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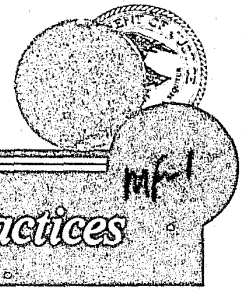

National Institute of Justice / Issues and Practices

Sentencing Reform Impacts

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James K. Stewart
Director

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

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Sentencing Reform Impacts

by

Michael H. Tonry

February 1987

Issues and Practices in Criminal Justice is a publication series of the National Institute of Justice. Designed for the criminal justice professional, each *Issues and Practices* report presents the program options and management issues in a topic area, based on a review of research and evaluation findings, operational experience, and expert opinion in the subject. The intent is to provide criminal justice managers and administrators with the information to make informed choices in planning, implementing and improving programs and practice.

Prepared for the National Institute of Jusice, U.S. Department of Justice by Abt Associates Inc., under contract #J-LEAA-011-81. Points of view or opinions stated in this document are those of the author and do not necessarily represent the official position of policies of the U.S. Department of Justice.

Foreword

The modern movement toward reform of American sentencing practices and institutions is now a decade old. Since 1975, nearly every American state has considered or undertaken major sentencing changes. The pressures for reforms have come primarily from public dissatisfaction with crime and punishment.

Some states have enacted determinate sentencing laws and abolished parole. Some have adopted parole guidelines. Most have enacted mandatory sentencing laws. Several have established sentencing commissions and adopted sentencing guidelines.

The sentencing reform movement continues today. The innovations now receiving greatest attention are the sentencing commission and sentencing guidelines. Several state sentencing commissions are at work and the recently created U.S. Sentencing Commission is engaged in developing federal sentencing guidelines.

The National Institute of Justice has sponsored major action projects concerned with sentencing innovations, including support of development of many parole and sentencing guidelines systems. The Institute has provided technical assistance to many sentencing projects and has supported major independent evaluations of sentencing innovations in Alaska, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina and Pennsylvania, among other states.

Before 1975, every American state, and the federal system, had "indeterminate" sentencing systems. All were characterized by nearly unlimited judicial discretion to set minimum and maximum sentences and by comparably broad parole board discretion to set release dates.

Today, after a decade of change, the United States has many different sentencing systems, some determinate and some indeterminate. The accumulating body of evaluation research allows comparisons to be made between systems and their operations.

This monograph pulls together the evaluation literature on the impacts of sentencing changes in the United States and draws conclusions about the consequences of change.

The Institute hopes that this summary of recent sentencing changes and their impacts will prove useful to legislators and other policymakers as they consider adoption of innovations in their jurisdictions. Most significantly this research can stimulate and inform the public debate on policies of sanctions in our society.

James K. Stewart
Director
National Institute of Justice

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Chapter 1

Introduction

Sentencing reform developments of the last ten years have been unprecedented in their diversity. During the previous period of ferment in this century—when the adoption of parole in the 1920s and 1930s made sentencing "indeterminate" throughout the United States—the changes were much the same in every jurisdiction. Criminal justice systems without parole became systems with parole. The details varied—whether the parole board was full-time or part-time, professional or amateur; whether prisoners were eligible for release after one year, or after serving a third of the announced maximum, or after serving a minimum term set by the judge; how intensive and lengthy a period of parole supervision followed release—but the broad outlines were everywhere the same.

Modern sentencing changes, however, have produced greater diversity. Many jurisdictions remain indeterminate and in profile look in 1986 much as they did in 1936. Those jurisdictions making major changes have shared a premise—that the traditional system was undesirable—but not a conclusion as to what to establish in its place. No single approach has predominated.

Some jurisdictions have abolished parole release, parole supervision, or both. Some have adopted parole guidelines. Some have enacted statutory determinate sentencing laws. Some have adopted presumptive sentencing guidelines. Some have adopted "voluntary" sentencing guidelines at the state or local levels, for some or all offenses. Most have enacted mandatory sentencing laws. A few have tried to invigorate appellate sentence review.

Readers who are unfamiliar with some or all of the terms used in the preceding paragraph, such as "determinate" or "mandatory" sentencing, or "voluntary" guidelines, will find that each is defined in the chapter in which it is discussed and in the glossary following the last chapter.

Taken together, the innovations of the last decade have replaced a more or less uniform "American sentencing system" with a variety of different systems. For the first time one can sensibly ask which approaches work better or what differences it makes to change from one to another.

This monograph surveys efforts by researchers to answer both questions. Briefly to anticipate more qualified and elaborated discussions below, the following assertions seem supported by the research evidence:

1. mandatory sentencing laws increase the proportion of offenders imprisoned among persons convicted of the pertinent offense but tend to elicit widespread efforts by judges and lawyers to circumvent their application;
2. voluntary sentencing guidelines, where evaluated, have generally not resulted in significantly altered sentencing patterns;
3. presumptive sentencing guidelines, like those in Minnesota and Washington, can, under favorable circumstances, achieve substantial changes in sentencing patterns, compared with past practices, and can increase consistency in sentencing;
4. statutory determinate sentencing laws, like those in California and North Carolina, under certain circumstances, can produce demonstrable changes in sentencing outcomes, including increased consistency;
5. parole guidelines can achieve relatively high levels of accuracy, consistency, and accountability in decision-making and can offset disparities in the lengths of prison sentences imposed by judges;
6. neither jury trial rates, trial rates, nor average case disposition times necessarily increase under statutory determinate sentencing laws, presumptive sentencing guidelines, or plea bargaining bans (increases in trial rates and case processing times have often been hypothesized as a likely result of such systems, because defendants could expect

little incremental increase in sanctions after trial convictions, compared with sanctions following plea bargains); and

7. appellate review of sentences need not generate a caseload that overwhelms the appellate courts (as has been hypothesized by those concerned with judicial caseloads and apprehensive about the litigious proclivities of prisoners).

Policymakers generally, and legislators particularly, are likely also to be interested in three other questions. Do sentencing law changes increase criminal justice system costs? Do they reduce crime rates? Do they increase prison crowding? This monograph is a summary of research and is limited to the issues and subjects addressed by the available research. Because it does not generally address questions of cost, crime control, or prison crowding, the sentencing impact research does not yield clear answers to those questions. However, some things can be said.

As to cost: many major sentencing law changes do not appear to have increased criminal justice system costs significantly. Generally, trial rates and average case disposition times have not increased when major sentencing changes have been implemented. This means that the cost of operating the system has probably not increased. Mandatory sentencing laws are the major exception. The lengthy mandatory sentences adopted in New York in 1973 as the "Rockefeller Drug Laws" offer an example. By the time the laws were altered in 1976 and despite creation of thirty-one new courts and the expenditure of 32 million dollars, case backlogs and average case processing times had increased enormously. The absence of comparable findings in evaluations of other sentencing innovations suggests that criminal justice systems have adapted to most sentencing changes without incurring great costs.

As to crime rates: it is very difficult to link changes in sentencing laws to changes in crime rates. According to the FBI's *Uniform Crime Reports*, crime rates declined in the early 1980s. During that period, sentencing generally became more severe and prisons became more crowded. It is unlikely that most sentencing law changes *caused* crime rates to decrease or sentencing to become more severe. Evaluations of mandatory sentencing laws, the sentencing change most directly targeted on reducing crime, are mixed. Some studies have concluded that mandatory sentencing laws have reduced crime rates. This appears to have happened when Massachusetts adopted a mandatory sentencing law for unlawful carrying of a firearm. Other studies of mandatory sentencing laws have not shown crime reduction effects.

As to prison populations: there is no question that prison populations have increased in recent years. Various evaluations have shown that patterns of prison use have been affected by sentencing law changes. For example, one effect of California's Uniform Determinate Sentencing Law was that larger numbers of convicted persons received prison sentences (initially, however, for shorter terms than had been customary). Similarly, the presumptive sentencing guidelines in Washington and Minnesota have altered traditional patterns of prison use. The much more difficult question, however, is whether sentencing changes *cause* prison populations to increase. Prison populations have increased substantially since 1980 both in states that have revised their sentencing institutions and those that have not. My view—which is no more than a guess—is that prison population increases have resulted much more from changes in public and officials' attitudes about appropriate punishments than from changes in sentencing laws and institutions.

Behind these generalizations lie three truths. First, laws and regulations are not self-executing; many innovations have perished stillborn either because comprehensive, politically self-conscious efforts were not made to encourage compliance with them or because key decision-makers simply chose to ignore or subvert them. Second, any sentencing innovation that makes judges' sentencing decisions more predictable increases the power of prosecutors; unless prosecutors support an innovation, or can be made to comply with it, the innovation is unlikely to meet its objectives. Third, powerful bureaucratic and normative pressures conduce to business as usual; "accommodative reactions" or "adaptive responses," to adopt the relevant academic jargon, can entirely undermine the integrity of an innovation, and often have.

The organization of this monograph follows the forms of innovation. Chapter two concerns plea bargaining rules and bans. Chapters three to seven concern mandatory sentencing laws, voluntary sentencing guidelines, presumptive sentencing guidelines, statutory determinate sentence laws and parole guidelines. Chapter eight is a brief summary. The sequence of chapters parallels criminal justice system case processing from prosecution to parole. For readers who prefer a chronological approach to sentencing reform, the chapters should be read in the sequence seven (parole guidelines), four (voluntary sentencing guidelines), six (statutory determinate sentencing), five (presumptive sentencing guidelines), two (plea bargaining bans) and three (mandatory sentencing laws).

Although the road map to what follows has been set out, this introductory chapter has more territory to cover. First, although detailed information on the origins of each sentencing innovation is presented at the beginning of "its" chapter, a brief general background is set out here.

Second, the term "impact" warrants examination. It is sometimes hard to know how to weigh the effectiveness of an innovation. Is the goal to achieve what the innovation's draftsmen said they wanted to accomplish, to achieve the results specified by a literal analysis of the plain meaning of the law or rule, to make a slight change in direction toward outcomes consistent with the values underlying the change, or something else? Third, a number of methodological and interpretive problems confront efforts to generalize from the sentencing literature; some characterize the literature *en masse* and others affect individual studies. The most important of these are summarized below. Fourth, a general caveat is offered and elaborated about the difficulty of separating cause from effect in looking at legal change and its aftermath. Doctor Johnson accused doctors, particularly, of confusing subsequence for consequence, and that confusion is a dilemma for analyses of legal changes. If the average severity of sentencing in a jurisdiction increases after a significant change in sentencing institutions, it is not impossible that the latter caused the former. Equally, however, changes in social attitudes, cultural values, or political sensibilities may have caused both the legal change and its apparent consequences and sentencing patterns may well have changed in any event.

The Origins of Sentencing Reform

In nineteenth-century America, sentencing was "determinate," though not so called, in that parole did not exist and no general procedure existed to second-guess the sentence announced by the judge. The governor, or the President, might pardon an offender or announce a specific or general commutation of sentences, but these were unpredictable acts of grace, politics, or venality, and could not be relied upon. In the first several decades of this century, sentencing became, in every American state and under federal law, "indeterminate." Each jurisdiction had a parole board which could release prisoners who had completed some prescribed minimum sentence. Parole eligibility generally ripened long before the prisoner's nominal maximum sentence expired.

Historians and others have chronicled this abrupt and pervasive change and offered explanations for it. Some explanations deal with intellectual trends. Environmental determinism was often blamed for individual behavior in the early twentieth century and, as a result, it was often urged that offenders should be rehabilitated, not punished. Incarcerative sentences were purportedly made indeterminate so that offenders could be held until rehabilitated and then released. Since this process would vary from individual to individual, decisions about treatment, cure, and release were to be made on an individualized basis and to rely heavily on informed professional judgments.

Other explanations focus on idealism. The early twentieth century was a time of optimism and one manifestation of this was a view that the unfortunate and maladjusted should, and could, be made into contributing members of society. Imprisonment for rehabilitation and individualized decision-making were compatible with this view, as was support for judges' individualized decisions as to who needed incarceration.

Yet other explanations focus on the advantages to administrators of having the large discretions and limited accountability that indeterminate sentencing allowed, and on the class, ethnic, and racial composition of prison populations that resulted in there being few effective voices outside the prison walls to focus public scrutiny on what went on inside.

Whatever the reasons for the ubiquitous adoption of indeterminate and individualized sentencing, by 1930 it existed in every state and in 1975 it persisted. After 1975, for at least the next ten years, the monolith of American indeterminate sentencing dissolved, to be replaced not by another monolith, but by a diverse assortment of sentencing approaches that varied from state to state. The rationales for these changes, and the motives underlying them, have varied with time and place.

About the intensity of reform activity after 1975, there can be no doubt. A mere five years later, in 1980, a federally supported sentencing project reported that sentencing guidelines projects had been established or considered in a majority of states. By 1983, mandatory sentencing laws had been enacted in forty-nine states. At least nine states have abolished parole release since 1975 and most of those have enacted statutory determinate sentencing laws. In three states, sentencing commissions have created and promulgated presumptive sentencing guidelines; sentencing commissions are at work in several other jurisdictions and have tried but failed to produce guidelines in several jurisdictions including South Carolina, New York, and Maine. In other states, the organized judiciary has promulgated statewide sentencing guidelines; at least five jurisdictions have received considerable attention—Massachusetts, Michigan, New Jersey, Maryland, Florida—but there are others.

Not only has reform activity been widespread and diverse, it has proceeded by fits and starts. Washington State, for example, for long the site of what may have been America's most indeterminate sentencing system, has, in succession, implemented two different systems of parole guidelines, juvenile sentencing guidelines, and presumptive sentencing guidelines coupled with abolition of parole and statewide prosecutorial guidelines. New Jersey has experienced local sentencing guidelines, statewide sentencing guidelines, and statutory presumptive sentencing. Minnesota early adopted parole guidelines and later abolished them, and

parole release, in favor of sentencing guidelines. Most of these jurisdictions have also enacted mandatory sentencing laws.

So active a siege of law reform activity resulted from a combination of political, intellectual, and social forces that undermined the indeterminate monolith but, being more often refutations than declarations, did not by their collective force prescribe a replacement.

Among the forces and developments undermining indeterminate sentencing were these:

Disparities. Critics of sentencing and parole asserted that both were characterized by extreme unwarranted disparities in which sentences or release dates reflected as much the decision-maker's values, outlook, and idiosyncrasies as the offender's culpability, character, and characteristics. This was attributed in part to the lack of established general standards or criteria to govern sentencing and parole decisions. Although many judges long rejected claims that unwarranted sentencing disparities were common, a gradual, nearly unanswerable accumulation of research on disparities has stilled many such denials.

Discretion and Discrimination. Critics argued that indeterminate sentencing and individualized decision-making accorded too much discretion to decision-makers and that this too often resulted in decisions animated by racial, ethnic, or class biases and stereotypes. The findings of research on discrimination in sentencing are equivocal. Whether or not invidious discrimination was common, the necessarily ad hoc decisions that resulted from the lack of standards often made it *appear* that discrimination was operating. The civil rights movement was then at its height and the very appearance of discrimination made a powerful case for sentencing reform.

Rehabilitation and Research. A substantial body of research on the effects of treatment programs—often evaluated in terms of their effects on later offending or recidivism—had accumulated by 1970. Several prominent reviews of this literature concluded that research could not demonstrate that correctional programs "worked." Although "nothing works" was, in retrospect, too harsh a conclusion, both critics and correctional professionals soon abandoned claims that offenders should be incarcerated for rehabilitation, or, as a corollary, that parole boards could make reliable judgments as to whether or when a prisoner was sufficiently rehabilitated to warrant release. Although it would claim too much to assert that reduced confidence in rehabilitative programs caused the decline of indeterminate sentencing, it clearly weakened resistance to proposals for change.

Prisoners' Rights. Outbreaks such as those at Attica, Pendleton, and New York's "Tombs" focused attention on the deficiencies of prisons. The prisoners' rights movement had blossomed in the mid-1960s with a series of judicial decisions in which courts abandoned the "hands off" approach of nearly unlimited deference to correctional administrators in matters affecting prison management. Although neither the outbreaks nor the lawsuits directly caused sentencing changes, they contributed to the ferment affecting the criminal justice system and to interest in radical sentencing reforms which were often proposed, and seen, as a solution. It was often said that awareness among prisoners of extreme sentencing disparities yielded dissatisfaction, undermined morale, and contributed to the general malaise that affected prisons.

Law Reform Proposals. In many jurisdictions, sentencing and parole release were simply considered unfair and all of the other criticisms—too much discretion, the lack of standards, disparities, discrimination, ineffective treatment programs—were seen as symptoms. The solution offered was often the establishment of specific, published criteria for sentencing, the more specific the better, as a means of removing discretion from the system. From 1969 to 1976, a series of books appeared that proposed development of sentencing standards: several of these were widely read and much discussed. Among these were Norval Morris's *The Future of Imprisonment* (1974), Andrew von Hirsch's *Doing Justice* (1976), Judge Marvin Frankel's *Criminal Sentences* (1972), and Kenneth Culp Davis's *Discretionary Justice* (1969).

Crime Control. Crime rates, as reported in the F.B.I's *Uniform Crime Reports*, increased throughout the 1970s and many blamed this in part on the ineffectiveness and inefficiency of the criminal justice system. Fairly or not, judges and parole boards were accused of coddling criminals and extending undue leniency. Another criticism was that the system of "bark and bite" sentencing, in which judges announced severe sentences that prisoners seldom served, reduced the deterrent effects of sentences. Coupled with these negative assertions were positive assertions that crime would be reduced through the deterrent and incapacitative effects of punishment if sentences were made more certain. A substantial body of research on incapacitation and deterrence has accumulated and has been summarized in a report by the National Academy of Sciences (Blumstein, Cohen, and Nagin 1978). Proposals for mandatory sentencing laws and for statutory determinate sentencing often were supported by conservative politicians and by law enforcement officials who saw them as devices for tying judges', and sometimes prosecutors', hands, and thereby increasing the chances that offenders would receive long sentences.

Philosophy. The 1970s witnessed substantial shifts in prevailing beliefs about the purposes of punishment. In the 1950s and 1960s, many who wrote and argued about criminal law and sentencing firmly subscribed to a belief in rehabilitation as the primary purpose of punishment. By the 1980s, few openly took that position and many writers expressly endorsed "retribution," "just deserts," or "modified just deserts" as a, or the, justification for punishment. This change in outlook affected both mainstream philosophy, in which there was a resurgence of interest in "rights theories" in which the interests and perspective of individuals are paramount, and the more specialized world of punishment philosophy. Andrew von Hirsch's influential *Doing Justice* (1976) used the term "just deserts" as shorthand for a retributive sentencing scheme and changed the national vocabulary of discussions of the purposes of punishment. Legislators and policy makers were infected by the change in outlook, as is shown by the California legislature's statutory adjuration that "the purpose of imprisonment is punishment," the Oregon legislature's declaration that just deserts should be the primary determinant of parole release decisions, and the Minnesota Sentencing Guidelines Commission's adoption of "modified just deserts" as the basis for its incarceration policies.

The developments described above had different significance in different jurisdictions and for different constituencies. Some of the developments, including concern about discrimination and rising crime rates, presumably acted directly on law-makers. Others acted indirectly by influencing the views of people who influence legislators. Correctional research, for example, is primarily of interest to researchers and correctional administrators; yet the findings of that research, by making researchers and administrators into proponents of change, or less zealous opponents, changed the legislative environment. Taken together, these developments created powerful coalitions of critics of indeterminacy. In many states, prisoners' groups and law enforcement officials, liberals and conservatives, civil rights groups and effective law enforcement groups, joined to oppose the existing sentencing system.

These coalitions, however, often were moved by entirely different premises and goals, and this raises a major difficulty for efforts to assess the effectiveness or success of sentencing law changes. Various law reform groups sought different, sometimes irreconcilable, objectives as a result of reforms that all supported.

What Kind of "Impacts?"

This is not an easy question. Whether an innovation can be said to succeed must depend on the criteria chosen for success. For many stat-

utes, success can be measured straightforwardly. If a new law requires mandatory automobile liability insurance or use of seat belts, measuring compliance is relatively easy; methods are available for finding out what proportion of people have insurance or use seat belts. With sentencing laws, it is sometimes more difficult. For some sorts of sentencing innovations, such as mandatory sentences, the real goal of legislation may be achieved merely by its passage. Legislators may wish to be seen to be "tough on crime" and may support laws that many of them realize are unlikely to be enforced.

Setting aside that special category, by what measure does one assess whether a sentencing innovation has worked? A number of measures might be employed:

1. has the innovation achieved the declared goals of its proponents—reduced sentencing disparity, increased sentencing severity, whatever;
2. has the new law been complied with literally—if, for example, it forbids plea bargaining of certain charges, has plea bargaining stopped; if it requires three-year prison sentences for persons convicted of robbery, have those sentences actually been imposed;
3. has the innovation achieved those goals that are conceptually implied in the legislation, whether reduction of discrimination in sentencing outcomes, reduction in the extent of sentencing disparities, increased severity, more use of alternative sentencing resources;
4. has the innovation affected the volume or nature of crime by increasing the deterrent or incapacitative efficacy of sanctioning;
5. has the innovation affected the processing of cases and the operations of the courts and other personnel, including prosecutors, defense lawyers, probation officers, judges, and sometimes policemen.

In this monograph, the effects of sentencing changes on crime rates are not assessed, for three reasons. First, a number of major assessments of these impacts have been completed by others and are readily available. Second, the technical issues implicated by efforts to assess deterrent and incapacitative effects are numerous and complex and require a different degree of technical difficulty than this monograph aims for. Third, not much can usefully be said about crime control impacts because most of the sentencing impact evaluations do not investigate them.

The reason why this monograph does not discuss innovations' "success" in terms of whether they achieved their proponents' goals is different. That is not a useful inquiry for a number of reasons. First, there may be no available authoritative source from which the proponents' goals can be ascertained. Second, the "authoritative" sources may be disingenuous, ambiguous, or contradictory; legislators often try to "make a record" to support an interpretation of a law in a way they prefer but which they failed to persuade their legislative colleagues to adopt. Third, different proponents may have had different goals. In many jurisdictions, liberals supported law changes because they hoped to make sentencing more fair and less severe and conservatives supported the same changes because they hoped to make sentencing more consistent (less room for leniency) and more severe. Whichever result occurs, one set of proponents' goals will be frustrated.

