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SENTENCING POLICIES AND PRACTICES
IN THE USA

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Introduction

Any reform of sentencing requires that reformers consider the purposes of sentencing. Generally speaking, there are two main purposes of sentencing: retribution and crime control (Blumstein, 1984:131-32).

The doctrine of retribution regards punishment as an end in itself. The offender should be punished for the offense whether or not any other objective of punishment is achieved. The principle of "just deserts" underlies one retributive sentencing model. Ideally, "just deserts" requires that some amount of blameworthiness or culpability be set for each criminal act and a punishment for anyone who is convicted of that offense determined. In sentencing, this means that the moral evaluation of culpability must be measured in some scale of punishments. There is the difficult task of determining what constitutes broad classes of punishments and scaling them, e.g., to scale work, fines, and imprisonment. Where incarceration is the form of punishment, a scale of days of confinement must be developed.

The goal of crime control is met when the sentence decreases aggregate crime in the future by the amount that would have been committed were the sentence not given. This goal can be met in three different ways: rehabilitation, general deterrence, and specific deterrence.

Rehabilitation is designed to change the offender into a law-abiding person. Ideally, rehabilitation seeks to terminate the offender's criminal career but practically, more modest goals may be set, such as reducing the rate at which the individual offends or the harm he does by victimizing others.

General deterrence is achieved when punishing offenders prevents others from entering a criminal career.

Specific deterrence is reached when the offender desists from future offending as a result of the punishment.

A special form of specific deterrence is incapacitation, where crime control is achieved by isolating the offender from victimizing others or their property in the free society. Today, isolation usually occurs through incarceration in jails or prisons but transportation and other modes have been used in the past. Parenthetically we note that the offender may not be isolated to the degree that he cannot commit offenses against fellow inmates, prison personnel, or prison property, although strict isolation to prevent these crimes is possible and was practiced historically.

There are two different types of incapacitation policy that can be followed in any society: collective and selective incapacitation (Greenberg, 1975).

Collective incapacitation represents a sentencing policy where offenders are sentenced solely on the basis of their current offense and conceivably other factors such as their prior criminal record that places them in a class of offenders. The assumption is that all persons who fit a given class of offending shall be sentenced uniformly, i.e., equals shall be treated equally. Underlying collective incapacitation then is an aggregate offense-based sentencing policy (Cohen, 1984). Under an aggregate-offense-based sentencing policy, no attempt is made to predict the future behavior of each offender. When comparing different aggregate or collective incapacitation policies, only

the average consequences of that policy are compared. Any differences in effects for different kinds of individuals are ignored.

Selective incapacitation is a sentencing policy based on individual sentencing decisions to fit a particular individual. Predictions are made about the future behavior of each particular offender. The predictions may be of the individual's expected rate of offending if not incapacitated or of the propensity to commit particular types of crimes, with sentences varied according to how one evaluates the consequences of the predicted behavior. Selective incapacitation allows a judge to give very different sentences for the same current offense, since one takes into account the potential for future offending in determining the kind and length of sentence.

For at least the last fifty years, since the rise of indeterminate sentencing, the goal of sentencing has been crime control achieved primarily through implementation of the rehabilitative ideal. However, the past decade in the United States has witnessed a decline of the rehabilitative ideal in criminal justice sentencing. This decline is paralleled by increased emphasis on the retributive ideal. The indeterminate sentence is associated with the rehabilitative model, whereas determinate and mandatory sentences are bound to the retributive model.

Indeterminate Sentencing

The indeterminate sentence fits quite naturally with a rehabilitation model because it was deemed impossible to predict the amount of time it takes to change an incarcerated offender into a law-abiding person who could safely be returned to society or,

often, to know in advance the different kinds of treatment that might be necessary to bring about law-abidingness.

