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## Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania

Susan E. Martin

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INTERESTS AND POLITICS IN SENTENCING REFORM:  
THE DEVELOPMENT OF SENTENCING  
GUIDELINES IN MINNESOTA AND  
PENNSYLVANIA

SUSAN E. MARTIN†

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† B.A. Swarthmore College, 1962; M.S. University of Rochester, 1964; Ph.D. American University, 1977. The author is Project Director of a Study of Policing Career Criminals at the Police Foundation, Washington, D.C.

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## I. INTRODUCTION

A WAVE of dissatisfaction with the existing indeterminate sentencing policies and practices swept across the nation in the early 1970's. Critics from a wide spectrum of political interests criticized the use of the indeterminate sentence and the theory of rehabilitation on which it rested.<sup>1</sup> The critics focused on the extensive disparity in sentences and called for reforms to limit and structure discretionary decisionmaking.<sup>2</sup> In response, various jurisdictions rejected indeterminate sentencing in favor of more systematically structured sentencing decisionmaking. State legislatures passed presumptive flat-time sentencing<sup>3</sup> and mandatory minimum sentencing laws,<sup>4</sup> and abol-

1. For a discussion of the policies underlying indeterminate sentencing, see notes 13-14 and accompanying text *infra*.

2. For a general overview of sentencing reforms, see generally notes 18-21 and accompanying text *infra*. See also Dowd, *The Pit and the Pendulum: Correctional Law Reform from the Sixties into the Eighties*, 29 VILL. L. REV. 1 (1983).

3. California became the first state to adopt across-the-board presumptive sentences for offenders committed to prison by passing the Uniform Determinate Sentencing Law in 1976. 1976 Cal. Stat., ch. 1139, § 273, at 5140 (codified as amended at CAL. PENAL CODE § 1170 (West Supp. 1983)). For a general discussion of the California statute, see Messinger & Johnson, *California's Determinate Sentence Statute: History and Issues*, in NAT'L INST. OF LAW ENFORCEMENT AND CRIM. JUST., U.S.

ished parole release.<sup>5</sup> Parole boards responded by establishing guidelines to structure parole,<sup>6</sup> and the judiciary adopted voluntary sentencing guidelines.<sup>7</sup>

Two states, Minnesota and Pennsylvania, have responded by instituting similar alternative approaches to sentencing reform. In 1978, each state legislature created a hybrid body called a sentencing guidelines commission which was authorized to produce sentencing

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DEP'T OF JUST., DETERMINATE SENTENCING: REFORM OR REGRESSION? 13-18 (1978).

Other states that have since adopted analogous legislation are as follows: Alaska (for second and subsequent offenders), Arizona, Colorado, Illinois, Indiana, New Jersey, and North Carolina. *See generally* von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 CRIME & DELINQ. 289 (1981). Typically, presumptive sentencing schemes do not attempt to regulate the judicial decision whether or not to imprison, but instead govern the duration of a prison sentence if the judge has chosen to impose one. *Id.* at 299.

4. Between 1977 and 1980 mandatory minimum sentencing laws were adopted in 27 states and were under consideration in 14 others. These laws typically directed that repeat offenders who commit violent crimes or crimes involving a firearm be sentenced to a prison term of not less than a specified period of years. U.S. DEP'T OF JUST., CRIME IN THE UNITED STATES—1979 (1980).

5. "Parole release" refers to "the conditional release, for a specified period, of an offender who has already served a portion of his sentence in a correctional institution. While on parole, the released prisoner remains in the custody of the paroling authority and may be returned to the penal institution for violations of parole regulations or for commission of a new offense." D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 9 (1975). Parole release has been abolished in Alaska, California, Colorado, Illinois, Indiana, New Mexico, and North Carolina. Von Hirsch & Hanrahan, *supra* note 3, at 299 n.28.

6. Parole guidelines to establish explicit standards for release decisions were first developed by the (then) United States Board of Parole. In 1976, these guidelines were mandated for use through the entire federal system and have served as a model for many of the 17 states that, as of 1979, were reported to have parole guidelines. UNIFORM PAROLE REPORTS, PAROLE IN THE UNITED STATES: 1979 at 11 n.1. *See generally* von Hirsch & Hanrahan, *supra* note 3, at 309-12. *See also* Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975) (analyzing innovations in the federal parole system, including hearing reforms and detailed parole guidelines).

7. Following the successful implementation of the U.S. Parole Commission's guidelines, the developers sought to test the feasibility of guidelines for sentencing. *See generally* L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION (1978) [hereinafter cited as STRUCTURING JUDICIAL DISCRETION]. Massachusetts, Denver, and Philadelphia adopted voluntary sentencing guidelines using a methodology sometimes termed "the Albany approach," since it was developed at the Criminal Justice Research Center in Albany, New York. The Massachusetts sentencing guidelines are described and analyzed in R. SPARKS, B. STECHER, J. ALBANESE & P. SHELLY, STUMBLING TOWARD JUSTICE: SOME OVERLOOKED RESEARCH AND POLICY QUESTIONS ABOUT STATEWIDE SENTENCING GUIDELINES 203-413 (Working Draft, 1982) (report to the National Institute of Justice, U.S. Dep't of Justice) [hereinafter cited as SPARKS & STECHER]. The Philadelphia and Denver guidelines are described and examined in W. RICH, L. SUTTON, T. CLEAR & M. SAKS, SENTENCING BY MATHEMATICS (1982).

guidelines that would structure judicial decisions. Minnesota's guidelines went into effect in May 1980.<sup>8</sup> In Pennsylvania the legislature rejected the proposed guidelines in April 1981 and returned them to the Commission for revision.<sup>9</sup> The revised guidelines were resubmitted to the legislature in January 1982 and went into effect in July 1982.<sup>10</sup> The purpose of this article is to explore the social, organizational, and political factors and interests that shaped the seemingly similar sentencing reform laws, and yet contributed to divergent initial legislative reactions and unique final products in these two states.

Several limitations should be noted. First, the findings are preliminary, as there have been no long-term studies on the implementation or impact of the guidelines.<sup>11</sup> Second, generalization of the experience of the two states in the study to other states is clearly conjectural given the diversity of social histories, sentencing structures, and political cultures among other states. Nonetheless, examination of the Pennsylvania and Minnesota experiences is useful. It provides a record which makes possible a preliminary interpretation of the forces that shape an institutional change and an indication of the complexities involved in designing sentencing guidelines. These problems extend beyond the development of statistical models describing past practice to the political tradeoffs and value choices required in the policy-making process.

This article initially reviews the nature of the problems associated with sentencing reform, noting the importance of the political culture and the traditions of a jurisdiction in shaping its policy options and perspectives on change, and describes the structure of the criminal court and corrections systems in Minnesota and Pennsylvania. The article next examines in some detail the politics of sentencing reform in Minnesota. It includes a review of the legislative process resulting in a statute creating the Minnesota Sentencing Guidelines Commission, the Commission's mandate, the key elements in formulating the guidelines, the content of the guidelines, the role of interest groups in shaping them, and the legislature's reaction to the guidelines. The third section contains an analogous review of the politics of sentencing reform in Pennsylvania. The final section analyzes the factors that shaped the divergent processes by which legislatively mandated sentencing guidelines came into being in the two

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8. See notes 177-79 and accompanying text *infra*.

9. See notes 324-32 and accompanying text *infra*.

10. See notes 363-72 and accompanying text *infra*.

11. For an analysis of the impact of the Minnesota guidelines during the first year in which they were in effect, see Knapp, *Impact of the Minnesota Guidelines on Sentencing Practices*, 5 *HAMLIN L. REV.* 237 (1982).

states, compares the structure and content of the resulting guidelines, and considers the likely impact of the guidelines in each state. It suggests that changing a sentencing system is an inherently political process that requires reformers to address two types of questions. First, there are normative questions regarding the goals of sanctions, the appropriate object of such sanctions, and the amount of punishment necessary to achieve the sentencer's goal. Second, they must address questions related to the functional goals of the criminal justice system such as how to structure discretion and, at the same time, gain the cooperation of the key organizations and individuals with interests in the system and who frequently resist change. As will be indicated, the sentencing guidelines commission in Minnesota was more successful than that in Pennsylvania in achieving a balance between principles and practice and in designing a compromise among competing ideologies and interests that is likely to bring a substantial measure of determinacy to sentencing in that state.<sup>12</sup>

## II. THE POLITICAL AND LEGAL CONTEXT OF SENTENCING REFORM

### A. *The Nature of the Problem*

Under indeterminate sentencing schemes, legislatures establish very broad policies through the creation of statements of purpose, the establishment of maximum sentences, often without minimums, and the authorization of general sentencing procedures. Vast discretion is then left in the hands of sentencing judges and parole boards to de-

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12. The research methodology adopted for this study involved an extensive review of the following: sentencing reform bills submitted to the Minnesota and Pennsylvania legislatures and the statutes creating the commissions in each state; minutes of all meetings of both commissions up to submission to each legislature for final consideration; staff concept papers and other materials prepared for presentation at commission meetings; the public documents related to the guidelines; and written testimony presented at public hearings of the Pennsylvania Commission. The author also conducted numerous unstructured interviews with participants in the legislative and administrative development process as well as with representatives of various concerned interest groups. Thus, the author's conclusions attributing motives to particular individuals or groups are often based on her interpretation of this composite of information. The author, of course, accepts full responsibility for her conclusions.

Interviews were conducted in Minneapolis and Saint Paul, Minnesota on March 6-7 and May 11-13, 1981. For a list of the individuals interviewed in Minnesota, see note 52 *infra*. Interviews were conducted in Pennsylvania between March and May 1981, and again in March 1982. For a list of the individuals interviewed in Pennsylvania, see note 165 *infra*. The interviews were unstructured and ranged from half an hour to several hours in length, averaging 1.5 hours.

Because the author's conclusions were often drawn from a composite of sources such as unpublished materials, interviews, and her own observations, standard forms of substantiation are difficult, particularly with respect to attributing motives to various groups.

cide on the type and amount of punishment appropriate in individual cases. Indeterminate schemes are based on the premise that society will be protected by keeping offenders incarcerated until they have become rehabilitated. Accordingly, the severity of the punishment depends more on the characteristics of the individual offender than on the nature of the crime, and disparity in sentencing individuals convicted of the same crime is an accepted part of the system of individualized treatment for offenders.<sup>13</sup>

For many years indeterminate sentencing satisfied a wide spectrum of interests. Liberals were pleased with the rejection of the notion of retribution as well as the possibility of speedy release of offenders amenable to rehabilitation; judges enjoyed wide authority but were relieved of the responsibility for release decisions; prison administrators had flexibility in controlling hostile inmates; and politicians could appear "tough on crime" by raising statutory penalties without affecting prison populations or the actual time served.<sup>14</sup>

However, in the early 1970's, support for the prevailing indeterminate sentencing system began to crumble. Civil libertarian and prisoners' rights groups initiated the attack, charging that the system was based on inadequate assumptions about the predictability of human behavior, gave unchecked discretion to judges and paroling authorities, contributed to prisoner unrest, and resulted in excessively long and arbitrary sentences.<sup>15</sup> A widely publicized article reported that existing rehabilitation programs were ineffective.<sup>16</sup> The perception of continually rising crime rates led others to demand surer and stiffer sanctions against criminals as a means of preventing crime.<sup>17</sup>

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13. For a general discussion of the indeterminate scheme, see SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 17 (M. Forst ed. 1982) [hereinafter SENTENCING REFORM]. See also D. ROTHMAN, CONSCIENCE AND CONVENIENCE 56-72 (1980).

14. See Messinger & Johnson, *supra* note 3, at 16-17.

15. See M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) (criticizing broad judicial discretion in sentencing and discussing possible remedies); AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971) (focusing on the fallacies behind the individual treatment model).

16. D. LIPTON, R. MARTINSON & J. WILKS, *supra* note 5. This survey is a compilation of research studies conducted to evaluate the different methods of treating criminal and juvenile offenders. Instituted at the behest of the Governor of New York's Special Committee on Criminal Offenders and supported by state funds, its purpose was to determine the relative effectiveness of different categories of treatment and the factors contributing to the success or failure of each method. *Id.* at 3-21. Robert Martinson, one of the authors of the study, summarized the study's findings in a separate article: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." Martinson, *What Works?—Questions and Answers About Prison Reform*, THE PUBLIC INTEREST, Spring 1974, at 22, 25.

17. See generally J. WILSON, THINKING ABOUT CRIME (1975). The resurgence of

Thus, criticism came from both those concerned with individual rights whose objective was “fair, equitable punishment of offenses”<sup>18</sup> and those concerned with social protection whose objective was swift, simple crime prevention.<sup>19</sup> The unifying concern shared by most of the opponents of indeterminate sentencing was the belief that sentencing reform based upon more explicit standards that would structure the discretion of officials and reduce disparity was necessary.<sup>20</sup>

Along with the call for reform, debate developed in many jurisdictions over three overlapping sets of questions. First, how should the competing goals of deterrence, incapacitation, rehabilitation, and retribution be ordered or balanced? Second, how severe a sanction should be imposed to achieve the particular goal? Finally, what criteria should be used for applying different types of sanctions and who should have the authority to establish sentencing standards and make individual sentencing decisions?

In addition to normative considerations, any effort to alter sentencing structure will also be affected by the existing institutional ar-

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popularity of the death penalty was symptomatic of such demand. *Id.* at 181-204. See also F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

18. Travis, *The Politics of Sentencing Reform*, in *SENTENCING REFORM*, *supra* note 13, at 71. In general, reformers embracing a just desserts or retributive approach advocated a sentencing system based on the principles of commensurability and predictability of punishment. Penalties under such a scheme are apportioned on the basis of the blameworthiness of criminal conduct by scaling punishments to the seriousness of the offense. Predictability is sought through the adoption of standards specifying the amount of punishment ordinarily to be given for certain types of criminal conduct. A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976) (report of the Committee for the Study of Incarceration calling for major sentencing reform and proposing commensurate punishment as the sole legitimate goal of the system). See also TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* (1976) (outlining a method of promulgating a commensurate desserts sentencing structure).

19. For a discussion of the use of sentencing as a means of crime prevention and social protection, see B. WOOTEN, *CRIME AND THE CRIMINAL LAW* 91-118 (1963). See also H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) (comparing a “crime control” model with a “due process” approach).

20. See, e.g., R. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 10 (1979) (“in the late 1960’s and 1970’s there was a growing perception that the criminal justice system was becoming incredibly overworked . . . . Rehabilitation seemed not to work; deterrence, and if not deterrence, incapacitation seemed like the answer.”).

Of special concern was the problem of unchecked judicial power over sentencing. See, e.g., M. FRANKEL, *supra* note 15; Ozanne, *Judicial Review: A Case for Sentencing Guidelines and Just Desserts*, in *SENTENCING REFORM*, *supra* note 11, at 177 (examining early responses of the legal community to this problem, including the American Bar Association’s publication in 1968 of detailed standards for appellate review of sentencing decisions). *But cf.* Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 *GEO. L.J.* 975 (1978) (critically analyzing guideline sentencing systems as remedies for overbroad judicial discretion).



rangements for distributing discretion, the extent and origin of sentence disparities in the state, and the political influence of interest groups with a stake in the debate. Thus, to be effective, reformers must also consider functional goals such as the needs and interests of the individuals and organizations that comprise the criminal justice system.<sup>21</sup> When a proposed change appears to reduce authority, diminish flexibility, increase workloads, or result in other costs, it is likely to be opposed, and, if implemented, undermined by those operating the system. The task of designing a sentencing reform that introduces a meaningful rather than a symbolic change thus depends on the way the reformers define "the sentencing problem," the clarity and degree of consensus regarding normative goals, and the degree to which they take into account the functional goals of individuals operating the institutions and devise ways to neutralize opposition or co-opt potential opponents into participating in a change.

### B. *Criminal Justice Systems in Minnesota and Pennsylvania*

#### 1. *Minnesota*

##### a. The Political Culture

Professor David Elazar, a scholar of American federalism, has described Minnesota as having a moralistic political culture in which citizens tend to view government as a means to achieve a good community through positive political action.<sup>22</sup> Characterized by its small

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21. See generally D. ROTHMAN, *supra* note 7 (attributing the success of the Progressive reform movement in the early 1900's to the harmony of goals among various groups such as concerned citizens, psychologists, judges, district attorneys, wardens, and superintendents).