This monograph summarizes the evidence concerning the following general sentencing reform impacts:

1. impacts on sentencing patterns;
2. impacts on sentencing severity;
3. impacts on disparity;
4. impacts on court processing, including guilty plea and trial rates and case processing time;
5. impacts on court procedures, including plea bargaining practices.

Limitations of the Impact Evaluation Literature

Although a complete bibliography on modern sentencing reforms would be lengthy, the credible bases for developing generalizations about the consequences of sentencing innovations are few in number and subject to important methodological limitations.

Sparseness of the Literature. One of the most striking aspects of the social science literature on sentencing, especially in light of the enormous volume of reform activity of the last decade, is its size. It is tiny. Although many agencies of government routinely collect statistics for managerial purposes, these are seldom collected with the needs of impact evaluations in mind, and can seldom be more than suggestive. Deliberate special-purpose impact evaluations are required if generalizations concerning impact are to be offered with some confidence. Yet, of the many sentencing reforms since 1975, only the enactment of California's determinate sentencing law in 1976 precipitated the funding and conduct of a significant number of impact evaluations. Much more commonly when major

changes were initiated, no formal independent evaluation was undertaken, or if one was, it was of limited duration and scope. For example, no major independent evaluation has reported on the operation of presumptive sentencing guidelines in the three jurisdictions where they have been promulgated by sentencing commissions. Even in the case of Minnesota's sentencing guidelines, probably the single best known sentencing reform initiative in the United States and, outside North America, of the United States, was not independently evaluated. Fortunately the former director of the Minnesota Sentencing Guidelines Commission has completed and published a series of ambitious, highly competent, and surprisingly open-minded in-house evaluations.

Evaluations of other sentencing innovations have also been few in number. Mandatory sentencing laws, for example, though in effect in forty-nine states, have been seriously evaluated in only four jurisdictions—New York, Massachusetts, Michigan, and Florida. Determinate sentencing laws that abolished parole and established sentencing standards have given rise to major evaluations only in California and North Carolina, notwithstanding that at least nine states have adopted such systems.

For purposes of this monograph, the scantness is no great problem. What is important is the potential of sentencing reforms to achieve certain results and, when it can be demonstrated that those results are obtainable sometimes, under some circumstances, that may be all one needs to know.

Research Designs. Most of the impact evaluations use a "before-after" research design, which is one of the weakest available. When the "before" period extends, say, six months or a year from the date of implementation of an innovation, and the "after" period extends six months or a year after, it is difficult to know what to make of apparent differences in behavior or sentencing outcomes during the two periods.

A before-after study may fail to recognize long-term trends. Sentencing may have been changing gradually but systematically over an extended term and a before-after comparison may miss the trend altogether and see the change between the two periods as the result of a legal change. A before-after study may mislead because behavior during either period, or both, may not be representative of normal behavior. Decision-makers may, for example, consciously decide to act according to the new system before it formally takes effect, thereby making the before-after contrast look less substantial than it was. Conversely, there may be a gradual phase-in period during which decision-makers learn about, come to understand, and adapt to a new system. Or there may be a period of resistance to the new system that wanes as time passes. In any

of these cases, behavior during the first six months or year after a change takes effect may be very different from behavior thereafter.

Most of the sentencing reform impact evaluations are simple before-after studies, often with relatively short time periods under consideration, and this necessarily limits the confidence with which their findings can be declaimed. However, until the 1970s, there were few impact evaluations available and many of these were little more than impressionistic descriptions offered by advocates of programs. Thus, while much of the available research uses before-after designs, the current research is more reliable than what preceded it, and future research will be better still.

Sample Selection. Another serious difficulty with a number of the sentencing reform impact evaluations concerns the "sample selection" problem. The samples of cases examined in studies of felony sentencing often come from cases that have already entered the felony courts. To the extent that a changed sentencing system alters pre-indictment or pre-arraignment charging or bargaining patterns, the mix of cases entering the felony courts after its initiation may be significantly different from those entering before. The solution to this problem is, in theory, simple. Begin data analysis and sample selection with arrests or complaints and follow cases from that point through the system to sentencing. This theoretically easy answer, in practice, is seldom practicable. Research budgets and schedules often preclude comprehensive long-term data collection and analysis. Waiting for arrests to penetrate entire systems may require delays that cannot be accommodated. And, even if these constraints are not insuperable, the non-integration of official records systems can create logistical barriers to tracking cases that are, as a practical matter, more than researchers can manage.

Sample selection affects some evaluations more than others, but it is not a trivial problem: a considerable number of impact evaluations indicate that changes in felony sentencing produced changes in pre-arraignment charging and bargaining practices.

The Maturation Problem. The problems with the "before-after" research design aggravate the problem of evaluating an innovation before it has fully been implemented. Just as there is evidence that "pre" periods may not be representative of practices before the innovation was seriously contemplated, because behavior changes in anticipation of the new regime, so behavior immediately after implementation of the change may be unrepresentative of what happens twelve or twenty-four months later. Practitioners must learn how to use the new systems. They must deal with grandfathered cases that arose in the old system but are being resolved under the new one, and for a time must sometimes simultaneously handle parallel sets of grandfathered cases under the old rules and new cases

under the new rules. They must form a view as to whether the new system is to be taken seriously and, if it is, whether it is to be generally complied with or systematically circumvented. All of these processes happen during the early months of implementation and it is likely that a new equilibrium will have been established twelve or twenty-four months after implementation. Whether the experience during months one to six is an adequate proxy for the experience during months twenty-four to thirty obviously will vary from place to place but certainly in many cases the two will differ substantially.

What to Make of Research Limitations? The limitations summarized above limit the confidence with which any specific conclusion of most individual studies can be urged. Certainly they create a need to try to verify tentative conclusions from multiple sources whenever possible. This monograph does not devote substantial attention to details of research design and resulting limitations. That has been done by others, elsewhere, as to much of the research discussed here. The approach taken here is to deal in broad research conclusions, especially where those conclusions are repeated from study to study.

Legal Change from a Distance

There is an over-riding analytical problem affecting all research on sentencing reform impacts. It is a classic chicken and egg problem and concerns the question of whether behavior after the implementation of a major sentencing law change should be seen as the consequence of that change or, along with the change, as the consequence of underlying changes in political attitudes, ideology, social values, and culture. California illustrates the problem. Some of the impact evaluations of California's determinate sentencing law seemed to show that sentencing severity increased after the new law took effect. These studies, however, were simple before-after studies and when one research team looked at sentencing outcomes over a longer period, including several periods before the change and several after, it became apparent that there was a long-term trend toward increasing severity and it significantly pre-dated the statutory change. That may suggest that both the preexisting trend and the law change were symptomatic of cultural, normative, or political changes in California and that the sentencing patterns after implementation would have happened in any event. That doesn't mean that they would have happened in exactly the same way or affected the same people, but that in broad outline sentencing would have continued to become more severe in California. The same underlying dynamic may apply in jurisdictions across the country. If so, it greatly undermines the sense of efforts to identify the impacts of change. This sort of analysis should not

be pushed too far or it ends in nihilism, determinism, or both, but its cautions cannot be ignored when considering the effects of legal change.

With the ground now cleared of caveats and explanations, it is time to turn to the impacts of sentencing reforms. Immediately following the last chapter is a glossary of sentencing reform terms. Chapter two considers plea bargaining bans and rules.

Chapter 2

Plea Bargaining Bans and Rules

Plea bargaining isn't sentencing. However, the prosecutor is the gatekeeper to the courts. He determines what charges will be filed and against whom. While the desirability of plea bargaining in theory remains a matter of controversy, in practice, and as a matter of constitutional law, it has been endorsed by the U.S. Supreme Court. Defendants are entitled to rely on an offer that induces a guilty plea and the judge must accept the bargain or permit the defendant to reconsider whether to plead guilty (*Santobello v. New York*, 404 U.S. 257 [1971]). The Supreme Court has also held that the prosecutor's charging decisions, including decisions to file additional charges against a defendant who refuses to accept a proposed plea bargain, are not subject to review by the courts (*Bordenkircher v. Hayes*, 434 U.S. 357 [1978]). These powers give the prosecutor immense influence over sentencing. Especially under recent sentencing innovations, including mandatory sentencing laws and detailed presumptive sentencing guidelines, like Minnesota's and Washington's, the prosecutor's discretion over charging decisions is tantamount to sentencing discretion. As will be seen in the chapters dealing with mandatory sentencing laws and presumptive sentencing guidelines, prosecutors use that discretion to manipulate sentencing outcomes.

Because the relevant scholarly literature has not grown significantly since a comprehensive review of plea bargaining evaluations was completed in 1982 (Cohen and Tonry 1983), and because the impact of plea bargaining on sentencing innovations is discussed in the chapters that follow, this chapter offers but a brief summary of major research findings.

There have been three major studies of plea bargaining bans, and three minor ones. One major evaluation concerns Alaska and two Michigan. The most comprehensive evaluation considers the impact of the 1975 decision by the Attorney General of Alaska to forbid plea bargaining throughout the state (Rubinstein, Clarke, and White 1980). Simultaneous with the passage of a law mandating prison sentences for persons convicted of possession of a firearm during the commission of a felony, the Wayne County, Michigan, prosecutor forbade bargaining over the firearms charges. The impact of that ban was considered in a comprehensive evaluation of the impact of the mandatory firearms law (Heumann and Loftin 1979; Loftin, Heumann, and McDowall 1983). The third major plea bargaining study investigated the effects of a ban on charge bargains in drug sale cases in pseudonymous "Hampton County," Michigan (Church 1976).

An early assessment of the effects of a ban on one form of plea bargaining by a midwestern prosecutor showed that the ban was entirely effective but resulted simply in a shift to a different form of plea bargaining (Iowa Law Review 1975). Because of the interaction between prosecutorial discretion and mandatory sentencing laws, the Rockefeller Drug Laws in New York included prohibitions on some forms of charge bargaining. Plea bargaining was therefore discussed as part of the comprehensive evaluation of the drug laws' impact (Joint Committee . . . 1978). Finally, the only plea bargaining ban evaluation not covered in the earlier review (Cohen and Tonry 1983) assessed the imposition in 1975 of "rather severe restrictions on the use of pretrial agreements [in the Coast Guard justice system that]. . . amounted to the virtual elimination of plea bargaining" (Call, England, and Talarico 1983, p. 352).

A number of generalizations can be derived from these evaluations. Plea bargaining can be substantially controlled if the chief prosecutor wishes to do so and establishes internal reviews and management systems that effectively monitor the behavior of assistant prosecutors. When only one form of plea bargaining is prohibited, there is a strong tendency for judges and lawyers to establish alternative bargaining systems. When effective controls are established, there is a tendency toward increased rates of dismissal or diversion of persons charged with minor offenses in order to avoid what participants perceive as unduly harsh sentences. Defendants continue to plead guilty at customary rates when plea bargaining has been banned. Finally, assistant prosecutors in several studies apparently preferred working in a system having little or no plea bargaining whereas many defense lawyers disliked the new regimes.

Varieties of Plea Bargaining

A little background on plea bargaining may be in order. Several forms of plea bargaining are generally distinguished.

In *charge bargaining*, the prosecution agrees to dismiss some charges in exchange for the defendant's agreement to plead guilty to other charges.

In *horizontal charge bargaining*, the prosecution drops some of a group of comparable charges. For example, if the defendant is charged with four burglaries, the prosecution may agree to dismiss three charges if the defendant pleads guilty to the fourth.

In *vertical charge bargaining*, the prosecution drops a more serious charge, such as armed robbery, if the defendant pleads guilty to a less serious charge, such as simple robbery or theft.

In *sentence bargaining*, the prosecution agrees that the defendant will receive a specified sentence if the defendant pleads guilty. Some sentence bargains are vaguer than this. The defendant receives no assurance of a specific sentence; the prosecutor simply agrees to recommend, or weaker still, not to oppose, a particular sentence.

As noted earlier, defendants are entitled to the benefit of any bargain, as a matter of constitutional law. This means that the defendant must be allowed to withdraw a guilty plea if the judge refuses to accept the bargain. As a practical matter, however, many judges tend to acquiesce in plea bargains to which both sides have agreed.

The Effectiveness of Bans

It may be important to distinguish between plea bargains and charging concessions or dismissals based on good faith assessments by prosecutors concerning evidentiary considerations or the strength of the prosecution's case. Even in the most well-managed prosecution system, most people would want prosecutors to retain discretion to dismiss charges that they conclude are inappropriate or not provable and would want to distinguish these decisions, difficult as they may be to isolate and identify, from plea bargaining.

Considerable evidence is available that prosecution offices that wish to limit or eliminate plea bargaining, or certain forms of plea bargaining, can do so. The Alaska evaluators concluded that "plea bargaining *as an institution* was clearly curtailed" (Rubinstein, Clarke, and White 1980, p. 31; emphasis in original). This is especially dramatic given that sentence

bargaining was routinely practiced in Alaska before the ban took effect. The conclusion was supported both by a statistical analysis of case processing before and after the ban took effect (see Rubinstein, Clarke, and White 1980, table II-1), and by an extensive set of interviews with defense lawyers, prosecutors, and judges. Interview respondents "agreed with the statistical finding that sentence bargaining had been essentially terminated" (p. 93).

A similar conclusion was reached in the evaluation of the abolition of plea bargaining in the Coast Guard, on the basis of statistical analyses of cases disposed during the periods three years before and three years after the effective date (Call, England, and Talarico 1983, p. 354).

The "Hampton County" prosecutor's prohibition of charge concessions in drug sale cases was nearly entirely effective. For cases charged and disposed of before the rule took effect, 81 percent were disposed of by means of guilty pleas to reduced charges. Of those cases resolved in 1974 or later, when the ban was in effect, 90 percent of convictions resulted from guilty pleas to the original charge and 10 percent from trial convictions; there were no guilty pleas to reduced charges (Church 1976, table 1). A similar finding emerged in the Iowa Law Review study of "Black Hawk County" (Iowa Law Review 1975). Finally, in the study of a partial plea bargaining ban in conjunction with the Michigan mandatory firearms law, Heumann and Loftin concluded that "the interview and quantitative data lent qualified support to a conclusion that in fact the Prosecutor was successful in obtaining the compliance of his subordinates" (1979, p. 402). Most observers indicate that the Rockefeller Drug Law's plea bargaining ban was widely ignored.

Those bans that were comprehensive, like Alaska's and the Coast Guard's, apparently achieved high levels of compliance, notwithstanding widespread belief that the operation of the courts would grind to a halt without plea bargaining. The findings from the two Michigan studies and the Iowa Law Review study, however, are more equivocal because in the case of those partial bans, as will be seen in the next section, other forms of consensual disposition of charges emerged.

Adaptations to Plea Bargaining Bans and Rules

There is considerable evidence that partial bans on plea bargaining have resulted in accommodative responses by assistant prosecutors, defense lawyers, and judges that enable them to carry on business as usual. An early evaluation of a ban of charge bargains found that the ban was entirely effective but that lawyers simply shifted to a form of sentence bargaining (Iowa Law Review 1975). For the first eight months after the Alaska Attorney General's ban on plea bargaining took effect, prosecu-

tors in Fairbanks, where sentence bargaining had been prevalent, shifted to charge bargaining. This was eventually stopped when the local district attorney prohibited charge bargaining (Rubinstein, Clarke, and White 1980, p. 235).

In response to the "Hampton County," Michigan prosecutor's ban on charge bargaining in drug sale cases, sentence bargaining, including judicial participation, took its place: "roughly half the bench would make some form of pre-plea sentence commitment in [plea bargaining ban] policy cases—a sizable shift given former practices and strong system norms against judicial participation in plea bargaining" (Church 1976, p. 387). Something similar happened in Wayne County when the prosecutor forbade charge bargaining in connection with the mandatory sentencing law. Assistant prosecutors largely adhered to the office policy forbidding charge bargains. The ban was, however, circumvented by means of "waiver trials" in which trial judges explicitly indicated in advance to defense counsel that they would acquit the defendant on the gun charge. In a variation of the waiver trial, the judges would consider every possible way to avoid convicting on the firearms charge or on the underlying felony (the mandatory sentencing law did not apply to misdemeanor convictions). Finally, for more serious cases in which a prison sentence would be imposed in any case, many judges simply reduced the intended sentence by two years and then added the mandatory two years, thereby nullifying the mandatory sentencing law (Heumann and Loftin 1979).

Thus there is considerable evidence that partial bans on plea bargaining tend to result in accommodative responses consisting of shifts to other consensual means of case disposition.

Diversion and Sentencing Severity

Most of the evaluations concluded that plea bargaining bans resulted in a tendency toward early dismissal of minor cases and either no increase, or a slight increase, in sentencing severity for the remaining cases.

The evaluation of the Coast Guard ban noted that it had no effect on dismissal rates or on sentencing severity (Call, England, and Talarico 1983). However, several of the studies concluded that the plea bargaining bans produced a small trend toward earlier dismissal of cases in order to avoid the bans' inflexibility, and to increases in sanctioning severity especially in respect of minor offenses by inexperienced offenders. Both of these conclusions were reached by the Alaska evaluation (Rubinstein, Clarke, and White 1980). The "Hampton County" study concluded that judicial dismissal rates increased significantly after the ban took effect (Church 1976, table 2; Cohen and Tonry 1983, p. 330), and did not consider sentencing severity. The Wayne County evaluation concluded that

dismissal rates for relatively minor offenses ("other assaults") increased substantially after the ban took effect (Heumann and Loftin 1979, table 3) and that sentencing severity increased somewhat for most offenses (Loftin, Heumann, and McDowall 1983). It should be noted that it is difficult to disentangle sentencing severity effects in both the Wayne County and the New York evaluations because of the interaction between plea bargaining bans and mandatory sentencing laws.

Backlogs and Trial Demands

It has often been hypothesized that a ban on plea bargaining would substantially disrupt the operation of the criminal courts. Eighty-five to 95 percent of criminal cases in most jurisdictions are disposed of by means of guilty pleas. One might expect a defendant to demand some concession in exchange for waiver of the constitutional right to trial. The hypothesis is often made that, without guilty pleas, defendants would simply refuse to cooperate and trial rates would greatly increase, case backlogs would grow, and average case processing times would lengthen. With the exception of New York's Rockefeller drug laws, none of the hypothesized adverse effects occurred. Under the New York law, trial rates tripled (from 6 percent to 17 percent of dispositions), and average case processing time doubled (from 172 days in 1973 to 351 days in 1976) (Joint Committee ... 1978, pp. 104-5).

The Alaska evaluation concluded that defendants continued to plead guilty at about the same rates as before. Trial rates increased slightly, but the absolute number of trials remained manageable. Case processing times decreased (Rubinstein, Clarke and White 1980). The Coast Guard study also found no effect of the plea bargaining ban on guilty plea rates (Call, England, and Talarico 1983). The "Hampton County" evaluation found that trial rates increased slightly (Church 1976, table 1), and the Wayne County evaluation found that trial rates increased significantly for "felonious assaults"; this was the category of cases for which "waiver trials" were used as a device for circumventing application of the mandatory sentence that would result from the prosecutor's refusal to dismiss the firearms charge (Heumann and Loftin 1979, table 4). Somewhat improbably, the Wayne County evaluation also concluded that case processing time declined substantially after the combined mandatory sentencing law/plea bargaining ban took effect (Heumann and Loftin 1979, table 3 and p. 409), but there is reason to suspect that this conclusion may not be valid (see Cohen and Tonry 1983, pp. 335-37).

Participants' Reactions

Two of the plea bargaining studies attempted to find out what judges and lawyers thought about the bans. The basic conclusions of the "Hampton County" and Alaska evaluations are opposite—the ban apparently worked in Alaska and was circumvented in Hampton County, and yet there are striking similarities in the ways lawyers reacted to the two reforms. Prosecutors tended to approve the bans and to prefer working under them both because it made them feel more professional ("bargaining is probably inherently inconsistent with the job. I was spending probably one-third of my time arguing with defense attorneys . . . I'm a trial attorney, and that's what I'm supposed to do.") (Rubinstein, Clarke and White 1980, p. 46) and because "the policy makes my job a lot easier" (Church 1976, p. 388).

Defense lawyers were generally dissatisfied. The basis of dissatisfaction varied with the nature of defense practice. Most defense lawyers stressed the importance of plea bargaining as a tool for obtaining substantive justice by means of sentences tailored to fit the circumstances of individual cases. However, "attorneys generally conceded that a fundamental source of their distaste for the no-reduction policy was indeed the difficulties it caused them in dealing with clients" (Church 1976, p. 392). The primary inconvenience to retained counsel was that plea bargaining became more ambiguous and it was more difficult to convince the defendant who was pleading guilty that he would receive something of value for the lawyer's fee.

The Alaska ban had different impacts on public defenders, private counsel paid through a union legal services program, and the rest of the defense bar. Public defenders felt obliged to prepare seriously to defend persons charged with serious crimes or likely to receive long sentences. Scarce resources can be spread only so far and the low severity, minor-record defendant may have suffered in consequence. Before the ban, such defendants could be dealt with expeditiously by means of a sentence bargain to a nonincarcerative sentence. After the ban, public defenders lacked the resources to defend minor offenders vigorously.

The private defense bar also suffered, for lawyers could not easily demonstrate to clients that their efforts had produced a benefit. Yet the economics of private defense practice often requires high-volume turnover of cases and makes it difficult to file motions, prepare for trial, and vigorously represent all clients in all cases.

Only lawyers paid by the union legal services program and their clients may have benefitted. Paid on an hourly basis at prevailing market

rates, these lawyers could devote as much time to each case as the case required and possibly could gain clients some advantage from a full defense (Rubinstein, Clarke, and White 1980, pp. 36-42).

Chapter 3

Mandatory Sentencing Laws

Mandatory sentencing laws have been American's most popular sentencing innovation. By 1983, forty-nine of the fifty states had adopted mandatory sentencing laws for offenses other than murder or drunk driving (Shane-DuBow, Brown, and Olson 1985, table 30). Most apply to drug offenses, felonies involving firearms, or felonies committed by persons who have previous felony convictions.

The attractiveness of mandatory sentencing laws is not difficult to understand. They are usually targeted on especially disturbing behaviors, such as large-scale drug sales, or especially unattractive characters, such as repeat violent offenders or people who use guns in violent crimes. In the case of firearms offenses, mandatory laws allow the state to adopt a Janus-like posture; to frown on law-defying villains who use firearms for criminal purposes and to smile on law-abiding citizens who use firearms for legitimate purposes. In a nation in which most approaches to control of gun use are politically impracticable, mandatory sentencing laws are a mechanism for attempting to deter illegal gun use and encourage offenders to use less lethal weapons.

