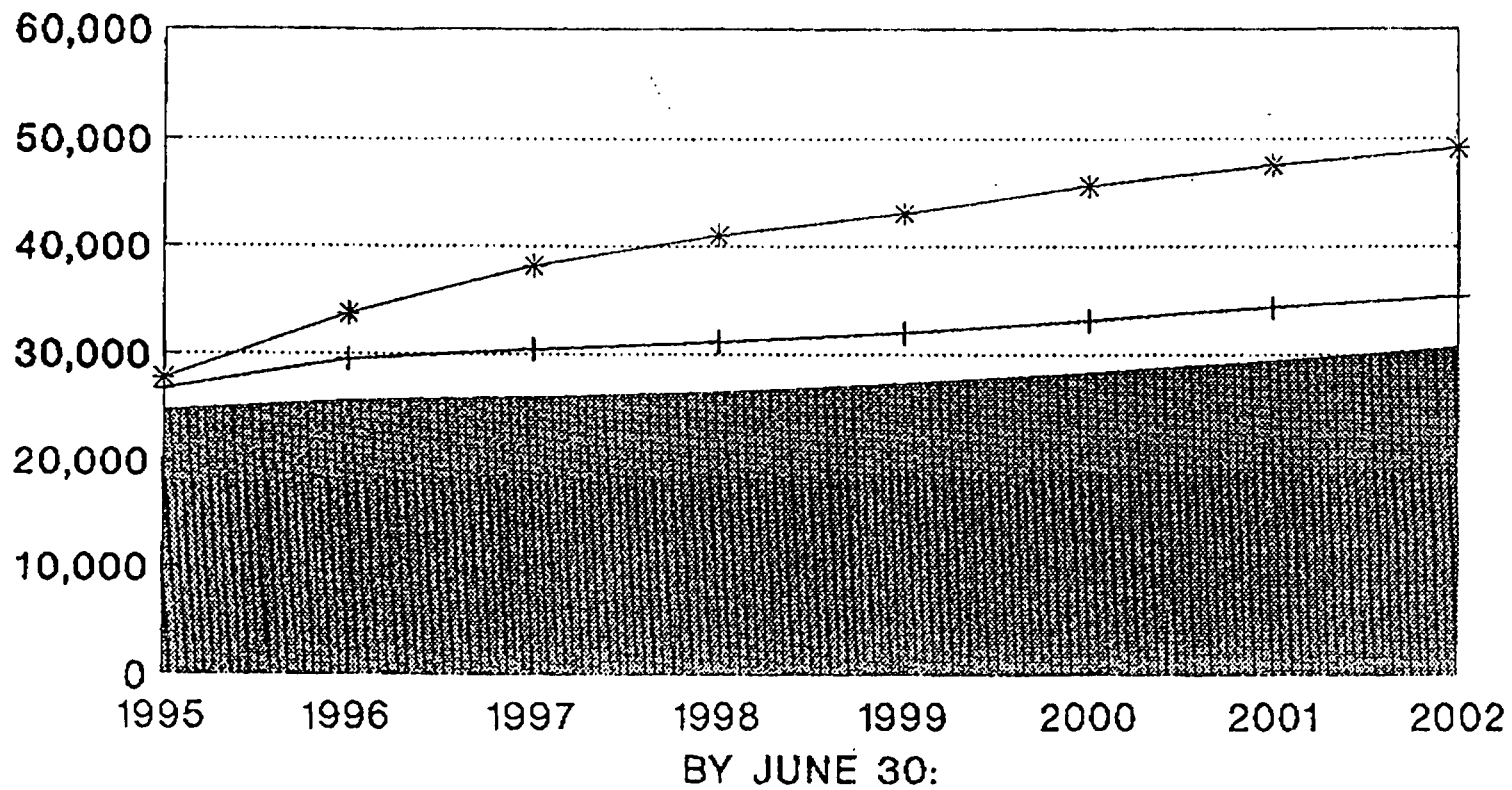


—□— POPULATION —+— CAPACITY

SELECTED STATES INCLUDE BUREAU OF PRISONS, FLORIDA, MINNESOTA, N. CAROLINA, PENNSYLVANIA,
TENNESSEE AND WASHINGTON.

FIGURE 6-10

NC PROJECTED PRISON POPULATION



Structured Sent Current Practice 1980's Practice

strikes and you're out" and other mandatory minimum sentencing provisions are frequently presented to the public as crime control measures.

Even among certain guideline states it has been strongly implied that sentencing reform should have some influence on public safety. For example, the Washington Guidelines Commission in its assessment of its guidelines states that the impact of guidelines on public safety should be evaluated since the law attempts to incarcerate "violent offenders" more often and for longer periods of time (Sentencing Guidelines Commission, 1991:12). In Chapter 4, we saw that Tennessee, Oregon, Arkansas, and Delaware in developing their rationales for adopting guidelines used such terms as "protect the public", "prevent crime", "deter criminal behavior", "insure the security of the people", "prevention of recidivism" and "incapacitation of violent-prone offenders". The USSC states in its evaluation of the mandatory minimum sentences that the Sentencing Reform Act "... was part of the Comprehensive Crime Control Act whose purpose was to address the problem of crime in society" (USSC, 1991:i). Given these statements, we believe it is important to examine the relationship between adoption of guidelines and changes in crime rates.

