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Michael Tonry

Sentencing Commissions and Their Guidelines

ABSTRACT

Sentencing commissions, administrative agencies charged to develop and promulgate standards for sentencing, were first proposed early in the 1970s and first established in 1978. Of four recent major sentencing reform approaches—the others being parole guidelines, voluntary sentencing guidelines, and statutory determinate sentences—only sentencing commission systems continue to be created. Despite controversies associated with the highly unpopular federal guidelines, commissions and their guidelines have achieved their primary goals. Some commissions have achieved specialized technical competence, have adopted comprehensive policy approaches, and have to a degree insulated policy from short-term political pressures. Guidelines have reduced disparities and gender and sex differences in sentencing and by tying policies to available resources have enabled some jurisdictions to resist national trends toward greatly increased prison populations.

The sentencing commission is alive and well. Proposed by Judge Marvin Frankel more than twenty years ago as a device for reducing sentencing disparities and judicial “lawlessness,” sentencing commissions were to be specialized administrative agencies charged to set standards for sentencing (Frankel 1972). Some commissions have operated much as Judge Frankel hoped they would; they have achieved and maintained specialized institutional competence, have to a degree insulated sentencing policy from short-term “crime of the week” political pressures, and have maintained a focus on comprehensive system-wide policy-making. Guidelines promulgated by commissions have altered sentenc-

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ing patterns and practices, have reduced sentencing disparities and gender and race effects, and have shown that sentencing policies can be linked to correctional and other resources, thereby enhancing governmental accountability and protecting the public purse.

Many readers may be surprised by the preceding summary of experience with sentencing commissions and their guidelines. The controversial story of the best-known commission, the U.S. Sentencing Commission, is well known. The U.S. commission's guidelines are easily the most disliked sentencing reform initiative in the United States in this century. They are commonly criticized on policy grounds (that they unduly limit judicial discretion and unduly shift discretion to prosecutors), on process grounds (that they foreseeably cause judges and prosecutors to devise hypocritical stratagems to circumvent them), on technocratic grounds (that they are too complex and are hard to apply accurately), on fairness grounds (that by taking only offense elements and prior criminal history into account, very different defendants receive the same sentence), and on normative grounds (that they greatly increased the proportion of offenders receiving prison sentences and are generally too harsh). How, a reader might reasonably ask, can the commission idea be a success if its most prominent example is so controversial?

The answer is that the experience of the U.S. commission is misleading in two ways. First, the federal commission is but one of twenty that have been established and of a dozen or more now in existence. In some states, notably including Delaware, Minnesota, Oregon, Pennsylvania, and Washington, the experience has been much happier. Second, and as important for assessment of the viability of Judge Frankel's proposal, the evidence documenting the policy failures and unpopularity of the U.S. guidelines at the same time demonstrates the institutional capacities of sentencing commissions. However misguided the U.S. Sentencing Commission's policies, and however ineffective its efforts to elicit acceptance from practitioners, it has become a specialized agency of technical competence and has managed through its guidelines radically to alter sentencing practices in the federal courts.¹

The sentencing commission idea will survive the federal debacle. To be sure, the federal example raises skepticism in many states. In both North Carolina and Texas, for example, commissions at early meetings

¹ This point, that an increasingly effective organization is behind the deeply unpopular federal guidelines, is obvious enough once noted but has long gone unnoted. Doob (1993) pointed it out to me, and I have developed the idea elsewhere (Tonry 1993a).

adopted resolutions expressly repudiating the federal guidelines as a model for anything they might develop (Knapp 1993). The North Carolina commission euphemistically abjured use of the word "guidelines" in its legislative proposals (North Carolina Sentencing and Policy Advisory Commission 1993) so as not to conjure up images of the federal guidelines (Orland and Reitz 1993). At a meeting of state sentencing commissions in Boulder, Colorado, in February 1993, an Ohio representative reported that the Ohio commission early in its work resolved that "Ohio should not adopt the type of rigid sentencing guidelines exemplified by the federal guidelines" (Orland and Reitz 1993). State policymakers can and do distinguish the merits and promise of Judge Frankel's proposal from the demerits and policy failures of the U.S. federal experience.

Sentencing reform remains on the policy agendas of many common law jurisdictions in the United States and elsewhere. The Criminal Justice Act 1991, which took effect in October 1992, is a major reconstitution of sentencing laws and practices in England and Wales (Wasik and Taylor 1991; Ashworth 1992; Thomas 1993). In Australia, although the 1980 call of the Australian Law Reform Commission for abolition of parole fell on deaf ears, in 1989 New South Wales (Gorta 1992, 1993) enacted truth-in-sentencing laws not greatly different from those in some American states; in 1991 Victoria enacted the Sentencing Act of 1991, which made significant changes to that state's sentencing laws (Fox 1991; Freiberg 1993). Although the 1987 recommendation of a Canadian national commission that Canada establish a permanent sentencing commission was not adopted by the Canadian Parliament (Canadian Sentencing Commission 1987, chap. 14), major sentencing reform legislation has been repeatedly considered (see, e.g., Roberts and von Hirsch 1993).

In American states, the sentencing commission is the only institutional survivor of two decades' experimentation with comprehensive approaches to sentencing reform. During the 1970s, four differing reform approaches contended (Blumstein et al. 1983, chap. 3). Parole guidelines, the earliest dating initially from the late 1960s, were an effort to reduce disparities in prison sentences by structuring the discretion of parole boards in setting release dates. A number of states, notably including Oregon, Washington, and Minnesota, and the federal system, adopted parole guidelines (e.g., Gottfredson, Wilkins, and Hoffman 1978; Arthur D. Little, Inc. 1981; Bottomley 1990). Because parole boards, however, have no jurisdiction over jail sentences or

nonincarcerative penalties, or over the decision whether to incarcerate in state prisons, parole guidelines were at best a partial solution to sentencing disparities and were repealed to be replaced by sentencing guidelines in the jurisdictions mentioned. Some states continue to develop and to use parole guidelines, but they are promoted as relevant to parole administration and not as a stand-alone sentencing reform.

Next in order, expressly building on experience with parole guidelines and dating initially from pilot projects in Denver and Vermont in the mid-1970s, were sentencing guidelines that were "voluntary" in the two senses that they were developed by judges without a statutory mandate and that judicial compliance with them was entirely discretionary with the individual judge (Wilkins et al. 1978; Kress 1980). By the early 1980s, voluntary guidelines had been developed in most states (Blumstein et al. 1983, pp. 138–39), sometimes at the state level (e.g., Maryland, Florida, Massachusetts, Michigan, New Jersey, and Wisconsin) and more often at county or judicial district levels (Shane-DuBow, Brown, and Olsen 1985). The voluntary guidelines were often created by judges in hopes that by putting their own houses in order they would forestall passage of mandatory or determinate sentencing laws (e.g., Carrow et al. 1985, pp. 126–27). Evaluations showed that voluntary guidelines typically had little or no demonstrable effect on sentences imposed (Rich et al. 1982; Blumstein et al. 1983, chap. 4; Carrow 1984; Carrow et al. 1985), and in most places they were abandoned. They continue in effect in a number of states, including Michigan and Wisconsin, but no evaluations have been published. The notable exception to the generally pessimistic story of voluntary guidelines is in Delaware, where they took effect in the mid-1980s and appear to have normative and collegial, albeit they do not have formal legal, authority (e.g., Quinn 1990, 1992; Gebelein 1991). In Delaware, also, no major independent or other evaluations have been published.

Third in sequence were statutory determinate sentencing schemes dating from the mid-to-late 1970s like those in California, Illinois, Indiana, and North Carolina. They were diversely specific, ranging from California where, initially, for example, robbery was specified to warrant a three-year prison term in the ordinary case, but two or four years if mitigating or aggravating circumstances were present, to Indiana where statutes prescribed ranges of ten to forty years for some offenses (Blumstein et al. 1983, chap. 3). Few of the statutory schemes were subjected to independent evaluations by outsiders. The exceptions are California, where many evaluations were conducted (for a

complete list, see Cohen and Tonry 1983, table 7-15), and North Carolina, where Stevens Clarke and colleagues completed a number of evaluations (Clarke et al. 1983; Clarke 1984, 1987). In both states, statutory determinate sentencing laws reduced sentencing disparities and (remarkably, in retrospect) led to reductions in average sentence lengths. Nonetheless, no state known to me (and I have said this often in places where, if I am wrong, I should have been corrected) has adopted a statutory determinate sentencing system for more than ten years.

After nearly two decades of experimentation, the guideline-setting sentencing commission is the only reform strategy that commands widespread support and continues to be the subject of new legislation. Legislation to establish the first two commissions, in Minnesota and Pennsylvania, was enacted in 1978. In other places I have told the story of sentencing commissions through the mid-1980s (Tonry 1987, 1988). Suffice to say that by 1987, presumptive guidelines created by sentencing commissions were in place in Minnesota, Washington, and (after an initial legislative rejection) Pennsylvania. Voluntary guidelines in Maryland and Florida, which had been created with federal demonstration project money, were adopted statewide; Florida's were converted into (nominally) presumptive guidelines, and the judicial steering committee that oversaw the demonstration project evolved into a sentencing commission (Carrow et al. 1985). Entities called sentencing commissions had been created in South Carolina (von Hirsch, Knapp, and Tonry 1987, pp. 24-25, 117-24), New York (Griset 1991), Connecticut (Shane-DuBow, Brown, and Olsen 1985), and Maine (von Hirsch, Knapp, and Tonry 1987, pp. 20-21), but either decided not to develop guidelines (Maine and Connecticut) or tried to do so but were unable to persuade state legislatures to ratify the guidelines proposed (New York and South Carolina).

The pace of sentencing commission activity increased after the mid-1980s. The federal legislation was passed in 1984, commissioners were appointed in 1985, and the guidelines took effect in 1987. Oregon's guidelines took effect in 1989; with Washington and Minnesota, Oregon has the most sophisticated guidelines now in use. Guidelines created by sentencing commissions took effect in Tennessee, Louisiana and, after legislative rejection of initial proposed guidelines, in Kansas in 1993 (Gottlieb 1991). At the time of writing, sentencing commissions are at work in Ohio, North Carolina, and Alaska, and commissions with wider charges to consider sentencing and corrections policies and laws are working in Texas and Arkansas (Knapp 1993).

Supreme Court Justice Louis Brandeis once observed that "it is one of the happy incidents of the federal system that a single, courageous state may, if its citizens choose, serve as a laboratory and try social and economic experiments without risk to the rest of the country" (*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 [1932]). Amid discussion, development, promulgation, enactment, rejection, celebration, and denunciation of American's experiments with sentencing commissions, it seems a good time to take stock of what has happened to Judge Frankel's suggestion that sentencing policy be made the subject of administrative rule making.

Numerous entities of different sorts have been called sentencing commissions but my focus here is principally on those that fall within Judge Frankel's proposals for statutory creation of an administrative body charged with developing rules for sentencing that would be presumptively applicable, subject to a judge's authority to impose some other sentence if reasons were given, with that judgment being subject to review on appeal by a higher court (von Hirsch, Knapp, and Tonry 1987, chap. 1). At least ten commissions fit that definition (more or less in chronological order, Minnesota, Pennsylvania, Maine, Washington, South Carolina, the U.S. Sentencing Commission, Oregon, New Mexico, North Carolina, Kansas, and Ohio). Excluded are commissions with more general charges to consider sentencing or corrections issues, or both, and formulate recommendations. The most celebrated commission of this type was the Canadian Sentencing Commission (1987); notable American instances occurred in New York (Griset 1991), Texas (Reynolds 1993), and Arkansas (Knapp 1993).

