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The Minnesota Sentencing Guidelines: The Effects of Determinate Sentencing on Disparities in Sentencing Decisions

Blake Nelson*

Introduction:

This article examines the relationship between criminal sentencing and the characteristics of the individuals being sentenced in Minnesota. Its purpose is to examine whether the Minnesota Sentencing Guidelines have been successful in meeting their stated objective of reducing the importance of certain offender characteristics in sentencing. Part I of the article deals briefly with the philosophical underpinnings of criminal justice systems and the notion of punishment. Part II is an overview of determinate sentencing systems in general and the Minnesota Sentencing Guidelines in particular. Part III deals with the existing research in determinate sentencing systems. Part IV is an empirical analysis of determinate sentencing and its impact in Minnesota dealing with two specific relationships between criminal sentencing and felon characteristics. The first part of the analysis examines the characteristics of felons who receive departures from the Minnesota Sentencing Guidelines generally. The second part of the analysis examines the characteristics of felons who receive a specific type of judge-made reason for departure from the sentencing guidelines.

Part I: Philosophical Underpinnings:

Criminal law encompasses coercive governmental powers. Governments maintain not only "civil order," but also their own authority through enforced criminal codes. The choices of which acts to call crimes and which punishments to apply to those crimes are political ones. These decisions represent not only different political but different philosophical rationales.¹

* Blake J. Nelson received a B.A. from the University of Minnesota in 1989. J.D. University of Minnesota (1993), Ph.D. Candidate, University of Minnesota.

1. Philosophical rationales for punishment are manifold. For an overview of two major philosophical traditions, "just deserts" and utilitarianism, see EDMUND L.

Criminal law is a creation of the sovereign and has inherent potential for discrimination against the politically disadvantaged. In the United States, the criminal law has had a dichotomous character. While the criminal law has been codified by the legislatures of the states and, to a lesser extent, the federal government, the sentencing decisions under these criminal codes have been left to judicial discretion. Potential friction is created between the legislature that codifies the criminal law and the judiciary that imposes sanctions. Policy problems, absent any moral judgments about the merits of the criminal code and its enforcement, are, and have been, serious concerns that manifest themselves in three ways.

First, and most simply, uneven application of the existing criminal code is a problem which offends basic notions of equality and fairness.² Second, an incongruity concerning the philosophical bases for punishment³ between the legislature and the judiciary, or even within the judiciary, impart an incoherent or polychotomous nature to the criminal justice system. Consequently no unified theme or coherent pattern has been applied to criminal law. While differing philosophical bases for punishment may not produce an overall uneven administration of the law in terms of punishment imposed, opposed philosophical bases for punishment will produce no coherent philosophical basis for culpability. The result is that no philosophically coherent purpose for punishment is advanced. Third, the potential exists that certain elements of the criminal code will be undermined because they will not be enforced. Judges may fail to impose sanctions for certain crimes, in effect, making those actions only technically illegal. The failure to impose any meaningful sanctions for particular criminal code vio-

PINCOFFS, *PHILOSOPHY OF LAW* (1991). A "just deserts" basis of punishment is primarily concerned with treating people who are convicted of like crimes in the same way. A utilitarian basis of punishment allows for concerns such as benefit to society to be taken into account in sentencing. For a broad overview of different traditions of punishment, see David Garland, *Sociological Perspectives on Punishment*, 14 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 115 (1991).

2. This basic notion of equality and fairness is meant as a general illustration. For a general discussion, see PINCOFFS, *supra* note 1. These basic concepts have different implications for different philosophical bases of punishment. For an illustration of some interpretations of a fundamental concept of fairness, see Andrew von Hirsh, *Proportionality in Punishment: Some Philosophical Issues*, 16 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* (forthcoming 1992).

3. By philosophical bases of punishment, I refer to many schools of thought on why we should punish "criminals" such as "just deserts" or "utilitarianism." The purpose of this article is not to explain these philosophical perspectives, but to point out the existence of disparate views of punishment that would dictate different treatment of "criminals." It is also to suggest that philosophical bases of punishment must also be taken into account when evaluating whether or not a sentencing system is accomplishing the purposes it is established to accomplish.

lations can undermine the purpose of the code without creating an uneven administration of the law or creating conflicting philosophical bases for punishment.

Determinate sentencing systems represents a legislative attempt to resolve conflicts inherent in the dichotomous nature of the United States' criminal justice systems. Determinate sentencing systems are a political solution to a political problem. This article examines the Minnesota legislature's attempt to restrict the authority of the Minnesota state judiciary and enforce a coherent application of Minnesota's criminal law philosophically and politically. This article examines sentencing patterns before and after the imposition of the Minnesota Sentencing Guidelines to determine whether the legislative attempt to restrict the judiciary's decision-making has reduced disparities in dispositional departures⁴ based on the racial and socioeconomic characteristics of the convicted felons.

Part II: Overview of Determinate Sentencing:

Minnesota's determinate sentencing system went into effect on May 1, 1980. The promulgation of the sentencing guidelines represented the culmination of a drawn out political struggle⁵ that paralleled similar sentencing decisions being made in other states.⁶ Throughout the United States, the realities of prison overcrowding, the failure of the "therapeutic model of punishment,"⁷ increased demands for "get tough" policies on crime, and

4. Dispositional departures refer to departures from sentencing guidelines' presumptive disposition: whether an individual should be imprisoned or not. The Minnesota Sentencing Guidelines use two characteristics to determine the presumptive sentence. The first is the current severity of the offense. Felony offenses are scaled from one to ten in severity, with one being the least severe and ten being the most. The numerical value for the crime of which the offender has been convicted represents the offense severity score for that individual.

The second component used is a criminal history score. Each offense for which the criminal has been convicted has a corresponding criminal history score value. Offenders with no prior convictions have a criminal history score of zero. Thus, the more convictions or the more serious the crime, the higher the criminal history score. A mitigated dispositional departure represents a situation in which the Minnesota Sentencing Guidelines would have dictated that the judge impose a prison sentence, but no prison sentence was imposed. Conversely, an aggravated dispositional departure is a case in which the guidelines dictated that no prison sentence be imposed, but a prison sentence was imposed.

5. The process by which the Minnesota Sentencing Guidelines were formulated has been described by as a "three year struggle characterized by procedural maneuvering, emotionalism and misunderstanding." James K. Appleby, *Legislative History*, 5 *HAMLIN L. REV.* 301, 301 (1982).

6. See generally Johnathon D. Casper & David Brereton, *Evaluating Criminal Justice Reforms*, 18 *LAW & SOC'Y REV.* 121 (1984).

7. See, e.g., FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL*:

documented socioeconomic, racial disparities in sentencing⁸ fueled the push for sentencing reforms. Attempts at developing systems to deal with these realities were many and varied. Generally, approaches towards sentencing practices have fallen into three broad categories: prescriptive guidelines, which have the force of law, "voluntary" guidelines, and indeterminate sentencing, which allows for the greatest judicial discretion.

The move to determinate sentencing systems was spurred by two opposed political forces. On one hand, "liberal" attacks on the disparities of unfettered judicial discretion have been fueled by research on biases against the socially disadvantaged,⁹ disparities in parole board decisions,¹⁰ and a wide range of racial and socioeconomic disparities.¹¹ On the other hand, the desire for "law and order" and "get tough" policies on crime has been promoted by those who have seen the unfettered judicial discretion as too lenient on offenders.¹² This twofold drive helps determine what type of determinate sentencing system, if any, will develop in a given jurisdiction since the resultant sentencing system will largely be a product of both drives. The critical issues that distinguish these opposing political groups center around the nature of the determinate sentencing systems, their scope and their underlying purpose or philosophical bases.

Determinate sentencing systems premised on different philosophical bases of punishment will treat individual offenders differently. A utilitarian model of punishment concerned with recidivism¹³ will have little emphasis on the crime that the offender commits. Instead this model will emphasize the likelihood of the offender committing another crime.¹⁴ A utilitarian model of punishment concerned with deterrence will demand longer sentences for crimes where the deterrent effect associated with in-

PENAL POLICY AND SOCIAL PURPOSE (1981) (discussing the empirical and political failure of rehabilitative efforts).

8. See generally NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); DAVID FOGEL, *WE ARE THE LIVING PROOF - THE JUSTICE MODEL FOR CORRECTIONS* (1975); ERNEST VAN DE HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION* (1975); JAMES Q. WILSON, *THINKING ABOUT CRIME* (1975); and ANDREW VON HIRSCH, *DOING JUSTICE - THE CHOICE OF PUNISHMENTS* (1976).