An indeterminate sentence requires a determination of when the offender is rehabilitated. Commonly this decision is based on the advice of rehabilitation specialists who determine when an offender is rehabilitated. An indeterminate sentence, moreover, is presumed to be a source of motivation to offenders to cooperate with treatment staff to secure early release from court supervision or imprisonment. Prison managers view the indeterminate sentence as a means of inmate control, since another measure of their rehabilitation is their conformity to prison rules and regulations.

Responsibility for the decision to release inmates from prison or from supervision following their release commonly is given to a Parole Board. The Parole Board usually acquires information from treatment program specialists and from prison authorities as to the suitability of the inmate for release and from probation officers on their progress following release. Certification of successful completion of a treatment program is the principal sign of rehabilitation, although other diagnostic and treatment tools may be used in reaching that conclusion. Prior to release the Parole Board also obtains information on the conformity of the inmate to prison life, especially a disciplinary history and a record of the amount of "good-time" the inmate has accumulated. By scheduling appearances before the Board at specified intervals following eligibility for release after serving the minimum sentence minus any accumulated "good-time", the Board assumes it motivates inmates to change and that it can

also monitor an inmate's progress towards change. Final authority on release usually lies with parole rather than sentencing authorities unless an offender is returned to the Court for adjudication.

During the 60's and 70's, disfavor grew with this organization of indeterminate sentencing. With a rising crime rate, attention focused on repeat offenders, especially those on parole. Parole Boards were charged with leniency in releasing offenders earlier than warranted. Demands were heard to restrict their discretion to release. The discretion of judges also was questioned as there appeared to be wide disparity in the sentences meted out for similar offenses and offenders. In the USA, charges of racial discrimination in sentencing became common as the proportion of blacks in prison became several times that of their proportion in the population at large. Finally, the ideal of rehabilitation was challenged as unworkable. Assessments concluded that no method seemed to alter the rate of recidivism (Martinson, 1974).

Determinate and mandatory sentencing have increasingly replaced indeterminate sentencing as they are seen as means to reduce the discretionary power of judges and parole agents which lead to leniency and disparity in sentencing and release from parole.

Determinate Sentencing

The major goal of rehabilitation in sentencing has always been crime control--to reduce the amount of crime by changing offenders so that their future crimes are prevented. With the erosion of a belief in the efficacy of rehabilitation, the

dominant alternative was retribution. If offenders could not be rehabilitated, they at least should pay through punishment for the harm inflicted on victims. The dominant rationale for retribution was "just deserts"--a belief that the "punishment should fit the crime". This doctrine of proportionality in punishment required determinate sentences. It likewise promises fairness in that equals should receive the same sentence.

The problem in fixing sentences under "just deserts" is to determine what sentence shall be fixed for which offenses. The principle of proportionality, unfortunately, is of limited utility in determining what sentence length should be given an offender for a specific offense. The principle of proportionality can be used to order sentences consistent with the seriousness of offenses, provided, of course, that one can order them in terms of their seriousness--a not so simple matter for detailed classes of offense. Under the condition that one can scale offenses according to their seriousness, it offers guidance on how much more punishment should be assigned to one offense as compared with another. Thus, if one judges robberies to be more serious than auto theft and that robbery is twice as serious as auto theft, to be proportional, robbery should get twice the sentence of auto theft.

Where just deserts is of no value, however, is in telling us just what sentence length to assign to any offense. It cannot tell us whether auto thieves should get six months, a year, or longer. The determination of what particular sentence to assign a given offense must be sought on other grounds. One such grounds used in the United States is to set sentences so that

sentenced offenders will not exceed prison capacity. For the most part, however, just how much punishment should be given depends upon legislative or judicial precedent in setting sentence length. There is no overriding rationale to guide policy-makers in choosing one rationale over another.

To insure fairness in sentencing, it is generally assumed that judicial discretion in sentencing must be confined or sentences modified on review. Yet, judges are reluctant to give up entirely their discretionary powers. Some accommodations have been worked out in the retributive sentencing models adopted in the USA in recent years to accommodate both the interests of fairness and of judicial discretion.