This essay consists of three sections. The first examines experience with sentencing commissions in relation to the effects of their guidelines on sentencing patterns and correctional practices and in relation to their institutional properties (specialized competence, insulation from short-term emotionalism and political pressures, a systemic approach to policy-making). The second section canvasses the major policy issues that current commissions have addressed and that future commissions must resolve. The third provides a diagnosis of the state of health of Judge Frankel's proposal and its long-term prospects.

Before beginning, one final prefatory note concerning sources is necessary. The scholarly and evaluation literatures on sentencing commissions and their guidelines are slight. Besides Judge Frankel's book, only three others have discussed commissions (as opposed to their guidelines) in any detail (O'Donnell, Churgin, and Curtis 1977; von

Hirsch, Knapp, and Tonry 1987; Parent 1988) and only a handful of articles (Tonry 1979, 1991; Frankel and Orland 1984; Wright 1991). Private foundations and the federal research-sponsoring agencies have shown little interest in sentencing for many years and, as a result, little has been added to the literature since the last time I took stock of the sentencing commission experience (Tonry 1988). The only major exception concerns the U.S. Sentencing Commission on which a modest evaluation literature (e.g., Schulhofer and Nagel 1989; Heaney 1991; Karle and Sager 1991; U.S. Sentencing Commission 1991*a*, 1991*b*; Dunworth and Weisselberg 1992; Meierhoefer 1992; Nagel and Schulhofer 1992; U.S. General Accounting Office 1992) and a sizable policy literature (e.g., Wright 1991; Freed 1992; Doob 1993; Tonry 1993*b*) have accumulated. The bimonthly *Federal Sentencing Reporter* published by the University of California Press for the Vera Institute of Justice is a treasure trove of otherwise fugitive reports and analyses of the federal sentencing commission and its guidelines; the December 1992 issue is devoted entirely to evaluation issues. In addition, most sentencing commissions collect monitoring data in greater or lesser detail and publish annual or more frequent statistical reports. There are a handful of recent empirical writings by others, using commission data, in Minnesota (e.g., Frase 1991, 1993*a*) and Washington (Boerner 1993), and a small number of articles have described the policies and processes of state sentencing commissions (Kramer and Scirica 1985; Parent 1988; Bogan 1990, 1991; Griscti 1991; Lieb 1991, 1993; Dailey 1992; Kramer 1992; Gottlieb 1993; Wright and Ellis 1993) and the federal sentencing commission (Breyer 1988, 1992; von Hirsch 1988; Stith and Koh 1993; Tonry 1991, 1993*b*). Finally, five law reviews have recently devoted symposium issues to sentencing.² This essay draws on these sources and also on personal contacts with state and federal policymakers and practitioners.

I. Experience with Commissions

The crux of Judge Frankel's proposal concerned the institutional capacities of administrative agencies. Rule-making authority has been delegated by legislatures in the United States to countless state and federal agencies on the bases that, better than any legislature, they can achieve

² The *Yale Law Journal* (vol. 101, no. 8), the *University of Southern California Law Review* (vol. 66, no. 1), the *University of California Davis Law Review* (vol. 25, no. 3), the *Wake Forest Law Review* (vol. 28, no. 2), and the *University of Colorado Law Review* (vol. 64, no. 3).

and maintain specialized competence concerning complex subjects, they have some degree of insulation from short-term popular emotions and political pressures, and they can adopt comprehensive, long-term approaches to policy-making. Because the sentencing commission was proposed as a tool for establishing standards for sentencing and reducing disparities, any stocktaking must consider two questions. First, have commissions successfully developed and implemented sentencing guidelines that have changed sentencing practices and reduced disparities? Second, as administrative agencies, have sentencing commissions developed specialized competence, achieved some insulation from knee-jerk politics, and adopted comprehensive, long-term approaches to policymaking?

A. Effects on Sentencing Practices

Guidelines developed by commissions have changed sentencing practices and patterns, reduced disparities, ameliorated racial and gender differences, and helped states control their prison populations. That statement camouflages deep disagreements about the wisdom of decisions made by commissions. In the federal system, for example, numerous observers charge that the new sentencing patterns are too severe and that the new practices are undesirable because lawyers and judges commonly, and foreseeably, manipulate the guidelines to avoid imposing sentences that they believe are too harsh (Federal Courts Study Committee 1990; Freed 1992; Nagel and Schulhofer 1992; Tonry 1993*b*). In the federal, Minnesota, and Oregon systems, critics argue that disparities have been reduced by violating the second half of the equality injunction ("and treat different cases differently"). Racial and gender differences have been reduced but, controlling for current offenses and criminal histories, women and whites continue more often to receive mitigated sentences than do men and blacks and, conversely, men and blacks more often receive aggravated sentences. Gender differences have been ameliorated but only by increasing the relative severity of women's punishments compared with preguidelines patterns in which women's sentences were markedly less severe than men's (e.g., Knapp 1984, pp. 67–68). Racial differences have diminished in some jurisdictions, but only by limiting standard sentencing criteria to current offense and criminal history information (which in any case has a systematically unfavorable disparate impact on black defendants) and by forbidding judges to adjust sentences on the basis of biographical information such as education, employment, and family

status,³ which lessens chances of favorable treatment of nondisadvantaged defendants but in many individual cases penalizes disadvantaged defendants who have to some degree overcome dismal life chances. Finally, although some jurisdictions have managed to regulate their prison populations, some never tried and the U.S. commission, despite a statutory directive, failed to do so.

Nonetheless, while reasonable people can disagree about the wisdom of policies commissions have adopted and regret that they have not been more successful at reducing unwarranted disparities and eliminating harsher treatment of minority defendants, no informed person can disagree that some commissions and their guidelines have altered sentencing practices and patterns in their jurisdictions.

1. *Conformity with Guidelines.* Data are available from four states and the federal system on judges' compliance with guidelines. It is clear that judges in a large majority of cases will conform the sentences they announce to applicable authorized sentencing ranges. That assertion requires two important caveats. First, guideline developers have often insisted that guidelines should be disregarded when a case's special features warrant different treatment (Gottfredson, Wilkins, and Hoffman 1978); they are after all guidelines, not mandatory penalties,⁴ and judges' reasons for imposing some other sentence can be stated for the record and examined by higher courts. From this perspective, a guidelines system that elicited 100 percent compliance would be undesirable because judges would not be discriminating among cases as they should.

Second, if judges are willing to give plea bargaining free rein, compliance may be more apparent than real. Guidelines make sentencing predictable. Picture a guidelines grid as a dart board. Figure 1 as an example shows the initial 1989 Oregon grid. Each cell specifies a range of presumptively appropriate sentences; to fix the game counsel need only be sure that their dart hits the right cell. This they can do by means of charge dismissals. If counsel negotiate a fifteen-month prison sentence, and the applicable sentencing range for offense *X* is fourteen to sixteen months, the defendant need only plead guilty to *X* and the

³ The federal guidelines, for example, in § 5H1.6 provide: "Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the guidelines" (U.S. Sentencing Commission 1992a). Comparable rules apply to education and employment.

⁴ Although the U.S. Sentencing Commission has muddled the distinction by describing its own presumptive guidelines as "mandatory guidelines" (U.S. Sentencing Commission 1991a, p. i).

		Criminal History Scale									
		0 No prior record or 1st offense (0-1) years	1 2nd offense (1-2) years	2 3rd offense (2-3) years	3 4th offense (3-4) years	4 5th offense (4-5) years	5 6th offense (5-6) years	6 7th offense (6-7) years	7 8th offense (7-8) years	8 9th offense (8-9) years	9 10th offense (9-10) years
Crime Seriousness Scale	Murder	11	225-269	196-224	178-194	149-177	149-177	135-148	129-134	122-128	120-121
	Manslaughter I, Assault I, Rape I, Arson I	10	121-130	116-120	111-115	91-110	81-90	71-80	66-70	61-65	58-60
	Rape I, Assault I, Kidnapping I, Arson I, Burglary I, Robbery I	9	66-72	61-65	56-60	51-55	46-50	41-45	39-40	37-38	34-36
	Manslaughter II, Sexual Abuse I, Assault II, Rape II, Using Child in Display of Sexual Conduct, Drugs—Minors, Cult/Manuf., Del. Comp., Prostitution, Neg. Homicide	8	41-45	35-40	29-34	27-28	25-26	23-24	21-22	19-20	16-18
	Extortion, Coercion, Supplying Contraband, Escape I	7	31-36	25-30	21-24	19-20	16-18	180-90	180-90	180-90	180-90
	Robbery II, Assault III, Rape III, Sbite Receiving, Intimidation, Property Crimes (more than \$50,000), Drug Possession	6	25-30	19-24	15-18	13-14	10-12	180-90	180-90	180-90	180-90
	Robbery III, Theft by Receiving, Trafficking Stolen Vehicles, Property Crimes (\$10,000 - \$49,999)	5	15-16	13-14	11-12	9-10	6-8	180-90	120-60	120-60	120-60
	Failure to Appear I, Custodial Interference II, Property Crimes (\$5,000 - \$9,999) Drugs—Cult/Manuf./Del.	4	10-10	8-9	120-60	120-60	120-60	120-60	120-60	120-60	120-60
	Abandon Child, Abuse of Corpse, Criminal Nonsupport, Property Crimes (\$1,000 - \$4,999)	3	120-60	120-60	120-60	120-60	120-60	120-60	90-30	90-30	90-30
	Dealing Child Pornography, Violation of Wildlife Laws, Welfare Fraud, Property Crimes (less than \$1,000)	2	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30
	Altering Firearm ID, Habitual Offender Violation, Bigamy, Paramilitary Activity, Drugs—Possession	1	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30

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

FIG. 1.—Oregon sentencing guidelines grid, 1989. Source: Ashford and Mosbaek (1991).

prosecutor to dismiss any other charges to assure the agreed sentence. Of course, different prosecutors may offer different deals to like-situated offenders, who may therefore plead guilty to offense *Y* or offense *Z*. So long as the judge imposes the agreed sentence from within the applicable guideline range in every case, nominal compliance will be absolute, however disparate the sentences like-situated offenders receive.

There is considerable evidence that counsel do bargain around guidelines, which makes before-and-after-guidelines comparisons of sentencing difficult; the meaning of a plea to, say, second-degree aggravated assault may be different before and under guidelines. Comparisons of

TABLE 1
Conviction Offenses by Seriousness Levels, 1982 and 1985 (%)

Level	FY 1982	January-June 1985	Difference
XIV	.2	.1	-.1
XIII	.5	.3	-.2
XII	.3	.2	-.1
XI	.1	.2	+.1
X	.9	.4	-.5
IX	5.6	3.6	-2.0
VIII	1.4	.6	-.8
VII	3.4	2.0	-1.4
VI	4.7	5.7	+1.0
V	.8	.7	-.1
IV	10.6	9.7	-.9
III	8.3	10.1	+1.8
II	34.5	33.3	-1.2
I	28.7	31.1	+2.4
Unranked	.0	1.9	+1.9
Total	100.0	99.9	

SOURCE.—Washington State Sentencing Guidelines Commission (1985), p. 3.

NOTE.—Level XIV is the most serious category (aggravated murder). Percentages do not equal 100 due to rounding. FY = fiscal year.

plea bargaining in Minnesota before and under guidelines showed a marked shift away from sentence bargaining and toward charge bargaining (Knapp 1984, chap. 6). Frase, in a quantitative analysis of Minnesota sentencing patterns through 1989, concluded, "It appears likely that whatever plea-trial disparities there were before the guidelines went into effect continued to exist in the early post-guidelines years, and still exist today; plea bargaining, and its accompanying charge and sentence disparities, is 'alive and well' in Minnesota" (1993a, p. 34).

