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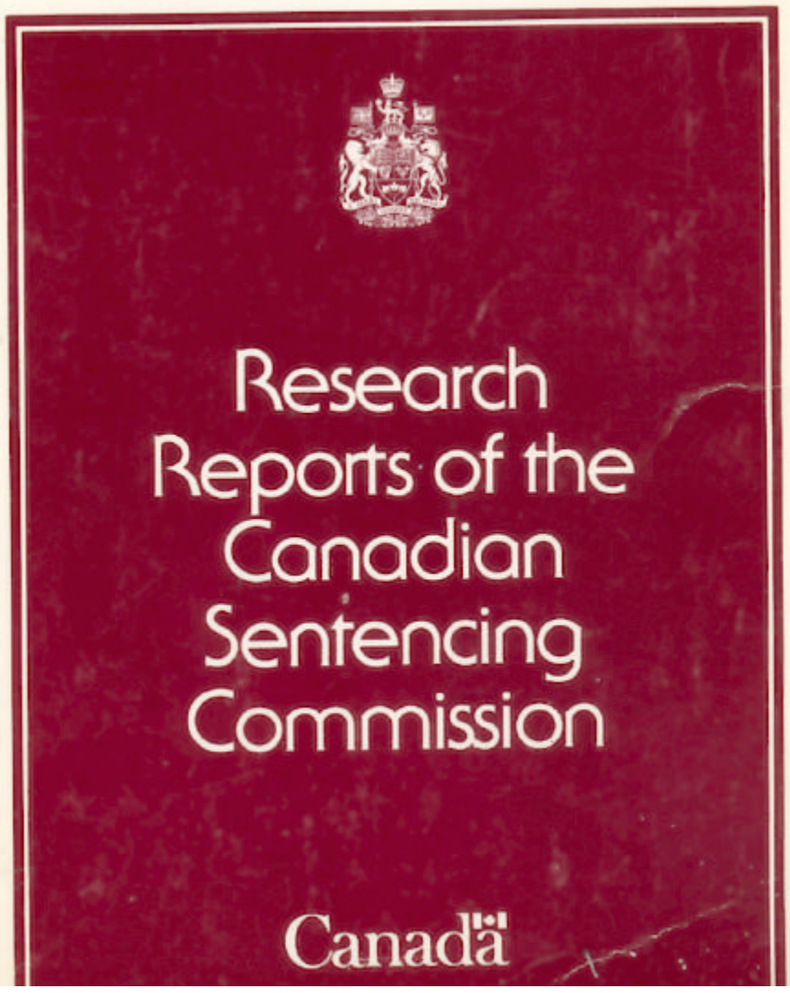
ISSUES RELATING TO SENTENCING GUIDELINES: AN EVALUATION OF U.S. EXPERIENCES AND THEIR RELEVANCE FOR CANADA



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ISSUES RELATING TO SENTENCING GUIDELINES: AN EVALUATION OF U.S. EXPERIENCES AND THEIR RELEVANCE FOR CANADA

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I. INTRODUCTION

In May, 1984, an Order-in-Council[1] established the Canadian Sentencing Commission "to examine the efficacy of various possible approaches to sentencing guidelines, and to develop model guidelines for sentencing and advise on the most feasible and desirable means for their use, within the Canadian context ...".[2] The Commission is required to present its report by May, 1986. Somewhat unusually the Commission was explicitly mandated to take a comparative approach in its deliberations, "... sentencing guidelines ... have been developed for use in other jurisdictions and merit study and consideration for use in Canada".[3] The obvious, and perhaps only, potential focus for such a comparative approach is the various commissions[4] that have developed sentencing guidelines in the United States over the last several years.

Therefore the objective of this article is to summarize, analyse and evaluate sentencing guidelines commissions in a number of United States jurisdictions with a view to making recommendations on a sentencing guidelines approach for Canada. A sentencing commission for this purpose is defined to be an ongoing, appointed body which is delegated the authority by the legislature to develop sentencing policy and, most specifically, sentencing guidelines -- in other words a relatively structured set of sentencing procedures, set out in matrix fashion[5] (see appendices 1 and 2).

The major focus of the analysis is on the sentencing commissions of Minnesota and Pennsylvania. There are two reasons for making the Minnesota Sentencing Guidelines Commission (MSGC) and the Pennsylvania Commission on Sentencing (PCS) the central focus: first, they are considered the first examples of "true" sentencing guidelines commissions; second, considerable

(necessarily preliminary) analyses have already been conducted on the impact and performance of these commissions, while much less evidence is available on any other guidelines system.[6] The major data sources are reports of the various sentencing commissions,[7] reports of individual staff members of the commissions,[8] articles by individual commission members[9] and commentators who have studied various aspects of the commissions[10].

While these sources have either presented evidence on the performance of individual commissions' guidelines or evaluated specific aspects of commission process or outcome there is currently no review that: (1) summarizes the evidence on both commissions; (2) provides an analytic framework for evaluating the performance of this type of commission in general, and (3) presents a method of generalizing these lessons which will be usable by other jurisdictions considering implementing commission/guidelines sentencing reform. Although Minnesota and Pennsylvania are the major foci of the report, where appropriate and possible, reference is also made to other guidelines including the Florida Sentencing Guidelines Commission (FSGC), the guidelines in Washington State,[11] the recent (October, 1984) United States Sentencing Commission (USSC),[12] the United States Parole Board guidelines (USPB)[13] and earlier guidelines such as those in Denver[14] and Philadelphia.[15]

The article is organized subsequently into three parts. The next section examines the major outcomes and impacts of recently implemented guidelines. The major outcomes that are deemed to be of importance in evaluating the commission/guidelines approach are:

(1) The impact of a sentencing commission and guidelines on disparity. Disparity has been identified as perhaps the major deleterious outcome

of current sentencing practices in North America.[16] It has been pointed out that "despite the growing diversity of factors considered and the increasing methodological sophistication of statistical analyses of sentencing, large portions -- two-thirds or more -- of variance in sentence outcomes remain unexplained".[17] There are two separate dimensions to disparity: that related to the random dispersion of sentences which cannot be justified (i.e. are not related to normatively appropriate variables) and that related to disparate sentencing resulting from the intrusion of inappropriate variables, such as race.

(2) The success or failure of guidelines in bringing sentencing practices into conformity with stated sentencing policy as determined by the sentencing commission. A major criticism of sentencing in both Canada and the United States has been either that the legislative mandate on sentencing is broad, vague and even contradictory[18] or that there is no effective mechanism for ensuring the implementation of any sentencing policy, if it did exist[19]. It should be noted that this criticism is not a criticism of any particular goal of sentencing (such as rehabilitation, for example), but rather that in many jurisdictions sentencing is not directed by manifest, operational goals.[20] An example of effective sentencing policy would be the ability of a commission to successfully introduce a sentencing structure that more consistently incarcerates offenders committing violent offences.

(3) The ability of a commission to determine appropriate sentencing principles and practices in an atmosphere free from constant political and interest group pressure. As a sentencing commission is a permanent body it will inevitably become a magnet for debate on sentencing issues:

can it avoid unprincipled politization of the process, while retaining the ability to integrate legitimately expressed concerns into an ongoing system of sentencing policy formulation?

(4) The impact on system costs, including training costs, implementation costs and ongoing (marginal) costs. Additionally, it would be useful to know the extent of incremental savings, e.g. the reduction of costs associated with an elimination of parole release decision making.

An ideal sentencing commission and the resulting guidelines would reduce disparity, generate conformity to stated sentencing policy, be flexible and responsive (but principled), be able to project the impact of its decisions on incarcerative populations and be reasonably inexpensive.

The four outcomes described above depend on decisions relating to a variety of issues which are described in the subsequent section of the article. These issues can be thought of as a series of questions that a commission has to resolve. For example, the impact of a guidelines system in reducing aggregate disparity will obviously be dependent on the percentage of all offenders that are subject to the guidelines. Unfortunately, it is not always possible to unambiguously link outcomes with the decision that must be reached on a specific issue. However, an attempt to make such linkages is a necessary part of generating lessons and recommendations for Canada. The ten issues that are deemed to be most important in determining the four outcomes described above are: (1) Should guidelines be explicitly based on previous sentencing decisions? (2) Should guidelines be advisory (voluntary), presumptive or compulsory? (3) How should plea-bargaining be dealt with in guidelines? (4) Should variables be used in the guidelines that are not related to either the seriousness of the current offence or to previous

record? (5) Should capacity constraints be overtly used in determining the severity of incarcerative sentences? (6) Should the guidelines cover all incarcerative sentences and nonincarcerative sentences? (7) What format should guidelines take? (8) How much discretion should a judge have within a given guideline cell? (9) How should relative penalty severity be decided? (10) Should sentencing guidelines specify the minimum incarcerative sentence or the actual sentence to be served?

The final section of the paper attempts to link outcomes and issues. Essentially, it attempts to summarize the answers to the questions raised in Section III and to translate these findings into recommendations.

II. OUTCOMES

To reprise, the crucial question in assessing sentencing guidelines is how they have effected sentence "outcomes" in those jurisdictions where they have been implemented. It has been posited that four outcomes are of primary importance. The first outcome of concern is disparity. The success of the respective guidelines approaches in achieving each of these outcomes will be assessed in turn.

1. The impact of the guidelines on disparity.

Both Minnesota and Pennsylvania have recently conducted preliminary analyses of the impact of the guidelines on disparity.[21] Additional preliminary evidence is available from other jurisdictions. In Minnesota Commission staff have studied the first 5,500 cases under the guidelines.[22] Their analysis addressed both the question of dispersion of sentences (the "unexplained variation")[23] and differences in sentences that were

attributable to race, gender and geographic location (the explained, but inappropriate, variation). The Minnesota research attempted to address both dispositional (the in/out decision) issues and durational (the length of sentence decision) issues. The Commission developed two measures of dispositional uniformity, an aggregate variance measure and a dispositional "departure" rate.[24] Their findings indicate an increase of 52% in aggregate dispositional uniformity. Dispositional uniformity increased for Blacks and Native Americans with the biggest increase in uniformity for White offenders (59% increase). Gender variances also decreased, with improvements of 54% (male) and 60% (female).

The second dispositional measure examined is the "departure rate", that is, the extent to which offenders landed in unexpected cells. Most importantly, durational departure rates were used to examine uniformity in prison sentence lengths.[25] An analysis of dispositional departure rates also provided an indication of uniformity changes under the guidelines (high departure rates indicate less uniformity than low departure rates). The dispositional departure rate for the cases sentenced under the guidelines was only 6.2%,[26] but varied considerably among the ten judicial districts, ranging from a low of 1.9% to a high of 10.2%[27]. The dispositional departure rate still varied significantly by race, although the Commission's evidence suggests that racial variation would have been considerably larger without the Guidelines.[28] Uniformity in dispositions also increased for both males and females under the guidelines.[29] To some extent the differences in departure rates among racial groups and between male and female offenders can be explained by their different distribution within the sentencing matrix. Once controls for offence severity and criminal history were introduced, male

and female departure rates were found to be very similar.

A crucial issue is whether these departures from those mandated by the Guidelines were appropriate. The researchers in Minnesota examined this question by looking at 1,728 cases in detail. A group of independent reviewers assessed whether departures were in accordance with "substantial and compelling" circumstances.[30] A significantly higher proportion of minority offenders received executed prison sentences, the area where departure rates tended to be higher.[31] These actual departure rates were compared to those recommended by the independent assessors. The optimal dispositional departures of the independent assessments were lower than the observed departure rates. The analysis suggests that less uniformity was achieved for minorities than for Whites, and is totally a result of the distribution of cases within the matrix.[32]

Unfortunately the research does not address several questions. First, it does not address the question of departures that may have been justified by aggravating or mitigating circumstances not directly covered by the guidelines. In other words, did judges reasonably broaden the factors that should have led to a finding of aggravation or mitigation or did the departures simply represent disparity? Second, it does not relate these data to the plea of the offender (see plea bargaining, below). Third, the research presents no evidence on appeal rates from those cases involving departures and how the appeal court treated the cases.[33]

The MSGC evidence suggests that the guidelines have considerably reduced, but not eliminated, dispositional (i.e. in/out) racial and locational disparity. Appeal procedures may reduce this residual disparity even further. The evidence from Minnesota is, therefore, very relevant to

the design of guidelines as it suggests the need for at least presumptive guidelines and for relatively narrow cell ranges.

