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# THE ROLE OF THE LEGISLATURE, THE SENTENCING COMMISSION, AND OTHER OFFICIALS UNDER THE MINNESOTA SENTENCING GUIDELINES

Richard S. Frase\*

## INTRODUCTION

Minnesota's experience with sentencing guidelines remains critically important to legislators and sentencing reformers in other jurisdictions. Minnesota adopted the first commission-based presumptive sentencing system in 1980, and its Guidelines<sup>1</sup> have been the focus of exhaustive study.<sup>2</sup> The Minnesota Sentencing Guidelines Commission has routinely collected extensive data on all felony sentences, as well as more detailed data on selected sentencing samples.<sup>3</sup> This rich source of data and commentary, coupled with a considerable appellate caselaw interpreting the Guidelines and over a decade of legislative and Commission-initiated

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1. The current version of the Minnesota Sentencing Guidelines can be found in MINN. STAT. ANN. ch. 244, §§ I-V (Appendix) (West 1992) and in MINN. R. CT., MINN. SENTENCING GUIDELINES AND COMMENTARY §§ I-V (West 1992) [hereinafter GUIDELINES].

2. See, e.g., MINN. SENTENCING GUIDELINES COMM'N, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION (1984) [hereinafter THREE YEAR EVALUATION]; DALE E. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988); Richard S. Frase, *Implementing Commission-based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. LAW & PUB. POL'Y (forthcoming Spring 1993) (evaluating success of the Guidelines, through 1989, in achieving the Commission's stated or apparent goals) [hereinafter Frase, *First Ten Years*]; Kay A. Knapp, *What Sentencing Reform in Minnesota Has and Has Not Accomplished*, 68 JUDICATURE 181 (1984); Terance D. Miethe, *Charging and Plea Bargaining Practices under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155 (1987); Charles A. Moore & Terance D. Miethe, *Regulated and Unregulated Sentencing Decisions: An Analysis of First-Year Practices Under Minnesota's Felony Sentencing Guidelines*, 20 LAW & SOC'Y REV. 253 (1986); Terance D. Miethe & Charles A. Moore, *Socioeconomic Disparities under Determinate Sentencing Systems: A Comparison of Preguideline and Postguideline Practices in Minnesota*, 23 CRIMINOLOGY 337 (1985); Terance D. Miethe & Charles A. Moore, *Can Sentencing Reform Work? A Four-year Evaluation of Determinate Sentencing in Minnesota* (1987) (project supported by a national Institute of Justice grant, copy on file with author).

Dale Parent's book is reviewed and updated (through 1988) in Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After*, 75 MINN. L. REV. 727 (1991) [hereinafter Frase, *Ten Years After*]. See also Debra L. Dailey, *The Sentencing of Sex Offenders Under the Minnesota Sentencing Guidelines: Is There a Need for Change?* 10 HAMLINE J. PUB. L. & POL'Y 193 (1990); *Symposium on Determinate Sentencing*, 5 HAMLINE L. REV. 161 (1982) (articles and casenotes on Minnesota Guidelines).

3. See Frase, *First Ten Years*, *supra* note 2, at 52 n.2.

amendments, provides invaluable lessons concerning the processes by which commission-based guidelines are drafted, implemented, and evolve over time.

Although a major goal of the Minnesota Guidelines was to reduce the legislative role in sentencing,<sup>4</sup> that role has remained prominent in Minnesota and has become increasingly so since 1989. This article examines the interaction between the Minnesota Legislature and the Minnesota Sentencing Guidelines Commission, with particular emphasis on the division of decision-making power between the two bodies regarding overall sentencing purposes and sentencing policy for particular offenses and offenders. This article also describes the role that other criminal justice system actors—particularly the appellate courts—have played in these decisions, and the powerful influence that political and media events have had in shaping recent sentencing policy. Part I of the article describes the 1978 legislation creating the Minnesota Sentencing Guidelines Commission and discusses the statute's apparent goals and sentencing philosophy. Part II examines the Commission's implementation of its statutory mandate, and the extent to which the Commission has both followed and departed from the legislature's original intent. Part III summarizes the most important legislative, judicial, and Commission-initiated Guidelines developments to date, while Part IV analyzes the successes and failures of the Guidelines and anticipates likely developments in the near future. This article concludes by highlighting the lessons of the Minnesota experience, lessons that should serve as guides to legislators in other jurisdictions in drafting an enabling statute and in defining the legislature's proper post-implementation role.

#### I. THE 1978 ENABLING STATUTE AND ITS APPARENT PURPOSES

The broad outlines of the Minnesota Sentencing Guidelines were laid down in a 1978 statute creating the Minnesota Sentencing Guidelines Commission<sup>5</sup> (Commission). The new Commission was to be composed of nine members—a justice of the Minnesota Supreme Court, two district court judges, one public defender, one county attorney, the Commissioner of Corrections, the Corrections (parole) Board Chairman, and two public members.<sup>6</sup>

The Commission was directed to promulgate guidelines regulating both the decision to impose state imprisonment and the duration<sup>7</sup> of that imprisonment. These guidelines were to be based on "reasonable offense and offender characteristics" and were to take into "substantial consider-

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4. For a discussion of this goal, see *infra* text accompanying note 140-43.

5. 1978 Minn. Laws 723.

6. *Id.* art. I, § 9. The Commission now has 11 members, including three public members: a peace officer, a probation or parole officer (in lieu of the former Corrections Board representative), and a court of appeals judge (in lieu of one of the district court judges). MINN. STAT. ANN. § 244.09-2 (West 1992).

7. Presumptive prison durations were to fall within a narrow range (plus or minus 15% of the presumptive duration). 1978 Minn. Laws 723, § 9-5.

ation" (1) current sentencing and release practices, and (2) correctional resources—including but not limited to the capacities of local and state correctional facilities.<sup>8</sup> The Commission was also permitted, though not required, to develop guidelines regulating the conditions of non-prison sentences.<sup>9</sup> Parole release was abolished under the act and was replaced with a specified reduction—up to one-third off the pronounced sentence—for good behavior in prison.<sup>10</sup> This earned "good time" reduction would then constitute a period of parole-like post-release supervision, the "supervised release term."<sup>11</sup> The statute also implied that denial of good time reductions could only be based on disciplinary violations, and not on a failure to participate in or cooperate with in-prison treatment programs, since all such programs were to become voluntary.<sup>12</sup> Finally, sentencing judges were directed under the act to provide written reasons for departing from the new guidelines,<sup>13</sup> with both the prosecution and defense given the right to appeal any sentence, whether or not it constituted a departure.<sup>14</sup>

The procedures and policy decisions adopted by the Commission to carry out its statutory mandate are discussed later in this article; however, it is worthwhile to pause at this juncture to inquire what conclusions can be reached concerning the original legislative intent reflected in the enabling statute and its legislative history. It seems clear that a major purpose of the enabling statute was to reduce sentencing discretion, thus promoting greater uniformity of sentences. What broader sentencing purposes did the legislature intend? Subsequent Commission reports indicate that retribution, or "just deserts," represented the primary sentencing goal under the Guidelines.<sup>15</sup> Did the legislature desire such a focus?<sup>16</sup> If not clearly retributive, can the enabling statute at least be read as rejecting each of the utilitarian purposes of punishment—rehabilitation, incapacitation, and deterrence? As discussed more fully in Part III of this article, subsequent legislation, appellate caselaw, and trial court departure practices strongly indicate continued adherence to utilitarian sentencing goals.<sup>17</sup> Which theory of punishment is truer to the legislature's original intent? How much of a departure from existing sentencing norms

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8. MINN. STAT. ANN. § 244.09-5(2) (West 1992).

9. *Id.*

10. *Id.* § 244.04.

11. *Id.* § 244.05.

12. *Id.* § 244.02, 244.03.

13. *Id.* § 244.10-2.

14. *Id.* § 244.11.

15. THREE YEAR EVALUATION, *supra* note 2, at 10.

16. The legislative goal of uniformity does not necessarily imply an emphasis on just deserts. Reduced discretion limits the ability of courts to achieve *all* major punishment goals—not only individualized treatment and incapacitation, but also retributive proportionality (i.e., "making the punishment fit the crime"). See Richard S. Frase, *Defendant Amenability to Treatment or Probation as a Basis for Departure Under the Minnesota and Federal Sentencing Guidelines*, 3 FED. SENT. REP. 328, 332 (1991).

17. For an explanation of the utilitarian goals of sentencing, see *infra* notes 36-43 and accompanying text.

did the legislature anticipate?

The principal academic proponent of the theory of just deserts, Professor Andrew von Hirsch, has conceded that the Minnesota enabling statute "suggests no particular rationale" or choice between sentencing purposes.<sup>18</sup> Indeed, the statute directs the Commission to give "substantial consideration" to existing sentencing and release practices. This instruction suggests that the legislature desired both limited change in pre-existing norms and substantial continued emphasis on utilitarian goals. Of course, the statute did limit the pursuit of such goals (especially rehabilitation and incapacitation) in that discretionary parole release was abolished and all prison treatment programs were made voluntary. However, the statute did not forbid consideration of the offender's treatment needs or dangerousness when determining whether to impose a prison term; nor did it preclude the imposition of conditions of probation or supervised release designed to promote rehabilitation or public safety. Thus, although individualized parole-risk assessments and coerced "cure" in prison were both abandoned, probation-risk assessments and treatment in the community—even *mandated* treatment<sup>19</sup>—were not necessarily rejected.

Nor does the legislative history of the enabling statute evince an intention to abandon utilitarian goals in favor of an emphasis on retribution, or to dramatically change any existing sentencing norms. The 1978 enabling act represented the culmination of several years of legislative ferment over the sentencing reform issue, reflecting increased dissatisfaction with indeterminate sentencing, but general indecision over the proper reform course to follow.<sup>20</sup> Sentencing purposes were apparently rarely debated as such. What consensus did exist seemed to focus on abolishing the parole board and enhancing the uniformity of sentences without any overall increase in sentencing severity or prison populations and, it seems, without agreement to change the sentencing of any particular offenses or offenders.<sup>21</sup> It is also worth noting that the 1978 legislature did not delete the references to utilitarian goals contained in the state's criminal code.<sup>22</sup> Moreover, the same bill that created the Commission also amended the statute governing presentence investigations to make these

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18. ANDREW VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* 65 (1987).

19. Cf. Lynne Goodstein, *Sentencing Reform and the Correctional System*, 5 *LAW & POL'Y Q.* 478, 494 (1983) (noting early emergence of the practice of setting mandatory treatment conditions of supervised release—the Guidelines "parole" term).

20. See generally CLARK, *AN HISTORICAL OVERVIEW OF SENTENCING REFORM LEGISLATION: 1975-1978* (1979) (unpublished report to the Minnesota Sentencing Guidelines Commission) (on file with author); PARENT, *supra* note 2, at 21-27; Susan E. Martin, *Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania*, 29 *VILL. L. REV.* 21 (1984).