In Washington State, as table 1 shows, there was a marked shift in offense-of-conviction patterns after the guidelines took effect. In general, convictions of offenses subject to presumptive state-prison sentences declined, and convictions of other offenses increased. Similarly, among the six lowest offense levels, in which the presumption generally is against state incarceration, there was a marked shift toward more convictions for the least serious crimes, for which the guidelines did not call for any incarceration.

In Pennsylvania, a more subtle pattern appeared which shows how

guidelines can accommodate different patterns of plea bargaining. Table 2 shows patterns of guideline compliance in Pennsylvania in 1983 and 1986.⁵ Pennsylvania has a unique set of guidelines that establish standard, aggravated, and mitigated ranges for every offense and, like most jurisdictions,⁶ recognize various severity levels of some crimes (e.g., first-, second-, and third-degree robbery). Two patterns stand out from table 2. For most sets of offenses, fewer than half of those convicted of the most serious grade of the offense received sentences within the standard range; mitigated-range sentences were high, and downward departures were very high. Among those convicted of the lowest-grade offense in each set, from 62 to 96 percent received standard-range sentences; mitigated-range and downward-departure sentences were much less common. The most plausible explanation is that these patterns reveal the operation of diverse plea negotiation conventions within Pennsylvania. Where sentence bargaining is common, defendants plead guilty to the most serious offense charged with an understanding that the judge will impose a mitigated sentence or depart downward. Where charge bargaining is common, defendants plead to a charge which bears a presumptive penalty they will accept, and judges then impose a standard-range sentence.

In theory, plea bargains should not distort application of the federal guidelines because they are based on the defendant's "relevant conduct" as determined by a preponderance of the evidence at sentencing and not merely on the conviction offense. Nonetheless, there is substantial evidence from research sponsored by the U.S. commission (Schulhofer and Nagel 1989; U.S. Sentencing Commission 1991*b*, chap. 6; Nagel and Schulhofer 1992) and research by others (Heaney 1991) that counsel, often with tacit judicial approval, do bargain around the guidelines. Sometimes this is done by having the defendant plead guilty to an offense for which the maximum lawful sentence is less than the applicable guideline range. Sometimes it is done by counsel stipulating to facts that omit details like weapon use or victim injury or a larger quantity of drugs that require a stiffer sentence. Sometimes it is done by understandings that the judge will ignore the guidelines and that neither party will appeal. Sometimes it is done in even more

⁵ Comparable patterns continued in 1991 although reclassification of some offenses makes exact comparisons impossible (Pennsylvania Commission on Sentencing 1993, table 4).

⁶ The North Carolina Sentencing and Policy Advisory Commission (1993) has proposed that North Carolina adopt guidelines patterned on Pennsylvania's separate set of ranges for standard, mitigated, and aggravated sentences (see also Lubitz 1993).

TABLE 2
Statewide Conformity in Pennsylvania in 1983 and 1986, Selected Offenses (in Percent)

Offense	Standard Range		Aggravated Range		Mitigated Range		Departure Up		Departure Down	
	1983	1986	1983	1986	1983	1986	1983	1986	1983	1986
Aggravated assault:										
Felony2	36	47	4	5	12	12	2	3	46	33
Felony3	100	N.A.	0	N.A.	0	N.A.	0	N.A.	0	N.A.
Misdemeanor1	70	71	1	2	10	8	0	1	19	18
Arson:										
Felony1	13	33	0	4	10	16	0	3	77	44
Felony2	62	48	0	8	11	10	5	1	22	33
Burglary:										
ogs 7	39	40	3	4	25	18	3	9	29	29
ogs 6	49	56	3	4	14	13	4	5	31	22
ogs 5	78	77	2	4	5	5	2	3	12	11
Retail theft:										
Felony3	62	65	2	2	9	12	1	0	25	20
Misdemeanor1	91	96	0	0	4	1	0	0	5	2
Robbery:										
Felony1	48	59	6	7	10	10	15	11	25	12
Felony2	67	73	4	4	6	7	6	4	20	12
Felony3	85	87	1	3	4	3	2	2	17	5

SOURCES.—Pennsylvania Commission on Sentencing (1984), table 1; Pennsylvania Commission on Sentencing (1987), table 4.

NOTE.—ogs = offense gravity scale; N.A. = not available.

Byzantine ways.⁷ Although no one has devised a credible estimate of how often the guidelines are deceptively evaded, commission-sponsored research acknowledges that bargaining distorts guideline application in at least 25 to 35 percent of cases (Nagel and Schulhofer 1992).

Keeping in mind therefore that compliance rates may mean less than appears, table 3 shows compliance and departure rates for selected recent years for Minnesota, Oregon, Pennsylvania, Washington, and the federal system. Departure rates are low in every jurisdiction, which shows that guidelines have moral force in each of them. Judges sworn to enforce the law are presumably more comfortable not "departing" from guidelines that the legislature has adopted or ratified. Not much else can be concluded from table 3. Because guideline ranges vary substantially from Minnesota's very narrow ones (e.g., for rape with no prior record: eighty-one to ninety-one months) to Pennsylvania's very broad combination of standard, aggravated, and mitigated ranges (e.g., for rape with no prior record: twenty-seven to seventy-five months), comparisons of departure rates across jurisdictions offer no comparative insights into sentencing consistency. Moreover, jurisdictions count departures in different ways. In the federal system, sentence reductions awarded defendants for "substantial assistance to the government" are not considered departures. Nor in Pennsylvania are sentences in the aggravated and mitigated ranges considered departures. Nor in Washington are sentence reductions under "First-Time Offender Waiver" and "Sex Offender Sentencing Option" provisions.

Once all the caveats are taken into account, and ignoring plea-bargaining complications, it would appear that the greatest levels of guidelines compliance occur in Oregon and Minnesota. Here too, unfortunately, things are not as simple as appears. As Frase has pointed out (1991; 1993*a*, p. 17 and figs. 4-6), gross compliance rates are misleading; a better inquiry would focus on departures from what to what. He shows, for example, that in Minnesota rates of mitigated dispositional departures (that is non-state-prison sentences when the guidelines specify state prison) annually represented 3-7 percent of all felony sentences between 1981 and 1989, but represented from 19 to 33 per-

⁷ Rule 5.k.1., e.g., allows the judge to disregard the guidelines altogether if the prosecutor files a motion requesting a mitigated sentence because of the defendant's "substantial assistance to the government"; if the prosecutor's real motive is to avoid an unduly harsh sentence, observers can not know whether the claimed "substantial assistance" was provided or was useful.

TABLE 3
Departure Rates, American Guidelines Systems, Recent Years (in Percent)

	Ad hoc Aggravated Departures	Approved Aggravated Sentences	Standard Sentences	Approved Mitigated Sentences	Ad hoc Mitigated Sentences
Federal (1991)	1.7	...	80.6	11.9	5.8
Minnesota (1989)*	6.4	...	80.9	...	12.7
Minnesota (1989)†	6.8	...	75.3	...	17.9
Oregon (1991)	3	...	94	...	3
Pennsylvania (1991)	2	2	74	8	13
Washington (1991)	1.6	...	80.7	15.4	1.7

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

* Dispositional departures only (state incarceration or not).

† Durational departures (length of sentence).

cent of all presumptive prison sentences. This is because guidelines presume state imprisonment for only approximately 20 percent of convicted felons. If, therefore 7 percent of all cases are mitigated dispositional departures, they represent a third of those presumed bound for prison.

One last permutation on compliance-and-departure calculations is to disaggregate for types of offense. Pennsylvania's guidelines, for example, cover felonies and misdemeanors. Although 87 percent of Pennsylvania sentences in 1983 fell within the applicable guideline ranges, when the data are broken down, 97 percent of misdemeanor sentences were compliant but only 79 percent of felony sentences (Tonry 1988, table 8). Significantly lower compliance rates characterized escape (40 percent), arson (64 percent), involuntary deviate sexual intercourse (68 percent), and aggravated assault (70 percent) (Tonry 1988, table 9). Data for 1991 show an 85 percent overall compliance rate which breaks down much as the 1983 data did (Pennsylvania Commission on Sentencing 1993, table 9).

For all the qualifications, however, judges much more often than not impose sentences that comply with applicable guidelines.

2. *Disparity Reduction.* Every sentencing commission claims that its guidelines have reduced sentencing disparities compared with sentencing patterns before guidelines took effect. Research on disparities, however, faces a number of formidable problems, some of which mirror the problems posed by data on compliance with guidelines. First, promulgation of guidelines may affect plea bargaining and before-and-after comparisons may be confounded if charging and bargaining practices change with the guidelines. If offenses labeled as second-degree aggravated assaults are systematically different before and under guidelines, analyses of disparities in sentencing for that offense may involve apples-and-oranges comparisons. If, for example, less serious second-degree assaults under guidelines more often result in pleas to less serious charges than before, cases resulting in convictions of second-degree assault may be more homogeneously serious and apparently reduced disparity a product of that greater homogeneity. Second, as was true during most of the last decade, if public and officials' attitudes toward offenders became more punitive over time, sentences are likely to have become harsher with or without guidelines and that rising tide complicates disparity analyses. Third, and most important, is a combined conceptual and methodological problem. Most disparity-reduction analyses use the offense severity and criminal history classifications

that are expressed in the relevant guidelines as the basis of comparisons, rather than comprehensive statistical models of sentencing before and under guidelines, and this inevitably exaggerates the extent to which disparities have been reduced. This last problem has greatest relevance to the federal guidelines; recent evaluations of the federal sentencing guidelines by the U.S. Sentencing Commission (1991*b*) and the U.S. General Accounting Office (1992) illustrate the problem, and it is discussed in some detail below.

Because the evidence is clearer in the states and because the federal guidelines present special problems for disparity analyses, I discuss them in separate subsections. First, however, some prefatory remarks about disparity studies are in order. Most of the analyses discussed are efforts to compare sentencing disparities in the first year, or few years, under a guidelines system with sentencing in some period before guidelines took effect. As time goes by, it becomes increasingly difficult, and soon impossible, to reach conclusions about disparities. After a few years, hypothetical comparisons must be made with sentencing patterns as they would have been had guidelines not been adopted. This is impossible to do. The public and political attitudes and sensibilities that led to creation of a sentencing commission would presumably have influenced sentencing patterns without guidelines. In addition, political and policy environments change over time, and these changes would also alter sentencing patterns with or without guidelines.

a. *Disparity Reduction in the States.* There are plausible grounds for believing that the state guidelines in their early years reduced disparities. In Minnesota, where more evaluations have been conducted than in any other state, an evaluation of the first four years experience concluded, "disparity in sentencing decreased under the sentencing guidelines. This reduction in disparity is indicated by increased sentence uniformity and proportionality" (Knapp 1984, pp. v-vi). Outside evaluators agreed: Minnesota "was largely successful in reducing pre-guideline disparities in those decisions that fall within the scope of the guidelines" (Miethe and Moore 1985, p. 360). Frase, drawing on data for 1981 to 1989, concludes that "the Minnesota guidelines have achieved, and continue to achieve" most of their goals, including disparity reduction, and "have been modestly successful in achieving greater honesty and uniformity in sentencing" (Frase 1993*a*, p. 3).

No independent evaluations have been published concerning the Oregon, Pennsylvania, Washington, and Delaware guidelines, but each commission, relying on its regularly collected monitoring data,

has concluded that disparities declined. The Washington commission, relying on 1985 data, concluded, "the Sentencing Reform Act has clearly increased consistency in the imprisonment decision" (Washington State Sentencing Guidelines Commission 1986, p. 7). Looking back over the first six years' experience with guidelines, the Washington commission reported, "the high degree of compliance with sentencing guidelines has reduced variability in sentencing among counties and among judges" (Washington State Sentencing Guidelines Commission 1992*b*, p. 12). On the early years of the Pennsylvania guidelines, its commission concluded for 1983, "it appears that Pennsylvania's guidelines are accomplishing their intended goal of reducing unwarranted sentencing disparity" (Pennsylvania Commission on Sentencing 1984, p. i), and for 1984, "sentences became more uniform throughout the state" (Pennsylvania Commission on Sentencing 1985, p. i). Kramer and Lubitz (1985) agreed. Finally, reporting on the first fifteen months' guidelines experience in Oregon, its commission concluded, "the guidelines have increased uniformity in sentencing considerably. Dispositional variability for offenders with identical crime seriousness and criminal history scores has been reduced by 45 percent over the variability under the pre-guidelines system" (Ashford and Mosbaek 1991, p. viii).