22. D. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (1966). Elazar defines a political culture as "the particular orientation to political action in which each political system is embedded." *Id.* at 84. He identifies three ideal, typical conceptions—the individualistic, moralistic, and traditional political cultures. Elazar characterizes Minnesota as moralistic and Pennsylvania as individualistic. For a discussion of Elazar's description of the political culture in Pennsylvania, see note 35 and accompanying text *infra*.

Many of the characteristics defined by Elazar as representing a moralistic political culture are found in Minnesota. See generally Leavitt & Nord, *Minnesota's Changing Political Culture*, in *PERSPECTIVES ON MINNESOTA GOVERNMENT AND POLITICS* 31 (M. Gieske & E. Brandt eds. 1977). For example, there is substantial citizen participation in civic and political activity, a relatively weak party system, strong civil service laws, and great pride in the absence of political corruption. *Id.*, *passim*. From 1913 until 1973 candidates for the state legislature ran in non-partisan elections, protest or reform movements were a recurrent part of the political landscape, and a three-party system prevented more than brief domination of both the legislature and state house by any party. Organized interest groups played a significant role in shaping political issues. Internal cohesiveness and issue oriented politics rest in large part on Minnesota's ethnic homogeneity. *Id.* Most Minnesotans are descendants of Scandinavians and Germans. In 1970 less than two percent of Minnesota's four mil-

population, ethnic and cultural homogeneity and a tradition of citizen participation in government, including the involvement of interest groups in policymaking, this political culture facilitated the development of a consensus on a new state sentencing policy.

#### b. The Law

Prior to the 1978 implementation of Minnesota's sentencing guidelines, Minnesota had an indeterminate sentencing law in which the judge was responsible for the decision whether to incarcerate and, if incarceration were imposed, for the establishment of a maximum sentence. Under Minnesota's categorization of public offenses, only offenders convicted of a felony may be committed to the custody of the Commissioner of Corrections and subjected to possible confinement in state prisons.<sup>23</sup> Prior to its abolition in 1981,<sup>24</sup> the paroling authority determined all state prisoners' release dates, which could be any time after imprisonment and were usually substantially sooner than the maximum terms.<sup>25</sup>

After sentencing, judges may stay imposition or execution of the sentence and, in most cases, grant probation as a condition of the stayed sentence.<sup>26</sup> The judge may also impose a variety of conditions

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lion inhabitants were black (34,868), Indian (23,128), or Chicano (23,198). Haniff, *Social Groups in Minnesota Politics*, in *PERSPECTIVES ON MINNESOTA GOVERNMENT AND POLITICS* 87, 99 (M. Gieske & E. Brandt eds. 1977).

23. Minnesota law categorizes "crimes" as felonies, gross misdemeanors, misdemeanors, and petty misdemeanors. A felony is a crime for which a penalty of more than one year may be imposed. There are no subcategories of felonies; the only distinctions among them are the maximum penalties that may be imposed. A gross misdemeanor may carry a penalty of more than 90 days and up to a year in county jail. A misdemeanor is a crime for which a sentence of not more than 90 days or a fine of not more than \$500 or both may be imposed. A petty misdemeanor is a petty offense prohibited by statute which does not constitute a crime and for which a fine of not more than \$100 may be imposed. MINN. STAT. ANN. § 609.02 (West Supp. 1983).

A sentence of more than one year, i.e., for a felony, calls for the Commissioner of Corrections to determine the place of confinement in a prison or other facility. A sentence for a year or less, i.e., for a gross misdemeanor or misdemeanor, must be served in a county jail, workhouse, work farm or other authorized facility. *Id.* § 609.105.

24. 1981 MINN. LAWS ch. 3600, § 4 subd. 2.

25. For a general discussion of Minnesota paroling practices, see Research Project, *infra* note 53, at 355-72.

26. MINN. STAT. ANN. § 609.135 (West Supp. 1983). The judge may prescribe the terms of the probation, including restitution, when practicable. *Id.* Judicial discretion to stay a sentence for first degree murder and for other crimes in which a firearm or dangerous weapon is involved is limited by a mandatory minimum sentencing law. *Id.* (citing *id.* § 609.11). These crimes include aggravated assault, assault, burglary, kidnapping, manslaughter, murder in the second and third degrees, rape, robbery, sodomy, or escape while under charge or conviction of a felony. *Id.* § 609.11. When the guidelines were written, the mandatory minimum prison sen-

on the stayed sentence, including a term of up to one year in the county jail, extended probation, or assignment to a treatment program.<sup>27</sup>

The Community Correction Act,<sup>28</sup> passed in 1973, commits Minnesota to a policy of keeping offenders in the local communities and out of jail through state subsidies for the operation of local programs that provide alternatives to incarceration. Participating counties that send an offender to state prison for an offense punishable by five years or less have to pay the costs of that offender's imprisonment out of their subsidy monies.<sup>29</sup>

### c. Courts and Counsel

The district court is the court of general criminal jurisdiction in Minnesota. There are ten judicial districts and appeals are taken directly to the Minnesota Supreme Court. Judges are elected to six-year terms in non-partisan elections.<sup>30</sup> Judicial candidates are not screened or endorsed by political parties. In general, judges are not a politically powerful or active group.

Although there is an extensive system of public defenders, neither they nor the private criminal bar are well organized or politically powerful. In contrast, county attorneys are a well-organized and active political force. County prosecutors are elected for four-year terms in non-partisan elections. The county prosecutors' association has a full-time paid lobbyist as well as an active educational program.

### d. Corrections and Parole

#### The Commissioner of the Minnesota Department of Corrections

tence was applicable only to recidivists. Since then it has been extended to first offenses involving firearms. 1981 MINN. LAWS ch. 227, §§ 1-7 (codified as amended at *id.*).

27. A stay of imposition means the defendant is convicted but not sentenced. He or she is given probation, and on its completion the felony conviction is reduced to a misdemeanor on the criminal record. If the offender violates probation, the court may impose a sentence. If the judge stays execution, the defendant is convicted and sentenced but the sentence is not carried out. A stay of execution results in a felony conviction on the offender's record. The offender is put on probation and a violation permits the judge to order the sentence to be carried out. *Id.* §§ 609.13-609.14.

28. *Id.* §§ 401.01-401.16.

29. *Id.* § 401.13.

About 80% of the convicted felons in Minnesota are kept under local supervision rather than being committed to prison. Minnesota Sentencing Guidelines Commission, A Preliminary Analysis of Sentencing and Releasing Data 8 (1979) (unpublished report on file with the *Villanova Law Review*).

30. MINN. STAT. ANN. § 388.01 (West Supp. 1983).

is appointed by the governor, and, since 1959, has held cabinet level status.<sup>31</sup> On January 1, 1974, in an effort to professionalize parole decisionmaking, a full-time five-member Minnesota Correctional Authority (later renamed the Minnesota Corrections Board or MCB) replaced the two part-time parole authorities previously responsible for adult and juvenile parole.<sup>32</sup> Until the abolition of the MCB in 1981, members were appointed by the governor and its chairperson was appointed by the Commissioner of Corrections, creating an overlap in the interests of parole and correctional bureaucracies. Parole decisionmaking guidelines, modeled after the U.S. Parole Commission guidelines, were put into effect on May 1, 1976 by the MCB.<sup>33</sup>

Minnesota has been and remains a low incarceration state. In 1983 its rate of fifty-three persons incarcerated per 100,000 population was considerably lower than the national average of 177.<sup>34</sup>

## 2. *Pennsylvania*

### a. The Political Culture

Pennsylvania's political culture is characterized by a large and heterogeneous population, a tradition of strong local government, and a lack of shared goals and values. Pennsylvania has been characterized by Professor Elazar as having an individualistic political culture where politics is generally regarded as the business of professionals.<sup>35</sup>

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31. *See id.* § 241.045(1).

In the early 1970's, reform-oriented commissioners sought to develop a political constituency for corrections in Minnesota. They introduced reforms such as reorganization of the parole authority and community-based corrections. Interviews with Dale Parent, Ken Schoen, and Richard Mulcrone, *infra* note 52.

32. *See* MINN. STAT. ANN. § 241.045(2)(a) (West Supp. 1983).

33. MINNESOTA CORRECTIONS BOARD, PAROLE DECISION-MAKING GUIDELINES (July 1979).

34. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., PRISONERS AT MID-YEAR 1983, at 2, Table 2.

35. *See* D. ELAZAR, *supra* note 22, at 112. In an individualistic political culture, government is seen as a means of efficiently responding to the demands of different competing individuals and groups. *Id.* Parties operate like business organizations, maintaining a system of favors and mutual obligations, demanding strong loyalty and cohesiveness, controlling the nomination process and entry into politics, and distributing the tangible reward of power to members. *Id.* Because political parties are composed of competing groups of conflicting interests, often lacking a unifying or common philosophy, elections are rarely issue-oriented. *Id.* The view of politics as the job of professional politicians translates into limited citizen participation in political life and elected officials acting as brokers for private interests. *Id.* *See also* R.M. Stevens, Occupation "Legislator": An Exploration of Political Culture in the Pennsylvania General Assembly (1971) (unpublished manuscript, Center for the Study of

## b. The Law

Pennsylvania has an indeterminate sentencing system in which the role of the judge in determining the actual time to be served in prison overshadows the role of the parole authority. Under the 1974 Crimes Code, criminal offenses are graded into eight major categories with a maximum sentence for each.<sup>36</sup> Judges have wide discretion to impose on a convicted offender a fine, partial confinement, total confinement, or no penalty at all.<sup>37</sup> In imposing a sentence of incarceration, the judge selects a minimum and maximum sentence. The minimum imposed may not be greater than half of the maximum, which is limited by the statutory maximum for the class of crime.<sup>38</sup> The court also considers where to send the offender. Those serving more than a five-year maximum must go to a state institution.<sup>39</sup> Those serving a maximum of two to five years (usually with a minimum of one to two and one-half years) may be sent to either a local or state facility.<sup>40</sup> Those serving less than a two-year maximum must go to a local jail, where they remain under the supervision of the sentencing court which may grant parole at any time.<sup>41</sup> Upon completion of the minimum sentence, a state prisoner may be considered for parole.<sup>42</sup> There is no provision for "good time."

## c. The Courts and Counsel

The Court of Common Pleas is the court of general criminal jurisdiction in Pennsylvania. Except in capital cases, appeals in criminal cases go to the Superior Court, and subsequently, to the

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Federalism, Temple University) (empirical study confirming Elazar's views of Pennsylvania's political culture).

Heterogeneity contributes to the predominance of many competing interests in an individualistic political culture. Pennsylvania is characterized by great ethnic diversity, varied regional economic interests and activities, and a tradition of strong local government. There are 5,518 individual governmental units established by the state or county governments that are loosely held together by common norms and goals. See 105 THE PENNSYLVANIA MANUAL 481 (G. Ackley ed. 1981).

36. These categories are first and second degree murder; first, second, and third degree felonies; first, second, and third degree misdemeanors; and summary offenses. 18 PA. CONS. STAT. ANN. § 106 (Purdon 1983).

37. 42 PA. CONS. STAT. ANN. § 9721 (Purdon 1982) (except when a mandatory sentence is prescribed by law, the judge has discretion to choose from the alternatives of probation, determination of guilt without further penalty, partial confinement, total confinement, or a fine).

38. *Id.* § 9756.

39. *Id.* § 9762.

40. *Id.*

41. PA. STAT. ANN. tit. 61, § 331.26 (Purdon 1964).

42. *Id.* § 331.21.

Pennsylvania Supreme Court, at the latter's discretion.<sup>43</sup> Judges of each court are elected initially for ten-year terms in partisan elections and subsequently face retention elections.<sup>44</sup> Judges tend to come from political rather than legal careers and often maintain close party ties.<sup>45</sup>

As in Minnesota, both public and private defense bars are relatively politically weak and disorganized, while county prosecutors, many of whom are elected officials, are well organized and politically visible.

#### d. Corrections and Parole

The Bureau of Corrections is headed by a commissioner who, until 1980, was named by the Governor's appointed Attorney General. The Attorney General is now an elective office<sup>46</sup> and the Department of Justice, of which the Bureau of Corrections is a part, is the responsibility of the Governor's appointed General Counsel. The General Counsel now appoints the Commissioner.<sup>47</sup>

The Pennsylvania Board of Probation and Parole has the exclusive power to determine the parole discharge of inmates sentenced to state institutions after their minimum sentence has been served. Its practice has been to parole offenders upon service of the court-imposed minimum sentence unless the offender's prison adjustment and conduct have been unsatisfactory. In 1975-78, about eighty percent of the offenders considered for parole were released at the expiration of their minimum sentence.<sup>48</sup>

The Pennsylvania state prison system was not crowded through much of the 1970's.<sup>49</sup> However, local jails were both crowded and

43. 42 PA. CONS. STAT. ANN. §§ 722, 724, 742 (Purdon 1981).

44. See 42 PA. CONS. STAT. ANN. §§ 3131-3135 (Purdon 1981).

45. Though crossfiling is permitted and occurs, allowing the judicial candidate to receive the nomination of both parties in contrast to Minnesota's system of judicial selection, judges are chosen by political party leaders directly and run with party endorsement. For a thorough discussion and criticism of the partisan political election of judges, see Kauffman, *Judicial Selection in Pennsylvania: A Proposal*, 27 VILL. L. REV. 1163 (1982).

46. PA. CONST. art. 4, § 4.1.

47. See PA. STAT. ANN. tit. 71, § 302 (Purdon 1962). The authority of the Bureau of Corrections and the influence of the Commissioner are limited by their placement in the executive organization and by a Bureau tradition of low visibility.

48. See PENN. BD. OF PROBATION AND PAROLE, 1982 ANNUAL REPORT 28, Table 7.

49. On November 30, 1979 there were 8,275 inmates in the Pennsylvania prison system, which had a total usable capacity of 8,380. PENNSYLVANIA COMMISSION ON CRIME AND DELINQUENCY, AN ANALYSIS OF THE ADEQUACY OF OUR CURRENT STATE CORRECTIONAL FACILITIES NOW AND IN THE FUTURE (submitted to the Governor Jan. 11, 1980).

physically deteriorating.<sup>50</sup> Pennsylvania's incarceration rate of 93 per 100,000 civilian population in 1983, while higher than that in Minnesota, was still below the national average.<sup>51</sup>

### III. THE POLITICS OF SENTENCING REFORM IN MINNESOTA<sup>52</sup>

#### A. *The Legislation*

##### 1. *The Legislative Battle*

In Minnesota, the effort to reform sentencing originated in the Senate in 1975 and was led by Senator William McCutcheon. McCutcheon's goal was to introduce determinacy through legislatively-fixed sentences and to abolish the parole board.<sup>53</sup> McCutcheon is difficult to classify politically. As a member of the majority Democratic Farmer Labor Party and a fiscal conservative, he opposed policies that would increase inmate populations (including across-the-board hikes in sentence severity). However, as deputy police chief of St. Paul, he was seen as a friend of law enforcement and "tough" on crime and therefore respected by conservatives.

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50. Since 1975 county jails have been overcrowded. In 1975 and 1976 their populations hovered at about 113 percent of capacity. House Judiciary Committee Staff Report on the Use and Impact of Mandatory Sentencing in Pennsylvania (Sept. 1976).

51. BUREAU OF JUSTICE STATISTICS, *supra* note 34, at 2, Table 2. The national average ratio as of June 30, 1983 was 177 prisoners per 100,000 citizens. *Id.*

52. For details of the legislative battle in Minnesota, see Clark, An Historical Overview of Sentencing Reform Legislation: 1975-1978 (May 15, 1979) (unpublished study prepared for the Minnesota Sentencing Guidelines Commission; on file with the *Villanova Law Review*).

Interviews were conducted with the following individuals in Minnesota: Justice Douglas Amdahl, member of the Minnesota Sentencing Guidelines Commission (MSGC), in St. Paul (May 12, 1981); Howard Costello, legislative liaison for the Department of Corrections, in St. Paul (May 13, 1981); William Falvey, Public Defender and member of the MSGC, in St. Paul (May 13, 1981); Frank Fly, Senate staff member, in St. Paul (May 12, 1981); Cort Holton, former legislative aide to Representative Donald Moe, in St. Paul (May 11, 1981); Arnold Kempe, former Representative, in St. Paul (May 12, 1981); Kay Knapp, MSGC Research Director, in St. Paul (March 7 & May 14, 1981) (by phone on April 10, June 8 & Oct. 19, 1981); William McCutcheon, former senator, in St. Paul (May 12, 1981); Senator Donald Moe, former representative, in St. Paul (May 14, 1981); Richard Mulcrone, former Parole Board Chairman, in St. Paul (May 14, 1981); Dale Parent, MSGC Staff Director, in St. Paul (March 7, May 11 & 13, 1981); Steven Rathke, County Attorney and member of the MSGC, in St. Paul (March 7 & May 14, 1981); Kenneth Schoen, former MSGC member and Commissioner of Corrections, in New York City (April 20, 1981); Jan Smaby, MSGC Chairperson and Hennepin County representative of MACCAC, in Minneapolis (March 6, 1981); Representative Robert Vanasek, Chairman of the House Criminal Justice Committee, in St. Paul (May 12, 1981).

