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**Document Title:** Sentencing Digest: Examining Current Sentencing Issues and Policies

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**Document Number:** 173490

**Date Received:** 1998

**Award Number:** 96-IJ-CX-K004

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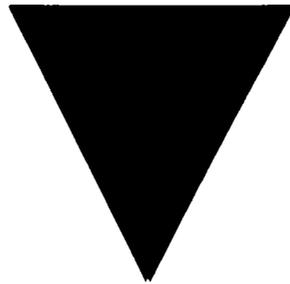
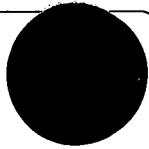
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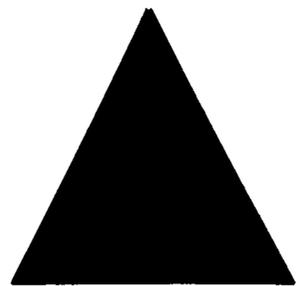
# SENTENCING

*Examining Current Sentencing Issues and Policies*

# DIGEST

173490





A partnership of the  
National Association  
of Sentencing Commis-  
sions, the Conference  
of State Court Adminis-  
trators, and the National  
Center for State Courts.

# SENTENCING DIGEST

## Examining Current Sentencing Issues and Policies

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Produced by the  
National Center for State Courts  
Research and Conference Service (NCJRS)  
P.O. Box 33461  
Cincinnati, OH 45233-0461

Funded by the National Institute of Justice



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National Center for State Courts

ISBN 0-89656-190-9

NCSC Publications Number R-204

This report was developed under Grant 96-UJ-CX-K004 from the National Institute of Justice. The points of view expressed are those of the authors and do not necessarily reflect the official position or policies of the National Institute of Justice, the Conference of State Court Administrators, or the National Association of Sentencing Commissions.



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## Acknowledgements

This project would not have been possible without the considerable help and encouragement of our NASC and COSCA partners. NASC members that provided valuable comment on draft sections include William Bales, director of research at the Florida Department of Corrections; Debra Daily, executive director of the Minnesota Sentencing Commission; Richard P. Kern, executive director of the Virginia Criminal Sentencing Commission; Cynthia Kempinen, senior associate director of the Pennsylvania Commission on Sentencing; Francis J. Carney, executive director of the Massachusetts Sentencing Commission; and Phil Lemman, executive director of the Oregon Criminal Justice Commission. Special thanks go to Rob Lubitz, director of the North Carolina Governors Crime Commission, for his willingness to work closely with NCSC staff in developing the project partnership and for providing continuous feedback and support.

All products produced by this project benefited greatly from the guidance of the COSCA Court Statistics Committee. J. Denis Moran, state court administrator of Wisconsin, served as the principal liaison between COSCA and the project partnership, and Judge Aaron Ment, state court administrator of Connecticut, provided additional information for this report.

This Research-in-Action Partnership was funded through the generous support of the National Institute of Justice. The authors wish to acknowledge the support and advice provided by NJU project monitor John Thomas.

This publication benefited greatly from the careful editing of Dawn Spinozza and the administrative support of Margaret Fonner. Research assistance was provided by Joshua LaGrange and John Larson. Judith Ann Sullivan skillfully managed the design and publishing of this document.

# Introduction

*State and local governments continually adjust criminal justice policies and programs to improve the justice system's response to convicted criminals. In the judicial area, these changes often are introduced as "reforms" that require judges to follow new policies or to adhere to new legislative mandates relating to the sentencing of convicted criminals. These reforms often address the broader goals of sentencing, the role of judges, and the punishment options that should be available and used by the courts.*

In determining a sound course for the future, research and policy analysis should examine which laws are used, how different sentencing policies are applied, and to what extent they are effective. To be useful, the results of this effort should provide clear responses to questions posed by decision makers during their deliberations. Given these objectives, this report addresses five general topic areas relevant to those working to improve sentencing systems.

## **The Partnership**

The National Association of Sentencing Commissions (NASC), the Conference of State Court Administrators (COSCA), and the National Center for State Courts (NCSC), with funding from the National Institute of Justice, initiated this project together. The three organizations came together to identify the most important sentencing issues facing state-level decision makers. The participation of their membership and their role in the criminal justice system were critical for delivering this report.

**NASC** includes at least one representative from each state with a sentencing commission and representatives from states contemplating establishing such a commission. NASC members are at the forefront of efforts to revise and develop sentencing policies and to respond to a wide range of sentencing reforms.

**COSCA** officials are responsible for presenting the views of the state judiciaries to the legislative branch as well as serving as the collective voice for judicial administration issues. COSCA members are in a unique position to assess the impact of legislative changes on judicial branch activities. The COSCA Court Statistics Committee (CSP) serves as the liaison between the full COSCA membership and the project partnership.

The **NCSC** is the state court community's vehicle for identifying and responding to problems facing the state courts. The NCSC's research division conducts research and policy analysis on sentencing as well as on a host of other court-related subjects. Staff and consultants from the research division were responsible for collecting and analyzing the material included in this volume.

## **The Sentencing Digest**

Project staff met with the partner organizations to determine the broad sentencing themes that are most germane to state policymakers and practitioners. Staff then contacted representatives from NASC to discuss the specific sentencing issues currently under consideration by sentencing commissions as well as by the legislative, judicial, and executive branches. On the basis of meetings and interviews, staff constructed a number of questions related to

sentencing policy and organized these questions into five broad topics that capture the major concerns and emerging issues confronting sentencing commissions. Each question is addressed by a short, self-contained analysis. Questions are clarified and answers offered through the use of narrative and data graphics, and citations and additional readings related to each question are provided.

The data and research included in this volume originate from three source types: (1) the published body of research on sentencing, (2) "fugitive" reports and analysis provided directly by NASC representatives, and (3) original research and data analysis. The first source refers to the books, reports, and journals that are most accessible through automated and manual literature reviews. "Fugitive" reports are less accessible reports containing research conducted by sentencing commissions or other agencies primarily for internal use. Although these reports often are intended to have a narrower focus or audience, many offer high-quality research that supports broad implications. Third, some of the analysis herein represents original research conducted specifically for this report. Original research entailed conducting structured telephone interviews with sentencing commission directors, conducting mail surveys and collect-

ing data from sentencing commissions, and examining annual reports, training manuals, and other documents prepared by state sentencing commission staff.

Research conducted for this project was also used to produce *Sentencing Commission Profiles*, a companion to this volume that summarizes the structure and mechanics of each sentencing commission and guidelines system.

## **Organization and Content**

The purpose of this volume is not to provide a comprehensive analysis of each topic area, but to provide a summary of the available knowledge and to point to additional sources for further information. The five general topic areas covered in this report are:

### *Judicial Discretion:*

Reviews how judicial discretion has changed over the past three decades, describes the practical application of voluntary and mandatory guidelines systems, and compares compliance and departure rates across selected guidelines systems.

*Truth-In-Sentencing:*

Examines the current definitions of truth-in-sentencing used by the states and the federal government, discusses how states have implemented truth-in-sentencing, and explores key issues related to sentencing guidelines and parole restructuring.

*Disparity:*

Considers sentencing disparity in terms of definition, prevalence, and cause and examines measurement issues and the relationship between guidelines implementation and disparity reduction.

*Intermediate Sanctions:*

Reviews intermediate sanctions as an alternative to traditional probation and incarceration, examines how states have integrated intermediate sanctions into structured sentencing schemes, and examines how effective intermediate sanctions have been in achieving their goals.

*Cross-State Comparisons:*

Uses refined measures to enhance comparisons of sentence recommendations, prison population and admission rates, and new sentencing and parole policies in selected states with sentencing guidelines.

# How have structured sentencing reforms affected

*Since the late 1970s, judicial discretion has been constrained by the creation of sentencing guidelines and other means for structuring the sentencing decision. Some argue these limits unduly restrict a judge's ability to appropriately weigh the factors that play a role in sentencing, while others feel that additional measures, such as mandatory minimum sentencing laws, are needed to constrain judicial discretion further. Most current structured systems provide judges with bounded discretion during the sentencing decision process.*

Judicial discretion is increasingly constrained through sentencing guidelines, mandatory minimum penalties, three-strikes laws, and other forms of structured sentencing. In many instances, sentencing guidelines were developed and implemented through the efforts of state legislative and executive branches. However, members of the judiciary are well represented on current sentencing commissions, and in many cases judges serve as the commission chair. The sentencing reforms since the 1970s have sought to limit judicial discretion and, at least on paper, have largely succeeded in that objective. Judges in many states find that statutory provisions mandate the factors that must be considered when passing sentence, designate the relative importance of those factors, and specify a presumptive sentence (or range) for a defendant based on offense seriousness and prior criminal involvement.

The attention given to judicial sentencing should be understood as a part of a sea change that occurred in sentencing philosophies. The 1970s brought the transition from a venerable system of "indeterminate sentencing" to a new one organized around the principle of "just deserts." Indeterminate sentencing combined two main features. First, judicial discretion in sentencing was wide and largely unchecked, save for legislatively specified maximums and (less commonly) minimums. Second, judicial decisions regarding sentence length was paired with a system of state parole boards, appointed by the governor, whose release decisions determined the actual length of time offenders spent in custody.

The formal principle underlying indeterminate sentencing was substantive rationality: achieving the sentence that is just for each individual defendant.<sup>1</sup> This principle encouraged the use of extralegal factors to establish, for example, the rehabilitative potential of the offender. The heyday of indeterminate sentencing coincided with a period of optimism about the potential for rehabilitation – the 1960s – in which treatment displaced punishment as the official role for penal institutions.

Structured sentencing, including guidelines systems, arose in response to what were perceived as undesirable features of indeterminate sentencing. Some critics claimed that disparity was promoted when judges were given no guidance in how to incorporate all sentencing-relevant factors in a consistent fashion.<sup>2</sup> In this regard, it was possible for offenders with identical offenses and prior criminal records to receive vastly different sentences. Also, critics noted that indeterminate sentencing did not encourage appellate review of sentencing decisions.<sup>3</sup> Moreover, the broad discretionary powers of parole boards ensured that judges could never be certain of the actual time that a convicted offender would serve following imposition of sentence.

With structured sentencing, formal rationality (predictable and uniform application of rules) replaces substantive rationality as the principle underlying sentencing. This principle has been most influentially expressed in the just deserts approach to sentencing.<sup>4</sup> A just deserts philosophy was used to establish the first state sentencing guidelines system, enacted by Minnesota in 1980.

# Judicial discretion?

Since the mid-1970s, judicial discretion has been out of fashion and parole boards have been eliminated or have had their discretionary release authority substantially curtailed. Implementing sentencing guidelines is not the only mechanism for structuring discretion. Legislatures enact mandatory minimum sentences in pursuit of uniform and severe punishment of selected types of offenders (e.g., those committing their crimes with firearms in proximity to a public school). Habitual offender and “three-strikes” provisions also direct judicial sentencing to accomplish specific objectives of the legislative branch.

States have pursued various paths to sentencing reform. Many states have adopted a prescriptive approach to guidelines development, whereby a sentencing rationale has been articulated at the onset and guidelines have been formulated consistent with that rationale. Other states have created guidelines in a more descriptive fashion, such that sentence recommendations more closely reflect past sentencing behavior of judges in felony cases. However, no state has gone the route of the U.S. Sentencing Commission, which developed a highly detailed and mechanical set of guidelines without a clear rationale.

Observers disagree on the overall impact of sentencing guidelines on judicial discretion. Some feel that the criminal justice system contains a fixed amount of discretion. Efforts to restrict discretion at any one stage or by any one category of actor in the system fail because of the “hydraulic displacement of discretion.”<sup>5</sup> That is, a change or reform that limits discretion in one area leads to an increase of discretion in another area.

There is a consensus that sentencing reform in recent decades has diminished the discretion of judges and parole offices, but has enhanced discretion of the prosecutor.<sup>6</sup> As the gatekeepers to the system, prosecutors decide which defendants are prosecuted and with what charges.