Mandatory sentencing laws command support from politicians and the general public. There is a powerful appeal to the proposition that anyone who commits the target crime goes to prison. As one Michigan prosecutor promised on billboards and bumperstickers, "One With a Gun Gets You Two."

Although the uninitiated citizen might reasonably believe that under a mandatory sentencing law anyone who commits the target offense will

receive the mandated sentence, the reality is more complicated. Actually, the only people who are subject to the mandated sentence are those who are *convicted* of the target offense. This platitude means that the sentencing policy is only as mandatory as police, prosecutors, and judges choose to make it. The people who operate the criminal justice system generally find mandatory sentencing laws too inflexible for their taste and take steps to avoid what they consider unduly harsh, and therefore unjust, sentences in individual cases. And, frequently, the mandatory sentencing law is simply ignored. For example, in Minnesota in 1981, of persons convicted of weapons offenses to which a mandatory minimum applied, only 76.5 percent actually received prison sentences (Knapp 1984a, p. 28).

Research on mandatory sentencing laws reveals a number of avoidance strategies. Boston police avoided application of a 1975 Massachusetts law calling for mandatory one-year sentences for persons convicted of carrying a gun by decreasing the number of arrests made for that offense and increasing (by 120 percent between 1974 and 1976) the number of weapons seizures without arrest (Carlson 1982). Prosecutors often avoid application of mandatory sentencing laws simply by filing charges for different, but roughly comparable, offenses that are not subject to mandatory sentences. Judges too can circumvent such laws. Detroit judges sidestepped a 1977 law requiring a two-year sentence for persons convicted of possession of a firearm in the commission of a felony by acquitting defendants of the gun charge (even though the evidence would support a conviction) or decreasing the sentence they would otherwise impose by two years to offset the mandatory two-year term (Heumann and Loftin 1979).

There has been considerable research on the operation of mandatory sentencing laws and, taken together, it supports the following generalizations:

1. lawyers and judges will take steps to avoid application of laws they consider unduly harsh;
2. dismissal rates typically increase at early stages of the criminal justice process after implementation of mandatory laws as practitioners attempt to shield some defendants from the law's reach;
3. defendants whose cases are not dismissed or diverted make more vigorous efforts to avoid conviction and delay sentencing;
4. defendants who are convicted of the target offense are often sentenced more severely than they would be in the absence of the mandatory law;

5. because declines in conviction rates for those arrested tend to offset increases in imprisonment rates for those convicted, the overall probability that defendants will be incarcerated remains about the same after enactment of a mandatory sentence law.

The research evidence concerning the operation of mandatory sentencing laws comes primarily from six studies. Two concern the operation of the 1977 Michigan law requiring imposition of a two-year mandatory prison sentence on persons convicted of possession of a gun during commission of a felony (Loftin and McDowall 1981; Bynum 1982). Two concern Massachusetts's law requiring a one-year prison sentence for persons convicted of unlawful carrying of a firearm (Beha 1977; Rossman et al. 1979). The last concerns the "Rockefeller Drug Law" which required mandatory prison sentences for persons convicted of a variety of drug felonies (Joint Committee . . . 1978). This chapter summarizes these studies and their key findings and then comments on what they teach about mandatory sentencing laws.

Although crime control effects of sentencing changes are generally not discussed in this monograph, several studies of mandatory sentencing warrant mention. Several studies of the Massachusetts firearms law concluded that it did deter the use of firearms in violent crimes (e.g., Pierce and Bowers 1981). However, studies of mandatory sentencing laws for firearms offenses in Michigan (Loftin, Heumann, and McDowall 1983) and Florida (Loftin and McDowall 1984) concluded that no discernible effect on the level of crime could be attributed to the mandatory sentencing law. The Rockefeller Drug Law evaluation also found no demonstrable impact of that law on drug use or crime in New York (Joint Committee . . . 1978).

The Rockefeller Drug Laws in New York

The "Rockefeller Drug Law" took effect in New York on September 1, 1973. It prescribed severe and mandatory prison sentences for narcotics offenses and included selective statutory limits on plea bargaining. A major evaluation of the New York law (Joint Committee . . . 1978) focused primarily on the effects of the drug laws on drug use and drug related crime, and only to a lesser extent on case processing. The study was based primarily on analyses of official record data routinely collected by public agencies. The key findings were these:

1. drug felony arrests, indictment rates, and conviction rates all declined after the law took effect;

2. for those who were convicted, however, the likelihood of being imprisoned and the average length of prison terms increased;
3. the two preceding patterns cancelled each other out and the likelihood that a person arrested for a drug felony would be imprisoned was the same—11 percent—after the law took effect as before;
4. because defendants struggled to avoid the mandatory sentences, the proportion of drug felony dispositions resulting from trials tripled between 1973 and 1976 and the average time required for processing of a single case doubled.

Table 3-1 shows case processing patterns for drug felony cases in New York during the period 1972-1976. Looking horizontally across table 3-1 it can be seen that the percentage of drug felony arrests resulting in indictments declined steadily from 1972, before the law took effect, to the first half of 1976 from 39.1 percent to 25.4 percent. Similarly, the likelihood of conviction, given indictment, declined from 87.3 percent in 1972 to 79.3 percent in the first half of 1976. Of those defendants, however, who were not winnowed out earlier, the likelihood that a person convicted of a drug felony would be incarcerated increased from 33.8 percent in 1972 to 54.8 percent in 1976. The interpretation conventionally put on

Table 3-1

Drug Felony Processing in New York State

	1972	1973[a]	1974	1975	1976 (January-June)
Arrests	19,269	15,594	17,670	15,941	8,166
Indictments	7,528	5,969	5,791	4,283	2,073
(% of Arrests)	(39.1)	(38.3)	(32.8)	(26.9)	(25.4)
Indictments disposed	6,911	5,580	3,939	3,989	2,173
Convictions	6,033	4,739	3,085	3,147	1,724
(% of dispositions)	(87.3)	(84.9)	(78.3)	(78.9)	(79.3)
Prison and jail sentences	2,039	1,555	1,074	1,369	945
(% of Convictions)	(33.8)	(32.8)	(34.8)	(43.5)	(54.8)
(% of Arrests)	(10.6)	(10.0)	(6.1)	(8.6)	(11.6)

Source: Joint Committee (1978: Tables 19, 24, 27, 29).
[a]The new drug law went into effect September 1, 1973.

these data is that defense lawyers and prosecutors made vigorous efforts to avoid application of the mandatory sentences in cases in which they viewed those sentences as being too harsh and that the remaining cases were dealt with harshly as the law dictated.

For those cases that were not winnowed out, defendants were prepared to struggle vigorously to prevent imposition of the mandatory penalties. Thus, the percentage of drug felonies in New York City disposed of after a trial rose from 6 percent in 1972 to 17 percent in the first six months of 1976 (Joint Committee . . . 1978, p. 104). In other words, many fewer defendants pled guilty and the trial rate tripled. During the period January 1, 1974 to June 30, 1976 the trial rate for all class A dispositions was 23.4 percent; for all class A-II dispositions the trial rate was 34.6 percent. No doubt as a consequence of the increased trial rates, it "took between ten and fifteen times as much court time to dispose of a case by trial as by plea" and the average case processing time increased from 172 days in the last four months of 1973 to 351 days in the first six months of 1976. Backlogs rose commensurately notwithstanding the creation of 31 additional criminal courts in New York City for handling of drug prosecutions (Joint Committee . . . 1978, tables 33-35 and p. 105).

Sentencing severity increased substantially for defendants who were eventually convicted. Only three percent of sentenced drug felons received minimum sentences of more than three years under the old law between 1972 and 1974. Under the new law the use of long minimums increased to 22 percent. The likelihood that a person convicted of a drug felony would receive an incarcerative sentence increased in New York State from 33.8 percent in 1972, before the new law took effect, to 54.8 percent in the first six months of 1976 (Joint Committee . . . 1978, pp. 99-103).

The broad pattern of findings in the New York study, while more stark in New York than in other mandatory sentencing jurisdictions that have been evaluated, recurs throughout the impact evaluations—efforts are made to prevent application of the mandatory sentencing law on offenders for whom the lawyers consider the sentence too severe, and for those who remain, application of the new sentencing law increases the severity of sanction imposed. In New York, in any case, that combination of impacts was more than the system could absorb and many key features of the law were repealed in mid-1976.

Massachusetts's Bartley-Fox Amendment

Massachusetts's Bartley-Fox Amendment required imposition of a one-year mandatory minimum prison sentence, without suspension, furlough, or parole, for anyone convicted of unlawful carrying of an un-

licensed firearm. An offender need not have committed any other crime: the Massachusetts law thus was different from many mandatory sentencing firearms laws which require imposition of a minimum prison sentence for the use or possession of a firearm in the commission of a felony.

Two major evaluations of the Massachusetts Gun Law were conducted (Beha 1977; Rossman et al. 1979). Some background on the Boston courts may make the following discussion more intelligible. The Boston Municipal Court is both a trial court and a preliminary hearing court. If a defendant is dissatisfied either with his conviction or his sentence, he may appeal to the Suffolk County Superior Court where he is entitled to a new and unbiased trial—what the law calls a trial *de novo*.

The Beha analysis is based primarily on comparisons of police and court records for the periods six months before and six months after the effective date of the mandatory sentencing law. The Rossman et al. study dealt with official records from 1974, 1975, and 1976 supplemented by interviews with police, lawyers, and court personnel. The primary findings were:

1. police altered their behavior in a variety of ways aimed at limiting the law's reach; they became more selective about whom to frisk; the absolute number of reports of gun incidents taking place out-of-doors decreased, which meant a concomitant decrease in arrests, and the number of weapons seized without arrest increased by 120 percent from 1974 to 1976 (Carlson 1982, p. 6, relying on Rossman et al. 1979);
2. the number of persons "absconding" increased substantially between the period before the law took effect and the period after (both studies);
3. outcomes favorable to defendants, including both dismissals and acquittals, increased significantly between the before and after periods (both studies);
4. of persons convicted of firearms carrying charges in Boston Municipal Court, appeal rates increased radically (Beha 1977, table 2); in 1974, 21 percent of Municipal Court convictions were appealed to the Superior Court and by 1976 that rate had increased to 94 percent (Rossman et al. 1979);
5. the percentage of the defendants who entirely avoided a conviction rose from 53.5 percent in 1974 to 80 percent in 1976 (Carlson 1982, p. 10, relying on Rossman et al. 1979);

6. of that residuum of offenders who were finally convicted, the probability of receiving an incarcerative sentence increased from 23 percent to 100 percent (Carlson, p. 8, relying on Rossman et al. 1979).

Thus the broad patterns of findings for the Rockefeller Drug Law Evaluation carry over to Massachusetts—more early dismissals, more protracted proceedings, increased sentencing severity for those finally convicted.

The Michigan Felony Firearms Statute

The Michigan Felony Firearm Statute created a new offense of possessing a firearm while engaging in a felony and specified a two-year mandatory prison sentence that could not be suspended or shortened by release on parole and that must be served consecutively to a sentence imposed for the underlying felony. The law took effect on January 1, 1977 and, because the Wayne County prosecutor banned charge bargaining in firearms cases, and took measures to enforce that ban, one would have thought that the likelihood of circumvention would have been less than was experienced in New York and Massachusetts.

There has been one major evaluation of the Michigan law which gave rise to a number of related publications (Heumann and Loftin 1979; Loftin and McDowall 1981; Loftin, Heumann, and McDowall 1983). Several other articles concerning the Michigan gun law have been published and one of these (Bynum 1982) also discusses empirical data.

The Bynum study (1982) graphically demonstrates how prosecutors control the use of mandatory sentencing laws. Drawing on a sample of cases from a statewide data set collected during the course of a sentencing guidelines project, Bynum identified 426 cases that, from records, involved robberies involving firearms that were committed after January 1, 1977 and were therefore eligible for prosecution under the felony firearms statute. In only 65 percent of the eligible cases was the firearms charge filed. More indicative, however, of prosecutorial manipulation of mandatory sentencing laws by means of their control over charging was the finding that in some courts firearms charges were filed in 100 percent of the eligible cases and in other courts firearms charges were filed in none of the eligible cases (Bynum 1982, table 4.1). However, Heumann and Loftin in their examination of case records to determine the existence and extent of undercharging found that the gun law charge had been made in 96 percent of the eligible cases in Wayne County (1979, p. 407).

Heumann and Loftin observed a strong tendency in Wayne County toward early dismissal of charges other than on the merits. Their inquiry

focused on three offenses which were relatively common—felonious assault, "other assault," and armed robbery. Armed robbery means in Wayne County what it means most places. "Felonious assaults" tend to arise from "disputes among acquaintances or relatives and are, by conventional standards, less predatory than armed robbery. . . ." "Other assaults" is an intermediate category of "assault with intent to. . . ." offenses. These three categories offered a severity continuum. Most armed robberies would generally be perceived as serious crimes. Many felonious assaults would commonly be regarded as impulsive and expressive and less serious then armed robbery. Other assaults are more heterogeneous.

Felonious assault disposition patterns did not change under the mandatory law. There was some increase in early dismissal of armed robbery charges and a substantial increase in the rate of early dismissals of "other assault" charges. These findings are consistent with the hypothesis that efforts will be made to avoid application of harsh sentencing laws to defendants for whom lawyers and judges feel that they are inappropriately severe: "other assault" was the offense category in which the greatest ambiguities about culpability were likely to exist.

The probabilities of conviction differed after implementation depending on the offense at issue. Consistently with the Massachusetts findings that mandatory sentences reduce the probability of convictions, Loftin and his colleagues concluded that conviction probabilities declined for felonious assault and armed robbery (Loftin, Heumann, and McDowall 1983, p. 295).

Loftin and his colleagues assessed the impacts of the Felony Firearm Statute on sentencing severity in two ways. Using fairly sophisticated quantitative methods, they concluded that the statute did not generally increase the probability that prison sentences would be imposed, but that, for those receiving prison sentences, it did increase the expected lengths of sentences for some offenses (Loftin, Heumann, and McDowall 1983, pp. 297-98). Using simpler tabular analyses in an earlier article, they concluded that, overall, the percentage of defendants vulnerable to the firearms law who were incarcerated did not change markedly in Wayne County after implementation of the new law (Heumann and Loftin 1979). As table 3-2 indicates, the probability of receiving a prison sentence, given filing of the charge, increased slightly for felonious assault and other assault and decreased slightly for armed robbery. The probability of incarceration given conviction also did not change markedly for felonious assault or armed robbery but did change for "other assault" and increased from 57 percent prior to implementation of the firearm law to 82 percent afterwards. This resulted in part from the substantial shift toward

Table 3-2

Disposition of Original Charges in Wayne County, Michigan, by Offense Type and Time Period

	N	Dismissed at/ Before Pretrial (%)	Dismissed or Acquitted After Pretrial (%)	Convicted/No Prison (%)	Some Prison (%)	Total (%)
Felonious Assault						
Before[a]	145	24	31	31	14	100
After[b]	39	26	26	31	18	101
Other Assault						
Before	240	12	24	28	37	101
After	53	26	24	9	41	102
Armed Robbery						
Before	471	13	19	4	64	100
After	136	22	17	2	60	101

Source: Cohen and Tonry 1983, tables 7-10, adapted from Heumann and Loftin 1979, table 3.
Note: The totals do not always sum to 100 percent because of rounding.
[a]Offense committed before January 1, 1977, and case disposed between July 1, 1976, and June 30, 1977.
[b]Offense committed and case disposed between January 1, 1977, and June 30, 1977.

early dismissal of "other assault" charges reducing the residuum of cases to be sentenced from 65 percent of all cases to 50 percent.

Finally, trial rates remained roughly comparable before and after implementation except for the least serious category of offenses, "felonious assaults," for which the percentage of cases resolved at trial increased from 16 percent of cases to 41 percent of cases (Heumann and Loftin 1979, table 4). This is explained by Heumann and Loftin in terms of an innovative adaptive response, the "waiver trial." Either by agreement or by expectation, the judge would convict the defendant of a misdemeanor, rather than the charged felony (which made the firearm law inapplicable because it specified a two-year add-on following conviction of a *felony*) or would simply, with the prosecutor's acquiescence, acquit

the defendant on the firearms charge. Either approach eliminated the mandatory sentence threat. A third mechanism for nullifying the mandatory sentencing law in cases in which imprisonment would be ordered in any case was to decrease the sentence that otherwise would have been imposed in respect of the underlying felony by two years and then add the two years back on the basis of the firearm law (Heumann and Loftin 1979, pp. 416-24).

Conclusion

For a variety of reasons, the Massachusetts, Michigan, and New York laws are especially good case studies in the operation of mandatory sentencing laws. Many such laws are on the books but exist simply as part of a larger statutory backdrop before which the drama of crime and punishment takes place. In these three instances, however, for differing reasons, vigorous and highly publicized efforts were made to make the mandatory sentencing law stick. In New York, amidst enormous publicity and massive media attention, the legislature established 31 new courts, including creation of additional judges, construction of new courtroom space, and provision of supporting personnel and resources, and expressly forbade some kinds of plea bargaining in an effort to assure that the mandatory sentences were imposed. In Massachusetts, while the statute did not address plea bargaining, it expressly forbade "diversion in the form of continuance without a finding or filing of cases," both devices used in the Boston Municipal Court for disposition of cases other than on the merits. (Filing is a practice in which cases are left open with no expectation that they will ever be closed; continuance without finding leaves the case open in anticipation of eventual dismissal if the defendant avoids further trouble.) In Michigan, while the statute did not address plea bargaining, the Wayne County prosecutor established and enforced a ban on plea bargaining in cases coming within the operation of the mandatory sentencing law.

Thus, in all three states, the new laws were accompanied by evidence of seriousness of purpose. If mandatory sentencing laws are to operate as their supporters hope they will, the experience in these three states provides a good test of the realism of those hopes.

These hopes are unrealistic. Discouraging findings appear in the evaluations of all three states' experience. The probability that a person who is arrested will be imprisoned does not generally increase, although sentencing severities tend to increase for those who are convicted. In New York, in Massachusetts, and in Michigan in respect of felonious assault charges, trial rates increased substantially with attendant delays in case processing.

These findings suggest that mandatory sentencing laws are not an especially effective way to achieve certainty and predictability in sentencing. To the extent that they prescribe sanctions more severe than lawyers and judges believe appropriate, they can be, and are, circumvented. For serious criminal charges, the mandatory sentence laws are often redundant in that offenders are, in any case, likely to receive prison sentences longer than those mandated by statute. For less serious cases, mandatory sentencing laws tend to be arbitrary; they result either in increased rates of dismissal or diversion of some defendants to avoid application of the statute or occasionally result in sentencing of "marginal" offenders in ways that most parties involved consider unduly harsh. Thus the evidence simply does not demonstrate that mandatory sentences "work."

Chapter 4

Voluntary Sentencing Guidelines

Voluntary sentencing guidelines were among the earliest of the sentencing innovations of the seventies. They were based on "implicit sentencing policies" revealed by empirical research on past sentencing practices and were seen as a method for reducing sentencing disparities (Wilkins et al. 1978). Although there was a boom in voluntary guidelines activity in the late seventies and early eighties, it has subsided.

The guidelines are "voluntary" because judges are not required to comply with them. Nothing happens if a judge ignores the guidelines altogether or imposes a sentence not specified in the applicable guidelines. The guidelines lack statutory force or mandate and generally are not adopted as court rules. As a result, a defendant has no legal right to be sentenced according to the guidelines and has no legal right to appeal a sentence that is contrary to the guidelines.

The earliest voluntary guidelines projects were efforts to apply methods and experience derived from development of parole guidelines. Consequently, before discussing the major research on voluntary sentencing guidelines, some comments on parole guidelines may be in order.

For most of this century, both parole and sentencing were premised on the desirability of individualized decision-making in which a judge or parole board would consider the unique circumstances of each individual case and then, acting within wide limits of discretion, would make the most appropriate decision. In the early 1970s, however, the U.S. Parole Commission elected to set standards for its release decisions, based on empirical research designed to uncover the Parole Board's "implicit

policies," and thereby to structure its own discretion by means of parole guidelines (Gottfredson, Wilkins, and Hoffman 1978).

The parole guidelines offered promise as a means for reducing sentencing disparities. They offered a means for making decision-makers accountable by setting presumptions for their decisions and then requiring them to explain why decisions were made contrary to the presumption. They made policy explicit and thereby helped to lessen the apprehension that decision-making was capricious or idiosyncratic. Both the problems with individualized decision-making and the potential benefits of guidelines appeared to some to be equally applicable to sentencing and, in 1974, the National Institute of Justice initiated a multi-year project to study the feasibility of empirically-based guidelines for sentencing. In the first instance, support was provided to the researchers who had been instrumental in development of the parole guidelines to test the feasibility of sentencing guidelines. The feasibility study was undertaken in the state courts in Vermont and in the Denver, Colorado courts (for a report, see Wilkins et al. 1978).

There are, however, a number of crucial differences between parole and sentencing decision-making and these have confounded the effort to transfer parole guidelines approaches to sentencing. One difference is that parole boards have one crucial decision to make—how long should a prisoner be held in prison before release? Judges, by contrast, have two critical decisions to make—should a convicted defendant be imprisoned and, if so, for how long? After deciding to impose a prison sentence, trial judges often have to make decisions concerning both minimum and maximum sentences.

A second significant difference between parole and sentencing is that, within constraints created by applicable minimum or maximum sentences imposed by the judge or by statute, the parole board can set a release date to its liking. Judges, however, are part of a "work group" consisting primarily of the prosecutor, the defense lawyer, and the judge, but influenced by probation officers and police. As a consequence, judges in some ways are not as independent as parole boards. The judges' independence is limited by plea bargains, prevailing notions of "going rates," and the need to maintain relatively smooth functioning of the courts in cooperation with other key actors.

A third critical difference between parole and sentencing is that parole boards are better able to monitor the decisions made by examiners and establish management controls and appeal procedures to assure that guidelines are applied properly. The organized judiciary lacks similar managerial controls over individual trial judges and, certainly in the

1970s, there was no reason to expect appellate sentence review to serve as an effective monitoring mechanism.