In Delaware, no evaluation has been published of the effects of its voluntary guidelines on disparities. However, a number of publications by the chairman (Gebelein 1991) and director (Quinn 1990, 1992) of Delaware's Sentencing Accountability Commission list "consistency and certainty" among the guidelines' goals and present data showing that the guidelines have succeeded in increasing use of incarceration for violent offenders and use of intermediate punishments for nonviolent offenders. This at least arguably supports an inference of greater consistency in Delaware sentencing.

Most likely, sentencing guidelines reduced disparities in all these jurisdictions compared with what they would have been without guidelines. Judge Frankel's complaints about lawlessness in sentencing presumably strike a responsive chord in most judges and lawyers. Because presumptive guidelines set authoritative standards for sentences where none existed, it would be astonishing if they had no effect on sentencing decisions. Even when plea bargaining, which is nearly ubiquitous in American courts, is taken into account, it is likely that the bargaining takes place in the shadow of the guidelines and that the bargained sentences are more consistent than otherwise they would have been.

Nonetheless, the evaluation research evidence on this question is less definitive than it appears or than its celebrants claim.

b. *Disparity-Reduction in the Federal System.* The evidence on federal sentencing disparities is mixed, and the best conclusion at present is that we do not know whether disparities have increased or decreased (Rhodes 1992; Weisburd 1992; Tonry 1993*b*). Although the U.S. commission, on the basis of an evaluation of the first four years experience with federal guidelines, claims “the data . . . show significant reductions in disparity” (U.S. Sentencing Commission 1991*b*, p. 419), there is reason to doubt that conclusion. Because both the U.S. commission and the U.S. General Accounting Office (GAO) devoted extensive efforts to measuring changes in sentencing disparities, I discuss the subject at some length.

For a discussion of the federal evaluation to be intelligible to readers not already familiar with the federal guidelines, some description of the system is necessary. Judges in setting sentences are supposed first to consult a schedule for the particular offense (table 4 shows the schedule for robbery) which specifies a “base offense level.” Then, on the basis of various offense circumstances, such as whether the offender was armed and if so with what, whether the weapon was used and with what injurious result, and the value of any property taken, the offense level is adjusted upward or downward (almost always upward). Next the judge must determine the offender’s criminal history score (mostly a measure of prior convictions). Finally the judge is to consult a two-dimensional grid (see table 5) to learn the presumptive sentence for the offender, given his adjusted offense level and his criminal history. Thus, a hypothetical offender who was convicted of robbery (base offense level in table 5: 20) of \$15,000 (increase by one level) of a bank (increase by two levels), in which he possessed and discharged a firearm (increase by seven levels), causing a minor injury (increase by two levels), would, with no prior record, fall within level thirty-two and be presumed to receive a prison sentence between 121 and 151 months.

The federal guidelines, uniquely among American guideline systems, are based not on the offense to which the defendant pled guilty or of which he was convicted at trial, but on “actual offense behavior,” which the commission calls “relevant conduct.” The chairman and general counsel of the commission have explained that the relevant conduct approach was intended to offset efforts by prosecutors to manipulate the guidelines by dismissing charges to achieve a conviction

TABLE 4
Robbery, Extortion, and Blackmail

§2B3.1 Robbery

a) Base offense level: 20

b) Specific offense characteristics

1. If the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, increase by 2 levels.
2. (A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished, displayed, or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished, displayed, or possessed, increase by 3 levels; or (F) if an express threat of death was made, increase by 2 levels.
3. If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily injury and increase in level

- A) Bodily injury, add 2 levels
- B) Serious bodily injury, add 4 levels
- C) Permanent or life-threatening bodily injury, add 6 levels
- D) If the degree of injury is between that specified in subdivisions A and B, add 3 levels; or
- E) If the degree of injury is between that specified in subdivisions B and C, add 5 levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 11 levels.

4. (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.
5. If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by 1 level.
6. If the loss exceeded \$10,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
A) \$10,000 or less	no increase
B) More than \$10,000	add 1
C) More than \$50,000	add 2
D) More than \$250,000	add 3
E) More than \$800,000	add 4
F) More than \$1,500,000	add 5
G) More than \$2,500,000	add 6
H) More than \$5,000,000	add 7

SOURCE.—U.S. Sentencing Commission (1992a).

offense that, under the guidelines, prescribed the preferred sentence (Wilkins and Steer 1990).

The complexity of the federal guidelines and their reliance on relevant conduct present nearly insuperable difficulties for a before-and-after disparity analysis. Information concerning drug quantity or purity or the presence of an unused firearm or the occurrence of uncharged crimes, all of which are "relevant conduct" and have incremental punitive significance, was often not material before the guidelines took effect. Consequently, there was no reason for probation officers to obtain or record such information, and for periods before November 1987 it is not systematically and reliably available. The GAO observed, "significant differences in much of the offender data available made it difficult to reliably match and compare groups of preguidelines and guidelines offenders. Preguideline offender data focused on personal information, such as socioeconomic status and family and community ties, that was supposed to be irrelevant under the guidelines in all or most cases. Conversely, most of the detailed data available on guidelines offenders, such as role in the offense, were not available for preguidelines cases" (1992, p. 10).

The commission and GAO approached disparities in two ways—by asking participants whether they believed disparities had been reduced and by conducting sophisticated quantitative analyses. All that can be learned from the interviews and surveys is that prosecutors and probation officers were likelier to believe that disparities had been reduced than were judges and defense lawyers. Table 6 shows answers to questions about reduced disparities from GAO interviews in four sites, commission interviews in twelve sites, and a commission mail survey.

Table 6 shows that most judges and defense counsel did not believe disparities to have been reduced (significant and slight majorities of prosecutors and probation officers disagreed). An earlier analysis of the guidelines by the Federal Courts Study Committee (1990) reported that many judges and the committee itself believed that disparities had increased.

The quantitative analyses were also inconclusive. The GAO's conclusion, based both on examination of the U.S. commission's statistical analyses and reanalysis of the commission's data is that "limitations and inconsistencies in the data available for preguidelines and guideline offenders made it impossible to determine how effective the sentencing guidelines have been in reducing overall sentencing disparity" (1992, p. 10).

TABLE 5
U.S. Sentencing Commission Sentencing Table (in Months of Imprisonment)

Offense level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	1-7	2-8	4-10	8-14	12-18	15-21
8	2-8	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78

20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

SOURCE.—U. S. Sentencing Commission (1992a).

TABLE 6
Percentage of Practitioners Who Believe Unwarranted Disparities
Have Been Reduced

	Judges	Prosecutors	Federal Defenders	Private Attorneys	Probation Officers
USSC interviews	50	76	41	32	59
USSC mail survey	32	51	11	19	52
GAO interviews	20	83	(←37→)		50

SOURCES.—For USSC interviews, U.S. Sentencing Commission (1991*b*), table 27; for USSC mail survey, U.S. Sentencing Commission (1991*b*), table 28; for GAO interviews, U.S. General Accounting Office (1992), table 3.

NOTE.—USSC = U.S. Sentencing Commission; GAO = U.S. General Accounting Office.

The commission would put a different gloss on its and GAO's findings on disparity reduction. The GAO entitled its report "Sentencing Guidelines—Central Questions Remain Unanswered." Commission Chairman Wilkins urged instead, "Sentencing Guidelines: Disparity Reduced, but Some Questions Remain" (GAO 1992, p. 182).

The insurmountable problem that comparable pre- and postguidelines data are not available served as the basis for GAO's agnosticism, though it noted that commission analyses showed reduction in disparities for some selected offenses. The GAO's own analysis showed that "unwarranted disparity continued" in relation to offenders' race, gender, employment status, age, and marital status (1992, p. 12).

Because of data limitations, the commission confined its empirical analyses of disparity reduction to four categories of robbery (with no or moderate criminal history, with and without a weapon), two categories of embezzlement (\$10,000–\$20,000 loss, \$20,000–\$40,000 loss), heroin trafficking (100–400 grams), and cocaine trafficking (500–2000 grams). Sample sizes were tiny (preguidelines samples were 17, 13, 25, 18, 27, 36, 40, and 44 cases; postguidelines samples were 80, 38, 57, 24, 56, 71, 72, and 81 cases). Sentences from downward departures for "substantial assistance to the government" were excluded from the analysis. For each of the eight offenses examined, sentences "pre" and "post" guidelines (both sentences announced and sentences "expected to be served") were characterized in terms of means, medians, and the range in months within which the middle 80 percent of cases fell. The breadth of the ranges of the middle 80 percent of sentences declined

for all eight offenses, though for five of those offenses the decline was not statistically significant. As commentators have stressed, the “not statistically significant” caveat means that the apparent reduction in disparity in five of the eight offenses studied may result from random chance and have nothing to do with the guidelines (Rhodes 1992; Weisburd 1992).

There are, unhappily, five reasons why even these modest findings are suspect. The first two are the inherent data limitations mentioned earlier and the tiny sample sizes. The third is that the commission’s own process evaluation and several other studies (Schulhofer and Nagel 1989; Nagel and Schulhofer 1992) suggest that “substantial assistance” notions are commonly used to permit judges to impose sentences less severe than guideline sentences that the judge and the prosecutor consider too severe. In fiscal year 1991, of all disposed cases, 11.9 percent were downward departures for substantial assistance; 21 percent of drug offense dispositions were substantial assistance departures (U.S. Sentencing Commission 1992*b*, table 55). Since judges are completely free of the guidelines once a substantial assistance motion is filed, opportunity for disparity is great. Excluding those departures from the disparity analysis inevitably understates the degree of variation in sentences, especially for drug cases.

The fourth problem is that two of the offenses examined, heroin and cocaine trafficking, became subject to mandatory minimum five-year sentences after the cases in the preguidelines sample were decided. Thus any apparent reduction in disparity for those offenses is likelier to result from passage of the mandatory minimum legislation than from implementation of the guidelines.

The fifth, and most important problem, however, is conceptual. “Unwarranted disparity” is not defined in the Sentencing Reform Act of 1984, and the commission selected a self-serving definition that inevitably exaggerated disparity reduction. Much research on sentencing disparities uses multivariate analyses and mathematical models to describe sentencing patterns before and after a policy or law change (e.g., Blumstein et al. 1983, chap. 2). Observed changes, assuming they are statistically significant and theoretically plausible, are then attributed to the change. The commission, instead, defined unwarranted disparities solely in terms of its own guidelines offense and criminal history characteristics.

The commission’s approach is misleading for two reasons. First, because federal law and guidelines now set very precise standards for

sentences in relation to offenses and criminal history, and the previous law had only maximum authorized sanctions and a few mandatory minimums, it would be astonishing if the new guidelines had no effect on sentencing patterns. Previously there were no targets to shoot at but under guidelines there were. Unless judges completely ignored the guidelines, sentences should on average have become closer to the targets. Second, however, the commission's approach might completely miss increases in disparity in relation to variables other than current offense and criminal history characteristics.