More recently, observers have stressed the discretion that judges retain in the sentencing process. Despite the embrace of just deserts in Minnesota’s sentencing guidelines, “attorneys and trial judges remain firmly attached to offender-based crime control sentencing goals” and the use of judicial discretion has steadily increased. Some of the prime movers in the sentencing guidelines movement now claim that enhancing judicial discretion (by reducing “back end” discretion on the part of parole boards) was one of their original objectives and note the accountability that judges uniquely possess for their sentencing decisions.<sup>7</sup>

Here, as elsewhere for criminal justice issues, things often come full circle. Judicial discretion is no longer an unmitigated evil in the eyes of sentencing reformers. This view accords with an older assessment, echoing Churchill’s verdict on democracy: “Judicial discretion may be the most inexact manner of sentencing – that is, until we examine the alternatives.”<sup>8</sup>

## Endnotes

<sup>1</sup> Ulmer, Jeffery T., and Kramer, John H., “Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity,” *Criminology*, Vol. 34, No. 3 (1996).

<sup>2</sup> Freed, Daniel, “Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers,” *Yale Law Journal*, Vol. 101, No. 8 (1992).

<sup>3</sup> U.S. Supreme Court case of 1949; see Freed, *op. cit.*

<sup>4</sup> Ulmer and Kramer, *op. cit.*

<sup>5</sup> McCoy, Candace, “Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California,” *Justice System Journal*, Vol. 9, No. 3 (1984).

<sup>6</sup> Boerner, David, “Sentencing Guidelines and Prosecutorial Discretion,” *Judicature*, Vol. 78, No. 4 (1995).

<sup>7</sup> Compare Knapp, Kay, “Allocation of Discretion and Accountability within Sentencing Structures,” *University of Colorado Law Review*, Vol. 64, No. 3 (1993), to Alschuler, Albert, “Monarch, Lackey, or Judge,” *University of Colorado Law Review*, Vol. 64, No. 3 (1993).

<sup>8</sup> Aspen, Marvin, “Sentencing: Judicial Function,” in S. Kadish, ed., *Encyclopedia of Crime and Justice* (New York: The Free Press, 1983), p. 1465.

## Additional Reading

Frase, Richard S. “Purposes of Punishment Under the Minnesota Sentencing Guidelines,” *Criminal Justice Ethics*, Winter/Spring 1994.

Griset, Pamela L. “Discretion, Disparity, and Discrimination in Sentencing: Where Have All the Critics Gone?” *The Judges’ Journal*, Vol. 35, No. 3 (1996).

Tony, Michael. *Sentencing Matters*. New York: Oxford University Press, 1996.

# How do states distinguish between voluntary

*Structured sentencing systems are often referred to as either “voluntary” or “mandatory” in nature. This voluntary/mandatory distinction draws attention to a number of features that can influence the acceptance, impact, and longevity of a system – whether guidelines are legislatively mandated, whether judges must justify departures, and whether appellate review of sentences is afforded to defendants. Current guidelines systems do not fit neatly into a simple voluntary vs. mandatory classification, but fall along a multifaceted continuum.*

Sentencing guidelines circumscribe and structure the sentencing process, and thus limit judicial discretion. Guideline sentences are typically based on factors such as offense severity, the offender's prior record, the availability of punishment alternatives, and concerns for community safety. Distinctions exist, though, in how stringent different guidelines systems are in “limiting” judicial discretion. The limits are found in the sentencing procedures that direct judges to reference, consider, and adhere to a specific recommendation on a sentencing grid or worksheet. In conjunction with state statutes and authority, these procedures or “mechanics” define the extent to which a system is voluntary or mandatory in nature.

Sentencing guidelines systems developed during the early 1980s were quickly categorized by scholars and practitioners as either mandatory or voluntary (presumptive or advisory).<sup>1</sup> As new systems have developed, this distinction has blurred, with states using combinations or hybrids of the earlier systems. States considering the adoption of structured sentencing strategies may benefit from an awareness of the similarities and differences in the mechanics of existing guidelines systems.

The mechanics of sentencing guidelines are specific to each state and are subject to updating and revision. For this reason, it is difficult to classify the various sentencing guidelines systems into a rigid voluntary/mandatory dichotomy. Each guidelines system has policies and procedures addressing issues such as when guidelines forms should be completed, when judges must review guidelines, how compliance or departures are to be handled, and what appellate rights are retained by the defense or prosecution.

At one extreme, states may use legislation to specify all of the procedures and requirements of a sentencing guidelines system. The sentencing commission oversees a strict system of worksheet completion and reports departure rates or the use of aggravating and mitigating sentences. Such a system also gives the defense and state counsel appellate rights and uses case law to further refine the appropriate application of the guidelines. North Carolina, for example, enacted a system that requires the completion of a guidelines worksheet for all cases and requires sentences to fall within a specified presumptive range. If aggravating and mitigating circumstances exist, judges still must sentence within specified ranges and may not depart further from the guidelines. It could be argued that North Carolina's system is the most “mandatory” system currently in place at the state level.

Further along the continuum, some states adopt laws that require guidelines form completion but allow departures if accompanied by written justification. Legislation often gives the defense and prosecution the right to appeal departures under these systems (e.g., Kansas, Minnesota, and Florida). Virginia requires guidelines form completion and written reasons for departure, but specifically denies appellate relief for any reason related to the guidelines. Similarly, Delaware's policies require written reasons for departure but prevent appellate review of those sentences. Utah, rather than using state statutes, requires completion of guidelines forms through authority of the sentencing commission. Utah also denies appellate review for guidelines sentences. Considered more voluntary than most, Missouri's sentencing guidelines system does not require completion of guidelines forms and allows judges to depart at their discretion.

# and mandatory sentencing guidelines systems?

## Policies Governing Sentencing Guidelines' Use in Selected States<sup>2</sup>

<b>North Carolina</b>	State law requires completion of guidelines forms. Compliance within presumptive, aggravated, or mitigated ranges is required; no departures are allowed. Sentences within approved aggravated and mitigated ranges must be accompanied by written justification.
<b>Florida</b>	State law requires completion of guidelines forms. Judges must review guidelines forms. State law requires departures to be accompanied by written justification. Defense and prosecution may appeal sentences.
<b>Kansas</b>	State law requires completion of guidelines forms. State law requires departures to be accompanied by written justification. Defense and prosecution may appeal sentences.
<b>Minnesota</b>	State law requires completion of guidelines forms. State law requires departures to be accompanied by written justification. Defense and prosecution may appeal sentences.
<b>Ohio</b>	There are no guidelines forms to be completed. Judges are guided by rebuttable presumptions. Defense or prosecution may appeal sentences against the presumptions.
<b>Oregon</b>	Sentencing commission policy requires completion of guidelines forms. State law requires departures to be accompanied by written justification. Defense and prosecution may appeal sentences.
<b>Pennsylvania</b>	Sentencing commission policy requires completion of guidelines forms. Judges must review guidelines forms. State law requires departures to be accompanied by written justification. Defense and prosecution may appeal sentences.
<b>Washington</b>	Information used to determine the standard range must be signed by the judge. Departures (exceptional sentences) must be accompanied by written justification. Defense and prosecution may appeal exceptional sentences.
<b>Arkansas</b>	Judges must review guidelines forms and departures must be accompanied by written justification. Failure to file departure may result in early release (release decision can be based on presumptive range). No appellate review of guidelines sentences.
<b>Delaware</b>	Judges must review sentencing orders. State law requires departures to be accompanied by written justification. No appellate review of guidelines sentences.
<b>Utah</b>	Sentencing commission policy requires completion of guidelines forms. Sentencing commission policy requires written justification for departures. No appellate review of guidelines sentences.
<b>Virginia</b>	State law requires completion of guidelines forms. State law requires court clerks to forward guidelines worksheets and sentencing order to commission. State law requires departures to be accompanied by written justification, no appellate review of guidelines sentences.
<b>Missouri</b>	Guidelines forms do not have to be completed. Judges may depart at their discretion.

Note: The table shows four basic gradations along the voluntary/mandatory continuum. The darker the shading, the greater the extent to which a state's sentencing system is considered "mandatory" in terms of its policies and procedures.

## Endnotes

<sup>1</sup> Tonry, Michael, *Sentencing Reform Impacts, Issues and Practices* (Washington: National Institute of Justice, 1987); Frase, Richard, "State Sentencing Guidelines: Still Going Strong," *Judicature*, Vol. 78, No. 4 (1995); Morris, Norval, and Tonry, Michael, *Between Prison and Probation* (New York: Oxford University Press, 1990).

<sup>2</sup> The states listed here had sentencing guidelines in operation as of September 1997 and returned the National Association of Sentencing Commissions (NASC)/National Center for State Courts (NCSC) Partnership Survey of Sentencing Commissions, September 1997.

## Additional Reading

Bureau of Justice Assistance, *National Assessment of Structured Sentencing*, February 1996.

"Survey Summary: Sentencing Guidelines," *Corrections Compendium*, July 1996.

# How are compliance and departure rates used to

*State sentencing commissions expend considerable effort assessing the effectiveness of sentencing guidelines. Whether guidelines are established to reduce disparity, control prison populations, or incapacitate dangerous offenders, sentencing commissions often consider judicial compliance as a reasonable and practical measure of performance. How compliance is defined varies, however, depending on the commission's philosophical perspective, the format of the guidelines, and the analytical approaches for measuring guideline conformity.*

Judicial compliance with guidelines recommendations is a key indicator of the effectiveness and performance of a sentencing guidelines system. First, analyzing compliance patterns is essential for detecting the offense and offender characteristics that lead to departures. Second, monitoring departures helps reveal judicial views concerning the severity of guidelines by crime and offender type. Third, compliance rates are measures for determining if judges perceive the guidelines as either too lenient or too harsh. Finally, states may benefit by analyzing compliance and departure rates when using sentencing guidelines to help forecast correctional resource needs. An increasing number of sentencing commissions have either a direct or advisory role in the correctional forecasting process. In sum, monitoring compliance allows a sentencing commission to review current practice and maintain the integrity of guidelines recommendations.

On a practical level, compliance monitoring informs judges that sentencing practices are being examined to ensure that the guidelines are being referenced and used. With compliance information in hand, commissions can also revise guidelines to reflect more accurately judicial or legislative intent or, perhaps more broadly, the sentiment of the public.

Compliance is defined differently across states with sentencing guidelines. Much of that variation is due to how guidelines systems are designed and, specifically, how judges set a sentence within the parameters of a guidelines grid or worksheet. For example, many guidelines systems articulate standard (presumptive), mitigated, and aggravated sentence ranges on a

guidelines grid. This approach allows judges to depart from the presumptive recommendation and impose a sentence within another range if warranted by mitigating or aggravating case circumstances. Sentences within these three ranges are normally not considered guidelines departures.

North Carolina judges can sentence outside the presumptive range as long as the sentence falls within the prescribed aggravated or mitigated ranges. Sentences outside these ranges are not permitted by law, resulting in a compliance rate of 100 percent. The table to the right shows how frequently judges in North Carolina sentence within the aggravated and mitigated ranges prescribed.<sup>1</sup>

In other sentencing guidelines systems, a grid or worksheet recommends only one range, or a sentence "midpoint" within a range. Sentences outside that range are considered departures. Washington and Virginia are examples of states that have one range with a recommended midpoint.

Defining compliance also requires an awareness of the difference between "dispositional" and "durational" compliance. Sentencing commissions increasingly recognize this distinction and have started to adopt reporting practices that track how often judges comply with the prison "in/out" recommendation (dispositional) and how often judges follow the sentence length recommendation (durational) after a sentence is prescribed. The Minnesota Sentencing Commission calculates and reports overall compliance as well as dispositional and durational compliance.