The combination of these differences between parole and sentencing had two major ramifications. First, the research effort to identify "implicit policies" governing decisions was much more complex for sentencing than for parole. Second, in those early days, the prospects that the Denver judiciary would agree to establish sentencing guidelines as presumptive decision-making standards was so slight as not to be considered; this meant that the resulting guidelines had to be "voluntary." There was some hope on the part of the guidelines' developers that the guidelines might have a logical or moral force that would incline judges to comply with them. The notion was that judges would welcome information on "going rates" and, for "ordinary" cases, might be inclined to set sentences in accordance with those going rates. At the very least, guidelines should help identify, and thereby lessen the frequency of, aberrantly lenient or severe sentences.

After the initial feasibility study was completed in Denver (Vermont fell by the wayside), the federal government funded a second generation of guidelines projects in criminal courts in Denver, Newark, New Jersey, Chicago, and Phoenix. The aim in these jurisdictions was to build on the feasibility study and develop and implement voluntary sentencing guidelines. (See Kress [1980] for accounts of those four implementation projects.) Parallel projects were undertaken, but under local direction, in Philadelphia and the State of New Jersey. At about the same time, the National Institute of Justice supported a third generation of voluntary sentencing guidelines projects, the "Multijurisdictional Sentencing Guidelines Program." Unlike the first two generations, each of which dealt with sentencing in a single city or county, the goal of this third generation of projects was to determine the feasibility of voluntary sentencing guidelines on a statewide basis. In each of the two participating states, Maryland and Florida, research on sentencing practices was undertaken in a number of demographically and culturally diverse counties with the aim of developing a single set of guidelines for use in all of the counties. The rationale was that if such diverse counties could share a single set of guidelines, there was no reason why guidelines would not be a viable sentencing reform mechanism on a statewide basis.

Between 1975 and 1980, voluntary sentencing guidelines were the single most energetically pursued sentencing innovation. By 1980, one count showed that voluntary guidelines had been developed or were underway in a majority of states (Criminal Courts Technical Assistance Project 1980). A more recent survey described sentencing guidelines activities in 35 states by 1983 (Carrow et al. 1985b, figs. A-1, A-2).

Eventually a sizeable number of statewide sentencing guideline systems were developed. At one time or another, Florida, Maryland, Utah, Massachusetts, Michigan, Wisconsin, New Jersey, and Rhode Island were numbered among the states that adopted statewide systems of voluntary sentencing guidelines (Shane-DuBow, Brown, and Olsen 1985).

Whether voluntary sentencing guidelines will be retained in many jurisdictions remains to be seen. The auguries are not good. Most of the original guidelines systems have been abandoned or supplanted. The second generation of federally-supported guidelines, in Denver, Chicago, Phoenix, and Newark, New Jersey, were all displaced by enactment of statutory determinate or presumptive sentencing laws. The initial set of statewide sentencing guidelines in New Jersey also was displaced by a presumptive sentencing law. The statewide experimental guidelines in Florida and Maryland survived, however, and have been institutionalized. Guideline systems have recently been adopted, after long development periods, in Massachusetts, Michigan, Utah, Rhode Island, and Wisconsin (Shane-DuBow, Brown, and Olsen 1985).

Notwithstanding the volume of voluntary guidelines activity in the United States, there is but a scant literature on the impact of those guidelines and that literature suggests that voluntary sentencing guidelines have had relatively little impact on sentencing outcomes or court processes. The National Center for State Courts conducted an assessment of the development and impact of voluntary guidelines, in Denver, Chicago, Newark, and Phoenix (Rich et al. 1982). Abt Associates (Carrow et al. 1985a) conducted an evaluation of the federally-supported "multijurisdictional" voluntary sentencing guidelines in Florida and Maryland. In broad outline, both evaluations concluded that the guidelines had few significant impacts on sentencing outcomes or sentencing processes in the courts studied.

One of the ironies of evaluation research is that results are often available too late to influence policy-making. The evaluation of the first guidelines projects (Rich et al. 1982) was not available even in a draft version until 1981, after the development of the "multijurisdictional" guidelines projects was far advanced. Had the evaluation been available earlier, it might have contributed importantly to the shaping of those projects. The evaluation is discussed at some length in the recent report of the National Academy of Sciences Panel on Sentencing Research (Blumstein et al. 1983) and, so, only the broadest conclusions are summarized here.

Rich and his colleagues identified major methodological and analytical defects in the development of the Denver guidelines. The evaluation concluded that the Denver guidelines did not have an important influence

on judicial decisions whether to incarcerate and that compliance rates for lengths for prison terms were disappointingly low. Moreover, the report concluded that it was "highly unlikely that sentencing guidelines affected the overall severity of sentences in either Denver or Philadelphia." They also found that the guidelines failed to reduce sentencing disparity. The overall conclusion:

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

The impacts in Florida and Maryland were not much greater. Concerning Florida, Carrow and her colleagues (1985a, pp. 275-76) concluded:

> "Sentences were *less* uniform . . . during the test-year than during the year before. Thus, guidelines clearly did not reduce unwarranted sentence disparity. . . . There were substantial differences in sentence severity across the sites. . . . The Florida guidelines did not begin to mitigate differences in local sentencing practice." (emphasis in original)

In Maryland, the findings were mixed. The researchers found evidence that sentencing disparities were significantly reduced in Baltimore during the first year of guidelines use, but "no changes in sentencing variation were detected in the other three Maryland test sites" (Carrow et al. 1985a, p. 14).

Using a combination of quantitative analyses, interviews, and participant observation, the evaluators investigated the effects of the guidelines on sentencing disparity and compliance rates, whether written reasons were provided for departures, and patterns of adaptive responses. Interviews revealed that many judges in the urban county in Florida rarely referred to the guidelines, especially in plea bargained cases, and that while most Maryland judges claimed to use the guidelines, they often did so after they had decided what sentence to impose. Evaluators found that the guideline scoring sheets were often not completed. In Florida, score sheets were filed only for 57 percent of the eligible burglary cases; the score sheet filing rate in Maryland was 70 percent.

Nominal compliance with the guidelines was not high. Although the largest majority of cases was sentenced within the guidelines, 78 percent in Florida and 68 percent in Maryland, the guidelines ranges were so wide

Table 4-1

Sentencing Matrix Offenses Against Persons Offender Score

Offense Score	0	1	2	3	4	5	6+
1	P	P	3M-2Y	3M-2Y	3M-2Y	3M-2Y	2Y-5Y
2	P-1Y	3M-2Y	3M-2Y	3M-2Y	3M-2Y	1Y-4Y	3Y-8Y
3	P-2Y	1Y-5Y	3Y-8Y	3Y-8Y	3Y-8Y	3Y-8Y	5Y-10Y
4	P-3Y	3Y-8Y	3Y-8Y	4Y-10Y	4Y-10Y	4Y-10Y	5Y-10Y
5	P-4Y	3Y-9Y	4Y-9Y	4Y-10Y	4Y-10Y	6Y-12Y	8Y-14Y
6	3Y-6Y	3Y-10Y	4Y-10Y	5Y-10Y	5Y-10Y	8Y-15Y	10Y-20Y
7	3Y-7Y	4Y-10Y	5Y-10Y	5Y-10Y	5Y-10Y	9Y-15Y	12Y-20Y
8	4Y-8Y	5Y-10Y	6Y-12Y	6Y-12Y	6Y-12Y	10Y-15Y	12Y-25Y
9	4Y-10Y	6Y-12Y	8Y-15Y	8Y-15Y	8Y-16Y	15Y-30Y	25Y-L
10	8Y-15Y	8Y-15Y	8Y-16Y	8Y-16Y	10Y-25Y	15Y-30Y	25Y-L
11	9Y-16Y	9Y-16Y	9Y-16Y	15Y-30Y	17Y-30Y	17Y-30Y	25Y-L
12	12Y-20Y	12Y-20Y	15Y-30Y	18Y-35Y	18Y-35Y	25Y-L	25Y-L
13	14Y-22Y	14Y-22Y	18Y-35Y	20Y-40Y	20Y-40Y	25Y-L	30Y-L

Source: Carrow et al. 1985b, p. E-12.
P = Probation
M = Months
Y = Years
L = Life

that that could happen as easily by coincidence as by purpose. Table 4-1 shows the revised Maryland grid for *minimum* sentences for violent offenses. Compared with any of the parole guidelines or presumptive guidelines grids shown in other chapters, these ranges are enormous. Finally, judges departing from guidelines in Florida complied with the requirement that they provide written reasons in 80 percent of such cases; only 50 percent of extra-guidelines sentences in Maryland were accompanied by explanations.

The question naturally arises as to why the Maryland and Florida guidelines achieved so little. Although Carrow and her colleagues identify a variety of political and public relations strategies that might help a guidelines project achieve acceptance, the central problem seems simply to have been that compliance with the guidelines was voluntary.

Overall, Carrow and her colleagues were not optimistic about the viability of voluntary sentencing guidelines:

> "it seems that purely voluntary systems are unlikely to achieve the kinds of compliance needed to make guidelines a

meaningful approach to sentencing reform. Strong requirements for compliance with the basic conditions of guidelines are necessary, whether that be through court rule or legislative mandate. In addition . . . without some capacity to review the validity of reasons for extra-guidelines sentences . . ., guidelines ultimately offer relatively little as a means of structuring judicial discretion." (Carrow et al. 1985a, p. 172)

Of course, the two evaluations described here should not, by themselves, be taken as conclusive evidence that voluntary sentencing guidelines cannot reduce sentencing disparities or serve as a means for structuring sentencing and increasing judicial accountability. After all, the Maryland guidelines did appear to reduce sentencing disparities in Baltimore. Research in Philadelphia on voluntary bail guidelines has also shown some successes in reducing bail disparities (Goldkamp and Gottfredson 1985). The evaluations are, however, reason to be skeptical about the long-term promise of voluntary sentencing guidelines.

In retrospect, however, the notion of voluntary guidelines was a good idea, well worth investigating; it simply did not work out as its proponents hoped. Voluntary sentencing guidelines served as a crucial intermediate step in the development of presumptive sentencing guidelines which offer the key features that voluntary guidelines lacked—a statutory mandate and appellate sentence review. Presumptive guidelines are discussed in the next chapter.

Chapter 5

The Sentencing Commission

To many observers, the story of sentencing reform in America is the Minnesota story. Minnesota combined two new ideas—the sentencing commission and presumptive sentencing guidelines—with an old idea, appellate sentence review. The Minnesota guidelines were principled, they incorporated ideals of racial, social, and sexual neutrality, they constituted a serious attack on sentencing disparities, and they were intended to alter Minnesota sentencing practices substantially. To the surprise of skeptics, they "worked." Trial judges adhered to the guidelines. Minnesota sentencing patterns shifted in the intended ways. Sentencing disparities were reduced. And, for the first time in the United States, a meaningful system of appellate sentence review developed.

Half a dozen other states now have sentencing commissions. In two states, Pennsylvania and Washington, sentencing commissions have promulgated guidelines. Commissions in Connecticut, New York, Maine, and South Carolina tried but failed; others are at work. In late 1984, the U.S. Congress enacted the Sentencing Reform Act of 1984 which established a federal sentencing commission; the seven commissioners were confirmed by the United States Senate in October 1985.

Here is how this chapter is organized. The first section summarizes the evolution of the sentencing commission, first as an idea and later as an institution. The second section describes the experience of the several states that have had sentencing commissions. The third section summarizes research on the commissions' guidelines. The last section comments on the future of the sentencing commission.

The Idea

The "sentencing commission model" incorporates three main elements—the sentencing commission, presumptive sentencing guidelines, and appellate sentence review. Each is an inseparable part of the Minnesota story. *The sentencing commission* was indispensable because it possessed the institutional capacity to develop fine-tuned sentencing standards of much greater subtlety and specificity than any legislature could. *Presumptive sentencing guidelines* provided a mechanism for expressing sentencing standards in a form that has more legal authority than voluntary guidelines, is less rigid than mandatory sentencing laws, and is much more specific than the maximum and minimum sentences specified by criminal law statutes. *Appellate sentence review* provided a mechanism for assuring that trial judges either imposed sentences that were consistent with the applicable guidelines or had adequate and acceptable reasons for imposing a different sentence.

The beauty of the sentencing commission model is its merger of the three elements. Appellate sentence review has been available in various jurisdictions, from time-to-time, throughout this century, and probably earlier. However, it seldom amounted to much, primarily because there was no substantive sentencing law. Most criminal statutes simply authorized maximum lawful sentences. If the maximum for robbery was fifteen years, there were no governing standards to guide a judge in deciding whether probation, five years, ten years, or fifteen years was the appropriate sentence to impose. By contrast, in most legal matters, when an appeal is taken from a trial judge's decision, the appellate court can look to the applicable statutes and case law for guidance in deciding whether the trial judge's decision was correct.

In most jurisdictions that have appellate sentence appeal, the scrutiny given to appealed sentences has been slight and doctrines of extreme deference to the trial judge have developed. It is hard to see what else could have happened. The long maximum sentences in indeterminate sentencing systems were intended to permit judges to individualize sentences. For an appellate judge to have reversed a sentence, in the absence of established standards for evaluating the appropriateness of sentences, would have seemed, and been, *ad hoc* and arbitrary.

The sentencing commission model changed that. The judge is supposed to impose a sentence consistent with the guidelines unless there is a good reason to do otherwise. This contrasts with "voluntary" guidelines from which there is no legal appeal. This is also what makes appellate sentence review feasible. There is no significant difference, in principle, between considering whether a trial judge rightly decided a question of

contract law, and considering whether a trial judge rightly decided to impose a sentence at odds with the applicable guidelines. In both instances, the appellate judges must consider the standard rule and any cases that apply or interpret it, and then decide whether the reasons given for the disputed decision are persuasive.

The sentencing commission model was first proposed by Marvin Frankel, then a federal district court judge, in a lecture given at the University of Cincinnati Law School, and later elaborated in a 1972 book, *Criminal Sentences—Law Without Order*. Judge Frankel's basic argument was that sentencing was "lawless" in that no substantive criteria existed to guide either the trial judge's sentence or the appellate judge's review of that sentence. Judge Frankel observed that legislatures are unlikely to be very good at developing detailed sentencing standards. Instead he urged creation of a special-purpose administrative agency that had the institutional capacity, and might develop an institutional competence, to establish substantive sentencing rules.

Shortly thereafter, a workshop at Yale Law School met over an extended period, under the auspices of the Guggenheim Foundation, and attempted to work out the details of Judge Frankel's proposal. The workshop generated a book (O'Donnell, Curtis, and Churgin 1977) that set forth a legislative proposal for creation of a sentencing commission. Slightly revised, the proposal was introduced in the 94th Congress by Senator Edward Kennedy as Senate Bill 2699. The sentencing commission legislation was reintroduced in subsequent congresses, initially as a separate sentencing commission bill, later as a part of the successive federal criminal code bills, and finally was enacted in October 1984 as part of the Sentencing Reform Act of 1984. At the time of writing, the members of the U.S. Sentencing Commission have been appointed, the senior staff has been hired, and the commission has set about its work.

However, ten years passed between the introduction of the first federal sentencing commission bill and the passage of the 1984 law. That first bill was the legislative prototype, but the operational prototype was in Minnesota.

The Experience

Minnesota, which had been one of the first jurisdictions to adopt parole guidelines, became the first jurisdiction to establish a sentencing commission. Minnesota's nine member part-time commission was created in 1978 and was directed to submit guidelines to the legislature on January 1, 1980. The Commission met regularly, conducted frequent public meetings, took its task seriously, and invested substantial energies

and resources in training practitioners in use of the guidelines. After implementation, an elaborate and intensive monitoring system was established.

The Minnesota Commission made a number of bold policy decisions. First, it decided to be "prescriptive" and explicitly to establish its own sentencing priorities; every other sentencing guidelines system to that date had purported to be "descriptive," to attempt to replicate existing sentencing patterns. Second, the Commission decided to de-emphasize imprisonment as a punishment for property offenders and to emphasize imprisonment for violent offenders; this was a major sentencing policy decision because research on past Minnesota sentencing patterns showed that repeat property offenders tended to go to prison and that first-time violent offenders tended not to. Third, in order to attack sentencing disparities, the Commission established very narrow sentencing ranges (for example 30-34 months, or 50-58 months) and to authorize departures from guideline ranges only when "substantial and compelling" reasons were present. Fourth, the Commission elected to adopt "Just Deserts" as the governing premise of its policies concerning who receives prison sentences. Fifth, the Commission chose to interpret an ambiguous statutory injunction that it take correctional resources into "substantial consideration" as a mandate that its guidelines not increase prison population beyond existing capacity constraints. This meant that the Commission had to make deliberate trade-offs in imprisonment policies. If the Commission decided to increase the lengths of prison terms for one group of offenders, it had also either to decrease prison terms for another group or to shift the "in/out" line and divert some group of prisoners from prison altogether. Sixth, the Commission forbade consideration at sentencing of many personal factors—such as education, employment, marital status, living arrangements—that many judges believed to be legitimate. This decision resulted from a policy that sentencing decisions not be based on factors that might directly or indirectly discriminate against minorities, women, or low income groups. A recent book by Kay Knapp (1985) provides a full account of the Commission's work.

The Minnesota Commission had a number of things going for it. It was blessed with an unusually talented staff. Its first chairman was actively involved in the Commission's work and, because she was politically knowledgeable and effective, was able to anticipate and avoid political problems that later overwhelmed commissions in other states. Key members were able both to represent the interests of their "constituencies," notably the judiciary and the prosecutors, and, later, to persuade their constituencies not to oppose the Commission and its product. The Commission early decided that its work would be an "open political process" in which the views, opinions, and concerns of the affected con-

stituencies and interest groups would be solicited. When the Commission elected to take principled positions or to undertake bold policy initiatives, it was able to test those decisions on the affected constituencies, to modify those decisions when opposition appeared intractable, and, once those constituencies were won over, to be relatively confident that they would not be seriously opposed before the legislature.

Minnesota's guidelines, which are set out as table 5-1, initially proved more successful than even the Commission anticipated. Rates of compliance with the guidelines were high. Relatively more violent offenders and relatively fewer property offenders went to prison. Disparities in prison sentences diminished. Prison populations remained under control.

Later there was backsliding; as time passed, sentencing patterns came more closely to resemble those that pre-existed the guidelines. Few would deny, however, that the Minnesota guidelines system has been a remarkable success with important long-term consequences. Before, however, discussing the guidelines' impact in detail, the remainder of this section offers capsule summaries of the sentencing commission experience in other states. Six states, Maine, Connecticut, New York, Pennsylvania, South Carolina, and Washington, illustrate the range of experience to date.

Maine

In June, 1983, the Maine Legislature created the Maine Sentencing Guidelines Commission and charged it to "make recommendations of sentencing guidelines" to the legislature. The Commission's primary recommendation in a 5-page report in November 1984 (Phillips 1984) was "that a new commission be created to continue the responsibilities of this commission." The Commission did not give a detailed explanation of why it had failed to develop guidelines.

The Maine Sentencing Guidelines Commission apparently suffered from a number of limitations. A sizeable number of its members apparently decided early on that Maine did not need sentencing guidelines; as a consequence, institutional momentum seems never to have developed. Most of the Maine Commission's nine part-time members had little prior knowledge of sentencing reform developments elsewhere. No full-time professional staff were appointed. State funding was insubstantial and outside funding was neither sought nor obtained. In January 1986, Maine's governor signed legislation to re-establish the Maine Commission. Whether its prospects of success will be any greater the second time around will be known only as events unfold.

Table 5-1

Minnesota Sentencing Guidelines Grid

Presumptive Sentence Lengths in Months

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

Offenders with nonimprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle *Possession of Marijuana*	I	12*	12*	12*	13	15	17	19 *18-20*
Theft Related Crimes ($250-$2500) *Aggravated Forgery ($250-$2500)*	II	12*	12*	13	15	17	19	21 *20-22*
Theft Crimes ($250-$2500)	III	12*	13	15	17	19 *18-20*	22 *21-23*	25 *24-26*
Nonresidential Burglary *Theft Crimes (over $2500)*	IV	12*	15	18	21	25 *24-26*	32 *30-34*	41 *37-45*
Residential Burglary *Simple Robbery*	V	18	23	27	30 *29-31*	38 *36-40*	46 *43-49*	54 *50-58*
Criminal Sexual Conduct, 2nd Degree (a) & (b) *Intrafamilial Sexual Abuse, 2nd Degree subd. 1(1)*	VI	21	26	30	34 *33-35*	44 *42-46*	54 *50-58*	65 *60-70*
Aggravated Robbery	VII	24 *23-25*	32 *30-34*	41 *38-44*	49 *45-53*	65 *60-70*	81 *75-87*	97 *90-104*
Criminal Sexual Conduct 1st Degree Assault, 1st Degree	VIII	43 *41-45*	54 *50-58*	65 *60-70*	76 *71-81*	95 *89-101*	113 *106-120*	132 *124-140*
Murder, 3rd Degree Murder, 2nd Degree (felony murder)	IX	105 *102-108*	119 *116-122*	127 *124-130*	149 *143-155*	176 *168-184*	205 *195-215*	230 *218-242*
Murder, 2nd Degree (with intent)	X	120 *116-124*	140 *133-147*	162 *153-171*	203 *192-214*	243 *231-255*	284 *270-298*	234 *309-339*

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

At the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation.

Presumptive commitment to state imprisonment.

*one year and one day

Source: Knapp 1984, p.2

Connecticut

The Connecticut legislature created a sentencing commission in 1979. The Commission undertook research on past sentencing practices and developed a "descriptive" sentencing grid based on that research. Rules were developed for departures and for the role of aggravating and mitigating circumstances. However, "[a]fter developing this sentencing guidelines system, the Sentencing Commission went on record stating that it was strongly *opposed* to the adoption of the sentencing guidelines system, but rather *recommended the replacement of the indeterminate sentencing system in Connecticut with a determinate sentencing scheme*" (emphasis in original) (Shane-DuBow, Brown, and Olson 1985, p. 48). The legislature heeded that advice and, effective July 1, 1981, abolished parole and established a statutory determinate sentencing system.

