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Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines

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The Minnesota Sentencing Guidelines,[1] (the Guidelines) in effect since May 1, 1980, represent a pioneering effort to reduce sentencing and parole discretion and provide more uniform and proportional punishment for felony offenses. Although there have been many sentencing reforms around the country in the last fifteen years, Minnesota was the first state to use a statewide sentencing commission, independent of the legislature, to draft and implement sentencing reforms.[2] Minnesota was also the first jurisdiction to enact statewide controls over both the duration of prison terms imposed and the decision whether to impose prison at all. The Guidelines abolished parole release, and replaced it with specified reductions for good behavior in prison; they also provided a "presumptive" executed or stayed prison term for each felony offender, based only on the severity of the conviction offense and the defendant's "criminal history," primarily the number of prior felony convictions. Offenders with low criminal history scores convicted of low severity offenses receive a presumptive stayed prison term of a specific number of months; for more serious cases, the presumptive sentence is an executed prison term within a narrow specified range.[3]

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1. The Minnesota Sentencing Guidelines [hereinafter Guidelines] can be found in the MINNESOTA RULES OF COURT 277-310 (1990) and in MINN. STAT. § 244 (1990).

2. *See generally* Tonry, *Structuring Sentencing*, in 10 CRIME AND JUSTICE, A REVIEW OF RESEARCH 267-337 (1988) (evaluating nationwide success regarding mandatory sentencing guidelines).

3. For example, 30 to 34 months at severity level IV (e.g., non-residential burglary) with a criminal history score of 5. Guidelines, *supra* note 1, § IV.

Since 1980, several other states have followed the Minnesota model, and in 1984 Congress enacted a similar commission-based, presumptive sentencing system applicable to sentencing in federal courts.[4] In some respects, these later reforms go farther than Minnesota's to remedy some of the latter's perceived limitations.[5] Nevertheless, Minnesota's experience remains important, not only because its Guidelines have been in effect the longest, but also because of the extensive data collection and evaluation process built into the Minnesota reform from the outset. This rich source of data and commentary contains essential lessons for reformers in other jurisdictions, illustrating both the process of drafting and implementing commission-based presumptive sentences, and perhaps even more importantly, the evolution of such a system over time.

In describing and reflecting upon the design and initial implementation of Minnesota's Guidelines, perhaps no one is better qualified to tell the story than Dale Parent. As Staff Director for the Minnesota Sentencing Guidelines Commission from September 1978 until May 1982, Parent directly carried out, supervised, or observed the entire process of drafting the initial Guidelines and putting them into effect. Thus, his book[6] is essential reading for anyone interested in these processes, whether their interest is in the Minnesota Guidelines themselves, sentencing reform outside of Minnesota, or the processes of government that the commission-based sentencing reforms reveal. Parent does an excellent job of identifying and explaining all the Minnesota Commission's major decisions, the political context in which those decisions were made, and the results in the first few years of implementation. He writes clearly and directly, using language and data accessible to all interested readers. His book also identifies the most distinctive features of the Minnesota Guidelines, the keys to their success, and some of the problems that future sentencing reformers should avoid.

No one book, of course, can tell the whole story of so complex a subject as the Minnesota Guidelines. Indeed, the very complexity of sentencing reform — not to mention the voluminous and sometimes ambiguous data on implementation —

4. *See generally* A. VON HIRSCH, K. KNAPP & M. TONRY, THE SENTENCING COMMISSION AND ITS GUIDELINES 3-43 (1987) (discussing the experiences of states that have adopted sentencing guidelines).

5. *Id.* at 25-26 (Washington state).

6. D. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988).

make even this well-written book difficult to fully digest. Thus, the first goal of this Essay is to highlight and give greater visibility to some of Parent's most important points.

At the same time, this Essay attempts to supplement Parent's book in two ways. First, it takes issue with some of his most basic assumptions — and therefore with some of the conclusions he draws about the described events. The strength of Parent's book is also its greatest limitation: like most of the previously published reports and evaluations, it is essentially an "insider's" view. Although his book is often critical of important decisions that the Commission and/or its staff made, he rarely questions the most fundamental assumptions about the Guidelines' purposes, successes, and failures.

This Essay also seeks to supplement Parent's book by pointing out important developments after the book was written. Although the preface is dated September 1987, Parent rarely mentions events occurring after 1983. In any case, some of the most important post-implementation developments occurred after 1987. Starting with a series of highly-publicized rape-murders in the spring of 1988, the Minnesota Sentencing Guidelines confronted what can only be described as a law-and-order freight train that, unlike the earlier political crises Parent describes, could not be sidetracked or derailed. As a result, the Minnesota Guidelines, and their legal and political context, look very different in 1990 than they did in 1983 or even in 1987. It has definitely *not* been a quiet week in Lake Wobegon . . . .

Although events since Dale Parent wrote his book are of critical importance in evaluating Minnesota's experience, judging his book with hindsight would be unfair. Thus, each of the sections of this Essay begins by evaluating Parent's book from the perspective of events through 1983, the last year that he discusses in detail. The Essay then summarizes major post-1983 developments, and considers their implications for future efforts to draft, implement, and evaluate sentencing reforms.

I. WHY A COMMISSION? TO WHAT EXTENT DO COMMISSION-BASED GUIDELINES INSULATE SENTENCING POLICY DECISIONS FROM THE POLITICAL PROCESS?

The use of an independent commission to draft presumptive sentences has two advantages: it allows sentencing policy

to be both more expertly crafted and less subject to distorting political pressures.[7] The first of these points, delegation, is a general argument for creating specialized administrative agencies; the second responds to a problem peculiarly acute in the criminal law context. Any attempt to legislate more precise sentences must overcome the "politics of crime control": the tendency for elected officials to demand unrealistically severe penalties, because the official gains no votes by being, or even seeming to be, "soft" on crime and immorality. This political reality is especially significant in any attempt to abolish parole and move to a system in which judges set "real time" sentences, equal to the relatively short terms that most convicted persons have traditionally served in prison prior to being parolled. Hence, an independent, appointed commission, removed from direct electoral pressures, is needed.

However, future sentencing reformers and commissioners must be careful not to put too much faith in the "insulation" argument. Dale Parent's book convincingly demonstrates just how thoroughly, self-consciously, and skillfully "political" the Minnesota Commission was throughout the entire period of the Guidelines development and the early years of implementation. Indeed, as Parent repeatedly states,[8] formulating sentencing policy is essentially and unavoidably a "political" task, given the fundamental value choices that must be made. But, guidelines-setting is also political in a procedural sense: A commission must achieve and maintain a workable internal consensus on major issues, and it must satisfy or neutralize various external powers — interest groups within the criminal justice system, politicians, and the media. Parent praises especially the internal and external political skills of Jan Smaby, an experienced lobbyist and former corrections planner who served as Commission Chair from 1978 through mid-1982.[9]

Dale Parent's portrait of the essentially political workings of the Minnesota Commission is an important and lasting contribution to the literature of sentencing reform and political science. Subsequent events only reinforce his conclusions.

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7. *See* A. VON HIRSCH, K. KNAPP & M. TONRY, *supra* note 4, at 5-8.