9. See generally MARVIN E. FRANKEL, *STRUGGLE FOR JUSTICE* (1971).

10. See generally Leonard Orland, *Is Determinate Sentencing an Illusory Reform?*, 62 *JUDICATURE* 381 (1979).

11. See *supra* note 8.

12. See generally JAMES Q. WILSON, *THINKING ABOUT CRIME* (1975).

13. See PINCOFFS, *supra* note 1, at 14-15.

14. See MINNESOTA SENTENCING GUIDELINES COMMISSION, *THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION* (1984).

carceration is the most effective.¹⁵ A "just deserts" model, on the other hand, would emphasize the criminal act itself over other criteria.¹⁶ As a result, an empirical evaluation of any determinate sentencing system must be made in terms of its own expressed philosophical basis. For example, criticizing a criminal law system, which designates recidivism as a primary concern, for not proportionately incarcerating those with a higher socioeconomic status is inappropriate if members of that group are less likely to be recidivists. On the other hand, this criticism could be applied to a just deserts based criminal justice system because the political decisions made in developing that determinate sentencing system would not have been successful in carrying out their purpose.¹⁷

The attempt to resolve the potential conflicts between the codification of the law and its administration have taken three different political avenues. First, there are judicially developed guidelines. These guidelines offer the most autonomy to the judiciary as arbiters of the law. This attempt at determinate sentencing represents an attempt to prevent uneven administration of the law, and may have the effect of creating a coherent philosophical basis for the criminal justice system. It still leaves open the potential of certain parts of the criminal code being undermined. This method of creating sentencing guidelines is in the minority.¹⁸

Second, the direct legislative approach has the legislature directly attempting to draft and enact a sentencing system that constrains the judiciary. This method of determinate sentencing eliminates the potential frictions of uneven administration of the criminal code, as well as providing a coherent philosophical basis and not subverting the purpose of the criminal code. Most attempts at determinate sentencing have been of this nature.¹⁹ However, this method represents a potentially more difficult problem of hammering out a determinate sentencing system between the opposing political forces which may be present in the legisla-

15. See Pincoffs, *supra* note 1, at 15.

16. *Id.* at 15-19. See also ANDREW VON HIRSCH, *The Politics of "Just Deserts"*, 32 CAN. J. CRIMINOLOGY 397 (1990).

17. See, e.g., Milton Heumann & Colin Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC'Y 393 (1979); John Kramer & Robin L. Lubitz, *Pennsylvania's Sentencing Reform: The Impact of Commission-Established Guidelines*, 31 CRIME & DELINQ. 481-500 (1985).

18. Chris W. Eskridge, *Sentencing Guidelines: To Be or Not to Be* (1984) (unpublished paper presented at the Annual Meeting of the American Society of Criminology, Cincinnati, Ohio).

19. See, e.g., Terance D. Miethe & Charles A. Moore, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 CRIM. L. & CRIMINOLOGY 155-76 (1987).

ture. Because these forces seek sentencing systems for very different reasons, the potential exists that neither side can put a sentencing system into place. Thus, the potential exists that either a philosophically incoherent and hence ineffectual sentencing system is implemented, or that the parties cannot reach an acceptable political compromise.

The "sentencing commission" approach on the other hand, represents a method for not only addressing the major policy concerns that seem to underlie some need for determinate sentencing but also to ameliorate some of the problems associated with direct legislative action. As a result, the "sentencing commission" has gained perhaps the most attention in the literature as an innovative and unique means of developing and implementing determinate sentencing systems.²⁰ The Minnesota Sentencing Commission represents one of many possible types of sentencing commissions and the one that has been most heralded and emulated as a model.²¹

The Minnesota Guidelines:

The Minnesota Sentencing Guidelines represent a clear attempt to eliminate the three major potential sources of friction between the codification of the criminal law and its administration.

First, they limit the problem of judicial subversion of the criminal code by establishing prescribed²² presumptive sentences²³ for all convicted felons. A range in duration of sentences for each combination of criminal history and current offense severity is set by the guidelines. Additionally, the guidelines give some exem-

20. See generally ANDREW VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* (1987).

21. Sentencing commissions differ in many particular respects. The membership of the commission, the amount of legislative control, the nature of their authority to draft guidelines without legislative action are some of the major ways in which these sentencing commissions differ.

22. The sentencing guidelines in Minnesota are prescriptive, as opposed to descriptive. Descriptive sentencing guidelines purport to examine current sentencing practices and merely codify them. Prescriptive guidelines do not claim merely to codify existing practice, but to determine and set ranges for crimes that are not necessarily descriptive of previous practices.

23. Presumptive sentencing guidelines are "sentencing guidelines for individual cases adopted by a sentencing agency, usually called a 'sentencing commission.' The guideline sentence or range is presumptively applicable and the judge must give reasons for imposing any other sentence; the adequacy of those reasons is generally subject to appellate sentence review." MICHAEL H. TONRY, NATIONAL INSTITUTE OF JUSTICE, *SENTENCING REFORM IMPACTS* 102 (1987). Presumptive sentencing guidelines are contrasted with voluntary guidelines which are voluntary both in judicial compliance with the guidelines and in that there is no right to appeal departures from the guidelines.

plary grounds for mitigated and aggravated departures.²⁴ Under normal circumstances a judge is limited to a narrow durational sentence range to differentiate different convicted felons. Second, the philosophical basis of the sentencing system is avowedly a "modified" just deserts type.²⁵ Third, the uneven administration of the criminal law has been expressly addressed by forbidding certain factors to be taken into account when the judge makes his sentencing decision. Above all, the Minnesota Sentencing Guidelines state that they are designed to embody the principle that "sentencing should be neutral with respect to the race, gender, social or economic status of convicted felons."²⁶

Part III: Existing Literature:

The amount of sentencing discretion that remains with the judiciary is central to the elimination of potential conflicts that exist between the codification of criminal law and its application. It seems logical that presumptive sentencing guidelines are more likely to have their intended effect than a system where compliance is voluntary. Voluntary compliance by the judiciary or by judges has been considered the predominant obstacle to effective determinate sentencing systems.²⁷

Most of the literature on determinate sentencing systems is written under the theoretical assumption that disparities which exist in the sentencing process will be transferred to the administrative aspects of the legal system. In other words, most of the literature asserts that the intention of the determinate sentencing system would be circumvented by changes in charging and other nonsentencing practices.²⁸ Research examining whether sentenc-

24. Grounds for both aggravated and mitigated departures are suggested by the guidelines. Some have been added through legislation such as an aggravated departure for possessing "controlled substances" in a "school zone" or "park zone." MINN. STAT. 244.095 (1991).

25. Since the Minnesota Sentencing Guidelines use only criminal history score and offense severity in determining presumptive sentences, a true "just deserts" model would entail a strong emphasis on offense severity with minimal emphasis on criminal history score. The "modified just deserts" model employed by the Minnesota Guidelines places a moderate emphasis on offense severity with a low emphasis on criminal history. See MINNESOTA SENTENCING GUIDELINES COMMISSION, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION 10-14 (1984).

26. MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE 26 (1981).

27. I RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (Alfred Blumstein et al. eds., 1983) (hereinafter THE SEARCH FOR REFORM); TONRY, *supra* note 23.

28. The predominant literature in this area examines plea bargaining as a means by which the discriminatory effects eliminated in sentencing decision are not ameliorated, but merely moved to the administrative side of the criminal justice

ing disparities under such a system have been eliminated is sparse. However, it is important to note that even presumptive sentencing guidelines have a certain permissible universe of dispositional and durational²⁹ departures which are available to the sentencing judge.

The lack of empirical research testing determinate sentencing systems against their stated purposes is also a noted weakness of the existing literature.³⁰ Most of the research in the area of judicial compliance comes from states, via their sentencing commissions or other responsible state departments.³¹

One of the reasons the current empirical research in determinate sentencing is not definitive is the broad range of sentencing guideline systems that exist and the absence of available data to analyze. The existing empirical studies involve examinations of the California Uniform Determinate Sentencing Law,³² the Pennsylvania guidelines,³³ the Minnesota Sentencing Guidelines,³⁴ and most recently the Federal Sentencing Guidelines.³⁵ Research into the California Uniform Determinate Sentencing Law has been

system. See, e.g., Terance D. Miethe & Charles A. Moore, Evaluation of Minnesota's Felony Sentencing Guidelines (1987); Heumann & Loftin, *supra* 17; and Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

29. A durational departure is a departure from the presumptive sentence duration imposed by the guidelines based on whatever criteria the guidelines use to determine the presumptive sentence. The Minnesota Sentencing Guidelines predominantly use two factors to determine a presumptive sentence. See *supra* note 4.

30. See generally THE SEARCH FOR REFORM, *supra* note 27; SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT (1985); and TONRY, *supra* note 23.

31. See, e.g., MINNESOTA SENTENCING GUIDELINES COMMISSION, SUMMARY OF 1988 SENTENCING PRACTICES FOR CONVICTED FELONS (1990); MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE (1990); and MINNESOTA SENTENCING GUIDELINES COMMISSION, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION (1984). These tend to be periodic in nature and focus on issues of particular concern to the legislature at the time, such as intermediate sentencing and other issues.

32. See Jacqueline Cohen & Michael Tonry, *Sentencing Reforms and their Impacts*, in II RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 305, 353-411 (1983).

33. See John Kramer & Robin L. Lubitz, *Pennsylvania's Sentencing Reform: The Impact of Commission-Established Guidelines*, 31 CRIME & DELINQ. 481-500 (1985).

34. See, e.g., Terance D. Miethe & Charles A. Moore, *Socio-Economic Disparities Under Determinate Sentencing Systems: A Comparison of Pre- and Post-Guideline Practices in Minnesota*, 23 CRIMINOLOGY 337 (1985).