Doob (1993), for example, hypothesizes a situation in which pre-guideline sentencing decisions were premised solely on rehabilitative considerations and, in light of the relevant criteria, perfectly consistent. By using its culpability-based offense and criminal history categories to measure disparities, and superimposing them on the preguidelines data, the commission's methodology would miss the prior perfect consistency (by reference to different criteria) and most likely and unsurprisingly conclude that sentences were less disparate by its criteria after guidelines than before.

Suppose, for another example, that before the guidelines took effect, employed offenders with dependent children typically received lighter sentences because of judges' concern for the effects of a prison sentence on spouses, children, and household stability (as Wheeler, Mann, and Sarat [1991] suggest). The federal guidelines, which forbid judges to take account of employment prospects or family status, may have made the effects of employment plus dependents less consistent than before the guidelines; some judges foreseeably will circumvent the guidelines to achieve sentences that appear to them just and that follow the previous conventions, while others will adhere to the guidelines. Thus, in relation to employment and family status, sentencing under the guidelines will be more, not less, disparate than under the old system. By defining and looking for "unwarranted disparities" as it did, the commission undertook an impoverished look at disparity that was likely to produce a finding that disparities declined.

These methodological, measurement, and conceptual problems increased the odds that the commission would find that unwarranted disparities have declined. That statistically significant findings of reduced disparities were achieved for only three of eight selected crimes suggests that disparities have not declined very much or at all, or, as GAO more cautiously concluded, that decline cannot be demonstrated.

Absence of evidence is not, of course, evidence of absence. My best guess is that the state commissions are right and that sentencing in their states became more consistent and that disparities declined. It is harder to be sure about the federal guidelines because their complexity, rigidity, and severity have fostered such wholesale circumvention that much case disposition has been forced below ground, and it is unclear how reliable federal data are on the characteristics of disposed cases.

3. *Sentencing Patterns.* Most commissions have adopted "prescriptive" guidelines that are intended to change existing sentencing patterns (rather than "descriptive" guidelines intended to reproduce, with greater consistency, past sentencing practices). Minnesota and Washington sought to increase use of imprisonment for violent offenses and to decrease it for property offenses and assert that their monitoring data show that those objectives were achieved in the guidelines' early years (Knapp [1984], p. 31; Washington State Sentencing Guidelines Commission [1986], fig. 1; these analyses are discussed in some detail in Tonry [1988], pp. 306–9). Oregon had the same goals and found that the proportion of offenders convicted of felonies against persons who received state prison sentences increased from 34 percent before guidelines to 48 percent under guidelines while the proportion of property felons sentenced to state prisons declined from 19 to 9 percent; imprisonment for sex abuse felonies tripled from 13 to 42 percent (Ashford and Mosbaek 1991, pp. viii, 11). Pennsylvania sought to increase sentencing severity and appears to have succeeded; for most serious crimes, the proportion of convicted offenders incarcerated and their average minimum sentences before parole eligibility increased after the guidelines took effect (Pennsylvania Commission on Sentencing 1987, table 19). In Delaware, published monitoring data are less detailed than elsewhere but, as figure 2 shows, after the guidelines took effect the proportion of violent offenders among Delaware prisoners increased and the proportion of nonviolent offenders decreased (Gebelin 1991, p. 12). The U.S. Sentencing Commission also attempted to increase sentencing severity by decreasing use of probation, increasing the proportion of offenders incarcerated, and greatly increasing sentence lengths; it succeeded on all counts (U.S. Sentencing Commission 1991*b*; Tonry 1993*b*).

The effects of changes in sentencing patterns appear to vary with the abruptness of the new policies' departure from past practices. Where that change is modest, as in the initial guidelines in Pennsylvania and Minnesota, practices appear likely to revert to their prior pat-

FIG. 2.—Composition of Delaware's incarcerated population before and after effective date of SENTAC guidelines. Source: Gebelein (1991).

terns once the system has settled down. Where the change is sharp and the new sentencing policies are much more severe than past practice, there has been less evidence of reversion.

Published analyses are available from three jurisdictions—Minnesota, Washington, and the federal system—that describe system acceptance or rejection of substantial changes to sentencing policies. In Minnesota, amidst the commission's general policy of emphasizing prison use for violent offenses and deemphasizing its use for property offenses, major controversies included decisions to reduce the use of imprisonment for property offenders and to prescribe lengthy prison terms for sex offenders, especially for intrafamilial sex offenders. Frase (1993a) tells both stories; in each, the commission's policy changes were resisted.

Prosecutors actively resisted the policy decision to preclude imprisonment for most property offenders. Under the initial guidelines, minor property offenders were prison bound only if they had accumulated many prior convictions. A common prosecutorial strategy, in response, was to build criminal histories. A shoplifter might, for example, contrary to an earlier practice of taking a plea to one offense with other charges being dismissed, be required to plead guilty to five of-

fenses; the next time that offender was convicted of shoplifting, his five prior convictions would produce a presumptive prison sentence. The commission responded by changing the criminal history scoring rules so as to offset the bargaining pattern change (Parent 1988). This time prosecutors responded by insisting on guilty pleas to multiple charges and arguing that the sentence for the last contemporaneous plea must take account of the defendant's minutes-earlier prior convictions. In *State v. Hernandez*, 311 N.W. 2d 478 (1981), the Minnesota Supreme Court upheld that practice and the prosecutors won. By 1983, the proportion of property offenders imprisoned had risen to preguidelines levels and continued to rise through 1989 (Frase 1993a, p. 38).

The intrafamilial sex offense story is less tortured, but the moral is no less clear. Responding to heightened public concern, the commission prescribed prison sentences for most persons convicted of sexual offenses, regardless of the offender's prior record. Child sex abuse cases are especially complicated because of practitioners' recognition of many offenders' psychopathology, concern for maintaining households, and fear of making children feel guilty for having caused a parent's imprisonment and broken up the family. As a result, departure rates for child sex abuse cases have been high throughout the guidelines period and in 1987, despite the guidelines presumption of lengthy prison terms, the imprisonment rate for intrafamilial sex abuse cases was only 40 percent and the rate for nonfamilial statutory rape cases was only 58 percent (Frase 1993a). Frase's analysis does not demonstrate that sentences for sex offenders did not increase; they did, for those offenders for whom downward departures did not occur. Minnesota's sex-offender policies thus increased disparities among persons convicted of child sexual abuse offenses but, among those imprisoned, increased the severity of penalties.

Boerner has shown how changes in guideline severity adopted in Washington were quickly followed by increases in average sentence severity. Because criminal code changes that increase penalties must be made prospectively, for constitutional reasons, during transition periods grandfathered cases must be sentenced under the earlier, less harsh, standards and new cases under the new standards, allowing for examination of the effects of the new standards. Figure 3 shows sentencing patterns from 1988 to 1992 for second degree burglaries committed before and after the effective date of guideline amendments that divided second degree burglary into residential and nonresidential

Fig. 3.—Average sentence length, burglary. Source: Boerner (1993, fig. 5)

types and increased penalties for each. Average sentences for residential burglary increased substantially, while sentences for grandfathered cases (both nonresidential and residential) increased only slightly. Figure 4 shows comparable data for sentencing in first degree statutory rape and first degree “rape of child” cases from 1987 to 1992, which offenses Boerner writes are comparable because code changes in 1988 that increased penalties also relabeled statutory rape as “rape of a child;

Fig. 4.—Average sentence length, statutory rape and rape of child. Source: Boerner (1993, fig. 7).

the behavior covered by each of the degrees is essentially the same" (Boerner 1993, p. 25). Sentences for grandfathered cases under the original 1984 guidelines fluctuated but remained essentially the same through 1992, while cases sentenced under the 1988 guideline revision were substantially higher.

Boerner gives many such examples, all of which tend to demonstrate that changes in guidelines sentence severity were quickly followed by increases in the severity of sentences for affected offenses. As always, the data tell less than an omniscient observer would want to know. Because Boerner's data are average sentences received by incarcerated offenders sentenced for the designated offenses, it is impossible to know whether and how often the harsher sentences were avoided by plea bargains in which the defendant was allowed to plead guilty to a less serious offense than would have happened before the guideline revisions took effect. It would, however, require an unrealistically cynical hypothesis thereby to explain away all or most of the apparent increases in sentencing severity, leaving the conclusion that Washington's guideline changes did indeed significantly increase sentencing severity.

If the Washington data leave any doubt that sentencing policy changes through guidelines can alter sentencing practices, the U.S. Sentencing Commission experience should remove that doubt. The commission chose greatly to increase the proportion of offenders sentenced to imprisonment and greatly to increase the average lengths of prison sentences. It succeeded in both objectives.

The commission's evaluation showed that overall the percentage of convicted federal offenders sentenced to probation declined from 52 percent in late 1984 to 35 percent in June 1990. The commission isolates only three offenses for separate study (drugs, robbery, and "economic offenses"); use of nonincarcerative sentences fell sharply for each.

Reduction in the use of probation as a sentence was even greater than the commission reports. The commission's evaluation overstates the use of probation, presumably by counting split sentences that include some period of incarceration as a condition of "probation." The commission's 1991 annual report (U.S. Sentencing Commission 1992b, table 23) shows that only 14.5 percent of offenders in 1991 received "probation only" sentences. Although the evaluation does not report probation-only sentences before the guidelines took effect, some insight can be gained by comparing 1985 probation-only rates for selected

offenses with 1991 rates. The 1985 data were reported by the commission in 1987. The first number in each of the following pairs is the 1985 probation-only rate; the second is the 1991 rate: robbery—18 percent, 0.3 percent; fraud—59 percent, 22 percent; immigration—41 percent, 16.8 percent (U.S. Sentencing Commission 1987, p. 68; 1992*b*, table 3).

The severity of prison sentences likewise increased. The commission reports that the mean "expected to be served" sentence for all offenders increased from twenty-four months in July 1984 to forty-six months in June 1990 (1991*b*, p. 378). Prison sentences for drug offenses increased by 248 percent from 1984 to 1990 and from an average sixty months for robbery in 1984 to seventy-eight months in 1990. Although the commission's evaluation does not discuss other offenses, most offense categories would probably demonstrate stark increases.

The record, though not uncomplicated, seems to show that commissions through their policy choices can alter sentencing patterns substantially. That this can happen despite deep judicial dislike of the new policies is illustrated by the federal experience in which several judges have resigned rather than impose sentences they believe are unduly harsh, in which a California judge in tears imposed a lengthy sentence because the guidelines required it and then resigned, and in which one not unrepresentative appellate judge voted to uphold an aggregate 140 years imprisonment for four defendants, only to observe, "these sentences defy reason, but as I have already noted—such is our system" (Bright 1993).

4. *Racial and Gender Differences.* Every sentencing commission has included reduction or elimination of racial and gender discrimination in sentencing among its goals (e.g., Minnesota Sentencing Guidelines Commission 1980), and most claim to a considerable extent to have succeeded. The Minnesota commission's three-year evaluation concluded that racial differences in sentencing declined under guidelines; nonetheless, minority defendants were likelier than whites to be imprisoned when the presumptive sentence prescribed non-state-imprisonment, minority defendants received longer sentences than similarly categorized whites, and men received longer prison sentences than similarly categorized women (Knapp 1984, p. 61). Miethe and Moore (1985, pp. 352–55), using the same data but more sophisticated statistical techniques, agreed that overall racial and gender differences declined under guidelines. Frase (1993*a*, pp. 23–31), using the commis-

sion's monitoring data through 1989, also agreed that racial and gender differences diminished compared with preguidelines practices but painted a more complex picture. Controlling for current offense and criminal history, women continued to receive gentler handling; they were less than half as likely to be subject to aggravated departures and more likely to benefit from mitigated departures. Black defendants had equal or higher aggravated departure rates compared with whites in each of five years studied and lower mitigated departure rates in all five years.