In general, the models adopted reduce considerably the range within which a judge may set a sentence when compared with the older indeterminate sentencing models. The judge is expected to sentence most cases within the narrow band of that offense category. These ranges for different offenses are designed to insure proportionality and fairness in sentencing. To permit some judicial discretion, the judge may be granted the power to depart from that recommended sentence when there are particular aggravating or mitigating circumstances.

The reinstatement of the retributive goal of sentencing is accompanied also by administrative concerns with the consequences of determinate and mandatory sentencing policies. There is considerable loss in flexibility to control the stock and flow of prison populations and to maintain prison discipline. Generally, prison administrators retain their control over good time so as to insure disciplinary control. The determinate sentence is

discounted by apportioning good time according to some scale. Yet, the systems vary considerably in how sentence length is related to controlling the stock and flow of an inmate population. Setting sentences to maintain the equilibrium of the prison population is only one way to control prison stocks and flows of inmates. There are, for example, so-called back-end release procedures that reduce time served when the prison population will exceed capacity.

One other concern has led to modification of the determinate sentencing model in some states. A strict interpretation of the just deserts model would establish the sentence solely on the current offense, since in theory one has paid the price of prior offenses. Yet, a strong and prevailing belief, formerly associated with the rehabilitation model, is that repeat offenders are more culpable than others. One should consequently take into account the prior record of an offender. The offender's past record of offending is weighted accordingly in determining what sentence he shall serve.

Sentencing Guidelines

We turn next to examine two of the major determinate sentencing models currently implemented in the USA and some evaluation of their success in achieving their goals. They are the Minnesota and Pennsylvania sentencing guidelines systems. These two systems are chosen because they provide some major contrasts in sentencing guidelines systems and because we have some information on which to assess them. Lastly, we shall examine a model of crime control that is an alternative to rehabilitation, that of selective incapacitation.

Minnesota Sentencing Guidelines. The first major attempt to develop sentencing guidelines was in our state of Minnesota. The state legislature of Minnesota created a Minnesota Sentencing Guidelines Commission (1981) and its members were given the responsibility of developing sentencing guidelines based on a modified just deserts model. The Commission had a staff headed by a psychologist who did its research and worked with it. Members of the Commission included prosecutors, jurists, correctional administrators, and other professionals.

The Commission was mandated to do more than codify existing practice. It was expected to develop sentencing guidelines based on proportional sentencing. One speaks of their task as implementing a modified just deserts model since two other considerations were important in developing them.

The first of these was to continue to take into account the prior record of the person to be sentenced. Rather than simply count the number of prior convictions, charges, or arrests in the record of the person to be sentenced, as was quite often the practice in sentencing, a prior offense score was calculated that takes into account the seriousness of the prior offenses in the record. In a sense, there is to be proportionality in weighting both current and prior offenses, though one can see that it is difficult to maintain strict proportionality in both cases. The risk of inequity is increased by any weighting scheme developed for a prior record score.

The clear intent of their new guidelines was to increase the risk of imprisonment for first offenders convicted of the more serious crimes of violence, reducing thereby the risk of those

who are convicted for relatively minor offenses against property or of the so-called victimless crimes that hitherto had carried severe penalties, e.g., sale or possession of marijuana. It also was the intent to increase the risk of first imprisonment for first offenders convicted of the most serious crimes of violence such as murder, criminal sexual conduct, and aggravated assault while substantially reducing the risk of imprisonment for those with long records of minor offenses. This resulted in the adoption of a two-factor system in determining sentence length--the seriousness of the current offense and the seriousness and number of the offenses in the prior record of offending. A modified selective incapacitation model is embedded in this decision since the emphasis falls on reducing the crime rate from serious crimes. Since those crimes account for only a relatively small proportion of all major crimes in the crime index of the United States, their sentencing guidelines policy tolerates high crime rates for crimes such as burglary, larceny, and motor vehicle theft unless the offender has an extensive record of prior convictions in the weighted criminal history score. The Minnesota Sentencing Guidelines thus merge retributive and crime control goals in sentencing.