35. See, e.g., Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L. J. 400 (1991).

hampered by the lack of data regarding offender characteristics and case attributes.³⁶ Examination of Pennsylvania's voluntary guidelines has found that sentencing disparities have been reduced, but sentencing remains highly variable.³⁷ The research into the Federal Sentencing Guidelines concentrates on the types of prosecutions taking place under the pre- and post-guidelines periods and did not examine offender characteristics in sentencing.³⁸

The Minnesota Sentencing Guidelines have received only a little more empirical attention. While they have been the subject of considerable attention as the first prescriptive and presumptive determinate sentencing system to be implemented, the literature has been mainly concerned with descriptive research into the history of the development of the guidelines.³⁹ The empirical research done regarding the effectiveness of the Minnesota Sentencing Guidelines has been based on data from only the first four years that the guidelines were in effect.⁴⁰ Terance D. Miethe and Charles A. Moore examined the Minnesota Sentencing Guideline Commission's empirical research by the use of regression analysis⁴¹ of data from the first year of the guidelines.⁴² The analysis confirmed that dispositional and durational departures were more predictable and uniform under the sentencing guidelines than under non-regulated sentencing decisions. However, sentencing decisions not covered by the guidelines, such as the imposition of jail time as a condition of a stayed prison sentence, were found to be influenced by social and economic characteristics of the offender.⁴³ Miethe and Moore did not, however, examine the ways in which judicial discretion over dispositional or durational departures may be influenced by the offender's economic and social

36. Cohen & Tonry, *supra* note 32.

37. Kramer & Lubitz, *supra* note 33.

38. Karle & Sager, *supra* note 35, at 428 et seq. (focusing on the case law problems in taking into account offender characteristics).

39. See, e.g., Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, 75 MINN. L. REV. 727-54 (1991); Kay Knapp, *What Sentencing Reform in Minnesota Has and Has not Accomplished*, 68 JUDICATURE 181 (1984).

40. 1981, 1982 and 1984.

41. Regression analysis is a statistical estimation technique that attempts to explain variation in a dependent variable (e.g. whether an individual is sentenced to prison) based on a set of independent variables. For a description of regression analysis, see ROBERT S. PINDYK & DANIEL L. RUBINFELD, *ECONOMETRIC MODELS AND ECONOMIC FORECASTS* (1991).

42. Terance D. Miethe & Charles A. Moore, *Radical Differences in Criminal Processing: The Consequences of Model Selection on Conclusions about Differential Treatment*, 27 SOC. Q. 217 (1986).

43. *Id.*

characteristics.⁴⁴

The Minnesota Sentencing Guidelines Commission itself conducted an empirical study of the effects of its guidelines.⁴⁵ In three in-depth studies, the Commission primarily used descriptive statistics to examine the effects of the guidelines on sentencing practices. Descriptive statistics tend to paint a picture that maximizes the desired effects of the sentencing guidelines and minimizes the apparent deviations in sentencing. For example, when assessing durational departures, mitigated and aggravated, the Minnesota Sentencing Guidelines Commission routinely expressed them as a percentage of all cases in the data, rather than all cases which are eligible for a dispositional departure. In the case of aggravated dispositional departures, the number should, instead, be a percentage of defendants with a presumptive stayed sentence, and in the case of mitigated dispositional departures, a percentage of presumptive executed prison terms.⁴⁶ This can create a very different picture of the amount of judicial departure that actually takes place from the guidelines themselves. Such judicial discretion may occur in a number of ways. One obvious example involves dispositional departures. Suppose a situation where most of the dispositional departures are of the mitigated type, while relatively few are aggravated. Further suppose that the number of people eligible for aggravated departures is equal or greater than that eligible for mitigated departures. In such a case, the percentage of total dispositional departures may be low, while the percentage of mitigated dispositional departures is very high. In sum, descriptive statistics can distort what is actually happening by making inappropriate comparisons.

By stressing the role of prosecutorial power and discretion, the literature in the area of determinate sentencing neglects the role of judges and how judges react to the imposition of a determinate sentencing system. The theoretical justification for this approach is that constraints on judicial decision-making provide the

44. Miethe and Moore's analysis looked at uniformity in sentencing decisions in general, rather than looking at dispositional departures. Several other studies by Miethe and Moore have concentrated on the charging and plea bargaining practices under the Minnesota Sentencing Guidelines as a means of circumventing the intent of the guidelines. See Charles A. Moore & Terance D. Miethe, *Regulated and Non-Regulated Sentencing Decisions: An Analysis of First-Year Practices Under Minnesota's Felony Sentencing Guidelines*, 20 LAW & SOC'Y REV. 253-77 (1986).

45. The most significant of these is a 1984 analysis of the impact of the Minnesota Sentencing Guidelines on sentencing in general. MINNESOTA SENTENCING GUIDELINES COMMISSION, *THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION* (1984).

46. Frase, *supra* note 39.

opportunity for sentencing disparities to be displaced through prosecutorial and other decisions outside the domain of the sentencing guidelines.⁴⁷ This displacement rationale seems to suggest two conclusions which may or may not be borne out by more in-depth empirical research. First, prosecutorial discretion is not being exercised to discriminate, at least not to the same extent, as it was before the imposition of the determinate sentencing system.⁴⁸ Second, there is an overall institutional bias that will compensate for the elimination of the judicial decision bias.⁴⁹

While there may be institutional biases other than judicial discretion, it does not seem as likely that prosecutors, for example, will either consciously or intuitively "take up the slack" or some of the "slack" in discriminatory effect left by the elimination of judicial discretion. Indeed, if it is the purpose of determinate sentencing to remedy the abuses of indeterminate sentencing systems, it is even more logical that these abuses are the results of judicial decision-making in sentencing. It is an heroic assumption to assume that the imposition of a determinate sentencing system would necessarily change the underlying philosophical, practical, or psychological motives of the sitting judiciary. It cannot be assumed that simply because variance, in terms of sentencing practices, has lessened that the same amount of disparate treatment is not taking place. It may be that the same disparate treatment has been displaced and constrained, but not eliminated. The question then becomes whether the constraint existing in the determinate sentencing system is sufficient to keep judicial abuses in check or if the natural room for "maneuver" within the sentencing system allows these abuses to resurface in a displaced and/or ameliorated form.

47. Alschuler, *supra* note 28; Todd R. Clear et al., *Discretion and the Determinate Sentence: Its Distribution, Control and Effect on Time Served*, 24 CRIME & DELINQ. 428 (1978); and Candace McCoy, *Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Displacement in California*, 9 JUST. SYS. J. 256 (1984). These include not only non-judicial decisions, but sentencing not covered by the guidelines, such as non-felony sentencing.

48. Certainly, if plea bargaining and other forms of prosecutorial discretion were discriminating to the same extent before the determinate sentencing system was put into effect, there would be no purpose in studying it as a causally related phenomenon.

49. To put this another way, this suggests that there is a sum total of discriminatory effect in the system. Out of this sum total a certain amount is expressed in sentencing decisions. When the ability to express this discriminatory effect in sentencing decisions is removed from one part of the system, the system as a whole will express this discriminatory effect elsewhere in the system to compensate.

Part IV: Objectives of this Article:

The empirical analysis in this article will evaluate the sentencing practices in Minnesota since the introduction of the Minnesota Sentencing Guidelines as they relate to uniformity, neutrality and proportionality in sentencing, and how they relate to the underlying philosophical basis of the guidelines. The data used in the analysis is from one pre-guideline period (1978), the yearly felony conviction data since the Guidelines (1981 through 1989) as well as four in-depth post-guideline studies (1981, 1982, 1984, 1987). The specific objectives of this research are twofold:

- 1) To determine the extent to which proportionality and uniformity have been improved in dispositional decisions (whether or not the offender should go to jail) in terms of racial and socioeconomic factors.
- 2) To determine if judge-made decisional law⁵⁰ has resulted in a reintroduction of criteria into the sentencing system that the guidelines specifically intended to eliminate.⁵¹

Methodology:

The first question was examined using the four in-depth studies and the 1978 study. Most of the data already collected was of a summary nature, on dispositional departure rates of the system as a whole,⁵² which can lead to an imprecise picture of whether there is any systematic bias in decisions of whether or not to grant dispositional departures.⁵³ As previously noted, commentators have found that indeterminate sentencing systems led to discriminatory application of sentences based on racial and socioeconomic factors,⁵⁴ and it is these same criteria that the Minnesota Sentencing

50. The guidelines represent a framework within which judicial modification can and clearly has occurred. Judge-made law can create any number of modifications to these guidelines such as allowable reasons for departure (mitigated or aggravated), the appropriate way to compute criminal history scores and the effects of multiple offenses being prosecuted simultaneously.

51. Such criteria includes racial, educational, and socioeconomic factors.

52. See, e.g., Frase, *supra* note 39, at 739. Frase points out that the extent of deviation from the guidelines themselves appears different if you look at mitigated and aggravated dispositional departures as a percentage of cases eligible for those departures as opposed to a percentage of the total number of cases. Obviously, looking at mitigated and aggravated departures as a percentage of the total number of cases will give you a lower percentage than if you were to compute them as percentages of those cases eligible for such a departure.

53. Simply because there are more African-Americans getting mitigated or aggravated departures as a percentage of eligibles than whites does not necessarily mean that racial bias is taking place in the sentencing system. For example, it is possible that African-Americans and whites as groups commit different kinds of crimes, different numbers of crimes, occupy different socioeconomic statuses, have different educational backgrounds, etc.