Washington's evaluation revealed similar patterns. The initial evaluation found an overall decline in racial differences in sentencing but that "substantial racial and gender disparity was found in the use of sentencing alternatives"; whites were almost twice as likely as blacks to benefit from special mitigating provisions for first-time and some sex offenders (Washington State Sentencing Guidelines Commission 1987, p. 59). In a ten-year review of Washington sentencing reforms, although concluding that racial and gender differences had diminished, the commission in 1992 acknowledged "significant gender and ethnic differences in the application of options" to incarceration (Washington State Sentencing Guidelines Commission 1992*b*, p. 12).

The Oregon racial data from the first fifteen months' guidelines experience are difficult to disentangle because most analyses compare whites and "minorities," a category that includes blacks, Hispanics, Asians, and Native Americans, groups whose patterns of criminality vary substantially. In addition, most of the data are presented in tabular form without controls or multivariate analyses to take account of systematic differences in the kinds of crimes and criminal histories that characterize various groups. Noting that the data are crude, the following can be observed. First, the overall probability of state incarceration for whites fell from 17 percent before guidelines to 12 percent under guidelines. For minorities, the rate fell slightly from 23.9 percent to 23 percent (with six-point decreases for blacks and Asians and three- and five-point increases for Native Americans and Hispanics; Ashford and Mosbaek [1991], p. 47). Whites were slightly less likely than minority defendants to receive upward dispositional departures, slightly more likely to receive downward dispositional departures, and much more likely to benefit from an "optional probation" alternatives program (Ashford and Mosbaek 1991, pp. 49–52). As whites are to minority defendants in Oregon sentencing, so women are to men: women

were less likely to receive upward departures, more likely to receive downward departures, and more likely to be sentenced to optional probation.

Curiously, although the U.S. Sentencing Commission's self-evaluation and the GAO reanalyses of the commission's data involved much more sophisticated data-analytic methods than any of the state evaluations, the research design precluded any overall conclusions about racial and gender disparities. The commission's basic study, recall, was of disparity before and under guidelines using the commission's offense severity and criminal history schemes as the measure of consistency, but focusing on eight categories of cases involving small numbers in each category. As a result, the rote conclusion (U.S. Sentencing Commission 1991a, pp. 302, 324) was that "cell sizes were inadequate to test or no significant relationships were found with respect to . . . race, gender, age." Exclusion from the analysis of departures for "substantial assistance to the government" leaves open the possibility that those mitigated sentences are skewed in terms of race or gender. In addition, as with the general disparity analysis, there is no basis for generalizing from the specific offenses the commission analyzed to federal offenders generally (U.S. General Accounting Office 1992, p. 64).

Because of the small sample sizes, the numbers of mitigated departures were insignificant, and no meaningful analyses of race and gender effects in departures could be made. In relation to disparities within the guidelines (i.e., whether some racial or gender groups are likelier to receive sentences at the top or bottom of the guideline ranges), the commission found that "race was found to be statistically significant across all offense categories [but] . . . only slight variations between sentencing of black and white offenders were found." However, "women were statistically more likely to receive sentences at the bottom of the range" (U.S. Sentencing Commission 1991a, p. 324).

The GAO, in a more sophisticated analysis, concluded that "blacks were more likely than whites to receive sentences at the bottom or top of the guidelines range rather than in the middle" and that "females were twice as likely (i.e., 1.91 times as likely, to be exact) as males to receive sentences at the bottom rather than in the middle of the range" (U.S. General Accounting Office 1992, p. 92).

The commission somewhat formalistically disagreed with the GAO's depiction of sentencing differences within guidelines as disparity, arguing that Congress authorized guideline ranges in which the

maximum sentence was 25 percent longer than the minimum and accordingly by definition there could be no “unwarranted disparities,” on racial or any other grounds, among sentences within applicable ranges (U.S. General Accounting Office 1992). Probably the fairest summary of the federal evaluations is that they are inconclusive on the effect of guidelines on racial disparities and consistent with state evaluations in finding gender disparities in favor of women.

The available evidence thus shows that guidelines have ameliorated but not eliminated racial and gender disparities in sentencing and that whites more often than nonwhites, and women than men, benefit from alternatives to incarceration and mitigated departures from guidelines. The difficulties in all this are that racial sentencing comparisons are confounded by systematic socioeconomic differences between races and that both racial and gender comparisons are confounded by group differences in criminality. Because blacks for reasons both of racial discrimination and social disadvantage tend to be likelier than whites to participate in common law crimes and to accumulate criminal records, guidelines based primarily on the current crime and the past criminal record in the nature of things treat blacks more severely than whites (and a parallel pattern distinguishes men from women). These differences in crime participation and criminal history accumulation are well known and are illustrated in tables 7 and 8 from Oregon’s fifteen-month evaluation. Classification of offenders by ethnicity and criminal history (“A” is highest, “I” is lowest) shows more blacks than whites, and more men than women, with extensive criminal histories.

In order to combat racial disparities in sentencing, most sentencing commissions have forbidden judges to give weight in sentencing to socioeconomic factors such as education, employment, and family stability which are known to be correlated with race, in order not systematically to disadvantage members of minority groups. Unfortunately, the “neutral” criteria of current offense and criminal history have the same effect. Since most guideline disparity analyses control for criminal history, they define away much of the differentially adverse sentencing experienced by members of minority groups as “not disparity.”

5. *Prison Populations.* The Oregon, Washington, Minnesota, and federal commissions operated under enabling legislation which directed them to give substantial consideration to the impact of their guidelines on correctional resources, which was generally interpreted to refer to prison beds and capacity. The federal commission ignored that charge, despite unambiguous language in Section 994(g) of the Sentencing Re-

TABLE 7
Criminal History Classification by Race, Oregon (in Percent)

Criminal History Category	Race					Total
	White	Hispanic	Black	Native American	Asian	
A	.5	.4	3.9	.8	.0	.7
B	1.8	1.3	4.9	1.7	.0	1.9
C	5.6	3.2	12.7	9.9	6.9	5.9
D	3.1	2.0	6.0	11.6	.0	3.3
E	8.7	3.6	8.3	7.4	.0	7.9
F	13.4	9.4	13.0	22.3	10.3	12.9
G	21.0	17.4	15.3	18.2	20.7	20.0
H	14.9	9.1	11.7	17.4	3.4	13.8
I	30.9	53.6	24.4	10.7	58.6	33.5
Total	100.0	100.0	100.0	100.0	100.0	100.0
Number	4,300	834	386	121	29	5,670

SOURCE.—Ashford and Mosbaek (1991), p. 49.

NOTE.—Cases where criminal history is missing have been excluded; $p < .0001$.

TABLE 8
Criminal History Classification by Gender, Oregon (in Percent)

Criminal History Category	Gender		Total
	Male	Female	
A	.9	.0	.7
B	2.1	.4	1.9
C	6.7	1.4	5.9
D	3.7	2.0	3.4
E	8.7	4.2	8.1
F	13.3	12.4	13.2
G	20.3	17.5	19.9
H	13.3	16.7	13.8
I	31.0	45.4	33.1
Total	100.0	100.0	100.0
Number	5,200	910	6,110

SOURCE.—Ashford and Mosbaek (1991), p. 56.

NOTE.—Cases where criminal history is missing have been excluded; $p < .0001$.

form Act of 1984: "The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons," and promulgated guidelines that were predicted to triple the federal prison population within a decade (U.S. Sentencing Commission 1987, chap. 7). The other states heeded their charges and, rarities among American states, as figure 5 shows, managed to restrain population growth and hold prison populations within capacity for extended periods (and Oregon to the present). In Minnesota and Washington, sensational crimes in each state in 1989 provoked anticrime hysteria, and the legislatures increased penalties for many crimes; both prison populations thereafter rose rapidly (Frase 1993*b*; Lieb 1993).

Nonetheless, the experience in Washington, Oregon, and Minnesota shows that sentencing commissions and their guidelines can adopt policy approaches that treat prison beds as scarce and expensive resources and that those policies can succeed in constraining prison population growth and associated public spending.

B. Effectiveness as Administrative Agencies

Were there not a federal sentencing commission, no one would question that Judge Frankel's proposed new approach to formulation of sentencing policy has been markedly successful, both substantively and institutionally. In 1978, just a few years after the appearance of Judge Frankel's book, *Criminal Sentences: Law without Order*, and long before passage of the Federal Sentencing Reform Act of 1984, Minnesota and Pennsylvania enacted sentencing commission legislation and, in 1980 and 1982, respectively, guidelines took effect. Since then, guidelines developed by sentencing commissions have taken effect in Washington, Oregon, Louisiana, Tennessee, and Kansas. Commissions are at work in Ohio, North Carolina, and elsewhere.

Of guidelines now in effect, those in Minnesota, Pennsylvania, Washington, and Oregon have been in operation long enough that evidence concerning their operation is available. The preceding subsection showed that commissions have in significant degree achieved many of their substantive policy goals. State commissions have also achieved Judge Frankel's institutional purposes. They have established and sustained specialized technical competence. In all four states, the commissions have survived to serve as their state's principal forum for sentencing policy proposals. Each has developed a monitoring system and has from time to time considered or implemented guidelines changes to

Fig. 5.—Rate of prison population growth for selected states and the federal system, 1980–92. The top solid line is the rate for California; the bottom solid line is the rate for Minnesota. Sources: Bureau of Justice Statistics (1992a, table 2; 1992b, table 1); Flanagan and Maguire (1992, table 6.72).

respond to implementation problems revealed by monitoring programs. Each conducts regular training sessions. Each publishes annual statistical reports. Minnesota's commission in 1984 prepared the most sophisticated evaluation of a state sentencing initiative ever published (Knapp 1984). All four are wrestling with current policy issues. Pennsylvania, in particular, is now considering a major overhaul of its guidelines and some of their underlying policy premises (Pennsylvania Commission on Sentencing 1993, pp. 3-7). Oregon and Washington are both working on guidelines for misdemeanants and for non-state-prison-bound felons (Bogan 1991; Washington State Sentencing Guidelines Commission 1992*b*). Minnesota has been working for years on nonincarceration guidelines, drug-offense policy, and day fines (e.g., Minnesota Sentencing Guidelines Commission 1991*b*, 1992).

The state commissions have served to some degree to insulate sentencing policy from short-term emotionalism and law-and-order sloganeering. Sentencing policies did eventually change in both Minnesota and Washington to reflect the law-and-order politics of the 1990s; perhaps it is no coincidence that penalties in both states increased substantially in 1989, only months after Willie Horton's voter-galvanizing appearance in the 1988 presidential campaign. In Minnesota, the anticrime reaction was so strong that the legislature amended the enabling legislation to make "public safety" the primary factor in setting sentencing standards and, while allowing some role for resource concerns, provided that resources should no longer warrant substantial consideration (Frase 1993*b*).

No legislative delegation of rule-making authority to administrative agencies can forever or completely insulate policy from partisan political influence, nor should it. Powerful and determined political forces can overrule an agency's policies directly through legislation or indirectly through informal political pressure or appointment of new commissioners committed to different policies. In the short term, however, especially in the face of less powerful or less determined opposition, administrative agencies can buffer policy from episodic emotions and sometimes can protect elected officials from constituent pressures. Especially in the past dozen years in the United States, criminal justice policies have been highly contentious. Political pressures and emotions tend to support increased penalties for currently topical crimes and to provide little support for comprehensive unemotional approaches to crime control policies. Where the political will exists to try to buffer sentencing policies from short-term emotions, the experience in the

states shows that commissions can provide that buffer—so long as the supportive political will survives.