The second major consideration imposed on the Commission was the result of a firm legislative mandate that no new prisons be built. The new sentencing guidelines must keep the prison population within the bounds of the then authorized prison capacity and ideally do so without resort to safety-valve measures such as emergency release procedures. To set sentence lengths to achieve this objective, the Commission first had the research staff

develop a model that estimated the flow of cases through the criminal justice system as well as the stocks at any given point in time. In their model simulation, ideal typical offenders who conformed to a population of those currently being sentenced by judges were used. By sentencing each one under different guideline assumptions of sentence length, one can estimate the prison stock at any date.

To develop a final set of sentencing guidelines that would not increase the prison population when they were operational for the entire state, the Commission recognized that any increase in the length of a sentence for a type of offense required a compensating reduction for at least one other, the reduction depending upon the length of the sentence increase and the volume of cases sentenced for that offense. Clearly, this simulation model was an important tool in developing Minnesota sentence guidelines. It required members negotiating over sentence lengths while constraining them to accept a rationalized system of sentence lengths. Here we have an example of how modern criminological research becomes an important part of the administration of justice.

The accompanying Sentencing Guidelines Grid for Minnesota and the Offense Severity Reference Table present the recommended sentence lengths in months for 10 major classes of offense. First-degree murder does not fall under the guidelines in Minnesota since it has a mandatory life sentence. These recommended sentence lengths within the grid denote the range within which a judge may sentence without the sentence being deemed a departure from the model. Below the black line, an inmate will be sent to

serve a sentence in the state prison unless for some reason the judge suspends it. Above, the sentence will be suspended with probation supervision, fines, or community corrections or time will be served in a local jail. The minimum recommended length of incarceration is 21-23 months for major theft crimes where the property is valued at \$150 to \$2,500 and the offender has a prior criminal history score of 4. The maximum is 309 to 339 months (or a little over 28 years) for persons convicted of 2nd degree murder and a criminal history score of 6 or more.

Judges in Minnesota ordinarily must set the sentence length within the narrow range within the cell of the grid appropriate to the criminal history score and the current offense of the offender being sentenced (usually a range of a few months but for the most serious offenses, a range of roughly two years). They can depart from the guidelines and increase the sentence if there are, in the opinion of the judge, aggravating circumstances in the current offense or reduce it for mitigating circumstances. In doing so, they must give fairly detailed reasons for their decision, reasons that can be judged in an appellate review.

The Minnesota Supreme Court is the body to which appeals from a decision departing from the guidelines can be made. Either the prosecution or defense counsel may file an appeal. Minnesota has developed a body of case law based on these appeals. To date, the Supreme Court of Minnesota has issued a formal opinion for each appeal. These decisions clearly set precedent for future appeals and constrain departures since their precedent can be argued at the time a seemingly comparable sentence departs from the guidelines.

How well are these guidelines working? The Minnesota Sentencing Guidelines Commission has a continuing responsibility to monitor the system and to make appropriate adjustments in the sentencing grid when current sentencing decisions result in a change in the composition of the population of offenders or lead to an overcrowding of Minnesota prisons. A recent report by Kay Knapp, Staff Director to the Commission (1984), concludes that the initial high compliance rate with sentencing guidelines is not being sustained. Although sentencing practices have not reverted to pre-guideline sentencing patterns, proportionality and uniformity patterns in sentencing are moving towards pre-guideline rates.

Examination of the reasons for reversion in sentencing practices discloses several sources of a decrease in the goal of proportionality in sentencing. The major one lies in the exercise of prosecutorial discretion. Prosecutors increased the number of charges brought against property offenders and dismissed fewer of such charges against them. This results in higher criminal history scores. A second reason lies in the increased use of aggravated dispositional departures. There was an increase in commitments to prison when the guidelines presumed a nonimprisonment sanction. This shift is largely owing to the fact that defendants opt for a prison rather than a nonimprisonment sanction, a preference sanctioned by the Minnesota Supreme Court. A third reason for nonconformity to the guidelines is increased use of mitigated dispositional departures, especially for intrafamilial sex offenses with child victims. Here the judge is responsible for failure to conform to the guidelines.