54. See *supra*, notes 7, 8, 9 and 10.

Guidelines have sought to eliminate.⁵⁵ Additionally, commentators have hypothesized that the introduction of judicially based reasons for departure reintroduce not only socioeconomic and racial factors back into the sentencing decision, but many social and lifestyle factors.⁵⁶

Questions addressed by this study are:

1. Has the sentencing system eliminated some of the "typical" racial and socioeconomic biases of indeterminate sentencing?
2. If so, to what extent has the sentencing system eliminated them?
3. Has amenability to treatment reintroduced these biases, and does it introduce other social biases as suggested by Miethe and Moore?

The factors, suggested by the literature as having an influence on sentencing decisions, were incorporated into a multivariate model of judicial sentencing. The analysis examines the conditional probability that an individual having a particular characteristic will be granted a dispositional departure due to each impermissible reason for departure.⁵⁷ In doing this, it also allows

55. See *supra* note 26.

56. See MIETHE & MOORE, *supra* note 28. Miethe and Moore assert that "amenability to probation is strongly associated with various offender characteristics (e.g., community ties, family stability, employment status)," and that "this justification for departures seems likely to adversely impact both proportionality and neutrality of punishment." *Id.* at 24. Amenability to treatment is one judicially based reason for dispositional departures (not durational) that has received much attention as potentially subverting the purpose of the sentencing guidelines system.

57. There are still methodological problems involved in this. The most problematic aspect may be in not including control variables for criminal history and offense severity. These factors were not included because there is a problem with the inappropriate weighting of factors since certain criminal history and offense severity scores are eligible only for mitigated departures and others are eligible only for aggravated departure. Hence, by the nature of the guidelines, there would be too much explained by these factors if they were included. I am sacrificing a goodness of fit and predictive ability of the model to ascertain at least the direction of these impermissible factors. The main purpose is to see if there is a consistent relationship over time. When I examine amenability to treatment as a subset of mitigated departures these problems are somewhat ameliorated since everyone in both groups is within the eligible criminal severities and criminal history scores. I generated a correlation matrix for a number of possible variables relating to socioeconomic status, education, race, criminal history and offense severity. A correlation matrix produces a set of correlation coefficients that show the simple association between each pair of variables. A correlation coefficient is a number which is a measure of association that ranges from -1 to +1, with 0 indicating no relationship or association between the variables. Positive one indicates perfect positive association, negative one indicates perfect negative association. By correlating different racial groups with different types of crimes, we can see if they are highly associated - if one racial group is more likely to be associated with a particular crime. I found no statistically significant correlations between race, occupation, criminal history or offense severity. In fact, as a whole, I generally found no significant correlations

us to see if there are any particular patterns of certain offender characteristics that systematically have an impact on the decision to grant a dispositional departure from the Guidelines' presumptive sentence.⁵⁸ By finding out which of the variables in the equation carry the greatest weight it is possible to examine whether judges are using impermissible criteria in their sentencing decisions. This was done by using a probit model⁵⁹ which determined, out of all convicted felons, what factors had the most influence in whether an aggravated or mitigated dispositional departure was granted.

The second research objective was accomplished through a probit analysis of the data contained in the four in-depth panel studies (1981, 1982, 1984, 1987).⁶⁰ Several different regression models were used to test to what extent prohibited criteria were making their way back into the sentencing decisions covered by the guidelines. In examining whether an "amenability to treatment" mitigated dispositional departure was given, a series of variables

other than the expected negative correlation coefficients for dummy variables (variables representing a single category, such as whether an individual is caucasian, usually coded with a 0 or 1) from the same categorical variable (hence "White" correlated highly negative with "Black," "Asian," etc. since an offender can only be one race this statistically significant correlation is to be expected). Thus, in at least the samples I used, people of different racial and socioeconomic backgrounds did not seem to commit different types of crimes or have different criminal histories (at least to the extent of being statistically significant).

58. For example, are whites committing property crimes more likely to get a mitigated departure than non-whites with the same criminal history committing the same property crimes. Or if there is no such disparity for crimes against persons controlling for criminal history and offense severity.

59. For an explanation of probit models, see PINDYK & RUBINFELD, *supra* note 41, at 254-57.

60. A probit analysis was used because of the problems using Ordinary Least Squares (OLS) regression equations when the dependent variable is dichotomous. OLS regression is a technique which minimizes the sum of squared errors (simply, the sum of squared errors is the difference between the predicted values the equation generates and the actual data squared and added together). OLS regression uses this sum of squared errors to plot a unique line through the data. This line is found by finding the line that has the least sum of squared error. In OLS regression, the correlation coefficient estimated is the slope of the OLS regression line. In the case of regression where you have more than one variable explaining the dependent variable, the partial regression coefficients represent the change in the dependent variable associated with a unit change in the independent variable, controlling for all other independent variables. It represents the independent effect of the one independent variable on the dependent variable. In the case of a dichotomous dependent variable, this slope coefficient is meaningless. There is not a range of values that the dichotomous dependent variable can have; there are only two possible values. Probit models use a different model form. Instead of being linear, the probit model uses an s-shaped curve, to more closely approximate the fact that there are only two possible outcomes for the dependent variable. See generally JOHN H. ALDRICH & FORREST D. NELSON, *LINEAR PROBABILITY, LOGIT AND PROBIT MODELS* (1984).

that are not supposed to be taken into account (e.g. race, gender, marital status, employment status, educational attainment) were examined.⁶¹ These variables became the independent (or predictor) variables to attempt to determine whether an "amenability to treatment" mitigated dispositional departure was given to felons with certain characteristics as opposed to other convicted felons receiving mitigated departures.

Because of the prescriptive and presumptive nature of the Minnesota Sentencing Guidelines, these regulated sentencing decisions should show a high level of determinacy based on the applicable prescriptive criteria.⁶² Offender characteristics, on the other hand, should have no appreciable impact on sentencing decisions after the guidelines go into effect. This has several implications. When we specify a model of judicial decision-making that contains predominantly impermissible bases for granting a dispositional departure from the presumptive sentence, the variables should not be statistically significant and should not show continuity over time. If there is statistical significance over time for these variables, and there is also a continuity in both direction and magnitude of some of these variables, it will be clear that they do influence judicial decisions to depart from the Minnesota Sentencing Guidelines. If judicial discretion is operating in a systematically biased manner, the literature suggests that this bias would be more pronounced in the case of "amenability to treatment" mitigated dispositional departures because of the opportunity they provide to reintroduce impermissible offender characteristics.⁶³

The Data

The research questions were analyzed using two primary sources of data. In the first, state-wide monitoring data on all post-guideline time periods up until 1989⁶⁴ and a sample of pre-guideline cases collected in 1978 as a baseline measure of offender characteristics, sentencing decisions, and case attributes were used. In the second, four in-depth panels for the post-guideline years 1981, 1982, 1984 and 1987 were used. The yearly evaluation data on all felony convictions in the district courts in Minnesota contain less case attribute and offender characteristic data than the in-depth

61. See *supra* note 16.

62. Predominantly offense severity and criminal history score.

63. See Miethe & Moore, *supra* note 28.

64. The last year for which the Minnesota Sentencing Guidelines Commission had data prior to publication.

panels,⁶⁵ but it provides information on criminal history, offense severity, dispositional and durational departures, and some offender characteristics.⁶⁶ Even though there is not as much socio-economic data, racial dispositional disparities can be examined controlling for criminal history, offense severity and some offense and offender characteristics.

The in-depth samples⁶⁷ of pre-guideline data (1978⁶⁸) and post-guideline data (1981,⁶⁹ 1982,⁷⁰ 1984,⁷¹ 1987⁷²) contain a great

65. Factors such as occupation, employment at time of sentencing, and school education are left out of the data.

66. Such as race, age, sex.

67. The data for each of the subsequent time periods were collected from the following sources: Minnesota Sentencing Guidelines worksheets (except 1978 data), Minnesota Department of Correction files, Minnesota State Judicial Information System (SJIS) transaction reports (which provided the case number for coder tracking through the court system), court transcripts, initial complaints filed by prosecutors, arrest reports and pre-sentence investigation reports. These samples were stratified which means that a random sample is drawn from each of several different groups which compose the entire population. Stratifying by race means that an independent random sample was drawn from all white felons, another independent random sample was drawn from all African-American felons, and so forth until all the groups that compose the entire population of felons are sampled.

68. This data covers a year long-period two years before the guidelines went into effect. It was collected by taking an approximate sample of 50 percent of felony offenders sentenced in district court between July 1, 1977 and June 30, 1978. The sample included the entire population of female offenders and about 42 percent of all male offenders from each of Minnesota's 87 counties. Data on alleged offense behavior, victimization, conviction offense, criminal history, offender characteristics, case processing, and plea negotiations were contained in this base line data set.

69. This data covers the first 18 months under the Minnesota Sentencing Guidelines, May 1, 1980 to October 1, 1981. The sample of cases included in this study were stratified by disposition, county, race and sex. Also included in this sample is the population of cases that were committed to the Commissioner of Corrections and samples of stayed sentences from eight Minnesota counties (Anoka, Crow Wing, Dakota, Hennepin, Olmstead, Ramsey, St. Louis, and Washington). The sample of stayed sentences was stratified by gender and race with female and minority offenders sampled at a higher rate than white males to increase the representativeness of the smaller subpopulations. MINNESOTA SENTENCING GUIDELINES COMMISSION, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION 20 (1984).