53. Interview with Sen. William McCutcheon, *supra* note 52. See also Research Project: *Minnesota Sentencing Guidelines*, 5 HAMLIN L. REV. 292, 301 (1982).

Senator McCutcheon submitted a flat-time sentencing bill to the legislature in 1975 which would have put all offenses in the Criminal Code into one of three classes of felonies, punishable by fixed five-, ten-, and fifteen-year terms of incarceration. It would also have eliminated the parole board but would not have affected judicial discretion over the disposition decision<sup>54</sup> (i.e., whether to incarcerate and where to send prisoners). The bill would have resulted in vast increases in prison population and corrections system costs.<sup>55</sup> The bill, as it was introduced by McCutcheon, never received serious consideration.<sup>56</sup> It did, however, lead to the establishment of the Senate Select Subcommittee on Determinate Sentencing<sup>57</sup> which held public hearings and revised the bill.<sup>58</sup> Because the Subcommittee's hearings received substantial news coverage, sentencing became a high-visibility issue and created a "get tough on crime" image for McCutcheon's bill in the legislature, press, and public which persisted despite considerable modification of the bill between the 1975 and 1976 legislative sessions.

The bill that was reported out of the Judiciary Committee in January 1976<sup>59</sup> was a flat-time sentencing bill that set sentences at forty percent of the statutory maximum for each offense and permitted day-for-day time off for good behavior. This forty percent minus good time figure was chosen because it both resembled the average time currently served by offenders and, according to an impact state-

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54. S.F. 634 (Minn. 1975). The bill was submitted by Senators McCutcheon, Brown, and Olhoft.

In Minnesota, only about 20% of convicted felons are sentenced to a term in state prison. Others may serve jail terms as a condition of probation. For a discussion of sentencing in Minnesota prior to the imposition of guidelines, see notes 22-29 and accompanying text *supra*. See also Minn. Sentencing Guidelines Comm'n, Concept Paper on Guideline Development (Oct. 27, 1978) (unpublished staff paper available from the Minn. Sentencing Guidelines Comm'n, St. Paul, Minn.) [hereinafter cited as Concept Paper].

55. Clark, *supra* note 52, at 8.

56. Interviews with Dale Parent and Frank Fly, *supra* note 52. See also Research Project, *supra* note 53, at 302. The original bill did serve the important function of providing a vehicle for discussion of the need for sentencing reform. The bill was completely rewritten before it was passed. *Id.*

57. Research Project, *supra* note 53, at 302. The Subcommittee was chaired by Senator McCutcheon and was made up of members of the standing committee who would later consider the bill in the Senate. *Id.*

58. Clark, *supra* note 52, at 8. The subcommittee held 14 meetings and heard testimony from witnesses representing corrections groups, the judiciary, the parole board, attorneys, and private citizens. *Id.* at 8. The subcommittee also sponsored a survey done by the Correctional Service of Minnesota, a private consulting group, on determinate sentencing. *Id.* at 12.

59. S.F. 634 (Minn. 1975).



ment prepared by the Department of Corrections,<sup>60</sup> would not increase prison populations. Judges would be allowed to increase or decrease the sentence by fifteen percent to take aggravating or mitigating circumstances into account, but would be required to state the reasons for the deviation in writing. The bill also provided for abolition of the Parole Board on January 1, 1979 and for appellate review of sentences including appeals by the state.<sup>61</sup>

The McCutcheon bill was passed by a vote of 54 to 11 in the Senate and was sent to the House in March 1976.<sup>62</sup> It satisfied fiscal conservatives who were concerned with the cost of custody,<sup>63</sup> the law enforcement community which desired greater certainty of punishment,<sup>64</sup> and liberals who were concerned with the lack of clear standards and the resulting disparity in sentencing.<sup>65</sup>

In the House, the bill was initially referred to the Committee on Crime Prevention and Corrections which was chaired by Donald Moe.<sup>66</sup> The Committee, under Moe's leadership, refused to give the bill a hearing, claiming that so momentous a change should be given further study.<sup>67</sup> Moe's opposition rested on his fear that once the legislature began setting prison terms, it might easily and capriciously increase sentence lengths. He also objected to shifting discretionary authority from the parole board to judges and prosecutors.<sup>68</sup>

Additional opposition to the bill came from R.T. Mulcrone, chairman of the MCB, who worked closely with Moe to prevent the bill from coming to the House floor. When Moe's committee voted to send the bill to an interim subcommittee for study, a coalition of Republicans and Democrats brought the McCutcheon bill to the House floor by attaching it as a Senate amendment to a bill already

60. Interview with Frank Fly, *supra* note 52. See also Research Project, *supra* note 53, at 302.

61. S.F. 634 (Minn. 1975).

62. Clark, *supra* note 52, at 15-16. Several "toughening" amendments were added by the Judiciary Committee in February, 1976. The bill was passed by the Senate on March 11, 1976 with support from both Democrats and Republicans. *Id.* at 15.

63. *Id.* at 16.

64. *Id.* at 15. Because Senator McCutcheon had a reputation for being tough on crime, law enforcement support was strong even though sentence lengths were not increased. Interviews with Steven Rathke and Frank Fly, *supra* note 52.

65. Clark, *supra* note 52, at 16.

66. Research Product, *supra* note 53, at 303.

67. *Id.* Moe objected to totally modifying the criminal code in only a few weeks because revisions had traditionally taken years. He further asserted that many House members did not understand the bill. *Id.* (citing interview with Sen. Moe, former State Rep. (Feb. 1982)).

68. Interview with Sen. Moe, *supra* note 52.

passed by the House.<sup>69</sup> After heated debate, the House voted to defer the effective date to permit technical revisions,<sup>70</sup> then passed the bill.<sup>71</sup> The Senate passed the amended measure the following day and sent it to Governor Anderson.<sup>72</sup>

During much of the debate, Governor Anderson had assumed a low profile. When the bill reached his desk, however, the Governor vetoed it, citing "serious inadequacies" arising from a technical defect in drafting.<sup>73</sup> Some observers surmised, however, that Moe and Mulcrone, who had close personal ties with Governor Anderson's chief advisor, convinced the governor to veto the legislation and found that the technical defect made such an act politically feasible.<sup>74</sup>

When the new legislature convened in 1977, McCutcheon again introduced his determinate sentencing bill.<sup>75</sup> It was passed by the Senate on May 10 and was then sent to the House.<sup>76</sup> However, momentum had shifted during the intervening year. Representative Arnold Kempe, a conservative and former supporter of the McCutcheon bill, now advocated establishing a judicial guidelines commission which would establish advisory sentence lengths and ranges.<sup>77</sup> Kempe drafted a bill to establish a sentencing guidelines commission of five judges which would design guidelines to be approved by the supreme court.<sup>78</sup> The guidelines would establish a presumptive sen-

69. Interviews with Sen. Moe, Richard Mulcrone, and Dale Parent, *supra* note 52. See also Research Project, *supra* note 53, at 303. S.F. 634 was attached to H.F. 1865, an uncontroversial bill written by Representative Arnold Kempe. *Id.*

70. Interviews with Sen. Moe, Richard Mulcrone, and Dale Parent, *supra* note 52. See also Research Project, *supra* note 53, at 304. The bill was referred to a conference committee which amended it to reflect objections raised on the floor. *Id.* Among those amendments was the omission of an extended term for murder, serious offenses, and crimes with a weapon. *Id.* The Governor objected to this omission. See notes 73 & 74 and accompanying text *infra*.

71. Research Project, *supra* note 53, at 304. The final version was passed by a vote of 94 to 36. *Id.*

72. *Id.* at 304.

73. In the confusion surrounding the end of the legislative session, language specifying the length of extended sentences for certain violent and chronic offenders was inadvertently omitted. See Veto Message, 4 JOURNAL OF HOUSE 6640 (1976).

74. See *Savelkoul Claims Wendy 'Untruthful' about Veto Reasons*, St. Paul Pioneer, April 15, 1976, at 26. See also Clark, *supra* note 52, at 25.

75. S.F. 65 (Minn. 1977) (codified in scattered sections of MINN. CODE ANN. ch. 241, 244 & 609). The bill that McCutcheon introduced was essentially identical to the amended house bill from the previous session. Research Project, *supra* note 53, at 304.

76. Research Project, *supra* note 53, at 304.

77. Clark, *supra* note 52, at 31.

78. Kempe's proposal combined suggestions and ideas from several sources regarding a sentencing guidelines commission and sentencing guidelines. In 1977 Kempe learned that the Albany Criminal Justice Research Center had developed a method of creating sentencing guidelines known as the "Albany approach." *Id.* The

tence for all felonies, with the provision that a judge could depart from the guidelines sentence by setting forth in writing his reasons for doing so. Sentences would be subject to appeal by either the defense or the state. Representative Moe was willing to accept Kempe's approach to determinate sentencing if the final bill were shaped so as to allow the parole board to determine sentence length.<sup>79</sup>

With the McCutcheon bill bottled up in a House committee, and the Kempe bill unable to get a hearing in the Senate, Moe broke the impasse by arranging for the Speaker to pair the two non-companion bills so that they could move forward as a single piece of legislation.<sup>80</sup> The House passed the Kempe version, and when the Senate refused to concur, a conference committee composed of five House members and five Senate members was established on January 19, 1978.<sup>81</sup>

The Senate conferees, led by McCutcheon, supported abolition of the parole board and advocated legislatively-set flat-time sentences that left the dispositional decision in the hands of the judge.<sup>82</sup> The House conferees, however, were divided. Moe, fearful that legislative term-setting would ultimately result in increased sentence severity, advocated a dual concept with dispositional guidelines established by a sentencing commission and durational guidelines established by the MCB or its reincarnation.<sup>83</sup> Kempe supported a single guidelines commission made up of judges that would design presumptive guidelines for both sentence disposition and duration.<sup>84</sup> Thus, the conference committee had to deal with three principal issues: 1) whether the legislature or a commission would set sentencing policy; 2) whether there would be a single or dual sentencing authority; and 3) whether the commission would be composed only of judges or be a

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Albany approach involved a technical construction of guidelines modeled on the state's past sentencing practice, with the important modification that inappropriate factors, such as race, were eliminated from the final guidelines. The general effect of the Albany approach is to maintain the status quo. Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices*, 5 *HAMLIN L. REV.* 237, 238 (1982).

79. Research Project, *supra* note 53, at 306. Moe and McCutcheon both attempted to persuade Kempe to agree to "a bifurcated system in which judges would make the decision whether an offender would be incarcerated or put on probation, and the parole board would decide sentence length, using written guidelines." *Id.* Kempe, however, would not agree to this compromise. *Id.*

80. *Id.* at 304-06.

81. Clark, *supra* note 52, at 33.

82. The Senate position would have shifted discretion from the correctional bureaucracy to the court.

83. Interview with Sen. Moe, *supra* note 52.

84. The Kempe proposal would have had the effect of making the Parole Board and its release authority superfluous. For a general discussion of the bill proposed by Rep. Kempe, see note 78 and accompanying text *supra*.

mixed group.<sup>85</sup>

McCutcheon yielded to the House position in favor of sentencing guidelines, but insisted that the commission be of mixed composition, that the guidelines not go into effect until the legislature had the opportunity to review them, and that the guideline sentence be a presumptive sentence. The issue of a single or dual decisionmaking authority was resolved in favor of a single body.<sup>86</sup> Thus, the bill which came out of conference provided for a single, legislatively authorized guidelines commission that was to determine both sentence dispositions and durations. The bill was approved 129-1 in the House, 45-0 in the Senate, and was signed by the Governor on April 5, 1978.<sup>87</sup>

## 2. *The Provisions of the Law*

The law enacted after the four-year struggle created the Minnesota Sentencing Guidelines Commission (MSGC). The nine-member commission consisted of the Chief Justice of the Supreme Court or his designee, two district court judges appointed by the Chief Justice, the Commissioner of Corrections or his designee, the Chairperson of the Corrections Board or his designee, and the following persons appointed by the Governor: one prosecutor from those nominated by the Board of Governors of the County Attorneys Council, one public defender from those nominated by the State Public Defender, and two citizens. The Governor was to select one of the nine members as chairperson.<sup>88</sup>

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85. The positions of the leaders of the Minnesota legislative struggle with respect to the key issues are indicated in the following table.

Legislator	Discretion over Duration	Role of Parole	Structure of Commission	Severity	Client Constituency
McCutcheon	Legislature	Abolish	(No strong opinion)	No Increase	Police and Prosecutors
Kempe	Judiciary	Abolish	Dual	(No strong opinion)	(Judiciary)
Moe	Administrative Body	Retain	Single	No Increase	Corrections Bureaucracy

86. It has been suggested that Moe had actually planned to maneuver a "switch" by substituting his dual authority bill for Kempe's in conference. The plan apparently went awry when one of the three-House conferees necessary to support the change mistakenly voted the "wrong way" and was unwilling to reverse himself.

87. 1978 Minn. Laws 723. For a detailed description of the legislative history of the Minnesota sentencing guidelines law, see generally, Research Project, *supra* note 53, at 301-06.

88. MINN. STAT. ANN. § 244.09 subd. 2 (West Supp. 1983). The amended ver-

The sentencing guidelines were to be submitted to the legislature by January 1, 1980, and would become effective on May 1, 1980 unless the legislature took contrary action.<sup>89</sup> The guidelines were to be advisory to trial court judges. They were to include consideration of both the circumstances under which the imprisonment of an offender is "proper" and a recommendation of a presumptive fixed sentence for offenders for whom imprisonment is proper based on combinations of "reasonable" offense and offender characteristics. In determining the presumptive sentence, the MSGC was to "take into substantial consideration current sentencing and releasing practices and correctional resources including but not limited to the capacities of local and state correctional facilities."<sup>90</sup> The MSGC was permitted to establish a range of up to fifteen percent within which the presumptive sentence could vary,<sup>91</sup> with the requirement that the court make a written finding of fact as to the reasons for any departure.<sup>92</sup>

Both the state and the defendant are given an unlimited right to appeal stayed or imposed sentences. The supreme court may review the sentence to determine whether it is inconsistent with statutory requirements, "unreasonable, inappropriate, excessive, unjustifiably disparate or not warranted by the finding of fact issued by the court."<sup>93</sup> Good time may be earned at the rate of one day for every two days of good behavior in the institution.<sup>94</sup> The MCB retained full power over inmates imprisoned for crimes prior to May 1, 1980.<sup>95</sup> Those imprisoned after that date were to have release dates determined by the judge at the sentencing hearing. However, the MCB would continue to establish conditions of supervised release, revoke release upon violation of those conditions, and grant extraordinary discharges.<sup>96</sup>

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sion provides for a 10 or 11 member commission, adding one peace officer and one probation officer, both to be appointed by the governor. *Id.* § 244.09 subd. 2.

The exclusion of legislators and the delegation of responsibility to citizens and representatives of various interest groups are consistent with Minnesota's moralistic political culture. For a discussion of Minnesota's political culture, see note 22 and accompanying text *supra*.

89. MINN. STAT. § 244.09 subd. 12 (West Supp. 1983).

90. *Id.* § 244.09 subd. 5.

91. *Id.*

92. *Id.* § 244.10 subd. 2.

93. *Id.* § 244.11. ("the Supreme Court may dismiss or affirm the appeal, vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence or order further proceedings to be had as the Supreme Court may direct").

94. *Id.* § 244.04 subd. 1.

95. *Id.* § 244.08 subd. 1. The MCB was abolished in 1981, and its responsibilities were transferred to the Department of Corrections. 1981 Minn. Laws ch. 3600, § 4, subd. 2.