8. D. PARENT, *supra* note 6, at 43, 45, 139, 146. *See also* MINN. SENTENCING GUIDELINES COMM., THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES, THREE YEAR EVALUATION 15-16 (1984) [hereinafter 1984 IMPACT REPORT] (political acceptance of Guidelines was facilitated by the Commission's representative membership, its state-wide public hearing tours, and its emphasis on staying within prison capacity limits).

9. *See* D. PARENT, *supra* note 6, at 136-46.

POST-1983 DEVELOPMENTS

The signs of the Commission's weakening political strength began to appear in 1984, with enactment of a statute requiring legislative approval of major Guidelines modifications.[10] The Minnesota Guidelines Enabling Act was silent as to the legislature's role in proposing or approving such changes. In 1982, the Commission and the legislature agreed on a procedure under which the legislature could require the Commission either to adopt certain amendments, or to report why it had not done so.[11] The 1984 statute imposed additional legislative control: it provided that all changes in the Guidelines grid, and any other modifications resulting in reduced sentences or early release of any inmate, must be submitted to the legislature by January to become effective by August, unless the legislature by law provided otherwise.

Things were fairly quiet from 1984 until 1988, when pressures for substantially increased penalties and closer legislative control began to escalate rapidly. The Commission had faced similar political crises in the past,[12] but the sudden crime wave of 1988 proved too broad and too sustained to resist. Pressure began to build in late spring, with a series of sexual attacks on women in Minneapolis parking ramps, two of them fatal. The Minnesota Attorney General appointed a Task Force on Sexual Violence, which began to submit strongly-worded demands to the legislature and to the Commission to increase rape sentences substantially.[13] At the same time, the city of Minneapolis was experiencing what seemed like a general increase in violence and drug crime: the 1988 murder rate was 50% higher than in 1987, and drug offenses were up 60%.[14]

In mid-November, the Guidelines Commission responded by proposing to increase prison durations for violent crime (while reducing terms for property offenders, in order to stay within prison capacity). For example, the presumptive sentence for a first-degree rapist with no criminal history would have increased from 3-1/2 to 4-1/2 years. These proposals did not satisfy the hue and cry, and were met with calls to *double*

10. 1984 Minn. Laws, ch. 589, § 4.

11. D. PARENT, *supra* note 6, at 150.

12. *Id.* at 140-46.

13. MINN. ATT'Y GEN. TASK FORCE ON THE PREVENTION OF SEXUAL VIOLENCE AGAINST WOMEN, FINAL REPORT (1989).

14. MINNEAPOLIS POLICE DEP'T, CRIME ANALYSIS UNIT, UNIFORM CRIME REPORT SUMMARY, JAN.-DEC. 1988, at 2 (1989).

sentences for violent offenders.[15] In December of 1988, therefore, the Commission approved increases in all presumptive prison terms at severity levels VII (e.g., armed robbery) and VIII (first-degree rape); the Commission doubled prison terms for defendants with no criminal history, and also increased substantially, but by lesser percentages, sentences for those with higher criminal histories. The Commission also adopted a criminal history weighting scheme, valuing prior felony convictions at one-half point for severity levels I and II, and increasing to two points for levels VIII to X. These and other less sweeping changes became effective as of August 1, 1989.[16]

Nevertheless, the pressure for increased sentence severity and legislative control did not diminish. In the spring of 1989, the legislature considered a number of "get tough" crime bills, including one that would have re-established the death penalty, not used in Minnesota since 1911.[17] The legislature finally enacted the Omnibus Crime Bill, which included a number of severe measures: life without parole for certain first-degree murderers;[18] mandatory maximum terms for other recidivist murderers and sex offenders;[19] minimum prison terms for certain drug crimes;[20] and increased statutory maximums for other violent and sex crimes.[21]

The 1989 statute also contained several provisions suggesting that the legislature no longer trusted the Commission to set sufficiently severe penalties, and had decided to take back some of the delegated power to set specific sentencing policies. The legislature amended the enabling act to specify that the Commission's "primary" goal in setting guidelines should be public safety; correctional resources and current practices remain factors, but they are no longer to be taken into "substantial" consideration.[22] In addition, the legislature directed the Commission to increase penalties at severity levels IX and X by specified amounts, and to add a specific provision to the Guidelines list of aggravating circumstances.[23] Finally, judges

15. Minneapolis Star Tribune, Nov. 18, 1988, at 7A, col. 2.

16. *See* K. KNAPP, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY ANNOTATED 13A, 28A, 32A, 51A, 53A, 107A (1985 & Supp. 1990) [hereinafter GUIDELINES ANNOTATED].

17. 1989 Minn. Senate File No. 768; 1989 Minn. House File No. 998.

18. 1989 Minn. Laws, ch. 290, art. 2, §§ 10, 12 & 14.

19. *Id.* at art. 4, §§ 12-15.

20. *Id.* at art. 3, §§ 13 & 28.

21. *Id.* at art. 6, §§ 5-11.

22. *Id.* at art. 2, § 8.

23. *Id.* at art. 2, § 17; art. 3, § 25.

were given authority in certain cases to impose the statutory maximum prison term, apparently without regard to ordinary Guidelines rules governing departure and degree of departure.[24]

In conclusion, the events described in Parent's book show that the Minnesota Commission was never really insulated from the political process, and the events after 1983 suggest that it was ultimately not political enough. There are lessons here not only for future sentencing commission members, but also for the officials who appoint them: sentencing guidelines commissioners must be politically astute, as well as competent and committed to reform. Moreover, at least some members may need to have significant political experience and "connections" for the commission to be effective initially, and over the long term.[25]

II. IMPROVING ON THE COMMISSION MODEL — MINNESOTA'S STRICT PRISON CAPACITY CONSTRAINT

One of the most important advantages of a system of presumptive sentences set by an independent commission is that such a system permits states, for the first time, to insure that prison commitments stay within prison capacity.[26] Overcrowded prisons are unsafe, inhumane, and criminogenic, and must be avoided at all costs.[27] By limiting commitment rates and durations, presumptive sentences control overcrowding at the "front end." Using a commission to set presumptive sentences maximizes the potential to avoid prison overcrowding because such a commission can develop sophisticated measures to accurately predict prison populations and can use these measures to tailor its sentencing rules to stay within expected capacity. Indeed, such careful planning is an *essential* component of any sentencing reform that includes the abolition of parole release discretion — parole no longer serves as a "safety valve" to relieve prison overcrowding.

The Minnesota Guidelines Enabling Act instructed the Commission to take existing prison capacity and other correc-

24. *Id.* at art. 2, § 9; art. 4, § 10.

25. *See* D. PARENT, *supra* note 6, at 214.