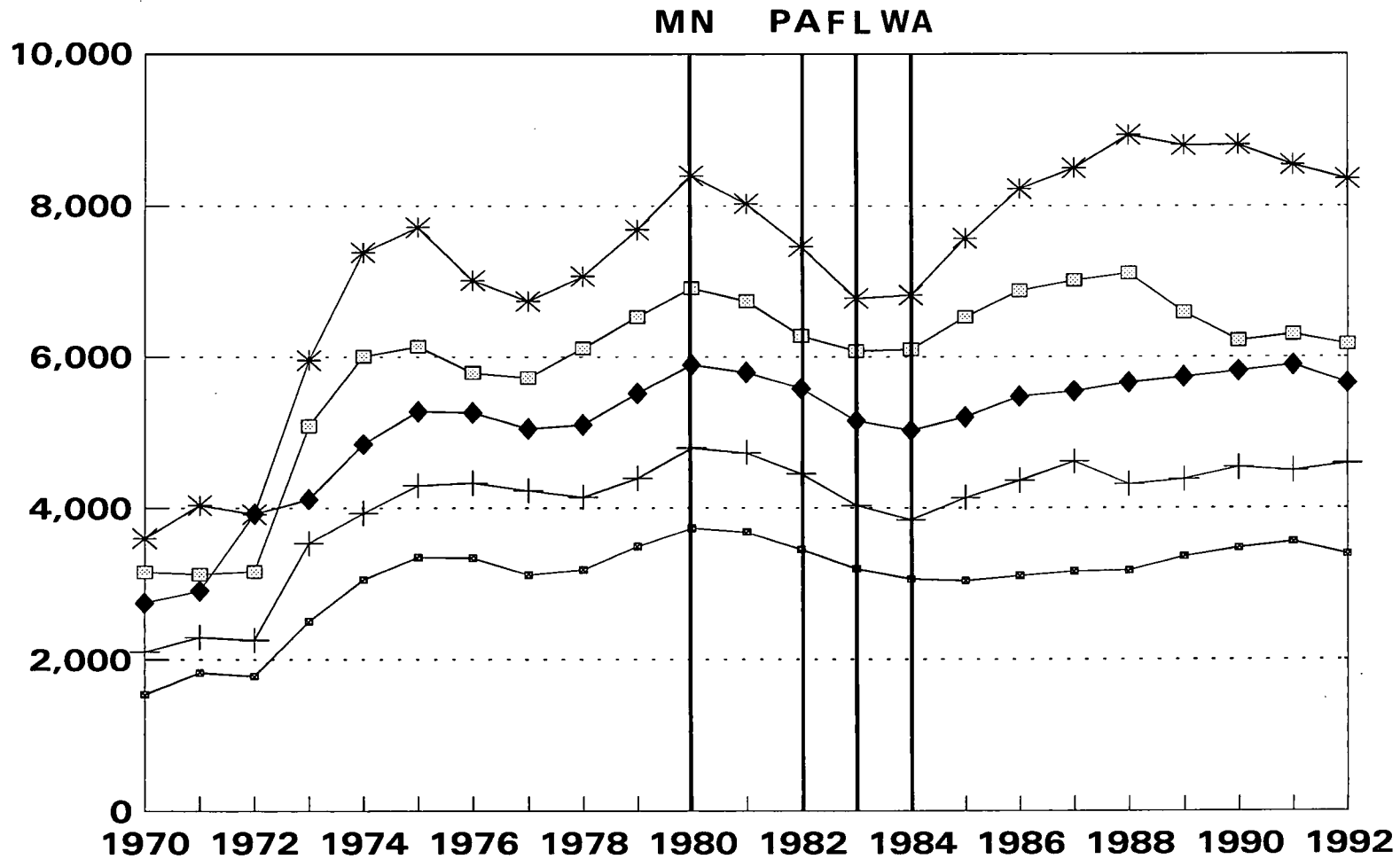
Our measures of crime were extracted from the Uniform Crime Reports (UCR) which include eight crime categories reported by the public to the police and tabulated by the FBI. Violent crime, as defined in the UCR, is comprised of four offenses: murder and non-negligent manslaughter, forcible rape, robbery, and aggravated

assault. The other major category of crime is property crime that includes burglary, larceny-theft, motor vehicle theft, and arson. All the rates described here are number of crimes per 100,000 total population. The same method used for selecting comparison states for the incarceration rate analysis was applied here as well.

Looking at the total crime rates of the four individual states, Minnesota and Pennsylvania have had lower crime rates than Washington and Florida. Between 1970 and 1980, crime rates increased. Since then, crime rates have remained constant or slightly declined (Figure 6-11). In general, these national trends are similar to the trends experienced by the guideline states. The dip in crime rates from 1980 to 1983 was similar for all states even though they implemented their guidelines in differing years. Washington, after steady years of increase starting in 1983, has experienced a moderate decline since 1987, the year it implemented its guidelines.