21. VON HIRSCH ET AL., *supra* note 18, at 111.

22. MINN. STAT. ANN. § 609.01-1 (West 1992) (purposes of Code include deterrence, rehabilitation, incapacitation, fair notice, sentences reasonably related to conduct and character of accused, and fair procedures).

measures mandatory in felony cases, but did not delete or amend references to rehabilitation contained in the same subdivision of that statute.<sup>23</sup>

What, then, were the most probable legislative purposes in enacting the 1978 enabling statute? As the above analysis suggests, the major goals of this reform were: (1) to limit sharply judicial and parole discretion in pursuing all of the traditional purposes of punishment, without abandoning any of those purposes or preferring some over others; (2) to emphasize that a state prison sentence is imposed primarily to achieve retribution, deterrence, and incapacitation, and is not imposed to achieve forced rehabilitation (rehabilitation is to be pursued, if at all, outside of prison); (3) to consider other changes in sentencing policy, without departing significantly from existing practices; and (4) to recognize while pursuing the above goals that punishment—especially incarceration—is expensive and that overcrowding of facilities and other resources must be avoided, even if this means a failure to fully achieve all other punishment goals.

## II. THE ORIGINAL 1980 GUIDELINES—COMMISSION IMPLEMENTATION OF, AND COMPLIANCE WITH, THE LEGISLATIVE MANDATE

How did the Minnesota Sentencing Guidelines Commission interpret and carry out its legislative mandate to develop and implement sentencing guidelines? As described in the previous section, the Commission's principal statutory directives were: (1) to promulgate guidelines governing which offenders should be sent to prison, and for how long, based on "reasonable offense and offender characteristics;" (2) to consider guidelines for non-prison sentences, although the Commission was not required to develop such guidelines; and (3) in drafting the guidelines, to take into "substantial consideration" current sentencing and release practices and the state's correctional resources.<sup>24</sup>

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23. *Id.* § 609.115-1.

24. *Id.* § 244.09-5 (2).

**Figure 1**  
**Original Minnesota Sentencing Guidelines Grid**  
**Effective May 1, 1980**

**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.

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Unauthorized Use of Motor Vehicle</i>	I	12*	12*	12*	15	18	21	24
<i>Possession of Marijuana</i>								
<i>Theft Related Crimes (\$150-\$2500)</i>	II	12*	12*	14	17	20	23	27 25-29
<i>Sale of Marijuana</i>								
<i>Theft Crimes (\$150-\$2500)</i>	III	12*	13	16	19	22 21-23	27 25-29	32 30-34
<i>Burglary - Felony Intent Receiving Stolen Goods (\$150-\$2500)</i>	IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
<i>Simple Robbery</i>	V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
<i>Assault, 2nd Degree</i>	VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
<i>Aggravated Robbery</i>	VII	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
<i>Assault, 1st Degree Criminal Sexual Conduct, 1st Degree</i>	VIII	43 41-45	54 50-58	65 60-70	76 71-81	95 89-101	113 106-120	132 124-140
<i>Murder, 3rd Degree</i>	IX	97 94-100	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
<i>Murder, 2nd Degree</i>	X	116 111-121	140 133-147	162 153-171	203 192-214	243 231-255	284 270-298	324 309-339

Under state statutes, 1st Degree Murder has a mandatory life sentence.

\* one year and one day

Pursuant to this statutory mandate, the Commission promulgated a set of guidelines represented by the matrix shown in Figure 1, with ten categories of offense severity on the vertical axis and seven defendant criminal history scores on the horizontal axis.<sup>25</sup> Offenders with low to medium criminal history scores convicted of lower severity offenses were to receive a "stayed" (suspended) prison term of a specified number of months. For more serious offenses or criminal history scores, the presumptive sentence was an "executed" prison term within a narrow speci-

25. MINN. SENTENCING GUIDELINES COMM., REPORT TO THE LEGISLATURE 30 (1980) [hereinafter 1980 COMMISSION REPORT].

fied range (e.g., thirty to thirty-four months).<sup>26</sup> These durations were based primarily on prior parole release practices (plus good time) and system impact (i.e., staying within prison capacity). The boundary between presumptive stayed and presumptive executed prison terms was shown on the matrix by a heavy black line known as the "disposition line." Cases above the line had presumptive stayed sentences, except for a few cases involving dangerous weapons or repeat sex offenders, which were subject to mandatory minimum prison terms under existing state statutes. Additional rules specified when consecutive prison sentences could be imposed, listed permissible and impermissible bases for departing from presumptive disposition and durational rules, defined a departure standard (i.e., "substantial and compelling circumstances"),<sup>27</sup> and suggested, but did not require, a wide variety of possible conditions of stayed prison sentences—up to one year of confinement in a local jail or workhouse, supervised or unsupervised probation, fines, restitution, treatment, and community service.<sup>28</sup>

One of the earliest decisions the Commission made was to adopt a "prescriptive" rather than a "descriptive" approach to guidelines development.<sup>29</sup> That is, the new Guidelines were not expected to simply model and perpetuate past judicial and parole decisions, or even the average of prior decisions. Although prior practices were taken into account, the Commission independently determined which offenders should go to prison, for how long, and what the primary purpose of punishment ought to be. Thus, the new Guidelines were intended to be "norm-changing," not simply "norm-reinforcing." On the other hand, the Commission strictly interpreted its statutory mandate to consider existing correctional resources and adopted a goal of never exceeding 95% of prison capacity. The Commission then developed a computerized projection model to predict the future prison populations which would result from proposed guidelines and tailored the latter to stay within expected capacity. Finally, the Commission chose *not* to develop guidelines for non-prison sentences, although it did make "non-presumptive recommendations" for those sentences.

In addition to its emphasis on just deserts, the Commission's most important "prescriptive" changes to pre-existing sentencing policy included the following:

- The Commission developed a rank-ordering of offense severity based

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26. The Commission's cell ranges generally varied from 5% to 8% above or below the cell midpoint, which was less than the 15% allowed by the enabling act. See VON HIRSCH ET AL., *supra* note 18., at 65.

27. This standard is arguably stricter than that provided in the enabling statute: "unreasonable, inappropriate, excessive [or] unjustifiably disparate." See *id.* at 73.

28. MINN. STAT. ANN. § 609.135 (West 1992). In felony cases, the duration of a stayed sentence, and thus, the length of probation, may be any period up to the maximum prison term that could have been imposed, or three years, whichever is longer. *Id.* § 609.135-2(a).

29. See 1980 COMMISSION REPORT, *supra* note 25, at 2-3; THREE YEAR EVALUATION, *supra* note 2, at v, 8-10.



entirely on its own determination of the "seriousness" of each crime.<sup>30</sup> The Commission did not explain how these rankings differed from those implicit in prior imprisonment and parole release decisions, but a comparison of Commission rankings with the average pre-Guidelines prison rates and durations for each offense reveals substantial differences.<sup>31</sup>

- The Commission's criminal history scale included one point for prior misdemeanor convictions and another point for prior juvenile felony-level adjudications; the former had not been a significant factor in the pre-Guidelines decisions and the latter had been considered inconsistently.<sup>32</sup>

- The Commission excluded consideration of the defendant's education, marital status, and employment status at the time of the offense or at sentencing, even though this last factor had been significant in prior dispositional decisions.<sup>33</sup> The Commission concluded that such "social status" variables should not bear on the sentencing decision since they tended to be correlated with race and income level. In this respect, the Commission adopted the broad prescriptive norm that "sentencing should be neutral with respect to race, gender, social, or economic status."<sup>34</sup>

- In deciding where to draw the disposition line separating presumptive stayed from presumptive executed prison terms, the Commission emphasized a flatter, more "desert-oriented" slope and specifically chose to send more low-criminal history "person offenders," and fewer recidivist "property offenders" to prison.<sup>35</sup>

Despite its avowed emphasis on retribution, even the Commission did not abandon utilitarian sentencing goals. Nor did the Commission expect that most offenders would actually receive their full just deserts. The Guidelines were written in such a way that at least three-quarters of defendants would receive presumptive non-prison or stayed sentences.<sup>36</sup> The "deserved" sentence in these cases was defined only in terms of the presumptive duration provided for cases where an aggravated dispositional departure was ordered or the initial stay of prison was later revoked. Moreover, the Guidelines recommended and assumed that such

30. 1980 COMMISSION REPORT, *supra* note 25, at 6-7.

31. For example, child sex abuse cases received a severity rank of 94 out of 100, and were placed in Severity Level VIII (presumptive executed prison sentence, even for a first offense); but in 1978, only 45 percent of these cases received executed terms. Minn. Sentencing Guidelines Comm'n, 1978 Dispositional sample (analyzed by the author, using SPSS PC+ software; the data is described in the THREE YEAR EVALUATION, *supra* note 2, at 19-20).

32. 1980 COMMISSION REPORT, *supra* note 25, at 7.

33. *Id.* at 5.

34. GUIDELINES, *supra* note 1, § I(1).

35. 1980 COMMISSION REPORT, *supra* note 25, at 9, 15; THREE YEAR EVALUATION, *supra* note 2, at 21.

36. Presumptive stays would have applied to 83% of the cases in the pre-guidelines baseline dataset (1978), and in the first year after the Guidelines became effective, 85% of defendants had presumptive stayed sentences. This percentage has fallen in more recent years, and was only 75% in 1989. Frase, *First Ten Years*, *supra* note 2, at 16-17.

departures and revocations would be rare. In the absence of departure or revocation, the Guidelines did not specify any particular sentence for these defendants. Under pre-Guidelines sentencing laws, such defendants could receive up to twelve months in jail—or no jail at all; they could be required to undergo residential or outpatient treatment, comply with strict supervised probation, pay restitution, fines, costs, and perform community work obligations—or be subjected to none of these penalties. Of the pre-Guidelines defendants studied by the Commission, less than half received any jail time. Thus, the Commission must have expected a large number of defendants to receive less than their full just deserts, as measured by their presumptive stayed prison duration. For these defendants, the retributive standards established an upper limit of severity, but did not further define the sentence.

In terms of the sentencing philosophy to be applied to cases with presumptive stayed prison terms, all of the traditional purposes of punishment were retained. The Guidelines provided the following advice on the setting of stay conditions:

[The proper] penal objectives to be considered in establishing conditions of stayed sentences [include] retribution, rehabilitation, public protection, restitution, deterrence, and public condemnation of criminal conduct; the relative importance of these objectives may vary with both offense and offender characteristics and . . . multiple objectives may be present in any given sentence.<sup>37</sup>

This statement, of course, embodies the classic values of indeterminate sentencing theory and reflects a clear endorsement, in the context of non-prison sentences, of the full range of utilitarian goals of punishment. Thus, for most defendants, the original 1980 Guidelines essentially retained the traditional indeterminate sentencing system and its utilitarian values, subject only to retributive “caps” set by the presumptive duration of stayed prison terms.

As for the minority of defendants with presumptive executed prison terms, the Commission must have expected that many defendants would not receive their full just deserts and that utilitarian sentencing purposes would continue to play an important role. The Guidelines imposed concessions which can easily be used to avoid or mitigate presumptive prison terms. The Commission must have also known that prosecutors could, and probably would, at times consider offender-based, utilitarian sentencing goals in deciding to grant or deny such concessions.<sup>38</sup>

Thus, it is an over-simplification to say that the original 1980 Minnesota Guidelines reflected a purely retributive/just deserts philosophy, or even a “modified”<sup>39</sup> or “primarily”<sup>40</sup> just deserts philosophy. The Guide-

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37. GUIDELINES, *supra* note 1, § III(A)(2).