26. A. VON HIRSCH, K. KNAPP & M. TONRY, *supra* note 4, at 12-14.

27. *See, e.g.*, Lerner, *Rule of the Cruel: How Violence is Built into America's Prison*, NEW REPUBLIC, October 15, 1984, at 17-21 (describing shocking conditions in overcrowded urban prisons).

tions resources into "substantial consideration," but the Commission chose to go further: it set a goal of never exceeding 95% of prison capacity.[28] Parent's book gives particularly strong emphasis to this decision, and shows how the strict prison capacity constraint allowed the Commissioners to reduce internal conflict and reach consensus on prison commitment and duration rules. Whenever a Commissioner or outside interest group proposed increased severity for a particular category of offenders, that Commissioner or group was asked to suggest another offender category that could receive leniency, so that prison populations would stay within capacity.[29]

A computerized sentencing and inmate population model estimated the specific effects of proposed sentence packages on future prison populations.[30] Even in the absence of internal dissent, this model often required the Commissioners to moderate their proposed sentencing policies to stay within prison capacity.[31] After the Guidelines went into effect, the Commission continued to use the model to project prison populations and to weigh proposed Guidelines changes.[32] As a result, Minnesota's prison population stayed within capacity throughout the early 1980s.[33] At a time when prisons in most other states were increasingly overcrowded and often subject to court intervention, Minnesota faced neither of these problems. Between 1980 and 1984, Minnesota's prison population increased only 8%, while the total U.S. prison population increased 41%.[34]

Minnesota's experience demonstrates that an assumption of limited prison capacity is an essential component of guidelines development — one that the enabling legislation should explicitly require. However, Dale Parent does not stress, and perhaps should have, another lesson of the early years: projecting future prison populations, especially under new sentencing rules or over the long term, is not an exact science. As described more fully in its 1984 implementation report, the Commission's projection model left out or assumed a number of key variables and did not anticipate the serious over-crowding

28. D. PARENT, *supra* note 6, at 6-7, 40.

29. *Id.* at 43-44.

30. *Id.* at 44-45.

31. *Id.* at 92-93.

32. *Id.* at 190-92.

33. UNITED STATES DEPARTMENT OF JUSTICE BULLETIN: PRISONERS IN 1984, at 3 (1985).

34. *Id.*

problems that began to appear in 1982.[35] Indeed, prison populations stayed within capacity through 1982 only because the Commission had chosen to err on the side of *under-* rather than over-populating the prison system.[36] Future reformers should thus pay careful attention to how Minnesota actually used its projection model: initial predictions were conservative; later predictions were always corroborated by observed changes in current commitment rates and populations; and all predictions beyond the short-term were viewed cautiously.

POST-1983 DEVELOPMENTS

By the end of the 1980s, Minnesota was still operating within its prison capacity.[37] It had the second-lowest per-resident imprisonment rate in the country, a rate one-fourth the national average.[38] However, Minnesota's prison population *did* increase in the late 1980s, at rates substantially higher than in the early years of the decade: 29% from 1984 to 1988 (versus 8% between 1980 and 1984) and 48% from 1984 to June 1990.[39] During these same periods, the national prison population increased 35% and 63%. Some of Minnesota's increase was due to rising crime rates, causing increased numbers of convictions.[40] The political developments described earlier, however, may also have played a role, as the legislature, prosecutors, and judges used their powers to send more offenders to prison for longer terms.

Minnesota's experience thus shows that a fixed-capacity model during guidelines development and implementation does not necessarily require — or guarantee — "zero growth" in prison populations over the long term. Nor did the Minnesota Commission ever formally adopt a zero-growth policy. How-

35. 1984 IMPACT REPORT, *supra* note 8, at 87-96.

36. In 1980, the Commission under-stated future prison capacity by not including a 400-bed prison completed in 1981; failing to factor in the effect of giving some pre-Guidelines prisoners the benefit of lower Guidelines sentences; and over-estimating departure rates. *Id.*; D. PARENT, *supra* note 6, at 107, 122.

37. UNITED STATES DEPARTMENT OF JUSTICE BULLETIN: PRISONERS IN 1989, at 2, 4 (1990).

38. *Id.*

39. UNITED STATES DEPARTMENT OF JUSTICE BULLETIN: PRISONERS IN 1984, at 3 (1985); UNITED STATES DEPARTMENT OF JUSTICE BULLETIN: PRISONERS IN 1988, at 2 (1989); UNITED STATES DEPARTMENT OF JUSTICE, PRESS RELEASE, Oct. 7, 1990, at 3.

40. *See* MINN. SENTENCING GUIDELINES COMM., 1988 DATA SUMMARY 2 (1990) [hereinafter 1988 DATA SUMMARY] (total convictions increased from 5,500 in 1981 to 7,572 in 1988).

ever, the Commission's emphasis on staying within current capacity and its failure to take an active role in defining future capacity may have given the appearance that the Commission advocated zero growth. Such a posture is risky because it weakens political support and invites public backlash; the result may be prison populations that not only increase, but do so faster than crime rates. Exclusive focus on existing prison capacity also forces continual tinkering with the guidelines rules, undercutting their overall balance and coherence, and encourages over-crowding in local jails, many of which are already seriously deficient in terms of plant, security, staffing, and programs.[41]

Thus, sentencing commissions may need to play a more active role in defining future prison capacity. At a minimum, such commissions must consider the impact of rising crime rates and criminal caseloads, and recommend either increases in prison capacity or greater use of severe non-prison ("intermediate") sanctions.[42] Of course, a commission such as Minnesota's cannot appropriate funds to pay for such expanded prison capacity or alternative sanctions, but it can take other steps — for example, recommending specific prison expansions to the legislature while offering to rescind population-reducing guidelines amendments as soon as such expansions are clearly underway. If the legislature fails to approve the expansions, then it, not the commission, will bear the responsibility; the commission will not so easily be scapegoated.

III. MEASURING "SUCCESS" IN DISPARITY REDUCTION: THE NEED FOR BETTER INDICATORS AND MORE FOCUSED ANALYSIS

One frequently repeated assessment of the Minnesota Guidelines is that, although they were initially very successful

41. *See generally* UNITED STATES DEPARTMENT OF JUSTICE BULLETIN: CENSUS OF LOCAL JAILS 1988 (1990). Between 1978 and 1988, the proportion of Minnesota felons sentenced to local jails increased from 35% to 59%. As a result of this heavy use of jail sentences, Minnesota's overall custody-sentence rate (prison plus jail) is actually higher than the national average. In 1986, 75% of Minnesota felony sentences involved either jail (55%) or prison (20%) terms. 1988 DATA SUMMARY, *supra* note 40, at 1, 6. In the same year, the estimated U.S. felony incarceration rate was 67% — 21% jail plus 46% prison. UNITED STATES DEPARTMENT OF JUSTICE BULLETIN: FELONY SENTENCES IN STATE COURTS, 1986, at 2 (table 2) (1989).

42. N. MORRIS & M. TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 3-8 (1990).

in reducing sentencing disparity, practice had substantially reverted to pre-Guidelines patterns by 1983.[43] This "headline" conclusion is both true and seriously misleading. The whole truth is more complex: the first year under the Guidelines (1981) was not as successful as the Commission claimed, and the next two years were not as bad. By overstating the initial success of the Guidelines, the Commission may have created impossibly high expectations for later success. Moreover, what slippage occurred in later years was not as dramatic as the Commission claimed, and it occurred in very specific areas. The Commission should have isolated and sought to contain those particular problems, rather than emphasizing system slippage in the aggregate. In doing so, it may have lost an opportunity to nip these emerging problems in the bud.