Comparisons of total crime rates between guideline and non-guideline states that had similar crime rates show few differences (Figure 6-12). As shown in Figures 6-13 and 6-14, the slight increase after 1983 for the guideline states is wholly attributable to increases in Florida (total and violent crime rates) and in Minnesota (violent crime rates only). Our conclusion is that different forms of sentencing models have little influence on crime rates. The fact that guideline states look similar to non-guideline states supports that view.

FIGURE 6-11
ANNUAL CHANGES IN TOTAL CRIME RATES
PENNSYLVANIA/MINNESOTA/FLORIDA/WASHINGTON/NATIONAL
1970-1992



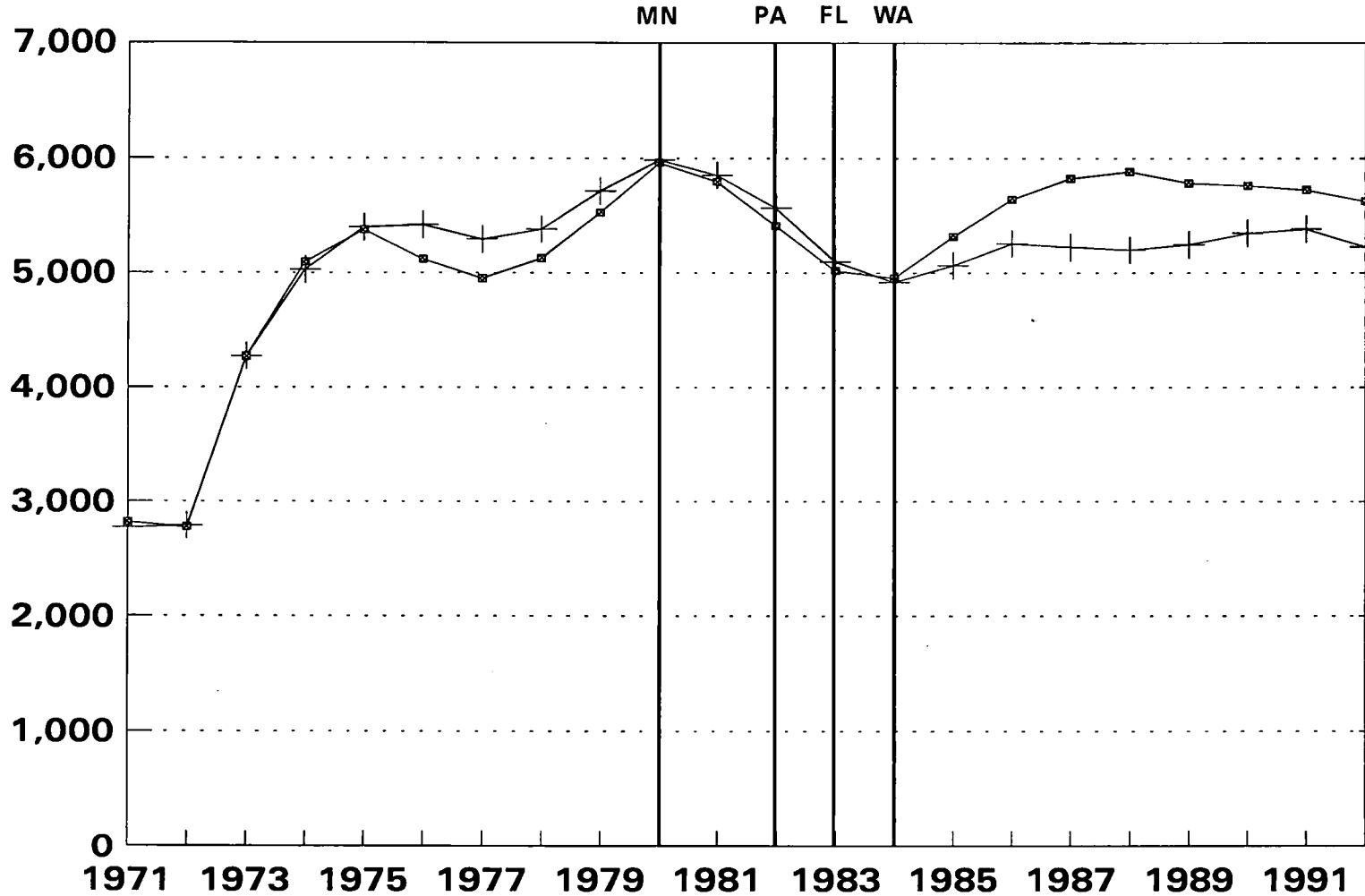
—□— Pennsylvania + Minnesota * Florida —□— Washington State ◆ National