38. For a brief discussion of caselaw authorizing courts to depart dispositionally based on findings of offender “amenability” to probation, see *infra* text at notes 67-73.

39. 1980 COMMISSION REPORT, *supra* note 25, at 9.

40. THREE YEAR EVALUATION, *supra* note 2, at v, 10-14.

lines, as written, were actually more consistent with the "limiting" retributivism suggested in the writings of Professor Norval Morris.<sup>41</sup> For most defendants, considerations of just deserts set only upper limits on sentencing severity. Within those limits, courts and prosecutors were expected to continue to pursue utilitarian purposes of punishment—especially rehabilitation—and were to be guided by a general principle of restraint and economy that Morris labels "parsimony."<sup>42</sup> As the original Guidelines provided, sanctions were to be "the least restrictive necessary to achieve the purposes of the sentence."<sup>43</sup> However, consistent with Morris' view,<sup>44</sup> no offender was to be sent to prison for either coerced treatment or on the basis of individualized predictions of dangerousness. Nor was the duration of imprisonment to be based on "need-for-treatment" or dangerousness assessments. Instead, a state prison sentence under the Guidelines was intended to further retribution, general deterrence, and incapacitation, and its duration was measured primarily by retributive standards.

### III. MAJOR LEGISLATIVE, JUDICIAL, AND COMMISSION-INITIATED CHANGES SINCE 1980

The Guidelines and related sentencing laws have been amended many times since 1980, particularly with respect to presumptive prison durations for high-severity offenses (compare the current grid, shown in Figure 2 below, with the original grid shown in Figure 1). The following discussion explains how these and other important changes resulted from legislative, judicial, and Commission-initiated decisions, as well as important political and media events. The judicial contributions are largely independent and are described separately; however, the legislative and Commission decisions are so closely intertwined that a single chronological report, covering each major phase of Guidelines evolution, best describes these developments.

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41. NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 199 (1982) (duration only sets maximum and minimum of sentence; any further "fine tuning" to be done on utilitarian grounds); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 60, 73-76 (1974).

42. NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 59 (1974).

43. *GUIDELINES*, *supra* note 1, § I(3).

44. MORRIS, *supra* note 42, at 17-20, 59-73.

**Figure 2**  
**Minnesota Sentencing Guidelines Grid**  
**Effective August 1, 1989**

**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.

SEVERITY LEVELS OF CONVICTION OFFENSE	CRIMINAL HISTORY SCORE						
	0	1	2	3	4	5	6 or more
<i>Sale of a Simulated Controlled Substance</i> I	12*	12*	12*	13	15	17	19 18-20
<i>Theft Related Crimes (\$2500 or less)</i> <i>Check Forgery (\$200-\$2500)</i> II	12*	12*	13	15	17	19	21 20-22
<i>Theft Crimes (\$2500 or less)</i> III	12*	13	15	17	19 18-20	22 21-23	25 24-26
<i>Nonresidential Burglary Theft Crimes (over \$2500)</i> IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
<i>Residential Burglary Simple Robbery</i> V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
<i>Criminal Sexual Conduct 2nd Degree (a) &amp; (b)</i> VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
<i>Aggravated Robbery</i> VII	48 44-52	58 54-62	68 64-72	78 74-82	88 84-92	98 94-102	108 104-112
<i>Criminal Sexual Conduct, 1st Degree</i> <i>Assault, 1st Degree</i> VIII	86 81-91	98 93-103	110 105-115	122 117-127	134 129-139	146 141-151	158 153-163
<i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree (felony murder)</i> IX	150 144-156	165 159-171	180 174-186	195 189-201	210 204-216	225 219-231	240 234-246
<i>Murder, 2nd Degree (with intent)</i> X	306 299-313	326 319-333	346 339-353	366 359-373	386 379-393	406 399-413	426 419-433

Under state statutes, 1st Degree Murder has a mandatory life sentence.

\* one year and one day

### A. Legislative Approval of Commission Proposals

A key issue in any commission-based sentencing system involves the division of labor between the legislature and the commission in enacting specific guidelines. While the 1978 enabling act allowed the Minnesota Legislature to veto the initial set of Guidelines proposed by the Commission, it did not define the legislature's role in the proposal or approval of subsequent changes.<sup>45</sup> In 1982, the Commission and the legislature agreed

45. MINN. STAT. ANN. § 244.09-5 (West 1992).

on a procedure whereby the legislature could require the Commission either to adopt certain legislative amendments to the Guidelines or to report its rationale for failing to do so.<sup>46</sup> A 1984 statute<sup>47</sup> imposed additional legislative control. This statute provided that all Commission-initiated changes to the Guidelines grid or any other modifications resulting in reduced sentences or the early release of any inmate be submitted to the legislature by January 1 of any given year, to become effective on August 1 of that year, unless the legislature specifically provided otherwise.

### *B. Major Guidelines and Statutory Changes Through 1988*

The most important changes made by the Commission itself between 1980 and 1988 involved the duration of presumptive prison terms.<sup>48</sup> In 1983, the Commission lowered sentence durations at severity levels I through III, with medium to high criminal history, by amounts ranging from one to seven months to avoid prison overcrowding.<sup>49</sup> At the same time, the Commission added from eight to one hundred months to the presumptive durations in certain cells at severity levels IX and X.<sup>50</sup>

Apart from these Commission-initiated changes, the legislature adopted major statutory changes affecting the Guidelines between 1980 and 1988. In 1981, the legislature amended the statute requiring a mandatory minimum prison term for the use of a dangerous weapon during the commission of a crime. This amendment increased the prison term for the use of a firearm during commission of a crime, increased the number of offenses to which the statute applied, and authorized courts to depart from the mandatory minimum prison term on the prosecutor's motion.<sup>51</sup> In that same year, the legislature created the separate offense of Intrafamilial Sexual Abuse to parallel the existing Criminal Sexual Conduct statutes. This legislation provided that the court could impose a stayed prison sentence if it found a stay to be in the best interest of the complainant or the family unit.<sup>52</sup> In 1985, the requirements for such

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46. PARENT, *supra* note 2, at 50.

47. MINN. STAT. ANN. § 244.09-11 (West 1992).

48. In addition, the disposition line was changed so that the upper righthand cell (severity level I, criminal history six or more) is now a presumptive executed prison sentence, not a stayed sentence (compare figures 1 and 2); also, aggravating factors were added for drug crimes, violent crimes for hire, and gang-related offenses. See KAY A. KNAPP, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY ANNOTATED 61A (1985 & Supp. 1992).

49. THREE YEAR EVALUATION, *supra* note 2, at 92.

50. *Id.*

51. MINN. STAT. ANN. § 609.11-4, -9 (West 1987). The statutory "sentence apart" provision may have been added in response to a Minnesota Supreme Court decision holding that the weapons statute was truly mandatory and did not permit probation (stay of imprisonment). *State v. Jonason*, 292 N.W.2d 730 (Minn. 1980). In 1982, the Minnesota Supreme Court ruled that the trial court may also depart on its own initiative without a prosecutor's motion. *State v. Olson*, 325 N.W.2d 13 (Minn. 1982).

52. MINN. STAT. ANN. § 609.364 to .3644 (West 1985). This provision was repealed in 1985 and replaced by similarly-worded provisions in the regular Criminal Sexual Conduct statutes. See, e.g., *id.* § 609.342-1(g), -3 (West 1987 & Supp. 1993) (stay authorized for cer-

stayed sentences were supplemented. A "professional assessment" provision was added requiring a finding that the offender had been accepted by, and could respond to, a treatment program<sup>53</sup> before the court could impose a stayed prison term. In addition, the court was required to compel the defendant to complete the treatment program and serve some period of incarceration in a local jail or warehouse.<sup>54</sup> In 1987, the legislature added a similar "amenable-to-treatment" provision to the statute imposing a mandatory minimum prison term for repeat sex offenders.<sup>55</sup> In 1985, 1986, and 1987, the legislature and the Commission adopted substantially increased penalties for cocaine and certain other drug crimes.<sup>56</sup>

### C. Important Early Guidelines Caselaw

Most of the major judicial decisions interpreting the Guidelines occurred in the first two years following their implementation. The Minnesota Supreme Court entirely controlled the early interpretation of the Guidelines, since the intermediate court of appeals did not yet exist.<sup>57</sup> The supreme court promptly established the principle that sentencing be based on the "conviction offense" rather than on details of offenses either dismissed or never filed—so-called "real offense" sentencing.<sup>58</sup> The court also determined that judges could not base departures from the Guidelines on assessments of the individual defendant's dangerousness,<sup>59</sup> on special needs for deterrence,<sup>60</sup> or on factors such as the absence of criminal history, which the drafters of the Guidelines had already taken into account.<sup>61</sup> In *State v. Evans*,<sup>62</sup> the court ruled that upward durational

tain offenders with a "significant relationship" to the complainant).

53. *Id.* § 609.11-4, -9.

54. *Id.* § 609.342-3(1), (2). The statute has been further amended such that the defendant can "have no unsupervised contact with the complainant" prior to completion of the program. *Id.* § 609.342-3.

55. *Id.* § 609.346-2. *See also* *State v. Feinstein*, 338 N.W.2d 244 (Minn. 1983) (holding that trial courts still have authority to grant probation in cases covered by this mandatory minimum statute, provided they comply with Guidelines requirements for a mitigated dispositional departure).

56. MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON CONTROLLED SUBSTANCE OFFENSES 3-4 (1992).

57. The Minnesota Court of Appeals did not begin issuing opinions until February 1984.

58. THREE YEAR EVALUATION, *supra* note 2, at 111-13. *Cf.* *United States v. Galloway*, 976 F.2d 414 (8th Cir. 1992) (en banc) (upholding trial court's power to impose a sentence three times longer than the Federal Sentencing Guidelines' presumptive term based on uncharged "relevant conduct"). However, some real-offense sentencing is permitted under the Minnesota Guidelines (e.g., mandatory prison terms are applicable if the offense is committed with a weapon, including many crimes which do not include weapon use as an element). *See* Frase, *First Ten Years*, *supra* note 2, at 57 n.24.

59. *State v. Hagen*, 317 N.W.2d 701, 703 (Minn. 1982).

60. *State v. Schmit*, 329 N.W.2d 56, 58 n.1 (Minn. 1983).

61. THREE YEAR EVALUATION, *supra* note 2, at 121, 124 (concept of "redundancy" with other Guidelines provisions or with factors inherent in the nature of the offense).