70. These data cover an additional 12 month period from October 1, 1981 to September 31, 1982. This data set contains the population of offenders committed to the Commissioner of Corrections from eight Minnesota counties (Anoka, Crow Wing, Dakota, Hennepin, Olmstead, Ramsey, St. Louis, and Washington). *Id.* at 19-20.

71. These data cover a subsequent 12 month period from November, 1983 until October, 1984. The sample is similar in scope and design to that used in the 1981 and 1982 studies. There are some differences in the coding of variables that needed to be taken into account. Most notably: the categories listed under occupation changed from the 1978, 1981, and 1982 to the 1987 study. The categories "disabled" and "youth", present in the 1978, 1981 & 1982 samples were discarded. "Owner" and "agricultural worker" were added for the 1984 and 1987 studies. *Id.*

72. The primary purpose of this in-depth study was to provide information on

deal of data regarding the offenders' socioeconomic status, educational background, and other measures of "community ties" such as residence, marital status and so on. While much of the in-depth data on 1981, 1982 and 1983 was drawn from eight of Minnesota's most populous counties, the samples still provide an opportunity to examine the role of offender characteristics in the judge's sentencing decision. Acquittals, dismissals and convictions for gross or petty misdemeanors are not included in the in-depth data. However, the primary concern is whether discrimination is still taking place within the sentencing decision process, not whether it exists outside the process.

The 1987 in-depth data provides, perhaps, the best estimation of the actual effects of offender characteristics on mitigated dispositional departures. This data contains the population of all convicted felons receiving a mitigated dispositional departure with the rest of the sample stratified⁷³ by race and gender. It also provides the best estimation of mitigated dispositional departures and departures due to "amenability to treatment," a substantial subset of mitigated dispositional departures.

Mitigated and Aggravated Dispositional Departures

The Minnesota Sentencing Guidelines are designed to embody the principle that "sentencing should be neutral with respect to the race, gender, social or economic status of convicted felons."⁷⁴ Consequently, the decision on the length and manner of sentencing convicted felons should be made regardless of these considerations. Yet, empirical research has not fully examined whether this is the case.

Previous research does, however, suggest variance in terms of sentencing decisions has been reduced since the imposition of the Minnesota Sentencing Guidelines.⁷⁵ However, the questions of what factors go into the judicial sentencing decisions under the

intermediate sanctions. This in-depth data collection effort collected a sample of cases from 37 Minnesota counties to provide a baseline set of data to guide policy and decision-making in the use of intermediate sanctions. The cases sampled were from the population of convicted felons sentenced to a stayed sentence between November 1, 1986 and October 31, 1987. The sample consisted of a sample of those who received a presumptive stayed sentence under the Minnesota Sentencing Guidelines and the population of cases where mitigated dispositional departures were granted and was otherwise stratified by race and gender. MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE ON INTERMEDIATE SANCTIONS (1991).

73. See *supra* note 63.

74. MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE 26 (1981).

75. See Miethe & Moore, *supra* note 34; MINNESOTA SENTENCING GUIDELINES

guidelines and whether the guidelines have materially altered the supposed biases and problems which they were meant to address have been largely unexplored. Since one of the basic premises of determinate sentencing is that judicial discretion has resulted in abuses in sentencing, attempts to constrain judicial discretion should be met with resistance if actual biases do exist. If such bias exists, it will likely express itself within the boundaries of the sentencing guidelines as it did before their inception. The biases could be expressed through permissible departures allowed by the sentence guidelines themselves. Such departures should show these alleged biases discriminatory effect. The primary difference is that these biases would be expressed under acceptable reasons for departure from the guidelines, even though the same impermissible factors were still being factored into the judicial sentencing decision.

To test whether the Minnesota Sentencing Guidelines are operating as intended (i.e. the exclusion of race, sex, socioeconomic status and community ties as variables in the decision-making process), a model of judicial decision-making that takes these prohibited factors into account was specified. In the second part of this analysis, the same set of predictor variables, prohibited criteria, was used to determine whether or not an individual offender is more likely to get a mitigated departure due to amenability to treatment.

Dependent Variable

Two models were specified, each with a different dependent variable. In the first model, the dependent variable was whether a mitigated dispositional departure was granted. A mitigated dispositional departure was coded 1, whereas both aggravated dispositional departures and no dispositional departure were coded 0. In the second model, the dependent variable was whether an aggravated dispositional departure was granted. An aggravated dispositional departure was coded 1, whereas both mitigated dispositional departure and no dispositional departure were coded 0.

Race: Race was coded as a series of dummy variables.⁷⁶

COMMISSION, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION (1984).

76. A dummy variable is a way to take categorical data, such as race and create data that can be used as if it were a number that is meaningful for statistical estimation. Simply, a dummy variable is a variable which is coded as one of two values (usually zero or one). Thus each racial category (White, Black, Hispanic, etc.) has its own dummy variable. Each racial category was assigned its own variable where 1 represents someone of that racial background; otherwise it was coded zero.

White (White), African-American (Black), Hispanic (Hispanic), American Indian (Indian), Asian (Asian) and Other were used, with Other being dropped out of the equation to prevent collinearity.⁷⁷

Socioeconomic Status: Socioeconomic status was coded as a series of dummy variables each representing a certain occupation: Unemployed (unemploy), Owner (owner), Professional (profess), White Collar (whitec), Skilled Labor (skill), Unskilled Labor (unskill), Agricultural laborer (ag), and Other, with Other being dropped to avoid collinearity.

Marital Status: Single (single) was coded as the variable to indicate any other status other than married.

Gender: Male (male) was coded 1; female 0.

Residence: Residence was coded as a series of dummy variables: Alone (alone), with Spouse (spouse), with other Family (family), with Friends (friends), in an Institution (inst), or with Employer. Living with Employer was dropped to avoid collinearity.

Since either a mitigated or an aggravated departure as a dependent variable is dichotomous,⁷⁸ Ordinary Least Squares (OLS)⁷⁹ regression is inappropriate to use in this case.⁸⁰ Instead, a probit model which estimates parameters for each of the variables above by a maximum-likelihood estimate (MLE) technique⁸¹ was used.

Mitigated Dispositional Departures

The first model was designed to examine the effects of the

77. Any regression model assumes that no exact linear relationship exists between any of the independent variables in the model. If such a relationship exists, they are collinear. If perfect collinearity exists coefficients cannot be calculated, because there is no unique solution to the equation. In the case of dummy variables, since all racial categories are mutually exclusive and every felon must fall into one of those categories, if we included every dummy variable for racial classification in the equation, they would be perfectly predictive of each other. In order to be able to solve the equation, one of the categories of race (or sex, or socioeconomic status, etc.) must be left out. See generally PINDYK & RUBINFELD, *supra* note 41 at 83-84.

78. Dichotomous simply means that it has two possible outcomes.

79. See *supra* note 60.

80. See ALDRICH & NELSON, *supra* note 60.

81. A maximum-likelihood estimate technique is designed to pick parameter estimates that imply the highest probability or likelihood of having obtained a particular observed sample. In simple cases, these will be identical to the estimates generated by the least-squares estimators. It is in situations where violations of OLS are violated, such as the dependent variable being dichotomous, that the least-squares estimates become biased, the maximum-likelihood estimates, however, remain unbiased. *Id.* at 49-52.

above variables on the probability that a mitigated dispositional departure was granted. The direction of the coefficients indicate whether a mitigated dispositional departure was more or less likely to be granted. A negative coefficient indicates it is less likely that a felon in that category will receive a mitigated dispositional departure. A positive coefficient indicates that it is more likely that a felon in that category will receive a mitigated dispositional departure.

Table 1 below indicates the results for running the probit model on the data for 1978, 1981, 1984 and 1987:

TABLE 1
Maximum Likelihood Estimates of Factors Influencing Mitigated
Dispositional Departures

Variable	Coefficients by Year					
	mit	1978	1981	1982	1984	1987
RACE						
white		5.84*	4.40*	-.16	-.03	.42
black		5.13*	4.50*	-.05	-.13	.75
indian		5.44*	4.42*	.11	.11	.36
hispanic		5.69*	4.52*	-.15	-.38	.32
asian		****	5.33*	.36	.14	-.22
JOB TYPE						
unemploy		-.40	-.14	.185	.15	-.5***
youth		-.27***	dropped ⁸²	dropped	N/A	N/A
owner		N/A	N/A	N/A	-.08	.67***
profes		-.46	.78***	-.18	.77***	.46**
whittec		-.21	.38***	.14	.54***	.15
skill		.16	-.19	.35***	.23	-.3
unskill		-.03	-.18	.17	.31	-.87
ag		N/A	N/A	N/A	****	****
MARITAL						
single		.05	-.10	-.40**	-.32**	-.25**
GENDER						
male		.41*	.19	.50**	.46**	.72*
RESIDENCE						
alone		.06	-.01	-.08	.20	-.14
spouse		.30***	-.10	.04	.10	-.43**
fam		.05	-.05	.45	-.05	-.34***
friend		-.15	****	.04	-.40	
inst		-.17	-.30	-.27	-.38	-.51***
constant		-6.78	-6.11	-1.95	-1.8	-1.62

* - significant at .001

** - significant at .01

*** - significant at .1

**** - due to perfect prediction of mitigated or not mitigated.

82. Due to collinearity, this category was dropped from this equation.

The Effects of Race on Mitigated Departures:

In both 1978 and 1981, race was clearly the single most important variable in explaining whether a mitigated dispositional departure was granted. The coefficients for the racial variables are substantially larger than the coefficients for the other variables and they are statistically significant at the .001 level, *i.e.* the probability is less than .001 that those race estimates are due to chance. In the subsequent years, 1982, 1984 and 1987 race, as a determinant of mitigated dispositional departures, is no longer statistically significant nor are the coefficients nearly as large.