Estimating changes in durational uniformity was more difficult than estimating dispositional uniformity because Minnesota previously relied on parole board release decisionmaking (as does Canada currently).[34] Data on parole guidelines departure rates was the only data on durational uniformity prior to the implementation of the MSGC guidelines.[35]. The durational departure rate for the 827 executed sentences under the sentencing guidelines was 23.9%. The total departure rate under the parole board matrix was 38%. In 1980 the departure rate was 33%, with an additional 13% of cases adjusted by administrative rule.[36] Again, these departures were analysed by location, race and gender. The independent assessment of durational departure rates suggested that there should have been substantially fewer departures for executed sentences for all racial groups and for both males and females than were actually given by the courts.[37] The report also concluded that female offenders still received significantly shorter sentences than similarly categorized males and that employment status still mattered even though the Commission had decided that socioeconomic status factors should not influence sentences. For example, it was found that the imprisonment rate for employed offenders was 4.9%, while for unemployed offenders the rate was 24.4%. The durational departure rate for the unemployed with executed sentences was 27.6%, for the employed it was 12.2%.[38]

This evidence suggests that, thus far, the guidelines have not been particularly successful at incrementally reducing durational disparity. It should be kept in mind, however, that the sentencing guidelines outcomes were being compared to a parole board matrix system which probably had already

eliminated a considerable amount of disparity. Against this must be put the fact that the independent assessors saw a need for many fewer departures than actually occurred. The researchers were especially concerned with increases in sentences that resulted from departures above the recommended guideline sentence.[39]

Perhaps the major finding of the research is that the guidelines in Minnesota have not eliminated, although they have reduced, racial disparity. The report concludes: "sentences for minority offenders are less uniform and more severe, even after controlling for severity level and criminal history score, than sentences for White offenders."[40]

Recently the MSGC has published a report of 1983 sentencing practices that contains some good news and some bad news.[41] The good news is that racial, gender and locational disparities are continuing to decrease compared to 1981.[42] The bad news is that the random dispersal of sentences is increasing relative to 1981. Both dispositional uniformity and durational uniformity have decreased somewhat over time. The MSGC appears to have no adequate explanation for this "decay".[43]

One of the major advantages of the guidelines is that it has allowed remaining disparities to be easily identified and has pinpointed the tendency over time for the dispersal of sentences to increase.

In comparing the extent to which disparity in Pennsylvania is impacted by PCS guidelines one should keep in mind that PCS sentencing ranges are wider than those in Minnesota -- thus the criterion of disparity reduction is easier to meet, and that the durational sentence is the minimum sentence to be served, not the actual sentence.

In Pennsylvania researchers compared a pre-guidelines sample set of

outcomes from 1980 with the actual guideline outcomes from 1983.[44] It should be kept in mind that while the Minnesota guidelines do not cover jail sentences, i.e. shorter incarcerative sentences, the Pennsylvania guidelines do, although the cell ranges are relatively broad. Kramer and Lubitz found that approximately 88% of all sentences fell within the recommended guidelines ranges: 81.9% within the standard range, 1.4% within the aggravated range and 4.7% fell within the mitigated range. The remaining 12% of all sentences departed from the guideline recommendations. The vast majority of departures (90%) involved sentences which were less severe than those recommended by the guidelines.[45]

Kramer and Lubitz argue that the overall conformity rate to the guidelines is deceptively high because it includes a large number of misdemeanors for which the guideline ranges are very wide. In general, they found the more serious offences, such as aggravated assault, arson, escape and involuntary sexual intercourse, tended to show lower conformity rates. The high departure rates for these offences are not particularly surprising as the guideline recommendations for these offences represented substantial penalty increases over historical sentencing patterns.[46]

Not surprisingly they found 1980 conformity to the guidelines would have been extremely low with most sentences falling below the guideline recommendations. However, the 1980 results were consistently below guideline sentences, suggesting that it is impossible to conclude that there has been any decrease in the random dispersion of sentences after the introduction of guidelines.[47]

More cogently, the Pennsylvanian researchers also attempted to classify 1980 offenders according to the guidelines and compare them to 1983

offenders. Offenders were grouped based on their offence gravity and prior record. The methodology examined changes in coefficients of variation in an attempt to measure changes in disparity by analysing the minimum incarceration length for those sentences in which incarceration was imposed. The percentage of variation explained by the guidelines doubled from 24.1% in the pre-guidelines data to 49.3% in the post-guidelines data, although more than half the variance remained unexplained.[48] Unfortunately, no independent assessments were conducted to determine where offenders should have been located in the matrix.

Kramer and Lubitz also examined the question of racial and locational disparity. They found that the actual incarceration rates and minimum incarceration lengths for minorities were very similar to the expected rates and lengths.[49] Once again, though, it should be kept in mind that Pennsylvania's ranges are considerably broader than Minnesota's and are, therefore, less likely to detect racial differences.

Prior to the creation of the PCS there was evidence that sentences in urban areas of the state were generally less severe than those imposed elsewhere in the state.[50] In the post-guidelines data, gross differences in conformity levels between counties was considerably reduced.[51]

A review of the evidence suggests that guidelines in both states have partially reduced the unwarranted (probably random) dispersion of sentences and have more substantially reduced racial, gender and locational disparity. However, the reduction of sentence dispersion (at least in Minnesota) has somewhat dissipated over time. The Minnesota evidence on disparity reduction is perhaps more convincing than the Pennsylvania evidence for several reasons. First, the independent assessor methodology utilized in Minnesota

is a particularly effective way to gauge the impact of guidelines. Second, major changes in sentencing philosophy were occurring in Pennsylvania during this period, obscuring the direct causal impact of the guidelines. Third, because the guideline ranges are considerably broader in Pennsylvania it is intrinsically more difficult either to conclude that unwarranted dispersion or specific types of disparity were decreased. Fourth, the Pennsylvania data only relate to minimum incarceration, not actual time served.

The only other empirical evidence on disparity outcomes is from the Florida pilot guidelines. 81.1% of the cases were within the sentencing range provided by the guidelines.[52] This seems a relatively high rate of compliance given that the Florida guidelines do not have a specific aggravating and mitigating circumstances list.[53]

The major methodological caveat in interpreting the evidence on disparity reduction for both guidelines is the impact of plea-bargaining. This question will be analysed in greater detail below.

2. The ability of the guidelines to generate conformity to overtly determined sentencing policy.

It has been noted that purely voluntary guidelines (putatively largely derived from empirical studies of previous sentences) have had almost no impact on sentence outcomes.[54] Both the MSGC and the PCS overtly attempted to change historical sentencing patterns. The MSGC policy emphasized the seriousness of the current offence as the primary determinant of imprisonment, whereas past practice had placed greater emphasis on the criminal history of the offender.[55] The guidelines mandated that the more serious person offenders be sent to prison and fewer property offenders be sent to prison.[56] The MSGC felt that this policy was consistent with both

overt and implicit legislative intent.[57]

Analysis of sentencing practices before and after sentencing guidelines indicated that the articulated policy resulted in major changes in the type of offender being imprisoned. The greatest changes from past practices involved offenders convicted of low severity level offences with moderate to high criminal history scores and offenders convicted of high severity level offences with low criminal history scores.[58] The increases in dispositional and departure durational rates that have taken place in 1983 suggest that familiarity presents some threat to the integrity of sentencing policy.[59] The exact causes of this problem are not clear and much will probably depend on the attitude of the appeal court. Clearly the guidelines have affected the type and length of sentencing outcomes associated with differing criminal behavior in Minnesota.

In Pennsylvania part of the impetus for guidelines stemmed from dissatisfaction with the perceived leniency of (then) current sentencing. Following legislative rejection of the initial proposed guidelines, the General Assembly instructed the PCS to increase sentence severity for violent offences. Given this background, it was expected that guidelines would increase overall sentencing severity for these serious crimes.[60] Kramer and Lubitz compared pre-guideline incarceration rates with post-guideline incarceration rates for the four crimes described above.[61] The net effect was an overall increase in the number of 'months sentenced' (number incarcerated times average minimum incarceration length) for these crimes.[62] The only problem with concluding that this represents the impact of the guidelines is evidence that this trend was already under way before implementation of the guidelines.

Clearly, one of the consequences of introducing guidelines is that specific changes in sentencing policy can be made more readily by a responsible body. In reading the Minnesota and Pennsylvania material one is struck by the ability of the commission format to systematically develop a sentencing philosophy and to translate this philosophy into implementable policy. Few other North American jurisdictions have accomplished both of these tasks satisfactorily. Again, the guidelines also make monitoring the degree of compliance to such policy initiatives much more feasible. It should be kept in mind, however, that guidelines sentencing policy is more amenable to being influenced by all interested parties, including Parliament and varied interest groups, once it is overt. This issue is now discussed.

3. The impact of external (political/interest group) influences upon the development of sentencing policy.

Any sentencing format that articulates clear sentencing policy is inherently more vulnerable to external pressures than a format which relies on diffuse and relatively unarticulated policy. Sentencing guidelines are likely to be extremely vulnerable as they are likely to be extremely clear. There appears to be three main areas of concern relating to this external pressure: (1) the concern over pressure to increase the length of all sentences; (2) the concern over pressure to increase sentences for particular offences or behaviour without reference to the overall integrity of a sentencing policy; (3) the pressure to introduce particular "factors" that should affect sentences for particular offences.

Martin has studied the external pressures that impacted the development of both sets of guidelines.[63] All three types of pressure seem to have manifested themselves. Martin concludes that Minnesota was much more

successful than Pennsylvania in both resisting and managing these pressures:

> [Minnesota's] success rests on that state's small and homogeneous population, its political traditions of moderation in punishment and a relatively centralized authority, the legislature's consensus not to increase severity in introducing sentencing reform, the commission's willingness to design a system and to convince interest groups that the constraints imposed by such a system would not be disruptive, the avoidance of politicization of sentencing issues, and the redistribution of authority such that the only group that clearly lost was the parole board, which had limited political clout. In contrast, the Pennsylvania commission gave way under the pressure of law-and-order politics, traditions of localism, a lack of legislative agreement on goals and the means to achieve them, and vested interests in preserving the existing distribution of authority in the criminal justice system.[64]

This analysis may be harsh on the PCS as, arguably, its problems were considerably greater than the MSGC's. However, there do seem to be several tactical reasons why the MSGC handled the political/interest group pressures more successfully. Clearly, for example, the MSGC was more successful in resisting pressure to increase <u>all</u> sentences. This appeared to flow from what might be called "the reification of the most visible number". The number (and ranges) in a given Minnesota cell of the matrix are, on average, considerably longer than actual time served as good time may be earned at the rate of one day for every two days of good behaviour in the institution. Additionally, the matrix highlights the potential incarcerative nature of sentences above the dispositional line, even though these sentences are usually stayed. In Pennsylvania, however, the matrix number was the <u>minimum</u> incarcerative sentence; most offenders would actually serve a longer sentence than that specified in the matrix. Legislative and public debate in both states tended to concentrate on the number(s) in the matrix without focusing on these important caveats. Exactly this issue arose in Florida. Critics of the guidelines claimed that the proposed sentences were

considerably shorter than previous sentences. Proponents of the guidelines claimed that this was not true as the announced sentences under the old (parole release) system were a fraud.[65]

A second major advantage that the MSGC had in resisting pressure to increase all sentences was legislative policy guidance on the need not to exceed existing prison capacity limitations and, equally importantly, the ability to simulate the impact on prison populations of any deviation from that policy. In other words, the MSGC had the analytic capability to simulate the population effects of alternate variations in the guideline matrix.[66] Such a model was particularly useful when dealing with legislators because it allowed the MSGC to highlight the fiscal (facility building) implications of any attempt to generally increase sentences.[67]

The third factor which appears to have minimized ad hoc political interference was the decision (obviously by the legislature itself) to minimize direct political representation on the Commission -- which consists largely of criminal justice participants and citizens -- and instead to focus political input through the House of Representatives Committee on Criminal Justice.[68]

As already mentioned, Pennsylvania chose to understate sentences rather than overstate them. It was also apparently less successful at developing a simulation model or at "structuring" political participation. It should be kept in mind, however, that there was relatively wide consensus in Pennsylvania, outside of the PCS, that sentences should be increased. Additionally the PCS included four legislators and did not include private citizens.[69]

In summary then, the MSGC was more successful in resisting pressure to

increase all sentences, the PCS less so. However, it is unlikely that a sentencing commission can long remain politically viable if it operates as an isolated oligarchy. This raises the question of the ability of a commission to integrate legitimate emerging political and public concerns about particular aspects of criminal behavior. Presumably, one of the great advantages of a commission is that it can more flexibly adopt sentencing policy than the legislature which inevitably has a much shorter and sporadic attention span for sentencing issues.[70] This issue relates to the second and third potential "pressures" described above.