62. 311 N.W.2d 481 (Minn. 1981).

departures should not generally exceed twice the presumptive duration.<sup>63</sup> However, the court intimated that in exceptional cases, the trial court could depart up to the statutory maximum.<sup>64</sup> Trial court decisions that did not depart from the Guidelines were largely insulated from appellate scrutiny by the court's statement in *State v. Kindem*,<sup>65</sup> that "[although] we do not intend entirely to close the door . . . it would be a rare case which would warrant reversal of the refusal to depart."<sup>66</sup>

In another significant line of cases, the Minnesota Supreme Court held that dispositional departures, but not durational departures, could be based on individualized assessments of the offender's "amenability" to probation or prison.<sup>67</sup> In *State v. Park*,<sup>68</sup> the court upheld an upward dispositional departure, consisting of commitment to prison rather than the presumptive stayed term, based on the defendant's "unamenability" to probation as evidenced by prior probation violations and an unwillingness to admit a chemical dependency problem.<sup>69</sup> In *State v. Wright*,<sup>70</sup> the court upheld a downward dispositional departure based on findings that the defendant was unusually vulnerable and was, therefore, unamenable to prison.<sup>71</sup> In *State v. Trog*,<sup>72</sup> the court upheld a downward dispositional departure based solely on the defendant's particular amenability to probation. In reaching this decision, the court emphasized the aberrational and uncharacteristic nature of the defendant's crime, rather than any specific treatment needs.<sup>73</sup>

In *State v. Randolph*,<sup>74</sup> the court held that the trial court must grant a defendant's request for execution of the presumptive stayed prison term when the trial court's proposed conditions of the stay are so onerous that they are, in effect, more severe than the prison term.<sup>75</sup> Such defendant requests account for a high proportion of upward dispositional departures.<sup>76</sup>

Finally, in *State v. Hernandez*,<sup>77</sup> the court held that criminal history

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63. *Id.* at 483.

64. *Id.*

65. 313 N.W.2d 6 (Minn. 1981).

66. *Id.* at 7.

67. These cases are discussed at length in Frase, *Ten Years After*, *supra* note 2, at 740-48. A similar line of cases decided under the Federal Sentencing Guidelines is discussed in Frase, *supra* note 16, at 328.

68. 305 N.W.2d 775 (Minn. 1981).

69. *Id.*

70. 310 N.W.2d 461 (Minn. 1981).

71. *Id.* at 462.

72. 323 N.W.2d 28 (Minn. 1982).

73. *Id.* at 31. Commission data on trial court reasons for departure indicates that amenable-to-probation findings are quite common, constituting one-half of all downward dispositional departures. See Frase, *First Ten Years*, *supra* note 2, at 41.

74. 316 N.W.2d 508 (Minn. 1982).

75. *Id.* at 510-11.

76. See Frase, *Ten Years After*, *supra* note 2, at 738; Frase, *First Ten Years*, *supra* note 2, at 29. *Randolph* requests, coupled with cases of defendants already in or going to prison on other charges, accounted for three-quarters of upward dispositional departures.

77. 311 N.W.2d 478 (Minn. 1981).

points may accrue on a single day when defendants are sentenced concurrently for more than one offense.<sup>78</sup> For example, a defendant with no previous convictions who is sentenced concurrently on four separate residential burglary counts would have a criminal history of three, moving him across the disposition line, by the time he is sentenced on the fourth count. Prior to *Hernandez*, prosecutors could threaten to serialize prosecutions to achieve the same result; additional concurrent counts would also increase the defendant's future criminal history if he committed further offenses. The effect of *Hernandez* is to accelerate the impact and plea-bargaining leverage of multiple counts. The *Hernandez* rule also helps prosecutors target and incapacitate "high-rate" offenders. Although such utilitarian purposes seem at odds with the Commission's just deserts philosophy, incapacitation goals (or at least, effects) were implicit in the Guidelines from the outset. Offenders with higher criminal history scores receive much more severe presumptive sentences.<sup>79</sup> Moreover, "prior" convictions have always been counted as of the date of sentencing;<sup>80</sup> under a purely retributive theory, events occurring after the date of the current offense have no bearing on the "deserved" punishment for that offense.<sup>81</sup>

#### D. Major Guidelines and Statutory Changes in 1989

In 1988, public pressure for substantially increased penalties and legislative demand for closer control over sentencing began to escalate rapidly. The Commission had faced similar political crises in the past,<sup>82</sup> but the "crime wave of '88" proved too broad and too sustained to resist. Pressure began to build in the late spring of 1988 with a series of rape-murders in Minneapolis parking ramps. The Minnesota Attorney General appointed a task force on sexual violence against women which issued strong demands to the legislature and the Commission to substantially increase rape sentences.<sup>83</sup> At the same time, the city of Minneapolis was experiencing a general increase in violent and drug crimes—the 1988 murder rate was 50 percent higher than in 1987, while drug offenses had grown by 60 percent.<sup>84</sup>

In mid-November of 1988, the Commission responded by proposing an increase in prison durations for violent crimes (and a corresponding reduction in prison terms for property offenders, in order to stay within prison capacity). Under the proposal, for example, the presumptive sentence before reduction for good time for a first-degree rapist with no

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78. *Id.* at 481.

79. *See infra* Figure 2.

80. GUIDELINES, *supra* note 1, § II(B)-(C).

81. *See* PARENT, *supra* note 2, at 163.

82. *Id.* at 140-46.

83. MINN. ATTORNEY GENERAL'S TASK FORCE ON THE PREVENTION OF SEXUAL VIOLENCE AGAINST WOMEN, FINAL REPORT 1 (1989).

84. MINNEAPOLIS POLICE DEPARTMENT, CRIME ANALYSIS UNIT, UNIFORM CRIME REPORT SUMMARY 2 (1988).



criminal history would have increased from 3.5 to 4.5 years. These proposals, however, were met by calls to *double* sentences for violent offenders.<sup>85</sup> In December of 1988, the Commission complied with public demand, approving increases in all sentence durations at severity levels VII and VIII. Durations were doubled for defendants with no criminal history and were increased substantially, but by lesser percentages, for defendants with higher criminal histories. The Commission also adopted a criminal history weighting scheme, valuing prior felony convictions at a range of one-half point for severity levels I and II to two points for severity levels VIII, IX, and X. The Commission designed this weighting scheme in part to counter the substantial increase in the number of property offenders with high criminal histories and presumptive-commit sentences.<sup>86</sup> These and other changes became effective on August 1, 1989.<sup>87</sup>

Even with these proposals, however, the pressure for increased sentence severity and legislative control did not ease. In the spring of 1989, the legislature considered a number of "get tough" crime bills. Two of these bills would have re-established the death penalty which had not been operative in Minnesota since 1911.<sup>88</sup> The 1989 Omnibus Crime Bill finally adopted included a number of severe measures—life without parole for certain first-degree murderers, mandatory maximum terms for other recidivist murderers and sex offenders, minimum prison terms for certain drug crimes, and increased statutory maximums for other violent and sex crimes.<sup>89</sup>

The 1989 Omnibus Crime Bill also included a provision permitting a non-prison sentence for drug offenders when a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.<sup>90</sup> In addition, the legislation imposed extended terms and mandatory minimum prison terms for offenders committing certain sex-motivated crimes if the court finds, based on a professional assessment, that the defendant is "a patterned sex offender" in need of long-term treatment or supervision, or is "a danger to public safety."<sup>91</sup> This latter finding is required to be based on either the presence of one or more aggravating factors in the offense or on the commission of a previ-

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85. MINNEAPOLIS STAR TRIB., Nov. 18, 1988, at 7A.

86. See Frase, *First Ten Years*, *supra* note 2, at 38 (these histories and sentences resulted, in part, from sentencing under *Hernandez*).

87. See KNAPP, *supra* note 48, at 13A, 28A, 32A, 51A, 53A, and 107A. The Commission also amended the Guidelines Commentary to provide that no amenability departure is valid unless the court "demonstrate[s] that the departure is not based on any of the excluded [social or economic] factors." The Commission expressly declined, however, to either prohibit all such departures or propose criteria for their use. MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 17-18 (1989).

88. 1989 Minn. S. File No. 768; 1989 Minn. H. File No. 998.

89. 1989 Minn. Laws 290, art. 2, §§ 10, 12, 14; art. 3, §§ 13, 28; art. 4, §§ 12-15; art. 6, §§ 5-11 (these severe measures may well have been the "price" of defeating the death penalty bills).

90. *Id.* art. 3, § 20.

91. *Id.* art. 4, § 10.

ous violent crime. Early release is allowed if the offender proves amenable to treatment and has made sufficient progress in a prison sex offender treatment program to be released to a community program.

The 1989 Omnibus Crime Bill contained further provisions authorizing judges to make individualized assessments of dangerousness in setting prison sentences.<sup>92</sup> Judges are authorized to impose the statutory maximum term for certain violent crimes upon a finding, based on past criminal behavior or the presence of at least one aggravating factor, that the defendant is a danger to public safety. Judges may also impose the maximum term for any other felony if a defendant has more than four prior felony convictions and the court finds that the present offense "was committed as a part of a pattern of criminal conduct from which a substantial portion of the offender's income was derived."<sup>93</sup> Like the amenability provisions adopted for sex offenders in the mid-1980's,<sup>94</sup> the 1989 provisions suggested that the legislature continued to accept individualized rehabilitative and incapacitative sentencing, albeit under stricter limits than applied prior to the Guidelines.

Finally, the 1989 Omnibus Crime Bill contained several provisions suggesting that the legislature no longer trusted the Commission to set sufficiently severe presumptive sentences and that the legislature had decided to reclaim some of its power to set specific sentencing guidelines and policy. The legislation amended the enabling act to specify that the Commission's "primary goal" in setting sentencing guidelines should be *public safety*—correctional resources and current practices would remain as factors, but these factors would no longer be taken into "substantial consideration."<sup>95</sup> In addition, the legislation directed the Commission to increase penalties at severity levels IX and X by specified amounts and to add a specific provision to the Guidelines' list of aggravating circumstances.<sup>96</sup> Finally, the legislation gave judges authority in certain cases to impose the statutory maximum prison term, without regard to ordinary Guidelines rules governing departure and degree of departure.<sup>97</sup>

### *E. 1990 and 1991 Legislation*

The legislature's principal 1990 crime bill appeared to endorse further individualized assessments of dangerousness and treatability. Central to this bill was a set of provisions authorizing and minutely structuring "Intensive Community Supervision" (ICS) under the control of the state Commissioner of Corrections.<sup>98</sup> Eligible offenders include: (1) inmates on supervised release; (2) offenders committed to custody following revocation of a stayed prison term; and (3) certain offenders originally

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92. *Id.* art. 2, §§ 9-2, -3.

93. *Id.* art. 2, § 9-3.

94. For a discussion of these provisions, see *supra* text at notes 52-55.

95. 1989 Minn. Laws 290, art. 2, § 8.

96. *Id.* art. 2, § 17; art. 3, § 25.

97. *Id.* art. 2, § 9; art. 4, § 10.

98. 1990 Minn. Laws 568, art. 2, §§ 31-36.

committed to prison for terms of twenty-seven months or less. These limitations suggest that the legislature was primarily interested in diverting offenders from prison rather than tightening supervision of probationers. Apparently, the legislature had begun to realize the serious repercussions on the prison population of the major sentencing severity increases enacted in 1989.