The Effects of Socioeconomic Status on Mitigated Departures:

The most striking development between the pre-guidelines and post-guidelines period is the role of socioeconomic status in determining whether an offender receives a mitigated dispositional departure. In the 1978 data, there are no statistically significant relationships between occupation and mitigated departures. By 1981, however, a pattern develops with a consistent relation between mitigated dispositional departures and socioeconomic status. The years of 1981, 1984, and 1987 all show statistically significant and relatively large coefficients for "upper" socioeconomic groups such as white collar workers, professionals and business owners. These groups are far more likely to receive mitigated dispositional departures after the guidelines were put in place than they were before.

The statistical significance of a professional, or white collar worker being more likely to receive a mitigated dispositional departure seems to be very stable over time. By 1984 and 1987, this relationship between socioeconomic status and likelihood of receiving a mitigated departure had become the most pronounced of the statistically significant determinants of mitigated departures. This suggests that the discriminatory effects sought to be avoided in sentencing decisions are greater than before the guidelines were established, at least in terms of the granting of mitigated dispositional departures to upper socioeconomic groups.

The Effect of Marital Status on Mitigated Departures:

An offender's marital status in 1978 and 1981 bore little relation to the likelihood of receiving a mitigated departure. By 1982, however, a clear and statistically significant pattern developed where being single made it less likely that an offender would receive a mitigated dispositional departure. This supports authors

who suggest that community ties play a role in judicial sentencing decisions; a married felon can be viewed as more stable with greater ties to the community than a single individual.

Effects of Gender on Mitigated Dispositional Departure:

Gender is clearly another statistically significant factor in determining whether a mitigated dispositional departure will be granted. The likelihood that a felon will receive a mitigated departure is increased if that felon is a male in each of the years for which the probit model was run, except for 1981.⁸³ In 1978, 1982, 1984 and 1987 this likelihood shows clear and strong statistical significance. The sentencing guidelines seemed to have little effect on the role gender plays in determining whether to grant dispositional departures.

Effects of Residence on Mitigated Departures:

Residence, like marital status, is another potential measure of community ties. A less clear but statistically significant relationship shows up in terms of the residence of the offender in the 1987 data. The data also suggests, in all four years, that an offender who is institutionalized will be less likely to receive a mitigated departure than a person who resides in any other type of residential setting. This relationship becomes statistically significant in the 1987 data. This negative relationship becomes more pronounced over the entire period being examined, suggesting that community ties, or the lack thereof become more important in the judge's decision not to grant a mitigated dispositional departure.

Aggravated Dispositional Departures

Looking at the same time period for aggravated departures, there is a parallel trend that provides additional support for some of the trends displayed in mitigated departures. Table 2 below shows the coefficients for each of the years:

83. This is not necessarily unexpected. Due to the fact that 80 percent of all convicted felons are male (MINNESOTA SENTENCING GUIDELINES COMMISSION, 1991, at 11), being a male will probably make it more likely that you will receive either a mitigated or an aggravated dispositional departures if such departures are granted proportionally to both genders since there are simply a larger absolute number of males being sentenced.

TABLE 2
Maximum Likelihood Estimates of Factors Influencing Aggravated
Dispositional Departures

Variable	Coefficient by Year					
	agg	1978	1981	1982	1984	1987 ⁸⁴
RACE						
white		.18	5.40*	.17	4.97*	
black		.19	5.31*	-.06	4.88*	
indian		.04	5.26*	.23	4.93*	
hispanic		-.10	4.99*	-.24	5.00*	
asian		****	****	****		
JOB TYPE						
unemploy		-.16	.17	-.54	.19	
owner		N/A	N/A	N/A	.32	
profes		-.27	-.55***	-.33***	****	
white		-.36***	-.039	-.51*	.19	
skill		-.28***	-.11	-.16	.05	
unskill		-.26***	.01	-.21	-.01	
ag		N/A	****	****	****	
MARITAL						
single		-.09***	.11	.05	.20***	
GENDER						
male		.42	.41	-.02	.23	
RESIDENCE						
alone		-.04	-.03	.22	-.13	
spouse		-.23***	-.28	.13	-.06	
fam		-.18	-.07	.02	-.06	
friend		-.11	.23	.05	-.1	
inst		.85*	.34***	.59***	.58**	
constant		-1.42	-6.96	-1.378	-1.76	

* - significant at .001

** - significant at .01

*** - significant at .1

**** - dropped due to perfect prediction of mitigated or not mitigated.

***** - no professional received an aggravated dispositional departure.

The patterns shown in the probit analysis of mitigated departures are echoed strongly in the probit analysis of aggravated departures for the same years. Most striking is the central role that race seems to play.

Effects of Race on Aggravated Departures:

In both 1981 and 1984, race is statistically significant at the .001 level.⁸⁵ In counterpoint to the mitigated departure data, in

84. No comparable data on aggravated departures exists for this year since no cases on aggravated dispositional departures were sampled in this study.

85. A .001 level of significance basically means that the chance that the MLE found occurred by chance is less than one in one thousand.

1978, race did not affect sentencing decisions as in 1981 and 1984. While the actual magnitude of difference is not great, African-Americans are less likely to receive aggravated disposition departures after the introduction of the guidelines. Thus, the role of race in determining whether an aggravated dispositional departure will be granted seems to have become more important after the passing of the sentencing guidelines.

Effects of Socioeconomic Status on Aggravated Departures:

Another pattern that echoes the one seen in the probit analysis of mitigated departures is the role of socioeconomic status in determining whether an offender will receive an aggravated departure. In the case of mitigated departures, owners, white collar workers and professionals, especially, were more likely to receive mitigated dispositional departures. The probit analysis of aggravated dispositional departures suggests that the converse is also the case. For each of the years for which data on aggravated departures was available, the data suggests that if a convicted felon occupied one of these "upper" socioeconomic occupations, the felon was less likely to receive an aggravated dispositional departure. Indeed, out of the fifty-eight "professionals" in the 1984 sample, none received an aggravated departure and hence the variable was dropped out of the equation because it predicted the failure of an aggravated departure perfectly. Professionals and white collar workers also showed a general negative coefficient, meaning it was less likely that these two groups would receive aggravated departures. Both negative relationships were clearly statistically significant in the 1982 data set. Skilled and unskilled workers alike also show statistically significant negative coefficients in 1978.

The analysis suggests that employment in general, as opposed to a particular kind of employment, factored prominently in the judge's decision whether to give an aggravated departure in the pre-guideline time period. The lack of statistical significance of these "lower" socioeconomic occupations and the proportionally increasing size of the coefficients for the "upper" socioeconomic occupations suggests that the type of employment has become more important than employment in general under the guidelines.

The Effect of Marital Status on Aggravated Departures:

Marital status also showed an reciprocal relationship to the mitigated departure data. Whereas being single made it less likely for an offender to receive a mitigated dispositional departure, the single offender was generally more likely to get an aggravated de-

parture after the guidelines were imposed. This relationship represents an apparent change from the pre-guideline period when being single reduced the probability of an individual receiving an aggravated departure. The trend since the imposition of the guidelines suggests an increasing relative importance of marital status as a determinant of whether an aggravated departure is imposed, and is clearly statistically significant for the 1984 data.

Effects of Residential Status on Aggravated Departures:

Whether an offender lived in an institutional setting was a strong factor in determining whether the offender received an aggravated dispositional departure. The offender who did live in an institutional setting is clearly more likely to receive an aggravated dispositional departure. This relationship is also statistically significant for each of the years for which data is available and shows little change from the pre- to the post-guidelines period. The first year of the guidelines (1981) resulted in this factor having less importance than it did before the guidelines, but over the intervening years the level of statistical significance and relative magnitude of the coefficient have increased steadily.

Dispositional Departures Before and After Guidelines

The results of the probit models suggest that the imposition of the sentencing guidelines in Minnesota have failed to fully accomplish their own stated purposes, and failed to provide a coherent underlying philosophical basis for punishment. While some of the problems that these guidelines were designed to address seem to be ameliorated, others seem to have been exacerbated, at least where dispositional departure decisions are concerned. In the case of mitigated dispositional departure decisions, there seems to have been success in eliminating race as a factor in the decision-making process. However, socioeconomic status and marital status, neither of which seemed to be factors before the guidelines were in place have become important in determining whether or not an offender receives a mitigated dispositional departure. This seems to indicate that the sentencing guidelines are not being applied in a neutral or proportional manner to all offenders, violating one of the basic principles of the guidelines themselves. This is also inconsistent with the "just deserts" model of punishment, as those individuals who are probably less likely to be recidivists (those occupying "upper" socioeconomic occupations) are receiving mitigated departures more often than those individuals who are not similarly situated in terms of occupation.