96. MINN. STAT. § 244.05 (1980). The Commission was also authorized both to

### 3. *The Role of Interest Groups in Shaping the Sentencing Law*

#### a. Law Enforcement

The law enforcement community strongly supported the McCutcheon bill. Police and prosecutors shared McCutcheon's dissatisfaction with the parole board's authority to release an offender at any time.<sup>97</sup> Although many of his supporters were concerned principally with the MCB's leniency, McCutcheon's goal was greater certainty of punishment rather than increased severity. His initial flat-time bill presented an image of toughness—whether intended or not—which lingered through its many revisions. Yet McCutcheon seemed to have been almost as determined as the Commissioner of Corrections to avoid increasing prison populations, and convinced the law enforcement community to trade greater severity for increased certainty of punishment.<sup>98</sup>

The county attorneys, recognizing that they would gain discretion at the expense of the parole board, strongly supported McCutcheon's bill. They were not pleased with the guidelines approach, but when it became apparent that the House version would prevail, they lobbied hard for and gained representation on the Commission, the inclusion of the right of the state to appeal a sentence, and a reduction in the rate at which good time could be earned.<sup>99</sup>

#### b. Judges

Judges were only marginally involved in the legislative battle. Neither a politically powerful nor an active group, their strong tradition of judicial restraint and lack of agreement with respect to the parole board inhibited overt participation, although it was evident to legislators that most judges did not like either bill. Even when Kempe suggested an entirely judicial commission, the reaction of the

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serve as a clearing house and information center on sentencing, and to conduct research and evaluation on the sentencing guidelines, the use of imprisonment and alternatives, plea bargaining, and other matters relating to the improvement of the criminal justice system. It was required to make periodic recommendations to the legislature regarding changes in the criminal code and criminal procedures. The Commission was permitted to promulgate guidelines relating to non-imprisonment sections. After implementing the guidelines, the Commission was required to review the powers and duties of the MCB and recommend to the legislature its future role. *Id.* § 244.09.

97. Interviews with Sen. William McCutcheon; Steven Rathke, Prosecutor and Commission member; Dale Parent, Staff Director; Kenneth Schoen, Commissioner of Corrections; and Howard Costello, Legislative Liaison for the Department of Corrections, *supra* note 52.

98. *Id.*

99. *Id.*

judiciary was cool.<sup>100</sup>

### c. Corrections

Kenneth Schoen, the Commissioner of Corrections, maintained a low profile during 1975-76, the first phase of the legislative struggle. While he opposed the McCutcheon bill, Schoen realized that open opposition was not an advisable position for the corrections department. Since the McCutcheon bill was designed to hold prison populations at current levels, Schoen felt he could tolerate the changes in sentencing practices and the abolition of the paroling authority.<sup>101</sup> In the second phase, between 1977 and 1978, the corrections department actively supported the guidelines approach. Since the MSGC would set sentence lengths, Schoen's key concern again was stable prison populations. Schoen submitted to the House conferees a provision drafted by the corrections-department staff calling for the MSGC to take correctional resources and facilities into consideration in designing the guidelines. Its inclusion in the bill was supported by both Moe and McCutcheon, and was ignored by virtually everyone else, although it later played a key role in the development of the sentencing guidelines.<sup>102</sup> Its significance was reinforced by Schoen's success in lobbying for MSGC membership for both the Commissioner of Corrections<sup>103</sup> and the chairman of the MCB.

The chairman of the parole board, R.T. Mulcrone, played a key role in the legislative struggle. Parole had no constituency because both liberals and conservatives saw it as the symbol of inequities in the system and the primary target of change. Yet Mulcrone, a former lobbyist, skillfully aroused the concern of both liberals and conservatives with the severity of the flat-time bill, and worked closely with Moe to devise a dual-guidelines approach.<sup>104</sup>

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100. Interviews with Kay Knapp, Research Director, and Dale Parent, Staff Director, *supra* note 52.

101. Interview with Kenneth Schoen, Commissioner of Corrections, *supra* note 52.

102. For a discussion of the importance of the language requiring the MSGC to take correctional resources and facilities into consideration in drafting the guidelines, see notes 113-17 and accompanying text *infra*.

103. The inclusion of the Commissioner of Corrections on the Commission proved to be an important decision for unplanned reasons. As an appointee of the Governor, he provided an important link to the Republican Governor who took office in 1978.

104. Input from other lobbying groups was limited. For example, penal reform groups played virtually no role in the legislative battle in Minnesota. For a discussion of the role of these groups in the passage of California's determinate sentencing law, see Messinger & Johnson, *supra* note 3, at 27-29. Prisoner advocacy groups supported the McCutcheon bill in 1976, but were virtually invisible thereafter. The

#### 4. *Additional Observations*

The composition of the MSGC is consistent with Minnesota's political culture.<sup>105</sup> The final bill excluded legislators, delegating responsibility for detailed decisionmaking to citizens and representatives of affected interest groups. This approach represented a compromise between fiscal conservatives and correctional liberals over the allocation of decisionmaking authority within the criminal justice system. Once Moe and Mulcrone agreed that there would be sentences of fixed duration, the central issue became who would determine sentence lengths: the legislature, the judiciary, or an administrative body. The issue of sentence severity was secondary because key actors agreed not to increase prison populations. This agreement greatly facilitated subsequent acceptance of the MSGC's interpretation of its legislative mandate.

#### B. *Formulating the Guidelines*

##### 1. *The Key Elements in Shaping the Guidelines*

The elements that were central to the interpretation of the legislative mandate and the development of politically acceptable sentencing guidelines in Minnesota were the character of individual Commission members and staff and the emergent sense of group purpose, the literal interpretation of the law as an absolute constraint on prison population, the use of research in policy development, and the view that guideline formulation was a political process in which interest groups should participate and make compromises according to the ground rules established by the MSGC.

##### a. *Membership, Leadership, and Staff*

An important factor in the Commission's development of acceptable guidelines was the dedication, political sensitivity, and intelligence of its members, chair, and staff. The two statutory members, Chairman of the Parole Board, R.T. Mulcrone and Commissioner of Corrections, Kenneth Schoen, both left their positions and the MSGC by the end of 1978. They were replaced after a hiatus of several months by Les Green and Jack Young, respectively. The three judicial members appointed by the Chief Justice included George Scott, associate justice of the Supreme Court, Douglas Amdahl, chief judge

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governor's office also remained aloof, both before and after the 1976 veto. Interviews with Dale Parent and Sen. McCutcheon, *supra* note 52.

105. For a discussion of Minnesota's political culture, see note 22 and accompanying text *supra*.



of the Fourth District Court (Hennepin County),<sup>106</sup> and Russell Olson, of the Third District (Rochester).

The Governor, after consultation with Moe, Mulcrone, Schoen, and McCutcheon, selected Steve Rathke, a prosecutor and political activist who, as chair of the County Prosecutors' Association's legislative committee, had lobbied hard for the McCutcheon bill; Bill Falvey, the public defender of Ramsey County (St. Paul); as citizen representatives, Barbara Andrus, a woman involved in community service activities; and Jan Smaby, the Community Corrections Act administrator for Hennepin County. Smaby was appointed chairperson and brought to the task both abundant energy and political experience both as a lobbyist for the Hennepin County Community Corrections Board and through family ties.<sup>107</sup> Her selection was strongly supported by both Moe and Schoen.<sup>108</sup>

The MSGC first met in June 1978 and had eighteen months in which to construct the guidelines. In the fall it hired Dale Parent as staff director and Kay Knapp as research director. Parent had worked for the corrections department for four years, including two years as research director of the parole board's guidelines project; Knapp was also formerly with the Department of Corrections.

In October, Knapp and Parent presented a concept paper which had emerged from considerable debate between them over the nature of the MSGC's task.<sup>109</sup> Initially the MSGC members and Parent, based on his parole guidelines experience, expected to develop largely descriptive guidelines. Knapp, convinced that guidelines that simply systematized existing practice were neither possible to create nor what the legislature desired, pressed for a shift to a more policy-oriented approach. The concept paper set out a workplan outlining stages of guideline development, policy issues, and likely problems. It also articulated concerns about descriptive guidelines that purport to replicate past practice, and made clear that the MSGC needed to "more actively engage in developing sentencing policy than has previously been required" by those jurisdictions following the Albany approach to guidelines development.<sup>110</sup>

Harmonious internal dynamics facilitated the MSGC's work.

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106. Hennepin County includes Minneapolis. Amdahl has since become Chief Justice of the Minnesota Supreme Court.

107. Smaby's mother had been a state legislator, and her husband was at the time an assistant majority leader in the state House of Representatives.

108. Interviews with Sen. Moe, former state representative, and Kenneth Schoen, former MSGC member, *supra* note 52.

109. Concept Paper, *supra* note 54.

110. *Id.* at 4.

Members acted as representatives of their particular constituencies' interests but were able to see beyond particular issues and positions to the larger goal. Meetings were held monthly and even weekly in the final stages, yet absenteeism was extremely low.<sup>111</sup> Gradually, the MSGC developed a strong collegial spirit and integrated outlook that facilitated resolution of differences through negotiation and compromise. The staff took an active role by focusing the Commission's attention on various issues, although they did not participate in the actual decisionmaking. Their numerous background papers and presentation of research findings provided the members with ample information and with clear, concise statements of the theoretical arguments and policy choices that the MSGC faced.<sup>112</sup>

b. The Interpretation of "consideration of . . . correctional resources"

The legislative directive that the MSGC "take into substantial consideration . . . correctional resources, including but not limited to the capacities of local and state correctional facilities"<sup>113</sup> gradually came to be interpreted as a directive that the guidelines should not lead to prison populations that exceeded the capacities of state correctional institutions.<sup>114</sup> Although there was never a vote on the interpretation of the phrase as an absolute limit, Smaby, Parent, and Knapp early agreed to view it as an absolute constraint on the MSGC's decisionmaking and gradually "sold" this perspective as both principled and practical to both MSGC members and the interest groups that participated in MSGC meetings.<sup>115</sup>

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111. The low absenteeism was facilitated, but not explained, by the fact that seven of the nine members lived in the Twin Cities area where Thursday evening dinner meetings were held.

112. For a discussion of the research studies used by the MSGC, see notes 118-26 and accompanying text *infra*.

113. MINN. STAT. ANN. § 244.09 subd. 5 (West 1980).

114. MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 2 (Jan. 1, 1980) [hereinafter cited as MINN. GUIDELINES REPORT]. The report stated, "In drafting the sentencing guidelines, the Commission has interpreted this directive to mean that the guidelines should produce prison populations which do not exceed the current capacity of state correctional institutions." *Id.*

115. Kay Knapp, the Sentencing Commission's Research Director, explained the Commission's rationales for viewing existing prison capacity as an absolute limit on the Commission: 1) since the legislature, not the Commission, appropriates funds, if the Commission were to increase prison population and force the construction of new facilities, it would overstep the legislative mandate; 2) it takes as long as five years to build a prison; if the legislature wanted more inmates imprisoned, it should have appropriated funds and built the facilities before increasing inmate populations; 3) it is immoral to create a sentencing system that consciously leads to overcrowding and endangers the safety of staff and inmates; and 4) if overcrowding were to occur, it is likely that there would be lawsuits and federal court intervention in the state prison

The interpretation by the MSGC of “consideration of . . . correctional resources” as an absolute limit was central to its work for two reasons. First, it facilitated the development of a useful research methodology; the methodology, in turn, reinforced the population limitation and the need to consider it. For the MSGC’s guidelines to maintain prison population at or below the current level, it was necessary to project accurately the impact of different sentencing policy options on prison populations; the accuracy of such projections in turn depended on predictable sentencing outcomes. Predictability required that guideline sentences had to be presumptive and the range of variation limited.

Second, the interpretation of the legislative mandate as an absolute limit on prison population imposed discipline on the MSGC. The Commission’s task then became the allocation of the limited space among the larger universe of potential occupants.<sup>116</sup> Furthermore, the population cap constrained the interest groups lobbying before the MSGC, particularly those seeking to increase sentencing severity. It forced principled, responsible decisions within the bounds of discourse established by the MSGC and put interest groups in the position of having to argue which types of offenders most merited imprisonment.<sup>117</sup>

### c. Research and its Role in Guideline Development

After defining its task as one of allocating existing prison space in accordance with past practices and members’ values, the MSGC needed accurate data on existing sentencing and paroling practices,

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system. K. Knapp, *Estimating the Impact of Sentencing Policies on Prison Populations* (presented at the American Society of Criminology 32nd annual meeting in San Francisco, California, Nov. 5-8, 1980 and on file with the *Villanova Law Review*). See also von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission*, 5 *HAMLIN L. REV.* 164, 176-80 (1982).

116. The state prison capacity was 2,072 inmates. *MINN. GUIDELINES REPORT*, *supra* note 114, at 13.

117. Smaby observed that the prison cap “was our strongest weapon to deal with the tremendous competing interests we had to face in terms of trying to influence who we were going to lock up.” Interview with Jan Smaby, MSGC Chairperson, *supra* note 52.

Several Commission members were initially uncomfortable with what they considered a pragmatic approach to setting policy, but gradually came to embrace the prison cap. When the prosecutor and conservative Commissioner of Corrections publicly supported the population constraint, it forced others to argue according to the rules established by the Commissioner. In the end, all groups realized they could not force the Commission to lock up all offenders and that they would have to agree to trade-offs and compromises in order to achieve some reform. Gradually a consensus developed that it was not so important to put more burglars in prison if it meant locking up fewer rapists. *Id.*

the current and future prison populations, and the likely impact of alternative sentencing policies. From the outset, the MSGC had agreed to undertake research to facilitate informed decisionmaking. The staff's October concept paper recommended three research components: a dispositional study to determine existing sentencing policy and practice with regard to the decision of whether to incarcerate, a durational study to determine the existing practice concerning sentence length, and a simulation or population projection model to predict the impact of various sets of guidelines on state and local correctional facilities.<sup>118</sup> The MSGC authorized the preparation of a detailed research design, and in January 1979, the dispositional and the durational studies were initiated.<sup>119</sup>

The results of the dispositional study indicated that the most significant factor in the judges' decisions regarding imprisonment was the offender's criminal history. The second most important factor was the severity of the current offense. The most important individual criminal history items were the number of prior felony convictions, followed by whether the offender was on probation or parole at the time of the current offense, and finally, the extent and severity of the juvenile record of young adult felons.<sup>120</sup> With regard to the durational component of sentences, the seriousness of the current offense was found to be the primary factor and criminal history the second most important variable associated with the MCB decisions on length

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118. Concept Paper, *supra* note 54, at 5. The Concept Paper suggested that the guideline development should involve the following four sequential stages:

- Stage 1: Determine existing sentencing policy and practice (in/out decisions) with a descriptive research study of sentencing dispositions. Determine existing practice concerning sentence length from a second study of releasing practices.
- Stage 2: Commission review of existing sentencing policy and practice.
- Stage 3: Development of Commission sentencing policy.
- Stage 4: Development of guidelines based on Commission policy using simulation to predict the impact of various sets of guidelines on state and local correctional resources.

*Id.*

119. In the dispositional study, data were collected on approximately 50% of the persons convicted of felonies in fiscal year 1978, including a 42% random sample of males and the entire population of females convicted of felonies. All counties in the state were sampled, with oversampling in those counties with a large Indian population. The dispositional sample consisted of 2,399 cases. The durational study included data on all 847 persons released—either by parole or sentence termination—from state correctional institutions in fiscal year 1978. Data collected for both studies included approximately 150 items regarding current offense, prior criminal history, juvenile history (for adults age 23 or less at the time of the current offense), social history, criminal justice processing data, and sentencing data. The durational study added variables covering duration of confinement. MINN. GUIDELINES REPORT, *supra* note 114, at 4.

120. *Id.* at 5.

of prison terms.<sup>121</sup>

The data further indicated the following: there was little systematic bias by race or gender in sentencing;<sup>122</sup> no social status factor other than employment was associated with sentencing;<sup>123</sup> and only modest regional differences in imprisonment patterns existed. A slightly lower proportion of person offenders were committed in metropolitan areas than non-metropolitan areas, but the large differences in urban and rural sentencing severity that had been expected failed to materialize due to the wide variation among the rural counties with respect to commitment rates.<sup>124</sup> The absence of large urban-rural variations in sentencing dispositions, as well as the existence of the Parole Board's statewide policies with respect to duration, greatly diminished potential regional opposition to the adoption of statewide guidelines regarding the imprisonment of felons.