The state sentencing commissions also adopted comprehensive systems approaches to sentencing policy. Minnesota, Washington, and Oregon all fitted their sentencing policies to available (or foreseeable) prison resources, taking the theretofore unknown but unassailable position that responsible policy-making requires that states face up to the programmatic and financial implications of the sentencing policies they adopt. Policy can be tailored to fit resources, or resources can be expanded to meet projected needs; one way or the other a “resource constraint” policy requires conscious and responsible decision making, a practice conspicuously absent in the 1980s in most American states, where punishments were repeatedly raised without regard to resources and foreseeably resulted in unprecedented prison overcrowding and federal court intervention. As a result of the resource constraint policy, each of the commissions had consciously to reduce penalties for some crimes when pressures arose to increase penalties for others.

To this point, the experience of the federal and state commissions is institutionally similar. Where the experience differs is in the quality of the guidelines the state commissions produced, their successful efforts to win (at least grudging) support from judges and other practitioners, their success in achieving an institutional esprit among commission staff, and their abilities to insulate policy from politics at least for a time (e.g., Tonry 1991, 1993*b*). Three points of difference stand out.

First, unlike the federal guidelines, which remain deeply unpopular with judges and lawyers six years after their effective date, the guidelines in Washington, Delaware, Pennsylvania, Minnesota, and Oregon are generally supported by criminal court practitioners. In no state is there heated debate about the guidelines’ desirability and legitimacy and in no state is there organized opposition to them.

Second, as noted earlier, until legislative changes in Washington and Minnesota led to toughened guidelines, those states successfully maintained prison populations within available capacity and maintained lower than average incarceration rate increases, thereby avoiding out-of-control corrections spending and federal court intervention. In Oregon, population control continues. By contrast, the U.S. commission ignored its statutory directive to link policy to resources and, as a result, the federal prison population grew by 60 percent between

year-end 1987 and mid-1992, and the federal prisons in 1992 were operating at 158 percent of capacity (Bureau of Justice Statistics 1992*b*).

Third, unlike the state commissions, the U.S. Sentencing Commission suffered from internal dissension, high staff turnover, ineffective management, and political infighting. The state commissions have been remarkably stable. The Pennsylvania commission's director, appointed in 1978, remained in place early in 1993, and several of the senior staff remained with the commission for ten years or longer. The current director of the Minnesota commission was promoted from within and has worked with the commission for more than a decade. The Washington commission's director was its initial research director, and the initial director remains active in sentencing policy deliberations. The director of the Oregon Criminal Justice Council, under the auspices of which Oregon's guidelines were developed, has held that position since before that state's guidelines were developed.

The U.S. Sentencing Commission experience has been less stable and less harmonious. The U.S. General Accounting Office (1990), when asked by the Congress to assess the commission's management and operations, found "organizational disarray." In four years the commission had four staff directors and one interim director and was without a research director for one and one-half years. "According to former staff directors, it was difficult to manage in an environment where they could not maintain authority over staff because of commissioners' involvement," the GAO observed. Moreover, "part of the problem has been finding qualified candidates who would be willing to take the [research director's] position, given perceptions that the working environment is complicated by commissioner involvement and other matters" (p. 15). The May 1990 issue of the *Federal Sentencing Reporter* reprints critical statements about the commission's management from numerous agencies and spokesmen. Two members of the commission and one ex officio member have resigned on principle over the commission's failures (Robinson 1987; Block 1989).

To be sure, not all state sentencing commissions have succeeded. Some, like those in New York and South Carolina, developed guidelines but could not persuade legislatures to adopt them. In Pennsylvania and Kansas, legislatures rejected initial sets of proposed guidelines, and commissions came forth with less ambitious but salable successors. In some states—for example, Florida—the guidelines are not well respected and are of little influence (Florida Legislature 1991).

If the controversies associated with the U.S. Sentencing Commission, and the wisdom of its policies, are set aside, from a purely technical perspective even it can be seen as an institutional success. Successful administrative agencies achieve and maintain specialized competence concerning complex subjects (that is why they are created), they have some degree of insulation from short-term political emotions and pressures (that is why typically their members are appointed for fixed terms and can only be removed for cause), and they can adopt comprehensive and long-term approaches to policy-making (this also is why they are created and why public funds are spent to develop cadres of policy experts).

From that perspective, even the U.S. commission has been at least a partial success. No one can doubt that it has achieved specialized competence. Through its rule-making processes, it has proposed and promulgated hundreds of changes to its guidelines, policy statements, and supporting commentary in efforts to rein in what it sees as willfully noncompliant judges and to fine-tune its policies. Through its monitoring and evaluation staffs, it has assembled mountains of data and published numerous annual and evaluation reports, at least some of which, notably its report on mandatory penalties (1991a), demonstrate high levels of technical competence and policy sophistication.

The commission has taken a comprehensive systems approach to policy-making, as is evidenced by its efforts to devise guidelines for all federal offenses, to monitor the guidelines' implementation, to counterbalance the plea-bargaining strategies of prosecutors and defense counsel, and to train probation officers to serve as guardians of the guidelines.

The most powerful evidence that the U.S. commission has succeeded institutionally is that federal sentencing practices have been radically altered. No matter how misguided the guidelines and despite their inability to win support from the people who must implement them (which means they will fail in the long term), the guidelines have succeeded in recasting federal sentencing. Sentencing patterns changed as the commission intended: the proportion of cases sentenced to probation declined greatly, and average prison terms for many offenses became longer.

Where Judge Frankel's model failed in the federal system was in respect of political insulation. Most proponents of guidelines have seen its one-step-removed-from-politics character as a great strength (e.g., Frankel and Orland 1984). The U.S. commission, by contrast, made

no effort to insulate its policies from law-and-order politics and short-term emotions. One sign of this is a repeated invocation by the commission of the "reduction of undue leniency" in sentencing as one of the guidelines' primary objectives (1991a, p. i),⁸ even though the Sentencing Reform Act of 1984 includes no equivalent language among its enumerated statutory purposes (18 USCA § 3553[a][2]; 28 USCA, chap. 58, § 991[b]). The commission apparently decided that the U.S. Department of Justice and the most law-and-order members of the U.S. Congress were its primary constituency, and it established and attempted to enforce policies that pleased that constituency. This is presumably why the commission ignored a statutory directive that it should tie its policies to available correctional resources,⁹ why it chose to ignore a statutory presumption against incarceration of first offenders not convicted of violent or other serious crimes,¹⁰ and why it reacted to harsh mandatory minimum penalty provisions for many drug offenses by making the guidelines even harsher (e.g., Tonry 1992).

Thus the federal experience shows that, as an institution, a sentencing commission can operate much as do administrative agencies on other subjects. The state experience supports that conclusion but also shows that commissions can also develop successful sentencing policies that win the support of practitioners, that tie policy to resource allocation, and that achieve substantively sound sentencing policies.

II. Issues Facing Commissions

For the foreseeable future, sentencing commissions are here to stay. Their guidelines have been completely successful nowhere, in part because there can be no consensus about the meaning of success. So long as people have discussed punishment there have been major differences in perspective between those who see the criminal law and sentencing primarily or exclusively as institutions concerned with alleged offenders' moral culpability and those who see the criminal law and

⁸ See, e.g., U.S. Sentencing Commission (1991a, p. i): "The goals of the Sentencing Reform Act of 1984 were to reduce unwarranted disparity, increase certainty and severity, and correct past patterns of undue leniency."

⁹ Section 994(g): "The Commission in promulgating guidelines . . . shall take into account the nature and capacity of the penal, correctional, and other services and facilities available. . . . The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons."

¹⁰ Section 994(j): "The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which a defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."

sentencing primarily as institutions concerned with prevention of crime and maximization of public safety. Even without fundamental differences in punishment philosophy, differences in officials' perspectives breed disagreements. Legislators and sentencing commissioners are concerned with policy in the aggregate. If disparity reduction is the goal, clear bright-line standards are the simplest to express and against which to measure progress. Judges, lawyers, and defendants are concerned with situationally just or appropriate penalties and often find clear and simple standards arbitrary and simplistic. Disagreements about punishment purposes and differences in perspective make it impossible to achieve perfect compliance with guidelines. Commissions have, however, managed to make sentencing more accountable, more consistent, and less disparate in its impact on minority group members, and those are not small achievements.

As the sentencing commission enters its third decade, two sets of policy issues must continue to be addressed. One set of issues poses fundamental policy-making challenges—plea bargaining, intermediate punishments, misdemeanor guidelines—that no commission has adequately resolved. Another, however, involves issues on which there has been slow but steady progress, on which commissions have gradually refined their approaches, and on which commissions have learned from one another. This section sketches the contours of those issues. Discussing them in detail would require another essay, and to my knowledge there is no published literature (except, perhaps, Parent [1988]). Interested readers, however, are invited to contact the commissions listed in the Appendix. All have wrestled with these issues and most have prepared, and are willing to share, staff or commission reports on the policy rationales and considerations behind detailed policy choices.

A. Major Systemic Issues

Four major systemic issues affecting sentencing guidelines have faced sentencing commissions from the outset. On one, the desirability of tying sentencing policy and its projected operations to correctional resources, there is slow but steady movement toward choosing to do so. Other major systemic issues—controlling prosecutorial discretion under guidelines and developing guidelines for misdemeanors and for nonincarcerative penalties—have been discussed by every sentencing commission but nowhere have they as yet been adequately resolved

(unless doing nothing or virtually nothing is seen as adequate resolution).

1. *Guidelines for Noncustodial Sanctions and Misdemeanors.* Although no commission in its initial years attempted to develop guidelines for nonincarcerative sentences, in part because development of incarceration guidelines was challenge enough, in part because of the lack of community-based punishments in most jurisdictions, and in part because no one knew how to do it, commissions today are at work in many states on proposals to integrate intermediate and noncustodial penalties into guidelines and to devise systems of interchangeability between prison and nonprison sanctions.

There has been considerable conceptual progress, but little practical policy-making, since the Minnesota commission declined a legislative invitation (Laws of Minnesota for 1978, chap. 723, § 9[5][2]) to devise nonincarceration guidelines: "The sentencing guidelines promulgated by the commission may also establish appropriate sentences for prisoners for whom imprisonment is not proper. Any [such] guidelines . . . shall make specific reference to noninstitutional sanctions including but not limited to the following: payment of fines, day fines, restitution, community work orders, work release programs in local facilities, community based residential and nonresidential programs, incarceration in a local correctional facility, and probation and the conditions thereof." In the event, the Minnesota commission's guidelines created presumptions as to who went to prison (roughly 20 percent of convicted felons) and for how long, but set no presumptions for sentences for nonimprisonment or local jail sanctions for felons or for sentences of any kind for misdemeanants.

Since then, each commission has considered misdemeanor and non-imprisonment guidelines, and a few have taken small steps. Three basic approaches have been considered. The first is to create "punishment units" in which all sanctions can be expressed. If guidelines, for example, set "120 punishment units" as the presumptive sentence, a judge could impose any combination of sanctions that represented 120 units. Oregon's guidelines specify presumptive sentences for many offenders in punishment units (Bogan 1990, 1991), but do not provide for how the units are to be calculated. This has been the critical problem in every jurisdiction that has considered the punishment unit approach. Preoccupation with prison sentences as the standard punishment has so far stymied development of the concept. Jurisdictions have typically

begun with prison time and then attempted to specify punitively equivalent nonprison sentences. In a number of jurisdictions, for example, one day's imprisonment has been made equivalent to one, or even three, days' community service. This limits substitution of noncustodial for custodial penalties to very short prison terms. The best-known American community service program (McDonald 1986) and the national policy in England and Wales (Pease 1985), respectively, set 70 and 240 hours as the maximum enforceable length of a community service sentence. At three days' community service to one day's incarceration, community service would be exchangeable for three to ten days' incarceration.