PER 100,000 TOTAL POPULATION

SOURCE: U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORTS 1970-1992

FIGURE 6-12

ANNUAL CHANGES IN TOTAL CRIME RATES
GUIDELINE VS COMPARISON STATES

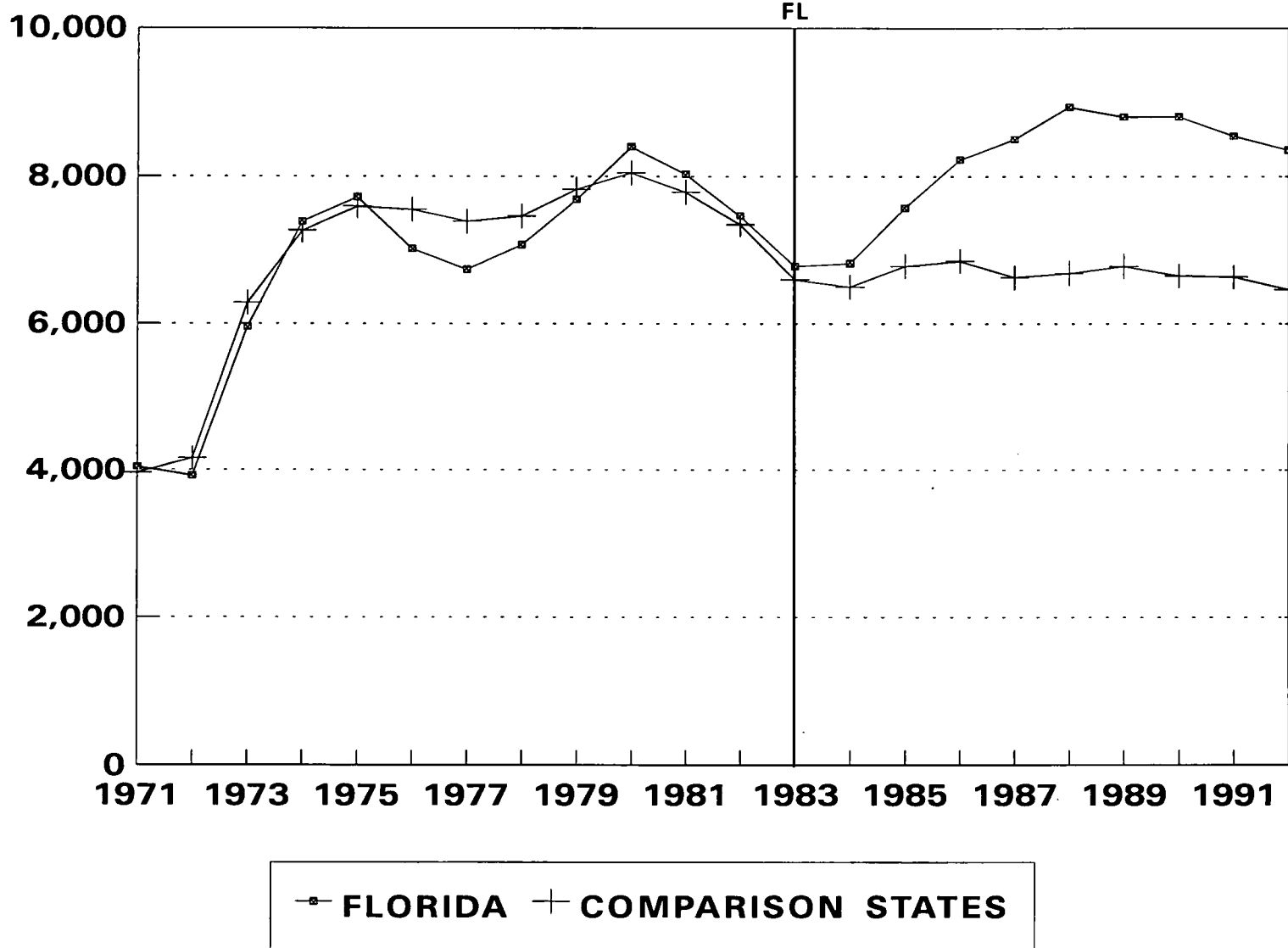


—■— GUIDELINE STATES + COMPARISON STATES

SOURCE: U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS 1970-1992.