The ICS provisions, however, also demonstrate the legislature's continued commitment to utilitarian, offender-based sentencing goals. The eligibility of the third group defined above was subject to several additional limitations, including the requirement that the defendant's presence in the community not create a danger to public safety.<sup>99</sup> The Commissioner of Corrections was directed to revoke the release of any offender who failed to follow program rules, who committed a new offense, or who "present[ed] a risk to the public, based on the offender's behavior, attitude, or abuse of alcohol or controlled substances."<sup>100</sup> In administering ICS programs, the Commissioner was further directed to (1) punish the offender, (2) protect the public, (3) facilitate employment of the offender during ICS and afterward, and (4) require restitution to victims where ordered by the court.<sup>101</sup>

The ICS statute is significant, not only for its endorsement of utilitarian, offender-based punishment, but also for its refusal to accept pre-Guidelines notions of unfettered administrative discretion. After strictly defining eligible offenders, the statute minutely specified the operating guidelines of ICS programs<sup>102</sup>—no more than fifteen offenders per probation officer; four defined phases of ICS, each with specified durations, degree of house arrest, and required face-to-face contacts and drug testing; specified work requirements; and mandatory revocation of release under certain conditions. A 1991 statute eliminated these restrictions for offenders on supervised release, thereby restoring discretion and control to the Department of Corrections.<sup>103</sup>

#### F. 1992 Legislation

The 1992 crime bills continued many of the trends described above and were precipitated by a wave of high-profile violent crimes and media reports similar to the ones that had sparked the 1989 Omnibus Crime Bill. In the summer of 1991, two female college students were kidnapped, raped, and murdered—the first by two local men in her hometown in northern Minnesota and the second by a repeat sex offender just released from prison. In the late fall, the state's principal newspaper published a sensational series of articles entitled "Free to Rape," arguing that Minnesota's sex offender penalties were far too lenient.<sup>104</sup> Finally, in December,

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99. *Id.* art. 2, § 33-3(3).

100. *Id.* art. 2, § 35-3(3).

101. *Id.* art. 2, § 35-1.

102. *Id.* art. 2, §§ 34-2, 35-3, 36.

103. 1991 Minn. Laws 258, § 2 (amending MINN. STAT. § 244.12-1 to -3) (1982).

104. *Free to Rape*, MINNEAPOLIS STAR TRIB., Nov. 9-11, 1991, at 7A.

the Minnesota Supreme Court ruled that the statutory and Guidelines rules imposing heavier penalties on crack cocaine offenders than on powdered cocaine offenders violated the state constitution. The rules were invalidated largely because of their disparate impact on blacks, who constituted the vast majority of crack cocaine offenders.<sup>105</sup>

This latter decision provoked an immediate and severe legislative response. In January of 1992, without waiting for the Commission's statutorily mandated report on drug sentences due in February,<sup>106</sup> the legislature enacted a revised drug law that raised powdered cocaine penalties to equal those previously applicable only to crack cocaine.<sup>107</sup> In addition, key members of the Senate took the unusual step of writing a letter to the Commission, urging it to rank certain cocaine offenses such that those offenses would receive presumptive executed prison sentences.<sup>108</sup> While the Commission chose not to follow this recommendation, its decision to retain most of the previous rankings applicable to each degree of drug crime resulted in major increases in penalties for powdered cocaine cases, which the 1992 drug law had shifted to higher degrees.

A "general purpose" crime bill was enacted later in the spring of 1992. Although this bill sought primarily to expand treatment, education, and social service programs, it also contained "get tough" provisions for certain sex offenders, including mandatory doubling of Guidelines presumptive sentences, lengthier supervised release terms, increased statutory maximums, and mandatory life and thirty-year prison terms.<sup>109</sup> In addition, the legislation increased correctional discretion through provisions that allowed officials to require prisoners to participate in sex offender programs, to discipline those who refused to participate, and to remove unamenable prisoners from such programs.<sup>110</sup> Furthermore, the bill eliminated discretion to grant early release to certain amenable sex offenders, while permitting the Commissioner of Corrections to select other offenders for early release to a new boot-camp or "challenge incarceration" program.<sup>111</sup> Finally, renewed interest in the goal of "truth in sentencing" led to the inclusion of a provision reversing the procedure for applying good time credits. Instead of pronouncing a longer prison term that is later reduced by up to one-third, judges now pronounce a sentence equal to two-thirds of the presumptive term which can then be lengthened for misconduct in prison.<sup>112</sup>

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105. *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991).

106. MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON CONTROLLED SUBSTANCE OFFENSES 1 (1992).

107. 1992 Minn. Laws 358.

108. Letter to Minnesota Sentencing Guidelines Commission (Feb. 20, 1992) (on file with author).

109. 1992 Minn. Laws 571, art. 1, §§ 11-12, 14-15, 22-25. *See also id.* art. 1, § 13 (mandating life without parole for certain rape-murderers).

110. *Id.* art. 1, § 1; art. 2, § 6.

111. *Id.* art. 1, § 12; art. 11, §§ 5-8.

112. *Id.* art. 2, §§ 3-7. *See also id.* art. 2, § 8 (removing 40-year cap on consecutive sentences) and § 12 (directing the Commission to adopt presumptive consecutive sentences

### G. Summary

The legislative, judicial, and Commission-initiated changes described above demonstrate that the Minnesota Sentencing Guidelines have evolved substantially over time, giving greater emphasis to treatment and incapacitation goals and broader scope to individualized assessments of offender amenability and dangerousness. The Guidelines in their present form thus place less emphasis on just deserts and uniformity goals. This evolutionary process has made the application of the Guidelines somewhat more complex than it once was, a trend which may be inherent in any regulatory scheme. Perhaps more troubling than the evolving complexity of the Guidelines has been the recent tendency of the legislature to take a more active and highly punitive role in establishing sentencing policy. The Commission still retains primary control over setting state-wide sentencing policy. However, the Commission no longer enjoys the relative monopoly and insulation from public scrutiny and political pressures that characterized its operation in the early 1980's.

## IV. ASSESSING THE PAST AND FUTURE SUCCESS OF THE GUIDELINES

To reach an accurate conclusion regarding the proper role of the legislature under a sentencing guidelines system, we must consider not only the actions of the legislature, the Commission, and other criminal justice system actors, but the actual success of the guidelines in achieving their stated goals. This section summarizes the findings of studies evaluating implementation of the Minnesota Sentencing Guidelines and concludes with some predictions of the developments that lie ahead.

### A. A Review of Past Achievements

A recent study evaluating the successes and failures of the Guidelines through 1989<sup>113</sup> identified the following major goals of the Minnesota Sentencing Guidelines Commission: (1) greater uniformity in the use of state prison sentences, with particular emphasis on preventing race, gender, and socio-economic disparities; (2) increased proportionality of prison commitment rates and durations relative to the Commission's offense severity rankings, definition of criminal history, and other prescriptive choices; (3) the avoidance of prison overcrowding; (4) greater honesty or "truth in sentencing," particularly with respect to the relationship between the sentence pronounced and the sentence actually served;<sup>114</sup> (5) simplicity in Guidelines definitions and application;<sup>115</sup> (6) "parsimony" in sentences (i.e., insuring that sentences are the least restrictive necessary

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for crimes committed by inmates); *id.* art. 4, § 3 (mandatory minimum fines equal to 20% of the statutory maximum fine).

113. See generally Frase, *First Ten Years*, *supra* note 2, at 3.

114. See, e.g., *id.* at 75; U.S. SENTENCING COMM'N GUIDELINES MANUAL (Nov. 1991), § 1A3; Frase, *supra* note 16, at 332.

115. See 1980 COMMISSION REPORT, *supra* note 25, at 7 (construction of Criminal History score); PARENT, *supra* note 2, at 53 n.3, 58 n.8, 71.

to achieve sentencing purpose);<sup>116</sup> and (7) maintaining Commission control over state sentencing policy to ensure that such policy remains informed, well-coordinated, and less subject to political pressures.<sup>117</sup>

The Minnesota Guidelines have moved toward achieving most of these goals. By abolishing parole and instituting "real-time" sentencing, for example, Minnesota achieved greater "openness" and "honesty" of punishment. The Guidelines also appear to have been modestly successful in promoting greater "uniformity" in sentencing, despite major increases in ethnic diversity among defendants during the 1980's.<sup>118</sup> Under the Guidelines, Minnesota has made very "parsimonious" use of prison sentences and has avoided prison and jail overcrowding—notwithstanding a seventy percent increase in the state's felony caseload from 1978 to 1989.<sup>119</sup> The Guidelines have placed controls on judicial discretion, while maintaining substantial flexibility to pursue a variety of sentencing purposes and to tailor sentences to individual cases.<sup>120</sup> Despite the many changes made since 1980, the Guidelines remain relatively simple to apply. Moreover, while the legislature has recaptured some of its originally delegated authority, the Commission has maintained primary control over statewide sentencing policy.<sup>121</sup>

Indeed, it appears that the Minnesota Guidelines have substantially achieved and maintained each of the goals listed above—with one exception. The Commission's efforts to effect certain prescriptive changes in the use of imprisonment were relatively unsuccessful even during the early implementation years of the Guidelines, and have become less and less successful over time.<sup>122</sup> Trial judges have often departed from presumptive prison terms in the case of first offenders convicted of violent crimes (especially child sex abuse and above-the-line weapons statute cases).<sup>123</sup> In addition, judges have made increasing use of "amenable-to-probation" departures based on utilitarian sentencing purposes that the Commission has never formally recognized.<sup>124</sup> The policy of reducing imprisonment rates for recidivist property offenders was initially effective, but the steady buildup of these offenders' criminal history scores eventually frustrated the policy by pushing offenders across the disposition

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116. GUIDELINES, *supra* note 1, § I.

117. Frase, *Ten Years After*, *supra* note 2, at 729-30.

118. MINN. SENTENCING GUIDELINES COMM'N, SUMMARY OF 1990 SENTENCING PRACTICES FOR CONVICTED FELONS 6 (Fig. 2) (1992) [hereinafter 1990 COMMISSION SUMMARY]. Black defendants made up 20% of Minnesota's felony convictions in 1990—up from 11% in 1981. The total nonwhite proportion grew from 19% in 1981 to 29% in 1990. *Id.*

119. In 1989, 7,974 defendants were sentenced. MINN. SENTENCING GUIDELINES COMM'N, SUMMARY OF 1989 SENTENCING PRACTICES FOR CONVICTED FELONS 29 (1990) [hereinafter 1989 COMMISSION SUMMARY]. This compares to an estimated 4,698 sentenced defendants in 1978. See THREE YEAR EVALUATION, *supra* note 2, at 20. Preliminary data for 1991 indicates a total of 9,161 sentenced felons, representing a 95% increase since 1978.

120. See, e.g., GUIDELINES, *supra* note 1, §§ II(C)-(D).

121. See, e.g., MINN. STAT. ANN. § 244.09-5 (West 1992).

122. See, e.g., Frase, *First Ten Years*, *supra* note 2, at 4.

123. See *id.* at 35.

124. See Frase, *Ten Years After*, *supra* note 2, at 742-47.

line.<sup>125</sup> These findings contradict the claims of some commentators that the Commission's prescriptive or norm-changing approach led to the Guidelines' early success.<sup>126</sup>

Viewed from the legislative perspective, however, one can argue that the Guidelines have been entirely successful. The failures to achieve the prescriptive changes described above have occurred in areas where legislative intent was ambiguous, if not wholly contrary to Commission policy. The primary legislative purpose of the Guidelines was to reduce judicial discretion—especially in parole decisions—without increasing either sentencing severity or prison populations.<sup>127</sup> The legislature also sought to avoid changes in established punishment goals, except to de-emphasize rehabilitative treatment in prison.<sup>128</sup> As of 1992, it appears that the Guidelines have continued to achieve these goals.