The recent history of the MSGC illustrates how a commission can interact with its political environment in a rational manner. The MSGC has committed itself to present annual modifications of the guidelines to the legislature and to incorporate statutory revisions into the guidelines. The MSGC has declared that it will make modifications to the guidelines at any time when necessary to maintain uniformity and proportionality of sentences.[71] Illustratively, August 1981 revisions: (1) added an aggravating factor for major controlled substance offences; (2) changed the dispositional line on the guidelines matrix to presume imprisonment for severity level one offences with criminal history score of six or more; (3) increased the severity level for burglary with a weapon or assault from severity level six to severity level seven; and (4) incorporated new offences such as Fleeing a Peace Officer into the various guidelines severity levels.[72]

The House Criminal Justice Committee has also periodically made recommendations to the MSGC.[73] The MSGC considered each of these recommendations.[74] For example, the Commission agreed with the Committee

that the severity level for the sale of cocaine should be increased from severity level three to severity level four. However, the Commission rejected the Committee's recommendation that the sale of heroin and other hallucinogens be ranked at severity level seven rather than six.[75] On burglary the Commission agreed with the Committee that the current severity ranking was inadequate but rather than simply acquiescing to the Committee's recommendation the MSGC felt that a complete revision of the burglary statute was necessary. The MSGC then prepared a new burglary statute which was presented to the Minnesota legislature and passed in 1983 with minimal opposition.[76]

Thus, the Minnesota approach appears to have facilitated ongoing legislative and public input while allowing the Commission to deal with these inputs in a considered manner. Unfortunately there is, as yet, little information on equivalent developments in Pennsylvania.

4. The impact on system costs

Unfortunately, this is an area where little direct information is available. Ideally, accurate costs should be available on: (1) the actual costs of the sentencing commissions; (2) the impact on the budget and opportunity costs (time costs) of decisionmakers (e.g. judges); (3) the impact on the cost of the parole board; and (4) the impact on appeals cost.

On the first issue, it is clear that sentencing commission costs are likely to be of two kinds: "start-up" or capital costs and ongoing operating costs. The major start-up costs are the analytic resources needed to develop the guidelines. In Minnesota the primary functions performed during the first four years of the MSGC were the development and implementation of the guidelines. Once the guidelines had been implemented

and their application had become routine in felony sentencing, Commission staff was reduced by approximately half in May 1982, from six and one half positions to three and one half. The state appropriation in 1983 was approximately $150,000, reduced from a budget of approximately $270,000 in fiscal year 1982.[77] One major problem in Pennsylvania is that the PCS may have had an insufficient start-up budget. The PCS had less analytic resources to develop a simulation model which would have allowed them to project the impact of alternative sentencing policies on prison populations. Clearly, though, many of the direct costs of a sentencing commission should be relatively temporary costs (not longer than 5 years).

The ongoing budgetary costs include the monitoring of sentencing practices (including the use of simulations), the meetings of the Commission and ongoing research.

The impact on the budgetary and (opportunity) costs of decisionmakers has, unfortunately, been little studied. The only evidence is the casual evidence that judges appear to have had no particular difficulty in implementing the guidelines. It is unlikely, therefore, that they have spent more time on sentencing. Indeed, given the relative simplicity of actually implementing the guidelines, it is probable that they have had to spend less time on sentencing but there is no direct evidence from any of the published material on this.

The impact on parole costs is, potentially, the largest saving under a guidelines system. As Pennsylvanian law only mandated the PCS to specify the minimum incarceration there was no net saving in this respect. On the other hand, Minnesota abolished the Minnesota Corrections Board as of July 1st, 1982.[78] In its last full year of existence the annual budget of the

Corrections Board was $348,000. Several decisions would determine how large net savings would be if a parole board release decisionmaking function is abolished. The major question is how such an abolition impacts on parole board supervision. At one extreme, the total abolition of parole can be envisioned (on the day prisoners are released the sentence is completed). On the other hand, incarcerative systems, which include good time, often specify that the part of sentence which is not served because of good time is (parole) supervised sentence. It is possible, therefore, to retain these supervisory functions even if the release decisionmaking function is abolished. In Canada, for example, Mandel[79] has estimated that 63.3% of the National Parole Board budget went to the release decisionmaking function and only 36.7% to the supervisory function. Thus, even if a supervisory function was retained there would be a considerable budgetary saving.

The largest "unknown" cost is the additional cost of appeals. The major control and monitoring mechanism in both jurisdictions is the right of both parties to appeal the sentence if there is a deviation from the guidelines. Neither jurisdiction has historically allowed appeals on sentence, therefore, the incremental cost is largely unknown. The impact of such an approach in Canada would be much less significant because of the existence of sentence appeals. Indeed, in Canada, the introduction of sentencing guidelines would likely reduce the workload of appeal courts. The evidence suggests that many of the costs of a sentencing commission are relatively short term; the steady state budget of a sentencing commission can be expected to be approximately half of the budget in the initial development period. The length of the development period will depend on both its sophistication (e.g. the development of simulation models) and its

scope (e.g. the inclusion of shorter incarcerative sentences as well as longer sentences).

The achievements of the U.S. commissions/guidelines in terms of the four outcomes can be summarized as follows:

(1) Sentencing guidelines have reduced both the random dispersion of sentences and sentence differences which are related to race, gender, location and social status. However, the evidence suggests that the dispersion has not been eliminated completely and may now be increasing as courts become more familiar with guidelines.

(2) Sentencing guidelines have encouraged the development of clearly articulated sentencing policy; this articulation, in turn, appears to have facilitated increased coherence in overall sentencing policy.

(3) The U.S. commissions have been relatively successful in controlling political and interest group pressures, while remaining responsive and adaptive. Legislatures appear to play a heightened, responsible, ongoing role in sentencing policy under guidelines.

(4) Guidelines appear to have reduced (net) system costs (including judicial, correctional and parole release decisionmaking costs). However, major savings depend on the elimination of parole release decisionmaking. Many of the costs associated with guidelines are relatively short term start-up costs.

The guidelines reviewed, therefore, can be regarded as a qualified success. This raises the crucial question as to how the positive achievements of guidelines/commissions can be amplified? The next section of this paper suggests that ten issues/questions relating to the design of such systems are central to this question.

III. ISSUES

Our review of developments in the United States suggest ten major substantive issues or questions relating to the establishment of guidelines.

1. Should guidelines be explicitly based on previous sentencing decisions?

The supposed dichotomy that this question suggests is that between empirically-derived sentencing guidelines and normatively-based (de novo) sentencing guidelines. The construction of empirically-based sentencing guidelines involves: (1) the collection of data on past sentencing practice; (2) a model of past sentencing practice (usually in the form of a statistical equation); and (3) the transposition of the model of past sentencing practices into guidelines.[80] Normatively-based guidelines, on the other hand, begin from the premise that those charged with the responsibility of designing guidelines must make decisions as to the relative seriousness of offences and the relative weighting of factors such as previous record. The criticism of so-called empirically-based guidelines has been enormous, most importantly that the methodologies used to estimate the previous sentences are flawed,[81] and that such an approach inevitably requires that the researchers introduce their normative values into the eventual guidelines.

The evidence suggests that the dichotomy between the two approaches is more apparent than real, i.e. no matter whether it is stated that the procedure is empirically derived or not -- elements of both are found, i.e. empirical guidelines inevitably involve implementators in normative choices and even where the process is overtly normative, past sentencing practices

are inevitably one of the elements that goes into sentencing. Critics have argued, however, that the choice of manifest objectives does matter and that most of the consequences of claiming to utilize empirically-derived guidelines have been negative.

The MSGC did collect data on both type of disposition (dispositional data) and the length of any incarcerative sentence (durational data).[82] The most significant dispositional factor in the judges' pre-guidelines decisions was offenders' criminal history. The second most important factor was the severity of the current offence.[83] With regard to the duration of sentences, the seriousness of the current offence was found to be the primary factor and criminal history the second most important factor. However, the research director of the MSGC was able to successfully argue that these historical outcomes should only be one of several inputs to the development of guidelines.[84] The guidelines, in fact, reversed the relative weighting of current offence vis-a-vis criminal history.

In Pennsylvania, as described above, previous sentences were also studied. If there had been general consensus on the appropriateness of sentences in the state perhaps the most serious problem with following historical practices would have been the documented locational disparity.[85] The critical point, however, appears to have been that Pennsylvanians were, in general, not interested in replicating previous sentencing patterns -- they were interested in increasing them. In 1980 the PCS compared current sentencing practices to the proposed guidelines and estimated that the guidelines they were then developing would increase sentences across the state.[86] This version of the guidelines eventually became law.

More recently Florida has relied on what might be called a "modified"

empirical approach. In developing its pilot guidelines a random sample of recent cases were analysed and the "inappropriate and undesirable factors" were eliminated from the model.[87] Spitzmiller notes that this did result in much greater influence of historical sentences, for example in the relatively severe sentences for possession of marijuana.[88] However, again, the development of statewide guidelines forced the FSGC to become somewhat more explicitly normative in the development of the final guidelines.[89]

The Minnesota experience demonstrates the value of providing a sentencing commission with an overt, normative role. The Pennsylvania experience demonstrates the dangers, although they may not be attributable to guidelines per se. Certainly the disadvantages of claiming to use historical sentencing practices appear to outweigh the advantages.

2. Should guidelines be advisory (voluntary), presumptive or compulsory?

A crucial issue in the development of guidelines is whether they should be voluntary, presumptive or compulsory, although a trichotomy oversimplifies a potentially complex continuum. Several early (putatively empirically-based) guidelines schemes adopted a voluntary approach; judges were entirely free to follow or ignore guidelines as they saw fit. Massachusetts, Denver and Philadelphia adopted voluntary sentencing guidelines using the so-called "Albany approach".[90] The intermediate category is that of "presumptive" guidelines.[91] One problem in making distinctions on this dimension is the degree of euphemism typically used. For example, how should guidelines that follow the following admonition be viewed? "When departing from the presumptive sentence, a judge must provide written reasons which specify the substantial and compelling nature of the circumstances and which demonstrate why the sentence selected in the

departure is more appropriate, reasonable or equitable than the presumptive sentence".[92] Additionally, the Minnesota statute permits an appeal as of right by either prosecution or defense from any sentence. Given these limitations, it is submitted that it is euphemistic to describe such guidelines as "advisory", even though this is the language used in the guidelines.

The Minnesota language can be compared to the language in Pennsylvania. Again the legislation requires the judge to provide a written statement of the reasons for the deviation and also provides for sentence appeal by either defense or prosecution. The appellate court may vacate a sentence if the application of the guidelines is "clearly unreasonable" or if a departure is "unreasonable".[93] This language suggests that the sentencing guidelines are somewhat less presumptive than Minnesota's, although it might still be euphemistic to describe them as advisory. In Florida the initial language on this point mirrored Minnesota, but the FSGC eventually substituted the phrase "clear and convincing reasons".[94] Although there is little evidence Spitzmiller speculates that this is intended to weaken the presumptive force of the guidelines.[95]

The most telling evidence relating to this question is the findings of the independent assessors in Minnesota. As we have seen they generally found far fewer reasons for departures than did judges. If one is convinced by this evidence it suggests that guidelines should be at least presumptive. However, the evidence also clearly suggests that there are sometimes good reasons for departures and, therefore, some flexibility in the sentencing process must be maintained. Certainly the problems with mandatory sentences suggest that inflexibility generates injustice and informal avoidance

mechanisms.

3. How should plea-bargaining be dealt with in guidelines?

A major question is whether guidelines should overtly recognize plea-bargaining. While there is a strong temptation to ignore plea-bargaining practices, there is a major danger that unintended (or unknown) consequences will flow from any attempt to formally ignore plea-bargaining. This appears to be a serious problem in Minnesota where the role of plea-bargaining was not explicitly dealt with in the guidelines. As has been predicted, where plea-bargaining is not explicitly covered by the guidelines it tends to shift the focus of plea-bargaining to prosecutors.[96] Most obviously, since the vertical index of the sentencing grid rates offences of conviction according to their gravity, actions which lower the severity level of the offence will move the defendant to a cell with a lower presumptive sentence. Thus a prosecutor can offer a reduced charge which will reduce the severity level and result in a lower presumptive sentence. If the charged offence carries with it a mandatory minimum prison term, the defendant has an even greater incentive to plea-bargain. Rathke has documented several ways attorneys have already developed bargaining tactics to avoid the intended outcome of the minimum sentence provisions.[97] He also argues that although the plea-bargaining power of prosecutors increases under the guidelines, the judges' plea-bargaining power is not completely eliminated.[98] However, plea-bargaining on the finding of aggravating or mitigating circumstances may be the most serious problem. If the defendant's offence puts him below the dispositional line, the prosecutor's agreement to concur in a dispositional departure is a powerful incentive to plead guilty. The incentive is enhanced if the offence carries with it a mandatory minimum

sentence. Rathke has concluded that the "practice of offering mitigating departures in exchange for a guilty plea poses the greatest single threat to the Guidelines".[99] This is likely to be particularly true because it is unlikely that this form of deviation will be easy to detect. Any examination of guideline outcomes will not reveal this problem because offenders who are, in fact, different will be in the same cell and will appear similar.