The data from these studies were then used to develop a unique impact analysis.<sup>125</sup> Rather than simply modeling the guidelines on past sentencing behavior, the Commission developed a population projection model that used case data from the dispositional and dura-

121. *Id.*

122. *Id.* Blacks were being committed at a higher rate than whites for serious person offenses; whites were being committed at a slightly higher rate for property offenses. *Id.*

123. *Id.* Social status items included educational attainment, employment status, community stability, marital status, and drug or alcohol use. *Id.* These items were not associated with sentencing decisions, with the exception of employment at the time of sentencing. It is conceivable that a systematic racial or economic bias could develop if social status items were included in sentencing decisions. *Id.*

124. In 1978 in Minnesota, the overall imprisonment rate for convicted felons was 20.4%. In the third, sixth, and seventh judicial districts (all of which were rural) rates of imprisonment were 25.7%, 13.4%, and 13.2%, respectively; in Hennepin and Ramsey Counties they were 23.9% and 22.7%. Summary Table of MSGC History Index Score (available from the Minnesota Sentencing Guidelines Commission).

125. The research findings were presented to the Commission at two two-day retreats in August 1979. Commission members received notebooks containing a series of color-coded tables indicating percentages of incarcerated offenders of different types and their average sentences. The general attitude of the Commission toward the research, as demonstrated by their actions, was one of trust in the methodology, acceptance of the findings, and a focus on their implications.

Kay Knapp, the MSGC Research Director, explained the Commission's use of data:

Viewing guideline development as the articulation of public policy rather than as the discovery of past practice led to the adoption of impact analysis, rather than statistical description of past practices, as the primary methodological focus. Impact analysis provided the Commission with information as to the consequences that various sentencing policies would have on other aspects of the criminal justice system, with particular emphasis on the consequences for the size and nature of the prison population.

Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices*, 5 HAMLINE L. REV. 237, 239 (1982).

tional studies to simulate the population effects of various sentencing policy options and Commission decisions over a five-year period. The model assigned probabilities of imprisonment to cases in each offense and offender category, permitting the projection of prison populations broken down by offender background and offense type.<sup>126</sup> The MSGC could then consider the implications of various guideline configurations for the overall prison population, the rate of accumulation of prison populations for each year during a five-year period, and the social characteristics of that population over time.

#### d. The Strategy of Public Involvement in the Development Process

The fourth essential element in the development of the Minnesota sentencing guidelines was the Commission's definition of its task in political rather than technical terms.<sup>127</sup> Recognizing that the development of public policy is a political process, the MSGC sought to develop a constituency for the guidelines by encouraging interest group participation. All Commission meetings were open. In addition, the MSGC held a series of six regional public meetings,<sup>128</sup> and staff and members made numerous presentations to interested groups

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126. K. Knapp, *supra* note 115. The Sentencing Guidelines Commission was awarded a \$12,700 grant from the National Institute of Corrections to develop a projection model to test the effect of sentencing policies on prison populations over a five-year period. *Id.* at 3.

Future prison population can be determined primarily by three factors: 1) the current prison population; 2) new commitments increasing the prison population between the present and future dates; and 3) the duration of imprisonment for current and future offenders. *Id.* Probabilities of type and length of sentencing are adjustable parameters in the model. *Id.* Other probabilities included in the model are the probability of parole or work release revocation and probation revocation. *Id.* at 5. The model also provides for a maximum of 100 categories of offenders and 10 severity levels of criminal offenses. *Id.* The system was designed so that a computer terminal could be brought to Commission meetings to provide information on the impact of policy options as they were considered prior to decisionmaking.

127. Kay Knapp, the MSGC Research Director, explained that "[r]ather than viewing guideline development as a technical problem with a mathematical solution, sentencing guidelines development was viewed as a normative problem (*i.e.*, how should punishment be allocated given limited resources) with a political solution (*i.e.*, development of public policy)." Knapp, *supra* note 125, at 239.

128. The regional public hearings were held between March and July 1979. Minutes of MSGC Meeting, at 5 (Feb. 15, 1979). To publicize the three meetings held outside the Twin Cities, about 130 individual letters were sent prior to each meeting to local public defenders, county attorneys, county court judges, county sheriffs, chiefs of police, county commissioners, district court administrators, regional corrections department personnel, and special interest groups such as Indian, black, and women's organizations. The local press was notified. Minutes of MSGC Meeting, at 1-2 (May 17, 1979). While attendance was spotty, no group could complain that it had not been availed an opportunity to make its concerns heard. Interviews with Dale Parent, Jan Smaby, and Kay Knapp, *supra* note 52.

and arranged for liaison with organizations and agencies that they regarded as important.<sup>129</sup>

At MSGC meetings, the members listened to advocates of various positions and then acted in a fashion similar to a panel of judges. Opponents of guidelines, deprived of the procedural objection that the guidelines were developed in a vacuum, generally chose to bargain. They accepted as "fact" that sentencing guidelines were the vehicle to bring determinacy to sentencing and adhered to the parameters imposed by the constraint of prison population capacities. They did so both because of the logic of that policy and because the Commission helped them to perceive how their group could gain more through participation and support than through opposition. By the time the guidelines were developed, all groups had been afforded some input, had gained some concessions, and the guidelines had become their product, too.

## 2. *Constructing the Guidelines*

Construction of the guidelines proceeded in several overlapping steps. Initially, the Commission gathered information through reading, discussion, and collection of data on existing sentencing practices in the state. It next adopted a grid format for the guidelines. One dimension represented offense severity; the other, the offender's criminal history. The core of the work then revolved around establishing several essential policies: selecting the specific items that would constitute offense severity and offender criminal history scores, and establishing policies to determine dispositions and set sentence lengths for those to be incarcerated. Once those issues were settled, the MSGC turned to deviations from the guidelines and other related policy questions.

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129. The Commission asked several police and sheriffs' associations and the Attorney General's office to appoint liaison persons to attend Commission meetings. The Minnesota Association of Community Corrections Act Counties appointed one of its board members to monitor Commission meetings. In addition, Parent informally briefed the Chief Judge's quarterly administrative meetings in 1979 and sat in on a Department of Corrections Task Force meeting on Sentencing Guidelines. Rathke gave the board of the County Attorneys Association regular briefings on the guidelines. Minutes of MSGC Meeting, (May 17, 1979); interviews with Jan Smaby, Dale Parent, and Steven Rathke, *supra* note 52.

Parent and Smaby also cultivated relations with the press. In May 1979, they began meeting with the editorial boards of all the major Twin Cities papers as well as several papers in the rest of the state. They also began developing contacts with reporters, regularly giving them news stories. The efforts translated into generally accurate and favorable coverage of the guidelines and publicity at critical moments that countered criticism and misrepresentation of the guidelines. Interview with Kay Knapp, *supra* note 52.

### a. Offense Severity Ranking

Guideline construction in Minnesota began with the ranking of offense severity.<sup>130</sup> All felonies were categorized into six generic groups.<sup>131</sup> Each member first ranked the crimes within each category in order of decreasing severity. After within-category rankings were agreed upon, an overall ranking was established and felonies were separated into ten categories according to seriousness.<sup>132</sup>

### b. Criminal History Index

The next step was to determine the criminal history index which would compose the second dimension of the grid. The MSGC agreed to include prior felonies and offender's custody status as the basic variables in the index because research had indicated that these were important factors in existing sentencing decisions.<sup>133</sup> However, when additional research indicated that the only social status factor associated with sentencing was employment at the time of arrest, a factor which is highly correlated with race and income level, the Commission unanimously agreed to exclude all social status factors from the criminal history index.<sup>134</sup>

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130. MINN. GUIDELINES REPORT, *supra* note 114, at 6. The Commission worked for four months constructing the severity rankings. *Id.* The initial effort to rank 60 felony offenses resulted in wide variation among individual members' rankings and dissension within the Commission. Rathke's subcommittee restructured the ranking activity by dividing felonies into generic groups for initial intragroup ranking. This greatly facilitated the decisionmaking.

131. *Id.* The six groups were crimes against persons, crimes against property, criminal sexual conduct, arson, drug offenses, and miscellaneous offenses. A total of 104 felonies were divided among the six categories.

132. Generally, the Commission did not attempt to subcategorize the seriousness of criminal conduct within statutory offense categories. *Minnesota Sentencing Guidelines & Commentary* § II.A (rev. ed. 1981), reprinted in MINN. STAT. ANN. § 244 app. (West Supp. 1983) [hereinafter cited as *Minn. Guidelines & Commentary*]. The Guidelines do rate the seriousness of theft and forgery-related offenses according to the value of the property involved. *Id.* § V. One commentator has suggested that the Commission was reluctant to create its own subcategories of criminal offenses because of the judicial difficulties that would be encountered when facts that were not proved at trial were introduced at the sentencing hearing. von Hirsch, *supra* note 115, at 194-95.

133. MINN. GUIDELINES REPORT, *supra* note 114, at 7. The term "custody status" refers to whether the offender was on probation or parole when the offense was committed. *Id.* The guidelines provide for an extra point to be added to the criminal history score if the crime is committed while the offender is on probation or parole. *Minn. Guidelines & Commentary*, *supra* note 132, § II.B.2.

134. *Minn. Guidelines & Commentary*, *supra* note 132, § II.D.1. Status factors which specifically may not be used as aggravating or mitigating circumstances include race, sex, employment, educational attainment, marital status, or living arrangements. *Id.*

Indian-rights groups had expressed considerable concern about the inclusion of these factors. Public defenders, who often rely on personal background as a source of



Two other aspects of the criminal history index were matters of more extended debate. Several options were considered for handling prior misdemeanors and gross misdemeanors. The Commission could exclude them from consideration altogether, include only those similar to the current offense, use a weighted system, or include all prior convictions. Data analyses indicated that misdemeanor and gross misdemeanor convictions had not been strongly associated with sentencing decisions in the past,<sup>135</sup> but most Commission members were reluctant to completely ignore prior misdemeanor convictions in sentencing felons. In October, the MSGC unanimously accepted a compromise motion to adopt a weighted system.<sup>136</sup>

Consideration of juvenile records caused the most heated and prolonged controversy within the Commission and the most intensive input from interest groups.<sup>137</sup> At the suggestion of a committee of juvenile judges, the MSGC held two public hearings on the question before making a decision.<sup>138</sup> Commission members eventually chose to include juvenile history in the criminal history index because they "felt that under limited and tightly controlled conditions to assure equity and reliability, certain juvenile history information was highly relevant to sentencing young adult offenders."<sup>139</sup> The initial compromise adopted by the Commission gave one point for two adjudications based on offenses that (1) would have been felonies if committed by an adult, and (2) that occurred after the offender's sixteenth birthday but before his twenty-first birthday with a maximum of two

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mitigating factors, were silent. Interview with Dale Parent, MSGC Staff Director, *supra* note 52.

135. MINN. GUIDELINES REPORT, *supra* note 114, at 7.

136. *Id.* Under the scoring system promulgated by the Commission, each prior felony conviction counts one point on the criminal history score, each gross misdemeanor counts one-half point, and each misdemeanor counts one-quarter point. *Id.* One of the difficulties with this system is that relatively trivial felony convictions count as much as major felony convictions. *Minn. Guidelines & Commentary, supra* note 132, § II.B.

137. MINN. GUIDELINES REPORT, *supra* note 114, at 7-8. *See also* Falvey, *Defense Perspectives on the Minnesota Sentencing Guidelines*, 5 *HAMLIN L. REV.* 257, 262 (1982). The defense bar was particularly concerned that the use of juvenile convictions would violate the statutory confidentiality of juvenile court records. *Id.* at 262-63. The bar believed that the use of such records would create sentencing disparity due to the varied procedures used by the different Minnesota juvenile courts. *Id.*

138. MINN. GUIDELINES REPORT, *supra* note 114, at 8. "Juvenile court judges, district court judges, prosecutors, defenders, law school professors, representatives of law enforcement organizations, and corrections officials addressed the Commission on the pros and cons of using juvenile records." *Id.*

139. *Id.* at 23. The Commission reasoned that young offenders with serious, extensive juvenile records should not be treated as first-time offenders. The Commission placed strict limits on the types of records considered and on the period of time during which the consideration of this information would be relevant. *Id.* at 8.

criminal history points based on juvenile offenses.<sup>140</sup>

c. Drawing the Disposition Line and Establishing Sentence Durations

The next step in constructing the guidelines was to draw the disposition line based on considerations of current sentencing practices, philosophical models of punishment, expressions of legislative intent, and impact on prison populations.<sup>141</sup> For several months, the staff and Commission floundered with abundant data indicating current practices, but no clear guide for determining placement of the line.<sup>142</sup> Turning to consideration of the implications of different philosophical models of punishment, the staff drew dispositional lines representing just desserts, modified just desserts, incapacitation, and modified incapacitation approaches.<sup>143</sup> The just-desserts approach emphasizes making punishment proportional to the seriousness of the current offense, and eliminates criminal history in determining whether and for how long to imprison.<sup>144</sup> The modified version allows for limited consideration of the offender's prior criminal record, though the current offense remains the dominant factor in sentencing.<sup>145</sup> The incapacitation approach aims to identify and restrain offenders who are likely to pose a threat to society through future criminal behavior. The offender's criminal history is the primary factor used to predict recidivism, although current offense seriousness also is considered in sentencing.<sup>146</sup> The modified incapacitation approach gives more at-

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140. *Minn. Guidelines & Commentary, supra* note 132, § II.B.4.

141. MINN. GUIDELINES REPORT, *supra* note 114, at 8. With regard to legislative intent, the Commission primarily considered mandatory sentencing laws and the Community Corrections Act. The Commission attempted to draw the dispositional line so that most offenses that fell within the mandatory sentences would receive a presumptive imprisonment sentence. The Community Corrections Act establishes a presumption against imprisonment for offenses with a statutory maximum of five years or less (generally property crimes). The Commission attempted to draw the disposition line to follow this intent generally, although the guidelines do recommend imprisonment for individuals convicted of property crimes with longer criminal histories. *Id.* at 9.

142. *Id.* The staff observed that, in general, rates of imprisonment were low for low severity and low criminal history cases and increased at higher levels of criminal history and higher levels of severity, but these trends did not suggest clear dispositional breakpoints. *Id.*

143. *Id.*

144. For a discussion of the just desserts approach, see G. FLETCHER, *RETHINKING CRIMINAL LAW* 460-66 (1978); R. SINGER, *JUST DESSERTS: SENTENCING BASED ON EQUALITY AND DESSERT* 67-74 (1979).

145. For a discussion of the modified just desserts approach, see von Hirsch, *Dessert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591 (1981).

146. For a discussion of the incapacitation approach, see D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *GUIDELINES FOR PAROLE AND SENTENCING* 41-67 (1978).

tention to the gravity of the current offense than does a strict incapacitation approach.<sup>147</sup> Data analyses indicated that Minnesota judicial decisions in the past resembled an incapacitation model more than a just desserts model.<sup>148</sup>

After labeling the philosophical bases of these four alternative disposition lines, the MSGC tested each to determine its impact on current prison populations. The Commission quickly adopted a modified just desserts disposition line; it rejected the incapacitation approach on philosophical grounds and the pure just desserts approach because it would have caused prison overcrowding.<sup>149</sup> The line adopted appeared to be feasible to implement in terms of existing correctional facility capacity, although actual population effects depended on other decisions. Subsequent decisions were made to conform with the tentative disposition line, to which the MSGC became increasingly attached.

Once the disposition issue had been addressed, the MSGC confronted the need to establish sentence durations. Durational considerations were strongly influenced by three factors: current practice of the MCB; philosophies of punishment; and system impact.<sup>150</sup> Ultimately, the MSGC adopted a sentencing scale which appeared to be consistent with a modified just deserts philosophy and which gave judges discretion to make limited durational variations without de-

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147. For a review of the theories considered by the MSGC, see von Hirsch, *supra* note 115, at 181-91.

148. *Id.* at 4-5. The Commission found that defendants who had felony records tended to be imprisoned despite the lack of seriousness of the current offense, whereas first offenders tended to receive probation even if the offense were serious. *Id.*

149. *Id.* at 9, 13-14. For a discussion of the enabling statute's requirement that the Commission take correctional resources into consideration, see notes 113-17 and accompanying text *supra*.