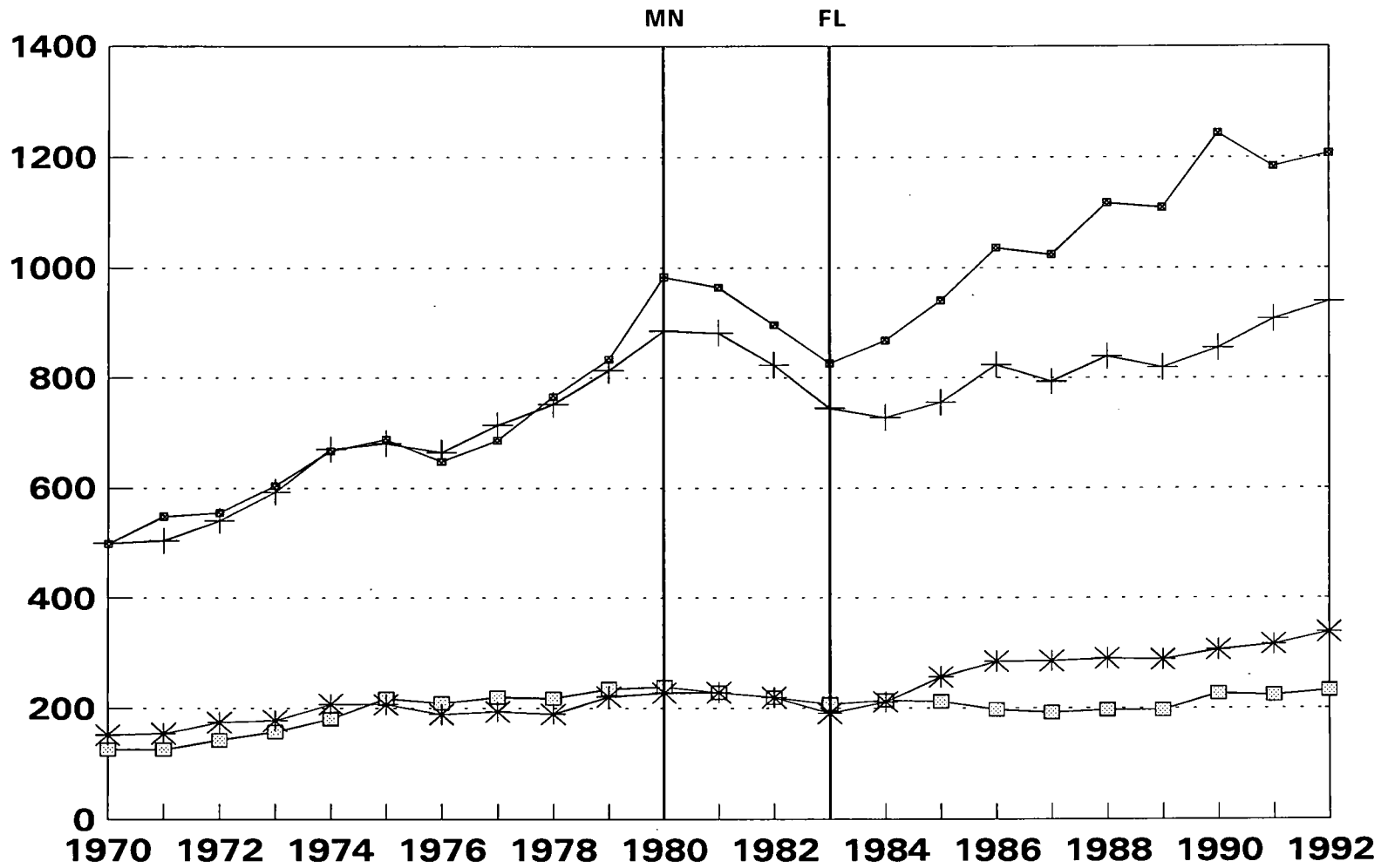
FIGURE 6-13

ANNUAL CHANGES IN TOTAL CRIME RATES
FLORIDA VS. COMPARISON STATES



SOURCE: U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS 1970-1992.

FIGURE 6-14 ANNUAL CHANGES IN VIOLENT CRIME RATES



FLORIDA
 FLORIDA COMPARISON
 * MINNESOTA
 MINNESOTA COMPARISON

SOURCE: U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS 1970-1992.

IX. SUMMARY

In this chapter we have examined the available evidence regarding the impact of guidelines on disparity, incarceration rates, prison crowding, and public safety. On the positive side, there is clear evidence for those states that have conducted evaluations that the guidelines have succeeded in changing historic sentencing patterns. Namely, persons convicted of violent crimes or repeat offenders are more likely to be incarcerated for longer periods of time. Conversely, persons convicted of property crimes are less likely to be incarcerated or for a shorter periods of time. Furthermore, compliance rates are high. Disparity appears to have been reduced although the growing use of departures and mandatory minimum sentencing threatens the gains in disparity reduction.

With respect to impact on the overall use of imprisonment, guideline states have significantly increased their incarceration rates as have all other states. However, the rate of growth was far lower for the two states (Minnesota and Washington) that had established a goal of minimizing prison crowding.

In terms of prison crowding, only Minnesota and Florida have had some success. Florida's success is not related to its guidelines but to other legislation that requires the state to provide sufficient bed capacity. Minnesota's success is not totally linked to the guidelines for two reasons. First, prior to guidelines there was no prison crowding problem to solve. Second, since the guidelines were significantly modified in 1989 to

increase prison terms for certain offenses, incarceration rates have increased and the prison system has become crowded. These same modifications were made to appease a strong movement to abolish the guidelines and institute mandatory minimums which was barely defeated. The reform also created two discretionary release programs under the control of the department of corrections that threaten the new found goal of "truth in sentencing" (Dailey, 1993). Washington had some initial success, but by design, its guidelines will help contribute to a major crowding problem for years to come at both the local and state level.

One must also recognize that guidelines and other forms of structured sentencing (e.g., mandatory minimums and determinate sentencing) have influenced the nature of the crowding problem and the range of options available to a state to address crowding. By establishing fixed sentencing criteria which are ultimately set by a legislature, a far more predictable but entrenched crowding crisis may exist for guideline states as opposed to states with more discretionary forms of sentencing, good-time structures and parole release.