The Commission evaluated initial success in disparity reduction by using two before-and-after measures: (1) "grid variance" (a measure of uniformity within Guidelines cells); and (2) judicial departure rates from presumptive commitment and durational rules.[44] However, both measures are based entirely on *conviction* offense, even though the Commission had ample evidence that the frequency of charge reductions increased substantially from 1978 to 1981.[45] Because of this change, the cases in a given grid "cell" in 1981 likely were not the same kinds of cases found in that cell in 1978, so the 1978 and 1981 cell "variances" are not directly comparable.[46] Similarly, many of the charge reductions can be viewed as *de facto* mitigating "depar-

43. D. PARENT, *supra* note 6, at 177-78, 193-201; *see also* 1984 IMPACT REPORT, *supra* note 8, at v-vi, 21-48 (assessing impact of sentencing guidelines from 1981-83).

44. D. PARENT, *supra* note 6, at 193-94. The variance in a single cell equals the percent of prison sentences multiplied by the percent of non-prison sentences. Maximum uniformity (e.g., 100% prison) yields a variance of zero; maximum non-uniformity (50% prison, 50% nonprison) yields a variance of .25. The total "grid variance" for all cells equals the sum of individual cell variances, weighted by the number of offenders within each cell. *Id.* at 194 n.11.

There are several "departure" measures. When a trial judge imposes an executed prison sentence instead of the presumptive stayed prison term, this is an "aggravated dispositional departure." Conversely, granting a stay instead of the presumptive executed prison term is a "mitigated dispositional departure." When a judge imposes a prison term (stayed or executed) which is longer or shorter than the presumptive term, this is an "aggravated" or "mitigated" "durational departure." Such departures are much more important when they involve an executed prison sentence, so these are reported separately. *Id.* at 122-28, 164-67.

45. *Id.* at 185.

46. Increased rates of charge reduction would be expected to cause high-severity conviction-offense cells to "lose" defendants, while low-severity cells

tures."[47] Thus, the Commission's published departure rates for 1981 are probably substantially understated.

Unfortunately, the Commission lacked the necessary data to compute comparable departure rates for 1978 and 1981. To compute those rates, one would need an accurate measure of the "real offense," independent of initial and subsequent charging discretion. The Commission did construct such a variable, based on corrections and court files,[48] but this variable could not adequately take into account problems of proof that might have been revealed by examining prosecution files. This issue is important not only to evaluate implementation results, but also to assess the sentencing impact of charging discretion and the need for guidelines or other controls. Future researchers must seek to develop better measures of the highest "provable" offense.

Having overstated the initial "success" of the Guidelines in achieving greater uniformity and proportionality, the Commission then proceeded to overstate the degree of "slippage" (or "reversion") between 1981 and 1983. The Commission frequently criticized judges for allowing overall dispositional (prison commitment or stay) departure rates to increase — from 6.2% in 1981 to 8.9% in 1983, an increase of 44%;[49] both aggravating and mitigating departure rates increased by similar amounts, as a percent of total cases.

However, the Commission did not attempt to factor in other changes during this period that might partially or even completely explain these increases. Dale Parent shows how the large increase in aggravated dispositional departures[50] that defendants requested explains much of the increase in total dispositional departure rates.[51] Indeed, if Parent had confined his adjustment to aggravated departures, his figures would have shown that such departures directly attributable to judges did not increase *at all* between 1981 and 1983.[52] Of course, judges

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gain them. Thus, each cell contains a different mix of cases in pre- and post-Guidelines years.

47. Prosecutors may find it easier to obtain a guilty plea by agreeing to reduce the charges to an offense with a lower presumptive prison duration, or with a presumptive non-prison sentence, rather than by retaining the higher charge and asking the court to approve a mitigated durational or dispositional departure. D. PARENT, *supra* note 6, at 167.

48. 1984 IMPACT REPORT, *supra* note 8, at 19-20.

49. *See id.* at v-vi, 39-42.

50. *See supra* note 44.

51. D. PARENT, *supra* note 6, at 198-200.

52. Subtract self-requested departures from aggravated dispositional de-

did have some responsibility for the increased numbers of defendant requests for a prison commitment; most such cases arise when the judge proposes onerous stay conditions — jail up to one year, treatment, lengthy probation, etc. — and the defendant decides to "get it over with" by choosing the relatively short presumptive prison term.[53] The point is simply that the problem in the case of aggravated dispositional departures was fairly specific; the Commission should have focused its criticism on that specific problem, rather than suggesting a more general problem of non-compliance.

The equally large increase in mitigated dispositional departures from 1981 to 1983[54] also reflects a problem with the Commission's statistical measures — a problem that Parent alludes to several times,[55] but never fully develops, and that substantially overstates the "slippage" during the first three years. The Guidelines Commission has always measured dispositional departure rates as a percentage of all sentenced defendants. However, when speaking separately about aggravated and mitigated dispositional departures, it is more meaningful to speak in terms of a percentage based on the number of defendants *eligible* for each type of departure in that year — aggravated departures as a percentage of presumptive stayed sentences, and mitigated departures as a percentage of presumptive executed prison terms. This approach produces very different departure rates for mitigated departures, because only about one-fifth of all defendants have presumptive executed sentences. When mitigated dispositional departures are computed on a percentage-of-eligibles basis, the departure rates become much greater in all three years, but do not substantially increase from 1981 (20.5%) to 1983 (21.5%).[56]

Nevertheless, there *was* clear evidence of increasing "non-compliance" between 1981 and 1983. More low-severity offenders were being sent to prison — because they requested it[57] or

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partures and divide the remainder by total cases. The adjusted departure rates are 2.4% (1981) and 2.5% (1983). D. PARENT, *supra* note 6, at 199-200; 1988 DATA SUMMARY, *supra* note 40, at 2.

53. D. PARENT, *supra* note 6, at 199.

54. *Id.* at 197-99.

55. *Id.* at 121, 189 n.6.

56. To compute presumptive prison eligibles for each year, take the number of prison commitments, subtract the number of aggravated dispositional departures and add mitigated departures. 1988 DATA SUMMARY, *supra* note 40, at 1-2.

57. D. PARENT, *supra* note 6, at 199.

were found "unamenable" to probation,[58] or because prosecutors had "run up" their criminal history scores enough to put them across the dispositional line.[59] This trend conflicted with the Commission's normative choice to imprison fewer non-violent offenders. At the same time, some high-severity, low-criminal-history offenders were receiving mitigated dispositional departures, based on individualized findings of "amenability" to treatment on probation.[60] This theory of sentencing conflicted with the Commission's emphasis on retributive, "just deserts" sentencing goals. The Commission condemned these trends, but took no concrete action until 1988 to limit departure in these areas;[61] indeed, its frequent emphasis on aggregate departure rates suggested broader non-compliance problems that did not really exist, at least not yet.

Why didn't the Commission act to isolate and contain these particular problems? Perhaps part of the reason was that to address and effectively limit such departures, the Commission might have had to admit, at least implicitly, the validity of utilitarian philosophies of punishment that it believed had been discarded under the Guidelines. Part IV of this Essay discusses these issues.