# determine the effectiveness of sentencing guidelines?

## Compliance and Departure Rates for Selected States, 1996

State & Compliance Rate	Departure Rate	Presumptive Range and Approved Aggravation or Mitigation Rates	Comments
<b>Delaware</b> 90%	10% overall 9% aggravated 1% mitigated		Compliance and departure rates are estimates.
<b>Florida*</b> 88.2%	11.8% overall 1.0% aggravated 10.8% mitigated		Departure rate includes dispositional and durational departures.
<b>Kansas</b> 76.3%	23.8% overall 8.7% aggravated 15.2% mitigated		Departure rate includes dispositional and durational departures.
<b>Minnesota</b> 77%	23% overall 7% aggravated 15% mitigated 1% mixed		Minnesota can also report dispositional, overall durational, and executed durational departures.
<b>North Carolina</b> 100%		83.1% presumptive 7.4% aggravated 9.5% mitigated	Judges are not allowed to depart from sentencing ranges within grid structure. No. Carolina considers itself to have a 100% compliance rate.
<b>Pennsylvania</b> 87.1%	12.9% overall 5.7% aggravated 7.2% mitigated	69.3% standard 9.3% aggravated 8.5% mitigated	Pennsylvania defines compliance as compliance within standard, aggravated, and mitigated ranges combined.
<b>Virginia*</b> 75.2%	24.8% overall 13.4% aggravated 11.4% mitigated		Departure rate includes dispositional and durational departures. Dispositional compliance is 83.7%; durational is 71.1%.
<b>Washington</b> 91.9%	8.1% overall 2.3% aggravated 5.8% mitigated		Departures include treatment-oriented alternatives for certain first-time or sex offenders. If these are not included, departure rate would be 2.9% (1.8% aggravated, 1.1% mitigated).

Compliance across the various sentencing guidelines systems ranges from roughly 75 to 90 percent. However, care should be exercised in comparing compliance rates across states, especially when trying to establish patterns in sentencing consistency. States use different definitions and measures of compliance depending on the purposes of monitoring. Compliance rates also vary because guidelines sentencing ranges differ in terms of their type, number, and width. Therefore, cross-jurisdictional comparisons may be primarily useful for portraying differences in how guidelines systems have been developed and modeled. Still, given all the caveats, it is clear that judges tend to impose sentences that conform to the guidelines system in place.<sup>2</sup>

To the extent that the goal of sentencing guidelines is to structure judicial discretion, not eliminate it, then some level of departure is to be expected – if not encouraged – in order to account for atypical cases. In this sense, states may find some agreed-upon or “acceptable” departure rate, based on the parameters of their particular sentencing guidelines, that strikes a balance between promoting greater uniformity and preserving reasonable discretion for unusual circumstances. These points may be important because they differentiate sentencing guidelines from mandatory sentencing.

\* Florida's rates are for 1995-1996; Virginia's rates are for 1995-1997.

Note: States currently using sentencing guidelines that are not included in the table were unable to report compliance rates.

## Endnotes

<sup>1</sup> National Association of Sentencing Commissions (NASC)/National Center for State Courts (NCSC) Partnership Survey of Sentencing Commissions, September 1997.

<sup>2</sup> Tonry, Michael, *Sentencing Matters* (New York: Oxford University Press, 1996).

# What is truth-in-sentencing?

*The term truth-in-sentencing is being used to describe various justice system policies that eliminate discretionary parole release and significantly reduce good-time accrual rates. The purpose is to bring the time an offender actually serves in custody closely in line with the length of the sentence imposed by the court. Truth-in-sentencing is cited as one of the major objectives for sentencing reform at both federal and state levels in the 1990s.*

Truth-in-sentencing policies are most often proposed as a means for ensuring that the amount of time an offender actually serves in prison is closely aligned with the sentence originally imposed by the court. These latest policies follow three decades of shifting sentencing philosophies and practices: indeterminate sentencing and powerful parole boards characterized the early 1970s; paroling authorities fell out of favor with the introduction of determinate sentencing models in the late 1970s; and sentencing guidelines and mandatory minimum sentences became commonplace during the 1980s. Many jurisdictions are now adopting truth-in-sentencing as the "reform" measure of the 1990s.

Proponents argue that truth-in-sentencing policies can restore public confidence in the criminal justice system and can help further concepts such as deterrence, victims rights, certainty and predictability, fairness, and consistency in the sentencing process. These concepts are deeply rooted in the determinate sentencing philosophy that dominated the 1980s. Generally, the determinate model holds that sentencing authority rests with the court and that sentences should be served in full. Only modest reductions in sentence length based on satisfactory behavior while incarcerated are acceptable. The determinate model is based upon a "just deserts" philosophy in which sentences are fixed proportionally on offense seriousness and, to a lesser extent, on prior criminal history. The just deserts model emphasizes allocating scaled penalties as a deserved punishment rather than as a means for rehabilitation and treatment.<sup>1</sup>

The just deserts philosophy contrasts with indeterminate models, which split authority over the final sentence between the court and some other entity, such as a parole board. In those

systems, the court sentences the offender to a specific term, within a range, or to an unspecified period, and a parole body determines an actual release date.<sup>2</sup>

Opponents claim that truth-in-sentencing is simply the latest "get tough" policy, that some release discretion should be retained by a paroling authority, and that in the long term, incapacitating offenders for longer periods wastes resources and will have little positive effect for society. The National Council on Crime and Delinquency (NCCD), for example, argues that the main factor in deciding upon an inmate's release should be the inmate's risk to the community, once a specified fraction of the custodial term has been served. NCCD also supports retaining the possibility of parole for serious offenders who have been given maximum terms or life sentences.<sup>3</sup> Critics also contend that truth-in-sentencing structures still generate deceptive sentences, as judges must creatively circumvent statutory provisions in order to adequately consider the full array of offender characteristics.<sup>4</sup>

Many truth-in-sentencing policies also include a post-release term of supervision – a reintegration mechanism that allows a jurisdiction to maintain control over released inmates similar to traditional post-release supervision periods on parole.

Although the term *truth-in-sentencing* is used frequently in the 1990s, jurisdictions began moving in that direction in the early 1980s. Congress mandated truth-in-sentencing at the federal level with the Sentencing Reform Act of 1984,<sup>5</sup> which established a sentencing commission as an independent agency to recommend prescriptive sentencing guidelines, to eliminate

parole, and to impose the requirement that inmates serve at least 85 percent of their sentence (good time would be limited to 54 days per year).

At the state level, Maine abolished parole in 1975 (inmates in Maine currently serve 50 to 67 percent of their sentences based on good-time accrual), and Minnesota enacted a sentencing guidelines system in 1980 in which prison sentences could be shortened only by good time. (Minnesota now sets an overall fixed sentence of which two-thirds must be served in prison and one-third under community supervision.)

In 1994, Congress enacted legislation authorizing funding of the *Violent Offender Incarceration and Truth in Sentencing Incentive Grants*. Funding was set at \$8 billion through the year 2000. States are eligible for grant funding if they can demonstrate

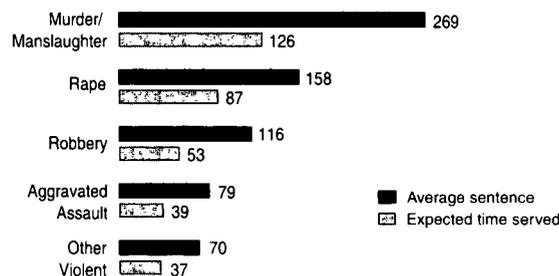
#### Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants

<b>Congressional Appropriations to the States</b>	1995	\$ 175,000,000
	1996	750,000,000
	1997	1,000,000,000
	1998	1,900,000,000
	1999	2,000,000,000
	2000	2,070,000,000
<b>Total</b>	<b>\$ 7,895,000,000</b>	

that violent offenders will serve at least 85 percent of their imposed sentences and that average prison terms are longer. This time-served requirement would be a significant change from past practice. The adjacent graph summarizes the results

from a national time-served analysis conducted by the Bureau of Justice Statistics (BJS). Overall, inmates convicted of violent crimes in 1994 received an average sentence of 9.8 years and are expected to serve 4.5 years, roughly 46 percent of their original sentence. The graph indicates the time-served analysis for specific violent offenses.

#### Average Sentence and Expected Time-Served Amounts for Violent Offenders Convicted in 1994 (in months)



Source: *Felony Sentences in the United States, 1994*, U.S. Department of Justice, Bureau of Justice Statistics, July 1997.

Many states followed the federal lead and moved quickly to consider adopting some form of truth-in-sentencing reform. A National Institute of Corrections survey using a broad-based definition of truth-in-sentencing found that 19 states had some form of truth-in-sentencing in place by 1995 and that another 29 states were considering truth-in-sentencing during their 1995 legislative sessions. Roughly 60 percent of the states reporting legislative activity in 1995 indicated the Federal Crime Bill was a significant factor when considering legislation, and 20 percent said it was the main or only impetus.<sup>6</sup>

#### Endnotes

- <sup>1</sup> Von Hirsch, Andrew, *Doing Justice, The Choice of Punishments* (New York: Hill and Wang, 1976).
- <sup>2</sup> Wilkins, William W., Jr., Newton, Phyllis J., and Steer, John R., "Competing Sentencing Policies in a 'War on Drugs' Era," *Wake Forest Law Review*, Vol. 28, No. 3 (Summer 1993).
- <sup>3</sup> National Council on Crime and Delinquency, *Criminal Justice Sentencing Policy Statement*, April 1992.
- <sup>4</sup> Tonry, Michael, *Sentencing Matters* (New York: Oxford University Press, 1996).
- <sup>5</sup> Greenfeld, Lawrence A., Beck, Allen, and Gilliard, Darrell, "Prisons: Population Trends and Key Issues for Management," *Criminal Justice Review*, Vol. 21, No. 1 (Spring 1996).
- <sup>6</sup> *State Legislative Actions on Truth In Sentencing: A Review of Law and Legislation in the Context of the Violent Crime Control and Law Enforcement Act of 1994* (Longmont, Colo.: National Institute of Corrections, 1995).

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# How have states approached the implementation

*States use various approaches to develop and implement truth-in-sentencing laws and policies. These varied approaches reflect the current sentencing structures and goals of each state. Reform models also differ according to political conditions in each state and attempt to satisfy a number of theoretical crime control models. Generally, the task of developing and recommending a structured framework for ensuring truth-in-sentencing is left to an administrative agency (often called a sentencing commission).*

Despite growing public and political support for the idea, there is no agreement on how to define and implement truth-in-sentencing. There is also considerable public and legislative debate about how to pay for the costs associated with such sentencing policy. The recent push to use intermediate sanctions as an alternative to traditional terms of incarceration adds further complexity. Some jurisdictions see the greater use of intermediate sanctions for nonviolent offenders as a way to ensure prison beds are available for those violent offenders who now will be ineligible for parole release and consequently will serve longer prison sentences than they would have in the past.

By 1996, 11 states indicated truth-in-sentencing as a reason for creating a sentencing guidelines system.<sup>1</sup> Some states explicitly cite truth-in-sentencing as a purpose of their reform. Delaware passed the Truth-in-Sentencing Act of 1990, and Massachusetts passed a "Truth-in-Sentencing Law" in 1993. Other states use different terminology to describe systems with the same basic intent. The Kansas Sentencing Guidelines Act states that "terms of imprisonment . . . are of pre-established, binding duration"—meaning that offenders will actually serve the imposed sentence.

Regardless of how states define and implement truth-in-sentencing, one commonality is the establishment of a sentencing commission and the adoption of some structured sentencing scheme, usually in the form of sentencing guidelines. By 1996, "Fifteen states adopted sentencing guidelines to limit judicial discretion, more than 10 had eliminated parole release, another 25 adopted parole guidelines, many had narrowed the amount of good time, and all had enacted mandatory minimum sentence legislation."<sup>2</sup> The states in the adjacent table have truth-

in-sentencing laws that apply to all felony convictions (other states may have truth-in-sentencing laws for a subset of offenses, usually for crimes of violence).

While the 1994 Federal Crime Bill was being drafted to increase the severity of sentences for violent offenders, there was also considerable public and political support for longer prison terms at the state level. North Carolina and Virginia amended their truth-in-sentencing provisions to increase time served in prison for selected offender groups (typically for violent or repeat offenders). These increases were explicit policy decisions grounded in an examination of and dissatisfaction with historical time-served amounts.

North Carolina's sentencing reforms received considerable attention in 1994, when parole was abolished, good time restricted, and a comprehensive community corrections plan developed. North Carolina had implemented grid-based presumptive sentencing guidelines, increased sentences for violent offenders, and developed a structured system to divert nonviolent and most drug offenders into alternative or intermediate sanction programs.

Virginia followed in 1995, abolishing parole and revising a set of sentencing guidelines to reflect time served rather than past imposed sentences. For most offenders, the Virginia system maintains incarceration rates and time-served levels consistent with past practice. However, prison terms were increased for violent offenders. Inmates convicted for violent offenses now serve two to four times more prison time (depending on their prior records) than previously.