150. MINN. GUIDELINES REPORT, *supra* note 114, at 10-11. The report is unclear as to how much weight the Commission gave to each of the three factors in establishing the durational component. Andrew von Hirsch has suggested that the most important factor was the Commission's desire not to disturb the dispositional line. von Hirsch, *supra* note 115, at 192. The Commission's desire to preserve the dispositional line resulted in a reduction in sentence duration when the preferred durational configuration was tested and found to result in average annual prison populations at capacity with no margin for fluctuations. This pressure on prison resources forced the Commission to choose among permitting periodic overcrowding, changing the dispositional line, or reducing durations. The Commission reluctantly agreed that a five percent population margin was necessary and cut durations by 10% to achieve a policy within the constraints of correctional resources. MINN. GUIDELINES REPORT, *supra* note 114, at 14. One other factor the Commission considered was the impact of "good time" on sentence durations. Under Minnesota law, good time may be earned by the prisoner at the rate of one day for every two days of good behavior. MINN. STAT. ANN. § 244.04 (West Supp. 1983). The Commission increased the length of presumptive fixed sentences to account for "good time" reductions. MINN. GUIDELINES REPORT, *supra* note 114, at 11.

parting from the guidelines.<sup>151</sup>

#### d. Departures from the Guidelines Sentence

The MSGC decided to permit departure from the presumptive sentences in cases presenting aggravating or mitigating circumstances.<sup>152</sup> Although it specifically prohibited considering social status factors as a basis for deviation, it allowed these factors to be used in determining nonstate incarceration and local treatment.<sup>153</sup> Thus, the Commission distinguished the limited universe of offenders for whom the guidelines' restrictions apply (convicted felons sent to state prisons) from the larger area of setting conditions of non-imprisonment sentences in which discretion remains.

In considering a proposed non-exclusive list of aggravating and mitigating circumstances for departure, several MSGC members adopted uncharacteristic advocacy roles. The prosecutor proposed adoption of many aggravating factors;<sup>154</sup> the defender countered with motions to adopt numerous mitigating factors.<sup>155</sup> After the MSGC voted to approve many vaguely worded reasons for departure, the Commissioner of Corrections chided the Commission for "making a farce of the departure issue" by opening more than half the cases to deviations.<sup>156</sup> Apparently swayed by this argument, the Commission rescinded previously adopted motions on departures and subsequently adopted a more limited but non-exclusive list of mitigating and aggravating factors.<sup>157</sup>

151. MINN. GUIDELINES REPORT, *supra* note 114, at 12.

152. *Minn. Guidelines & Commentary*, *supra* note 132, § II.D.2. The enabling statute permitted durational deviations within the guidelines of up to plus or minus 15%. MINN. STAT. ANN. § 244.09 subd. 5(2) (West Supp. 1983). The ranges actually provided by the guidelines are plus or minus five to eight percent of the fixed presumptive sentences. MINN. GUIDELINES REPORT, *supra* note 114, at 12. The Commission refrained from adopting the full permissible range because "broad ranges would increase the disparate treatment of similar cases and, in a sense, would allow disparity to continue in practice while defining it away in theory." *Id.*

153. *Minn. Guidelines & Commentary*, *supra* note 132, § II.D.1. More specifically, the guidelines prohibit, as a basis of deviation, consideration of race, sex, employment factors, social factors such as educational attainment, and the exercise of constitutional rights by the defendant during the adjudication process. *Id.*

154. Minutes of Meetings, Minnesota Sentencing Guidelines Commission, Nov. 1-3, 1979, at 10-11.

155. *Id.* at 11-13.

156. *Id.* at 13.

157. *Minn. Guidelines & Commentary*, *supra* note 132, § II.D.2. Mitigating factors which may be used as reasons for departure include the following:

- (1) The victim was an aggressor in the incident.
- (2) The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.
- (3) The offender, because of physical or mental impairment, lacked sub-

The legal standard adopted for departures was that of "substantial and compelling circumstances."<sup>158</sup> Despite the efforts to limit the number of departures, the Commission did not set a limit on the extent of the departure from the presumptive sentence, leaving specific standards for departure to be developed through appellate review of sentences by the state supreme court.<sup>159</sup>

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stantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.

- (4) Other substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense.

*Id.* § II.D.2.a.

Aggravating factors include the following:

- (1) The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender.
- (2) The victim was treated with particular cruelty for which the individual offender should be held responsible.
- (3) The current conviction is for an offense in which the victim was injured and there is a prior felony conviction for an offense in which the victim was injured.
- (4) The offense was a major economic offense, identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage. The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense:
  - (a) the offense involved multiple victims or multiple incidents per victim;
  - (b) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;
  - (c) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;
  - (d) the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; or
  - (e) the defendant has been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions.

*Id.* § II.D.2.b.

158. *Id.* § II.D. Judges must provide written reasons for a departure from the guidelines. *Id.* A judge who departs from both the presumptive disposition and the presumptive duration must provide reasons for each departure. *Id.* § II.D.02.

159. The extent to which judges may depart from the guidelines depends on the Minnesota Supreme Court's interpretation of the "substantial and compelling" standard. *See* von Hirsch, *supra* note 115, at 212. The Minnesota Supreme Court has ruled on the departure issue on a case-by-case basis. *See, e.g.*, *State v. Luna*, 320 N.W.2d 87 (Minn. 1982) (defendant's use of knife and particularly offensive threats during sexual assault justified increase in presumptive sentence from 43 to 60 months); *State v. Fairbanks*, 308 N.W.2d 805 (Minn. 1981) (13-month addition to presumptive sentence for conviction of burglary of dwelling with assault, justified in light of defendant's threats to his victim of castration and murder, and his assault on victim). Generally, the outer limit for departures is a doubling of the presumptive sentence. *See* *State v. Martinez*, 319 N.W.2d 699 (Minn. 1982); *State v. Evans*, 311

### e. Additional Policy Considerations

In designing the guidelines, the MSGC recognized that the effect of punishment standards critically depends on the actions of system officials, particularly prosecutors, and that the guidelines would increase these officials' discretion due to their control of the charging and plea negotiation process.<sup>160</sup> After hearing a variety of arguments, the Commission decided not to attempt to structure plea negotiation or limit prosecutorial power until the guidelines had been implemented and prosecutorial reactions had been studied. The Commission also weighed and rejected real offense sentencing and explicit sentence discounts for guilty pleas.<sup>161</sup>

The legislative mandate permitted, but did not obligate, the Commission to develop guidelines governing conditions of probation for convicted felons not sentenced to state prisons (non-imprisonment guidelines).<sup>162</sup> Initially, the grid included non-imprisonment guidelines, but later the Commission agreed not to adopt non-imprisonment guidelines or establish recommended sanctions for convicted offenders for whom state prison terms are not proper. This self-imposed limitation was an important factor in avoiding opposition to the guidelines. It permitted the judge to set the conditions of probation which may include up to one year in a local jail. For the eighty percent of all convicted felons whose sentences are stayed (as well as all misdemeanants) there is no state sentencing policy governing judicial determination of the conditions of punishment. This decision by the MSGC averted angering both the bench and bar over the determination of jail time, which often is affected by local traditions and conditions in county jails.<sup>163</sup>

### f. Final Adjustments

#### Statewide conferences of judges, prosecutors, and public defend-

N.W.2d 481 (Minn. 1981); *State v. McClay*, 310 N.W.2d 683 (Minn. 1981). *But cf.* *State v. Stumm*, 312 N.W.2d 248 (Minn. 1981) (absolute vulnerability of 2-year-old victim and cruelty of defendant and his indifference to child's medical needs justified more than a doubling of presumptive guideline sentence).

160. *See generally* Rathke, *Plea Negotiating Under the Sentencing Guidelines*, 5 *HAMLINE L. REV.* 271, 271-72 (1982).

161. Minutes of MSGC Meeting (Dec. 21, 1978); interviews with William Falvey, Steven Rathke, Dale Parent, and Judge Amdahl, *supra* note 52.

For a discussion of the implications of these policies, see Coffee & Tonry, *Hard Choices: Critical Trade-offs in the Implementation of Sentencing Reform Through Guidelines*, in *REFORM AND PUNISHMENT* (M. Tonry & F.E. Zimring eds. 1983).

162. MINN. STAT. ANN. § 244.09 subd. 5 (West Supp. 1983).

163. The Minnesota House of Representatives has recently adopted a resolution directing the Commission to develop a grid for non-prison sanctions. Resolution of March 17, 1982, Comm. on Crim. Justice, Minn. House of Reps.

ers were held in late November 1979 to present the draft guidelines that were to be submitted to the legislature January 1, 1980. Public defenders, who had been passive to that point, suddenly became vocal critics of the guidelines. The December meeting at which the Commission made final modifications of the guidelines was "the night of the defense."<sup>164</sup> Under pressure from public defenders to eliminate prior misdemeanors, gross misdemeanors, and juvenile adjudications from the criminal history score, the MSGC members representing the county attorneys and public defenders agreed to a compromise: a limit of one point on the criminal history score for all prior misdemeanors and gross misdemeanors<sup>165</sup> and one point for a juvenile record.<sup>166</sup> Other modifications included the adoption of a provision permitting the lapse of a prior record after a period of time if no subsequent convictions occur<sup>167</sup> and, in response to vigorous lobbying by women's groups, an increase in the severity level of several criminal sexual conduct offenses.<sup>168</sup>

### 3. *Endorsements and Interest Group Positions*

The response to the guidelines, while not wildly enthusiastic, was generally quite positive. Rathke's effort to persuade the County Attorneys Association to adopt a resolution in favor of the guidelines resulted in a bland statement that the association would not be the one to "cast the first stone" at the guidelines.<sup>169</sup> Thus, a politically powerful potential opponent was neutralized. Prosecutors had become convinced that they had more to gain from the sentencing guidelines than from continuation of the status quo. Indeed, the prosecutors had won several important concessions, including consideration of the juvenile record in the adult offender's history score and the elimination of consideration of social status factors in sentencing. What they had lost in severity of sentences was more than offset by increased certainty of imprisonment for violent offenders, greater leverage in the charge and plea negotiation process which had been left unregulated by the guidelines, and the elimination of parole board authority over the length of prison terms. These changes enhanced

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164. Telephone interview with Kay Knapp, MSGC Research Director, *supra* note 52.

165. *Minn. Guidelines & Commentary*, *supra* note 132, at Comment II.B.302.

166. *Id.* at Comment II.B.405.

167. *Id.* at Comment II.B.106.

168. This change was not adopted until modifications in the criminal history index reduced the projected prison population sufficiently to accommodate the proposed increases in offense severity.

169. Interview with Stephen Rathke, County Attorney and member of the MSGC, *supra* note 52.

the influence of the prosecutors in decisions about who should go to prison and for how long.

The public defenders, a less politically potent group than the prosecutors, actively entered the negotiation process only in its final stage. Their initial vocal opposition to the guidelines was blunted when they recognized that prison populations would shift but that overall severity level and numbers would not increase, and when they won a limitation on the criminal history score with respect to misdemeanors and juvenile adjudications.<sup>170</sup>

Judges took no position on a county, district, or statewide level. They were divided in their views of the guidelines, without leadership on the sentencing issue, and probably inhibited by their tradition of political restraint. Further, the decision of the Commission not to impose non-imprisonment guidelines avoided likely vociferous criticism by judges. While occasional statements that the guidelines would turn judges into robots surfaced, the guidelines shifted rather than diminished judicial discretion. Prior to the guidelines, judicial decisions with respect to dispositions were unfettered, but judges in reality had virtually no influence over prison terms.<sup>171</sup> With the guidelines, although their dispositional discretion was limited, their discretion with respect to sentence duration was increased.

Police and sheriffs, who might have been expected to oppose the guidelines as too lenient, did not take a position.<sup>172</sup> The Minnesota Association of Community Corrections Act Counties (MACCAC) gave the guidelines a weak endorsement. MACCAC was initially concerned about financial arrangements and increased costs to counties if jail use increased. The MSGC won their support with a financial incentive, providing that counties would not be charged under the Community Corrections Act for any offender sentenced according to the guidelines.<sup>173</sup> The reactions of other corrections personnel to

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170. Interviews with William Falvey, public defender and member of the MSGC; Kay Knapp, MSGC Research Director; and Jan Smaby, MSGC Chairperson, *supra* note 52.

171. For a discussion of sentencing in Minnesota before the guidelines were implemented, see notes 23-29 and accompanying text *supra*.

172. McCutcheon, who had become an advocate of the guidelines as a former Police Chief, apparently convinced the Police Chiefs' Association to support the guidelines rather than adopt a resolution opposing them, as they had been considering. Interviews with Dale Parent, MSGC Staff Director, and William McCutcheon, former senator, *supra* note 52.

173. Under the Community Corrections Act, counties were expected to keep felons' sentences to less than five years in local facilities. MINN. STAT. ANN. §§ 401.01-401.16 (West Supp. 1983). To encourage local treatment, counties received a subsidy from the state for local programming from which was subtracted the per diem expenses of "chargeable" felons sent to state institutions (*i.e.*, those offenders



the guidelines were mixed. Some officials were threatened by the rejection of rehabilitation as a goal of imprisonment and as a mechanism of social control of offenders. Probation officers were upset by the new burden imposed on them to provide accurate criminal history information in the face of often incomplete records. Top corrections department leaders, however, recognized the leverage provided by the adoption of "good time" and also welcomed the assurance of a limited and predictable prison population.<sup>174</sup>

Groups representing Indians, blacks, and women went along with the guidelines. While mistrustful of the impact of the guidelines, Indian and black civil rights groups sought and gained the explicit elimination of consideration of status factors which they believed worked against them. Indian advocates also successfully argued for the elimination of petty offenses and won a limitation on prior misdemeanor offenses in criminal history scoring. Feminist groups had succeeded in increasing the severity of criminal sexual conduct offenses.<sup>175</sup>

The Republican Governor, Albert Quie, also supported the guidelines. He had taken no position on the guidelines while the MSGC was constructing them. As several members were appointees of his Democratic predecessor, the only entree to the Governor's office was through the Commissioner of Corrections, Jack Young, a Quie appointee. When the guidelines were submitted to the legislature, Smaby, Parent, Knapp, and Young briefed the Governor in an open meeting that was attended by a news reporter who reported the Governor's only statement on the guidelines: he supported them.<sup>176</sup> This support helped avoid a partisan battle in the legislature.

#### 4. *The 1980 Legislative Session Strategy*

The MSGC presented the guidelines in a report to the legislature on January 1, 1980.<sup>177</sup> The enabling statute provided that the guide-

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...serving less than five years and thus chargeable to the county). Smaby, the Hennepin County representative of MACCAC, realizing that under the guidelines some chargeables would be sentenced to state prison, recommended legislation that counties not be charged for any offender sentenced according to the guidelines. This proposal won Community Corrections Act counties' support. Interview with Jan Smaby, MSGC Chairperson, *supra* note 52.

174. Interviews with Kay Knapp, Dale Parent, Howard Costello, and Kenneth Schoen, *supra* note 52.

175. *Id.*

176. Schultze, *Little Effect on Prison Rolls Seen*, Rochester Post Bull., Jan. 17, 1980, at 17 (reporting that Governor Quie supported the guidelines). See also Salisbury, *Uniform Criminal Penalties Taking Shape*, St. Paul Pioneer Press, Dec. 23, 1979.

177. See MINN. GUIDELINES REPORT, *supra* note 114.

lines would go into effect on May 1 if there were no legislative action to the contrary prior to that date.<sup>178</sup>

At the start of the 1980 legislative session, Chairperson Smaby briefed key legislators.<sup>179</sup> She argued that the guidelines could not retain their integrity if amended, that they adhered to the legislative mandate, and that they faced no organized opposition. Leaders in both chambers adopted the strategy of keeping the guidelines in committee until they went into effect to avoid debate or efforts to alter them on the floor of either chamber.<sup>180</sup>

The legislature was willing to let the guidelines go into effect because it did not want to reopen the sentencing issue that had earlier led to such a bitter and protracted debate. Further, the MSGC had resolved key issues, at least temporarily, in a responsible manner that was acceptable to all concerned groups. The goal of sentencing was shifted from an emphasis on rehabilitation to a primarily retributive approach. Discretionary authority to determine the disposition and duration of prison terms of felons was shifted and structured by the guidelines, and the existing level of sentencing severity was maintained, although average terms of imprisonment for certain types of offenses were altered.

#### IV. THE POLITICS OF SENTENCING REFORM IN PENNSYLVANIA<sup>181</sup>

##### A. *The Legislation*

##### 1. *The Legislative Battle*

In Pennsylvania, criticism of the existing indeterminate system of

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178. MINN. STAT. ANN. § 244.09 subd. 12 (West 1983). The guidelines are reprinted at MINN. STAT. ANN. § 244 (app.) (West 1983).

179. Interview with Jan Smaby, MSGC Chairperson, *supra* note 52.

180. Interviews with Jan Smaby and Rep. Vanasek, *supra* note 52. A bill was introduced to defer implementation of the guidelines rather than reject them, but it never got out of the House Criminal Justice and Corrections Committee. In the Senate, when a similar bill was blocked in committee and brought to the floor by a parliamentary maneuver, it was defeated in a party line vote. This is ironic (and perhaps an apocryphal sign of danger) in view of the tradition of nonpartisan treatment of criminal justice policy issues in the Minnesota legislature and the efforts of the commission to gain bipartisan support.