New York

Appointed in 1983, the New York State Committee on Sentencing Guidelines had a number of things going for it, including a larger budget and a larger staff than those of any other sentencing commission. The members of the Committee were sophisticated and many of them were well aware of developments in other jurisdictions. One member, Robert Morgenthau, had chaired a gubernatorial advisory committee that had in 1979 recommended that New York adopt the sentencing commission model. The staff director had worked in a major statewide sentencing guidelines project in an urban industrial state and the staff counsel was a veteran of political wars in New York. The New York Committee met regularly, and occasionally lengthily, and generated a substantial volume of proposals, staff papers, working drafts, and impact projections. A report setting out recommendations was presented to the New York legislature in April 1985; the report met with considerable hostility and was not approved.

The Committee's work had suffered throughout from political posturing and interest group politics. No consensus was reached about the goals or premises of the Committee's recommendations and the resulting *ad hoc* compromises pleased virtually no one. Robert Morgenthau, the Manhattan District Attorney, dissented from the Committee's report, thereby undermining its credibility and shattering any illusions that the Committee had reached consensus positions.

A *Newsday* feature on the New York experience captured the result: "[The Committee's] final report, in April, also drew contradictory complaints. It reduces mandatory minimums. It is too tough. It is too soft. It will lead to an explosion in prison populations. It won't do enough to reduce sentencing disparity" (Keeler 1985).

As of late-1985, the New York Sentencing Committee continued to exist and a few members continued to attend meetings. The staff director resigned much earlier as did the general counsel, who had succeeded him as director.

Pennsylvania

The Pennsylvania Commission on Sentencing was established in 1978 and began its work in April 1979. The Commission proposed guidelines to the legislature in January 1981, under a statutory provision by which the guidelines would take effect automatically six months later unless rejected in their entirety. They were rejected in March 1981 and the Commission was directed to revise and resubmit the guidelines, to make the sentencing standards more severe (in a variety of specified ways), and to increase judicial discretion under the guidelines. In numerous ways the Commission complied and the resulting guidelines were submitted to the legislature in January 1982 and took effect on July 22, 1982. (An article by Susan Martin [1983] describes the guideline development process in Pennsylvania.)

The Pennsylvania guidelines as effective in July 1982 are set out as table 5-2. Parole release has been retained in Pennsylvania and the guidelines accordingly prescribe ranges for minimum sentences; the judge retains full discretion over the maximum sentence and, of course, the parole board is not bound to release prisoners when the minimum sentence has been served.

For every offense, including misdemeanors, the guidelines specify three "ranges"—a normal range, an aggravated range, and a mitigated range. The judge may impose a sentence from within any of the three ranges and may do so for any reason, so long as he states a reason. The guidelines set no general criteria for imposition of aggravated or mitigated sentences, or for "departures" from the guidelines and no special findings of fact need be made. There are in addition no rules governing when consecutive sentences may be ordered.

Pennsylvania annually publishes statistical analyses of the guidelines' impact. Overall "compliance rates" are very high, but it is unclear what this means; the guidelines are so broad (for example, nine to thirty-six months) that substantial disparities can occur even within the guidelines, because judges can use the aggravated and mitigated ranges at will, and because no efforts have been made to account for the role of plea bargaining.

Pennsylvania only vaguely represents the "sentencing commission model." Because the guidelines concern only minimum sentences, there

Table 5-2

Pennsylvania Sentencing Guidelines

THE COURTS

Offense Gravity Score	Prior Record Score	Mininum Range*	Aggravated Minimum Range*	Mitigated Minimum Range*
10 Third Degree Murder**	0	48-120	Statutory Limit***	36-48
	1	54-120	Statutory Limit***	40-54
	2	60-120	Statutory Limit***	45-60
	3	72-120	Statutory Limit***	54-72
	4	84-120	Statutory Limit***	63-84
	5	96-120	Statutory Limit***	72-96
	6	102-120	Statutory Limit***	76-102
9 For example: Rape; Robbery inflicting serious bodily injury**	0	36-60	60-75	27-36
	1	42-66	66-82	31-42
	2	48-72	72-90	36-48
	3	54-78	78-97	40-54
	4	66-84	84-105	49-66
	5	72-90	90-112	54-72
	6	78-102	102-120	58-78
8 For Example: Kidnapping; Arson (Felony 1); Voluntary Manslaughter**	0	24-48	48-60	18-24
	1	30-54	54-68	22-30
	2	36-60	60-75	27-36
	3	42-66	66-82	32-42
	4	54-72	72-90	40-54
	5	60-78	78-98	45-60
	6	66-90	90-112	50-66
7 For example: Aggravated Assault causing serious bodily injury; Robbery threatening serious bodily injury**	0	8-12	12-18	4-8
	1	12-29	29-36	9-12
	2	17-34	34-42	12-17
	3	22-39	39-49	16-22
	4	33 49	49-61	25-33
	5	38-54	54-68	28-38
	6	43-64	64-80	32-43

*WEAPON ENHANCEMENT: At least 12 months and up to 24 months confinement must be added to the above lengths when a deadly weapon was used in the crime.

**These offenses are listed here for illustrative purposes only. Offense scores are given in Sec. 303.7.

***Statutory limit is defined as the longest minimum sentence permitted by law.

Table 5-2 (continued)

THE COURTS

Offense Gravity Score	Prior Record Score	Mininum Range*	Aggravated Minimum Range*	Mitigated Minimum Range*
6 For example: Robbery inflicting bodily injury; Theft by extortion (Felony III)**	0	4-12	12-18	2-4
	1	6-12	12-18	3-6
	2	8-12	12-18	4-8
	3	12-29	29-36	9-12
	4	23-34	34-42	17-23
	5	28-44	44-55	21-28
	6	33-49	49-61	25-33
5 For example: Criminal Mischief (Felony III); Theft by Unlawful Taking (Felony III); Theft by Receiving Stolen Property (Felony III); Bribery**	0	0-12	12-18	non-confinement
	1	3-12	12-18	1½-3
	2	5-12	12-18	2½-5
	3	8-12	12-18	4-8
	4	18-27	27-34	14-18
	5	21-30	30-38	16-21
	6	24-36	36-45	18-24
4 For Example: Theft by receiving stolen property, less than $2,000, by force or threat of force, or in breach of fiduciary obligation**	0	0-12	12-18	non-confinement
	1	0-12	12-18	non-confinement
	2	0-12	12-18	non-confinement
	3	5-12	12-18	2½-5
	4	8-12	12-18	4-8
	5	18-27	27-34	14-18
	6	21-30	30-38	16-21
3 Most Misdemeanor I's**	0	0-12	12-18	non-confinement
	1	0-12	12-18	non-confinement
	2	0-12	12-18	non-confinement
	3	0-12	12-18	non-confinement
	4	3-12	12-18	1½-3
	5	5-12	12-18	2½-5
	6	8-12	12-18	4-8

*WEAPON ENHANCEMENT: At least 12 months and up to 24 months confinement must be added to the above lengths when a deadly weapon was used in the crime.

**These offenses are listed here for illustrative purposes only. Offense scores are given in Sec. 303.7.

***Statutory limit is defined as the longest minimum sentence permitted by law.

Table 5-2 (continued)

THE COURTS

Offense Gravity Score	Prior Record Score	Mininum Range*	Aggravated Minimum Range*	Mitigated Minimum Range*
2 Most Misdemeanor II's**	0	0-12	Statutory Limit***	non-confinement
	1	0-12	Statutory Limit***	non-confinement
	2	0-12	Statutory Limit***	non-confinement
	3	0-12	Statutory Limit***	non-confinement
	4	0-12	Statutory Limit***	non-confinement
	5	2-12	Statutory Limit***	1-2
	6	5-12	Statutory Limit***	2½-5
1 Most Misdemeanor III's**	0	0-6	Statutory Limit***	non-confinement
	1	0-6	Statutory Limit***	non-confinement
	2	0-6	Statutory Limit***	non-confinement
	3	0-6	Statutory Limit***	non-confinement
	4	0-6	Statutory Limit***	non-confinement
	5	0-6	Statutory Limit***	non-confinement
	6	0-6	Statutory Limit***	non-confinement

*WEAPON ENHANCEMENT: At least 12 months and up to 24 months confinement must be added to the above lengths when a deadly weapon was used in the crime.

**These offenses are listed here for illustrative purposes only. Offense scores are given in Sec. 303.7.

***Statutory limit is defined as the longest minimum sentence permitted by law.

(Pa. B. Doc. No. 82-121. Filed January 22, 1982, 9:00 a.m.)

Source: PENNSYLVANIA BULLETIN, VOL. 12, NO. 4, SATURDAY, JANUARY 23, 1982

is no structural reason for appellate judges to take appellate sentence review seriously—the parole board makes release decisions and, if it chooses, can disregard idiosyncratic maximum sentences. Thus the parole board is the primary mechanism for review of maximum sentences. Only the appellate courts, however, can review minimum sentences and there is reason to be skeptical that they will do so in a meaningful way. More important, because the guideline ranges are broad, and because there are no rules governing when judges may depart from them, Pennsylvania appellate courts will have difficulty knowing the bases by which a sentence appeal can or should be evaluated. This is precisely the reason hypothesized above for the failure of meaningful appellate sentence review to develop in the United States. An interesting unpublished paper by a member of the Commission's research staff analyzes the sentence appeal case law and concludes that, to date, the courts have dealt primarily with procedural issues and have not dealt with the substantive bases of sentences (McCloskey 1985).

In fairness, the Pennsylvania Commission's initial, ultimately rejected, guidelines were considerably more ambitious than those that took effect. The original proposed guidelines had only a single relatively narrow guideline range, and provided rules on consecutive sentencing. In addition, the initial guidelines set out specific criteria for aggravation or mitigation of the guideline sentence (Pennsylvania Commission on Sentencing 1981). Each of these features disappeared from the final guidelines.

There appear to be a number of reasons for the Pennsylvania Commission's failure to establish meaningful guidelines. From one perspective, the legislature can be blamed for it passed a law calling for presumptive sentencing guidelines to operate in conjunction with parole and yet rejected the Commission's initial more meaningful guidelines.

During the period when the guidelines were being developed, the Pennsylvania Commission seems not to have jelled or to have developed a sense of collective mission. Several Commission members took little interest in the Commission's work and seldom appeared at meetings. Finally, little effort was apparently made, or success achieved, at obtaining genuine participation in the guidelines development process on the part of affected interests and constituencies. As a result, when the guidelines reached the legislature, the Commission had few allies or supporters and, in a law and order climate, did well to remain in existence (this summary relies heavily on Martin 1983).

South Carolina

The South Carolina Sentencing Guidelines Commission was appointed by the Governor of South Carolina in 1982, and somewhat later separate enabling legislation was passed. The Commission was chaired by a supreme court justice and its members included judges, legislators, and prosecutors. Sentencing guidelines were proposed to the legislature for adoption in 1985 but were rejected. To a considerable extent, this apparently resulted from the Commission's inability to gain support from the judiciary.

Washington

The one apparent success story, besides that in Minnesota, occurred in Washington State. Most of the Minnesota ingredients were present: a capable staff, an effective chairman, an adequate budget, achievement of a sense of joint mission among the commission's members, a comprehensive and principled approach to policy problems, and an acknowledgment of the need to make simple political compromises during development of the guidelines. When the proposed guidelines were submitted to the Washington legislature, they passed amidst relatively little controversy and have been in effect since July 1, 1984. A recent book by David Boerner (1985) describes Washington's guideline system.

The Washington guidelines, which are set out as table 5-3, resemble Minnesota's. Sentencing ranges are much narrower than those in Pennsylvania but are somewhat broader than those in Minnesota. The guidelines set out illustrative aggravating and mitigating circumstances and permit departures only, as in Minnesota, in the presence of "substantial and compelling" circumstances. Parole release has been abolished. As in Minnesota, the Commission decided to shift sentencing policy toward more incarceration of violent offenders and less incarceration of property offenders.

Finally, the Washington legislature had learned a number of lessons from the Minnesota experience and built these into the enabling legislation. Unlike the Minnesota guidelines, which apply only to felony sentences, the Washington guidelines apply to both felonies and misdemeanors. The Commission was directed to be sensitive to prison population capacity constraints and to promulgate statewide prosecutorial charging and bargaining guidelines. This last feature is a Washington original and resulted in part from the frequent observation that determinate sentencing in general and narrow guidelines ranges in particular increase the power of prosecutors. The Washington solution was to try to structure the discretion of the prosecutor.

Table 5-3

Washington Sentencing Guidelines Grid

SERIOUSNESS LEVEL	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XIV	Life Sentence without Parole/Death Penalty									
XIII	23y 4 m 240 - 320	24y 4m 250 - 333	25y 4m 261 - 347	26y 4m 271 - 361	27y 4m 281 - 374	28y 4m 291 - 388	30y 4m 312 - 416	32y 10m 338 - 450	36y 370 - 493	40y 411 - 548
XII	12y 123 - 164	13y 134 - 178	14y 144 - 192	15y 154 - 205	16y 165 - 219	17y 175 - 233	19y 195 - 260	21y 216 - 288	25y 257 - 342	29y 298 - 397
XI	6y 62 - 82	6y 9m 69 - 92	7y 6m 77 - 102	8y 3m 85 - 113	9y 93 - 123	9y 9m 100 - 133	12y 6m 129 - 171	13y 6m 139 - 185	15y 6m 159 - 212	17y 6m 180 - 240
X	5y 51 - 68	5y 6m 57 - 75	6y 62 - 82	6y 6m 67 - 89	7y 72 - 96	7y 6m 77 - 102	9y 6m 98 - 130	10y 6m 108 - 144	12y 6m 129 - 171	14y 6m 149 - 198
IX	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	5y 51 - 68	5y 6m 57 - 75	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144	12y 6m 129 - 171
VIII	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144
VII	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116
VI	13m 12+ - 14	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 6m 46 - 61	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102
V	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 41 - 54	5y 51 - 68	6y 62 - 82	7y 72 - 96
IV	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 2m 53 - 70	6y 2m 63 - 84
III	2m 1 - 3	5m 3 - 8	8m 4 - 12	11m 9 - 12	14m 12+ - 16	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 51 - 68
II	0 - 90 Days	4m 2 - 6	6m 3 - 9	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57
I	0 - 60 Days	0 - 90 Days	3m 2 - 5	4m 2 - 6	5m 3 - 8	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29

NOTE: Numbers represent presumptive sentence ranges in months. Midpoints are in bold type (y = years, m = months). 12+ equals one year and one day. For a few crimes, the presumptive sentences in the high offender score columns exceed the statutory maximums. In these cases, the statutory maximum applies.

Additional time added to the presumptive sentence if the offender was armed with a deadly weapon:

24 months (Rape 1, Robbery 1, Kidnapping 1) 18 months (Burglary 1) 12 months (Assault 2, Escape 1, Kidnapping 2, Commercial Burglary 2)

Source: State of Washington Sentencing Guidelines Commission 1985:7.

The preliminary evaluation of Washington's first year under guidelines suggests considerable successes: the shift toward imprisonment of violent offenders and away from imprisonment of property offenders is happening; compliance with the guidelines has been high. Trial rates have not increased.

* * * * *

The Minnesota and Washington experiences suggest that the combination of sentencing commissions and presumptive guidelines is a viable approach for achieving consistent and coherent jurisdiction-wide sentencing policies. However, the experiences in Maine, New York, Pennsylvania, and South Carolina counsel that the sentencing commission approach won't necessarily succeed. Six jurisdictions are too few to support any but the most tentative generalizations about success and failure. Still, it is clear that local legal and political cultures shape the environments in which the commissions work. Minnesota and Washington, for example, are both relatively homogeneous states with reform traditions. In neither state were criminal justice issues highly politicized. New York and Pennsylvania, by contrast, are heterogeneous states in which criminal justice issues are highly politicized and law-and-order sentiment is powerful. In some states, especially where trial judges are elected, judges may vigorously resist efforts to limit their discretion. Perhaps the only generalization that can be offered concerning political and legal culture is that the potential and the effectiveness of a sentencing commission will depend on how it addresses and accommodates constraints imposed by the local culture.

The Impacts of Commission Guidelines

This section summarizes the findings of the evaluations of the impact of sentencing commission-promulgated guidelines in Minnesota, Pennsylvania, and Washington. The Minnesota guidelines have been in effect since May 1, 1980, those in Pennsylvania since July 22, 1982, and those in Washington since July 1, 1984.

The staff of the Minnesota Commission prepared a series of major and exhaustive impact evaluations; the most recent was published in 1984 and covered the first three years' experience (Knapp 1984a, 1984b). One independent statistical analysis of Minnesota impact data has been published (Miethe and Moore 1985). The Pennsylvania Commission has published a series of sketchier statistical reports on sentencing in Pennsylvania and one article by members of its staff has been published (Pennsylvania Commission on Sentencing 1984, 1985; Kramer and Lubitz 1985). In addition, several unpublished papers have been presented at

academic meetings (Kramer, Lubitz, and Kempinen 1986; Kramer and Scirica 1985). Finally, Washington has undertaken a major in-house evaluation from which a preliminary report became available in November 1985 (Washington Sentencing Guidelines Commission 1985); a more comprehensive report was released in January 1986 (Washington Sentencing Guidelines Commission 1986).

A number of questions can be asked about the impacts of sentencing guidelines on sentencing patterns. Did judges comply with guidelines and to what extent? Were sentencing patterns under guidelines different from the patterns that existed before guidelines? Did sentences become more severe? Did disparities increase or decrease? What was the interaction between the guidelines and plea bargaining? Finally, were there important adverse effects of guidelines on the operation of the courts—did trial rates increase, case processing times increase, or the appellate courts become inundated by sentence appeals?

The following sections discuss these questions in sequence. To anticipate the conclusions:

1. all three guidelines systems achieved high compliance rates;
2. all three guidelines systems apparently succeeded in changing sentencing patterns;
3. the lengths of sentences received by imprisoned offenders increased in Pennsylvania and Minnesota (information is not yet available from Washington);
4. sentencing disparities apparently decreased in Minnesota and Pennsylvania during the first years of guidelines experience; in Minnesota there was slippage in the second and third years;
5. prosecutors in Minnesota have changed charging and bargaining practices in an effort to circumvent the guidelines, with some success, and there are indications that this may be happening in Pennyslvania and Washington;
6. in Minnesota, there were no significant increases in trial rates or case processing times under guidelines; sentence appeals were filed in only one percent of cases.

The findings of the evaluations are relatively clear. What is less clear is what they mean. For example, high rates of compliance with guidelines may mean that sentencing guidelines are successfully inducing judges and lawyers to defer to sentencing policies set by the sentencing commissions or they may mean that judges and lawyers are identifying the sentences

they wish to have imposed and are then assuring through bargains and charge dismissals that the defendant is convicted of an offense bearing the appropriate sentence. Similarly, an increase in sentence severity may result from promulgation of the guidelines or it may be the product of other causes. As findings are reviewed below, an effort is made to identify alternate explanations for evaluation findings.

Compliance Rates

All three sentencing commissions have achieved relatively high compliance rates. In the following discussion, "dispositional departure" is a sentence to state prison when the guidelines prescribe an "out" sentence or an "out" sentence when the guidelines prescribe state prison. A "durational departure" is a sentence for a term outside the applicable guideline range.

Minnesota. Compared with sentencing patterns in 1978, Minnesota sentencing patterns changed significantly after guidelines took effect and became more consistent. Minnesota's rate of dispositional departures increased slightly during the first 3 years of guidelines experience and departures were about evenly divided between upward and downward departures. Durational departure rates were stable; downward departures exceeded upward departures by two-to-one. Table 5-4 shows both kinds of departure rates during the first three years.

In 1981, 6.2 percent of Minnesota sentences were dispositional departures (3.1 percent upward; 3.1 percent downward). In 1982, 7.0 percent of sentences were dispositional departures (3.4 percent upward; 3.6 percent downward). In 1983, the dispositional departure rate had climbed to 8.9 percent (4.5 percent upward; 4.4 percent downward). Projected dispositional departures under the guidelines if they had been superimposed over 1978 sentences would have been 19.4 percent, suggesting that the guidelines significantly increased the consistency of sentencing. Looked at the other way round, in the first three years of Minnesota's experience with guidelines, the dispositional compliance rates were 93.8 percent, 93 percent, and 90.1 percent.

To some extent, the increased dispositional departure rates in 1982 and 1983 resulted from the anomaly that 75 defendants in 1982 and 111 defendants in 1983 requested to go to prison rather than receive nonprison sentences. The Minnesota Supreme Court has ruled that in many cases that request must be honored. These cases count as, and therefore inflate, aggravated departures.

These compliance figures are less impressive than first appears. Minnesota has very low imprisonment rates for persons convicted of

felonies. In 1978, before guidelines took effect, 20.4 percent of convicted felons received prison sentences. In 1981, imprisonment was the presumptive disposition in 15.0 percent of cases and the actual disposition in 15.0 percent of cases. In 1982 imprisonment was the presumptive disposition in 18.7 percent of cases and the actual disposition in 18.6 percent of cases. Thus non-imprisonment is the presumptive sentence in 80 to 85 percent of felony cases each year and it would take a very large shift toward greater severity in sentencing of persons convicted of less serious offenses to significantly alter dispositional compliance rates. Conversely, as many as a quarter of the presumptive incarceration offenders could receive non-prison sentences and affect the overall dispositional departure rate only by 3 to 5 percent.

Durational departure rates are also shown in table 5-4. There do not appear to be any clear patterns. No comparisons with pre-guidelines durational patterns are shown because the parole release decisions in 1978 were not easily compared with post-guidelines sentencing decisions.

Pennsylvania. The Pennsylvania guidelines have achieved much lower levels of dispositional or durational compliance than Minnesota's. Table 5-5 shows Pennsylvania dispositional data for 1983 and 1984. Even with the very wide guideline ranges that result when Pennsylvania's three

Table 5-4

Dispositional and Durational Departure Rates in Minnesota during the First Three Years under Sentencing Guidelines

		Dispositional Departures			
	Year	Total	Up	Down	# Cases
Pre-guidelines	1978	19.4%	12%	7.4%	4369
	1981	6.2	3.1	3.1	5500
	1982	7.0	3.4	3.6	6066
	1983	8.9	4.5	4.4	5562
		Durational Departures			
	Year	Total	Up	Down	# Cases
Pre-guidelines	1978	*	*	*	*
	1981	23.6%	7.9%	15.7%	827
	1982	20.4	6.6	13.8	1127
	1983	22.9	6.0	16.9	1124

Source: Knapp 1984, tables 2, 6, 8, 9, 13, 15; Knapp 1982, figure 3, p. 22.