POST-1983 DEVELOPMENTS

Although aggravated dispositional departures remained fairly stable through 1988, mitigated departures continued to rise: from 21.5% of "eligible" defendants in 1983 to 28.3% by 1988.[62] Most of the increase appears to be due to increased findings of defendant "amenability to probation."[63]

IV. DEFINING "SUCCESS" IN DISPARITY REDUCTION: THE MEANING OF "JUST DESERTS" IN MINNESOTA

Dale Parent's book, like all previous writings, stresses the underlying sentencing philosophy of the Minnesota Guide-

58. *Id.* at 198.

59. The number of offenders with high criminal history scores increased substantially between 1981 and 1983, as prosecutors charged and required defendants to plead guilty to a larger number of counts. *Id.* at 186.

60. *Id.* at 165-66.

61. *See infra* note 96 and accompanying text.

62. *See supra* note 56.

63. *See* MINN. SENTENCING GUIDELINES COMM., REPORT TO THE LEGISLATURE ON THREE SPECIAL ISSUES 8 (1989) [hereinafter 1989 REPORT].

lines.[64] Whereas traditional, indeterminate sentencing laws were based largely on utilitarian purposes — deterrence, incapacitation, and rehabilitation — the Guidelines are said to be based primarily on a theory of retribution or "just deserts": sentences should be proportional to the seriousness of the offense and the defendant's culpability, leaving judges little or no discretion to consider utilitarian sentencing goals.[65] According to this view, if Minnesota judges are still making individualized prison and probation decisions based on utilitarian concepts such as "amenability to probation," then they are rejecting the most fundamental principles of the Guidelines.[66]

However, a closer analysis of the amenability cases reveals that they are actually quite consistent with the Guidelines *as written*, and that strong practical and policy arguments support these cases. If they seem inconsistent with the "just deserts" theory, it is because the Commission overemphasized the role of that theory under the Guidelines.

Several amenability rules actually exist. The first appellate case based primarily on such a concept was *State v. Park*,[67] upholding an aggravated dispositional departure because the defendant was unamenable to probation. The defendant's serious chemical dependency problem supported this finding along with the defendant's refusal to accept that he had a problem or needed treatment, and his complete failure to cooperate during earlier probation terms.[68] The next case, *State v. Wright*,[69] involved a mitigated dispositional departure. The defendant faced a presumptive prison term of twenty-four months, but the trial court stayed this term and ordered probation with six months in jail, then treatment.[70] The Minnesota Supreme Court upheld this departure for two reasons. First, the defendant was "particularly unamenable to incarceration": his immaturity would cause him to be easily victimized in prison or led into criminal activity by other inmates.[71] Second, he was "particularly amenable to individualized treatment in a probation-

64. *See, e.g.*, 1984 IMPACT REPORT, *supra* note 8, at 5-14; A. VON HIRSCH, K. KNAPP & M. TONRY, *supra* note 4, at 84-106; D. PARENT, *supra* note 6, at 38-39, 66.

65. *See* 1984 IMPACT REPORT, *supra* note 8, at 10-15.

66. A. VON HIRSCH, K. KNAPP & M. TONRY, *supra* note 4, at 58, 104-05.

67. 305 N.W.2d 775 (Minn. 1981). *See also* State v. Garcia, 302 N.W.2d 643, 647 (Minn. 1981) (similar, alternative holding).

68. *Park*, 305 N.W.2d at 776.

69. 310 N.W.2d 461 (Minn. 1981).

70. *Id.* at 462-63.

71. *Id.*

ary setting": he needed psychiatric treatment unavailable in any institution and would not endanger public safety as long as he received appropriate out-patient care.[72]

A later case, *State v. Trog*,[73] held that the second *Wright* factor alone was a sufficient basis for departure.[74] Trog was convicted of burglary with assault. The presumptive sentence would have been twenty-four months in prison, but the trial court stayed this term and ordered probation with six months in jail, followed by treatment. The Minnesota Supreme Court upheld this departure, based on the defendant's amenability to probation. The pre-sentence report had indicated that, except for this incident, Trog had been an "outstanding citizen," had no police record even as a juvenile, had done well in school and at work, was intoxicated at the time of the offense, had cooperated fully with the police, and was shaken and extremely contrite about the incident. Among those who testified for the defendant at sentencing was a retired chief of the police juvenile division and former neighbor of Trog. The court quoted his testimony that nothing would be served by sending Trog to prison.[75]

Subsequent cases have added little, other than to make clear that amenability concerns may only affect the decision to stay or execute the presumptive prison term, not the duration of that term.[76] The supreme court has never explained why it made this distinction, or how amenability departures relate to the structure and purposes of the Guidelines. It should be noted, however, that Chief Justice Amdahl, a member of the Guidelines Commission from 1978 until 1982, wrote the *Trog* opinion; thus, at least one of the Guidelines "framers" saw no fundamental conflict with the Commission's "original intent."

How might the Minnesota Supreme Court have justified these amenability decisions? The Guidelines clearly emphasize retributive values much more than did pre-Guidelines sentencing, but it is equally clear that utilitarian goals remain very important. Indeed, these goals find support not only in the

72. *Id.* at 462.

73. 323 N.W.2d 28 (Minn. 1982).

74. *Id.* at 31.

75. *See id.* at 30-31.

76. *See, e.g.*, State v. Ott, 341 N.W.2d 883, 884 (Minn. 1984) (reversing departure involving consecutive sentence); Jackson v. State, 329 N.W.2d 66, 67 (Minn. 1983) (reversing durational departure).

criminal code,[77] but also in the Guidelines themselves. In describing the permissible conditions of stayed sentences (e.g., probation), the Guidelines explicitly recognize the goals of "retribution, rehabilitation, public protection, restitution, deterrence, and public condemnation of criminal conduct."[78] The choice among these goals is left up to the sentencing judge and may be based on both offense and offender characteristics.[79] Because about four-fifths of presumptive sentences are stayed,[80] the Guidelines clearly grant utilitarian sentencing goals a major continuing role.

But what about departure decisions such as those the supreme court upheld in the amenability cases? The Guidelines' text and commentary governing departure decisions contain no similar statement of punishment goals, and do not expressly preclude consideration of utilitarian goals.[81] A close reading of the suggested aggravating and mitigating factors permitting departure implies that such goals may not be considered: almost all factors appear to reflect retributive values, and one factor is explicitly limited to offender culpability.[82] On the other hand, these lists are expressly stated to be "nonexclusive."[83]

Thus, the Guidelines are ambiguous as to whether utilitarian purposes may influence departure decisions. Should the Commission have expressly ruled out such considerations? If so, would it have also had to make other changes in the Guidelines? What are the theoretical and practical merits of the amenability concepts?

One might begin by asking why any distinction should be made between conditions of stayed sentences and departures. Why should amenability considerations be relevant in setting conditions of probation, but irrelevant to the decision whether

77. *See, e.g.*, MINN. STAT. § 609.01 (1990) (purposes of Code); MINN. STAT. § 609.115 (1990) (contents of presentence investigation).

78. Guidelines, *supra* note 1, § III.A.2.

79. *Id.*

80. *See supra* note 56 and accompanying text.