Some preliminary evidence is available on this issue from 1980 and 1981 cases.[100] The researchers define two situations where proportionality would not be served: first, where substantial and compelling circumstances signficantly differentiate a case from others in the same cell but the presumptive sentence is imposed, i.e. there is no departure; second, departures are imposed where there are no compelling reasons for doing so.[101] Both problems could arise from plea-bargaining. The evidence suggests that plea-bargaining may be having a considerable negative impact on proportionality (although, of course, the cause of the problem is not directly discernable). The courts appear to make large numbers (and high percentages) of both dispositional and durational departures that do not appear to be justified. Approximately half of the aggravated dispositions were deemed unnecessary and about 90% of the mitigations by the independent assessors.[102] Approximately 70% of the durational aggravated departures were deemed unnecessary and, again, 90% of the mitigations appeared unnecessary.[103] Of course, these deviations may simply reflect wide variations in beliefs about the meaning of aggravating and mitigating circumstances. Unfortunately, the research provides no details about the relative frequency of guilty pleas associated with these departures, so it is impossible to directly assess the impact that plea bargaining may be having

on these departures. Additionally, it is not clear to what extent in this case the researchers compared actual behaviour and conviction offence.

The 1984 report of the MSGC reveals increasing concern over the impact of plea-bargaining.[104] Evidence is presented that charge bargaining has become increasingly important: approximately 21% of cases were charge negotiated in 1978 compared to approximately 32% in 1982.[105] The Commission concludes:

> Legislative efforts to effect mandatory imprisonment for offences in which weapons are used have not been very successful. Regardless of the statutory language inserted to insist on prosecutorial and judicial adherence, weapons have been "swallowed" as prosecutors deem appropriate.[106]

The Pennsylvania guidelines also failed to deal explictly with the issue of plea-bargaining.[107] The final version of the guidelines appears to evenly distribute plea-bargaining power between judges and prosecutors. The elimination of an aggravating and mitigating circumstances list included in earlier drafts gives judges scope to control bargaining because it will be more difficult for the appeal court to evaluate whether the decision not to find an aggravation is the result of a plea-bargain. More importantly, the guidelines include a deadly weapons provision as an "add-on" of between 12 and 24 months at the discretion of the judge.[108] This provision offers enormous potential for plea-bargaining. The increase in size of ranges also is significant enough to offer incentives for plea-bargaining. For example, the range for third degree murder (offence gravity score 10) is 48 to 120 months when the offender has a 0 prior record score.

In respect to plea bargaining the Sentence Reform Act in Washington is unusual in that it explicitly permits plea bargaining: [t]he prosecutor and the attorney for the defendant ... may engage in discussions with a view

toward reaching an agreement that, upon the entering of a plea to a charged offense or to a lesser or related offense, the prosecutor will do any of the following [including] ... [r]ecommend a particular sentence within the sentence range applicable to the offense or offenses to which the offenders pled guilty ... [r]ecommend a particular sentence outside of the sentence range."[109] However, the legislation does not provide direct mechanisms for ensuring that such bargaining is uniformly monitored (or indeed monitored at all). One commentator has pointed out that this will mean that "[a] ... result will be the very disparity criticized by the reformers."[110]

A guideline system makes it extremely difficult to generate actual empirical evidence of plea-bargaining. The only (indirect) evidence in Pennsylvania is based on a review of the first 1,495 cases sentenced under the guidelines.[111] The data represents those cases most quickly processed (which may be those cases where plea-bargaining has taken place). Kramer and Scirica found that the large majority of departures are below the sentence mandated by the guidelines, suggesting that plea-bargaining is extensive.

4. Should variables be used in the guidelines that are not related to either the seriousness of the current offence or to previous record?

One central issue that has emerged in guidelines development has been the type of variable that should influence sentence severity apart from the relative seriousness ranking of the offence. The guidelines necessarily require that the normative and philosophical issues of sentencing be faced head on. The vague statements of traditional sentencing statutes have, in practice, left this task to judges or parole boards.

Obviously, many factors should not be considered in sentencing, but

there is a considerable grey area. Currently there is little argument against including prior record although this would not be justifiable in terms of a narrow "just deserts" approach.[112] In Washington the Sentencing Reform Act actually requires the Commission to develop "a system for determining which range of punishment applies to each offender based on the extent and nature of the offender's criminal history, if any."[113]

The meaning and interpretation of prior record has generated several problems in both Minnesota and Pennsylvania. Both eventually utilized seriousness of conviction offence and prior record as the major determinants of sentence outcome.[114] Inclusion of juvenile records caused the most heated controversy within the MSGC and the most intensive input from interest groups.[115] Commission members eventually chose to include juvenile history in the criminal history index because they felt it was highly relevant to sentencing young adult offenders.

The MSGC unanimously agreed that so-called "social" or status factors should not play a role in defining criminal history;[116] the Florida legislation explicitly includes such a proscription. Additionally, the MSGC explicitly describes status factors which may not be used as aggravating or mitigating circumstances, including: race, sex, employment status, educational attainment, marital status or living arrangements.[117] Essentially, all the aggravating and mitigating circumstances that are permissable relate to the current offence. None of these circumstances are attempts either to assess the status of the offender or to "predict" the future behaviour of the offender.[118]

These matters were considerably more controversial in Pennsylvania. A major problem was a PCS survey of judicial attitudes which found that 89.2%

of judges surveyed considered the defendant's employment record an appropriate factor in sentencing and 84.1% viewed the defendant's education as an appropriate factor.[119] Critics of the exclusion of these factors argued that exclusion would be inconsistent with the enabling legislation.[120] In its final version of the guidelines the PCS did not explicitly include social status factors in the criminal history score.[121] However, the aggravating and mitigating circumstance list was eliminated thereby allowing judges to consider the character and history of the offender if they wished to do so. This is particularly significant as the guideline ranges where aggravation or mitigation might apply are 25% above the upper term in the normal range and 25% below the lower term of the normal range.[122]

In addition to social status factors the PCS also considered including "legal status" factors such as probation or parole status, prior probation or parole revocations, type and length of prior incarcerations and charges pending at the time of the current offence.[123] In contrast to the MSGC, the PCS chose not to include these factors.

The basic approach taken by both Minnesota and Pennsylvania can be contrasted with the approach recently followed by the United States Congress in the Sentencing Reform Act of 1984:

> The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences ... shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance -
> (1) age;
> (2) education;
> (3) vocational skills;
> (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability

or to the extent that such condition is otherwise plainly relevant;
(5) physical condition, including drug dependence;
(6) previous employment record;
(7) family ties and responsibilities;
(8) community ties;
(9) role in the offence;
(10) criminal history; and
(11) degree of dependence upon criminal activity for a livelihood.[124]

Thus, it seems inevitable that the USSC will be forced to place a relatively heavy emphasis on social status factors as exemplified by categories (2), (3), (6), (7) and (8) in the above list. While the other factors listed could conceivably be incorporated into some comprehensive framework of aggravating and mitigating circumstances it is hard to see how these factors can be.[125]

Thus Minnesota, Pennsylvania and the Federal system present a continuum on the inclusion of social status factors, ranging from Minnesota where these factors are almost totally excluded to the new Federal law where they are explicitly included.

Finally, it is worth mentioning that Pennsylvania has practically added a third dimension -- after offence severity and criminal history -- to its framework. At least 12 months and up to 24 months confinement must be added to the sentence when a deadly weapon is used in a crime.

5. Should capacity constraints be used overtly in determining the severity of incarcerative sentences?

An important consideration is whether existing system capacity constraints should be a factor in the development of guidelines penalty severity. To the extent that guidelines development is defined as being a purely normative process, capacity might be thought to be irrelevant.

In practice the issue of prison capacity and the expected size of prison

populations has played an important role in the development of both sets of guidelines. In Minnesota the MSGC was explicitly mandated to consider "correctional resources including but not limited to the capacities of local and state correctional facilities".[126,127] This constraint became a "cap". The arguments utilized by the MSGC research director for treating existing prison capacity as a cap included: (1) if the Commission increased prison population and forced the construction of new facilities it would overstep the Legislative mandate; (2) if the legislature wanted more inmates imprisoned it should have built the facilities before increasing inmate populations; (3) it is immoral to implement a system that consciously leads to overcrowding; and (4) if overcrowding were to occur, it is likely that there would be lawsuits and federal court intervention in the state prison system.[128]

Martin suggests that the MSGC's self-imposed limitation greatly facilitated the development of guidelines for two reasons. First, it facilitated the development of a research methodology which, in turn, reinforced the population limitation and the need to consider it. Second, the interpretation of the legislative mandate as an absolute limit on prison population imposed a sentencing framework on the MSGC. The population limitation also constrained the interest groups lobbying the MSGC, particularly those seeking to increase sentencing severity.[129] The fact that Florida had a similar explicit constraint appears to have given the FSGC some freedom to provide some original normative input into the development of guidelines, while restraining critics who believed the guidelines to be too lenient.[130]

On the other hand, the mandate of the PCS contained no explicit

instruction to consider the capacity of the existing correctional system and in May 1980 the PCS rejected such a policy. Several members and the staff insisted that it would be inappropriate for the PCS in establishing "appropriate sentences" to be guided by practical consideratons of space rather than by principles of justice.[131] Martin concludes that, in the context of Pennsylvania's heterogeneous political culture, it was a mistake not to adopt such a "cap". The absence of a clear policy regarding consideration of the guidelines' impact on prison population left the PCS subject to enormous pressure to increase sentence severity, to which it eventually succumbed.[132]

6. Should the guidelines cover all incarcerative sentences and nonincarcerative sentences?

Put another way the question becomes: how inclusive should the mandate of a sentencing commission be? In the United States context, the practical questions have been whether incarcerative sentences less than a year (i.e. jail sentences) should be covered by guidelines and whether the length of probation sentences should be covered by the guidelines. In the Canadian context, the equivalent question would probably be whether guidelines should cover those sentences which would be served in provincial institutions.

The Minnesota guidelines do not address misdemeanors or stayed sentences. As approximately 80% of all felons have their sentences stayed this is a serious limitation on the scope of the guidelines.[133] Under Minnesota law up to one year can be served in a jail or workhouse as a condition of a stayed felony sentence.[134] The legislation that established the Commission gave the MSGC authority to develop guidelines that would govern the use of local (jail) incarceration and other conditions of stayed

felony sentences.[135] However, the MSGC has delayed the development of jail guidelines until after prison guidelines have been fully implemented.[136]

The Commission's staff examination of those incarcerative sentences not covered by the guidelines revealed that, not surprisingly, they were not influenced by the guidelines. The MSGC presented an analysis of matrix variances in jail and workhouses before and after implementation of the guidelines. The variances, both before and after implementation, indicate almost perfect non-uniformity.[137] The non-uniformity is found for every racial and gender group and there has been no improvement of jail uniformity from 1978-79 to 1980-81.[138] The disparity in jail sentences is likely to be a serious aggregate problem, as it has demonstrated that the small (in individual terms) disparities experienced by lesser offenders may have a greater impact on aggregate disparity than the larger disparities experienced by more serious offenders. The reason is these offenders usually form a large proportion of total offenders, exactly the situation that is found in Minnesota.[139] An additional problem with not including jail sentences under the guidelines is that judges may be tempted to utilize these sentences more frequently as they are outside the purview of the guidelines. In 1980-1981 46% of convicted felons were given time in a jail or workhouse as a condition of probation compared to 35% in 1978-1979. The MSGC estimated that about half of that eleven percentage point increase can be attributed to the impact of the guidelines.[140]

In Pennsylvania all incarcerative sentences are covered by the guidelines. Indeed, all minimum range misdemeanor sentences include the possibility of some incarceration. Even the 7th level of offence gravity has 3 cells with possible incarcerations of less than 12 months incarceration (in

contrast with Minnesota, Pennsylvanian sentences up to 24 months must be served in jail). However, while the PCS guidelines cover all incarcerative sentences they only specify the minimum incarcerative sentence, the actual release date is determined by the parole board.