# of truth-in-sentencing?

Oklahoma established a Truth in Sentencing Policy Advisory Commission and proposed sentencing matrices (guidelines) and an 85 percent time-served minimum. In conjunction with truth-in-sentencing, Oklahoma proposed two other major reform components, which could free the prison space needed to accommodate the prisoners who would now serve virtually the entire imposed sentence. The Pre-Adjudication Act provides services to substance-abusing offenders at the "front end" of the system, and the Community Correction Act increases and enhances a continuum of sentencing options at the community level. The Oklahoma commission also recommended abolishing jury sentencing as part of its overall truth-in-sentencing reform package.

Mississippi enacted legislation in 1995 that abolished discretionary parole and requires inmates to serve 85 percent of their imposed sentences. Unlike most other states that passed similar laws, Mississippi did not create a sentencing commission or enact structured sentencing guidelines as part of the enabling legislation. No adjustments were made to existing sentencing ranges – judges still set a fixed term within the existing statutory ranges for particular felony classes.

Several states that implemented truth-in-sentencing reforms are now evaluating their effectiveness. These evaluations seek to define more clearly the process for reform and to determine the intended and unintended impact on the justice system. Members from the National Association of Sentencing Commissions (NASC) are actively participating in these studies and stress the importance of evaluating the reforms of individual states against the stated goals of their state's sentencing commission and against the objectives of existing truth-in-sentencing laws.<sup>3</sup>

## State – Year of Law Change and Truth-in-Sentencing Defin

### Ohio 1996

Adult felons – judge imposes a determinate sentence from a presumptive range.

Abolished parole release and good time (one day per month can be earned for meaningful program participation; these inmates serve 97% of sentence).

Instituted "bad time" for infractions occurring during incarceration.

Most inmates will serve 100% of sentence plus a mandatory period of post-release supervision.

### Virginia 1995

Felony sentencing guidelines work-sheets – judge imposes a determinate sentence from a recommended range.

Abolished parole for all felony offenses; sentences increased for violent crimes.

Inmates must serve at least 85% of imposed sentence (good time must be earned and is limited to 4.5 days per month).

Geriatric clause – inmates reaching age 60 having served at least ten years of their sentence or age 65 having served five years are eligible for release consideration.

### No. Carolina 1994

Sentencing guidelines grid for felonies and misdemeanors – judge imposes a minimum and maximum sentence from cell range.

Parole abolished; good time replaced by earned time (up to six days per month).

Sentence lengths increased for violent offenses; intermediate sanctions integrated into grid to divert selected groups from prison.

## Endnotes

<sup>1</sup> "Survey Summary: Sentencing Guidelines," *Corrections Compendium*, July 1996, and "Table 2 – Current Legislation and Rising Prison Populations," *Corrections Compendium*, March 1995.

<sup>2</sup> Tonry, Michael, *Sentencing Matters* (New York: Oxford University Press, 1996).

<sup>3</sup> Obtained from structured interviews with NASC members, January-February 1997.

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*Violent Crime Control and Law Enforcement Act of 1994*. Public Law 103-322. 103rd Cong.

# How do states use truth-in-sentencing provisions

*Although truth-in-sentencing laws in some jurisdictions apply to all felony offenders, most states have developed measures to deal specifically with violent, dangerous, or repeat offenders. Sentencing commissions and other policymakers in those states believe that the amount of prison time served by these categories of offenders has been too low in the past and that justice would be better served if incarceration terms were increased substantially.*

The *Violent Offender Incarceration and Truth in Sentencing Grants* subtitle of the 1994 Federal Crime Bill provides that grants may be made to states for construction or improvement of correctional facilities so as to “free conventional prison space for the confinement of violent offenders, to ensure that prison cell space is available for the confinement of violent offenders, and to implement truth in sentencing laws for sentencing violent offenders.”

Although states have used various definitions to qualify for funding under the grant requirements, a growing number of states have exclusively targeted violent offenders for truth-in-sentencing provisions.

Regardless of federal funding incentives, states have been studying the amount of time actually served by violent offenders relative to imposed sentences. Many of these states and sentencing commissions examined the historical relationship between sentences and time served as a precursor to introducing truth-in-sentencing reforms. This task established the appropriateness of current time-served amounts and proved critical when restructuring sentencing ranges or forecasting prison populations.

Dissatisfied with historical time-served amounts for violent offenders, many states targeted specific offense or offender groups by increasing lengths of prison stays and by making these offenders ineligible for parole. In Arizona, truth-in-sentencing requires offenders to serve 85.7 percent of their imposed “presumptive” sentence. For most offenses, sentence lengths were “rolled back” to reflect the historical time served. However, offenders deemed to be “dangerous and repetitive” did not have their sentence ranges adjusted. These offenders will serve longer periods of incarceration as a result of delayed release eligibility.<sup>1</sup>

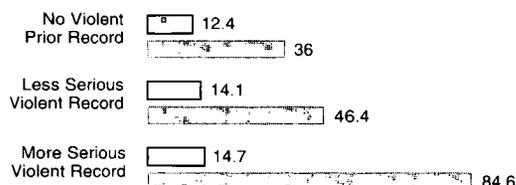
Missouri passed legislation in 1994 that requires persons convicted of dangerous crimes to serve 85 percent of their sentence before becoming eligible for parole release. Other offenders in the state serve 40 to 80 percent of their sentences depending on their number of prior prison commitments.<sup>2</sup>

Virginia targets violent offenders more harshly by doubling or quadrupling historic time-served amounts depending on prior record. For example, a person sentenced for robbery who has no prior record can expect to serve 6.3 years versus 2.7 years under the old parole system. Likewise, a person sentenced for robbery who has a record of serious violence can expect to serve 18 years versus 4.1 years under previous laws.<sup>3</sup> The adjacent graphic shows how Virginia specifically targeted a number of offenses for increased time-served amounts.

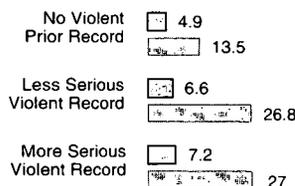
# for violent offenders or other targeted groups?

## Prison Time Served for Violent Offenders in Virginia – Parole System vs. Truth-in-Sentencing (in years)

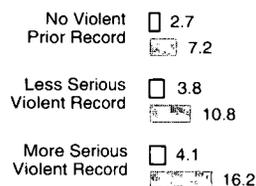
### First-Degree Murder



### Second-Degree Murder



### Robbery with a Firearm



□ 1988-1992 practice    ▨ Truth-in-sentencing expected practice

The state of Washington requires “serious violent offenders” to serve 85 percent of their imposed sentences before becoming eligible for release. All other offenders are eligible for release after serving one-third of their imposed sentence. Washington judges use sentencing guidelines to determine a mid-point sentence within narrow ranges set by the legislature. Washington has passed a number of legislative proposals over the past several years aimed at increasing sentencing severity – some have included expanding sentencing ranges at the upper level, while others have increased the seriousness level for selected crimes.<sup>4</sup>

A number of other states either apply the 85 percent time-served rule to violent offenders or have legislation pending to accomplish a similar objective: California, Connecticut, Florida, Illinois, Iowa, Louisiana, Massachusetts, Nebraska, New Jersey, New York, Ohio, Rhode Island, South Carolina, Wisconsin, and the District of Columbia. Some commentators suggest that the 85 percent rule will have greater implications for increasing punishments than other methods, including three-strikes legislation, because 85 percent policies usually are applied to all violent offenders, regardless of prior criminal history.<sup>5</sup>

## Endnotes

<sup>1</sup> *State Legislative Actions on Truth in Sentencing: A Review of Law and Legislation in the Context of the Violent Crime Control and Law Enforcement Act of 1994* (Longmont, Colo.: National Institute of Corrections, 1995).

<sup>2</sup> *Ibid.*

<sup>3</sup> Virginia Criminal Sentencing Commission, *1997 Progress Report* (data updated through 9-30-97).

<sup>4</sup> Obtained from structured interviews with NASC members, January-February 1997.

<sup>5</sup> National Council on Crime and Delinquency, “The 1995 NCCD Prison Population Forecast: The Cost of Truth-in-Sentencing Laws,” *NCCD FOCUS*, July 1995.

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Source: 1997 Progress Report, Virginia Criminal Sentencing Commission, December 1997.

# How have truth-in-sentencing and other sentencing

*Every state has enacted mandatory minimum penalties within the last two decades. The rationale for such legislation is that mandatory minimums are the optimal way to ensure that targeted offenders are punished consistently and serve a full, predetermined sentence. Critics contend that mandatory minimums are another failed "get tough" policy that undermines a more rational sentencing system. As a practical matter, states must consider the existence and effects of mandatory minimums when crafting a structured sentencing system.*

Mandatory minimum penalties exist in all states,<sup>1</sup> but are implemented using several formats, including minimums for selected offenses (e.g., firearm use during a felony, sale of a certain type and amount of drug), habitual or repeat offender enhancements, and three-strikes provisions. How mandatory sentencing is used varies widely across jurisdictions. Some offenders who receive mandatory sentences remain eligible for parole release, while others do not. Some do not earn good time, while others do. In other instances, statutory minimums are never even used.

Mandatory minimum laws became commonplace during the 1970s and 1980s. Some state legislatures continue to expand the list of crimes to which they apply, while others continue to raise the sentence minimums. Despite this strong trend, critics argue that mandatory minimums are at odds with the overarching framework of sentencing reform efforts (typically guidelines) that has evolved since the 1980s. A common purpose of sentencing guidelines is to structure sentencing decisions, but not eliminate judicial discretion – which is why guidelines are presumptive and not mandatory.<sup>2</sup> The same purpose generally characterizes truth-in-sentencing; that is, most states allow judges to sentence within a time-served adjusted range while continuing to take into account a variety of offense and offender characteristics.

Empirical evidence from a report presented to the National Conference of State Legislatures (NCSL) indicates that mandatory sentences, although popular with the public, overburden courts and corrections while doing little to deter crime. Sentencing guidelines, it is argued, offer a more constructive approach to fulfilling the goals of predictability and fairness in the

criminal justice system. The report also points out that while sentencing laws are formulated in highly political environments, policymakers can cultivate public support for alternative policies through statewide education and information programs.<sup>3</sup>

The central finding of most research conducted on mandatory minimums is that they do not work as promised:

Experienced practitioners and social science researchers have long agreed, for practical and policy reasons . . . that mandatory penalties are a bad idea. That is why nearly every authoritative nonpartisan organization that has considered the subject, including the American Bar Association (1968, 1994), the American Law Institute (1962), and the Federal Courts Study Committee (1990), has opposed enactment, and favored repeal, of mandatory penalties.<sup>4</sup>

The reluctance to praise mandatory minimums is not limited to researchers and scholars. Criminal justice practitioners use a variety of methods to avoid, or minimize, the effect of mandatory minimums. This is especially evident when viewing sentencing as one stage in the larger criminal justice process. It has been found that prosecutors and judges sometimes use creative charging practices to divert cases away from mandatory minimums when they believe the sentence is too harsh in general or in a particular case. Evidence from a variety of states shows that a number of methods are used to soften the impact of mandatory minimums, including increasing dismissal rates, using delay tactics, and relying more on plea bargaining.<sup>5</sup>

Although many criminal justice professionals see mandatory minimums as a failed reform effort, legislatures continue passing laws that require their inclusion as part of existing sentencing

# systems accommodated mandatory minimum laws?

laws. This situation poses the greatest difficulty for states that have implemented a structured sentencing system. In these cases, states have dealt with the problem in one of three ways:

- Mandatory minimums override or supersede guidelines recommendations – Oregon, Delaware, Virginia, Minnesota, and Arkansas,
- Mandatory minimums are handled outside of the guidelines system or grid and are not considered guidelines offenses – Kansas, North Carolina, and South Carolina (proposed), or
- Mandatory minimums are repealed – Utah and Oklahoma (proposed).<sup>6</sup>

Some examples further illustrate the complex interplay between mandatory minimums and other sentencing reforms. Mandatory minimum laws that applied to violent offenders were approved by voters in a ballot measure in Oregon (60 percent of voters voted yes). The statute set out minimum penalties ranging from 70 months for second-degree assault and second-degree robbery to 300 months for murder. It is anticipated that these new minimums will apply to 11 percent of the persons convicted of felonies. Under the state's sentencing guidelines, offenders with more extensive prior records likely will receive similar sentences and offenders with lesser criminal histories will face considerably longer sentences.