81. The 1980 Guidelines required departure sentences to be "more appropriate, reasonable, or equitable," and referred judges to the Guidelines statement of purpose clause. Guidelines, *supra* note 1, § I. The latter states that sanctions should be proportional to offense severity and to criminal history, but cites none of the traditional punishment goals. *Id.* In 1982, the Commission added a proportionality requirement to the departure standard. *See* GUIDELINES ANNOTATED, *supra* note 16, at 41.

82. Guidelines, *supra* note 1, § II.D.2.

83. *Id.*

to grant probation in the first place? There are at least three possible answers. First, it makes sense to confine the exercise of discretion in pursuing utilitarian goals to the setting of stay conditions because the law already limits the severity of such conditions (and hence, the potential for disparity) more than prison terms.[84] Second, prison-use decisions need to be more closely controlled in order to ensure that prison populations stay within capacity. Third, perhaps disposition rules reflect important retributive values: defendants with presumptive prison sentences *deserve* prison, unless their culpability is substantially mitigated; defendants with presumptive stayed sentences do not deserve prison, unless their culpability is substantially aggravated.

Of these reasons, the third seems especially important because it is closely linked to the Commission's overall "just deserts" theory. In fact, however, there are serious problems in any attempt to closely link the Guidelines disposition policy to a retributive theory. Parent alludes to these problems when he asks how decisions to revoke probation and execute the presumptive stayed prison term provided for the defendant's offense can be squared with a theory that assumes that probation was all the defendant deserved, and will ever deserve, for the original offense.[85] Parent appears to reject the argument that the defendant deserves more punishment if he has committed a new offense (since he has not yet been found legally guilty). In any case, revocation does not require commission of a new offense.[86]

The answer to Parent's retributive anomaly must be that such a defendant *did* deserve the presumptive prison term provided for his original offense, but was initially given *less* in an attempt to achieve the utilitarian purposes of probation (rehabilitation, restitution). Subsequent revocation is justified not only by the need to deter probation violations, as Parent concedes, but also by the defendant's acts that suggest that he is unamenable to probation and should now be given his full "just deserts." But, why did we think that he was amenable in the first place? The answer must be that he was *presumed* to be amenable, given his less serious offense and prior record. The presumptive stayed prison term thus reflects a theory of "limit-

84. *See* MINN. STAT. § 609.135, subd. 4 (1990) (maximum of one year of incarceration as condition of probation).

85. D. PARENT, *supra* note 6, at 231.

86. Guidelines, *supra* note 1, § III.B.

ing," rather than precisely "defining" retributivism.[87] Retributive values determine the maximum deserved punishment (prison duration), while utilitarian considerations determine initial and subsequent disposition decisions.

This theory provides a retributive explanation not only for imposing and revoking stayed prison terms, but also for "unamenable-to-probation" departures. If it is already very clear at the time of sentencing that the defendant is not a suitable candidate for probation, the court can immediately give the defendant his full "just deserts." Nor does allowing such departures necessarily raise the other two problems noted above — excessive judicial discretion and the risk of overcrowded prisons. Unamenability departures increase the exercise of judicial discretion only slightly, because judges are already making individualized revocation decisions, often based on unamenability findings. Moreover, forbidding all such departures does not avoid these problems of judicial discretion and prison-crowding, because judges may achieve the same result, *de facto*, by revoking probation.

Thus, it is a short step to say that, because judges have broad discretion to revoke probation, they may in exceptional circumstances deny it in advance. But what about the mitigated ("amenable to probation") departures recognized in *Wright* and *Trog*? In deciding these cases, the Minnesota Supreme Court merely stated that such departures are justified by a parity of reasoning: "this is the other side of unamenability to probation."[88] Such conclusory analysis is hardly satisfactory. As shown below, however, the same arguments that justify unamenability departures support amenability departures.

There are several practical arguments for recognizing amenable-to-probation departures. First, allowing such departures helps to counteract the prison-crowding impact of unamenable-to-probation departures. Second, as in the unamenability context, forbidding amenability departures would not prevent officials from achieving the same results *de facto*. Given the absence of any controls over charging and plea bargaining, prosecutors can avoid a presumptive prison term either by reducing the charges to an offense with a presumptive stayed term, or by agreeing to accept an unjustified mitigated-culpability depar-

87. *See* N. MORRIS, MADNESS AND THE CRIMINAL LAW 199 (1982); *see, e.g.*, N. MORRIS, THE FUTURE OF IMPRISONMENT 73-76 (1974) (discussing the role of desert in the awarding of punishment).

88. State v. Wright, 310 N.W.2d 461, 462 (Minn. 1981).

ture with the court's approval. Charge reductions are arguably the worst way to handle amenable-to-probation cases, because such reductions understate the seriousness of the defendant's offense, automatically reduce the duration of the stayed sentence, and require no written justification. Of course, allowing amenability departures does not prevent prosecutors and judges from continuing to use charge or sentence bargains to achieve *de facto* departures; however, formal recognition of such departures will bring at least some of these decisions out into the open, so that appellate courts and the Commission can identify them and seek to provide guidance.

From the perspective of sentencing theory, amenable-to-probation departures, like those based on unamenability to probation, find support in the structure of the Guidelines themselves. The Guidelines departure rules authorize the judge to grant a mitigated dispositional departure *without* departing durationally, thus creating the same retributive anomaly previously discussed: the defendant does not deserve immediate commitment to prison, but does deserve it later, if the stay is revoked. Moreover, the Guidelines emphasize that dispositional and durational departures are separate decisions, requiring separate justification;[89] this implies that these two forms of departure may have different theoretical justifications. In any event, the Guidelines clearly allow judges to decide, in exceptional cases, that the defendant is a suitable candidate for probation, but that he also deserves the presumptive prison term if probation is later revoked. In such cases, the presumptive prison duration apparently sets a retributive maximum sentence but not a minimum — a theory of limiting retributivism similar to the one that appears to explain presumptive stayed terms.

To summarize, the amenability case law views the Guidelines disposition rules as based at least in part on presumptions of amenability. For less serious combinations of offense and prior record (presumptive stayed prison sentences), individualized community-based treatment is presumed to be feasible; in more serious cases (presumptive prison commitment), defendants are presumed unamenable to such treatment. Either of these presumptions may be overcome in exceptional cases.[90]

89. Guidelines, *supra* note 1, § II.D., comment II.D.02.

90. In practice, however, the unamenability presumption appears almost impossible to overcome for murder. *See, e.g.*, 1988 DATA SUMMARY, *supra* note 40, at 9 (all 37 murder cases received executed prison terms). Minnesota's sys-

Stayed prison sentences — whether based on a presumption or an individualized finding of amenability to probation — may be revoked if the defendant's subsequent behavior indicates that he is not, in fact, amenable. In that case, the defendant is given his full "just deserts" as defined by the presumptive prison term applicable to his conviction offense and prior record, or whatever longer or shorter term is retributively justified.

This mixed retributive-utilitarian theory makes sense of the Guidelines' heavy use of stayed prison terms, which are incompatible with a purely retributive theory. It also lessens the need for officials to abuse their discretionary powers of probation revocation and plea bargaining in order to achieve the same results. Such practical considerations are particularly important in a heavily treatment-oriented state such as Minnesota.