All in all, these changes undermine proportionality by giving greater weight to the less serious offenses of property than to the more serious person offenses or by downgrading the seriousness of certain classes of person offenses.

There is then less uniformity in sentencing now. Judges depart from the guidelines at a higher rate than in 1981, the first year of the guidelines.

The prison population has remained within prison capacity despite these failures in achieving the substantive goals of proportionality and uniformity in sentencing. This goal was achieved mainly because the Commission made some changes in sentence length, reducing durations slightly for the least serious property offenses and providing credit for time spent in jail as a condition of probation, when probation was revoked and the offender imprisoned. The legislature also was persuaded to extend the "good-time" statute to mandatory minimum sentences, thereby reducing length of time served.

Nevertheless, the current forecast is that the prison capacity will be bridged in the not too distant future unless prosecutorial practices leading to an increase in property offenders are curbed.

Parenthetically it should be noted that the institutionalization of the Commission has led members to be less likely to make the changes that it is empowered to make to bring conformity with the sentencing guidelines. Members are more responsive to political constituencies, especially judges and prosecutors. Correlatively, the Minnesota Supreme Court continues to buttress

conformity with sentencing guidelines in that its case law decisions generally reenforce conformity with the guidelines.

It is well to keep in mind that current sentencing guidelines in the United States substantially codified existing sentencing practices that give considerable weight to the two factors of seriousness of the offense of conviction and prior criminal history of the defendant. Just how much the guidelines increase uniformity in sentencing among judges by reducing pre-guidelines discretion will depend upon how judges formerly weighted these with mitigating and aggravating factors in determining sentence length within the statutory range for a given offense. For the years immediately prior to the introduction of sentencing guidelines, Minnesota judges departed from the recommended guideline sentences in an estimated 18 percent of all dispositions. The Guidelines reduced that departure rate to roughly six percent in 1980-81. By 1984, however, the departure rate had risen to nine percent. Still, compared with the pre-guidelines rate, the guidelines have reduced the variability among judges by at least one-half.

From these comparisons it follows also that Sentencing Guidelines can result in an increase of uniformity in sentencing only to the extent that judges currently vary in their sentencing practices. And, of course, that degree of variability will depend upon how broad or how restricted is the Guideline range of sentence length a judge may impose for a particular offense. The Minnesota range is ordinarily a small number of months, making both pre- and post-guidelines uniformity in sentencing fairly impressive. In Pennsylvania, where we shall see that the

sentence ranges are much broader, the rates of uniformity should not be regarded as nearly so impressive. Since there is considerable discretion within a sentencing range as well as departures possible from it, the broader the ranges for sentencing a class of convicted persons, the greater the judicial discretion.

Pennsylvania Sentencing Guidelines. The Pennsylvania legislature established The Pennsylvania Commission on Sentencing with responsibilities for establishing sentencing guidelines, assisting officials in their implementation, and continuing monitoring of that implementation. Pennsylvania's current guidelines were adopted by its legislature on recommendation of the Commission and became operative in July of 1982.

What distinguishes Pennsylvania sentencing from that of other states which have adopted determinate sentencing is its attempt to increase uniformity and severity in sentencing while retaining the indeterminate sentence and parole. The Commission's goal was to structure judicial discretion concerning who is to be incarcerated by setting the minimum length of confinement. The minimum sentence in Pennsylvania is the eligible date for parole for any sentence with a maximum of two or more years. Sentences of less than two years are ordinarily served in county institutions with release on parole discretionary with the sentencing judge.