Neither set of guidelines attempt to structure non-incarcerative sentences. Essentially, in Minnesota only those release decisions which were previously made by the parole board are now covered by the guidelines. The Pennsylvanian guidelines, on the other hand, cover all incarcerative decisions that had previously been in the domain of the judiciary. These differences go a long way toward explaining the much greater pressure in Pennsylvania to expand the spread of both base ranges and aggravating and mitigating circumstances. Clearly, however, the main weakness of PCS guidelines is that they only specify the minimum length of all longer (i.e. state prison sentences), while the actual release decision is still made by the parole board, outside of the guidelines.

7. What format should guidelines take?

Given that a guidelines approach is being adopted, there appears to be two major alternatives: (1) an aggregate, single matrix approach; and (2) a series of disaggregated, offence-specific matrices. Initially both the MSGC and the PCS adopted the former approach, eventually however, the PCS switched to the latter approach.

The approach adopted in Minnesota has the virtue of simplicity. Minnesota developed a relatively simple matrix with 70 cells (Appendix 1). A single matrix makes it relatively easy to communicate the major decision in sentencing policy -- who should be incarcerated. The vertical dimension of the matrix indicates the severity level of the conviction offence and a

measure of criminal history forms the horizontal dimension of the matrix.[141] The line across the grid is the dispositional line, cases in cells below the dispositional line receive presumptive imprisonment sentences and cases above the dispositional line generally receive non-imprisonment or stayed sentences. However, this is not universally the case. Mandatory minimum sentences apply to assaults and burglaries if a weapon is used in the commission of the offence and to second and subsequent criminal sexual conduct offences.[142] There are two types of stays available to the sentencing court: stays of imposition and stays of execution.[143] In both cases, the court can impose conditions of the stay that could include up to a year in a local jail.[144] The single number at the top of each cell is the presumptive sentence length in months. However, a sentence within the ranges shown in cells below the dispositional line is not deemed a departure from the guidelines. The exceptions that apply to the matrix mean that, in practice, the simplicity of the matrix is somewhat diminished.

The PCS also initially developed a single matrix with 12 levels of offence severity and a 6 level prior record index (i.e. a matrix with 72 cells compared to Minnesota's 70). Eventually the PCS arrived at what might best be described as a series of offence-specific matrices. This series of matrices at first sight appears somewhat more complex than a single matrix (see Appendix 2). Each of the 10 offence-specific matrices contains 21 cells. The total number of cells for all offences is, therefore, 210 cells. In practice this understates the number of potential cells for several reasons. First, any cell is potentially subject to a weapons enhancement, which effectively doubles the number of different outcomes. Second, driving under the influence of alcohol or a controlled substance has a separate

matrix which places emphasis on previous convictions for the same offence.[145] Third, as in Minnesota, the legislature has "overlaid" certain mandatory sentences on the guidelines.[146] However, the PCS estimates that these provisions will only apply to 5% of all sentences in the state.[147]

While the PCS guidelines are more complex it should be kept in mind that the reach of the guidelines is much greater. The crucial question is whether the PCS guidelines are too complex. They do not appear to be so. The physical presentation of aggravating and mitigating cells probably simplifies the judge's task. Another advantage of the PCS approach is that it allows offence severity differences not to be totally ordinal. In other words, it recognizes that statutory definitions of crimes cover a range of behaviors such that for each crime there is a significant overlap in the appropriate severity of the punishment.[148] To pretend that the ranking of the statutes considers all these factors increases the potential of treating dissimilar offenders similarly. It seems unlikely that any sentencing commission would want to be involved in attempting to redefine statutory definitions of criminal behaviour at the same time as developing guidelines. Given this, offence-specific matrices allow incremental changes within a particular offence-specific matrix without forcing a complete re-evaluation of penalties throughout the guidelines. In contrast, a single matrix essentially forces offence gravity into an ordinal format.

Thus far there is no evidence that the PCS guidelines have presented judges with any particular cognitive difficulties.

8. How much discretion should a judge have within a given guideline cell?

Put another way, the question is whether incarcerative lengths presented in a given cell should be a point, a narrow range or a relatively broad

range. In practice this question can only be addressed in conjunction with the extent to which compliance with the guidelines is voluntary, advisory, presumptive or compulsory. One might expect logical consistency between the approach on the two issues because inconsistency would subvert the purpose of guidelines: it would be self-defeating to have presumptive or compulsory guidelines with extremely broad cell ranges. The former purpose would be subverted by the latter strategy. Conversely, if the guidelines are truly purely advisory it is largely symbolic to place either a point or a narrow range within a given cell. These caveats may seem rather obvious. Yet there is a tendency for euphemism to creep into guideline language, which can lead to inconsistency between stated purposes. Arguably the MSGC guidelines move in this direction when they place point (as opposed to range) jail sentence lengths (in months) in those cells above the dispositional line where incarcerative sentences are normally stayed.

Minnesota and Pennsylvania adopted somewhat different approaches to the issue of judicial discretion. Minnesota, which arguably has a presumptive structure even though it is labelled advisory, has adopted quite narrow ranges.[149] Pennsylvania, which is arguably on the advisory/presumptive border line, has adopted wider ranges.[150] How broad these ranges could become before making a set of guidelines purely symbolic is a difficult question. It must be kept in mind that the Pennsylvania guideline sentence is the minimum sentence. As has been shown, Kramer and Lubitz's evidence suggests that even the relatively broad Pennsylvanian ranges considerably reduces the dispersion of outcomes (and incidently increases their length).[151] There is one major caveat in reaching such a conclusion. Because these data only examine the sentence the judge gave one does not know

whether the dispersion of actual time served decreased. However, the evidence suggests that even relatively broad cell ranges can make a difference.

9. How should relative penalty severity be decided?

This question is linked to that raised above (should variables be used in the guidelines that are not related to either the seriousness of the current offence or to previous record?). The rationale for separating the question is that both Minnesota and Pennsylvania appear to have approached these related problems as sequential steps, i.e. they first decided that current offence and prior record should be the primary determinants of sentence outcomes and then considered both how offences should be ranked in terms of severity and the slope of the dispositional line. It is these later two issues which are considered in this section.

There are essentially four alternative approaches to the problem: (1) basing penalties upon historical sentence lengths; (2) basing penalties upon existing offence categories; (3) basing sentence rankings upon public opinion ranking of offence seriousness; and (4) basing sentence rankings upon the normative beliefs of commission members. As we have seen above, historical sentence decisions could be used as the framework for the whole development of guidelines. For example, New Jersey explicitly claimed that its procedure was merely a codification of existing judicial practice.[152] However, of the four approaches outlined above this is the most clearly discredited.[153]

There are two major problems with using existing penalties as the primary basis for severity rankings: (1) because they have been developed over a long period of time they usually incorporate many inconsistencies, if not irrationalities; and (2) the categories are so broad as to provide little

practical guidance. Both of these problems appear to have effectively eliminated such an approach in Pennsylvania and Minnesota. The evidence suggests that it is equally a problem in Canada. As Vining puts it, "[a] perusal of the historical development of sentencing laws in Canada brings home the incremental, narrow and "borrowed" nature of changes in laws relating to sentencing".[154]

Several commentators have strongly advocated the third approach, the use of public opinion surveys.[155] However, while numerous studies have examined rankings of seriousness[156], there is little evidence that these have influenced decisionmakers. Arguably, however, these surveys could provide valuable input into indexing penalties. In Pennsylvania and Minnesota the fourth approach was adopted. The MSGC began by ranking 60 felony offences. Eventually, a subcommittee divided all felonies into six generic groupings.[157] The six groups were crimes against persons, crimes against property, criminal sexual conduct, arson, drug offences and miscellaneous offences. After within-cateogry rankings were agreed upon, an overall ranking was established and felonies were separated into ten categories according to seriousness.[158] The MSGC did not attempt to subcategorize the seriousness of the conduct within statutory offence categories. One problem with attempting to do this would be the difficulty of introducing facts at sentencing which were not proved at trial.[159] As we have already seen, the MSGC has subsequently adopted the strategy of proposing draft legislation where it feels new categorizations are necessary.

Having ranked offences, the second major decision was the position of the dispositional line given the primacy of offence severity and prior record. While the MSGC might have considered a whole range of utilitarian

and non-utilitarian goals of sentencing[160] it chose, instead, to consider four relatively simple alternative models. These alternatives appear to roughly correspond to two philosophical categories: just deserts (relatively "strict" or "modified") and utilitarian (again, relatively strict or modified). Strict just deserts places strong emphasis on current offence and low emphasis on prior record; modified just deserts places moderate emphasis on current offence and low emphasis on prior record; strict utilitarianism places high emphasis on criminal history; modified utilitarianism puts low emphasis on severity and moderate emphasis on prior record. The MSGC initially opted for a relatively strict just deserts approach, but subsequently moved more in the direction of modified just deserts.[161]

The main lesson that emerges from the Minnesota experience is that offence severity issues and dispositional issues are best dealt with incrementally, sequentially and pragmatically. Incrementation and sequentialism allow decisionmakers to cognitively decompose the problem and make step-by-step progress. Pragmatism is reflected by not discussing sentencing goals in a purely abstract context but rather within the framework of concrete alternatives.

The PCS adopted an essentially similar approach. Once again, a matrix format was first selected with axes representing offence severity and offender characteristics (initially not limited to prior record, see issue 4 above for a discussion). As in Minnesota, a subcommittee was designated to develop an offence severity index but appeared to have more difficulty in reaching consensus, at least partially it appears, because they did not group offences by severity.[162] Eventually a ranking was completed by PCS staff. As the existing statute law mandated extremely wide ranges (cf Canada) it

provided only minimal assistance in offence ranking.

The PCS was presented with the same four alternative approaches to sentences as had been used in Minnesota. The PCS quickly adopted a modified just deserts approach, partially, it appears, because this largely reflected existing sentencing practice. Once again, the reader must be reminded that the impact of any approach chosen would be minimized because the PCS only chose to mandate minimum incarcerative sentences. However, successful external pressure convinced the PCS to move more toward a utilitarian approach, relatively stressing the importance of prior records.[163] Additionally, the philosophical logic of the guidelines was weakened by the "ad hoc" legislative introduction of a series of mandatory minimum sentence provisions.

The relevant lessons that emerge from Pennsylvania in respect to this issue are that: (1) offence severity ranking is a central element in the development of guidelines; and (2) ranking penalties is more tractable if a severity scale is first formulated and existing offences are then assigned to those categories.

A major conclusion that emerges from both jurisdictions is that the thorough examination of any sentencing system that has been in place for a long period of time and which has been amended incrementally is bound to reveal either obvious inconsistencies or relative severity rankings that a commission will find inappropriate for current conditions. It is almost imperative, therefore, that a commission's mandate should include the power to propose draft legislation that would alter existing relative penalties or develop new gradations (see the MSGC's burglary statute proposal, above).

10. Should sentencing guidelines specify the minimum incarcerative sentence or the actual sentence to be served?

As we have seen, one of the major distinctions between Minnesota and Pennsylvania is that the former specifies the actual sentence (albeit before the good time adjustment) and the latter the minimum incarcerative sentence. Therefore, the analyses of disparity outcomes in Pennsylvania are necessarily partial because they do not analyse actual time served. The Parole Board will continue to make the actual release decision. The major criticisms of parole release decisionmaking have been well documented and will not be repeated in detail here.[164] The narrower question is whether there is any appropriate role for parole release decisionmaking given the existence of guidelines, i.e. is there any rationale for adopting the Pennsylvanian approach on this issue? Obviously, the parole board, even in this narrowed context, shares many of the weaknesses of the traditional parole board. Clearly, there is little rationale for a parole board if any version of a "just deserts" approach is adopted because, in such an approach, all the relevant information is known at the time of sentencing. Both Minnesota and Pennsylvania appear to have adopted "modified" "just deserts" approaches for their guidelines (see issue 9, above). This appears to leave the "control value" argument as the only rationale for the retention of parole board release decision making.[165] The argument here is that such decisionmaking can adjust release rates to maintain equilibrium prison populations. One major problem is that this will likely subvert a sentencing commission goal of reducing disparity. Clearly the greatest argument for the retention would come if a sentencing commission is not prepared to explicitly consider prison capacity constraints in developing guidelines and if it is believed that (in

prison) rehabilitation should influence sentence length. For reasons that have been discussed above, these are not rationales for retaining a parole board release function.

IV. CONCLUSIONS AND LESSONS

The major finding of this report is that sentencing guidelines in several United States jurisdictions have achieved substantial improvements in sentencing policy. However, and this caveat is crucial, these benefits are not inevitable. The extent to which any, and all, the four benefits described in Section II are achieved depends on the design and structure of the specific guidelines. Neither of the sentencing guidelines commissions studied in detail have either done well in terms of all outcomes or have necessarily optimized any given outcome. While the MSGC has probably achieved more overall, this is not universally the case. Additionally, it should be kept in mind that the PCS faced a much more complex political environment, a much larger logistical problem (e.g. number of offenders) and a more radical, synoptic change from existing sentencing policy. Reform in Canada is likely to face an environment more like that in Pennsylvania than in Minnesota. It should also be kept in mind that any assessment at this time must necessarily be preliminary and tentative. Preliminary because of the short time that the guidelines have been in operation. Tentative because evidence on many of the issues addressed is incomplete.