The theory also makes sentencing policy sense. There is no reason to waste probation efforts on defendants who have failed on probation before and who will probably fail again and end up in prison anyway. Promptly giving such defendants their full "just deserts" incapacitates high-risk offenders and sends appropriate deterrent messages to the public and the defendant. Conversely, conclusively presuming that presumptive-commit offenders are untreatable on probation makes little sense. Why must all such offenders be sent to prison, even if prison is very likely to make them worse — more dangerous and less treatable — after their release? Such a rigidly punitive approach punishes society, not just the offender and his family.

The problem with amenability departures is not that they are never justified, but rather that they are so vague, and so popular with judges, defense attorneys, probation officers, and even prosecutors, that they are likely to be overused. It is also true that amenability considerations are sometimes closely related to excluded social and economic factors. However, by addressing this case law immediately, the Commission might have been able to limit its rapid expansion.[91] The Commission could have sought to develop more precise definitions of "amenability" and "unamenability," including objective criteria for mak-

tem thus resembles the "multi-band" scheme proposed in Morris & Tonry, *supra* note 42, at 60 ("out" [of prison], "out but," "in but," and "in"). Thus, there may still be a few retributively required minimum prison terms, but they only apply to the most serious crimes, not all cases with presumptive prison terms.

91. *See supra* notes 54-63 and accompanying text (discussion of increasing disparity).

ing these findings. For example, unamenable-to-probation departures could have been limited to defendants with at least one prior failure on probation.[92] The Commission could also have proposed limitations on amenable-to-probation departures similar to those adopted by statute in 1985 for certain child sex abuse cases.[93]

Alternatively, the Commission could have expressly forbidden all amenability and unamenability departures. As shown above, however, that would not have been enough. To have a purely retributive dispositional policy and avoid *de facto* unamenability departures, the Commission would have had to devise a culpability rationale for revocation of stayed prison terms, or else eliminate such stays. The Commission would also have had to place stricter limits on charging and plea bargaining discretions[94] that can be used to achieve *de facto* amenability departures.

POST-1983 DEVELOPMENTS

The rates of mitigated dispositional departures increased further, between 1983 and 1988, largely due to an increase in departures based on amenability to probation. In December of 1988, the Commission amended the Guidelines Commentary to provide that all amenability and unamenability departures are invalid unless the court "demonstrate[s] that the departure is not based on any of the excluded [social or economic] factors."[95] The Commission expressly declined to either prohibit all such departures or propose criteria for their use.[96]

Post-1983 legislation suggests that the legislature accepts the use of amenability concepts in making disposition decisions, albeit under strict statutory controls. In 1985 and 1987, the legislature amended the criminal sexual conduct statutes and related recidivist provisions to permit a non-prison sentence when "a professional assessment indicates that the offender has been accepted by and can respond" to a treatment program.[97] The

92. *Cf.* State v. Chase, 343 N.W.2d 695, 697-98 (Minn. Ct. App. 1984) (declining to require any record of prior failure).

93. *See infra* note 97.

94. *See supra* notes 62-63 and accompanying text.

95. Guidelines, *supra* note 1, comment II.D.101.

96. *See* 1989 REPORT, *supra* note 63, at 17-18.

97. 1985 Minn. Laws, ch. 286, §§ 15-18; 1987 Minn. Laws, ch. 224, § 1. Any non-prison sentence must include jail time and require defendant to complete a treatment program.

1989 Omnibus bill[98] includes a similar provision for drug offenders.[99] In addition, extended terms and mandatory minimum prison terms apply to certain sex-motivated crimes if the court finds, based on a professional assessment, that the defendant is a "patterned sex offender," who "needs long-term treatment or supervision," and is a "danger to public safety."[100] The latter finding must be based either on the presence of one or more aggravating factors in the present offense or on the commission of a previous violent crime. However, early release is allowed if "the offender is amenable to treatment and has made sufficient progress in a [prison] sex offender treatment program . . . to be released [to a community program]."[101]

The 1989 crime bill also contains several other provisions permitting judges to make individualized assessments of dangerousness in setting prison durations. The bill authorizes judges to impose the statutory maximum term for certain violent crimes upon a finding that the defendant is "a danger to public safety" based on his past criminal behavior, or the presence of at least one aggravating factor in the present offense.[102] Judges may also impose the maximum term for any other felony if the defendant has more than four prior felony convictions and the court finds that the present offense "was committed as a part of a pattern of criminal conduct from which a substantial portion of the offender's income was derived."[103]

The legislature's principal 1990 crime bill seemed to further endorse individualized assessments of dangerousness and treatability. Central to this bill was a set of provisions authorizing and minutely structuring "intensive community supervision" (ICS) under the control of the state Commissioner of Corrections.[104] Eligible offenders include: 1) inmates on supervised release;[105] 2) offenders committed to custody following revocation of a stayed prison term; and 3) certain offenders originally committed to prison for terms of twenty-seven

98. *See supra* notes 18-21 and accompanying text.

99. 1989 Minn. Laws, ch. 290, art. 3, § 20.

100. *Id.* at art. 4, § 10.

101. *Id.* at art. 4, § 10, subd. 5.

102. *Id.* at art. 2, § 9, subds. 2 & 3.

103. *Id.* at art. 2, § 9, subd. 3.

104. 1990 Minn. Laws, ch. 568, art. 2, §§ 31-36.

105. Supervised release is the Guidelines "parole" term, consisting of earned good time. Guidelines, *supra* note 1, § V.

months or less.[106] These limitations suggest that the legislature was primarily interested in diverting offenders *out* of prison, rather than tightening up supervision of probationers; apparently, the legislature had begun to realize the serious prison-population consequences of the major severity increases enacted in 1989.

For present purposes, however, what is most significant about these ICS provisions is their implications for theories of punishment and allowable discretion. Although eligibility for ICS is limited by statute, the Commissioner of Corrections has discretion to decide which eligibles to actually release, and ICS release of any defendant in the second or third eligible group defined above also requires written approval from the sentencing court.[107] The third eligible group is subject to several further limitations, one of which is that the offender's presence in the community must not "present a danger to public safety."[108] The Commissioner of Corrections is also directed to revoke the release of any offender who fails to follow program rules, commits a new offense, or "presents a risk to the public, based on the offender's behavior, attitude, or abuse of alcohol or controlled substances."[109] In administering ICS programs, the Commissioner is further directed to pursue four goals: 1) to punish the offender; 2) to protect public safety; 3) to facilitate employment of the offender during ICS and afterward; and 4) to require restitution to victims, where ordered by the court.[110] The statute thus clearly endorses utilitarian goals of punishment (incapacitation,[111] employment of ex-offenders) and also implies that release decisions may be based on individualized assessments of offenders.