The state of Washington incorporates mandatory minimums, in addition to its prominent three-strikes law, as "enhancements" under the guidelines. Rather than overriding a guidelines recommendation, the penalty for the targeted behavior enhances the guidelines range – giving the judge a new, more severe range of punishment.

The process of revising and adding more mandatory minimums within the context of guidelines presents a challenge for maintaining a rational sentencing structure. In Delaware, for example, a mandatory minimum sentence of three years was set for any drug offender arrested in possession of 15 grams or more of cocaine. The criterion for activating the mandatory minimum was recently reduced to five grams, causing 50 percent of offenders who previously would have been sentenced at a lower guidelines level to receive the three-year mandatory minimum. The three-year sentence for five grams of cocaine now exceeds the mandatory two years required for a Class B offense, such as robbery or firearm use during a felony.

Based on the experiences of these and other states, it is unclear whether mandatory sentencing can achieve its goals (whatever they might be) without detracting from the purposes of a broader structured sentencing system. Partly because of the fear of public backlash, most elected officials choose to accommodate or ignore mandatory penalties once they are enacted. Only a few jurisdictions are beginning to repeal (or have proposed repealing) these laws to achieve more continuity, simplicity, and rationality in their systems. The popularity of mandatory minimums challenges the direction that states take when fashioning a more "truthful" and coherent sentencing structure. The degree to which states achieve truth-in-sentencing depends not only on how that term is defined, but also on the extent to which the system can be clearly understood and sensibly applied.

## Endnotes

- <sup>1</sup> Bureau of Justice Assistance, *National Assessment of Structured Sentencing*, February 1996.
- <sup>2</sup> Boerner, David, "Sentencing Guidelines and Prosecutorial Discretion," *Judicature*, Vol. 78, No. 4 (January/February 1995).
- <sup>3</sup> Hunzeker, Donna, *Bringing Corrections Policy in to the 1990s* (National Conference of State Legislatures, Denver, Colo.; Rockville, Md.: NCJRS, 1992), microfiche NCJ 140237.
- <sup>4</sup> Tonry, Michael, *Sentencing Matters* (New York: Oxford University Press, 1996) p. 134.
- <sup>5</sup> Ashworth, Andrew J., "Sentencing Reform Structures," in Michael Tonry, ed., *Crime and Justice, A Review of Research*, Vol. 16 (Chicago: University of Chicago Press, 1992).
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# What is sentencing disparity?

*According to the U.S. Congress, sentencing disparity exists “when defendants with similar criminal records found guilty of similar criminal conduct receive dissimilar sentences.”<sup>1</sup> In practice, disparity refers to differences in sentencing outcomes that are associated with “extralegal” factors such as race, ethnicity, economic standing, gender, or the exercise of certain procedural rights (e.g., trial). Not all sentencing variation is unwarranted; sentences properly reflect differences in the seriousness of the offense and/or the criminal history of the offender. Assessing disparity requires distinguishing between differences in sentences that meet the state’s legitimate purposes in sentencing and those differences whose consideration is prohibited by the offender’s constitutional rights.*

One reason for the emergence of sentencing guidelines is to minimize the influence of “extralegal” factors, such as race, ethnicity, economic standing, and gender, in sentencing. Such factors are “extra” because they are often beyond the offender’s control and they are not part of the set of legal factors (offense type, victim harm, weapon use) that most would agree should have a role in sentencing decisions. Under indeterminate sentencing (see the Discretion section of this report), individual judges were tasked with balancing diverse goals:

The sentencing decision is the symbolic keystone of the criminal justice system: in it, the conflicts between the goals of equal justice under the law and individualized justice with punishment tailored to the offender are played out, and society’s moral principles and highest values – life and liberty – are interpreted and applied.<sup>2</sup>

To critics, indeterminate sentencing *invited* disparity by giving each judge the authority to consider all aspects of the crime and the individual in assigning a minimum sentence to parallel the legislatively mandated maximum sentence. Despite the absence of rules specifying the manner in which various factors were to be weighed, judges were expected to sentence in a *consistent* and *neutral* fashion.

Consistency in sentencing refers to the extent to which offenders who are similarly situated receive similar sentences. Consistency further requires that offenders who are legally dissimilar receive sentences that are dissimilar in rough proportion to their degree of dissimilarity.

Neutrality (or impartiality) in sentencing exists when the legal facts of the case are emphasized in the sentencing decision and the extralegal factors, those which most agree should not play a role in sentencing, are de-emphasized or not considered. Although related to consistency, neutrality is measured by determining the extent to which legal and extralegal factors are present in sentencing, rather than by measuring sentencing consistency across convicted offenders.

The key to any analysis of judicial disparity is a determination of whether certain groups of offenders are being treated in a similar fashion. However, as Westen notes, “we must first possess a . . . standard for distinguishing those people who are alike from those who are not.”<sup>3</sup> Once standards are established, a judge must follow them if like cases are to be sentenced alike. An apparent absence of consistency and neutrality need not reflect an inherent

weakness of the judiciary but instead “can arise from fundamental philosophical differences regarding the goals of sentencing which may not be shared universally, or even if they are, cannot be applied consistently. . . . [T]his . . . would show [itself] in the use of different sentencing criteria or the application of different weights to the various criteria.”<sup>4</sup>

Therefore, evidence of disparity can arise when either (a) there are no guiding standards or (b) different judges implement the standards differently. Sentencing guidelines establish a system in which the decisions of the many judges throughout a state can be structured to promote equity in sentencing while retaining flexibility.

## Endnotes

<sup>1</sup> 28 U.S.C. §991(b)(1)(B).

<sup>2</sup> Blumstein, Alfred, Cohen, Jacqueline, Martin, Susan E., and Tonry, Michael H., eds., *Research on Sentencing: The Search for Reform*, Vol. 1 (Washington: National Academy Press, 1983), p. 1.

<sup>3</sup> Westen, Peter, “The Empty Idea of Equality,” *Harvard Law Review*, Vol. 95 (1982): 537.

<sup>4</sup> Blumstein et al., op. cit., p. 76.

## Disparity Measures

Disparity Measure	How defined	How measured
Consistency	Similarly situated offenders who commit similar crimes receive the same punishments in terms of disposition type and sentence length.	Determine the extent to which offenders who possess similar criminal histories and who commit the same crimes receive widely dissimilar sentences. Sentencing guidelines compliance rates can be used to measure consistency.
Neutrality	Sentencing reflects emphasis on legal factors and de-emphasizes or attempts to eliminate extralegal factors such as race, gender, socio-economic status, judge identity, or location of court.	Ascertain the degree to which extralegal factors influence sentencing decisions. Statistical procedures are used to isolate which factors independently affect sentence outcomes – before and after guidelines or in sites with guidelines versus sites without guidelines.

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# How can we determine if disparity exists in the

*There have been numerous attempts to determine whether "similarly situated offenders do receive similar sanctions." The contribution of these studies is determined largely by their ability to: (1) determine what constitutes "similar" in comparing offenders, offenses, and sanctions; (2) account for how different judges balance the competing goals of sentencing; and (3) control for all of the factors that potentially affect sentencing decisions, particularly those factors that are difficult to detect and measure.*

A central problem for the analysis of disparity is disentangling the competing goals of sentencing from the sentencing decisions of judges. Throughout the many characterizations of the goals of sentencing, four goals stand out.<sup>1</sup> First, there is a desire to deter the offender and other potential offenders. Second, there is a desire to incapacitate the offender so that he or she cannot commit further crimes. Third, there is a desire for retribution against the individual for his or her social transgressions. Finally, there is a desire to rehabilitate the offender and thereby ensure that he or she will commit no future crimes.

Indeterminate sentencing structures do not specify a single goal for judges to consider when devising their sentences. Because the four goals are only partially complementary, "the main burden of reconciling the competing goals of the criminal justice system falls on the sentencing judge."<sup>2</sup> Because no two offenders or offenses are exactly alike, labeling sentencing differences as disparity involves a moral judgment – what appears to be disparity to one individual may simply be justifiable variation to another. Many within the research community, however, have felt comfortable concluding that there is evidence of disparity when similar individuals convicted of committing similar crimes are given different sentences. A conservative approach to assessing "similarity" is to assume that judges pay attention, in a limited fashion, to all four goals.

Each goal requires incorporating different types of information into a study of the sentencing decision. To pursue the goals of deterrence and/or retribution, a judge must examine the characteristics of the offense. If a judge wishes to focus on incapacitation, the offender's prior record becomes important. An interest in rehabilitation prospects leads each judge to examine the personal status characteristics of the offender. Researchers therefore include information pertinent to all of the goals in their analyses. Any investigation of sentencing disparity must proceed from a plausible model of sentence decision making that includes three distinct types of information: (1) factors related to the conviction offense, (2) factors describing the offender's prior criminal history, and (3) extralegal factors that (potentially) are related to the offender's prospects for rehabilitation.

The measurement and interpretation of a sentencing model is difficult. One problem is the sheer number of factors potentially influencing sentencing decisions. A more fundamental issue, though, is correctly interpreting the findings of the model. In a detailed study of racial disparity under Pennsylvania's sentencing guidelines, Kramer and Steffensmeier find some evidence that incarceration patterns vary by race.<sup>3</sup> They conclude, however, that the findings indicate not that racial disparity exists, but that race is confounded with other factors that are not easily measured by the available data. These factors include plea bargaining strategies and information about the defendant's prior record that does not appear in the official files. Further complicating the analysis is that discrimination also can affect legitimate, seemingly measurable factors

# sentencing process?

(e.g., one's prior record is a legitimate determinant of one's sentence, but previous discriminatory practice by police in some communities can unfairly enhance certain individuals' prior history of offenses).<sup>4</sup> Finally, social and economic factors that are generally considered in pursuit of the goal of rehabilitation (e.g., education, employment, and socioeconomic status) are often related to potential sources of disparity (e.g., race or gender).

It is therefore unsurprising that the results found in the research literature are difficult to interpret. Some studies, finding that African-Americans are incarcerated more often and receive longer sentences than whites, interpret this finding as evidence of racial disparity.<sup>5</sup> Other studies argue that evidence of racial disparity in sentencing primarily reflects inadequate research designs, a failure to rigorously take into consideration the full range of legal variables, or the disproportionate participation in crime among blacks.<sup>6</sup>

Another source of difficulty in measuring disparity at the sentencing stage is that a defendant passes through a number of "evaluation checkpoints" between the detection of a crime and incarceration. These evaluation procedures introduce the possibility of an unacknowledged bias in the pool of individuals who reach the relatively late stage of sentencing. Research results may indicate evidence – or lack of evidence – of disparate sentencing by judges that is actually due to discriminatory practices at the arrest or prosecution stages. Examining whether women receive more lenient sentences than men can illustrate this potential for bias. It may be that systematic bias causes

women to be treated more leniently in the earlier stages of the criminal justice process, so only the most nefarious female offenders reach the sentencing stage. Consequently, one might find no evidence of disparity at the sentencing stage because the previous bias has gone undetected.<sup>7</sup>

A final noteworthy complication is that consistency and disparity in sentencing can coexist. Disparities can arise if judges use legitimate extralegal factors as calculation aids. As Nagel has noted, "extralegal . . . is not synonymous with illegal, inappropriate, or socially unjust. It is defined as 'extra' to the law."<sup>8</sup> Certain extralegal factors (e.g., age, employment, and education) could be used by a judge to simplify the task of identifying the types of individuals to receive particular intermediate sanctions. Even though the use of these factors may enhance "consistency" in sentencing, it may do so at the expense of creating unwarranted differences.

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# Do sentencing guidelines reduce disparity?