Table 5-5

Dispositional Departure Rates in Pennsylvania in 1983 and 1984

Year	Departure Down	Mitigated Range	Standard	Aggravated Range	Aggravated Up
1983	12%	5%	80.5%	1%	1%
1984	12%	5.6%	78.5%	1.7%	2%

Source: Pennsylvania Commission on Sentencing 1984, figure I, table 1; Pennsylvania Commission on Sentencing 1985, figure G, table 6.
Note: Percentages do not total 100% due to rounding.

ranges are combined, Pennsylvania's dispositional departure rates of 13 percent in 1983 and 14 percent in 1984 are much higher than Minnesota's 6.2-8.9 percent in the first three years.

Table 5-6 shows Pennsylvania's durational departure rates of 7 percent in 1983 and in 1984. These appear lower than Minnesota's but probably nothing can be concluded from this. The effect of Pennsylvania's three wide ranges allows enormous scope for variation without departures. For example, the combined guideline range in Pennsylvania for a person convicted of an aggravated robbery who had previously been convicted of a robbery would be 9 to 36 months (Offense Level 6, Prior Record Score 3; mitigated range = 9-12 months, standard range = 12-29 months, aggravated range = 29-36 months). Under the Minnesota guidelines, the guideline range would be 30-34 months (Offense Level 7, Criminal History Score 1).

Even the modest Pennsylvania compliance rates must be considered with skepticism. These data are heavily influenced by high compliance rates for minor offenses. For example, of 25,694 sentences imposed in the one-year period covered by the Pennsylvania Commission's 1984 report, 6,987 of those cases, more than a quarter, fell in the category "crimes

Table 5-6

Durational Departure Rates in Pennsylvania in 1983 and 1984

Year	Departure Upward	Departure Down
1983	1%	6%
1984	2%	5%

Source: Pennsylvania Commission on Sentencing 1984, table 3; Pennsylvania Commission on Sentencing 1985, table 8.

Table 5-7

Compliance with Guideline Sentences Imposed in 1983 for Selected Offenses

Offense	N	Comply (%)	Above (%)	Below (%)
Aggravated assault	574	70	0	30
Arson	95	64	1	35
Burglary	2538	77	3	20
Criminal trespass	451	93	0	7
Drug felonies	872	80	2	18
Drug misdemeanors	646	100	0	0
Escape	99	40	0	60
Forgery	450	85	0	15
Involuntary deviate sexual intercourse	69	68	0	32
Race	75	76	4	20
Retail theft	611	84	1	15
Robbery	1020	83	5	12
Terroristic threats	130	92	0	8
Theft-felony	906	89	1	10
Weapons	454	81	1	18

Source: Kramer and Lubitz 1985, p. 490.

code misdemeanors" of which 97 percent resulted in sentences in the normal guideline range (the normal guideline range is 0-6 months); that single offense category therefore constitutes more than 25 percent of the statewide compliance with Pennsylvania's guidelines. Other misdemeanors totaling 3,143 sentences in 1984 experienced dispositional compliance rates ranging from 94 to 99 percent.

Further evidence of low levels of compliance in Pennsylvania is shown in a recent article by the executive and associate directors of the Pennsylvania Commission (Kramer and Lubitz 1985). Table 5-7, taken from that article, shows compliance rates in 1983 for selected offenses. "Compliance" in table 5-7 means imposition of any sentence from within the aggregate mitigated, standard, and aggravated ranges.

The offenses set out in table 5-7 (excepting drug misdemeanors) are generally felonies and therefore are comparable with the offenses, only felonies, that are affected by Minnesota's guidelines. Pennsylvania's level of compliance for felony sentences appears lower than Minnesota's even when the different widths of "compliant" guideline ranges is ignored.

Table 5-8

Statewide Conformity with Guidelines in Pennsylvania in 1983

Offense	Standard	Aggravated	Mitigated	Departure Up	Departure Down
Aggravated Assault (F2)	36%	4%	12%	2%	46%
Aggravated Assault (F3)	100	0	0	0	0
Aggravated Assault (M1)	70	1	10	0	19
Arson (F1)	13	0	10	0	77
Arson (F2)	62	0	11	5	22
Burglary (ogs* 7)	39	3	25	3	29
Burglary (ogs 6)	49	3	14	4	31
Burglary (ogs 5)	78	2	5	2	12
Retail Theft (F3)	62	2	9	1	25
Retail Theft (M1)	91	0	4	0	5
Robbery (F1)	48	6	10	15	25
Robbery (F2)	67	4	6	6	20
Robbery (F3)	85	1	4	2	17

Source: Pennsylvania Commission on Sentencing 1984, table 2.
*offense gravity scale

Compliance rates for aggravated assault, arson, burglary, drug felonies, rape, and robbery range from 64 percent to 83 percent.

Unfortunately, because of plea bargaining, even the weak evidence summarized above for compliance with Pennsylvania's guidelines may be overstated. Table 5-8, taken from the Pennsylvania Commission's 1983

report, shows guideline conformity rates for selected offenses.

The offenses shown are of sets of related offenses of variable severity and they exhibit certain common features. Mitigated departure rates are very high for persons convicted of the *most serious* offense of a class (Aggravated Assault—46 percent; Arson—77 percent; Burglary—29 percent; Retail Theft—25 percent; Robbery—25 percent). However, persons convicted of the *least serious* version of the offense tend to be sentenced from within the standard range (Aggravated Assault—70 percent: Arson—62 percent; Burglary—78 percent; Retail Theft—91 percent; Robbery—85 percent). These patterns support a number of hypotheses about variations in plea bargaining practices. In courts in which sentence bargaining is the norm, the parties may agree to conviction of the offense charged but with an understanding that the guideline sentence will be reduced substantially. This would explain the high downward departure rates for the most serious form of an offense. In charge bargaining courts, the parties may agree to conviction of a reduced charge and imposition of a sentence from within the standard range. This would explain high rates of sentences within the normal guidelines ranges for the least serious form of an offense. If these hypotheses are valid. one cannot conclude anything about compliance from the aggregate data. Whether these hypotheses are valid can be tested by participant observation research on plea bargaining in Pennsylvania.

Table 5-8 shows how high compliance rates can be compatible with extensive plea bargaining. Critics of sentencing guidelines have suggested that greater predictability allows the prosecutor increased power. Or, in jurisdictions in which plea bargaining is the norm, the specificity that accompanies determinate sentencing may allow bargaining to work backwards from the sentence to the offense. That is, counsel can agree on an appropriate sentence, locate it on the sentencing grid, and then reach agreement concerning the offense to which the defendant will plead guilty (there is evidence that something comparable sometimes happens under California's Determinate Sentencing Law: Casper, Brereton, and Neal 1983, p. 412).

Table 5-9 shows, for 1983, "sentence conformity" for the offenses "violations/firearms-loaded" and "violations/firearms-unloaded." Table 5-9 illustrates conformity patterns that may be artifacts of plea bargaining. The loaded firearms offense is more serious than the unloaded firearms offense. Of persons convicted of the more serious offense, only 30 percent received sentences from the standard range and 52 percent received departures below both the standard range and the mitigated range. This suggests that in courts where sentence bargaining is the prevalent pattern

Table 5-9

Firearms Offenses 1983 Sentencing Severity

	Number Sentenced	Standard Range	Aggravated Range	Mitigated Range	Departures Above	Departures Below
Violations/ Firearms-loaded	155	30%	1%	15%	1%	52%
Violations/ Firearms-unloaded	252	94%	1%	1%	2%	2%

Source: Pennsylvania Commission on Sentencing 1984, table 1.

of plea negotiation, counsel negotiated a below-guideline sentence in a majority of cases.

However, of persons convicted of unloaded firearms offenses, 94 percent were sentenced from within the standard range. That suggests that in many jurisdictions charge bargaining was the norm and defendants charged with "loaded firearms" violations pled guilty to the "unloaded firearms" offense and received the expected standard sentence.

Washington. Washington has relatively narrow guidelines, only one guideline range for each offense and offender, and a demanding standard for departures. Only 3.4 percent of sentences in the first 6 months of 1985 were "exceptional" sentences that satisfied the "substantial and compelling" test and therefore were "departures" (Washington Sentencing Guidelines Commission 1986). Washington has, however, a special "first offender" provision (for persons convicted of a non-violent, non-sexual offense who have no prior felony conviction); this option permits the judge to order a treatment-oriented sentence and jail time not to exceed 90 days in place of whatever sentence the guidelines might prescribe. The first offender provision applied to 23.2 percent of offenders, of whom about half benefitted from the special provision; it is unclear how to factor these cases into compliance rates.

The special first offender provision is unlikely significantly to affect the size of the departure rate. Almost by definition, first offenders convicted of non-violent, non-sexual offenses are unlikely in any jurisdiction to fall within a part of a guidelines grid that specifies an incarcerative sentence. If even 10 percent of those offenders received incarcerative sentences, the departure rate would increase to only 5.4 percent. The Washington compliance rates are possibly even more impressive than Minnesota's since the guidelines cover both felonies and misdemeanors.

Changes in Sentencing Patterns

Both the Minnesota and the Washington commissions decided, as a matter of policy, to attempt to change patterns of prison use by emphasizing the use of prison for persons convicted of violent offenses, including first offenders, and by de-emphasizing the use of imprisonment in nonviolent cases, including those involving offenders with extensive criminal records. In Pennsylvania, the legislature directed that sentencing be made more severe when it rejected the first set of guidelines proposed by the Commission.

In Minnesota, in the first year of experience with guidelines, 78 percent of offenders convicted of serious violent offenses and having a minor criminal record, or none at all, were imprisoned; that constituted a 73 percent increase over pre-guidelines practices. Conversely, of those convicted of minor property offenses and having moderate to extensive criminal records, only 15 percent were imprisoned under the sentencing guidelines during the first year; that constituted a 72 percent reduction. During the second and third years, sentencing appeared to shift back toward traditional patterns. Imprisonment rates for violent offenders remained higher than pre-guidelines levels but were lower than in 1981 and 1982 (Knapp 1984a, p. 31). By 1983, the imprisonment rate for low-severity property offenders was at almost the pre-guidelines level, but, this may camouflage the guidelines' impact. The major reason for incarceration of such offenders was that they *requested* incarceration; the Minnesota Supreme Court has held that such requests must be honored. Some offenders requested incarceration because they were being imprisoned for another, more serious, offense, and wanted the sentences to run concurrently. Other offenders, however, who constituted 4 percent of prison admissions in 1981 and 10 percent in 1983, apparently preferred incarceration because it appeared less onerous than an "out" sentence. Under anomalies in the Minnesota guidelines, some "out" sentences are potentially harsher than some "in" sentences. A person receiving a one-year prison term would, assuming "good time" was credited, be released in eight months. An "out" sentence might include twelve months in jail plus a lengthy term of probation with conditions, and, if probation were revoked, a state prison sentence of twelve to thirty months might be imposed. If the anomalies were eliminated so that this category of offenders did not request imprisonment, the imprisonment rate for low-severity property offenders in 1983 would probably be little higher than the 1981 rate.

Washington also seems to have succeeded in altering sentencing patterns. In 1982, the pre-guideline comparison year chosen, 46 percent of persons convicted of violent offenses received prison sentences; during

the first 6 months of 1985, under the guidelines, 63.5 percent of persons convicted of violent offenses received prison sentences. Conversely, in 1982, 84 percent of persons convicted of non-violent offenses received non-prison sentences; during the first half of 1985, under the guidelines, that had increased to 90.8 percent. The Washington data are cruder than Minnesota's, for they do not distinguish among either violent or non-violent offenses in terms of their relative severity, but the pattern is clear. In both jurisdictions, during the first year's experience under guidelines, there were substantial shifts in the patterns of sentences imposed toward the direction contemplated by the creators of the guidelines.

Sentencing Severity

Only Minnesota and Pennsylvania data are relevant. The early Washington reports do not discuss changes in sentencing severity. The Pennsylvania evaluations showed increases in sentencing severity in each of the first two years of experience with guidelines. The 1983 report concluded "incarceration rates and incarceration lengths increased substantially over previous levels, especially for violent crimes" (Pennsylvania Commission on Sentencing 1984, p. i). The Commission's conclusion in 1984 was that "sentencing severity for serious crimes increased over previous levels," for the second year (Pennsylvania Commission on Sentencing 1985, p. 1). By every measure shown in table 5-10, sentencing in Pennsylvania appears to have been more severe in 1984 than in 1983.

Table 5-10

Sentencing Severity in Pennsylvania in 1983-84

Year	Defendants Incarcerated	Minimum Average Incarcerated	Maximum Average Incarcerated	Average Minimum Jail Sentence	Average Maximum Jail Sentence	Average Minimum Prison Sentence	Average Maximum Prison Sentence	Minimum Sentence in Excess of Five Years
1983	55%	12.1 mos.	33.4 mos.	6.4 mos.	20.5 mos.	24.4 mos.	61.5 mos.	3.3%
1984	57%	N/A	N/A	6.8 mos.	22.2 mos.	28.7 mos.	70.0 mos.	6%

Source: Pennsylvania Commission on Sentencing 1984, p. 17; 1985, p. 22

In Minnesota, also, sentencing severity appears to have increased during the first three years after implementation of the guidelines. During the first year, the average sentence imposed was 38.3 months, and the projected actual incarceration (taking account of good time) was 25.5 months. Those figures increased in 1982 to 41 months and 27.3 months and would likely have increased again in the third year but for a series of

changes made by both the Minnesota legislature and the Commission aimed at reducing sentence lengths (and prison overcrowding); the resulting figures for 1983 were 36.5 months and 24.3 months (Knapp 1984a, p. 30). By a different measure, however, Minnesota sentencing patterns showed steady increases in severity. The percentage of felony convictions resulting in prison sentences increased from 15 percent in 1981 to 18.6 percent in 1982 and 20.5 percent in 1983 (in 1978, 20.4 percent of convicted felons received prison sentences, so the apparent increase in prison use between 1981 and 1983 may instead be a reversion to pre-guidelines levels).

Extent of Sentencing Disparities

In all three jurisdictions, there was evidence that sentencing became more consistent under guidelines than before. In Minnesota, the evaluation concluded that "disparity in sentencing decreased under the sentencing guidelines. This reduction in disparity is indicated by increased sentence uniformity and proportionality. . . . Although sentencing practices were still more uniform and proportional in 1982 and 1983 than sentencing practices prior to the guidelines, there was less uniformity and proportionality in 1982 and 1983 than there was in 1981" (Knapp 1984a, pp. v-vi). A statistical analysis of the first eighteen months of guidelines experience in Minnesota similarly concluded that Minnesota "was largely successful in reducing preguideline disparities in those decisions that fall within the scope of the guidelines" (Miethe and Moore 1985, p. 360).

One major weakness of the Minnesota guidelines is that they deal only with felony sentencing and then primarily with state prison sentences. Although the enabling legislation provided that "the commission may also establish appropriate sanctions for offenders for whom imprisonment is not proper . . . ," the Commission elected not to do so. As a consequence, the guidelines created presumptions as to who goes to prison, but provide no guidelines concerning sentencing of persons not receiving *state prison* sentences. Inasmuch as up to one year's *jail incarceration* may be imposed as a condition of probation, the absence of guidance could well have produced considerable disparity. Moreover, for those repetitive property offenders who the Commission preferred not receive prison sentences, jail remains an available option. The foreseeable confusion resulted: the Commission's 3-year evaluation concluded: "nonconformity of [jail] use is found for every racial and gender group, and there has been very little improvement in uniformity of jail use from 1978 to jail use in 1981, 1982, and 1983" (Knapp 1984a, p. 48).

The extent of uniformity and proportionality in Washington is difficult to assess because the preliminary evaluation report does not

break down sentenced offenders by criminal history scores. Insofar, however, as very high compliance rates were obtained, it is likely that substantial consistency was achieved.

The Pennsylvania evidence is difficult to assess. The Commission's evaluation of 1983 sentencing asserts: "it appears that Pennsylvania's guidelines are accomplishing their intended goal of reducing unwarranted disparity" (1984a, p. i) and the 1984 evaluation notes "sentences became more uniform throughout the state" (1985, p. i). These conclusions presumably are inferences drawn from high "conformity with guideline" rates. As these may, for reasons discussed above, well be plea bargaining artifacts, it is not clear that disparities have been reduced.

It is difficult to know how to assess Pennsylvania's shift. Less has been published about the Pennsylvania experience than about Minnesota. One of the goals of the Pennsylvania guidelines was to lessen differences in sentencing patterns between rural and urban courts. An analysis by the executive and research directors of the Pennsylvania Commission indicates much greater similarity in urban and rural sentencing patterns after guidelines than before (Kramer and Lubitz 1985, table 4).

Plea Bargaining

The current chairman of the Minnesota Commission has written about the need for prosecutors to develop prosecutorial guidelines because of "the potential of the prosecutor to undermine the uniformity desired by the guidelines" (Rathke 1982, p. 271). It has often been suggested that the greater predictability that accompanies determinate sentencing will serve to increase the potential power of prosecutors. Experience has validated that prediction as is shown by direct evidence from Minnesota and indirect evidence from Pennsylvania and Washington.

The Minnesota evaluation investigated plea bargaining under guidelines in a number of ways. The overall conclusion was that, under guidelines, "[t]here were more charge negotiations and fewer sentence negotiations. There were more charge reductions that affected the severity level of the offense and an increase in the number of conviction offenses which affected the criminal history score of the offender" (Knapp 1984a, p. vi).

Table 5-11 shows the findings of the Commission's study of conviction methods in eight counties for 1978 and the first two years under guidelines. Compared with 1978, the percentage of cases resolved by charge negotiations in 1982 increased from 21.1 percent to 31.3 percent. The percentage of cases resolved by sentence negotiations fell from 34.3 percent in 1978 to 25.7 percent in 1982.

Table 5-11

Method of Obtaining Conviction—Eight County Area

	1978	1981	1982
Trial	5.8%	4.7%	5.6%
Straight Plea	17.1	25.8	15.7
Charge Negotiation	21.1	27.6	31.3
Sentence Negotiation	34.3	23.4	25.7
Plea Negotiation	21.7	18.5	21.6
Charge and Sentence			
Total	100.0%	100.0%	100.0%

Source: Knapp 1984, table 27.

The increase in charge bargaining should be no surprise. The Minnesota guidelines are based on the charge of conviction and, assuming the judge will impose a sentence from within the applicable guideline range, the sentencing ramifications of a "vertical" charge reduction are explicit and predictable. This is particularly true when the charge reduction moves the case across the "in/out" line from the area of presumptive prison sentences to the area of presumptive non-prison sentences. Compared with the pre-guidelines year of 1978, the percentage of cases in which there were charge reductions across offense severity levels in 1983 increased from 12 percent to 27 percent (Knapp 1984a, p. 78).

The increase in vertical charge bargaining is thus explicable in terms of case dispositions. A change in Minnesota "horizontal" charging and bargaining practices resulted from an effort by prosecutors to manipulate the guidelines. Many prosecutors apparently disagreed with the Commission's policy decision to decrease the use of state prison incarceration as a sanction for property offenses. Under the guidelines, an offender convicted of a minor property offense had to accumulate a substantial criminal record before prison became the presumptive sentence. In a deliberate effort to increase property offenders' criminal history scores, prosecutors required property offenders to plead guilty to multiple charges more often than in the past. Prior to guidelines, a person believed to have committed three burglaries might be convicted of one, which would yield a criminal history score of one when next he came before the court for sentencing. After the guidelines took effect, however, this same first-time offender might be required to plead guilty to three counts of burglary which, the next time he came before a court for sentencing, would give him a criminal history score of three. Prosecutors apparently intentionally attempted to undermine the Commission's policies in this way and the Commission

changed the criminal history scoring system to offset this prosecutorial tactic (Knapp 1984a, pp. 71-86, p. 31).

The survival of sentence negotiations is somewhat more surprising. Although, as noted in table 5-11, the percentage of cases disposed by sentence negotiations fell from 34.3 percent in 1978 to 25.7 percent in 1982, the latter figure remains substantial (Dale Parent, the first director of the Minnesota Commission, has informed me that these statistics are misleading because 90 percent of the sentence bargains concern sentences *within* the guidelines range, conditions of probation, or "bogus" bargains not to seek aggravation of the sentence). The Minnesota Supreme Court has held that a sentence negotiation is not a "substantial and compelling reason" for departing from guidelines. Despite that prohibition, the single most common reason provided by judges for departures from guidelines is "pursuant to plea negotiations." Reconciling this pattern with the Supreme Court's decision is difficult. In practice, such a case would come before the court only if one of the parties appealed the sentence imposed pursuant to the negotiation, and neither party is likely to do so.

The evidence on plea bargaining under the Washington and Pennsylvania guidelines is much more ambiguous. As noted earlier, in discussion of table 5-8, the patterns of conviction offenses and sentencing outcomes in Pennsylvania suggest that plea bargaining has adapted to the guidelines.

In Washington, the initial evaluation report comparing sentencing outcomes for 1982 and the first six months of 1985 suggests that charge bargaining around the guidelines is playing a prominent role. Table 5-12 shows the offense seriousness levels by conviction in Washington state during the two periods. There is an almost invariant shift downward in the percentages of cases disposed at each of severity levels seven to fourteen, supporting a strong inference that many cases that would have been sentenced in 1982 at one level are being sentenced in 1985 at a lower level as a result of charge bargains. The increase in cases at level 6 (the presumptive prison sentence level) may indicate that, regardless of charge concessions, prosecutors in some cases insisted on pleas to charges calling for prison sentences. These analyses, however, are no more than inferences and little more can be said until more exhaustive evaluations have been completed.