On the other hand, the ICS statute appears to reject pre-Guidelines notions of unfettered administrative discretion. After strictly defining eligible offenders, the statute goes on to specify minutely how ICS programs shall be operated: no more than fifteen offenders per probation officer; four defined phases of ICS, each with specified durations, degree of house arrest, and required face-to-face contacts and drug testing; specified work requirements; and mandatory revocation of release, under

106. 1990 Minn. Laws, *supra* note 104, at § 33, subd. 2.
107. *Id.* at art. 2, § 33, subd. 1.
108. *Id.* at art. 2, § 33, subd. 3(3).
109. *Id.* at art. 2, § 35, subd. 3(3).
110. *Id.* at art. 2, § 35, subd. 1.
111. *See also supra* text accompanying notes 22, 102 (emphasis on public safety in 1989 crime bill).

certain circumstances.[112] Moreover, the Commissioner's initial draft of internal regulations for ICS suggests that he intends to limit his own discretion even further. In particular, "dangerousness" of offenders will be based in part on group rather than individual predictions.[113]

Thus, it appears that sentencing theory and practice have not come full circle in Minnesota, at least not yet. Sentencing and release decisions are still less discretionary, and retributive values still receive greater emphasis, than was the case prior to the Guidelines. However, theory and practice are, in important respects, similar to pre-Guidelines patterns. Judges and correctional administrators retain power to base their decisions on the individual offender, and utilitarian goals continue to play an important role in these decisions.

The Commission, however, appears to remain committed to a more purely retributive theory. Perhaps the reason it refused to give greater acceptance to pre-Guidelines sentencing goals is that this acceptance would contradict the Commission's strongly-held view that the Guidelines are, and should be, "prescriptive" (norm-changing) rather than "descriptive" of prior norms (norm-reinforcing). However, as Parent recognizes,[114] there are limits to how much fundamental normative change a criminal justice system can accept, particularly change imposed by a small, unelected body with limited control over the actors in the system and without strong legislative support. It is no accident that the greatest problems of the Guidelines' non-compliance have always been in the areas of greatest conflict with pre-existing practices.[115] Parent argues that Minnesota's experience proves the superiority of the prescriptive approach, which he believes lends greater coherence to the process of drafting and implementing guidelines.[116] However, the lesson for future reformers may be a more modest one: Prescriptive guidelines can alter, but not erase, strongly-held system norms.

112. 1990 Minn. Laws, *supra* note 104, at art. 2, § 34, subd. 2; § 35, subd. 3; § 36.

113. For example, offenders are ineligible for early release if their commitment offense, or any prior conviction within 10 years, involved victim injury. MINN. DEP'T OF CORRECTIONS, CRITERIA AND GUIDELINES FOR INTENSIVE COMMUNITY SUPERVISION 2 (May 21, 1990 Draft).

114. D. PARENT, *supra* note 6, at 92.

115. *See, e.g.*, 1984 IMPACT REPORT, *supra* note 8, at 21, 36 (areas of Guidelines grid reflecting greatest change from prior practices had highest departure rates in 1981).

116. D. PARENT, *supra* note 6, at 39.

V. GOING BEYOND THE MINNESOTA GUIDELINES

Dale Parent ends his book with a number of suggestions for improving on Minnesota's pioneering sentencing reform. Two of these suggestions address what many consider to be major items of "unfinished business": the need for guidelines to regulate both non-imprisonment sanctions and plea bargaining.[117] Parent argues that both kinds of guidelines are feasible and essential and suggests that future states give their commissions enough time to allow development of such guidelines at the outset, or at least within a few years after initial implementation.[118]

Undoubtedly substantial unregulated discretion remains in both of these areas, and useful guidelines may eventually be developed. However, no one should underestimate the difficulties here, both in drafting meaningful guidelines and in ensuring that they are enforced. First, non-imprisonment and plea bargaining guidelines each require substantial databases that did not exist in Minnesota in 1980, and still do not in 1990.[119] Second, discretion in these two areas is closely related to purposes of punishment; to the extent that a state adopts the mixed retributive-utilitarian approach described in Part IV,[120] judges and attorneys will need substantial flexibility in choosing between prison and probation, in setting the conditions of probation, and in revoking probation. Flexibility is also needed to accommodate local variations in crime problems, values, and criminal justice resources. Third, as the Minnesota Commission recognized, simplicity of application is a separate and important goal.[121] The Guidelines are already quite complex; at some point, the cost of developing and enforcing further refinements outweighs the benefits. Finally, unless some other party, such as the victim or the Commission, is given standing to appeal,[122] it seems unlikely that either non-imprisonment or plea bargaining guidelines can be effectively enforced. This is particularly true as to the setting of *lower* limits on sanction severity: expe-

117. *Id.* at 209.

118. *Id.* at 217.

119. *See* D. PARENT, *supra* note 6, at 96-97 (non-prison sentences); *supra* note 48 and accompanying text (lack of data on actual sentencing impact of charge bargaining). However, efforts are now underway to collect data on local correctional resources and sentencing practices. *See* MINN. SENTENCING GUIDELINES COMM., REPORT TO THE LEGISLATURE 21 (1990).

120. *See supra* text accompanying notes 64-113.

121. D. Parent, *supra* note 6, at 53 n.3, 58 n.8, 71.

122. *See* A. VON HIRSCH, K. KNAPP & M. TONRY, *supra* note 4, at 168-72.

rience under the Minnesota Guidelines shows that upper limits are much more likely to be strictly enforced than lower limits,[123] because the prosecutor agrees to most cases of leniency and does not appeal them.[124]

POST-1983 DEVELOPMENTS

In 1988, the Minnesota Legislature ordered the Commission to study whether non-imprisonment guidelines should be developed.[125] In 1989, the Commission recommended against such guidelines; although several pilot projects were underway, most criminal justice officials were strongly opposed to statewide guidelines.[126] As of the fall of 1990, there still has been no legislative or Commission proposal to subject plea bargaining to guidelines or other limitations.

CONCLUSION

The Minnesota experience, as reflected in Dale Parent's book and subsequent events, shows that a system of presumptive sentences drafted by an independent commission can work to narrow discretion, stay within prison capacity, and change the type of offenders sent to prison. But that experience also shows the limits of criminal justice reforms. Such reforms operate in a systemic context — a complex web of inter-related rules and multiple, largely unregulated spheres of discretion. Changes in one part of the system are often cancelled out by compensating changes in other parts of the system. On the other hand, even limited changes require a substantial commitment to research and implementation. Parent's book shows how the Minnesota Commission, despite its broad policy-making and research mandate, was given too little time and money to address carefully all important issues.[127] As might be expected, budget problems only grew worse with time.[128]

Reformers in other states must thus temper their idealism with realism, setting their sights on achievable goals. At the

123. *See supra* note 43 and accompanying text (charge bargaining leniency); D. PARENT, *supra* note 6, at 189 n.6 (mitigated dispositional departures four times more frequent than aggravated departures); *Id.* at 187 (two-thirds of durational departures were toward shorter terms).

124. D. PARENT, *supra* note 6, at 167.

125. 1988 Minn. Laws, ch. 483, § 1, subd. 2.

126. MINN. SENTENCING GUIDELINES COMM., REPORT TO THE LEGISLATURE ON THREE SPECIAL ISSUES 19-36 (1989).

127. D. PARENT, *supra* note 6, at 32-33 n.5, 97 n.13, 209-10.

128. *Id.* at 207.

same time, they must recognize that even modest reforms require a substantial financial commitment, initially and over time. Above all, such reforms require the involvement of politically skilled commissioners like those whose work Dale Parent describes, and of talented and dedicated staff like Parent himself. Efforts to improve on their work, with the benefits of hindsight, must not be allowed to overshadow the magnitude of their accomplishment.