*Sentencing guidelines seek to produce consistent and neutral sentencing by specifying standard sentence ranges that are deemed appropriate for typical cases. To sentence fairly for cases that are not typical, judges must retain sufficient discretion to consider aggravating and mitigating circumstances. However, allowing judges to depart from the guidelines makes it impossible to eliminate disparity in sentencing. Sentencing guidelines "reflect a fundamental dilemma of formal social control – the balance between uniformity (similar offenses should receive similar sanctions) and individualization (tailoring sanctions to individual offenders)."*<sup>1</sup>

Concern with sentencing disparity under indeterminate sentencing laws led many states to adopt sentencing guidelines in the 1970s and 1980s. While recent years have seen sentencing commissions pay considerable attention to other sentencing goals such as incapacitation through truth-in-sentencing, the reduction of disparity remains a fundamental goal. State efforts to "reconsider sentencing goals, redistribute discretionary authority, and determine the appropriate level of sanction are strongly affected by the distribution of discretion, [and] the extent and nature of sentencing disparity."<sup>2</sup> Numerous sentencing commissions explicitly state that the elimination of disparity is a current goal of their sentencing guidelines.

In Pennsylvania, prior to implementation of guidelines, offense seriousness and prior record explained less than one-quarter of the variation in sentences, suggesting that 75 percent of the variation in sentences was due to "extralegal" factors, including the defendant's race, gender, employment status, or home county or other reasons not directly related to his or her criminal conduct. Soon after Pennsylvania's guidelines took effect, the percentage of the variation in sentences that could be attributed to a defendant's offense and criminal record doubled, and sentencing consistency, particularly across county lines, improved.<sup>3</sup> There was also no significant variation in minimum sentence length due to race, another goal important to the commission.

However, recent studies of Pennsylvania's guidelines have found that while criminal history and offense severity are the strongest influences on judicial decision making, gender, race, and conviction by trial continue to exert a downward influence on dispositional and, to a lesser extent, durational departures.<sup>4</sup> Pennsylvania's sentencing guidelines have shown an overall improvement in sentence consistency and neutrality<sup>5</sup> while simultaneously providing judges with sizeable "windows of discretion"<sup>6</sup> in the sentencing decision. This finding suggests that guidelines need not eliminate judicial discretion to improve uniformity in sentencing.

The majority of research examining Minnesota's sentencing guidelines concludes that guidelines have been successful in reducing sentencing disparity.<sup>7</sup> A recent study using a sophisticated interrupted time-series design provides the most accurate picture of the long-term success of Minnesota's guidelines.<sup>8</sup> While sentencing guidelines have effectively reduced disparity in decisions about prison sentence length, they have reduced disparity in prison/no prison decisions to a lesser degree. Gains from guidelines in terms of sentencing consistency and neutrality dissipated somewhat over time. Stolzenberg and D'Alessio suggest that disparity found in Minnesota's sentencing patterns may be due to judicial adjustments to prison/nonprison sanctions for first-time violent offenders.<sup>9</sup>

Findings from the state of Washington indicate that the state's guidelines have achieved the goal of reducing disparity in nondeparture sentences (i.e., sentences within the recommended range). However, substantial disparity was found in the use of the First-Time Offender Waiver and the Special Sexual Offender Sentencing Alternative – dispositional options that can be used by the judge in lieu of the guidelines under certain circumstances. The commission found that use of these sentencing options were found to favor Caucasians and women.<sup>10</sup>

In general, sentencing guidelines have reduced unwarranted disparity, although there are varying schools of thought on the precise guidelines design that is optimal for achieving this result. Recent research, though, points to a lingering tension between judicial discretion and sentencing disparity. Though permitted guidelines departures – particularly downward dispositional departures – create the potential for introducing extralegal factors, they are a necessary tool for imposing fair sanctions in atypical cases. A more rigid sentencing system might prolong the disparity reduction attained through sentencing guidelines, but at an unacceptable reduction of judicial discretion. The long-term reductions of unwarranted disparity may be best achieved through increased monitoring of judicial compliance to determine why judges depart from guidelines, coupled with ongoing adjustment of the guidelines to ensure that they reflect current sentencing goals.

### Current Goals of Sentencing Commissions Addressing Sentencing Disparity

<b>Arkansas</b>	The standards seek to ensure equitable sanctions which provide that offenders similar with respect to relevant sentencing criteria will receive similar sanctions.
<b>Florida</b>	Sentencing is neutral with respect to race, gender, and social and economic status.
<b>Kansas</b>	One of the goals specified to achieve uniform sentencing in Kansas is to reduce sentencing disparity to ensure the elimination of any racial, geographical, or other bias that may exist.
<b>Louisiana</b>	The purpose of the guidelines is to recommend a sanctioning policy that ensures certainty, uniformity, consistency, and proportionality of punishment.
<b>Michigan</b> (proposed)	The sentencing guidelines shall reduce sentencing disparities based on factors other than offense and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences.
<b>Minnesota</b>	The purpose of the sentencing guidelines is to establish rational and consistent sentencing standards that reduce sentencing disparity.
<b>Missouri</b>	The purpose of the sentencing guidelines is to recommend a uniform policy that will ensure certainty, consistency, and proportionality of punishment. Use of the guidelines will result in minimal sentencing disparity.
<b>No. Carolina</b>	Sentencing policies should be consistent and certain: similarly situated offenders should receive similar sentences.
<b>Oregon</b>	Guidelines are intended to establish proportional and just punishment, create truth-in-sentencing, and establish sentencing uniformity.
<b>Pennsylvania</b>	The purpose of the sentencing guidelines is to insure that more uniform sentences are imposed in this Commonwealth. <sup>11</sup>
<b>So. Carolina</b> (proposed)	Sentencing guidelines should balance judicial and prosecutorial discretion with fairness and consistency in sentencing.
<b>Virginia</b>	The primary goal is to achieve certainty, consistency, and adequacy of punishment. Disparity reduction is also mentioned as an important goal.
<b>Washington</b>	The sentencing of felony offenders should be structured, but should not eliminate discretionary decisions affecting sentences. Sentence structure should ensure that the punishment is commensurate with the punishment imposed on others committing similar offenses.

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## Intermediate Sanctions

*Intermediate sanctions are programs, or a set of programs, designed to punish and perhaps rehabilitate offenders. To be considered "intermediate," a program functions or operates somewhere between traditional probation and imprisonment. Prime examples include intensive probation, boot camps, and community service. Intermediate sanctions attracted the attention of policymakers, judges, and corrections officials during the 1980s and, from the early 1990s, the general public as well.*

# What are intermediate sanctions and how have

Intermediate sanctions are currently the most popular approach for attempting to reduce the demand for prison space while simultaneously maintaining public safety and offender accountability. Intermediate sanctions are usually intended to be more restrictive and to require more offender accountability than regular probation or parole, but are less severe than incarceration.

In many jurisdictions, intermediate sanctions are viewed as a "continuum," providing a range or a menu of programs that vary in restrictiveness or treatment intensity. Intermediate sanctions are labeled and defined differently from state to state. The terms *community restraints*, *correctional options*, *intermediate punishments*, *alternative punishments*, and *optional nonprison sentences* all have been used to reference an array of programs that have similar goals or provide similar services.

A number of factors influenced the development of intermediate sanctions since the 1980s. Tonry offers three major reasons for the growth of intermediate sanctions:

- Doubts concerning the ethical justification and effectiveness of rehabilitative programs,
- The rise of "just deserts" policies that advocated scaled punishment severity and fitting sentences proportionate to the seriousness of crimes committed, and
- The rise of "law and order" crime control policy and the belief that ordinary probation was not punitive enough.<sup>1</sup>

Intermediate sanctions build on a significant legacy dating back to the 1970s. As seen in the adjacent table, the names have changed and enforcement is given more emphasis, but the goals and types of services are often very similar.<sup>2</sup>

### Alternatives to Incarceration in the 1970s and Intermediate Sanctions in the 1990s

1970s Alternatives to Incarceration	1990s Intermediate Sanctions
Juvenile training schools	Juvenile boot camps
Prerelease centers	Adult boot camps (or shock incarceration)
Halfway houses	Detention centers
Work release programs	Drug courts, community courts
Restitution	Day fines
Weekend sentencing	Intensive supervision (ISP)
Community service orders	Electronic monitoring, house arrest
Group and foster homes	Day reporting centers
Probation	Community service

In effect, while most jurisdictions in the United States now utilize intermediate sanctions, many have had similar programs available for decades. Within each category of sentencing in the table, the individual programs vary in definition, services provided, and availability, even among localities within the same state. The methods by which offenders are referred to intermediate sanctions also differ. For example, special "drug courts" that are intended to divert low-level drug offenders from prison often have resources to provide various forms of treatment, including substance abuse services, job placement, and social services counseling. In these instances, the intention is to create an environment of services, whereas other drug courts place less emphasis on treatment or are less coordinated and less formal in their approach.

The most common types of intermediate sanctions currently being used across the United States are discussed below.

**Intensive Supervised Probation (ISP)** Whereas regular probation usually involves a set time of community supervision, ISP couples this time with more restrictive requirements. An offender on ISP may be required to undergo substance abuse

# they evolved over the last two decades?

counseling and/or drug screening, report on a regular and frequent basis to a case supervisor, abide by stricter curfews, or abide by additional specific rules or requirements. Four states out of five now administer some form of ISP.<sup>3</sup>

**Electronic Surveillance** Technological advances have assisted the drive to establish alternatives to incarceration, and one key example is electronic monitoring (EM). Although the first EM system was introduced in 1964 and tested on parolees, mental patients, and research volunteers,<sup>4</sup> large-scale implementation of EM began in the early to mid-1980s.<sup>5</sup> EM generally requires offenders to remain within their own home or stay within a certain distance of a signaling device that can alert authorities to their whereabouts 24 hours a day.

Thirty-eight states report using EM, often in combination with other forms of supervision and treatment programs.<sup>6</sup>

**Boot Camps** Correctional boot camps or "shock incarceration" programs have been in existence in the United States since 1983. Boot camps, advocated by judges, governors, and legislators, continue to enjoy favorable media coverage and remain in tune with the public demand for harsher punishment.<sup>7</sup> These military-like training facilities tend to be targeted for young, nonviolent first-time offenders. Offenders usually spend between 90 and 180 days in a boot camp, characterized by a demanding daily schedule structured by strictly enforced rules and discipline.<sup>8</sup> Most boot camp programs also include traditional forms of offender services such as adult education, vocational training, and treatment programs. Thirty-four states report having implemented boot camps or shock incarceration programs.<sup>9</sup>

**Day Reporting Centers (DRCs)** Day Reporting Centers provide a full day of intervention and treatment to probationers (frequent client contact, substance abuse counseling, drug testing, formal scheduling, etc.). These facilities provide services similar to those offered by halfway houses without the problems and costs associated with a residential setting.<sup>10</sup> DRCs are implemented and structured in varying ways and differ according to offender eligibility and the services provided. Few states currently use DRCs, although the number of states considering day reporting-type programs is expanding.<sup>11</sup>

**Community Service** Community service has been used as a sentencing option by courts well before the term *intermediate sanctions* was crafted. Community service orders, which require offenders to give back to the community, are appealing on several levels. They not only serve as punishment, but also provide a constructive means for the offender to compensate the community. They are also used in cases in which a "debt" must be paid, but the offender is unable to pay a court-imposed fine or the victim is the community itself. Most adult criminal and juvenile courts use some form of community service orders. It has been argued that community service can also be rehabilitative – in that a structured daily schedule is followed and the service or experience may provide the offender with an opportunity to gain paid employment.<sup>12</sup>

**Day Fines** The use of fines for criminal sentences is not new. In fact, fines are an ancient and widely used penalty both here and in court systems abroad.<sup>13</sup> Fines mesh well with current U.S. sentencing philosophies and goals: fines are punishing and retributive, stress offender accountability, and are relatively inexpensive to enforce and monitor. Arising from European justice systems, the term *day fine* denotes the method in which the fine amount is calculated. Based

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## Intermediate Sanctions

*The ability to successfully integrate intermediate sanctions into the sentencing process is a goal of many jurisdictions pursuing sentencing reform. States and localities that have structured sentencing systems use a number of strategies to identify offenders for diversion into or for participation in these programs.*

# How are intermediate sanctions integrated into

States find that justice system agencies and the public support a punishment system that allows for alternatives to incarceration. Successful implementation, though, requires groundwork in the form of aggressive public education, training, and systemwide planning and consensus building.<sup>1</sup> Once support is solidified the functional task becomes how to credibly identify which offenders should be placed in which types of programs.