181. For a general discussion of the author's research methodology, see note 12 and accompanying text *supra*.

Interviews were conducted with the following individuals in Pennsylvania: Patrick Beaty, Staff Aide to Sen. Michael O'Pake, in Harrisburg (May 4, 1981); Rep. Norman Berson, member of the Pennsylvania Commission on Sentencing (PCS), in Philadelphia (March 14, 1981) and in Harrisburg (April 1, 1981); Judge Richard Conaboy, original Chairperson of the PCS, in Scranton (March 13, 1981); Rendell Davis, Executive Director of Pennsylvania Prison Society, in Philadelphia (April 28, 1981); Saundra D'Illio, Research Director of the Philadelphia Sentencing Guidelines Project, in Philadelphia (April 28, 1981); Donald Dowd, Criminal Law Professor at

sentencing criminals focused on disparity and on the apparent leniency of sentences. The legislative struggle was between House leaders and their allies, who sought broad criminal justice reform, and Senate leaders and their supporters, whose focus was on increasing the severity of sentences for repeat violent offenders. The House leaders' goals were to reduce disparity in sentences, abuses of judicial discretion, and inconsistency in the administration of justice and to create a coherent system through judicial participation in sentencing reform without increasing overall severity.<sup>182</sup> The concerns of Senate leader Michael O'Pake and his allies, on the other hand, focused on inconsistency and leniency in the sentencing of violent offenders.<sup>183</sup>

In 1976, the Senate took the lead in sentencing reform by amending a relatively minor bill, S.B. 995,<sup>184</sup> adding a provision that mandated minimum prison sentences for offenders convicted of a number of violent felonies.<sup>185</sup> The subsequent vote by the House not

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Villanova Law School, in Villanova (May 5, 1981); Sen. George Gekas, member of the PCS, in Harrisburg (March 4, 1981); Frederick Giles, Counsel to the Chairman of the Senate Judiciary Committee, in Harrisburg (May 4, 1981); Rep. Lois Hagarty, in Bala Cynwyd (April 28, 1981 and March 17, 1982); Frank Hazel, District Attorney of Delaware County, in Media (April 28, 1981); Sen. James Kelley, member of the PCS, in Harrisburg (March 4, 1981); John Kramer, PCS Executive Director, in State College (Jan. 27-28, 1981) and in Harrisburg (Feb. 19, Dec. 9, 1981 and March 19, 1982); Nick Lippincott, Counsel to the House Judiciary Committee, in Harrisburg (May 4, 1981); Robin Lubitz, PCS Associate Director, in Philadelphia (March 11, 1981) and in Harrisburg (April 1, 1981); Ronald Marks, Commissioner of Corrections, in Camp Hill (May 4, 1981); Lynn Marks, Executive Director of Women Organized Against Rape, in Philadelphia (May 5, 1981); Sam McClea, Executive Director of the House Judiciary Committee, in Harrisburg (March 4, 1981), in Philadelphia (March 11, 1981) and by telephone (March 2, 1981); John McCormack, PCS Research Associate, by telephone (April 10, 1981); Rep. Terrance McVerry, member of the PCS, in Pittsburgh (Feb. 28, 1981) in Harrisburg (May 4, 1981 and March 29, 1982); Michael Minney, member of the PCS, in Lancaster (May 5, 1981); Judge John O'Brien, member of the PCS, in Pittsburgh (Feb. 28, 1981); Alfred Pelaez, member of the PCS, in Pittsburgh (Feb. 28, 1981); Edward Rendell, District Attorney of Philadelphia County, in Philadelphia (April 29, 1981); Judge Anthony Scirica, member of the PCS and later PCS Chairperson, in Norristown (March 12, 1981 and March 16, 1982); Joseph Smyth, District Attorney of Montgomery County in Norristown (April 29, 1981).

182. For example, Rep. Scirica, the chief sponsor of the bill establishing a guidelines commission, believed that the adoption of appellate review of sentencing was an even more important means than the Guidelines Commission of reining in judicial discretion. Interview with Judge Anthony Scirica, *supra* note 181.

183. Interview with Patrick Beaty, Staff Aide to Sen. O'Pake, *supra* note 181. *See also* Synopses of Public Hearing Testimony, 1980, *infra* note 304 (testimony of Sen. O'Pake advocating more severe sentencing, particularly for violent crimes).

184. S.B. 995, 159th Sess. (Pa. 1975) (amended June 30, 1976). S.B. 995 originally merely added the theft of leased property to Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes. *Id.*

185. *Id.* The amendment to S.B. 995 specified mandatory sentences for those convicted of rape, arson, and robbery. S.B. 995 was not the only mandatory sentencing bill seriously considered that year. *See* H.B. 1509, 159th Sess. (Pa. 1975). The

to concur forced the bill to a joint conference committee.<sup>186</sup> The bill was reported out of the conference committee and passed in the Senate,<sup>187</sup> but was tabled in the House on the last vote of the 1976 session.<sup>188</sup>

The principal opposition to S.B. 995 came from Norman Berson, Democratic Chair of the House Judiciary Committee, and Anthony Scirica, Republican member of that committee. Both opposed mandatory minimum sentencing legislation in general as too rigid, and opposed S.B. 995 specifically as too severe and costly.<sup>189</sup> Their initial strategy was to undertake a study of the fiscal impact of S.B. 995 and several similar bills. The joint research study conducted during the summer of 1976 by the legislative staff on the use and impact of mandatory sentencing in Pennsylvania indicated the enormous costs of its adoption and implementation.<sup>190</sup> In addition to using these cost figures to their advantage, opponents of the bill invoked a rarely used parliamentary procedure, resulting in the defeat of S.B. 995

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Senate had earlier amended H.B. 1509 to include a provision which required mandatory sentences for repeat offenders and offenders who commit crimes while in the possession of firearms. *See* Pa. House Leg. J., June 30, 1976, at 5924-26. The House rejected that amendment on the same day that it added its own mandatory sentencing amendments to S.B. 995. *Id.*

186. Pa. Senate Leg. J., Sept. 27, 1976, at 1970.

187. *Id.*, Nov. 16, 1976, at 2088-89. The bill that was reported out of the conference committee toned down the mandatory sentencing amendments. *See id.*, Nov. 15, 1976, at 2056.

188. Pa. House Leg. J., Nov. 17, 1976, at 6441-44. The House tabled the bill by a 92-84 vote. *Id.* at 6442-43.

189. Pa. House Leg. J., June 30, 1976, at 6012 (remarks by Rep. Scirica in opposition to S.B. 995).

This criticism was shared by the Sentencing Task Force of the Pennsylvania Council on the Criminal Justice system, which concluded that mandatory sentencing does not achieve the deterrent effects that many claim, that the imposition of such sanctions disregards constitutional principles and beliefs regarding individualized justice and that the implementation of mandatory sentences would be exorbitantly expensive and, from a correctional management point of view, unrealistic.

Memo from Judge Richard P. Conaboy, President of the Pennsylvania Joint Council on the Criminal Justice System, to Participants and Invitees to the Pennsylvania Sentencing Conference of 1977 (Feb. 23, 1978) (on file with the *Villanova Law Review*).

190. Memorandum from Frederick D. Giles, Kenneth R. Neeley, Sam McClea, and Mike Berney (Feb. 3, 1977) (on file with the *Villanova Law Review*) (discussing the legislative staff's projection of the fiscal impact of S.B. 995). In 1975, 4,915 of the 10,061 persons sentenced for crimes which would be subject to mandatory sentences under S.B. 995 (48.9%) were given probation or another non-incarcerative sentence. *Id.* Assuming that one-quarter of those not incarcerated had one or more prior felony convictions—and under S.B. 995 would be incarcerated—a conservative estimate of the cost arising from an increased number of inmates, longer individual prison sentences, a rise in operational and construction costs for the correctional system, and the costs of more jury trials was set at \$28.8 million. *Id.* If half this number of felons were affected, the cost to the state would be \$92.7 million. *Id.*

in the House.<sup>191</sup>

As in Minnesota, opponents of the nearly-adopted mandatory minimum sentencing bill sought an alternative, and proposed sentencing guidelines in the next session.<sup>192</sup> The prime mover in developing the sentencing guidelines legislation was Representative Scirica. The idea of implementing sentencing guidelines received additional exposure with the adoption by the Philadelphia judiciary of voluntary "descriptive" guidelines in an effort to "reform" its sentencing practices.<sup>193</sup> Further support for the guidelines concept came from the Pennsylvania Joint Council on the Criminal Justice System.<sup>194</sup> Its Sentencing Task Force, which included Scirica and Judge Richard Conaboy, the Joint Council's president, organized a sentencing conference attended by more than 100 state leaders in February 1977 to discuss sentencing issues and to develop recommendations for the legislature. The well-orchestrated consensus that emerged from the conference resulted in Joint Council support for the creation of a statewide sentencing guidelines commission.<sup>195</sup> The Joint Council also agreed on the desirability of some form of appellate review of

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191. In the Pennsylvania House, votes are tabulated electronically. While a House rule provides that members cannot vote unless they are seated, it is common practice for members to press the buttons to record votes for other members. This practice is rarely challenged.

The majority leader, who opposed S.B. 995, invoked the rule, thereby limiting the vote to those actually present. Pa. House Leg. J., Nov. 17, 1976, at 6442. This tactic enraged Democratic Representative Zeller, who shouted abuse at the majority leader. *Id.* Representative Zeller's tactics may have been counterproductive since some of the House members who had previously indicated their support for the bill at a party caucus subsequently changed their votes during the actual count.

192. *See* H.B. 953, 161st Sess. (Pa. 1977). H.B. 953 resulted from the combination of two prior bills, H.B. 796, 161st Sess. (Pa. 1977) and H.B. 197, 161st Sess. (Pa. 1977). It provided for appellate review of sentences and for the creation of a sentencing commission.

193. The Philadelphia voluntary guidelines are described in R. Lubitz, S. Dillio and T. Clear, Philadelphia's Sentencing Guidelines: The Impact of Judicially Initiated Reform on the Court of Common Pleas (unpublished manuscript available from the Pennsylvania Commission on Sentencing).

194. The Joint Council is a 24-member body composed of trial judges, lawyers, legislators, state agency heads, and administrators of professional organizations actively involved in Pennsylvania's criminal justice system. It was established in May 1972 by the Governor to serve as an ongoing forum in which concerns of the justice system could be discussed from the interdisciplinary and interdepartmental perspectives of its members. Funds for most of its activities come from the Law Enforcement Assistance Administration's monies and are distributed by the state planning agency.

195. *Pa. Joint Council on the Criminal Justice System, Sentencing Task Force Position Statement on House Bill 953, presented at Pa. House Judiciary Committee Hearings on Sentencing Reform*, at 4-5 (Sept. 20 and 21, 1977) (on file with the *Villanova Law Review*).

Following the sentencing conference, the Task Force focused its attention on House Bill 953 which was seen as embodying many of the views expressed by conference members. *Id.*

sentencing, on the goal of emphasizing greater certainty of punishment over increased severity, and on the need to decrease sentence disparity among various regions of the state.<sup>196</sup>

The House Judiciary Committee held public hearings on several sentencing reform bills during the summer of 1977.<sup>197</sup> However, none of the proposed bills were passed by the House that year. In the 1978 session, Scirica's 1977 guidelines bill<sup>198</sup> was passed by the House,<sup>199</sup> but died in the Senate Appropriations Committee.<sup>200</sup> In the fall of 1978, Representatives Berson and Scirica broke the impasse by attaching their sentencing guidelines commission provision as an amendment to a minor bill that had been passed by the Senate.<sup>201</sup> The amended bill was passed by the House,<sup>202</sup> but the Senate voted not to concur in the House amendment.<sup>203</sup> The bill was then referred to a six-member House-Senate conference committee to negotiate a final compromise.<sup>204</sup> The price of compromise was the inclusion of an interim mandatory sentencing provision.<sup>205</sup> The Conference Com-

196. *Id.* at 1-4.

197. The reform bills were primarily mandatory sentencing bills. *See, e.g.*, H.B. 193, 161st Sess. (Pa. 1977) (providing presumptive minimum sentences for offenders convicted of violent crimes and repeat offenders who committed crimes with the use of a weapon); H.B. 168, 161st Sess. (Pa. 1977) (providing, *inter alia*, additional mandatory penalties for possessing a firearm during the commission of a crime); and H.B. 1467, 161st Sess. (Pa. 1977) (providing mandatory penalties for victimizing the elderly). An important exception was House Bill 953, the guidelines bill, which was introduced by Representatives Berson and Scirica. H.B. 953, 161st Sess. (Pa. 1977).

198. H.B. 953, 161st Sess. (Pa. 1977).

199. Pa. House Leg. J., May 23, 1978, at 1484. The bill passed by a 185-6 vote.

200. Pa. Senate Leg. J., June 13, 1978, at 610.

201. S.B. 195, 162nd Sess. (Pa. 1978). Senate Bill 195 originally amended Title 18 of the Pennsylvania Code (Crimes and Offenses) relating to the alteration of identification marks on personal property.

202. The vote in the House in favor of the bill was 190-0. Pa. House Leg. J., Sept. 21, 1978, at 3132.

203. Pa. Senate Leg. J., Sept. 27, 1978, at 1020.

204. Pa. Senate Leg. J., Sept. 28, 1978, at 1044. The Senate appointed Senators O'Pake, Fumo, and Jubelier to the Conference Committee. *Id.* The House appointed Representatives Scirica, Rhodes, and Berson. Pa. House Leg. J., Sept. 28, 1978, at 3581.

205. The conferees agreed to the inclusion of interim guidelines, avoiding the term "mandatory sentence." *See* 1978 Pa. Laws 319 § 5 (expired with adoption of sentencing guidelines), *reprinted at* 42 PA. CONST. STAT. ANN. § 9721, at 333. Under the Interim Sentencing Guidelines, when sentencing offenders who had committed certain violent crimes and had previously been convicted of any of the listed crimes, the court must have "consider[ed] as a guideline in imposing sentence that such person be sentenced to a minimum term of not less than four years imprisonment." *Id.* § 5(a). A judge imposing a sentence of less than four years in such cases was required to provide a statement of reasons for deviation. *Id.* § 5(b). Additionally, it provided for the right of either the defendant or the Commonwealth to appeal the sentence, and gave standards for review on appeal. *Id.* § 5(c)-(f). The Interim Sentencing Guidelines were, by terms of the law, to expire upon the effective date of the sentenc-

mittee Report was adopted by both the House and Senate,<sup>206</sup> and the bill establishing the Pennsylvania Commission on Sentencing (PCS) was signed into law on November 26, 1978 by the Governor.<sup>207</sup>

The sentencing guidelines commission legislation was thus enacted as a compromise between the House and Senate factions. The Senate leaders had preferred mandatory minimum sentences as a preferable way to force lenient judges to change, to reduce violent crime, and to appear to their constituents as "tough on crime." In agreeing to the guidelines approach they expected the latter to impose sentences that were both more uniform and more severe. The House leaders supported guidelines as a politically useful alternative that offered the opportunity for broad sentencing reform while avoiding the costs of mandatory minimums.

## 2. *The Provisions of the Legislation Establishing the Sentencing Guidelines Commission*

The struggle over determining the composition of the guidelines commission was marked by the legislators' bias against allowing too great a role for judges, whom they viewed as having created the sentencing problem. At the same time, they felt a significant role on the commission for legislators was warranted to ensure that the resulting guidelines would be "sold" to fellow legislators.<sup>208</sup> Thus, although at one point the bill had proposed a commission composed of eight legislators and seven judges,<sup>209</sup> the final compromise reduced the number of judges and legislators to four each, and added three gubernatorial appointees.<sup>210</sup> To satisfy other groups that had sought inclusion on

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ing guidelines adopted by the Pennsylvania Commission on Sentencing. *Id.* § 5(j). Those guidelines were adopted on May 14, 1982 and went into effect July 22, 1982. See 204 Pa. Admin. Code § 303 (Shepard's 1983).

206. The House adopted the Report by a vote of 185-5. Pa. House Leg. J., Nov. 15, 1978, at 3734. The Senate adopted the Report with a vote of 47-0. Pa. Senate Leg. J., Nov. 15, 1978, at 1128.