The Pennsylvania guidelines are analogous to those in Minnesota in being based on an Offense Gravity Score and a Prior Record Score. No attempt is made, however, to achieve the same measure of uniformity and proportionality in sentence length as in Minnesota nor are the recommended sentence lengths fitted to

the prison capacity of Pennsylvania. Pennsylvania judges, moreover, are not similarly constrained by an appellate procedure whenever they deviate from the Guidelines. When a Pennsylvania judge departs from the guidelines by sentencing below the mandatory minimum sentence, no reason need be given for doing so. And, when, in the opinion of a judge, aggravating circumstances warrant exceeding the maximum allowable under the guidelines, the judge must state the reasons for the increased sentence length in open court and notify the Commission of those reasons. Failure to state a reason for exceeding the sentence length is grounds for vacating the sentence and resentencing the defendant. The system then gives Pennsylvania judges greater discretion than those in Minnesota to set the minimum sentence. Moreover, since sentence length is not fitted to prison capacity, there can be considerable fluctuation in the size of the Pennsylvania prison population and overcrowding becomes a distinct possibility.

The considerably greater discretion enjoyed by Pennsylvania as contrasted with Minnesota judges is a consequence principally of two major differences in discretionary power.

Firstly, Pennsylvania judges are provided with three sentencing ranges rather than one in setting the minimum sentence at which one is eligible for parole consideration. There is a standard range which is the typical presumptive sentence range for a class of offenses. But there also are ranges to dispose of cases where it is judged there are aggravating circumstances and for those with mitigating circumstances. The result is that judges have a broader range for setting the minimum sentence than is allowed under Minnesota's determinate sentencing guidelines.

Secondly, the variation in the minimum sentence within each of these ranges is fairly broad. By way of example, in Table 1, one sees that the crime of robbery with an Offense Gravity Score of 9 and a Prior Record Score of 1 has a Mitigated minimum range of 31 to 42 months, a Standard range of 42 to 66 months, and an Aggravated range of 66 to 82 months. In each range, the choice is 12 months or more and the total spread is 52 months for persons with the same Prior record score of 1. Indeed, the total for persons with an Offense Gravity Score of 9 runs from 27 months for persons with a Prior Record Score of 0 in the mitigated minimum range to 120 months for persons with a Prior Record Score of 6 in the aggravated minimum range, or a total range of eight years and four months. Clearly, for offenses of this seriousness, judges have considerable discretion in setting the minimum sentence.

Additionally, offenses where a deadly weapon is used in committing the crime must carry an added penalty of 12 to 24 months. Judges have the discretion to increase the sentence within this 12- to 24-month latitude.

Some offenses are excluded from disposition under the Pennsylvania Sentencing Guidelines. Pennsylvania statutes mandate a minimum sentence of five years for certain repeat offenders, offenses committed on public transportation, and offenses committed with firearms. These include the most serious felony aggravated assaults, kidnapping, Murder III, Rape, Felony robberies, and voluntary manslaughter. Pennsylvania statutes also exclude the offense of Driving Under the Influence of Alcohol, an offense that the Sentencing Commission originally had

regarded as among the least serious. DUI has a separate schedule of sentences with normal, mitigated, and aggravated ranges based on number of prior convictions. The maximum sentence allowable, however, is six months for any offense within the normal range and mandatory for any within the aggravated range, regardless of number of prior convictions.

How well have the guidelines worked in Pennsylvania? One way to measure their performance is to assess the extent to which they meet the stated objectives of the Sentencing Commission.

One guideline objective was to increase sentences for the most serious crimes. The following comparison demonstrates that this objective was clearly reached. Applying the guidelines sentences adopted in 1982 to a sample of pre-guidelines convictions for the serious crimes of aggravated assault, rape, robbery and burglary and comparing those sentences with post-guidelines sentences for these same offenses, we observe that the proportion of sentences where the minimum was below that prescribed by the guidelines fell substantially for each of these offenses after adoption of the guidelines. As conformity with the guidelines increased, there also was some decline in the proportion of those with a higher minimum sentence. Inasmuch as the Guidelines prescribed longer minimum sentences, one can conclude that the objective of increased severity had been achieved.