Trial and Appeal Rates

Opponents of determinate sentencing and sentencing guidelines, especially judicial opponents, have often argued that determinate sentencing reduces the incentives for offenders to plead guilty. As a conse-

Table 5-12

Conviction Offenses by Seriousness Levels; 1982, 1985

Level	FY 1982	Jan.-June 1985	Difference
XIV	0.2%	0.1%	−0.1%
XIII	0.5%	0.3%	−0.2%
XII	0.3%	0.2%	−0.1%
XI	0.1%	0.2%	+0.1%
X	0.9%	0.4%	−0.5%
IX	5.6%	3.6%	−2.0%
VIII	1.4%	0.6%	−0.8%
VII	3.4%	2.0%	−1.4%
VI	4.7%	5.7%	+1.0%
V	0.8%	0.7%	−0.1%
IV	10.6%	9.7%	−0.9%
III	8.3%	10.1%	+1.8%
II	34.5%	33.3%	−1.2%
I	28.7%	31.1%	+2.4%
Unranked	0.0%	1.9%	+1.9%
Total	100.0%	99.9%	

Source: Washington Sentencing Guidelines Commission 1985, p. 3.
Note: Level XIV is the most serious category (Aggravated Murder). First-time offenders who commit a Level VI offense and above have a guideline prison term. Figures do not equal 100 percent due to rounding.

quence, it was argued, offenders would insist on jury or bench trials, confident that their sentences would not be increased significantly were they convicted at trial in comparison with sentences following a guilty plea. If that hypothesis is sound, trial rates should increase in the sentencing guidelines jurisdictions. In Washington, they were stable. In 1982, before guidelines, 90.1 percent of cases were disposed of by pleas, 7.8 percent by jury trials, and 2.1 percent by bench trials. During the first six months of 1985, under guidelines, the plea rate declined slightly to 89.2 percent, the jury trial rate remained essentially stable at 7.9 percent, and the bench trial rate increased slightly to 2.7 percent (Washington Sentencing Guidelines Commission 1985, p. 3). In Minnesota, in 1978, before guidelines, and in 1981 and 1982, under guidelines, the percentages of felony cases disposed of after trials, rather than by guilty pleas, were 5.8 percent, 4.7 percent, and 5.6 percent (Knapp 1984a, p. 72). In neither Washington nor Minnesota, notwithstanding their narrow sentencing guidelines, does the evidence suggest that large numbers of defendants

chose to plead not guilty because of the lessened jeopardy they might feel concerning penalties that would be imposed after a conviction at a trial.

Nor has the recognition of appellate sentence review resulted in flooded appellate dockets. While no data are available from Washington and Pennsylvania, fewer than 1 percent of Minnesota sentences have been appealed. As Kay Knapp's important treatise (Knapp 1985) demonstrates, the Minnesota appellate courts have taken sentence appeals seriously. The appeals courts have decided more than 300 appeals and in general have upheld the guidelines. They have established standards for departures and for the extent to which sentences can be increased in aggravated cases. Minnesota may become the first American jurisdiction to have a meaningful system of appellate sentence review.

The Future

The sentencing commission model is the most promising of the recent sentencing innovations. Although Connecticut, New York, Maine, South Carolina, and Pennsylvania provide illustrations of instances in which sentencing commissions did not realize their promise, Washington and Minnesota tell a different story. The Minnesota and Washington stories show that guidelines can accomplish substantial alterations in sentencing practices, that they can obtain support from the officials whose discretions they affect, and that they can reduce sentencing disparities and achieve high levels of compliance with the sentencing standards they set out.

Minnesota has experienced declining levels of compliance with guidelines as time has passed. Sentencing disparities are increasing as are rates of departure from guidelines and the prevalence of plea bargaining manipulations. Nonetheless, the contrast between sentencing before guidelines took effect, and after, remains dramatic. Sentencing is more open and officials are accountable for their decisions in Minnesota than in most other states or than in Minnesota during earlier periods. Without guidelines the development of an extensive Common Law of sentencing in Minnesota would not have evolved nor would the extensive system of monitoring of sentencing decisions that both provides insight into how the courts are operating and how those operations are changing over time and also serves as an early warning indicator of the imposition of extraordinary sentences in individual cases.

Chapter 6

Statutory Determinate Sentencing

The Maine legislature abolished parole release in Maine in 1975 and thereby became the first state to replace an indeterminate sentencing system with a determinate sentencing system. "Determinate" sentencing means different things to different people. "Indeterminate" sentencing systems were so called because an imprisoned offender's actual date for release from prison could not be known until it was set by the parole board. The length of a prison sentence would not be determined until it was over. By analogy, therefore, to many people, a "determinate" sentencing system is simply one in which parole has been abolished and, accordingly, the length of a prison sentence can be known, that is determined, at the time that it is imposed (given certain assumptions about the operation of good time laws). By that definition, at least ten states—California, Colorado, Connecticut, Illinois, Indiana, Maine, Minnesota, New Mexico, North Carolina, and Washington—have adopted determinate sentencing because they have abolished parole release for the vast majority of imprisoned offenders. Some analysts mean something different when they use the term "determinate sentencing." Thus, to Andrew von Hirsch and Kathleen Hanrahan (1981), a determinate sentencing system is one in which the duration of a prison sentence can be known at the time of sentencing or shortly thereafter; this definition includes parole guideline systems in which the parole date is set early in the prisoner's term.

In this chapter, I regard as "determinate" sentencing any jurisdiction in which parole release has been abolished. This definition comports,

I believe, with general usage. In any event, parole guideline systems are discussed in Chapter 7.

Determinate sentencing laws can be divided into three general categories. First, Maine occupies a category in itself in that it abolished parole release but established no standards to govern judicial sentencing decisions. When parole release was abandoned, Maine adopted a new criminal code, based generally on the *Model Penal Code* (American Law Institute 1962). The *Model Penal Code* was drafted for use in indeterminate sentencing systems and therefore divided all felonies into three classes and specified no sentencing standards other than lengthy maximum authorized sentences for each felony class. What this combination of parole abolition and lengthy sentence maximums meant was that judges had no guidance for the sentences that they set. With parole abolished, only three mechanisms existed in Maine under the new statutes for review of arbitrary, disparate, or extremely long sentences. The first was a mechanism for petition for resentencing by the Department of Corrections. This procedure was declared unconstitutional by the Maine Supreme Court on the basis that the judge's power to resentence on petition violated the constitutional doctrine of Separation of Powers and intruded on the "commutation power expressly and exclusively granted by the state constitution to the Governor" (*Maine v. Hunter* [1982]). The second was the governor's commutation power, a power that is seldom exercised in Maine. The third is appellate sentence review, which, in Maine, as in most states, does not afford meaningful scrutiny to sentencing decisions.

The second category of determinate sentencing laws is represented by statutes in North Carolina and California that set out specific concrete standards for sentences. In California, for example, the determinate sentencing law specifies for each felony three presumptive sentences: a presumptive standard sentence, a presumptive aggravated sentence, and a presumptive mitigated sentence. For robbery, for example, three years is the presumptive standard sentence, two years is the presumptive mitigated sentence, and five years is the presumptive aggravated sentence. The California law also sets out specific statutory "enhancements" which increase the presumptive sentence by one, two, or three years in respect of weapon use, injury infliction, prior incarceration, or large property loss. The North Carolina law specifies presumptive sentences for each offense. This second group of determinate sentencing laws, in principle, is not substantially different from sentencing guidelines. The standards are simply set out in a statute enacted by a legislature rather than in guidelines developed by a sentencing commission. In practice, sentencing commission guidelines are much more specific and detailed than any statutory determinate sentencing law.

The third category of determinate sentencing laws, exemplified by states like Illinois, Indiana, and Arizona, specify only very general standards for sentencing. In Indiana, for example, the statutory sentencing range for Class B offenses is six to twenty years and the range for Class A offenses is twenty to fifty years (Hussey and Lagoy 1983; Lagoy, Hussey, and Kramer 1978). These determinate sentencing laws, none of which has been subjected to a rigorous evaluation (assuming a rigorous evaluation of so nebulous a set of standards is a sensible thing to attempt), provide little more guidance to sentencing than is afforded by Maine's law or by indeterminate sentencing laws. The only evaluation of such a system known to me, of which a second part dealing with judicial sentencing decisions remains to be published, concluded: "the [Illinois] Act's efforts to structure the exercise of discretion by prosecutorial, judicial, and correctional officials in the bargaining for, imposing, and serving of criminal sentences have been systematically ignored, subverted, or invalidated" (Schuwerk 1984, p. 739).

A number of hypotheses have been offered about the operation of determinate sentencing laws: that they will be systematically manipulated by plea bargaining counsel; that they will reduce sentencing disparities because sentences will tend to cluster around the statutory standards; that trial rates will increase because the incentive to plead guilty will be removed by increased predictability about sentences to be imposed; that more "marginal" offenders will receive prison sentences because judges need no longer worry that the parole boards will keep them in prison for an unduly long period.

The impacts of determinate sentencing laws have been undramatic. Determinate sentencing laws shift discretion to judges and prosecutors; prosecutors have used their control over charging and plea bargaining to strengthen their influence in determining sentences imposed. However, criminal justice systems have readily absorbed determinate sentencing laws and, in general, trial rates have not increased, and case processing delays have not become greater.

The move towards statutory determinate sentencing seems now to have ended, perhaps because ten years' experience suggests that presumptive sentencing guidelines developed by a sentencing commission are a much more effective means for establishing and enforcing comprehensive system-wide sentencing standards. No jurisdiction, to my knowledge, has adopted a statutory determinate sentencing law in the last few years. Several jurisdictions, including South Carolina, Wisconsin, New York, Maine, and the federal system, have established sentencing commissions.

Our knowledge about the operation of determinate sentencing laws comes primarily from evaluation of their operation in three jurisdictions: California, Maine, and North Carolina.

California

The original California determinate sentencing law, often referred to as "DSL," took effect July 1, 1977 and has been more extensively evaluated than any other state's. The law has, at the time of writing, been in effect for almost ten years. Six years after the law took effect, the National Academy of Sciences Panel on Sentencing Research commissioned a paper summarizing the findings of the evaluation research. Because it would be difficult credibly to claim that changes in sentencing patterns or court processes after 1982 resulted from passage of the determinate sentencing law in 1976, rather than from political, social, or other changes, I will here simply restate the findings of the National Academy's assessment:

> "A procedural change as fundamental and complex as DSL has potential for widespread impact on the processing of criminal cases. In actual practice, however, we found relatively few changes that might be attributed to DSL:
>
> - Judges largely complied with the requirements of the law when sentencing convicted defendants; the considerable discretion of the prosecutor in initial charging and later dismissal practices was not affected.
> - There is not evidence of substantial changes in initial charging practices, at least for cases finally disposed of in superior court.
> - Explicit bargaining over the length of prison terms was limited to those jurisdictions already engaged in extensive sentence bargaining.
> - Enhancements and probation ineligibility provisions represented important bargaining chips for the prosecutor; these allegations were frequently dropped in return for defense agreements to prison terms.
> - While there were no substantial changes in aggregate guilty plea rates, there is some evidence that early guilty pleas did increase after DSL.
> - Prison use definitely increased after DSL; this increase was accompanied by apparent increasing imprisonment of less serious, marginal offenders. These increases in prison use,

however, are best viewed as continuations of preexisting trends toward increased prison use in California and not as effects of DSL.

- Also consistent with preexisting trends, both mean and median prison terms to be served continued to decrease after DSL. There are also some indications of a decline in variation of sentences for the same convicted offense, although the range of sentences observed under DSL remains broad.
- The Adult Authority exercised an important role in controlling the size of prison populations through their administrative releasing function; without some similar "safety valve" release mechanism, California's prison population can be expected to increase dramatically as a result of increasing prison commitments and only marginal decreases in time served, particularly in view of legislative increases in prison terms." (Cohen and Tonry 1983, pp. 355-57; drawing upon Brewer, Beckett, and Holt 1980; Casper, Brereton, and Neal 1981; Ku 1980; Lipson and Peterson 1980; Sparks 1981; and Utz 1981)

North Carolina

North Carolina's "Fair Sentencing Act" applies to felonies committed on or after July 1, 1981. It specifies a presumptive prison sentence for each felony and specifies aggravating and mitigating factors that judges must consider in setting sentences. The judges are required either to impose the presumptive term or to give reasons for doing otherwise (unless the term was imposed pursuant to a judge-approved plea bargain). The judge may in his discretion, without giving reasons, suspend prison terms with or without probation supervision, impose consecutive prison terms for multiple convictions, and grant special status to committed youthful offenders. The statute provided a right of sentence review of prison terms longer than the presumptive term and eliminated discretionary parole for most offenders.

An evaluation of the impacts of the North Carolina law was conducted by researchers at the Institute of Government of the University of North Carolina (Clarke 1984; Clarke et al. 1983). The researchers conducted extensive interviews with prosecutors, judges, and defense attorneys, and carried out statistical analyses of four different sources of data.

Overall, the researchers concluded that judges for the most part complied with the provisions of the law, that charge bargaining increased, that trial rates did not increase, but declined, that sentencing severity

declined for many offenses, that sentencing disparities declined, and that prison populations were unlikely to increase as a result of passage of the law.

Trial Court Dispositions

Some North Carolina officials believed that the increased predictability of sentencing outcomes under the new law would remove the incentive to plead guilty and therefore increase trial rates. The evaluation's major empirical analysis, using data from twelve counties, showed that the percentage of dispositions resulting from jury trials declined from 5.7 percent of dispositions before the law took effect to 3.2 percent after. Because judges could impose a sentence other than the presumptive sentence in cases in which there was a sentence bargain, without giving reasons and without precipitating sentence appeals, some observers predicted that sentence bargaining would increase. In fact, sentence bargaining became less frequent under the new law (Clarke 1984, p. 146).

Trial Court Delay

Some observers hypothesized that court delays would increase under the new law, both because sentencing procedures would become more complicated and because increased certainty would reduce defendants' incentive to plead guilty. Instead, jury trial rates declined rather than increased and, perhaps partly as a result, "disposition times in trial court *decreased* in the twelve counties studied" (Clarke et al. 1983, p. 4; emphasis in original).

Severity and Variation in Sentencing

The evaluators concluded that sentencing disparities were reduced and sentencing severity declined after implementation of the new law: "with regard to the length of active prison terms imposed for felonies, *sentencing became generally less severe after the FSA and also varied less*" (Clarke et al. 1983, p. 6; emphasis in original). The reason for decreases in sentencing disparities among persons receiving prison sentences is relatively straightforward: "*The median active sentence length imposed under the FSA was equal to the presumptive prison term in most cases*" (Clarke et al. 1983, p. 6; emphasis in original). This means that judges imposed the presumptive sentence in many cases, and as a result, disparities among people imprisoned for that offense decreased.

The picture was slightly different when looking at sentencing patterns concerning the use of imprisonment. For persons charged with felonies and convicted of *some* charge (half the time a misdemeanor), there was no increase in the likelihood of receiving an active prison sen-

tence. "But for defendants convicted of felonies statewide, the Department of Corrections data indicated that the chance of receiving an active prison sentence (rather than supervised probation) increased from 55 percent in 1979 (pre-FSA) to 63 percent in 1981-82 (post-FSA)" (Clarke 1984, p. 148). The evaluators observed that it was unclear whether the increase resulted from passage of the new law, or from changing normative views or political attitudes.

Finally, the evaluators concluded that the FSA was unlikely to result in an increase in the felon prison population in North Carolina's prisons and might reduce it. This resulted from the interaction of the two converging trends described in the preceding section. A greater percentage of persons convicted of felonies received prison sentences under the new law, but, for almost all offense categories, the average length of prison term to be served declined. The effect of the latter trend outweighed the former and a prognosis against increased prison populations was the result (Clarke et al. 1983, p. 9).

In Summary

The North Carolina findings strongly resemble California's: judges largely complied with the requirements of the law and the median sentence imposed for felony offenders was the sentence specified in the statute; there were no substantial changes in charging practices; there were no substantial increases in trial rates or court delays; there was an increase in the proportion of convicted felons receiving prison sentences, offset to some extent by decreases in the average time to be served. The evaluators conclude:

> "On balance, it is fair to conclude from this study that the FSA accomplished at least some of what it was intended to accomplish—and without creating the problems that critics predicted it would produce. Length of active sentences for felonies clearly varied less after the FSA" (Clarke et al. 1983, p. 9). . . . "Perhaps the major defect of the FSA was that it attempted to regulate only the length of active prison terms. It did not limit in any way the judge's complete discretion to suspend the prison sentence . . ., impose consecutive prison terms for multiple offenses or impose 'committed youthful offender' status making a prisoner eligible for immediate discretionary parole. This deficiency led to the result that, while a judge must make written findings to support any active prison term different from the presumptive [unless there was a plea bargain], he need not make any written findings to suspend the prison term altogether." (Clarke 1984, p. 142)

Maine

There have been a series of evaluations of the Maine law (Anspach, Lehman, and Kramer 1983; Anspach 1981; Kramer et al. 1978). For a variety of reasons, largely having to do with Maine's small population, and the resulting small numbers of cases for use in statistical comparisons, it is difficult to have much confidence in the findings of statistical analyses of sentencing practices (the reasons for this skepticism are set out in Cohen and Tonry 1983, pp. 429-35). The most substantial of the evaluations concluded:

> "The 1976 sentencing reform had little impact on the type of sentences or the severity of sentence types given to offenders in Maine. For more serious felony offenders, split sentences increasingly replaced incarceration only sentences. However, since incarceration only sentences before 1976 were generally followed by parole supervision, it would be difficult to argue that post-reform split sentences (incarceration followed by probationary supervision) are significantly less severe.
>
> In essence, the increased use of split sentences, accelerated and reinforced by the reform, represents the development of a structured, judicially imposed, functional equivalent to parole." (Anspach, Lehman, and Kramer 1983, p. 65)

By 1986, split sentences have become the most commonly imposed sentences in Maine and the system is often called "judicial parole."

The evaluators were unable to draw any further conclusions about the impact of the 1976 law on sentencing disparities:

> "Overall, there is little indication that the reform had a substantial, systematic, or consistent effect on the criteria used in the decision as to the type of sentence to impose. Although there is clearly a great deal of variation in criteria used, there is no indication this variation is different either in magnitude or form before and after the reform. The reform has neither resulted in an overall increase in the consistency in the basis of decisions about sentence types, nor has it resulted in an overall increase in the predictability of sentence types." (Anspach, Lehman, and Kramer 1983, p. 103)

As to sentence length however, the researchers concluded, "Overall, the consistency and predictability of sentence length decisions have decreased under the new sentencing structure" (Anspach, Lehman, and Kramer 1983, p. 108). This finding should come as no surprise given the

absence from the Maine sentencing system of any standards for sentences.

* * *

Taken together, the evaluations in North Carolina and California suggest that judges will attempt to impose sentences as directed by statutory presumptive sentencing laws, that neither trial rates nor court processing delays necessarily increase as sentencing outcomes become more predictable, and the greater consistency in sentences can be achieved.

Chapter 7

Parole Guidelines

The parole guidelines developed and promulgated by the U.S. Parole Commission in the early 1970s are the direct predecessors of many sentencing innovations. The original "voluntary" sentencing guidelines projects in Denver, Chicago, Philadelphia, and elsewhere were efforts to apply to sentencing the methods and insights learned in the development and operation of the federal parole guidelines. Presumptive sentencing guidelines promulgated by a sentencing commission, were a next step after voluntary guidelines. Even statutory determinate sentencing laws are a variation on parole guidelines, for they are an effort to provide presumptive standards for sentences that are more specific than are afforded by statutory sentence maximums.

It is important to recall the context in which parole guidelines were first developed. Before 1970, all American parole boards purported to make individualized parole release decisions on the basis of consideration of the unique circumstances presented by each prisoner. This system of ad hoc decision-making was severely criticized. One especially powerful and influential attack on parole practices was made by Kenneth Culp Davis, a specialist in administrative law (1969). Davis pointed out that most government officials who make decisions affecting important interests of individuals must follow established rules and standards and are thereby accountable for their decisions. Under traditional parole practices, there were no standards, parole boards were not accountable, and there was no practical way that a prisoner could contest the appropriateness of a release date. Just as indeterminate sentencing provided no standards for judges, it provided no standards for parole boards.

In the late 1960s, the hypothesis was offered that the seemingly individualized decisions of parole boards followed underlying patterns which, if made explicit, would provide useful guidance to decision-makers. Salutary effects might include greater equity for prisoners by means of reduction of paroling disparities and greater accountability in decision-making by means of enunciation of standards for individual decisions. In an effort to test the implicit policies hypothesis, the Parole Decision-Making Project of the National Council on Crime and Delinquency Research Center, in collaboration with the U.S. Parole Board, attempted to identify the weights given by U.S. Parole Board hearing examiners to various criteria in making parole decision.

The research showed that the decision-makers' primary concerns were the severity of the offense, the prisoner's parole prognosis (the recidivism probability), and the prisoner's behavior in prison. The researchers concluded "that a parole board's decisions could be predicted fairly accurately by knowledge of its weightings on these three factors" (Gottfredson, Wilkins, and Hoffman 1978). The next step was to develop guidelines that set out parole release standards that reflected the research findings. The resulting matrix contained scales of offense severity and "parole prognosis" and for each combination of offense severity and parole prognosis specified a range of prison terms from which, in the ordinary case, the hearing examiner should select an offender's release date. This system, it is important to stress, was based on predictions of official decision-making, and not on predictions of prisoners' subsequent behavior (though those predictions of behavior were taken into account by officials).

The first parole guidelines project was initiated by the (then) U.S. Board of Parole in October 1972 as a pilot project in the Parole Board's Northeast Region. Eventually the parole guidelines were adopted throughout the federal parole system and in March 1976 were mandated by the Congress.

The U. S. Parole Commission's example was heeded by many states, including New York, Minnesota, Washington, Maryland, and Florida. The logic of parole guidelines is powerful. Guidelines make policy explicit, make decision-makers accountable, and may achieve substantial consistency in the decisions made. Thus, parole guidelines address the criticisms that parole boards are not accountable, that decision-making is ad hoc and inconsistent, that prisoners cannot know the reasons for decisions concerning them, and that there are great disparities in decisions. Moreover, in jurisdictions in which judicial sentencing discretion is neither constrained nor structured, parole guidelines can serve as a check on aberrant or idiosyncratic judicial sentencing practices. Parole

boards' ability to set release dates without regard to maximum sentences, bound instead only by minimum sentences or parole eligibility statutes, gives parole boards a power to even out disparities in the sentences judges impose. Moreover, because parole board agencies are small bureaucracies, management techniques are available for assuring that hearing examiners complied with the guidelines.

The typical parole guideline system, of which the U. S. Parole Commission's current guidelines are set forth as an illustration in table 7-1, divides prisoners into categories on the basis of their offenses. Prisoners are also categorized on the basis of their recidivism probabilities. The U. S. Parole Commission's risk prediction device is called the "Salient Factor Score." The examiners are directed to set a release date from within the applicable parole guideline range in "ordinary cases." If they conclude that special circumstances justify some other release date, they are empowered to set that release date so long as they clearly set forth in writing their reasons for doing so. This permits the prisoner to appeal the decision to an administrative review board and, if necessary, ultimately to the Parole Commission itself.