### B. A Look to the Future

Looking to the future, however, the Minnesota Sentencing Guidelines may encounter difficulty in maintaining this success, particularly with respect to the goal of avoiding prison overcrowding. A recent study<sup>129</sup> found that, although Minnesota still had the nation's second-lowest per-resident imprisonment rate in 1992, its prison population was rising rapidly and was threatening to exceed capacity. Prison population increases were greatest after 1988 and appeared to be the result of at least three factors: (1) continuing increases in the number of felony convictions;<sup>130</sup> (2) the initial impact of the substantial durational increases adopted in 1989; and (3) increases in the rates of probation and parole revocation.<sup>131</sup> The most recent Minnesota projections estimate a prison population of over 4,700 inmates by the end of 1996, representing a dramatic increase over the figures of earlier years.<sup>132</sup> Likewise, jail populations continue to grow, with the average daily jail population reaching a record 3,950 in 1991.<sup>133</sup> Nev-

125. See Frase, *First Ten Years*, *supra* note 2, at 38.

126. See, e.g., PARENT, *supra* note 2, at 39 (asserting that just deserts perspective lent greater coherence of purpose to the drafting and implementation of the Guidelines). Cf. VON HIRSCH ET AL., *supra* note 18, at 63 (expressing approval of the Minnesota Commission's decision to develop its own policy for sentencing).

127. These purposes are reflected in the "Statement of Purpose and Principles" set out in the Guidelines. See GUIDELINES, *supra* note 1, § I.

128. *Id.* However, the legislature has recently relaxed its opposition to coerced in-prison treatment, at least in the case of sex offenders. See *supra* text accompanying note 110.

129. See Richard S. Frase, *Prison Population Growing Under Minnesota Guidelines*, 4 OVERCROWDED TIMES 1, 10-12 (1993).

130. For a discussion of increased felony convictions, see *supra* note 119 and accompanying text.

131. See MINN. DEPT. OF CORRECTIONS, ADULT COURT COMMITMENTS 1 (1993); MINN. DEPT. OF CORRECTIONS, ADULTS RETURNED WITHOUT NEW SENTENCES 1 (1993); Letter from Gene Larramore (Jan. 7, 1993) (on file with author).

132. MINN. DEPT. OF CORRECTIONS, BACKGROUNDER 1 (Fig. 1) (Jan. 29, 1993).

133. MINN. DEPT. OF CORRECTIONS, JAIL POPULATION ISSUES 1 (1993); Interview with Dennis Falenschek, Detention Program Manager, Minn. Dept. of Corrections) (interview on

ertheless, most Minnesota jails and prisons have, thus far, managed to avoid serious overcrowding problems.<sup>134</sup>

While other future developments are more difficult to predict, it seems likely that Guidelines departure rates will continue to climb. For example, the mitigated dispositional departure rate (computed as a percentage of defendants eligible for such a departure) was 33.7% in 1990—up from 28.3% in 1989 and 20.4% in 1981.<sup>135</sup> Such increased downward departure rates are not surprising, given the sharp increases in durations enacted in 1989, combined with the fact that the Guidelines cells with the highest percentage durational increases in 1989—severity levels VII and VIII, at zero criminal history—are also the cells that traditionally have experienced the highest rates of downward departures (about 50 percent).<sup>136</sup> Just as judges and prosecutors have typically used their discretion to evade or dilute severe mandatory minimum prison penalties,<sup>137</sup> one can expect these officials to use their charging, plea bargaining, and departure powers to shelter certain defendants for whom lengthy prison terms would seem too harsh.

Equally troubling future developments include the possibility that the legislature will continue its punitive activism in the area of sentencing policy in reaction to high-profile violent crimes, sensational journalism, and electoral posturing. The crime bills enacted from 1989 through 1992 reveal the following ominous trends: (1) “creeping indeterminism”—increasing numbers of statutes authorizing courts or prison officials to make individualized assessments of treatability and dangerousness; (2) “creeping determinism”—increasing numbers of laws imposing mandatory minimum prison sentences; (3) “legislative micro-management” of Guidelines policy—more *ad hoc* tinkering with sentencing laws, including specific directives to the Commission to make changes in ranking, duration, and departure rules; and (4) “credit-card-sentencing policy”—an increasing willingness to enact severe penalties with little or no consideration given to whether the state has, or will ever have, the resources to meet the resulting demand.<sup>138</sup>

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file with author). This number is up from 2,758 in 1986 and 2,167 in 1981. Average daily jail populations fell in 1992, to 3,610. *Id.*

134. See Frase, *First Ten Years*, *supra* note 2, at 44.

135. Minn. Sentencing Guidelines Comm'n Monitoring Data (analyzed by the author, using SPSS PC+ software). Preliminary data for 1991 show a further increase to 34.4%. These rates would be even higher if they included *de facto* downward dispositional departures achieved through charging and plea bargaining leniency. See Frase, *First Ten Years*, *supra* note 2, at 19-22, 16-18 (explaining the importance of basing dispositional departure rates on eligible cases, not on total cases).

136. See, e.g., 1989 COMMISSION SUMMARY, *supra* note 119, at 37 (1989 prison-commitment, *no*-departure rates in these cells were only 51.0 and 53.3 percent, respectively).

137. See 1 A. BLUMSTEIN ET AL., RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 188-89 (1983).

138. See generally Richard S. Frase, *The Uncertain Future of Sentencing Guidelines* (1993) (unpublished manuscript, on file with author).



## V. LESSONS FOR LEGISLATORS IN OTHER JURISDICTIONS

As legislators in other jurisdictions consider implementing a sentencing guidelines system, they should carefully consider the lessons of Minnesota's long experience with guidelines. That experience suggests the following conclusions about the processes of drafting an enabling statute and defining the legislature's post-implementation role.

A. *Drafting the Guidelines Enabling Statute*<sup>139</sup>1. *Use of a sentencing commission*

The creation of an independent commission to draft sentencing guidelines has been recognized as having the advantage of allowing sentencing policy to be more expertly crafted, while insulating the process from the distortion of political pressures.<sup>140</sup> The first of these rationales—delegation—is an argument supporting the creation of specialized administrative agencies in general. The second argument recognizes a problem that is particularly acute in the criminal law context. Any attempt to legislate more precise sentences must overcome the “politics of crime control”—the tendency for elected officials, not wanting to appear “soft” on crime, to demand unrealistically severe penalties. This political reality becomes especially significant in any attempt to abolish parole and move to a system in which judges set “real time” sentences. Such a move reveals the relatively short terms typically served in prison for common offenses. Hence, the need arises to have those terms set by an independent, appointed commission insulated from direct electoral pressures.

As Minnesota's experience demonstrates, the creation of an independent commission is a workable and highly desirable feature of sentencing reform.<sup>141</sup> However, legislators and reformers must not place absolute faith in the expertise and insulation rationales. Given the fundamental value choices inherent in sentencing policy and the need to achieve internal consensus and satisfy a variety of external constituencies, the sentencing reform process is essentially and inevitably a “political” task. Although the use of a sentencing commission can buffer the process somewhat from short-term<sup>142</sup> political pressures, as Minnesota's experience

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139. For a discussion of these issues as of the mid-1980's, see VON HIRSCH ET AL., *supra* note 18, at 62-83. See also Michael Tonry, *The Politics and Processes of Sentencing Commissions*, 37 CRIME & DELINQ. 307, 317-27 (1991).

140. See VON HIRSCH ET AL., *supra* note 18, at 7.

141. For a discussion of Minnesota's experience, see PARENT, *supra* note 2, at 208.

142. In the long run, of course, if the public really wants more punitive sentences, that is what the public will get. However, political pressures for greater severity often reflect transitory reactions to notorious crimes and/or media reports. In Minnesota, for example, in spite of the recent trend toward more punitive legislation, public opinion surveys reveal a widespread preference for education, job training, community programs and restitution, as opposed to more punishment. KAY PRANIS & MARK UMBREIT, PUBLIC OPINION RESEARCH CHALLENGES PERCEPTION OF WIDESPREAD PUBLIC DEMAND FOR HARsher PUNISHMENT 2 (Minn. Citizens Council 1992).

shows, those pressures may still be very intense.<sup>143</sup> Thus, commission members must be politically astute, as well as capable, experienced, and committed to reform. At the very least, some commission members must have significant political experience and connections—as did the first chair of the Minnesota Commission<sup>144</sup>—for the commission to be effective initially and over the long term.

How can legislators ensure that these qualifications are met? To maintain the commission's independence, the legislature must not play a direct role in filling commission vacancies; however, legislators should give careful consideration to the choice of other appointing officials, appointment qualifications, and *ex officio* membership.<sup>145</sup> An explicit requirement of non-partisanship or bipartisan balance may also be desirable in some states.

## 2. Initial budget and time-frame

Just as important as who the commissioners are is how much money and time they are allotted to spend in drafting the initial guidelines. The Minnesota Commission, despite its substantial initial budget and broad research mandate, was given insufficient funding to address all important issues carefully.<sup>146</sup> As might be expected, budget problems only grew worse with time.<sup>147</sup> Unless the sentencing commission has adequate research and staff resources, it cannot provide either the necessary expertise or independence of control over sentencing policy that are central to its role.

The initial time frame for drafting guidelines is equally important. Even with sufficient monetary resources, a limit exists as to how quickly a commission can absorb research and staff proposals, discuss alternatives, and refine proposed policies. Inadequate time was a major reason for the Minnesota Commission's initial failure to adopt guidelines for non-imprisonment sanctions.<sup>148</sup> When the Commission later returned to the issue, field opposition had become prohibitive.<sup>149</sup> As discussed below, it is not entirely clear whether guidelines for non-imprisonment sanctions are

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143. For a discussion of the political pressures in Minnesota, see PARENT, *supra* note 2, at 135-53.

144. *See id.* at 31.

145. In Minnesota, the Governor appoints most of the commissioners and the Chief Justice appoints the rest. The State Public Defender or County Attorney's Association must nominate the prosecutor and defense attorney members. *See* MINN. STAT. ANN. § 244.09-2 (West 1992).

146. PARENT, *supra* note 2, at 209.

147. *Id.* at 217.

148. *Id.* at 209-10.

149. *Id.* at 210. In 1988, the Minnesota Legislature ordered the Commission to study whether it should develop non-imprisonment guidelines. In 1989, the Commission recommended against such guidelines. MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON THREE SPECIAL ISSUES 20 (1989). Although several pilot projects were underway, most criminal justice officials were strongly opposed to statewide guidelines. *Id.* at 33.

a good idea. If the legislature believes that non-imprisonment guidelines are desirable, it must provide sufficient time and money at the outset for their drafting. The task does not become easier, and may become more difficult, with the passage of time.