In spite of these caveats, ten issues have been identified whose resolution will largely determine the success or failure of any given guidelines system in achieving the outcomes described above. An examination

of the commissions in the United States suggests that the decision on these questions is crucial. The findings relating to each issue are summarized here. Hopefully they suggest the direction a permanent Canadian Sentencing Commission should take in developing guidelines for Canada.

(1) Should guidelines be explicitly based on previous sentence decisions? The answer is no. Such a procedure would be unwise and, probably, impractical. Probably most crucially, guidelines should not be "sold" as the codification of existing judicial decisions. While such an approach may have some short-term political advantages in generating support for the guidelines its long-term impact is likely to be the minimization of disparity elimination, the stifling of clear, articulate sentencing policy development and the delegitimization of adaptive policy formation.

(2) Should guidelines be advisory, presumptive or compulsory? If guidelines are to have impact in terms of the discussed outcomes, the evidence suggests they must have, at least, presumptive force. One clear finding is that truly voluntary guidelines have no, or almost no, impact especially in reducing disparity. The evidence suggests that a presumptive approach is most appropriate. A presumptive system allows judges to deviate from the guidelines provided such departures are explained in writing. Either party (i.e. crown counsel or the defense) would have the opportunity to appeal such sentences. A presumptive approach would optimize disparity reduction because it would ensure that unlike cases were not treated in a like manner. Additionally, it would ensure that the appeal courts continue to play an important role in ensuring a coherent but adaptive sentencing law. Compulsory guidelines would discourage such development.

Another finding is that this tends to be an issues prone to euphemism;

for example, to describe guidelines as "voluntary", but to, in fact, structure them so they have presumptive force. Such an approach, again, has some short-term appeal — it may defuse some judicial opposition. But such euphemisms may be taken at their face value, thereby delegitimizing a guidelines commission's efforts to reduce disparity and to develop a coherent and comprehensive sentencing policy. For this reason euphemistic language should be avoided. It should be recognized that achieving presumptive force will be extremely difficult given the historical sentencing power of Canadian judges (at least in theory).

(3) How should plea-bargaining be dealt with in the guidelines? This is undoubtedly the single most difficult issue to deal with in the development of guidelines. A finding of this report is that the failure of the MSGC and PCS to actively deal with this issue has almost certainly reduced the amount of disparity reduction achieved. This failure has probably also retarded the development of principled sentencing policy. A major problem is that disparity caused by plea-bargaining is extremely difficult to detect under a guidelines system. The minimal requirement is that any disparity analysis should control for the nature of the plea. This would allow guideline analysts to monitor the extent to which plea-bargaining is impeaching the guidelines. The more radical step is to overtly include some "quid pro quo" for plea-bargaining in guidelines. Again bringing plea bargaining from the shadows will be extremely difficult. Canadian judges and counsel have been even willing than their American colleagues to acknowledge the centrality of plea bargaining.

(4) Should variables be used in the guidelines that are not related to either the seriousness of the offence or to previous record? No. Mitigating

and aggravating circumstances (of various kinds) can (and should) provide an implicit third dimension to the guidelines, this is enough. Additional variables, almost inevitably, would involve an attempt at prediction. Given that the evidence is that such predictions are unreliable their inclusion would seriously compromise disparity reduction. The fact that the USSC has included numerous variables of this type suggests that it will only have a minimal impact on disparity and on sentencing policy in general.

(5) Should capacity constraints be overtly used in determining the severity of incarcerative sentences? The answer may appear obvious and, indeed, it is: yes. What is perhaps less obvious are the implications of using capacity constraints. The major implication is that a major analytic effort will be required to build some kind of simulation model. In Minnesota's case this was relatively simple, however, it will be considerably more costly for the complex, spatially diffused Canadian correctional system. However, such modeling capability is necessary to a rational sentencing system. The evidence is quite clear from the United States that the ability to convincingly predict the capacity implications of proposed sentencing penalties defuses much unrealistic external pressure group activity.

(6) Should the guidelines cover all incarcerative sentences and non-incarcerative sentences? Ideally, guidelines should cover all incarcerative sentences. The evidence is that the aggregate disparity involved in short incarcerative sentences is very considerable. The great danger is that a commission might dissipate its effort by attempting to overambitiously attack all sentences simultaneously. Therefore, it makes more sense to make a commitment to develop guidelines for all incarcerative sentences but to implement this commitment sequentially. In the Canadian

context, the obvious break-point is at two years; guidelines should first be developed and implemented for those sentences to be served in Federal prisons.

(7) What format should guidelines take? The practical choice is between a single aggregate matrix (Minnesota) and offence-specific matrices (Pennsylvania). This report has argued that offence-specific matrices are more flexible and, therefore, more accommodating to the needs of an evolutionary sentencing policy. Additionally, offence specific matrices allow overlap where necessary, facilitating "fine-tuning" of penalties.

(8) How much discretion should a judge have within a given (matrix) cell? The U.S. evidence suggests there is a clear correlation between judicial discretion reduction and disparity reduction, therefore, all discretion within particular cells should be relatively limited.

(9) How should relative penalty severity be decided? The evidence suggests that a guidelines commission will inevitably be forced into prescriptive decisionmaking, therefore, the question is whether this process will be manifest or latent. Unless the guidelines commission explicitly embraces such a role its ability to develop a coherent, integrated sentencing policy will be seriously compromised. This, of course, should not prevent the commission from using current practice as a benchmark.[166]

(10) Should sentencing guidelines specify the minimum incarcerative sentence or the actual sentence to be served? The evidence suggests that it makes little sense to implement guidelines of the type outlined and then retain a parole board release function. Either the parole board will continue to utilize its own relatively informal procedures, thus probably increasing disparity and subverting the implementation of coherent sentencing

principles or, conceivably, the parole board would introduce guidelines itself (as did the Minnesota board before its abolition) in which case it would be (expensively) redundant.

In summary, these findings suggest that the MSGC is an excellent guidelines model with one important outcome caveat, three issue caveats and one process caveat. The outcome caveat is that Minnesota has not eliminated sentencing disparity, rather, it has been reduced. The issue caveats are: first, the Minnesota guidelines do not explicitly deal with plea-bargaining. There is clear evidence that charge bargaining has increased as a result of the guidelines.[167] Second, the guidelines do not cover shorter (jail) incarcerative sentences. This has been shown to be a serious problem in Minnesota. Third, Minnesota's single matrix is somewhat inflexible.

The process caveat is perhaps most difficult to analyze. The evidence suggests that there has been some "decay" in the implementation of the guidelines. The extent of disparity has increased over time, although it is still considerably less than prior to the introduction of the guidelines.

The major danger in Canada would appear to be the tendency not to make hard choices on sentencing reform. As has been pointed out previous sentencing "reform" has been extremely incremental and hesitant.

Footnotes

1. Order-in-Council P.C. 1984-1985, Privy Council, 10 May, 1984 (hereafter Order-in-Council).

2. Id., p.2.

3. Id., p.1.

4. A semantic point should be clarified here. The Canadian Sentencing Commission is not, at this time, a sentencing commission in the sense that it will be used throughout this article. The Canadian Sentencing Commission is constituted under Part I of the Inquiries Act. Like other (ie. Royal) commissions its task is to present model guidelines. Of course it may well be that upon presenting its reports -- and if it indeed recommends guidelines -- that it will be reformulated as an ongoing sentencing commission with the responsibility of actually developing and implementing guidelines.

5. As the U.S. legislation has invariably appointed an ongoing commission to develop guidelines, the terms guidelines and commission will often be used interchangeably to avoid the ungainly "commission/guidelines".

6. A preliminary empirical evaluation by the Sentencing Guidelines Commission in Washington should be available in 1986 (personal communication with Ms. Roxanna Park (Exec. Director), Sentencing Guidelines Commission). Some empirical evidence is available from Florida's pilot program guidelines, but none as yet from the revised and implemented statewide guidelines. There are considerable differences between the pilot guidelines and the legislated guidelines; see R. Spitzmiller, "An Examination of Issues in the Florida Sentencing

Guidelines", Nova Law Journal, Vol. 8, 1984, 687-721 (hereafter Spitzmiller).

7. Minnesota Sentencing Guidelines Commission "Report to the Legislature", St. Paul, Minnesota (1980) (hereinafter referred to as MSGC, 1980). Minnesota Sentencing Guidelines Commission "Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines", St. Paul, Minnesota (1982) (hereafter referred to as MSGC, 1982). Minnesota Sentencing Guidelines Commission "Report to the Legislature", St. Paul, Minnesota (1983) (hereinafter referred as MSGC, 1983). Minnesota Sentencing Guidelines Commission "The Impact of the Minnesota Sentencing Guidelines Three Year Evaluation", St. Paul, Minnesota (1984) (hereinafter referred as MSGC, 1984). Lubitz, R., J. Kramer and J. McClosky "Sentencing in Pennsylvania: A Review of 1977 Sentencing Patterns", State College: Pennsylvania Commission on Sentencing (1981) (hereinafter referred as Lubitz, Kramer and McClosky).

8. Knapp, K. "Estimating the Impact of Sentencing Policies on Prison Populations." Presented at the annual meeting of the American Society of Criminology, San Francisco, California (1980) (hereinafter referred as Knapp, 1980). Knapp, K. "Impact of the Minnesota Sentencing Guidelines on Sentencing Practices", Hamline Law Review, 5(2) (1982) 237-256 (hereinafter referred as Knapp, 1982). Kramer, J., J. McCloskey and N. Kurtz "Sentencing Reform: The Pennsylvania Commission on Sentencing." Paper presented at the annual meeting of the Academy of Criminal Justice Sciences, Louisville, Kentucky (1982) (hereinafter referred as Kramer, McCloskey and Kurtz). Kramer, J. and A. Scirica "Pennsylvania's Sentencing Guidelines: Just Desert Versus

Individualized Sentences." Presented at the annual meeting of the Academy of Criminal Justice Sciences, San Antonio, Texas (1983) (hereinafter referred as Kramer and Scirica). Kramer, J. and R. Lubitz "Pennsylvania's Sentencing Reform: The Impact of Commission Established Guidelines." Presented at the annual meeting of the Academy of Criminal Justice Sciences, Chicago, Illinois (1984) (hereinafter referred as Kramer and Lubitz.

9. Falvey, W. "Defense Perspectives on the Minnesota Sentencing Guidelines", Hamlin Law Review, 5(2) (1982) 257-270 (hereinafter referred as Falvey). Rathke, S. "Plea Negotiating Under the Minnesota Sentencing Guidelines", Hamline Law Review, 5(2) (1982) 271-291 (hereinafter referred as Rathke).

10. von Hirsch, A. "Constructing Guidelines for Sentencing: The Critical Choice for the Minnesota Sentencing Guidelines", Hamline Law Review, 5(2) (1982) 164-215 (hereinafter referred as von Hirsch, 1982). Martin, S. "The Politics of Sentencing Reforms: Sentencing Guidelines in Pennsylvania and Minnesota", (hereinafter referred as Martin, 1983), in A. Blumstein, J. Cohen, S. Martin and M. Lonry (eds.), Research on Sentencing: The Search for Reform Vol. II, Washington, National Academy Press (1983) (hereinafter Blumstein). Martin, S. "Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania", Villanova Law Review, 21(1) (1983-84) 21-113 (hereinafter referred as Martin, 1983-84).

11. Washington State Board of Prison Terms and Parole, Guidelines for Fixing Minimum Terms (Dec. 1, 1978).

12. Sentencing Reform Act of 1984.

13. For a recent version of these guidelines see: U.S. Parole Commission Rules Sec. 2-20 (effective September 1, 1981); 28 Code of Federal Regulation 2-20.

14. Rich, Sutton, Clear and Saks, Sentencing by Mathematics. An Evaluation of the Early Attempts to Develop and Implement Sentencing Guidelines, Williamsburg, National Centers for State Courts, 159-160 (1982) (hereinafter referred as Rich, Sutton, Clear and Saks).

15. Id.

16. A brief sampling of the vast literature on this topic includes: Fogel, D., "... We are the Living Proof ..." (1975); von Hirsch, A., Doing Justice (1976); P. O'Donnell, Churgin, M., and Curtis, D., Toward a Just and Effective Sentencing System (1977); Forst, Martin L., Sentencing Reform: Experiments in Reducing Disparity (1982).