Judges, likewise, were far more likely to incarcerate under the guidelines than they were before their establishment. Only 47 percent of the aggravated assault cases led to incarceration in the pre-guidelines as compared with 78 percent in the post-guidelines decisions. Incarceration increased similarly from 81

Conformity to Sentencing Guidelines by Offense*

Major Offense Category	Sentence Conformity							
	Pre-Guidelines (1980)				Post-Guidelines (1983)			
	Percent				Percent			
	Num- ber	Con- form	Above	Below	Num- ber	Con- form	Above	Below
Aggravated Assault	1054	25	5	70	424	67	1	32
Rape	134	22	19	59	56	70	7	23
Robbery	1499	43	17	40	864	81	7	12
Burglary	2215	51	6	43	1707	78	3	19

*Adapted from John H. Kramer and Robin L. Lubitz, "Pennsylvania's Sentencing Reform: The Impact of Commission Established Guidelines", Unpublished MS, March 28, 1984.

91 percent of all rapes, 81 to 93 percent of all robberies, and 69 to 89 percent of all burglary dispositions.

In the decision to incarcerate an offender, judges, moreover, clearly conformed their sentences to the guidelines ranges. Only 48 percent of the pre-guidelines sentences of persons imprisoned for aggravated assault conformed to the guidelines ranges as compared with 84 percent following their adoption. The comparable shifts for some other offenses are from 30 to 68 percent for rape, 57 to 79 percent for robbery and 65 to 84 percent for burglary.

Given the fairly broad range Pennsylvania judges have to set minimum sentences for offenses, they nonetheless display considerable discretion in sentencing even after adoption of the Sentencing Guidelines. Figure I discloses that only 80.5 percent of the dispositions conformed to the standard range in 1983 and Figure G, that it was 78.5 in 1984. Parenthetically I note that this slight shift downward of from 1983 to 1984 probably does not represent a shift to less conformity with the guidelines since the number of reporting counties increased from 1983 to 1984. That judges were exercising considerable discretion to go outside as well as within the Guidelines is also apparent from these graphs. In both years there were roughly twice as many dispositions outside the Guidelines as within the aggravated and mitigated ranges. In 1984, for example, 14.2 percent were disposed of outside the guidelines as compared with 5.6 percent within the mitigated range and 1.7 in the aggravated range.

Judicial conformity nevertheless is fairly impressive in the aggregate, showing that only 13 to 14 percent of all sentences departed from the sentencing guidelines recommendations for minimums in the standard, aggravated, and mitigated ranges. Yet, this conformity is in a sense misleading, since it is determined substantially by the mix of offenses of different statutory grades. As Figure J discloses, the departure is much greater (26%) for the most serious felonies (F₁) and least for the most serious misdemeanors (9%). The not inconsiderable variation in judicial discretion by type of offense is even more apparent in Table 6 in the Commission's report for 1984, which shows variation for selected specific types of offense.

One of the major reasons for sentencing guidelines in the United States is to reduce judicial disparity in sentencing like offenders, i.e., to enhance fairness in sentencing. The sentencing guidelines systems we have discussed do so by grouping offenders as equals according to an offense gravity and a prior record score. Just how well these groupings reduce disparity in Pennsylvania sentencing has been assessed by Kramer and Lubitz (1984). They conclude that the variation in sentencing from the pre- to the post-guidelines attributable to offense gravity and prior record scores doubled from 24.1 percent in the pre-guidelines sentences to 49.3 percent in the post-guidelines sentences. Nevertheless, just over one-half of the variation still remains attributable to prosecutorial and judicial discretion. Experience in the states of Minnesota and Washington suggests that a substantial amount of this variation is due to prosecutorial discretion. Additionally, we have seen that in Minnesota, the prosecutors have been undermining the integrity of the score categories, destroying the proportionality sought in sentencing. By increasing the prior record scores through adding charges for which convictions are obtained, the lesser offenses are being given longer sentences. Increasing the number of charges clearly is more feasible for the less than the more serious offenses.