### 3. *Specific directives as to sentencing goals or outcomes*

Although some guidelines enabling statutes have specifically mandated the purposes of punishment and the commission's approach to certain issues,<sup>150</sup> the Minnesota statute as originally drafted merely directed the Commission to take current sentencing and release practices into "substantial consideration." The Commission interpreted this language as permitting substantial changes in previous sentencing norms and responded by enacting "prescriptive" rather than "descriptive" guidelines. Minnesota's experience, however, suggests that such prescriptive changes are unlikely to succeed, especially in the long run. Highly prescriptive guidelines may make sentencing appear more rational, but such guidelines will not win the vital support of judges, attorneys, and correctional officials. These officials will likely use their remaining, unregulated discretionary powers in charging, plea bargaining, and setting and revoking probation and supervised release conditions to circumvent the unpopular guidelines requirements. Such covert evasion invites greater sentence disparity and undermines the goal of "truth in sentencing," because critical decisions about the nature and severity of the sentence are not made openly and honestly. As Minnesota's experience demonstrates, presumptive sentencing guidelines can reinforce existing norms and encourage criminal justice system actors to follow those guidelines more consistently. Presumptive sentencing guidelines can even effect modest changes in existing norms. However, any guidelines—whether voluntary, presumptive, or mandatory—are unlikely to permanently alter state and local traditions and the strongly-held beliefs of the officials who control sentencing and release decisions.<sup>151</sup> No system has yet to succeed in wringing all discretion, and hence, all potential for evasion, out of the charging, plea bargaining, and sentencing processes.

Future guidelines enabling statutes should provide more detailed direction to the commission than did the Minnesota statute. These statutes should not simply direct the commission to take current sentencing and release practices into "substantial consideration," but should further limit any prescriptive changes in existing punishment goals or sentencing of particular offenses or offenders to those needed to achieve other enumerated guidelines goals (for example, respecting existing resource limits). In addition, these statutes should direct the commission to eliminate uncon-

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150. See VON HIRSCH ET AL., *supra* note 18, at 67-69 (discussing provisions of law creating the U.S. Sentencing Commission).

151. Cf. Michael Tonry, *Structuring Sentencing*, 10 CRIME & JUST. 267, 330 (1988) (discussing research on the persistence of pre-existing norms and traditions, despite reform efforts).

stitutional or other clearly inappropriate policies.<sup>152</sup> Future legislative reformers must recognize that sentencing—and therefore guidelines drafting and implementation—demands compromise to achieve several important, but mutually inconsistent goals. For instance, general deterrence and uniformity require limited discretion, while rehabilitation and incapacitation require considerable individualization; general deterrence and just deserts focus on the offense, while most other punishment goals focus on the offender; and crime-control-oriented goals, especially deterrence and incapacitation, conflict with state budget and prison capacity limitations. The Minnesota Guidelines strike a workable balance among these competing goals, a balance that other jurisdictions should strive to replicate.

Legislators must exercise particular caution in enacting or expanding mandatory minimum penalties, or in directing the new commission to substantially increase sentencing severity for certain offenders. Until recently, Minnesota had very few mandatory minimum penalties. Those in place, especially those applicable to use or possession of a weapon in a case which would not otherwise carry a presumptive prison sentence, have often not been enforced.<sup>153</sup> Overall, Minnesota's experience suggests that presumptive sentence maximums are much easier to enforce than presumptive or mandatory minimums.<sup>154</sup> This is due, in part, to the desire to mitigate presumptive or statutory penalties deemed unreasonably harsh. Further, practically all systems of investigation, adjudication, and sentencing depend to some extent on the cooperation of defendants. Such cooperation must be purchased with leniency. Before and at trial, defendants must be given inducements to confess, plead guilty, testify against others, and so on. At sentencing, the court must initially "under-punish"; that is, give defendants less than their full deserts to leave room for subsequent tightening of sanctions (e.g., by revocation of probation or good time) if the defendant proves uncooperative. Since most defendants do cooperate, at least to some extent, very few receive the full authorized presumptive or "mandatory" punishment.<sup>155</sup> Because a few do receive full punishment, however, a principal effect of increased sentencing severity is increased sentencing disparity.

Although mandatory or even presumptive minimum terms are difficult to enforce, it may be possible to achieve major prescriptive change in the opposite direction—toward reduced severity, in particular, reduced reliance on lengthy custodial sentences. As suggested above, Minnesota's experience suggests that presumptive *maximum* sentences are more en-

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152. Cf. VON HIRSCH ET AL., *supra* note 18, at 62-69 (enabling acts should not specify a sentencing rationale or mandate specific sentences, but the commission should be directed to adopt a prescriptive approach and develop its own theory of punishment).

153. See, e.g., Frase, *First Ten Years*, *supra* note 2, at 25 (80% departure rate in 1987).

154. *Id.* at 31-35.

155. Thus, in practice, states can inevitably achieve only the "limiting" retributivist punishment theory implicit in the Minnesota Guidelines. For an explanation of this theory, see *supra* text accompanying notes 41-44.

forceable, largely because defendants can be counted on to appeal upward departures from the presumptive term. In states where prisons or jails are overcrowded, or where custody sentences are being used very heavily (relative to the crime rate and to custody sentence rates in other states), legislators should consider explicitly authorizing or even directing the sentencing commission to study the need for current custody sentence rates and recommend appropriate reductions. Of course, any such overt "roll-back" in severity levels is difficult for elected legislators to propose and approve, but there are ways to achieve the same result indirectly (for example, freezing jail and prison capacity while sentenced caseloads rise or allowing trial courts to substitute equally punitive intermediate sanctions).

#### 4. *The prison capacity constraint*

Overcrowded prisons are unsafe, inhumane, and criminogenic, and must be avoided at all costs. Presumptive sentences permit "front-end" control over the prison population by limiting commitment rates and durations and by making prison sentences more predictable than under a traditional indeterminate sentencing scheme. Under a sentencing guidelines system, a prison capacity constraint becomes essential because parole no longer operates as a "safety valve" to relieve prison overcrowding and to counter political pressures that escalate penalties unreasonably. Using a commission to set presumptive sentences maximizes the potential for avoiding prison overcrowding. Such a commission can develop sophisticated measures to accurately predict prison populations and can use these measures to tailor its sentencing rules to stay within expected capacity.

As Minnesota's experience demonstrates, an assumption of limited prison capacity is an essential component of guidelines development, one that should be explicitly provided for in the enabling legislation. Indeed, future legislation should go beyond the Minnesota statute, which only required that capacity be taken into "substantial consideration," and mandate that projected prison population not exceed 95% of prison capacity. However, as Minnesota's experience in recent years also illustrates, a limited-capacity model during guidelines development and implementation does not necessarily require, or guarantee, "zero growth" in prison population over the long term. The Minnesota Commission never formally adopted a zero-growth policy, but its decided emphasis on staying within existing capacity, and its failure to take an active role in defining future capacity, may have suggested that the Commission advocated zero growth. Such a posture is risky in that it weakens political support and invites public backlash and "scapegoating" of the commission. The result may be a prison population that not only increases, but does so at a rate faster than the crime rate. An exclusive focus on existing prison capacity also mandates continued revision of the guidelines rules, undercutting their overall balance and coherence. Furthermore, such a focus encourages overcrowding in local jails, many of which are already seriously defi-

cient in terms of plant, security, staffing, and programs.<sup>156</sup>

Future sentencing commissions should play a more active role in defining prison capacity, and the enabling statute should encourage such a role. The statute should direct the commission to consider the impact of rising crime rates and projected criminal caseloads, as well as current and proposed sentencing rules, in recommending either increases in prison capacity or specific non-prison, "intermediate" sanctions.<sup>157</sup> Although the commission cannot appropriate funds to pay for such expanded prison capacity or alternative sanctions, it can recommend specific prison and alternative sanction expansions to the legislature, accompanied by any prison population reducing guidelines amendments (for example, reduced durations) needed to stay within currently funded capacity. Such amendments would be rescinded as soon as the needed additional capacity was funded.

##### 5. Guidelines for non-prison sentences

The Minnesota Commission's failure to formulate guidelines for probation and other non-imprisonment sanctions is considered by many to be a major item of "unfinished business." Several commentators<sup>158</sup> have maintained that such guidelines are feasible and essential, and that future enabling statutes should require their development at the outset or within a prescribed number of years.

Significant difficulties exist, however, in drafting meaningful non-imprisonment guidelines and in ensuring their enforcement. First, non-imprisonment guidelines require a substantial and expensive database describing the current use of intermediate sanctions. Such data did not exist in Minnesota in 1980; nor does it exist in Minnesota or in most states today.<sup>159</sup> Second, discretion in the area of non-imprisonment guidelines is closely related to the purposes of punishment. If, as Minnesota has done, other states continue to pursue rehabilitative sentencing goals for less serious offenders, judges and attorneys will require substantial flexibility in setting the conditions of probation, in revoking probation,

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156. See generally U.S. DEPT. OF JUST., BULLETIN: CENSUS OF LOCAL JAILS, 1988, at 1 (1990). Between 1978 and 1990, the proportion of Minnesota felons sentenced to local jails increased from 35% to 61%. 1990 COMMISSION SUMMARY, *supra* note 118, at 54. As a result of this heavy use of jail sentences, Minnesota's overall custody-sentence rate, prison plus jail, is actually higher than the national average, although its prison rate is much lower. In 1986, 75% of Minnesota felony sentences involved either jail (55%) or prison (20%) commitments. MINN. SENTENCING GUIDELINES COMM'N, 1988 DATA SUMMARY 1, 6 (1990). In the same year, the estimated U.S. felony incarceration rate was only 67%—jail (21%) and prison (46%). U.S. DEPT. OF JUST., BULLETIN: FELONY SENTENCES IN STATE COURTS, 1986, at 2 (Table 2) (1989).

157. See generally NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990).

158. PARENT, *supra* note 2, at 209, 217; VON HIRSCH ET AL., *supra* note 18, at 64.

159. See PARENT, *supra* note 2, at 96-97. However, some recent data on conditions of stayed sentences in 37 counties in 1987 has been collected. See generally MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON INTERMEDIATE SANCTIONS 1 (1991).

and in accommodating local variations in crime problems, values, and resources. Third, the Minnesota Commission has recognized that simplicity of application is a separate and important goal.<sup>160</sup> At some point, the cost of developing and enforcing further guidelines refinements outweighs the benefits in reduced disparity. Finally, non-imprisonment guidelines—particularly at the lower limits of sanction severity—are difficult to enforce. As noted earlier, the experience under the Minnesota Guidelines illustrates that upper limits of sanction severity are much more likely to be strictly enforced than lower limits<sup>161</sup> because most cases of leniency are agreed to by the prosecutor and are not appealed.<sup>162</sup>

However, it may be desirable and feasible to develop non-imprisonment guidelines for at least one category of cases—defendants who would otherwise receive a jail or short prison term. Particularly if a state's prisons or jails are overcrowded or appear to be overused, sentencing judges need to be given the maximum encouragement to substitute non-custodial sentences. In such states, the legislature should direct the sentencing commission to develop "equivalency" scales of equally punitive and effective intermediate sanctions (for example, one day in jail may be replaced by X days of home detention, or Y day-fines, or Z days of community service).<sup>163</sup> Indeed, even in states without serious problems of prison overcrowding or overuse, the sentencing commission should probably still be directed to develop such equivalency scales at some point to promote the use of cheaper but equally effective forms of "punishment." Other nations have learned how to impose just and effective punishment by means far less costly than prison;<sup>164</sup> it is time we joined them.