Finally, if different forms of sentencing models influence crime rates, this is not revealed by the limited analysis presented here. The lack of measurable impact on crime rates flows from the absence of impact on state incarceration rates. If there are few differences among the guideline and non-guideline states in their incarceration rates, and if one assumes that incarceration has a major impact on aggregate crime rates, there can be no reason to

expect higher or lower reductions in crime rates based on a state's sentencing structure.

Attempting to link crime reduction to sentencing structure is further diminished when one realizes that guidelines tend to discriminate among offenders for sentencing dispositions based on two items unrelated to criminal careers. The "first time" youthful property offender is likely to receive a very brief period of incarceration even though that person may well pose a far greater risk to public safety by virtue of other factors unrelated to criminal careers but not incorporated in the guidelines (age, sex, employment, marital status, education, drug use, and residence). At the same time, an older offender who has built up a long history of arrests and convictions is more likely to receive a far longer prison term even though that person is now "burning out" of his/her criminal career. Such a sentencing policy will fill a state's prison system with less risky and older inmates thus diminishing whatever incapacitation and subsequent crime effects are possible.

Harer, in his recent study of federal prisoner recidivism rates, points out that a significant portion of drug offenders, who are now receiving far longer prison terms under the guidelines, are very low risks to public safety. He questions the utility of these guidelines as an effective crime control strategy.

... it does seem clear that by imposing longer sentences on low-risk drug traffickers, there has been a substantial increase in retribution with little, if any, reduced sentencing disparity, or increased incapacitation, deterrent, or rehabilitation value and a huge increase in taxpayer dollars spent (1994:101).

In summary, considerable progress has been made through sentencing guidelines but much more work remains. Tonry (1993), a long time evaluator of sentencing reform, concluded:

Some commissions have operated much as Judge Frankel hoped they would; they have achieved and maintained specialized institutional competence, have to a degree insulated sentencing policy from short-term "crime of the week" political pressures, and have maintained a focus on comprehensive system-wide policy making. Guidelines promulgated by commissions have altered sentencing patterns and practices, have reduced sentencing disparities and gender and race effects, and have shown that sentencing policies can be linked to correctional and other resources, thereby enhancing governmental accountability and protecting the public purse (pp. 137-138).

Simply stated, guidelines may or may not "work" depending upon how they are designed and implemented and for what purposes. But one should not expect guidelines to somehow magically solve all of the problems of dispensing justice and reducing crime.

We conclude this chapter by noting the relative absence of research on these very important topics. One is certainly struck by the lack of rigorous studies of disparity that employed pre- and post-guideline samples. Only three states and the USSC have provided the field with such studies. Given the high priority that states place on reducing unwarranted disparity and that many states have recently enacted or are now in the process of implementation, now is the time to launch a series of such studies.

There is a related need to conduct studies on whether guidelines have altered plea bargaining practices. While many suspect that guidelines enhance the influence of prosecutors to negotiate pleas, this phenomenon has never been seriously studied in a number of states. Such studies would consist of both

quantitative and qualitative methods (interviews and observations of the plea bargaining process) to determine whether disparity has been reduced throughout the entire system or has simply been displaced. The growing number of Blacks and Hispanics being incarcerated also needs to be addressed in terms of whether or not guidelines are contributing to racial disparity at the points of charging and sentencing.

Finally, studies are required to document the extent to which the attributes of the prison and non-prison populations have been altered and the consequences of such changes on prison management and bed capacity needs. If guidelines result in non-violent offenders receiving very short or no prison terms while violent, drug and repeat offenders are incarcerated more frequently and for longer periods of time, prison populations will look very different in the future. How these changes will impact the number and type of prison beds, along with the need for special housing units and services (medical, administrative segregation, and protective custody populations) needs to be understood.

CHAPTER 7

SUMMARY

The past decade has witnessed a considerable amount of activity in sentencing reform. Most states have instituted a number of reforms to increase the certainty of sentencing decisions by adopting either mandatory sentencing provisions, more sweeping determinate sentencing or sentencing guideline systems (either voluntary/advisory or presumptive). The impetus for many of these reforms has been to control sentencing disparity, increase "truth in sentencing", and control correctional population growth. They have advanced the ability of the state to set an overall policy as to the goals of sentencing and to set limits on what the state is willing to invest in incarceration facilities. In view of the strong move toward sentencing commissions over the last 15 years and the projected growth of prison populations, it is likely that there will be continued interest in structured sentencing models.

This report has tried to summarize the nature and results of this reform movement. This closing chapter summarizes the study's major findings and policy implications for how structured sentencing reforms may proceed in the future.

I. MAJOR FINDINGS

A. CURRENT SENTENCING PRACTICES

- There has been an unprecedented flurry of structured sentencing reforms over the past two decades. As of 1994, 16 states and the federal government have implemented or are about to implement either presumptive or voluntary/advisory

sentencing guidelines. Another five states have adopted determinate sentencing systems.