The development of structured sentencing systems, such as guidelines, can provide a formal mechanism for deciding which offenders will be recommended for intermediate sanction programs. Some systems give guidance concerning the type of sanctions available to the court, allowing judges to pick from a menu of alternative programs. Intermediate sanctions are used in less structured sentencing systems as well, although it is more difficult to ensure that offenders selected for intermediate sanctions would have otherwise received prison terms. In addition, in a nonstructured system it is difficult to ensure that specific sanctions are being used for the kinds of offenders for which particular programs were created.<sup>2</sup>

States with structured sentencing systems are making the integration of intermediate sanctions into their systems a priority. In a sentencing guidelines system, offenders are usually sentenced based on the seriousness of their offense and the extent and seriousness of their prior criminal record. The result is a placement (or recommendation of placement) in a specific cell within a sentencing grid. As a guidelines system is used and continuously refined, data accumulates and compliance is measured – making the task of determining which type of offenders are being placed into specific cells easier. The decision to replace a traditional cell recommendation (probation or prison) with an intermediate

sanction can then be measured in terms of its diversionary impact and offender appropriateness. Although it is difficult to predict which offenders are best suited for a particular sanction, some researchers have developed statistical models that can help judges determine which offenders are reasonable candidates for sanctions that place fewer restrictions on their freedom.<sup>3</sup>

In Kansas, “border boxes” have been placed within a sentencing guidelines grid to formalize the use of intermediate sanctions. Border box cells yield presumptive prison recommendations, but allow the judge to impose an optional nonprison sentence. Judges are instructed to use nonprison options

### Kansas Sentencing Ranges – NonDrug Offenses

		CRIMINAL HISTORY CATEGORY								
		G 1 Nonperson Felony		H 2+ Misdemeanor		I 1 Misdemeanor No Record				
OFFENSE SEVERITY LEVEL	IV	52	50	47	48	45	42	43	42	38
	V	43	41	38	38	36	34	34	32	31
	VI	26	24	22	21	20	19	19	18	17
	VII	17	16	15	14	13	12	13	12	11

Presumptive imprisonment   
  Border box   
  Presumptive probation

# existing structured sentencing systems?

when (1) a treatment program exists that is likely to be more effective than prison in reducing the risk of recidivism, (2) a treatment program to which an offender can be admitted within a reasonable time period is available, or (3) the non-prison option will serve community safety interests by promoting offender rehabilitation. A decision to impose a nonprison sentence in "border box" cases is not considered a departure from the guidelines and is not subject to appeal.<sup>4</sup>

Delaware established a sentencing guidelines system to determine where offenders should be placed along a "continuum" of sanctions. The result is a five-level (I-V), graduated tier system that becomes increasingly restrictive based on offense seriousness and prior record. Offenders can move within or across the "accountability" levels, obtaining more or less freedom depending on their behavior and compliance. For example, a judge can sentence an offender to begin serving an intermediate sanction in a halfway house on Level IV and can later impose a prison sentence, if warranted by the offender's behavior, within the same level. In addition, judges can sentence offenders to serve set periods in more than one accountability level, exposing offenders to a mix of sanctioning types.<sup>5</sup>

## Delaware Accountability Levels

Levels	Sentence
Level V .....	Imprisonment
Level IV .....	House arrest or residential treatment programs
Level III .....	Intensive supervision
Level II .....	Standard probation
Level I .....	Unsupervised probation

The sentencing guidelines system used in Pennsylvania divides intermediate sanctions into two categories: RIPs – restrictive intermediate punishments – and RSs – restorative sanctions. RIPs are programs that require strict offender supervision, meaning that offenders are housed in a program full- or part-time or that the offender's movement is severely restricted. RSs are less restrictive, nonconfinement programs that focus on ways for offenders to help restore victims to their pre-offense status.

Although the boot camp program in Pennsylvania is not considered an intermediate sanction per se, guidelines also specify who is eligible for such programs. Boot camp candidates are sentenced to state prison terms and are identified by the judge. Final acceptance into boot camp is based on criteria set by correctional authorities.

The Pennsylvania grid uses shaded areas to indicate when restrictive sanctions can be used in lieu of incarceration. Judges also may impose a combination of both RIPs and RSs when appropriate. This flexibility allows the court to provide

## Pennsylvania Sentencing Matrix

The following matrix was created to show a partial section of the Pennsylvania where intermediate sanctions are part of the sentence recommendations.

Level	OGS	0	1	2	3
Level 4 State Incarceration/ RIP trade	8 (F1)	9-16 BC	12-18 BC	15-21 BC	18-24 BC
Level 3 State/County Incarceration/ RIP trade	7 (F2)	6-14 BC	9-16 BC	12-18 BC	15-21 BC
	6	3-12 BC	6-14 BC	9-16 BC	12-18 BC

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## Intermediate Sanctions

*Intermediate sanctions are now being used by most states. Evidence to date indicates that many of the programs evaluated have not achieved their desired goals. Some observers suggest that this lack of empirical support for intermediate sanctions may be due more to faulty or inappropriate research methods and measurement problems than to failures of specific programs or services. Experts feel that making use of some form of intermediate sanctioning remains worthwhile and that jurisdictions can take steps to enhance prospects for success.*

# How effective have intermediate sanctions been

Accurate measures of the success or failure of intermediate sanctioning programs are difficult to achieve for a number of reasons. First, only a small number of programs have been evaluated through rigorous testing. Second, because the evaluated programs also tend to be city- or county-based, it is difficult to generate findings at the state or national level. Third, individual programs may have partially complementary and partially conflicting goals, making it difficult to determine how success or failure should be defined. For example, "success" may depend on how one views a reduction in state versus local corrections cost or how one ranks the goals of rehabilitation, incapacitation, and the reduction of recidivism. The existing evaluation literature focuses largely on intensive supervision (ISP), boot camps, and home confinement or electronic monitoring.

**Intensive Supervised Probation (ISPs)** A rigorous, randomized field experiment of ISP programs in 16 jurisdictions concluded that offenders in those programs did not have lower recidivism rates than regular probationers. Further, the programs were not more cost-effective (given their recidivism and reincarceration rates), nor did they help reduce prison crowding.<sup>1</sup> It is possible, however, that the closer supervision and more stringent conditions of ISP are the cause of higher failure rates, since regular probationers are less likely to be caught violating conditions.

ISP might be more effective than traditional supervision methods when monitoring treatment for drug-abusing populations.<sup>2</sup> There is evidence that drug treatment, whether voluntary or coerced, reduces both drug use and crime for drug-using offenders.<sup>3</sup> ISP may also be a viable mechanism for keeping offenders in treatment for longer periods of time.

### **Home Confinement (Electronic Monitoring—"EM")**

The terms *home confinement*, *house arrest*, and *electronic monitoring* are often used interchangeably. Home confinement and house arrest are types of programs, whereas electronic monitoring is a tool used to monitor compliance with the requirements of a sentence.<sup>4</sup> In any event, all of these programs are intended to limit the movement of offenders in the community.

EM is generally designed to divert less serious offenders from incarceration, although more serious offenders have been placed on EM programs.<sup>5</sup> Although the equipment used in EM sites is subject to occasional failure, it provides more intensive and consistent monitoring than "manual" methods.<sup>6</sup>

Success rates of EM vary across programs and according to the established criteria for measuring success or failure. Failure rates ranging between 3 and 16 percent and averaging about 5 percent are considerably lower than the failure rates of ISP.<sup>7</sup> On the other hand, offenders placed on EM are more likely to be drawn from those at the low end of the crime severity or prior record spectrums than those on ISP.

Other empirical studies report no significant differences in offender recidivism for offenders who were electronically monitored and for those who were "manually" supervised. However, there is evidence that home confinement programs encourage offenders to work and can further stabilize and add structure to the lives of those being monitored.<sup>8</sup>

# in achieving their goals?

**Boot Camps** A study of boot camps in eight states concluded that these programs did change attitudes and reduce prison crowding, yet the impact on recidivism remains unclear.<sup>9</sup> The military atmosphere alone did not reduce recidivism or significantly alter lifestyle after completion of the boot camp, but boot camp participation in combination with rehabilitation programs or intensive supervision holds promise. Although boot camps are more expensive on a daily basis than imprisonment, boot camp may be less expensive at the individual offender level because the length of stay in a program is usually shorter than a traditional incarceration sentence.<sup>10</sup> One group of evaluators suggests that the ineffectiveness of boot camps in serving offender needs may be associated with the general structure and administration of boot camp facilities. Emphasis on establishing a more therapeutic environment might be beneficial in meeting offender needs.<sup>11</sup>

**Intermediate Sanctions and Structured Sentencing** A recent report concludes that intermediate sanctions are more likely to be successful if state legislatures have developed policies that govern their use. Such policies include articulated program goals and specification of the types of offenders eligible for each sanction. In addition, it suggests that guidelines be developed to help determine the application of intermediate sanctions on a case-by-case basis within a structured fashion.<sup>12</sup> However, sentencing commissions are only beginning to develop methods to assess offender risk and provide guidance in the most appropriate choice of sanction.

Pennsylvania is in the preliminary stages of analyzing data that will disclose if and how sentences in that state have shifted from incarceration to intermediate punishments. Early indications are that judges are diverting targeted offenders from incarceration to intermediate punishments. It is anticipated that these programs will be used to an even greater extent since increased funding has been allocated.<sup>13</sup>

North Carolina has invested considerable resources and effort into developing a comprehensive system of intermediate sanctions. As the state abolished parole and increased time served for selected violent and repeat offenders, intermediate sanctions were viewed as a rational means for controlling prison populations by diverting specific offender groups away from active prison sentences. In 1994, it was projected that 32 percent of convicted felons would receive active prison sentences under the new sentencing guidelines, compared with 47 percent under the old system. Forecasts show this decrease will be offset by an increase in the number of offenders sentenced to intermediate (+10 percent) and community (+4 percent) punishments. The table below displays past, projected, and actual rates at which offenders received intermediate sanctions.<sup>14</sup>

**Rates of Active Incarceration and Intermediate and Community Punishments in North Carolina – Felony Offenses**

Disposition	Before Guidelines	Projected After Guidelines	1996 Actual
Active Incarceration	46.7%	32.1%	29.2%
Intermediate Sanctions	27.6	37.5	39.8
Community Punishment	25.7	30.3	30.5

## Additional Reading

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## Cross-State Comparisons

*One task for sentencing commissions is to periodically assess the appropriateness of sentencing guidelines recommendations. Commissions often modify guidelines recommendations to reflect the changing sentiments of lawmakers, special interest groups, and the public. Information that compares various guidelines systems' recommendations on types and lengths of sentences can be useful during their deliberations. However, the introduction of intermediate sanctions, the use of split sentences, differences in parole and good-time eligibility, and the use of different offense and offender factors make valid comparisons difficult.*

# How do sentence recommendations compare

Sentencing commissions express an interest in comparing sanction types and sentence lengths for particular crimes across state sentencing guidelines systems.<sup>1</sup> Their interest stems from a desire to improve systems by obtaining additional baseline information and alternative perspectives on how certain offense and offender factors are handled by guidelines systems in other jurisdictions. In addition, a variety of public and private sector groups have an interest in assessing the similarities and differences in how current sentencing philosophies and policies are applied within structured sentencing systems.

Comparing sentencing recommendations across states is complex and time-consuming. Hypothetical cases and sentencing scenarios must be developed and "scored" according to each state's guidelines system in order to obtain a meaningful point of comparison. In addition, it is necessary to be aware of relevant differences in statutory offense definitions. Moreover, offense and offender factors must be carefully detailed to allow analogous scoring across systems, thus ensuring comparability. Consideration must also be given to relevant parole and release policies. Some states have guidelines that recommend relatively long prison terms but allow offenders to be released after serving a portion of the imposed sentence. On the other hand, some guidelines systems recommend relatively short prison terms but require inmates to serve 85 percent or more of their sentence.