These same patterns are reflected in the analysis of aggravated dispositional departures. Race, unlike mitigated departures, seems to play a stronger role than it did before the sentencing guidelines were put into place. However, the differences among racial groups is not great. Likewise, the lack of community ties in the case of institutionalized offenders continues to be a primary determinant of whether an aggravated dispositional departure is granted. These findings would also be inconsistent with the "just deserts" model underlying the sentencing guidelines.

These results suggest systematic biases continue to play a role in sentencing decisions and in some cases, new systematic biases have been created in dispositional departure decisions. This does not necessarily mean that the judiciary has become more biased in their decision-making, but suggests that existing biases or opposed philosophical bases for punishment, conscious or unconscious, have been channeled into areas in which judges still have discretion in their decision-making.

Judicial Rules: Modifications of the Minnesota Sentencing Guidelines

One of the primary purposes of the Minnesota Sentencing Guidelines was to eliminate disparities based on factors such as race, gender, socioeconomic status and community ties from the Minnesota Sentencing Guidelines.⁸⁶ The purpose in establishing a determinate sentencing system and not allowing these factors to be taken into account is to provide a check against judicial discretion manifesting bias towards individuals with certain characteristics and to provide a coherent philosophical basis for punishment. The development of independent judicial criteria to justify departures from determinate sentencing guidelines creates the opportunity for judges to reintroduce the same sort of discretion the guidelines were designed to eliminate. The policy rationales behind determinate sentencing (even administration of the law, philosophical coherency, and no subversion of the purpose of the criminal code) may all become corrupted if such judicial discretion is permitted.

In Minnesota, several judicially developed rules have evolved that affect sentencing procedures and outcomes.⁸⁷ Among the most important of these are the ability to successively increase the offender's criminal history in cases of multiple behavioral inci-

86. See *supra* note 16.

87. See generally —Shapiro, MINNESOTA SENTENCING GUIDELINES: AN HISTORICAL OVERVIEW AND AN ANALYSIS OF THE APPELLATE CASE LAW (1987).

dents under the *Hernandez* rule,⁸⁸ plea bargaining practices,⁸⁹ and an offender's amenability to treatment as a reason for a mitigated dispositional departure from the Sentencing Guidelines.

Of these Minnesota modifications, it is the "amenability to treatment" grounds for mitigated dispositional departures which seem the most problematic to the underlying purposes of determinate sentencing and the express purposes of Minnesota's guidelines system. Amenability to treatment is a loose and ill-defined concept which allows many factors to be considered. The question of what makes an individual amenable to treatment can have a variety of answers such as being less likely to commit the crime again, having strong ties to the community and a array of other possible answers all of which impute impermissible criteria into the sentencing decision.⁹⁰ This ground for departure, it has been argued, reintroduces the very socioeconomic, racial and other factors back into the determination of sentencing.⁹¹ Others contend that "amenability to treatment" grounds for a mitigated dispositional departure does not represent a fundamental violation of the goals of the Sentencing Guidelines, but are in line with its broad purposes.⁹² While it may be true that the Sentencing Guidelines allow for other philosophical justifications for sentencing, they do not allow for disparate treatment based on race, gender, educational attainment or socioeconomic status.

What is clear is that the use of "amenability to treatment" is

88. *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981). MIETHE & MOORE, *supra* note 28.

89. In Minnesota, see Miethe & Moore, *supra* note 19. In general, see Heumann & Loftin, *supra* note 17; Alschuler, *supra* note 28.

90. Since the Minnesota guidelines are based upon a 'just deserts' model, questions of recidivism, connections to the community, and socioeconomic status are all impermissible. It is hard to find definitions for amenability to treatment which might not bring such criteria back into the sentencing decision. The most obvious possibility is amenability to treatment for chemical abuse problems. Such a finding could be made on post-arrest, pre-sentencing completion of a chemical dependency program. Outside of this area, however, the use of amenability to treatment as a grounds for departure seems problematic.

91. Miethe & Moore, point out that

[s]ince judgments about the amenability of a felon to probation are based on an overall assessment of the person (including in many cases community ties, family stability and employment history), the acceptance of this reason as a grounds for dispositional departure clearly introduces social factors in sentencing which are otherwise prohibited under the guidelines.

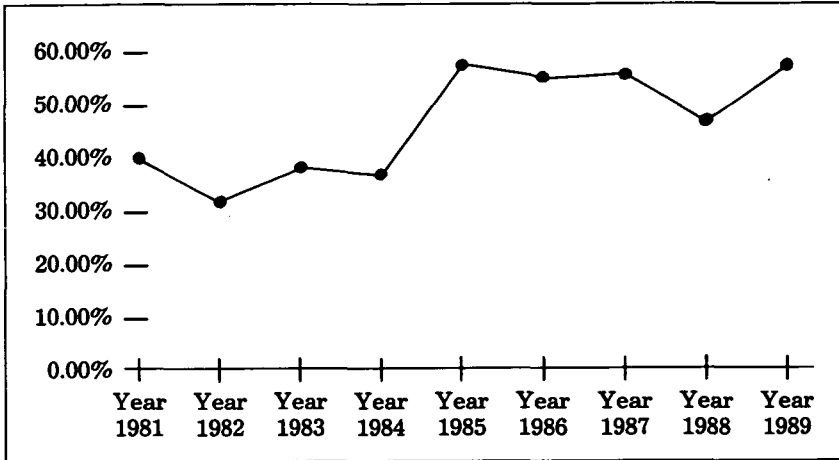
MIETHE & MOORE, *supra* note 28, at 84.

92. See Frase, *supra* note 39. Frase contends that since the guidelines "explicitly recognize the goals of 'retribution, rehabilitation, public protection, restitution, deterrence, and public condemnation of criminal conduct,'" that there is nothing inherently improper about this approach. Frase does, however, go on to suggest that there may be some linkage with impermissible criteria.

an increasingly cited reason for departure from the Minnesota Sentencing Guidelines as Figure 1 below illustrates.⁹³

FIGURE 1

Percentage of Mitigated Dispositional Departures in which "Amenability to Treatment" was Cited as a Reason for Departure



Not only have mitigated dispositional departures as a whole increased in number and in percent of total cases, but the percentage of those mitigated dispositional departures due to "amenability to treatment" have likewise increased in number.

In order to determine whether "amenability to treatment" is reintroducing inappropriate criteria, the same probit model was used for examining mitigated and aggravated departures. The model examines whether offenders who receive a mitigated dispositional departure due to "amenability to treatment" differ substantially from convicted felons in general, not merely those who are receiving a mitigated dispositional departure. If "amenability to treatment" does reintroduce impermissible factors into the sentencing decision, the results of this model should show that these impermissible factors play a role. The role that they should play, in relation to our results on mitigated departures, in general, is difficult to state with any theoretical certainty. That is, we have seen that impermissible factors clearly affect the probability of whether a mitigated dispositional departure will be granted. Theoretically,

93. A mitigated departure was categorized as due to amenability to treatment if any of the reasons the judge cited as a reason for departure involved amenability to treatment.

if "amenability to treatment" were the only logical or available method of importing these impermissible factors back into the decision-making process we should see a greater dependence on these impermissible factors. However, the extent of discretion under available or often used reasons for departure from the guidelines is unknown.⁹⁴

A PROBIT Analysis of Amenability to Treatment

The same probit model was run on amenability to treatment to examine whether the systematic biases found in the sentencing decisions to grant a mitigated dispositional departure were stronger for the amenability to treatment reason for departure.⁹⁵

In using probit analysis, for each variable a maximum-likelihood estimation technique is used.⁹⁶ If amenability to treatment is reintroducing impermissible criteria into the sentencing decision, our model would find the same factors playing a role we found in mitigated dispositional departures. If amenability to treatment is being used primarily to reintroduce impermissible criteria, the statistical relationships we found in the mitigated departures should be stronger for amenability to treatment.

The first model of amenability to treatment tested was one that included all reasons for amenability to treatment, including chemical dependency rehabilitation. The results for each of the four years are displayed in Table 3 below:

94. The Minnesota Sentencing Guidelines Commission own list of reasons for departure used in coding the responses from the worksheets received from judges are several pages long and contain many broad reasons for departure. It is very probable that "amenability to treatment" is merely one of the ways in which impermissible factors are brought back into the sentencing decision process. If this is the case, we cannot make any theoretical assumptions about what the results of these models should be.

95. We are examining which factors are involved in determining whether a particular offender, out of all offenders, will be found to be amenable to treatment.

96. The MLEs represent a change in the probability that the felon will receive a particular type of departure based on a one-unit change in the particular independent variable.