- Another popular form of structured sentencing has been mandatory minimum sentencing laws. All states have some version of these laws which are targeted for habitual offenders ("three strikes and you're out") and the crimes of possession of a deadly weapon ("use a gun go to prison"), drunk driving, and drugs (possession and distribution).
- Most states continue to allow inmates to earn good-time credits to either reduce the inmate's sentence or to advance the inmate's parole eligibility date.
- Despite the level of criticism directed at parole, most states, including those that have adopted determinate and sentencing guideline models have retained some form of discretionary release and post release supervision.
- Without a major reduction in existing sentencing lengths, abolition of good-time and discretionary parole release would have a profound impact on prison population growth.
- Despite the large number of states converting to guideline-based sentencing, most states do not utilize sentencing guidelines. Furthermore, five states have tried and failed to adopt sentencing guidelines.

B. SENTENCING GUIDELINE MODELS

1. Purposes and Goals

- Virtually all guideline commissions were asked to fulfill the multiple goals of punishment (just deserts), deterrence, incapacitation, and rehabilitation.
- Few jurisdictions explicitly stated the goal of establishing sentencing neutrality with respect to race, gender, social, or economic status.
- Only a few guideline commissions were required to take into consideration the impact of the guidelines on the need for future correctional resources (i.e., prison beds).

2. Structure of Sentencing Guidelines and Sentencing Commissions

- The structure of sentencing guidelines vary dramatically in terms of the criteria for assessing sentencing disposition criteria and sentence length. However,

virtually all guideline systems rely upon two major factors: current offense and criminal history.

- The most common format for guidelines is the two variable matrix that relies upon offense severity and prior criminal history.
- Sentencing Commission membership varies considerably in terms of the number and type of members selected for the commission. There appears to be no particular advantage to having either a large or small number of Commission members.
- In general, membership included judges, prosecutors, defense attorneys, and private citizens. Corrections, legislators and law enforcement officials were often but not always included on these commissions.

3. Implementation Issues

- The process for implementing guidelines is neither quick nor inexpensive. Implementation often requires at least two years to complete.
- The annual budget for guideline commissions and support staff range from \$250,000 - \$500,000. Considerable support is also required to monitor and analyze compliance with the guidelines, once they are enacted, and to project the impact of modifying the guidelines.
- Prior to implementation, detailed data on current sentencing patterns need to be collected and analyzed. A jurisdiction may also need a sophisticated simulation model to estimate the impact of the proposed guidelines on prison, parole, probation and jail populations.

4. Impact of Sentencing Guidelines

- States that have implemented presumptive guidelines have reported high compliance rates and have succeeded in changing historical sentencing trends.
- In general, offenders convicted of violent crimes or repeat offenders are far more likely to be imprisoned and to serve longer prison terms. Conversely, first time offenders charged with property crimes are less likely to be imprisoned and will serve shorter prison terms.
- Due in part to guidelines, persons convicted of drug crimes (both possession and sale) are now far more likely to be imprisoned and to serve lengthy prison terms. This

trend has directly increased the rate of imprisonment for Black and Hispanic offenders.

- Guidelines have helped reduce sentencing disparity. Despite these gains, disparity reductions have eroded somewhat over time.
- There is limited evidence that guideline sentencing structures designed to take correctional resources into account, have had lower rates of growth in incarceration and have helped to control prison crowding. However, prison crowding remains a problem for most states.
- In terms of future prison population growth, guideline states, similar to non-guideline states, are likely to be over-crowded over the next decade unless they embark on a substantial prison construction program or reduce prison terms for violent and drug offenders.

II. POLICY IMPLICATIONS

A. REDUCING DISPARITY WHILE MAINTAINING DISCRETION

The decisions that a jurisdiction must make with regard to its criminal justice laws will have a major impact on the quality of justice and the costs to its citizens. If these decisions are not structured by law or a commission, the difficult decisions are left to individual judges who must accept the great responsibility of not only determining what they perceive as just sentences, but also determining the best use of state and local correctional resources. The major question that remains is whether the technology of structured sentencing, and presumptive sentencing guidelines in particular, can overcome well established organizational values that may facilitate and protect inequitable sentencing practices?

One continuing concern is the ability to individualize sentencing and consider a wide range of sentencing purposes while maintaining an equitable sentencing system. Most states have

attempted to control the individualization of judicial practices while also maintaining that sentences should consider the full range of traditional sentencing purposes.

Pennsylvania, which requires judges to consider offenders' rehabilitative potential and community protection as well as the guidelines, or Washington, whose enabling legislation mandates that the guidelines incorporate multiple goals of retribution, incapacitation, rehabilitation, and frugal use of correctional resources, are perhaps the most explicit examples of this effort to structure sentencing while maintaining adequate court discretion to fashion sentences to individual offenders.

Recent innovations in Oregon and Louisiana have furthered this opportunity under the sentencing guidelines by expanding the range of sentencing options and providing for the commensurability of the punishments. This new approach illustrates that sentences can be very different yet equal, and this approach is an important move forward in the evolution of sentencing guidelines. On the shoulders of these innovations, other commissions may develop guidelines that will increase fairness, equity, proportionality, and still provide for a full range of sentencing options.

B. DISPLACEMENT OF DISPARITY

As noted earlier, one of the key issues that observers of the attempts to control sentencing discretion have is the issue of the displacement of discretion from the court to the prosecutor. One must be continually concerned that guidelines have merely shifted

discretion from parole boards, prison officials, and judges to prosecutors. Unfortunately, little systematic evidence exists to document the extent to which this has occurred. Clearly, research is sorely needed in this area of sentencing reform.