Besides the difficulty in reaching agreement about exchange rates between custodial and noncustodial penalties, two other problems have impeded policy development (Morris and Tonry 1990, chap. 8). Few American jurisdictions have large numbers of well-managed, credible, noncustodial penalties in operation, which makes it difficult to promulgate guidelines premised on their availability. In an era of constrained public resources, it has been difficult obtaining new money to create new programs (even though diversion of prison-bound offenders to community penalties should in the long run conserve public funds). The second, related, problem is that county governments in most American states pay for all or most noncustodial corrections programs. This means both that available programs differ substantially between counties within a state and that new programs must be paid for from county revenues (or from state funds, but in tight times, states are no more eager to appropriate new money than are counties).

The second approach is to create different presumptive bands within sentencing guideline grids—(strong presumptive “in”; weak presumptive “in”; weak presumptive “out”; strong presumptive “out”)—and to allow judges to create individualized noncustodial punishments that take account of those presumptions. The D.C. Superior Court Sentencing Guidelines Commission (1987) first proposed such a system, and Pennsylvania more recently has adopted one. The problem with this approach is that it authorizes use of noncustodial penalties and contemplates some interchangeability between custodial and noncustodial penalties but sets no standards for their use when they are authorized (Morris and Tonry 1990, chap. 3).

The third approach is simply to specify equivalent custodial and noncustodial penalties and to authorize judges to impose them in the alternative. Washington's commission did this (Boerner 1985) and later

proposed a more extensive system (Washington State Sentencing Guidelines Commission 1992*b*, pp. 19–23), which the legislature did not adopt. Like the punishment unit proposals, so far the equivalency approaches have been unable to overcome the psychological and political pressures to make “equivalent” punishments as subjectively burdensome as prison, which limits their use to the most minor offenses and offenders. Advice from academics (Wasik and von Hirsch 1988; Morris and Tonry 1990, chap. 4) has not proven enormously helpful.

2. *Tying Sentencing Policy to Corrections Resources.* The wisdom of the Minnesota-Washington-Oregon decision to tie sentencing policies to corrections resources has become ever clearer, and other states are beginning to follow suit. Pennsylvania’s commission, for example, which initially chose not to take correctional resources into account in devising its guidelines, is reconsidering that decision (Kramer 1992). The North Carolina Sentencing and Policy Advisory Commission (1993) and the Texas Punishment Standards Commission (Reynolds 1993) have proposed that their states adopt policies of tying sentencing policy to correctional resources. The Kansas commission proposed, and the legislature accepted, an “early warning system” approach in which the commissioner of corrections would certify an impending resource problem and the sentencing commission would review current practices and make recommendations for changes to the legislature (Kansas Sentencing Commission 1991; Gottlieb 1993).

3. *Controlling Plea Bargaining.* No jurisdiction has as yet devised an adequate system for controlling plea bargaining under a sentencing guidelines system. Washington State came closest. Aware of criticisms that guidelines for sentencing shift discretion to prosecutors, the Washington legislature authorized its sentencing commission to promulgate statewide charging and plea-bargaining standards. Because of concern that strong standards would be unenforceable (or invite judicial scrutiny of prosecutorial discretion that prosecutors adamantly opposed) and opposition on the merits from prosecutors, the commission developed weak aspirational standards (Boerner 1985, app. 6).

Sentence bargains, if allowed, can undermine any system of guidelines (Alschuler 1978). Charge (or “fact”) bargaining in systems based on conviction offenses like Minnesota’s or Oregon’s enable plea bargaining lawyers to pick the applicable guideline range and thereby greatly to limit the judge’s options. A number of proposals have been made for regulating plea bargaining under guidelines (Schulhofer 1980; Tonry and Coffee 1987). One is to provide an explicit percentage or

other mechanical sentence discount for defendants who plead guilty (Gottfredson, Wilkins, and Hoffman 1978). The U.S. Sentencing Commission in effect does this by allowing a two- or three-level sentence reduction for "acceptance of responsibility" evidenced by a guilty plea. The most radical proposal has been to adopt "real offense" sentencing in which penalties are based not on the defendants' conviction offense but on his "actual behavior." Only the U.S. Sentencing Commission has adopted a real-offense system. The U.S. commission adopted its "relevant conduct" approach to sentencing in order to offset plea bargaining's influence (Wilkins and Steer 1990); by requiring judges at sentencing to take account of uncharged behavior, and behavior alleged in dropped or acquitted charges, the commission's approach raises difficult issues of principle (Lear 1993; Reitz 1993). In addition, that approach has not managed to avoid increased prosecutorial influence. Many judges argue that the guidelines have shifted power to the prosecutor (Federal Courts Study Committee 1990; Heaney 1991).

B. Evolutionary Issues

The earliest guidelines, it is easy to forget, represented a radical departure from the indeterminate sentencing systems that they displaced. Before guidelines, judges had almost complete discretion to impose any lawful sentence, and parole boards could set any release date between the minimum parole eligibility date and the maximum set by the judge (often three times the minimum). That some policy choices made by the early commissions were cautious and others in retrospect relatively crude should be no surprise. In this brief section, I identify a number of issues on which there has been gradual movement in some states toward more refined policy choices.

1. *Scaling Offenses.* In early guideline systems, commissions for the most part stayed very close to statutory definitions of offenses, however broadly defined. As time has passed, commissions have partitioned statutory offense definitions into subcategories of different severity. The Pennsylvania commission, for example, has recently reconsidered its offense severity rankings and its subdivisions of crimes. The extreme case is the U.S. Commission (see table 4) which has added numerous extrastatutory elements to its system of offense scaling.

2. *Criminal Histories.* The earliest guidelines systems used broad generic criminal history measures. In Minnesota, for example, every prior felony conviction was given one "point," every prison misdemeanor one-fourth point, and every prior gross misdemeanor one-half

point. More recent systems, including revisions to Minnesota's, are subtler. Some give greater weight to prior violent than to prior property convictions. Some cross tabulate so that a prior violent conviction weighs more heavily for a current violent conviction than for a current nonviolent conviction. Some weight prior convictions in relation to their severity under the guidelines system's offense severity scaling for current convictions. In similar fashion, guidelines commissions are becoming more subtle in their chronological weighing of past crimes, tending more often to build in express "decay" provisions in which convictions prior to some date (e.g., five or ten years before the current crime) are no longer taken into account.

There are numerous other issues, of course, on which policy thinking continues to evolve. These include such things as the handling of aggravating and mitigating circumstances, the number of offense levels in a guidelines grid, the relative location of particular crimes in offense severity rankings, and the development of special procedures and rules for regularly recurring policy issues presented by sex abuse cases, first offenders, and drug cases.

III. The Future of the Sentencing Commission

The commissions that Judge Frankel proposed have shown that they can achieve much of what he had in mind. They can attain and sustain specialized institutional competence of a variety of kinds. They can develop and implement comprehensive, jurisdiction-wide standards for sentences. Their guidelines can reduce sentencing disparities, diminish racial and gender differences, and help jurisdictions link their criminal justice policies to their criminal justice budgets. That is on the bright side.

Commissions have limits as policy tools. There is evidence that, after the enthusiasms and satisfactions of innovation have passed, institutional hardening of the arteries can set in and commissions can lose their influence and lapse into passivity (e.g., Knapp 1987, pp. 127-41). Commissions are premised in part on belief in norms of instrumental rationality and empirically informed policy-making. When the political environment is such that elected officials insist on treating criminal justice policy-making primarily as symbolic politics, as happened in New York (Griset 1991) and the federal system (von Hirsch 1988) and with Pennsylvania's first set of proposed guidelines (Martin 1984), there is little that commissions can do to resist in the long run. In the short run, as the success of Minnesota's, Oregon's, and Washington's

commissions at defying the national trends toward increased use of imprisonment indicates, commissions can resist the politicization of criminal justice policy. In both Washington and Minnesota, perhaps because prison populations began to climb after get-tough guidelines amendments were enacted in the late eighties, legislators have begun to have second thoughts and to look for ways to regain the policy rationality their guidelines systems once had (Frase 1993*b*; Lieb 1993).

This overview of experience with sentencing commissions paints a partial picture and relies on literatures that more often support hypotheses than answer questions. In part, this is because so few evaluations have been carried out. With the exception of one series of outside evaluations of Minnesota's guidelines (e.g., Miethe and Moore 1985, 1987; Moore and Miethe 1986), which relied largely on the Minnesota commission's data, and the GAO's (1992) federal analysis, all of the evaluations to date have been internal efforts carried out by permanent staff. This has two obvious consequences. The commissions have a predictable institutional self-interest in establishing the success of their policies. The extreme instance is the U.S. commission's institutional defensiveness and distortion. Its self-evaluation defined disparity in a self-serving way that was foreordained to demonstrate success, evidence was presented in the most favorable possible light, and implementation problems were attributed not to the lack of wisdom in the commission's policies but to stubborn resistance of judges (e.g., U.S. Sentencing Commission 1991*b*, pp. 419–20). The second, and more common, problem is that ongoing commission budgets tend not to be adequate to support sophisticated evaluations. The only data available for analysis are routinely collected monitoring data which are limited in coverage and may not be comprehensive (in Oregon's fifteen-month evaluation, e.g., reporting forms had been filed for only 74 percent of cases sentenced under the guidelines; Ashford and Mosback [1991], p. x). Funds are not likely to be available to hire research consultants and supplementary staff to carry out the analysis. Minnesota's justly celebrated three-year evaluation was made possible only by grants from the National Institute of Corrections and the MacArthur Foundation, which supported supplementary data collection and paid for specialist research staff (Knapp 1984).

Thus, for a number of reasons, there are severe limitations inherent in having commissions evaluate their own handiwork. To date, however, with the exception of the Miethe and Moore and GAO studies, and recent reanalyses of commission data by Frase in Minnesota (1991,

1993a) and Boerner in Washington (1993), there have been no outside empirical assessments. With the exception of the federally funded self-evaluation by the U.S. Sentencing Commission (and the GAO follow-up), the federal government, including its research agencies, has not funded a single evaluation of sentencing commissions or their guidelines for nearly a decade, which seems a pity when so many states have tried, or are trying, to recast their sentencing policies and practices with the help of sentencing commissions.

Twenty years on, at least in an American context, sentencing commissions and their guidelines have proven themselves as the most effective prescription thus far offered for the ills of lawlessness, arbitrariness, disparity, and discrimination that were widely believed to characterize indeterminate sentencing.

Perhaps in time private and public funding agencies will realize that the states' experiments with sentencing reform are continuing and will provide the financial support that is needed to help states better understand where they have been and where they are going.

APPENDIX

Most commissions are willing to share materials with interested observers and to answer questions. The names and mailing addresses of the major commissions at the time of writing were:

Delaware Sentencing Accountability Commission (SENTAC)
State Office Building
820 French Street
Wilmington, Del. 19801

Kansas Sentencing Commission
Jayhawk Tower
700 Jackson, Suite 501
Topeka, Kans. 66603

Louisiana Sentencing Commission
2121 Wooddale Blvd.
Baton Rouge, La. 70806

Minnesota Sentencing Guidelines Commission
The Meridian National Bank Building
205 Aurora Avenue
Suite 205
St. Paul, Minn. 55103

North Carolina Sentencing and Policy Advisory Commission
P.O. Box 2472
Raleigh, N.C. 27602

Oregon Criminal Justice Council
School of Urban and Public Affairs
632 SW Hall Street, Room 314
P.O. Box 751
Portland State University
Portland, Oreg. 97207

Pennsylvania Commission on Sentencing
Commonwealth of Pennsylvania
P.O. Box 1200
State College, Pa. 16801

United States Sentencing Commission
One Columbus Circle NE
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

Washington Sentencing Guidelines Commission
421 So. Capitol Way, Suite 303
P.O. Box 40927
Olympia, Wash. 98504-0927

Wisconsin Sentencing Commission
Suite 701
2 East Mifflin Street
Madison, Wis. 53703

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