Published research studies that compare sentencing recommendations across state guidelines systems usually do not distinguish between different offender profiles (offense and offender characteristics) and often address a highly specific issue. For instance, survey results are available that measure the use of alternatives to incarceration across the states.<sup>2</sup> As another example, Morris and Tonry compare the sentencing recommendations for two offense scenarios (nonresidential burglary and simple robbery) under the Minnesota, Pennsylvania, Washington, and federal guidelines systems.<sup>3</sup> Their purpose was to show the lack of sentencing options found on guidelines grids and to urge the development of more choices along a continuum between prison and non-prison. Another cross-system study examined how prior record affected sentencing out-comes for the most serious offense classes in 12 jurisdictions with sentencing guidelines. The researchers found that prior record, at least in the highest criminal history levels, is a more powerful determinant of sentence severity than the seriousness of the offense. The results were limited because differences in offense definitions and other factors prevented exact comparisons across the states.<sup>4</sup>

The following table compares the sentencing recommendations for ten offense scenarios across the federal sentencing guidelines system and the guidelines systems of six states.<sup>5</sup> A unique feature of the analysis is the detailed comparison of offense seriousness and prior record elements.

# across different sentencing guidelines systems?

**Sentence Recommendations, in Months, from Selected Sentencing Guidelines Systems** (as of December 1996)

<u>Offense/criminal history</u>	<u>Delaware</u>	<u>Florida</u>	<u>Kansas</u>	<u>North Carolina</u>	<u>Virginia</u>	<u>Washington</u>	<u>Federal System</u>
<b>Possession/half gram cocaine</b>							
No prior record	probation	nonprison	probation to 12	probation	prob./intermed.	n/a	0 to 6
Prior robbery	up to 6	nonprison to 17	23 to 26	intermed.	prob./intermed.	n/a	1 to 7
<b>Sale/one gram cocaine</b>							
No prior record	up to 30	nonprison	14 to 16	probation to 10	7 to 16	n/a	10 to 16
Prior robbery	up to 60	nonprison to 29	32 to 36	intermed. to 15	50 to 82	n/a	12 to 18
<b>Unarmed robbery, no victim injury</b>							
No prior record	up to 15	21 to 35	31 to 34	intermed. to 20	16 to 37	3 to 9	41 to 51
Prior robbery	up to 60	38 to 64	50 to 55	intermed. to 24	76 to 116	12 to 14	46 to 57
<b>Armed robbery, no victim injury</b>							
No prior record	24 mandatory	47 to 79	46 to 51	38 to 105	40 to 78	91 to 101	63 to 78
Prior robbery	24 to 120	65 to 109	74 to 83	61 to 164	152 to 239	101 to 114	70 to 87
<b>Malicious wounding, victim injury</b>							
No prior record	up to 24	24 to 40	11 to 13	intermed. to 47	21 to 56	117 to 159	41 to 51
Prior robbery	up to 48	41 to 69	22 to 26	20 to 60	62 to 139	147 to 183	46 to 57
<b>Second-degree murder</b>							
No prior record	120 mandatory	246 to 410	Life w/parole	94 to 245	78 to 173	147 to 188	135 to 168
Prior robbery	120 mandatory	263 to life	Life w/parole	132 to 341	257 to 459	168 to 216	151 to 188
<b>Involuntary vehicular manslaughter and DUI</b>							
No prior record	24 mandatory	125 to 208	31 to 34	intermed. to 24	10 to 34	31 to 41	15 to 21
Prior robbery	24 to 30	142 to 236	50 to 55	intermed. to 32	46 to 117	36 to 48	18 to 24
<b>Forcible rape, no weapon or victim injury</b>							
No prior record	120 mandatory	95 to 158	184 to 206	44 to 120	86 to 186	51 to 68	70 to 87
Prior robbery	120 mandatory	112 to 186	300 to 334	70 to 183	275 to 486	62 to 82	78 to 97

## Endnotes

- <sup>1</sup> National Association of Sentencing Commissions (NASC)/National Center for State Courts (NCSC) Partnership Survey of Sentencing Commissions, September 1997.
- <sup>2</sup> "Table III - Alternatives to Incarceration," *Corrections Compendium*, March 1995.
- <sup>3</sup> Morris, Norval, and Tonry, Michael, *Between Prison and Probation* (New York: Oxford University Press, 1990).
- <sup>4</sup> Roberts, Julian V., "The Role of Criminal Record in the Sentencing Process," in Michael Tonry, ed., *Crime and Justice: A Review of Research*, Vol. 22 (Chicago: University of Chicago Press, 1997).
- <sup>5</sup> Virginia Criminal Sentencing Commission's *1996 Annual Report* (Virginia Criminal Sentencing Commission, 1996).

## Additional Reading

Kramer, John, Lubitz, Robin, and Kempinen, Cynthia. "Sentencing Guidelines: A Quantitative Comparison of Sentencing Policies in Minnesota, Pennsylvania, and Washington," *Justice Quarterly*, Vol. 6, No. 4 (1989).

Notes: "Probation" subsumes all community-based correctional programs; "intermediate" includes any program considered more harsh than probation but less restrictive than traditional incarceration. This table was adapted from a comprehensive analysis originally presented in the Virginia Criminal Sentencing Commission's *1996 Annual Report*. The original analysis includes two additional offenses and ten additional prior record scenarios and was accompanied by interpretive text for each offense scenario. The above jurisdictions were selected for comparison because each had a sentencing guidelines structure and offenders were required to serve at least 85 percent of their imposed sentence (except in Delaware, where inmates must serve 75 percent of their sentence, and in Washington, where only violent offenders must serve 85 percent of their sentence). Sentence recommendations for the first two offenses are not listed for Washington because they would not be directly comparable to those of other states.

## Cross-State Comparisons

# Have sentencing guidelines affected prison

*Whether the use of sentencing guidelines has an effect on the demand for prison beds depends on a number of factors related to the goals of the state sentencing system (e.g., the proportion of offenders receiving prison sentences and the average length of sentence). Similarly, decisions to increase or decrease incarceration rates or to change the amount of time offenders serve in prison are often balanced to fit current and future correctional capacities. Displayed here are two correctional measures, court commitments to prison and prison population, as well as indications of when some of the more significant changes in state sentencing policy occurred.*

The potential impact on correctional resources is an important consideration when significant changes in sentencing laws are proposed. The Partnership Survey of Sentencing Commissions revealed that sentencing commissions often are requested (some are required) to take prison capacity into account when recommending a change to an existing sentencing structure.<sup>1</sup> In practice, commissions, often in connection with corrections or budget agencies, will report to the legislature the projected impact of altering the guidelines. Forecasting the impact of guidelines revisions requires one to develop a clear set of assumptions on factors such as the profile of offenders who will be convicted and sentenced in the future, the extent to which judges will sentence at the low, mid, or high end of the guidelines range, and changing parole policies. Some states employ sophisticated simulation models for this purpose, while others use a range of forecasting and projection techniques.

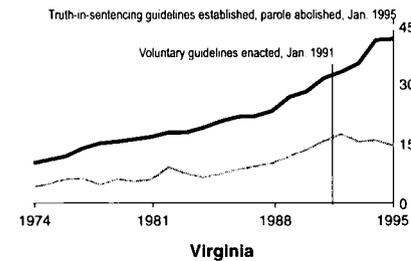
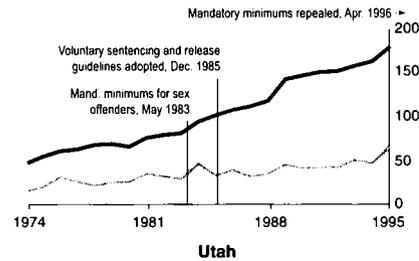
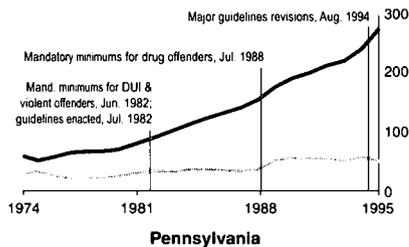
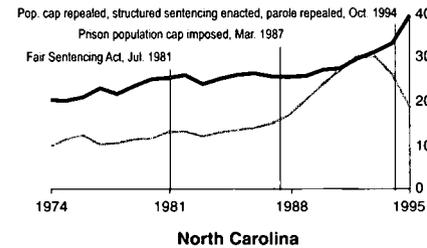
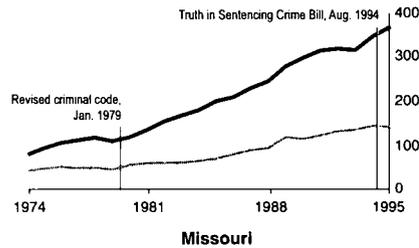
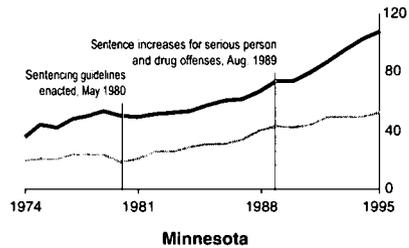
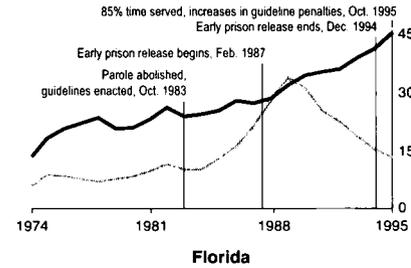
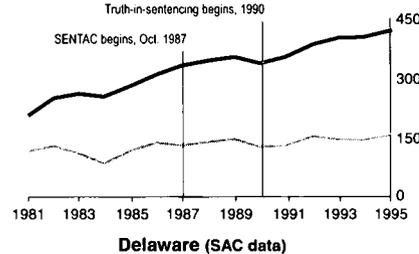
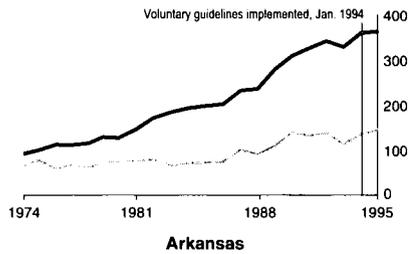
There is little research examining the impact of state sentencing guidelines on correctional resources at the national level. One national assessment sponsored by the Bureau of Justice Assistance, however, found evidence that states using guidelines that take correctional resources into account had somewhat slower incarceration growth rates than other states.<sup>2</sup> But the evidence also indicates that guidelines alone do not alleviate prison overcrowding. A comparative study by Marvell found that the use of guidelines was strongly correlated with slower prison population growth. The study also noted that guidelines may not have been *causally* related to slower growth, since broader efforts to reduce prison populations may accompany guidelines implementation.<sup>3</sup>

State-specific studies that examine the impact of guidelines on prisons draw various conclusions. Impact varies depending on factors such as whether the guidelines are presumptive or voluntary or whether the guidelines were developed explicitly to take prison populations into account. It is therefore sensible to conclude that guidelines alone will not alleviate prison overcrowding.

The following graphics portray the rate of new court prison commitments and the state prison population rate for 13 states currently using guidelines. Prison population is particularly sensitive to the length of sentence being served, while the number of new commitments is sensitive to changing propensities to incarcerate (the in/out decision). Through the current partnership initiative, sentencing commission staff were requested to indicate when major changes in sentencing policies took place in their respective states. Changes in the two indices (commitments and population) associated with the introduction or modification of guidelines in the various states suggest, but cannot confirm, the impact of sentencing reform on correctional population.

# admissions and populations?

**New Court Commitments to Prison and Total Prison Population (per 100,000 population), 1974-1995**



Notes: For years 1974 to 1990, "prison population" represents the number of prisoners in custody on December 31 of the year presented. For years 1991 to 1995, "prison population" represents the "New prison commitments" represent the number of sentenced prisoners admitted during each year for a new court commitment (as defined by the Bureau of Justice Statistics). New court commitm defendants returned to prison from appeal or bond, and prisoners transferred from other jurisdictions.

Source: All state data (except Delaware's) was obtained from *Prisoners in State and Federal Institutions* (for years 1974-1984) and *Prisoners* (for years 1985-1995), Bureau of Justice Statistics, U.S. Statistical Analysis Center (SAC) and was provided only for the period 1981-1995. All population data was obtained from the U.S. Census Bureau.

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ISBN 0-89656-190-9