17. Blumstein, supra note 10.

18. Davis, K., Discretionary Justice 126-42 (1969); Frankel, M., Criminal Sentences (1973); Harris, "Disquistion on the Need for a new Model for Criminal Sanctioning Systems", 77 West Virginia Law Review 263 (1975). Vining, A. "A Review of Issues in Sentencing", Ministry of the Solicitor General of Canada Technical Report Series No. 4, Ottawa, (1984) (hereinafter referred as Vining, 1984).

19. Frankel, 1973, supra note 18.

20. Some critics would argue that a demand for such goals is reductionist and simplistic. It is certainly not without problems. They would argue that the explication of goals is as likely to generate conflicts as it is to solve problems. For example attempts to discuss sentencing policy are likely to attract the political interest of groups that

would not normally become involved in sentencing (see issue 3 in the text).

21. MSGC, 1982, supra note 7; MSGC, 1984, supra note 7; Kramer and Lubitz, supra note 8.

22. For a complete description of sample and variables see MSGC, 1982: 16-40, supra note 7. Data included the conviction offence, criminal history, the presumptive sentence under the guidelines, the actual sentence imposed, race, sex, age and county of conviction. These data were supplemented with an examination of 1,728 of the 5,500 cases, including their offender characteristics (e.g. marital status, employment background and chemical use) and the apparent presence of "substantial and compelling circumstances". The cases were stratified by disposition, county, race and sex. Data on previous sentencing practices were collected on an approximate 50% sample of felony offenders sentenced in district court between July 1, 1977 and June 30, 1978, i.e. previous to the introduction of guidelines.

23. See Vining, A. "Developing Aggregate Measures of Disparity", Criminology, 21(2), (1983) 233-252, (hereafter Vining, 1983).

24. For the aggregate measure cell variance ranges from 0, which indicates complete uniformity, to .25, which represents the least uniformity that can occur. To move from measuring uniformity in a cell to the entire matrix each cell variance is multiplied by the number of cases in that cell, the products are summed and the result divided by the total number of cases. The matrix variance, like the cell variance, ranges from 0 (complete uniformity) to .25 (least amount of uniformity). The aggregate variance measure is computed by: (1) determining the

variance of each cell in the matrix (i.e. determining the uniformity in each cell); (2) multiplying each cell's variance by the number of cases in that cell so that cells with large numbers of cases are weighted more heavily than cells with small numbers; (3) summing the weighted variances across all of the cells; and (4) dividing by the total number of cases. The resultant figure is a uniformity measure for the entire matrix (MSGC, 1982: 16-40, supra note 7).

25. MSGC, 1984:33, supra note 7.

26. MSGC, 1982:22, supra note 7.

27. MSGC, 1982:23, supra note 7.

28. The dispositional departure rate for White offenders was 5.2%, for Blacks 9.6% and for Native Americans 12.4%. State imprisonment was imposed when the presumptive sentence was a stay in 2.6% of cases involving Whites, 4.9% of cases involving Blacks and 7.5% of cases involving Native Americans. Less severe dispositions than recommended by the guidelines were given in 2.7% of cases involving Whites, 4.7% of cases involving Blacks and 4.9% of cases involving Native Americans. MSGC's examination of the pre-guideline data indicated that dispositional departure rates under the guidelines would have been 18.6% for Whites, 21.5% for Blacks and 28.5% for Native Americans. Approximately 12.1% of White offenders, 12.2% of Black offenders and 11.4% of Native American offenders would have received a more severe disposition than the guidelines would have recommended, while approximately 6.5% of White offenders, 9.3% of Black offenders and 17.1% of Native American offenders would have received a less severe disposition than current recommendations; MSGC 1982:23, supra note 7.

29. For male offenders the dispositional departure rate was 6.5%. For females it was 3.1%. The dispositional departure rates for males and females can be contrasted with estimated dispositional departure rates in 1978-9 (i.e. pre-guidance) of 20.7% for males and 9.8% for females. (MSGC, 1982:23, supra note 7).

30. The assessors adopted a conservative approach in determining whether reasons existed that might have justified a departure from the guidelines. The review was conservative in two aspects: (1) a very strong presumption was maintained in favor of the recommended guidelines sentence; (2) the reasons for departure specified in the guidelines were treated as an exclusive rather than a non-exclusive list.

31. MSGC, 1984:36, supra note 1.

32. MSGC, 1984:39, supra note 1.

33. This is, of course, understandable given that this early sample of cases was just working its way through the system. Obviously, if the appeal court interprets its mandate rigorously many of these departures might eventually be eliminated.

34. Typical indeterminate sentence ranges in Minnesota were 0-5 years, 0-10 years and 0-20 years. For a broader discussion of disparity issues raised by such intermediate sentences see Vining "Reforming Canadian Sentencing Practices: Problems, Prospects and Lessons", Osgoode Hall Law Journal, 17(2), (1979) 355-414 (hereafter Vining, 1979). Also see Vining, 1984, supra note 18.

35. MSGC 1984:43, supra note 7.

36. Id.

37. MSGC, 1984:44, supra note 7.

38. MSGC, 1982:35, supra note 7.

39. They conclude "The extent of aggravation in durational departures continues to be an area of concern to critics, practitioners and policymakers. Excepting cases in which Supreme Court opinions have been issued, there were 18 sentences out of 827 executed sentences that were aggravated beyond the general standard of double the presumptive sentence articulated ... Ten of these were particularly extensive departures, their average being approximately 280 months ... Sentence appeals have been filed in several of these cases and the outcomes will undoubtedly help clarify the appropriate use of aggravated durations. It is certain that the role of extensive durational aggravations in effecting fair and equitable sentencing will be scrutinized by the Supreme Court, the Sentencing Guidelines Commission, and the Minnesota Legislature." MSGC, 1982:39, supra note 7.

40. MSGC, 1984:68, supra note 7.

41. MSGC, 1984, supra note 7.

42. MSGC, 1984:61-69, supra note 7.

43. MSGC, 1984, supra note 7.

44. Sentence information was collected for the crimes of aggravated assault, burglary, rape and robbery. The post-guideline sentencing data were based on sentences reported to the Commission as part of its guideline evaluation and monitoring system. In 1983 19,213 imposed sentences had been reported to and processed by the PCS. Sample counties were selected according to their population and geographical placement in order to ensure that all size and all regions of the state were represented. In most of the countries, information was collected on the total population of appropriate sentences. However, in four of the larger counties systematic samples were chosen. In Philadelphia and Allegheny counties random samples of sentences were selected for each of the four crime categories (Kramer and Lubitz, 1984, 14-15, supra note 8).

45. For complete details on sample and variables see Kramer and Lubitz, 17-24, supra note 8.

46. Id.

47. Kramer and Lubitz, Table 5, supra note 8.

48. The coefficient of variation remained approximately the same in 4 of the cells. In 13 of the cells the coefficients of variation were smaller in the post-guideline data and in 5 cells the coefficients of variation were larger. Kramer and Lubitz, 17-24, supra note 8.

49. Kramer and Lubitz, Table 4, supra note 8.

50. Lubitz, Kramer, and McCloskey, supra note 7.

51. Kramer and Lubitz, Table 8, supra note 8.

52. Office of the State Courts Administrator, Multijurisdictional Sentencing Guidelines Project, Final Report 3 (1983), 30.

53. Florida Sentencing Guidelines Commission, Guidelines Manual, 1983, 10.

54. See Rich, Sutton, Clear and Saks, supra note 14.

55. MSGC, 1984:21, supra note 7.

56. Id.

57. Id.

58. Prior to the guidelines, 45% of the offenders with severity levels of seven, eight or nine and criminal history scores of 0 or 1 were sent to state prison while approximately 54% of offenders at severity level one and two with criminal history scores of 3, 4 or 5 were imprisoned. Following implementation of the guidelines 78% of offenders with severity levels of seven, eight or nine and criminal history scores of 0 or 1 were imprisoned, a 73% increase over pre-guidelines practices. Of those offenders with severity levels one or two and criminal history

scores of 3, 4 or 5 only 15% of the offenders were imprisoned under the guidelines, a 72% reduction. MSGC, 1984: 21 and 27, supra note 7.

59. Martin, 1983, supra note 10.

60. Kramer and Lubitz, supra note 8.

61. Kramer and Lubitz, Table 11, supra note 8.

62. Id.

63. Martin, 1983, Martin, 1983-84, supra note 10.

64. Martin, 1983:295, supra note 10.

65. R. Spitzmiller, supra note 6, 703.

66. Given assumptions about the type and length of sentences (from the matrix and from assumptions about judges' behavior) MSGC staff found that future prison populations could be largely determined from: (1) the current prison population; (2) new commitments increasing the prison population between the present and future dates; and (3) the duration of imprisonment for current and future offenders. Martin, 1983-84:49, supra note 10.

67. Id.

68. The MSGC consists of the chief justice of the state supreme court and two other judges, two citizen members, a prosecutor and a public defender, the state commissioner of corrections and the chairman of the state parole board. Martin, 1983:276, supra note 12. Washington has followed Minnesota in not appointing any politicians to its Commission Sentencing Reform Act of 1981, WASH. REV. CODE. 9.94A.060 (2) (1981).

69. Martin argues that the inclusion of legislators was in keeping with Pennsylvania's political tradition of limited citizen participation and of policy making as the province of professional politicians. Martin,

1983, supra note 12.

70. See Vining, 1979, supra note 34; Vining 1984, supra note 18.

71. MSGC, 1983, supra note 7.

72. MSGC, 1983:4-5, supra note 7.

73. For example, in 1982 the House Committee recommended that the MSGC: (1) increase the severity level of certain drug offences; (2) increase the severity level of certain burglary offences; (3) establish the same severity level for criminal sexual conduct against children under 16 as criminal sexual conduct against mentally defective, mentally incapacitated or physically helpless adults; (4) study the feasibility of juvenile guidelines; (5) investigate the reasons for disparity in departure rates between the races; and (6) establish a matrix for offenders for whom imprisonment is presumptively improper. MSGC, 1983:5, supra note 7.

74. MSGC, 1983, supra note 7.

75. The MSGC argued that the vast majority of offenders convicted of these sales have criminal history scores of zero and that a stayed sentence with up to a year in a jail or workhouse is a commensurate sanction for first time "user-sellers". The Commission also pointed out that exceptions to this pattern had already been covered by the August 1981 revisions that added an aggravating factor for major "drug" offences. MSGC, 1983:7, supra note 7.

76. Telephone conversation with K. Knapp.

77. MSGC, 1983:1, supra note 1.

78. Minn. Sess. Law Ch. 360, 1981, 4.2.

79. Mandel, M. (1975) "Rethinking Parole", Osgoode Hall Law Journal,

13(2), 501-546 (hereinafter referred as Mandel).

80. Zimmerman, S. and A. Blumstein "The Construction of Sentencing Guidelines". Paper presented at the annual meeting of the Academy of Criminal Justice Sciences, Cincinnati, Ohio (1979) (hereinafter referred as Zimmerman and Blumstein, 1979); Sparks, R. "The Construction of Sentencing Guidelines: A Methodological Critique", in A. Blumstein, J. Cohen, S. Martin and M. Tonry (eds.), Research on Sentencing: The Search for Reform Vol. II, Washington, National Academy Press (1983) (hereinafter referred as Sparks).

81. Sparks, 195, supra note 80.

82. Martin, 1983-84:47, supra note 10.

83. Id.

84. As Knapp puts it: "The Albany approach obviously imposes a structure on guideline development that is heavily biased toward the institutionalization and maintenance of the status quo ... These assumptions were challenged in the development of the Minnesota Sentencing Guidelines and a very different developmental approach was adopted. Rather than viewing guideline development as a technical problem with a mathematical solution, sentencing guidelines development was viewed as a normative problem (i.e., how should punishment be allocated given limited resources) with a political solution (i.e., development of public policy)". Knapp, 1982:238-9, supra note 8.

85. The data revealed that there were considerable differences in sentencing by county: Philadelphia and Allegheny counties, with the highest crime rates, only incarcerated 28.5% of convicted offenders, while the suburban incarceration rate was 44.1%, and in rural areas the rate was 54%. Philadelphia judges also gave shorter sentences than suburban and rural judges for the same offences, particularly for misdemeanors. Martin, 1983-84:76, supra note 10.

86. Martin 1983-84, fn 323, supra note 10.

87. See Spitzmiller, 693, supra note 6. Sparks, supra note 80, has

described the methodological problems with such an approach.

88. Id. 694.

89. Id., p. 698. Although Spitzmiller notes that the Commission still "developed the guidelines by utilizing the statistical data provided by the project as to past sentencing practices," Spitzmiller, supra note 6, 696.