According to the available evaluations, states' experiences with parole guidelines systems have been mixed. Some systems have been efficiently and consistently applied and have reduced sentencing disparities. Others have accomplished none of these things. In any event, many jurisdictions that established parole guidelines systems have since abandoned them. Washington established two separate, successive sets of parole guidelines in the 1970s; the current set has been supplanted by sentencing guidelines for offenses committed after July 1, 1984 and eventually the parole board will cease to exist. Minnesota was one of the first states to adopt parole guidelines; its guidelines were abandoned for all but "grandfathered" cases on May 1, 1980 when Minnesota's sentencing guidelines system took effect. In the federal system, under the Sentencing Reform Act of 1984, the federal parole guidelines will cease to be applicable to cases involving crimes occurring after the effective date of the sentencing guidelines now being developed by the U. S. Sentencing Commission.

It is unclear why parole guidelines have not been adopted more widely. Although in some jurisdictions parole guidelines have been imperfectly implemented, with resulting problems, such as high rates of calculation errors and inordinately high "departure" rates, those are matters susceptible to managerial correction.

Perhaps the problem is their limited scope. Parole guidelines in the nature of things affect only prison sentences. Only felons are vulnerable to state prison sentences, which removes misdemeanor convictions from

Table 7-1

GUIDELINES FOR DECISION-MAKING

(Guidelines for Decision-Making, Customary Total Time to be Served before Release (including jail time))

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	OFFENDER CHARACTERISTICS: Parole prognosis (Salient Factor Score 1981)			
	Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category One (formerly "Low Severity")	Adult Range			
	= 6 months	6-9 months	9-12 months	12-16 months
	(Youth Range)			
	(= 6) months	(6-9) months	(9-12) months	(12-16) months
Category Two (formerly "Low Moderate Severity")	Adult Range			
	= 8 months	8-12 months	12-16 months	16-22 months
	(Youth Range)			
	(= 8) months	(8-12) months	(12-16) months	(16-20) months
Category Three (formerly "Moderate Severity")	Adult Range			
	10-14 months	14-18 months	18-24 months	24-32 months
	(Youth Range)			
	(8-12) months	(12-16) months	(16-20) months	(20-26) months
Category Four (formerly "High Severity")	Adult Range			
	14-20 months	20-26 months	26-34 months	34-44 months
	(Youth Range)			
	(12-16) months	(16-20) months	(20-26) months	(26-32) months

Table 7-1
(continued)

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	OFFENDER CHARACTERISTICS: Parole prognosis (Salient Factor Score 1981)			
	Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category Five (formerly "Very High Severity")	Adult Range			
	24-36 months	36-48 months	48-60 months	60-72 months
	(Youth Range)			
	(20-26) months	(26-32) months	(32-40) months	(40-48) months
Category Six (formerly "Greatest I Severity")	Adult Range			
	40-52 months	52-64 months	64-78 months	78-100 months
	(Youth Range)			
	(30-40) months	(40-50) months	(50-60) months	(60-76) months
Cetegory Seven (formerly included in "Greatest II Severity")	Adult Range			
	52-80 months	64-92 months	78-110 months	100-148 months
	(Youth Range)			
	(40-64) months	(50-74) months	(60-86) months	(76-110) months
Category Eight* (formerly included in "Greatest II Severity")	Adult Range			
	100 + months	120 + months	150 + months	180 + months
	(Youth Range)			
	(80 +) months	(100 +) months	(120 +) months	(150 +) months

*NOTE: For Category Eight, no upper limits are specified due to the extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category BY MORE THAN 48 MONTHS, the pertinent aggravating case factors considered are to be specified in the reasons given (e.g., that a homicide was premeditated or committed during the course of another felony; or that extreme cruelty or brutality was demonstrated).

SOURCE: United States Parole Commission Research Unit 1984, pp. 81-2.

the guidelines' reach. In many states, only fifteen to twenty-five percent of convicted felons receive prison sentences. In jurisdictions in which policy-makers are concerned about even-handed application of sanctions, parole guidelines simply do not address enough of the problem.

There have been a number of major recent evaluations of parole guidelines systems. Arthur D. Little, Inc. (ADL 1981) examined the U.S. Parole Commission's parole guidelines system and state guideline systems in Washington, Oregon, and Minnesota. Mueller and Sparks (1982) studied the operation of the Oregon parole guidelines. The General Accounting Office reported in 1982 on the operation of the federal parole guidelines system. In addition, the U.S. Parole Commission Research Division has carried out a number of evaluations of the accuracy and consistency with which its guidelines are applied (Beck and Hoffman 1983, 1984) and the extent to which guidelines reduce disparities in prison sentences imposed by judges. Finally, there have been a number of evaluations by individuals (Gottfredson 1979; Lombardi 1981). Four primary questions have been studied:

1. Severity—the effect of parole guidelines on the lengths of prison sentences;
2. Accuracy—the extent to which parole guidelines are correctly applied;
3. Variability—the extent to which parole release decisions are consistent with apparently applicable guidelines;
4. Disparity reduction—the extent to which parole guidelines serve to reduce disparities in punishment compared with parole release without guidelines and compared with the distribution of prison sentences imposed by judges.

Severity

Mueller and Sparks (1982, pp. 15-20) investigated whether the overall severity of prison sentences served in Oregon increased between 1974, before guidelines were implemented, and 1978, when guidelines had been in effect for several years. They concluded that there was "a general increase in severity of terms" (p. 20), but argue against a conclusion that "the guidelines *caused* the observed changes" (Mueller and Sparks 1982, p. 1, emphasis in original). Increasingly punitive attitudes on the part of the general public or parole board members during the late seventies might have increased the severity of prison terms irrespective of guidelines. The other studies did not assess the impact of guidelines on sentencing severity.

Accuracy

The Arthur D. Little and General Accounting Office studies investigated the accuracy with which different decision-makers would apply the guidelines to individual cases. The U.S. Parole Commission has also conducted in-house studies. Accuracy is generally tested by having researchers or (in the General Accounting Office study) parole hearing examiners calculate guideline sentences on the basis of case files for cases already decided. The researchers' sentences are then compared with those actually imposed.

In Minnesota, Arthur D. Little researchers, working with case files for a sample of prisoners released in 1979, concluded that the parole board "applies parole decision guidelines in a highly consistent fashion" (ADL 1981d, p. 97). The guideline calculations of Arthur D. Little researchers in Oregon were completely consistent with parole board calculations in two-thirds of the cases studied (ADL 1981a, p. 8). The complete agreement rate in Arthur D. Little's Washington study was only 13 percent (ADL 1981c, p. 2). The Washington guidelines, like Minnesota's, have since been abandoned.

The General Accounting Office and the Arthur D. Little studies of the U.S. Parole Commission's guidelines found accuracy problems, but, as noted below, there is some controversy as to whether these studies were well-executed. Arthur D. Little researchers had two individuals separately evaluate closed case files, reconcile their decisions, and compare them with the actual case decisions. There was agreement with the actual Parole Commission offense severity and salient factor calculations in only 61 percent of the cases studied (ADL 1981b, p. 49). The General Accounting Office (1982) study found great inconsistencies in release date calculations when it had parole examiners calculate guideline sentences for 30 prisoners previously released.

The evaluators point out that their analyses may, for several reasons, overstate discordance. For example, hearing examiners, unlike researchers working with paper records, have an opportunity to interview prisoners, and this may affect their decisions. Similarly, experienced hearing examiners may from their greater knowledge of prison and parole contexts pick up cues about prisoners or their records that less experienced researchers would miss.

The U.S. Parole Commission's staff has challenged the validity of the Arthur D. Little and GAO evaluations. They argue that the Arthur D. Little researchers "appeared to have little practical experience working with and interpreting prison/parole files and lacked the familiarity with the federal parole guidelines that comes from day to day use" (Beck and

Hoffman 1984, p. 9). They also argue that the GAO study overstates accuracy problems because it was based on a non-random sample of thirty cases that were chosen because they "were unusually complicated and/or were missing critical information" (Beck and Hoffman 1984, p. 9).

The U.S. Paroie Commission has in recent years conducted a number of assessments of the accuracy of guidelines applications, including evaluations of stratified random samples of 100 initial hearings in each of 1982 and 1983. The Commission found "substantive agreement on the guideline range between hearing examiner and research panels" of 86 percent for the 1982 study and 83 percent for the 1983 study (Beck and Hoffman 1983, p. 4; Beck and Hoffman 1984, p. 4).

Thus, of the jurisdictions studied, the record on the accuracy of parole decisions is mixed. Minnesota and, if the Beck and Hoffman studies are correct, the U.S. Parole Commission, demonstrate that guidelines can achieve accurate decisions. The other systems, especially Washington's, appeared highly vulnerable to calculation errors, owing to various combinations of inherent complexity, poor quality control procedures, insufficiently specific policy rules, and problems of missing and unreliable data.

Variability

Variability concerns the extent to which release dates are consistent with the apparently applicable guideline (that is, the guideline that the examiner determined was applicable, which, as noted above, may often be an inaccurate determination). Two important caveats must be noted. First, all parole guideline systems authorize examiners to depart from the guidelines in exceptional cases. Thus a release date not authorized by the guidelines does not necessarily mean that it is not in compliance with the guidelines system, nor is a release date from within the applicable guidelines necessarily compliant. Second, rates of compliance with guidelines are not especially informative without knowledge of the widths of the guideline ranges and the specificity of guideline criteria. A 90 percent compliance rate with three-to six-year ranges may be less meaningful than a 50 percent compliance rate with a fifty-six to fifty-eight month range. The discretionary "departure rates" under the U.S. Parole Guidelines have varied between 10 percent and 20 percent. Under the Minnesota guidelines the overall discretionary departure rate in 1977-1979 was around 12 percent (ADL 1981d, p. 40). Compliance with the first of Washington's two sets of guidelines occurred in about 30 percent of the cases (ADL 1981c, p. 8). Those guidelines were replaced with guidelines expressed in a different format. The Arthur D. Little researchers found that release dates were set within the new guidelines in three-fourths of cases in 1979-1980 (ADL 1981f, p. 14).

These guideline systems varied substantially in the widths of guideline ranges. Minnesota's were quite narrow; the U.S. Parole Commission's were quite broad. Yet compliance rates exceeded 75 percent in the jurisdictions studied, except under the original, quickly abandoned Washington guidelines. Thus it would appear that parole boards are capable of achieving considerable accountability in parole release decision making (assuming that "accuracy" problems are surmountable).

Disparity Reduction

The studies that assessed the impact of parole guidelines on disparity found evidence that the guidelines reduced sentencing disparities. Mueller and Sparks (1982, pp. 20-21, 36) concluded that, controlling for offense severity and using the Oregon Parole Board's offender scoring system, the variability of prison terms was less in 1976 and 1978, under guidelines, than in 1974 before guidelines were implemented. The Arthur D. Little study of the impact of the U.S. parole guidelines on disparity compared actual times served by prisoners convicted of robbery and selected property offenses who were released in 1970 (pre-guidelines) and 1979 (post-guidelines) and found "measurably less dispersion in the distribution of actual time served" for the 1979 releases that could not be explained by reduced variability in sentences imposed by judges (ADL 1981e, p. 3). For Minnesota, Arthur D. Little researchers found that for persons convicted of aggravated robbery, "offenders released in 1979 under the guidelines tended to serve more nearly the same amount of time . . . when stratified into subgroups based upon prior history" than did aggravated robbery prisoners who were released in 1974 before the guidelines took affect (ADL 1981e, p. 63). Finally, an independent assessment of the extent to which the U.S. parole guidelines reduce departures in sentences set by judges concluded that "regardless of the category of prior record/offense severity examined, the Parole Commission decisions are less disparate than the judicial decisions" (Gottfredson 1979, p. 226). Thus it appears that well-managed parole guideline systems can operate to reduce sentence disparities among persons imprisoned.

Discussion

The scorecard for parole guidelines, while mixed, is basically strong. Parole guidelines appear capable of reducing both sentencing disparities and paroling disparities that would exist in the absence of guidelines. Compliance rates of 75 to 90 percent were found in every jurisdiction studied. Although calculation errors appear to be a problem in some guidelines systems, Minnesota's experience shows that that problem is soluble.

None of the traditional arguments for unlimited parole release discretion remain viable. Even people who have not lost faith in the promise of rehabilitative programs in prison seldom argue any longer that parole boards are able to make accurate individualized assessments of which prisoners have been rehabilitated, and when. Whatever the underlying rationale for prison sentences—rehabilitation, incapacitation, retribution—both justice and efficiency argue for consistent and systematic release decisions in accordance with established standards. For jurisdictions that choose to retain parole release, it is difficult to develop a credible argument against adoption of parole guidelines. For jurisdictio however, that are interested in comprehensive approaches to sentencin parole release may—because it affects so small a percentage of convicted persons and because it presupposes "bark and bite" sentencing in which nominal punishments greatly exceed actual punishments—be part of the problem and not part of the solution.

Chapter 8

Whither Sentencing Reform: The Second Decade

As this is written, early in 1986, barely a decade has passed since the first parole guidelines system became operational, since the first sentencing guidelines project began, since Maine became the first state to abolish parole and, with it, indeterminate sentencing.

Ambitious research on the impacts of these changes began almost immediately. Although the number of major evaluations of any single innovation is small, collectively the evaluations constitute a substantial body of knowledge and have taught us a great deal about the effects of sentencing innovations. Depending on what policymakers want to accomplish, we now know a great deal about what works and what doesn't.

In this monograph, I have assumed that most sentencing innovations are aimed at a common set of goals—consistency and predictability in outcomes, accountability on the part of decision-makers, reduction of disparities and anomalies. No doubt policymakers sometimes have other goals in mind, such as increasing or decreasing sentencing severity, deterring crime, incapacitating criminals, limiting the discretion of officials. These goals are in some ways ancillary to achievement of predictability and accountability. Whatever the normative goals of sentencing—retribution, deterrence, incapacitation, rehabilitation—their pursuit inevitably will be ineffective until we learn how to regulate and structure the discretions of officials. This concluding chapter, therefore, summarizes the research concerning the various innovations in terms of their potential for achievement of consistency, predictability, and accountability.

Some sentencing innovations—parole guidelines, comprehensive plea bargaining bans, presumptive sentencing guidelines—have been shown capable of achieving their stated goals. Others—voluntary sentencing guidelines, mandatory sentencing laws, partial plea bargaining bans—have largely failed. Determinate sentencing laws defy easy generalizations.

A caveat. Any innovation can fail if it is poorly conceived or poorly implemented, or if it encounters insuperable political problems. When therefore I suggest below that an innovation has "succeeded," I mean only that there is credible evidence that it can, under the right circumstances, make sentencing fairer and more consistent, and not that, in any particular place or time, it will. For example, Minnesota's experience with a sentencing commission and presumptive sentencing guidelines, in most people's eyes, counts as a success. Whether Pennsylvania's experience is considered a success or a failure depends on whether it is compared with the fully indeterminate system that preceded it (by which measure it is probably a success), or with Minnesota's and Washington's determinate systems (by which measure it is probably a failure). New York's and Maine's experiences clearly count as failures. Similarly, while the federal and Minnesota parole guidelines apparently achieved high compliance rates, were applied accurately, and reduced sentencing disparities, Washington's first set of guidelines did none of these things.

Failures

Voluntary Sentencing Guidelines. Voluntary sentencing guidelines appear to offer little promise as a means to achievement of rational, consistent, accountable sentencing. Voluntary guidelines, where evaluated, have not been shown to elicit high levels of compliance, to reduce sentencing disparities (except in one study as to one city—Baltimore), or even to be taken seriously by judges and lawyers. As a means of regulating or structuring sentencing behavior, they have been ineffective.

Mandatory Sentencing Laws. Mandatory sentencing laws have achieved few of their stated goals. However, they have generally encountered extensive and successful efforts by judges and lawyers to circumvent their application. In New York, where especially severe sentences awaited those who were not diverted, the system broke down—trial rates tripled, case processing times doubled, and the law was repealed. Not only do mandatory sentencing laws not achieve their stated goals, they increase the extent of sentencing disparities by the divergence in punishment between those diverted from the system to avoid the mandatory sentence and those few who ultimately receive it.

Partial Plea Bargaining Bans. Partial plea bargaining bans both succeed and fail, and it is probably the failure that is more significant. Such bans, such as for example a prohibition of charge bargaining, succeed in the sense that they have been shown capable of high compliance levels. Such partial bans fail in that lawyers and judges tend quickly to shift to another system of bargaining, say from charge bargaining to sentence bargaining. Thus partial bans often achieve the appearance but not the substance of success.

Potential Successes

Presumptive Sentencing Guidelines and Sentencing Commissions. The Minnesota experience, and early indications of what is happening in Washington, identify the sentencing commission model as the most promising approach to date for establishment and implementation of statewide sentencing policies. Presumptive sentencing guidelines can alter preexisting sentencing patterns, can reduce sentencing disparities, and can achieve substantial levels of compliance from judges and lawyers. Although other sentencing commissions have tried and failed, Minnesota and Washington have shown what can be accomplished and, through the problems they have encountered, have shown other jurisdictions what problems to anticipate and thereby how to achieve greater successes.

Parole Guidelines. After a decade's experience, it is clear that a well-managed parole board can, by adoption and operation of a guidelines system, achieve an accurately and consistently applied system of release standards. Parole guidelines have reduced sentencing disparities compared both with release patterns before guidelines and with the sentences imposed by judges.

Plea Bargaining Bans and Rules. Comprehensive systems for control of plea bargaining have been shown capable of changing case disposition methods in the intended ways without greatly increasing the percentage of cases going to trial or the average time required for resolving a case. This is in marked contrast to the effects of mandatory sentencing laws, and partial plea bargaining bans; both tend to elicit widespread circumvention.

Determinate Sentencing Laws. Determinate sentencing laws come in a variety of forms. Those, like Maine's, that set no standards for judges' decisions, or like Illinois', Indiana's, and Arizona's, that provide standards so general as to be meaningless, are unlikely significantly to improve the consistency, predictability, or accountability of sentencing. Determinate sentencing laws like California's and North Carolina's, that establish relatively concrete standards, have been shown to achieve shifts

in sentencing outcomes in the directions intended. The shifts are, however, relatively slight. Like parole guidelines, determinate sentencing laws do not affect the decisions whom to imprison or what to do with the majority of convicted felons who do not receive prison sentences, and are at best a partial approach to comprehensive sentencing reform.

What's Best?

What's best depends on the circumstances. If local politics permit, and the local political and legal cultures wish to achieve, comprehensive systemwide sentencing policies that give primacy to consistency, predictability, and accountability, the ideal approach would appear to be a combination of a statewide system of plea bargaining controls and adoption of the sentencing commission model, including presumptive sentencing guidelines, parole abolition, and appellate sentence review. This, in weak forms, is the system established in Washington State and contemplated for the federal system. If the local political and legal cultures make that combination impossible, the next most promising option is the Minnesota approach of the sentencing commission model without comprehensive plea bargaining controls. From there, it is all down hill.

Glossary

Readers who are unfamiliar with some of the terms in the text may find the following brief definitions useful. Unfortunately, there is no standard sentencing reform vocabulary and some writers would define some of these terms somewhat differently. Some innovations, including presumptive sentencing standards, sentencing guidelines, and mandatory sentencing laws, have been adopted in both determinate and indeterminate sentencing jurisdictions.

Indeterminate sentencing—a sentencing system in which the legislature sets maximum lawful sentences, the judge has wide discretion to set the minimum or maximum prison term, or both, and the parole board has wide discretion to set release dates. All American sentencing jurisdictions were indeterminate during most of this century, as are a majority today. Iowa, New York, and Oregon, among many other states, are indeterminate sentencing states.

Determinate sentencing—a sentencing system in which parole release has been abolished and the length of a prison sentence can be "determined" when the sentence is imposed (assuming that the offender behaves in prison and does not lose "good time" credits, that is, time off for good behavior). California, Maine, and Minnesota are determinate sentencing states.

Statutory determinate sentencing—a determinate sentencing system in which the legislature establishes maximum lawful sentences, and also establishes a presumptive sentence, or range of sentences, for each offense; the judge may disregard the presumption but generally is expected to state reasons for doing so. California, Illinois, and North Carolina are illustrative states.

Statutory presumptive sentencing—this is sometimes used as a synonym for "statutory determinate sentencing," but, confusingly, it is also sometimes used in reference to *indeterminate* systems in which legislation establishes presumptive sentences but the parole board determines release dates (such an indeterminate presumptive sentencing system was adopted in Arizona in 1978.)

Sentencing guidelines—a sentencing system in which the legislature sets maximum lawful sentences and some other body, usually a "sentencing commission," but sometimes a committee of judges or the state judicial conference, establishes standards for sentences in individual cases; usually these standards incorporate information on the conviction offense and the defendant's criminal record. Sentencing guidelines have been adopted in both determinate and indeterminate jurisdictions.

Voluntary sentencing guidelines—sentencing guidelines that are "voluntary" in two senses: compliance by judges is voluntary and the defendant has no right of appeal if the judge disregards the guidelines; development of the guidelines by the judiciary is voluntary in that the legislature has not mandated development of guidelines. Maryland and Wisconsin are examples of states having voluntary guidelines.

Presumptive sentencing guidelines—sentencing guidelines for individual cases adopted by a sentencing agency, usually called a "sentencing commission." The guideline sentence or range is presumptively applicable and the judge must give reasons for imposing any other sentence; the adequacy of those reasons is generally subject to appellate sentence review. Presumptive guidelines have been adopted in Pennsylvania, an indeterminate sentencing state, and in determinate sentencing states like Minnesota and Washington.

Mandatory sentencing—statutes that specify a minimum sentence to be imposed on all persons convicted of a particular offense. The details of these laws vary considerably between states. Sometimes mandatory sentencing statutes apply to all persons convicted of the offense, sometimes only to persons receiving prison sentences (the judge may choose to impose a non-incarcerative sentence). Occasionally the statutes forbid plea bargaining to avoid application of the mandatory sentencing law. Nearly every state has enacted mandatory sentence laws.

Parole guidelines—guidelines for parole release decisions analogous to presumptive sentencing guidelines. They set presumptive standards for release decisions and prisoners generally may file an administrative appeal from decisions to set release dates other than as directed by the guidelines. Oregon, New York, and Maryland are parole guidelines jurisdictions.

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