#### 6. Guidelines for charging and plea bargaining

A second significant area of unfinished business in Minnesota is the absence of guidelines for charging and plea bargaining. Some commentators have suggested that future enabling legislation specifically require adoption of such guidelines.<sup>165</sup> However, as with guidelines for non-imprisonment sanctions, serious difficulties exist in drafting and enforcing charging and plea bargaining guidelines. These difficulties include: (1) the lack of suitable databases concerning existing practices, especially regarding the evidentiary strength of unfiled or dismissed charges; (2) the need for substantial flexibility in choosing between prison and probation to

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160. See PARENT, *supra* note 2, at 71.

161. See Frase, *First Ten Years*, *supra* note 2, at 32-34.

162. Another party (e.g., the victim or the Commission) could be granted standing to appeal. See Michael Tonry & John C. Coffee, Jr., *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, in VON HIRSCH ET AL., *supra* note 18, at 171-72. However, such appeals might substantially encumber the appellate courts.

163. MORRIS & TONRY, *supra* note 157, at 37-108.

164. Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 648-58 (1990) (French custody-sentence rate per offense much less severe than American rate).

165. See, e.g., PARENT, *supra* note 2, at 209, 217.

achieve remaining rehabilitative and incapacitative sentencing goals; (3) the competing goal of simplicity; and above all, (4) the lack of suitable enforcement mechanisms. Since charging or plea bargaining leniency is, by definition, agreed to by the prosecutor, undue leniency is not likely to be appealed by either party. Even if appealed, courts are ill-equipped to second-guess refusals to charge and to assess the proveability of unfiled or dismissed charges. The original Minnesota enabling statute was silent on this issue, arguably depriving the Commission of authority to implement any charging or plea bargaining guidelines. As of late 1992, no legislative or Commission-initiated proposal subjecting any aspect of charging or plea bargaining to guidelines or other limitations had been offered.

Future legislative drafters must be realistic in authorizing or mandating detailed state-wide charging or plea bargaining guidelines. One approach may be to create a system that leaves initial charging discretion to the prosecutor, but imposes some sort of charging "cut-off" point, after which courts would closely scrutinize further charge revisions.<sup>166</sup> Combining this approach with somewhat broader cell ranges and departure standards may encourage sentence-bargaining rather than charge-bargaining, thus avoiding the distortion of conviction records and bringing policy issues within the purview of appellate courts and the commission. In any case, legislatures must be sure to mandate and fund research that provides reliable data on the "real" (i.e., highest provable) offense, data that can be used to assess the extent of actual change in sentencing practices and the need for charging and plea bargaining limits. This becomes a critical issue in a conviction-offense system and represents a major void in Minnesota's otherwise extensive sentencing database.<sup>167</sup>

#### 7. *Choice between "conviction" versus "real-offense" sentencing*

One way to deal with charging variations is to enact guidelines that base the sentence on the "real" offense, as established at the sentencing hearing, rather than on the formal "conviction" offense.<sup>168</sup> With few exceptions, Minnesota has adopted a conviction-offense system, and that system appears to have worked well in practice.<sup>169</sup>

#### 8. *Binding effect of the guidelines and appellate review*

Another important issue is whether the enabling statute should specify the new guidelines as mandatory, presumptively binding, or merely

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166. For a discussion of one such proposal aimed at controlling problems of "vertical" charging discretion, see Frase, *supra* note 164, at 633-34. See also *id.* at 618-21, 635-36 (discussing how stricter rules barring sentence enhancements for multiple offenses can help to limit problems of disparity in "horizontal" charging).

167. See Frase, *Ten Years After*, *supra* note 2, at 738, 752; Frase, *First Ten Years*, *supra* note 2, at 19-22, 48.

168. I tend to agree with those authors who have argued against real-offense sentencing. See, e.g., Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 757-72 (1980); Tonry & Coffee, *supra* note 162, at 152-61.

169. See Miethe, *supra* note 2, at 158.



advisory. As noted earlier, "mandatory" penalties are rarely enforced as such in practice; at the other extreme, studies of purely advisory guidelines suggest that they achieve very little.<sup>170</sup> Minnesota's presumptive system appears to strike the proper balance between providing legislative, judicial, and Commission guidance and recognizing the need for flexibility to tailor the sentence to the offense and to the offender.

Future legislation should also provide a specific standard for departure and appellate review.<sup>171</sup> The standard developed by the Minnesota Commission—substantial and compelling circumstances—has apparently achieved a workable balance, generating a steady, though not overwhelming, volume of appeals and appellate precedent. In states with an intermediate court of appeals, or with multiple panels of the supreme court, it may be desirable to specify that some or all appeals dealing with the guidelines be heard by a single appellate panel. Most of the essential caselaw discussing guidelines in Minnesota was decided by the single-panel supreme court. As this experience demonstrates, review by one specified body allows for the rapid development of a coherent and consistent body of guidelines precedent.

### 9. *Review of initial guidelines and later amendments*

A final question concerns whether the guidelines formulated by the commission should require affirmative legislative approval or whether those guidelines, absent legislative action, should take automatic effect at some point after submission. The Minnesota Legislature's veto has never been exercised, either as to the initial Guidelines or proposed amendments.<sup>172</sup> This suggests that a veto provision serves to encourage the legislature to abstain from tinkering with Commission proposals. As noted earlier, the concept of an independent, expert sentencing commission requires a substantial degree of legislative deference and abstention. Thus, the veto approach appears preferable to a requirement of affirmative approval, which might encourage the legislature to become too actively involved in guidelines drafting.<sup>173</sup> Enabling acts should, therefore, specify a veto procedure for both initial and subsequent commission proposals.

## B. *Defining the Legislature's Post-implementation Role*

### 1. *Budgeting*

The Minnesota Commission's initial budgetary authorization quickly became inadequate, producing only a minimum set of preliminary Guidelines. As of 1992, the Commission had limited resources to manage its

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170. See 1 A. BLUMSTEIN ET AL., *supra* note 137, at 30.

171. VON HIRSCH ET AL., *supra* note 18, at 73.

172. See PARENT, *supra* note 2, at 139 (in Minnesota, only one floor vote was taken and no committee hearings were held to consider the Commission's proposed initial Guidelines).

173. VON HIRSCH ET AL., *supra* note 18, at 72-73.

ongoing monitoring system<sup>174</sup> and could neither carry out in-depth studies, nor respond quickly to legislative requests for specific data. In its early operation, the Commission had been able to draw on its expertise and unique data capabilities to inform the legislature and media about current sentencing practices and the future impact of proposed changes.<sup>175</sup> More recently, the Commission has had neither the staff nor the resources necessary to perform those important functions.

Adequate budgeting is vital to a sentencing commission in providing comprehensive, well-informed development of sentencing policy and in ensuring that its policies are properly implemented. Sentencing policies are thereby insulated from the pressures and distortions of electoral politics. The budget of future commissions must, therefore, be sufficient to permit thorough routine monitoring of all sentences, as well as regular in-depth studies at the commission's initiative and in response to legislative requests. In addition, the commission must possess a state-of-the-art, on-line computerized information system, coupled with a substantial social science and clerical staff. Such an adequately-funded information, research, and planning body is essential, since state and local correctional expenses are a significant item in most state budgets. Budget cuts here will only lead to ill-informed policymaking that will prove more expensive in the long run.

## 2. *The legislative role in setting specific sentencing policy*

An ongoing issue is how future legislative drafters should define their post-implementation role in the setting of sentencing policy for specific offenses. Although the form and severity of authorized as well as presumptive penalties are ultimately a legislative responsibility that cannot be wholly delegated to an administrative agency, legislators must defer to the extent possible to commission recommendations and resist the temptation to escalate penalties in response to short-term political pressures and sensational journalism. Legislators must be particularly wary of the previously noted trends now apparent in Minnesota: (1) "creeping determinism"—increasing numbers of mandatory minimum penalties; (2) "creeping indeterminism"—increasing numbers of provisions authorizing individualized assessments of treatability and dangerousness; (3) "legislative micro-management" of Guidelines policies—increasing enactment of specific directives to the Commission; and (4) "credit-card-sentencing policy"—increasing numbers of penalties imposed without regard to the availability of funds to support those penalties.

Minnesota's return to a "credit-card-sentencing policy" is ironic, given the nation's recent painful emergence from the excesses of the debt-ridden 1980's. However, the temptation to live beyond the state's current means is particularly strong in the area of sentencing, which is subject to

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174. This lack of resources was evidenced by a nine-month backlog in processing sentencing data received from the Minnesota Supreme Court.

175. See PARENT, *supra* note 2, at 144.

a seemingly universal bias in favor of enhanced penalties. To deal with this inherent bias, every crime bill should, by law, require a fiscal impact statement which includes: (1) an assessment of the short-term and long-term cost of the bill; and (2) the source of the funding (i.e., whether that cost will be funded through higher taxes or by the loss of other important public services). If properly funded, the commission and its data can help legislators document costs and tradeoffs for their constituents.

A second way to counteract the inherent bias of crime-control politics is to maintain a bipartisan approach to criminal justice. Just as politicians traditionally close ranks when a foreign war breaks out, the domestic "war on crime" or "war on drugs" must maintain a coolness of mind and an awareness of joint purpose.

Finally, legislators must never lose sight of the initial rationale for creating an independent sentencing commission. Legislators must look for ways to support and further the commission's independence and expertise in order to promote sound policy and to protect themselves and the state's budget from political pressures. This, in turn, will necessitate that the commission's budget and membership be comparable to its weighty responsibilities. To preserve commission independence, the legislature must not play a direct role in filling commission vacancies. However, legislative leaders must indirectly encourage appointment of individuals with stature, experience, and devotion to the goals of the guidelines. In defining, appointing, and dealing with commission members, a sound rule of thumb would be to treat the commission as a "quasi-judicial" body with the prestige, independence, and power of the state's highest appellate court. This standard is admittedly high; yet, it reflects the significance and difficulty of the commission's task.

### CONCLUSION

As the Minnesota experience demonstrates, a system of presumptive sentences drafted by an independent commission can work to narrow discretion, operate within prison capacity, and effect modest changes in the type of offenders sent to prison. However, as this experience also shows, the ultimate scope of reform under a sentencing guidelines system is necessarily limited. Criminal justice reform operates in a systemic context, a complex web of interrelated rules and unregulated discretion, where changes in one facet of the system are often cancelled by compensating changes elsewhere in the system. Minnesota has yet to achieve many of the prescriptive changes in sentencing theory and policy sought by the Commission. Nevertheless, the Minnesota Guidelines have achieved a unique and impressive balance among the important, and inherently competing, goals and limitations of punishment.

In following Minnesota's lead, sentencing reformers in other states must temper their idealism with realism, setting their sights on attainable and affordable goals. Even a modest change in existing practices requires a substantial commitment to research and implementation which, in turn, requires a substantial financial commitment to the work of the sentencing

commission initially and over time. Legislators must give careful attention, not only to the drafting of the guidelines enabling statute, but to their post-implementation relationship with the commission. Moreover, legislators must never lose sight of the value of an independent, expert commission, and must seek whenever possible to fully support its research and policy-making functions. Above all, a successful sentencing guidelines reform effort demands a commission with the seriousness of purpose in its leadership, the dedication and technical competence in its staff, and the clear vision of broadly based policy reform that have characterized the operation of the Minnesota Sentencing Guidelines Commission.