TABLE 3
Maximum Likelihood Estimates of Factors Influencing Whether
an Offender is Amenable to Treatment⁹⁷

Variable	Coefficient				
	amen	1981	1982	1984	1987
RACE					
white		4.30*	-0.86	4.30*	5.14*
black		4.06*	-1.01***	4.46*	5.31*
indian		3.94*	-0.92	4.79*	5.13*
hispanic		4.42*	****	****	4.61*
asian		****	****	****	****
JOB TYPE					
unemploy		-.11	-.01	-.01	-.38
owner		N/A	N/A	-.15	-.37
profes		.65	****	.67	.46
whitc		.38	-.35	-.01	.04
skill		-.30	-.013	.30	-.28
unskill		-.12	-.01	-.03	-.20
ag		N/A	N/A	****	-.24
MARITAL					
single		-.29***	-.36***	-.11	-.21***
GENDER					
male		****	****	.41*	.59*
RESIDENCE					
alone		-.26	-.41	-.10	.10
spouse		-.20	-.17	.01	-.01
family		-.15	.01	-.15	-.08
friend		****	-.44	-.36	-.09
inst		.05	****	****	.46***
constant		-5.73	-.77	-6.48	-6.78

* - significant at .001

** - significant at .01

*** - significant at .1

**** - dropped due to perfect prediction of not amenable to treatment.

The second model used to predict amenability to treatment did not include any case in which drug or alcohol rehabilitation was referred to as a reason for departure. This was done to avoid problems of drug and alcohol abuse correlating with the independent variables in the equation. The analysis attempted to see if the results would differ substantially from the above model on amenability to treatment.⁹⁸

97. This "amenability to treatment" includes all references to drug and alcohol rehabilitation.

98. If, for example, unemployed persons are more substantially more likely to abuse drugs or alcohol, that fact alone will make it more probable they will receive mitigated departures due to "amenability to treatment" that relate specifically to drug or alcohol programs and thus possibly hide the real relationship between

TABLE 4
Maximum Likelihood Estimates of Factors Influencing Whether
an Offender is Amenable to Treatment⁹⁹

Variable	Coefficient			
	1981	1982	1984	1987
amen1				
RACE				
white	3.35*	-1.03***	4.31*	4.40*
black	3.00*	-1.11***	4.47*	4.52*
indian	3.30*	-.80	4.84*	4.40*
hispanic	3.50*	****	****	3.98*
asian	****	****	****	****
JOB TYPE				
unemploy	-.44	****	-.12	.18
owner	N/A	N/A	****	-.02
profes	.45	****	.73***	.82
whitec	-.03	-.08	-.19	.29
skill	-.11	-.10	.27	.15
unskill	-.13	.08	-.26	.30
ag	N/A	N/A	****	****
MARITAL				
single	-.34	-.11	-.12	-.21
male	****	****	.30	.49**
RESIDENCE				
alone	.07	3.85*	.41	.18
spouse	.26	4.31*	.38	.16
friend	****	4.09*	.21	-.02
fam	.23	4.27*	.24	.16
inst	.65***	****	****	.35
constant	-5.40	-5.33	-6.80	-6.83

* - significant at .001

** - significant at .01

*** - significant at .1

**** - dropped due to perfect prediction of not amenable to treatment.

These data suggest somewhat different conclusions than the previous examination of mitigated and aggravated dispositional departures.

The Effect of Race on Amenability to Treatment:

The data indicate that regardless of how amenability to treatment is characterized,¹⁰⁰ a basic pattern over time shows race as

amenability to treatment as a method of introducing impermissible factors into the sentencing decision.

99. This "amenability to treatment" does not include any cases in which a reason relating to alcohol or drug treatment was reported.

100. We examine all decisions involving amenability to treatment, including chemical dependency reasons. We could instead look at general "amenability to treatment" to examine if there is some particular racial or socioeconomic bias. For example, if Hispanics were more likely to be chemically addicted, it would be ex-

the most important factor in whether an offender is "amenable to treatment." For both 1981 and 1982, African-Americans were less likely than whites to be found to be amenable to treatment. By 1984 and 1987, they were slightly more likely to be found amenable to treatment. This reflects the pattern of race becoming less important in determining mitigated dispositional departures in general. The difference in likelihood of different racial groups receiving amenability to treatment departures is not of great magnitude.

The Effect of Socioeconomic Status on Amenability to Treatment:

The clear systematic bias found in mitigated departures in general is largely absent in cases specifically involving "amenability to treatment." Professionals still show an expected strong likelihood for being found amenable to treatment, but this likelihood is only statistically significant in 1984. In general, an offender's socioeconomic status seems to have only a slight relation to whether he is "amenable to treatment."

The Effect of Marital Status on Amenability to Treatment:

The consistent pattern of bias towards single individuals found in the mitigated departure data, is only faintly echoed in the "amenability to treatment" data. For amenability dispositional departures granted for reasons other than drug or alcohol rehabilitation, the bias against single individuals receiving such a dispositional departure is consistent over three of the four years examined.

The Effect of Gender on Amenability to Treatment:

Male offenders are consistently less likely to receive mitigated departures on the ground of amenability to treatment.

The Effect of Residence on Amenability to Treatment:

A pattern somewhat at odds with the data on mitigated departures develops when examining offenders who live in institutional settings. While they are less likely to receive mitigated dispositional departures, when they do, they are more likely to receive them for "amenability to treatment" purposes, especially when "amenability" relates to a drug or alcohol addiction. This

pected that they would more often be granted mitigated departures for chemical dependency treatment reasons rather than others.

seems to be a logical result of the intent of the "amenability to treatment" ground for departure. It is likely that a significant number of offenders living in institutional settings do so because of drug or alcohol related problems. When these offenders receive a mitigated dispositional departure it is consistent that they would receive such a departure based on their drug or alcohol addiction.

Amenability to Treatment Departures Under the Guidelines

The strongest biases that appear in the data on "amenability to treatment" show up in the first two years of the sentencing guidelines. The data for the other two years examined indicate little of the systematic biases found in mitigated departure decisions in general. It does not seem to be the case that the "amenability to treatment" ground for departure reintroduces impermissible criteria for sentencing decisions into the guidelines. In fact, the use of impermissible criteria which is markedly present in the mitigated departures data is markedly absent or greatly weakened when we examine mitigated departures due to "amenability to treatment." The strong biases shown in the early years of the guidelines may indicate that initially this ground for departure was importing some of the impermissible criteria. There are a number of reasons why this may not still be occurring.

Primarily, it may be due to the increased use of "amenability to treatment" as a grounds for departure. Since its permissibility as a grounds for departure was confirmed by the Minnesota Supreme Court in 1982, its use has substantially increased. This increase may well have "watered down" any initial discriminatory effects brought into play by the use of this grounds for departure. Now, there may be more judges using permissible criteria to grant an amenability to treatment departure whereas before the Minnesota Supreme Court ruled, a smaller number were using impermissible criteria to circumvent the Guidelines.

The data indicate that while decisions regarding mitigated and aggravated dispositional departures have continued to use, and in many cases have increasingly used, impermissible criteria, decisions based on "amenability to treatment" have been moving away from the use of impermissible criteria. Most of the literature has suggested the converse is occurring, that is, while sentencing is becoming more uniform, the potential for abuse in discretion lies in vague and broad grounds for departure (e.g. "amenability to treatment"). This is not the case. The application of "amenability to treatment" by Minnesota judges is not letting in criteria which the

sentencing guidelines already tossed out of the decision-making process. Yet, the criteria which were supposed to be eliminated by the guidelines continue to play a prominent role in sentencing decisions, and in some cases and increasingly important one. What are we to make of this paradox?

It would seem that biases which have existed have been channeled more directly into the remaining areas of judicial discretion, just not through the justification of "amenability to treatment."

Conclusions and Implications

We can establish that the Minnesota Sentencing Guidelines have not succeeded in fully implementing their own stated purposes, nor have they been successful in remedying the inherent potential sources of conflict in the American criminal law system.

At the broadest level of coherency, the Minnesota Sentencing Guidelines operates on an avowedly "modified just deserts" philosophical basis. The primary concern for the application of the law is that similar criminal actions be treated in a like manner. Yet, the data indicates that individual offender characteristics play a clear role in determining whether an offender will receive a mitigated or aggravated dispositional departure. The judiciary, in its sentencing decisions, is not operating from a "just deserts" philosophical basis. The fact that members of upper socioeconomic strata obtain preferential treatment indicates that concerns such as recidivism are entering into the judicial decision-making process.

This lack of philosophical coherency has led to an uneven administration of the criminal law that advantages some members of society while disadvantaging others. Race, generally, has become less important in the decision whether to grant a mitigated dispositional departure, but remains an important factor in granting aggravated dispositional departures although the inter-racial differences are not great. Individuals who could be seen as not having strong community ties, such as people who are not married, are consistently discriminated against in the sentencing decision process. They are more likely to receive aggravated departures and less likely to receive mitigated departures. Likewise, offenders who live in institutional settings are far more likely to receive aggravated dispositional departures than other offenders.

There is a clear and pervasive reverse effect involving individuals whose occupations place them in "upper" socioeconomic strata. Business owners, professionals, and white collar workers all are more likely to receive mitigated dispositional departures and less likely to have aggravated dispositional departures im-

posed. This pronounced benefit has clearly increased since the imposition of the sentencing guidelines in Minnesota.

The imposition of the Minnesota Sentencing Guidelines on the judiciary has not succeeded in carrying out many of its stated objectives. It seems to have exacerbated the importance of many impermissible criteria in sentencing decisions in such a way as to work in favor of the socially and politically advantaged while harming the socially and politically disadvantaged.