C. PRISON CROWDING

To date, structured sentencing reforms have not yet demonstrated any appreciable effects on prison crowding. This is not to say that they could not have such an impact in the future. But, until the legislative process and sentencing commissions become immune to the "get tough on crime" pressures that most politicians respond to so readily, there is little reason to believe that structured sentencing models will solve the prison crowding problem.

Moreover, as state prisons remain crowded, they will continue to utilize discretionary early release programs. Depending upon how such programs are structured, they may negate the goals of reducing disparity in the determination of how much time similarly situated offenders will serve.

III. RECOMMENDATIONS

The purpose of this project was not to advocate one particular form of sentencing policy whether it be presumptive guidelines, voluntary/advisory guidelines, determinate sentencing, or indeterminate sentencing. Disparity, incarceration rates, and

prison crowding can be reduced via any number of sentencing reform measures. The question is how best to achieve these goals.

The most promising structured sentencing model to address these issues is sentencing guidelines developed by sentencing commissions. They have advanced the ability of the state to set an overall policy as to the goals of sentencing and, in some instances, have set limits on what the state is willing to invest in prisons. In view of the strong move toward sentencing commissions over the last five years, and in view of the continued growth of prison populations, it is likely that there will be continued interest in their use.

Despite this endorsement of the guideline approach, one remains cautious. This report has provided examples where guidelines did not improve the quality of justice. Simply stated, guidelines may or may not "work" depending upon how they are designed and implemented, and, for what purposes. Importantly, one should not expect guidelines to somehow magically solve all of the problems regarding the dispensing of justice and reducing crime.

What follows are policy recommendations that we believe states should consider in developing guidelines that will help meet these two objectives.

Commission Representation Participation:

Broad participation in the guideline process is desired as it both cultivates commitment to the promulgated guidelines and improves the quality of the guidelines that are developed.

Resources:

Adequate financial support is necessary if a commission is to be able to study past sentencing practices in the state; study

what other states have done; prepare reports and proposals for the commission to consider; pay for the commission to meet regularly; hire consultants when necessary; provide the ongoing feedback to the court and other governmental agencies; and monitor and evaluate the impact of guidelines.

On-Going Monitoring and Support:

Commissions that have successfully implemented guidelines have realized increases in budget and in staff size in the post-implementation years. This is due to continually increasing responsibilities imposed on the commissions by the legislature and the cost of maintaining and evaluating guidelines.

Appellate Review:

Without an enforcement mechanism, guidelines are merely voluntary/advisory and as such may have little impact on changing sentencing practices. The common procedure is to provide for appellate review, and for the appellate review to be initiated by either the defense or prosecution.

Mandatory Minimum Sentences:

It's clear from the experiences of many states that the increased use of mandatory minimums are doing great harm to achieving the dual goals of reducing disparity and controlling correctional population growth. States should resist such provisions if they affect large proportions of its sentenced population.

Controlling the Use of Departures:

The extent to which subjective factors are used to depart from the guidelines will have much to do with meeting the goal of reducing unwarranted disparity. States should specify as much as possible the type of departures that are acceptable. Moreover, commissions should carefully monitor the frequency and direction of departures by crime category, race, and gender.

Role of the Federal Government:

States that have recently adopted or are interested in adopting guidelines require assistance and guidance. In particular, the federal government can play an important role by providing a modest amount of assistance to states in the following areas:

- Establish and maintain a national clearinghouse on structured sentencing.

- Convene on an annual basis state sentencing commissions to share information and research findings.
- Establish a funding program to assist states in technologies that are necessary to support the development or modification of existing sentencing structures. Assistance is especially required in the following areas:
 - Conduct comprehensive studies of existing sentencing practices that can be used to guide states in the formulation of new sentencing structures;
 - Develop new methods or provide training to states in existing analytic methods for measuring disparity;
 - Design of information systems that can be used to monitor compliance with sentencing criteria;
 - Develop and improve criminal court and correctional population simulation technology (jails, prisons, probation and parole); and
 - Develop and improve methods of designing and pilot testing various sentencing guideline models.

Finally, more research is needed to assess whether guidelines and other forms of structured sentencing are indeed reducing sentencing disparity. As indicated above, a number of states have or are about to implement sentencing guidelines. It would be extremely valuable to the field to conduct independent process and impact evaluations of these new structured sentencing reforms and how well they perform relative to reducing disparity and controlling prison crowding. It would also be important to conduct studies of states with voluntary/advisory guidelines, indeterminate, and determinate sentencing systems to assess the degree of disparity that exists within these sentencing systems.

There is also the need to better understand how the introduction of reforms external to the guidelines themselves affects sentencing disparity, especially along racial lines. In particular, the impact of mandatory minimum provisions for selected drug crimes on disparity, and, the extent to which guidelines shift or intensify discretion from the courts to the front-end of the system (arrest, charging and plea bargaining) needs to be addressed. Only from these yet uncompleted studies will we learn how best to correct undesirable and unequal sentencing practices.

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