Additional Considerations in Sentencing Reform. Apart from the objectives of increased proportionality and fairness in sentencing by reducing judicial discretion, another issue in sentencing policy in the United States is just how sentencing ought to be organized to achieve those objectives. Our discussion has focused principally on the innovation of sentencing

commissions with powers to develop and monitor conformity to guidelines. Yet, alternative forms of developing and organizing sentencing practice have been opted for in other states. These include statutory determinate sentencing, especially in California, Illinois, Indiana, and Maine, that leaves the current structure and organization of sentencing intact, except for the abolition of parole authority, and voluntary guidelines promulgated by judicial conferences, such as in Maryland. The statutory determinate sentencing model appears to have very limited effectiveness, given the capacity of prosecutors and judges to adjust the charges and dispositions to an agreed-upon sentence. Voluntary guidelines, such as those developed in Maryland, are largely unevaluated, but it is readily apparent that judges do not comply with the requirement of providing information on their sentencing practice so that their dispositions can be evaluated (Judicature:1984). Maryland judges likewise oppose appellate review of sentencing, thereby precluding the development of a common law of sentencing.

Appellate review of sentencing can and does take various forms in the USA. But, it may well work most effectively in Minnesota where it is linked to appeal of any departure from the guidelines. Perhaps one of the more powerful constraints on judicial discretion in Minnesota has been appellate review. Gradually a body of case law is emerging that constrains judicial departure from the guidelines. It is well to bear in mind that there is a substantial difference between a sentence review system that reviews particular sentences with power to reset those sentences and one, such as in Minnesota, that functions

essentially to determine precedent that will guide judicial decisions. By concentrating appeals in the highest court of the State of Minnesota, its Supreme Court, one also lends considerable authority to that review process. The body of case law being developed there seems to have a substantial effect on decisions to depart from the guidelines. Such departures increasingly conform to the growing body of case law. Judges, we perhaps need not note, are wary of being overruled.

Sentencing Commissions in the United States may be thought of as regulatory bodies that operate under an administrative law model rather than the aegis of a judicial conference or a judicial body. The Minnesota legislature appears to have gone farthest in granting its Sentencing Commission the powers of a regulatory body. Yet by most standards, it is still a very weak form of regulatory body and, like many regulatory commissions, open to cooptation by those it would control. We have had little experience in relating regulatory to judicial bodies in the USA since the justification for administrative rule making and enforcement lies ultimately in judicial review of regulatory powers and decisions. The fate of Sentencing Commissions as regulatory bodies therefore is clouded.

Three other considerations are worthy of our attention. The first is a question of whether it is possible to curb discretion in one part of a criminal justice system and prevent its being exercised in some related form in another part of that system. The second is how best to adapt sentencing policies and practices to the changing conditions of society and its criminal justice

agencies. And the third is how to insulate the system from internal as well as from external political subversion.

It is commonly agreed that our criminal justice systems in Canada and the USA are organized to dispense discretionary justice. We lack, however, centrally organized and managed criminal justice systems to control and review discretion--though perhaps there is more central organization and coordination in Canada than in the USA. In the USA, the decisions of each criminal justice agency are largely reviewable only when cases or case matters are processed at a higher level in the hierarchy of decision making. When decisions are made to terminate a case within the agency, such decisions ordinarily are not reviewable. There are, moreover, distinct limits as to what matters can be reviewed and the powers to enforce any actions upon the behavior of the agency responsible for the decision that is reviewed. Additionally, within the criminal justice system, agency authority is traditionally divided among the executive and judicial branches. The system, furthermore, is fragmented by the separation of adult and juvenile jurisdictions and the statutory limits of authority based on age or diminished competence. All in all, it is difficult for any agency to constrain the exercise of discretion of another, since each has considerable discretionary authority to affect matters of the other only when they are passed on for processing.

There is another aspect of the organization of discretionary authority in our criminal justice systems that is particularly troublesome when one attempts to constrain the exercise of discretion within a particular agency or when one agency attempts to