90. Sparks, R., B. Stecher, J. Albanese and P. Shelly (1982) "Stumbling Toward Justice: Some Overlooked Research and Policy Questions Concerning Statewide Sentencing Guidelines", School of Criminal Justice, Rutger University; Rich, Sutton, Clear and Saks, 1982, supra note 14.

91. Which should be distinguished from so-called presumptive sentencing systems, e.g. California.

92. MSGC, 1980: II.D., supra note 7.

93. Described in Martin 1983-4: 68, supra note 10, 42 Pa. Cons. Stat. Ann. S2155(a).

94. FLA. R. CRIM. P. 3.701 (6)(6) and (d) (11).

95. In fact Spitzmiller doubts whether the change of wording will actually weaken the presumptive force of the guidelines, Spitzmiller, supra note 6, pp. 703-4.

96. Vining, 1984, supra note 18.

97. Rathke, supra note 9.

98. Because the judge has at his discretion a wide range of conditions of probation including local confinement, fines, costs of prosecution and public defense, in-patient treatment and special conditions such as abstinence from alcohol, the presumptive sentence for most offenders is

stayed. The judge also has the discretion to stay either the imposition or execution of a sentence. An offender is unlikely to be grateful that his twelve months and one day sentence is guaranteed to be stayed if one of the conditions of the stay is eight to twelve months in the county jail. Rathke, 1982:282-3, supra note 12.

99. Id.

100. MSGC, 1982, 16-18, supra note 7.

101. MSGC, 1984:53, supra note 7.

102. MSGC, 1984:54, supra note 7.

103. Id.

104. MSGC, 1984, supra note 7.

105. MSGC, 1984:72, supra note 1.

106. Id.

107. Indeed, it would have been extremely difficult to deal with this issue given the short time frame in which several "rounds" of the guidelines were negotiated. Earlier versions of the guidelines did not overtly discuss plea-bargaining but would almost certainly have transferred more plea-bargaining discretion to prosecutors.

108. October 1981, Revised Draft Guidelines.

109. Sentencing Reform Act of 1981, ch. 137, 1981, Wash. Laws at 519, WASH. REV. CODE ch. 9.94A. 080 (1981).

110. M. Ruark "The Sentencing Reform Act of 1981: A Critique of Presumptive Sentencing in Washington", Gonzaga Law Review, Vol.17, 583-608, 603.

111. Kramer and Scirica, 11, supra note 8.

112. von Hirsch, for example, has revised his previous argument against the use of prior record. von Hirsch, A. "Desert and Previous Convictions

in Sentencing", Minnesota Law Review, 65 (April), (1981) 591-634 (hereafter von Hirsch, 1981); von Hirsch, 1982, supra note 10.

113. Sentencing Reform Act of 1981, WASH. REV. CODE 9.94A. 040 (2) (a) (1981).

114. Under the MSGC scoring system each prior felony conviction counts one point on the criminal history score, each gross misdemeanor is worth a half-point and each misdemeanor is worth a quarter point. Minnesota includes an offender's custody status (on parole or probation) as an additional element in determining prior record. Martin, 1983-84:51, supra note 10.

115. Id.

116. Martin, 1983-84:51, supra note 10. The Florida legislation directs that "[s]entencing should be neutral with respect to race, gender, and social and economic status", FLA. R. CRIM. p. 3.701 (b) (1).

117. Id.

118. See Vining, 1984:III-2, supra note 18, for a review of these issues.

119. Martin, 1983-84:80, supra note 4.

120. Id. "In reviewing the record the appellate court shall have regard for the nature and circumstances of the offence and the history and characteristics of the defendant" (18 Pa.Cons. Stat. Ann. 1386(d)(1).

121. The PCS chose not to include these factors for several reasons:

1. They were highly correlated with race, social status, and economic advantage; and they often reflected the opportunities available to particular segments of the population, or the cultural values of those groups.

2. They were not uniformly endorsed as important to sentencing by the

judges who responded to a mailed questionnaire.

3. The primary justification for including such factors was that they predict future criminality or amenability to punishment or rehabilitation. The Commission had previously decided that punishments would be primarily assigned on the basis of the current crime, and only secondarily for other reasons...
4. While such factors may be important in particular cases, the inclusion of these items in the Offender Score would have required their use in every case.

5. It is illogical to penalize the defendant for previous legal behavior which was unrelated to the crime. Unemployment, dropping out of school, moving frequently, etc. are not criminal acts; to punish more severely because of such acts would treat them as if they were crimes.

Kramer, McCloskey and Kurtz, 1982:23-4, supra note 2. Although Florida has followed Minnesota in most respects, in this respect it has followed the PCS by not having a specific aggravating and mitigating circumstances list. Florida Sentencing Guidelines Commission, Guidelines Manual, 1983, 10.

122. 204 Pa, Admin Code, 303, see Kramer, McCloskey and Kurtz, 60, supra note 8.

123. Kramer and Lubitz, 1984, supra note 8.

124. Sentencing Reform Act, 1984

125. Vining 1979, supra note 34.

126. Minn. Stat. 244.09 Subd.5. Florida adopted the same approach and language as Minnesota, FLA. R. CRIM. p. 3.701.

127. Martin points out that:

"The legislative directive ... gradually came to be interpreted as a directive that the guidelines should not lead to prison populations that exceeded the capacities of state correctional institutions. Although there was never a vote on the interpretation of the phrase as an absolute limit, Smaby, Parent, and Knapp early agreed to view it as an absolute constraint on the MSGC's decisionmaking and gradually "sold" this perspective as both principled and practical to both MSGC members and the interest groups that participated in MSGC meetings." Martin 1983-84:45, supra note 10.

128. Knapp, 1980, supra note 8.

129. Martin, 1983-84:74-75, supra note 10.

130. See footnotes 88 and 89 for these constraints on the role of the capacity constraint in sentence severity, see Spitzmiller, supra note 6, 697-8.

131. Martin, 1983-84:75, supra note 10.

132. Martin, 1983-84:109, supra note 10.

133. Martin, 1983-84:29, supra note 10.

134. MSGC, 1984:48, supra note 7.

135. Id.

136. Id.

137. MSGC, 1984:48, supra note 7.

138. MSGC, 1983:26, supra note 7.

139. Vining 1983, supra note 23.

140. MSGC, 1984:1, supra note 7.

141. The criminal history score is an additive measure of criminal history: (1) one point is assigned for each prior felony sentence; (2) one point is assigned if the offender was under some form of custody supervision for a prior felony or gross misdemeanor at the time the current offence was committed; (3) a maximum of one point is assigned for a felony-type juvenile record; and (4) a maximum of one point is assigned for prior non-traffic misdemeanor and gross misdemeanor sentences. The area of the matrix where presumptive imprisonment occurs most frequently above the dispositional line is at severity level six, MSGC, 1984:1-3, supra note 7.

142. MSGC, 1984:135, supra note 7.

143. With the former, a sentence is not imposed and the offender is placed

on probation. A stay of execution involves the imposition of sentence with the execution of sentence stayed for a specified period not to exceed the statutory maximum.

144. 12 Pa. Admin Bull 431, 432-33 (Jan, 1982); 204 Pa Admin Code S.303.

145. Mandatory Sentencing Act (Act 54, 1982).

146. The Mandatory Sentencing Act requires a minimum five year sentence for all persons convicted of third degree murder, voluntary manslaughter, rape, involuntary deviate sexual intercourse, arson endangering persons, felony I robbery and aggravated assault inflicting serious bodily injury, if the offender had previously been convicted of one of these offences, if the crime was committed with a firearm or if the crime was committed on or in the vicinity of a public transportation facility.

147. Kramer, McCloskey and Kurtz, 66-7, supra note 2.

148. See Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (1976) for a discussion of this issue.

149. As has the State of Washington, supra note 11.

150. For example, 3rd degree murder with "3" criminal history score in the MSGC guidelines has a normal range of between 143 and 155 months, while 3rd degree murder in the PCS guidelines, also with a "3" prior record score, has a normal range of 72 months to 120 months (the absolute differences in months are not comparable because of "good time" provisions and the fact that Pennsylvania's sentence is a minimum).

151. Kramer and Lubitz, Table 5, supra note 2.

152. McCarthy, J. "Report of the Sentencing Guidelines Project to the Administrative Director of the Courts", State of New Jersey

Administrative Office of the Courts, Trenton (1978).

153. Sparks, 1983, supra note 80.

154. Vining, 1984: IV-4, supra note 18.

155. Wolfgang, M. "Seriousness of Crime and a Policy of Juvenile Justice", in J. Short (ed.) Delinquency, Crime and Society, Chicago: University of Chicago Press (1976); Sellin, T. and M. Wolfgang The Measurement of Delinquency, New York: John Wiley and Sons (1964).

156. Figlio, R. "The Seriousness of Offenses: An Evaluation by Offenders and Non-Offenders", Journal of Criminal Law and Criminology, 66(2) (1975), 189-200; Hsu, M. Cultural and Sexual Differences on the Judgement of Criminal Offenses: A Replication Study of the Measurement of Delinquency", Journal of Criminal Law and Criminology, 64(3), (1973) 348-353; Kvalseth, T. "Seriousness of Offenses", Criminology, 18(2), (1980) 237-244; Pease, K., J. Ireson and J. Thorpe "Modified Crime Indices for Eight Countries", Journal of Criminal Law and Criminology, 66(2), (1975) 209-214; Pease, K., J. Kreson, S. Billingham and J. Thorpe "The Development of a Scale of Offense Seriousness", International Journal of Criminology and Penology, 5(11), (1977) 17-29; Rossi, P., E. Waite, C. Bose and R. Berk "The Seriousness of Crime: Normative Structure and Individual Difference", American Sociological Review 39(2), (1974) 224-237; Sheley, J. "Crime Seriousness Ratings", British Journal of Criminology, 20(2), (1980) 123-135; Walker, M. "Measuring the Seriousness of Crimes", British Journal of Criminology, 18(4), (1978) 348-364.

157. Martin, 1983-84:51, supra note 10.

158. Id.

159. von Hirsch, 1981, supra note 112.

160. See Vining, 1984, supra note 18.

161. Because the MSGC staff has presented an unusually clear justification for the framework it adopted, it is worth repeating at some length:

> The combination of issues ... caused the Commission to explore and ultimately choose a dominant sentencing goal, that of retribution. As noted above, rehabilitation as a sentencing goal had been undermined in the legislation that created the Sentencing Guidelines Commission. Deterrence as an explicit sentencing goal was not pursued because there was little understanding as to what sort of sentencing structure would best support the goal of deterrence, unless it would be similar to a deserts sentencing structure, with the more serious offences assigned the more severe penalties.
>
> The commission rejected the incorporation of an explicit incapacitation factor, such as a risk prediction instrument, in the Sentencing Guidelines. ... The more significant objections, however, relate to: 1) an inherent conflict between likelihood of recidivism and a retributive schedule based on seriousness of offence; 2) the inevitable over-prediction that occurs when predicting to an infrequent event, such as recidivism with a felony offence; and 3) the ethical problem resulting from punishment for crimes that might be committed in the future ...
>
> While none of the utilitarian sentencing goals was affirmatively incorporated into the Sentencing Guidelines, utilitarian sentencing goals were retained somehwat amorphously, and with reduced importance, with the inclusion of criminal history as one component that determines presumptive sentences under Sentencing guidelines.
> MSGC, 1982:10-11, supra note 1.

162. Martin, 1983-84:79, supra note 10.

163. Martin, 1983-84:89, supra note 10.

164. See Vining, 1984, supra note 18, for a review.

165. See von Hirsch and K. Hanrahan, The Question of Parole: Retention, Reform or Abolition (1979), Chapter 9.

166. Vining and Dean has presented one view how current Canadian sentencing practices might be integrated into a guidelines approach; see A. Vining and C. Dean "Towards Sentencing Uniformity: Integrating the Normative and the Empirical Orientation (Ch.7) in New Directions in Sentencing

edited by B. Grosman, Toronto: Butterworths (1980).

167. MSGC, 1984, supra note 7.

IV. 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*	324 *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

(Rev. Eff. 8/1/81; 11/1/83; 8/1/84)

APPENDIX 2
Pennsylvania Guidelines Matrix

Offense Gravity Score	Prior Record Score	Minimum 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 ***	78–102
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 I); 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
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

*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 §303.7.

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

Offense Gravity Score	Prior Record Score	Minimum Range*	Aggravated Minimum Range*	Mitigated Minimum Range*
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 $2000, by force or threat of force, or in breach of fiduciary obligations**	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
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 §303.7.

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