207. See 1978 Pa. Laws 319 (codified as amended in scattered sections of 18 & 42 PA. CONS. STAT. ANN. (Purdon 1981)).

208. See, e.g., Pa. House J., Nov. 22, 1977, at 3298 (Rep. Milliron, suggesting that a majority of commission members should be from the legislature, so that legislators would have more say than the judiciary).

209. See *id.* (amendment introduced by Rep. Milliron).

210. See 1978 Pa. Laws 319 (codified at 42 PA. CONS. STAT. ANN. §§ 2152(a) (Purdon 1981)). The eleven commission members included four legislators, two from the House appointed by the Speaker, and two from the Senate appointed by the president pro tempore (one from each party in both chambers); four judges of a court of record appointed by the Chief Justice; and a district attorney, defense attorney, and law professor or criminologist appointed by the Governor. *Id.* § 2152(a)(1)-(4). The chairperson was to be elected by the Commission. *Id.* § 2152(c). This composition reflects the tendency in Pennsylvania's political culture to regard politics as a task for professionals. For a discussion of Pennsylvania political culture, see note 35

the Commission, the legislation called for public hearings prior to the submission of the guidelines to the legislature, and specified that certain groups were to be invited to testify.<sup>211</sup>

The mandate of the PCS was to promulgate sentencing guidelines "within the limits established by law which shall be considered by the sentencing court in determining the appropriate sentence for felonies and misdemeanors committed by a defendant."<sup>212</sup> The promulgated guidelines were to specify the range of sentences applicable to crimes of a certain degree of seriousness, the range of sentences of increased severity for defendants previously convicted of felonies or crimes involving a deadly weapon, and deviations from the range of sentences applicable due to the presence of aggravating or mitigating circumstances.<sup>213</sup>

The mandate included no direction to the PCS to consider existing capacities of correctional facilities. Such a provision was considered, but was rejected when it appeared its inclusion would lead Senator O'Pake and the Philadelphia District Attorney Edward Rendell to oppose the entire bill. Despite the omission of this explicit direction, Representative Scirica expected that he would be able to guide the adoption of guidelines that would not greatly affect prison

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and accompanying text *supra*. Half the initial members were appointed for one-year terms; the others and subsequent appointees were to serve for two years. 1978 Pa. Laws 319. It is difficult to understand why the drafters of the legislation initially established the Commission for four years but set the terms of office of half the members to expire while the Commission was in the middle of designing the guidelines, and the terms of the rest to expire shortly after the guidelines were to be implemented. The provision was repealed and replaced in 1980 by a provision that requires members to serve "two years and until a successor has been selected and qualified." 42 PA. CONST. STAT. ANN.

211. *See* 1978 Pa. Laws 319 (codified at 42 PA. CONST. STAT. ANN. § 2155(a)(1) (Purdon 1981)). For the debate over the composition of the Commission, see Pa. House J., 162nd Sess., May 23, 1978, at 1475. Rep. Williams expressed concern that the Guidelines Commission would be composed entirely of white professional males, and community input would be lacking. *Id.* Rep. Scirica pointed out that any interested parties could comment on the proposed guidelines at the public hearings required by the guidelines law. *Id.*

The groups specified by law to be invited to testify at the public hearings included the Pennsylvania District Attorneys Association; Chiefs of Police Associations; Fraternal Order of Police; Public Defenders Organization; law school faculty members; State Board of Probation and Parole; Bureau of Correction; Pennsylvania Bar Association; Pennsylvania Wardens Association; Pennsylvania Association of Probation, Parole and Corrections; Pennsylvania Conference of State Trial Judges; and any other interested persons or organizations. 42 PA. CONST. STAT. ANN. § 2155(a)(1) (Purdon 1981).

It appears that the Bureau of Corrections was excluded from the Commission because of its low visibility, and because of the sense that the Board of Probation and Parole would also have to be included.

212. 42 PA. CONST. STAT. ANN. § 2154 (Purdon 1981).

213. *Id.* § 2154(1)-(3).



population.<sup>214</sup>

The guidelines commission legislation required that public hearings be held on the draft guidelines between thirty and sixty days after their initial publication in the *Pennsylvania Bulletin*,<sup>215</sup> and publication of the guidelines in final form in the *Pennsylvania Bulletin* simultaneous with their adoption.<sup>216</sup> The guidelines were then to go into effect 180 days after the final publication unless they were rejected in their entirety by a concurrent resolution of the General Assembly within ninety days of publication.<sup>217</sup>

The statute also includes a number of provisions not directly related to the establishment of the guidelines commission, but which generally affect sentencing in Pennsylvania. For example, in sentencing outside the guidelines, the legislation requires a judge to provide a written statement of the reasons for the deviation.<sup>218</sup> The legislation further provides for appeal of the sentencing decision by both the defense and prosecution,<sup>219</sup> and allows the appellate court to vacate a sentence if the application of the guidelines is "clearly unreasonable" or if a departure is "unreasonable."<sup>220</sup> In reviewing the record, the appellate court is required to look at the nature of the offense, the circumstances under which it was committed, the history and characteristics of the defendant, the presentence investigation, and the findings on which the sentence was based, as well as the guidelines.<sup>221</sup> In sum, Pennsylvania's legislation suggests guidelines that would be broader in scope, covering both felony and misdemeanor sentences, but which were to be advisory rather than presumptive as in Minnesota. These guidelines were to be superimposed on the existing sentencing procedures and affected judges' discretion in determining the

214. Interview with Judge Anthony Scirica, *supra* note 181.

215. 42 PA. CONS. STAT. ANN. § 2155(a)(1) (Purdon 1981).

216. *Id.* § 2155(a)(3).

217. *Id.* § 2155(c).

218. *Id.* § 9721(b). The enactment of this provision appears to have been influenced by the Pennsylvania Supreme Court's decision in *Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140 (1977). In *Riggins*, a 21 year old married father with three sons was convicted of possession with intent to deliver 1.9 ounces of marijuana. *Id.* at 119-20. 377 A.2d at 142-43. Without explaining why he did so, the trial judge imposed the maximum allowable sentence (a period of "'not less than two nor more than five years.'"). *Id.* at 121-22, 377 A.2d at 143. The Pennsylvania Supreme Court overturned the sentence, holding that "[w]hen a trial court imposes judgement of sentence, its reasons for the imposition of the sentence should appear on the record." *Id.* at 122, 377 A.2d at 143.

219. 42 PA. CONS. STAT. ANN. § 9781(a) (Purdon 1982).

220. *Id.* § 9781(c).

221. *Id.* § 9781(d).

minimum sentence without affecting the parole board's decisionmaking authority.

### 3. *The Role of Interest Groups in Shaping the Sentencing Law*

Because judges in Pennsylvania make both the dispositional and durational decisions by setting the minimum sentence to be served, and because the legislature did not consider eliminating the parole board, the key legislative issues addressed by interest groups were the means by which judicial discretion should be restricted and the extent of those restrictions. Many of the interested parties saw sentencing guidelines as a more appropriate restriction than mandatory minimum sentencing.

The Trial Judges Association endorsed Scirica's sentencing bill.<sup>222</sup> Although much of the judiciary was not enthusiastic about sentencing reform, it appears that judges tended to view sentencing guidelines as preferable to mandatory sentences because the guidelines would allow greater room for the exercise of judicial discretion. Further, the PCS included members of the judiciary, and the imposition of any change would be deferred for at least eighteen months.

Like the judges, the district attorneys preferred sentencing guidelines over mandatory minimum sentencing. One reason for the preference appears to be a concern with retaining flexible plea and charge bargaining as a means of avoiding the overcrowding of local jails.<sup>223</sup> The inclusion of the right to state-initiated appeals and appellate review of sentences was also widely supported by the district attorneys.<sup>224</sup> The Philadelphia District Attorney, Edward Rendell, initially preferred mandatory minimum sentences, believing them necessary to force judges to increase sentence length.<sup>225</sup> Rendell did support the guidelines approach, however, once a provision for interim guidelines was added.

The defense bar also supported sentencing guidelines because they were seen as providing greater flexibility and leniency than mandatory minimums.<sup>226</sup> Defense interests, however, were not par-

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222. The Trial Judges Association pressed for a legislative provision for a range rather than a single sentence and for advisory rather than presumptive guidelines. After these provisions were incorporated in the bill, it was endorsed by the Trial Judges Association at its annual meeting.

223. Interviews with Rep. Norman Berson and district attorneys Frank Hazel, Edward Rendell, and Joseph Smyth, *supra* note 181.

224. Interview with Philadelphia District Attorney Edward Rendell, *supra* note 181.

225. *Id.*

226. Interviews with Sam McClea and Judge Anthony Scirica, *supra* note 181.

ticularly powerful in shaping the legislation.

The Bureau of Corrections, a potentially important interest group, was not very active in developing the guidelines legislation. The Commissioner of Corrections, Ronald Marks, believed, however, that the mandatory sentencing bill would vastly overcrowd the prisons, and accordingly stated his preference for the guidelines alternative.<sup>227</sup>

As in Minnesota, the sentencing guidelines bill was passed by an unusual coalition of conservative and liberal supporters that had different goals. It represented both a "compromise" and an obscuring of a number of issues, permitting its acceptance by wide majorities in both the House and Senate and endorsement by various interest groups outside the legislature. Conservatives, aware of the enormous costs of mandatory minimum sentences, were satisfied with the passage of a bill that they could hold out as being tough on crime, but that also avoided the political consequences of a real increase in sentence severity and fiscal costs. Liberals were encouraged by the adoption of legislation that avoided the inflexibility, severity, and costs of mandatory minimums and promised an opportunity to structure judicial discretion and thereby reduce disparity. Although the unusual and temporary coalition permitted the passage of the legislation, this working agreement postponed confrontation of the difficult questions of local autonomy and community standards versus a statewide policy, sentencing severity levels, and increased costs.

### B. *Formulating the Guidelines—Phase I*

Because many important policy questions were not resolved by the legislature, the PCS was faced with the difficult task of arriving, without much guidance, at a compromise solution. The PCS created three sets of guidelines during two distinct phases of development. During the first phase—from April 1979 to April 1981—the PCS created its initial draft guidelines ("the October 1980 Draft Guidelines")<sup>228</sup> and the first final guidelines ("The January 1981

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227. Interview with Ronald Marks, Commissioner of Corrections, *supra* note 181. Other groups that generally favored the guidelines bill included the following: the Joint Council, the Harrisburg Area Rape Crisis Center, the Pennsylvania Prison Society, the Pennsylvania Bar Association and, in general, the academic community. The police association, in contrast, supported mandatory minimums. *See* interviews with Rep. Norman Berson; Judge Richard Conaboy; Rendell Davis, Executive Director of Pennsylvania Prison Society; Professor Donald Dowd; Lynn Marks, Executive Director of Women Organized Against Rape; Sam McClea, Executive Director of the House Judiciary Committee; and Judge Anthony Scirica, *supra* note 181.

228. 10 Pa. Admin. Bull. 4181-96 (Oct. 25, 1980).

Proposal”).<sup>229</sup> These guidelines were rejected by the legislature in April 1981.<sup>230</sup> In the second phase, with several new members and a new chairperson, the PCS substantially revised the guidelines (“The October 1981 Revised Draft Guidelines”)<sup>231</sup> and produced the January 1982 guidelines<sup>232</sup> that went into effect in July 1982.<sup>233</sup>

### 1. *The Key Elements in Shaping the Guidelines*

#### a. Membership, Staff, and Internal Dynamics

The PCS first met in April 1979 with eighteen months in which to create the guidelines. The Commission consisted of eleven members. The four judges who were selected by the Chief Justice were: Richard Conaboy, from Lackawanna County (Scranton);<sup>234</sup> John O’Brien, from the Allegheny County (Pittsburgh) Court of Common Pleas; and Merna Marshall and Curtis Carson, Jr. from the Philadelphia Court of Common Pleas.<sup>235</sup> The Commission’s four legislative members were Senator Richard Kelley, a conservative Democrat; Senator George Gekas, the senior Republican on the Judiciary Committee;<sup>236</sup> and Representatives Anthony Scirica, a Republican, and Norman Berson, a Democrat. Judge Conaboy was elected as chairperson.

The three remaining appointments were made by Governor Shapp in the final days of his administration.<sup>237</sup> The Governor appointed Robert Colville, the District Attorney of Allegheny

229. 11 Pa. Admin. Bull. 463-76 (proposed Jan. 24, 1981) (rejected, H.R. Res. 24, 165th Reg. Sess. (Pa. Apr. 1, 1981)).

230. H.R. Res. 24, 165th Reg. Sess. (Pa., Apr. 1, 1981).

231. 11 Pa. Admin. Bull. 3597-3605 (Oct. 17, 1981).

232. 12 Pa. Admin. Bull. 431-40 (Jan. 23, 1982).

233. The statute creating the guidelines commission provided that the guidelines would become effective 180 days after final publication unless rejected in their entirety by a concurrent resolution of the General Assembly within 90 days of publication. *See* 42 PA. CONST. STAT. ANN. § 2155(c) (Purdon 1981). No such resolution was passed, and the guidelines became effective on July 22, 1982. *See* 204 PA. ADMIN. CODE § 303 (Shepard’s 1983).

234. Judge Conaboy was a “natural” choice, since he was president of the Pennsylvania Joint Council, former president of the state trial judges association, and a close friend of the Chief Justice.

235. Judge Marshall, the original Commission’s only woman, had been the primary supporter of the Philadelphia guidelines project. Judge Carson, the Commission’s only black, was a civil-rights activist and a critic of the Philadelphia guidelines.

236. Since Republicans gained control of the Senate in 1980, Senator Gekas has been the chairman of the Judiciary Committee.

237. The appointments by Governor Shapp were not discovered until the subsequent administration sought to make its own appointments. Interview with Prof. Donald Dowd, *supra* note 181.

County;<sup>238</sup> Michael Minney, an attorney in private practice in Lancaster to represent the defense bar; and Albert Pelaez, a professor specializing in maritime law at Duquesne University to fill the academic position.<sup>239</sup>

There were several membership changes during the guideline development period that had a significant impact on the Commission's composition. Judge Marshall died in December 1979. The subsequent judicial vacancy was filled by Anthony Scirica, who had been elected common pleas court judge in November 1979. The legislative vacancy created by Scirica was filled by Terrance McVerry, a Republican second-term representative from Allegheny County. Late in 1979, Judge Conaboy was appointed to the federal bench, but agreed to remain chairperson of the PCS.

Judge Conaboy's leadership style and view of his role as chairperson were quite different from those of Minnesota chairperson Jan Smaby.<sup>240</sup> Conaboy adopted a soft-spoken, gentlemanly manner and initially failed to take a strong lead within the PCS, contributing to the Commission's initial lack of clear direction. Conaboy did not actively represent the PCS and its guidelines to interest groups, the public and the legislature; instead, he saw his job as leading the Commission in weighing the issues and designing guidelines which the legislature could be expected to adopt.<sup>241</sup>

The PCS selected John Kramer, an associate professor of sociology at Pennsylvania State University, as its executive director. Kramer was an experienced criminal justice system researcher with little previous experience in politics and policy development. His staff included Robin Lubitz as research director, and John McClosky as research associate.

The PCS and its staff faced several problems which initially inhibited a productive working relationship. For example, the mem-

238. Colville was a supporter of the guidelines and one of the few Democratic district attorneys in the state.

239. Although the academic seat on the Commission was intended to provide the PCS with technical expertise, Professor Pelaez's speciality is admiralty law. Apparently without any initiative on Pelaez's part, his name was suggested by one of his former students, who was serving on the governor's staff. When offered the choice of a position on the Sentencing Commission or on the State Ethics Commission, Pelaez chose the former. Interview with Albert Pelaez, *supra* note 181.

240. For a discussion of Smaby's leadership style, see notes 107-08, 176 & 179-80 and accompanying text *supra*.

241. Judge Conaboy did not present the guidelines to the legislative caucus or visibly or actively use his contacts to gain legislative support for them. His personal preference to avoid "huckstering," his view that the legislature tends to be hostile to the judiciary and his position as a federal judge probably inhibited his activity on the guidelines' behalf.

bers' geographic dispersion made short and frequent meetings unmanageable. Attendance at the meetings by several members was spotty thereby preventing the continuity necessary to address issues effectively. Chairperson Conaboy and several other members were reluctant to rely on the staff, and were mistrustful of their statistics.<sup>242</sup> The PCS did not follow the staff's projected long-term strategy and workplan, and seemed to pressure the staff to adopt a largely reactive role.

#### b. The Ambiguous and Overly-Ambitious Mandate

Although Judge Scirica believed that the legislation made clear that the guidelines were to be advisory rather than presumptive,<sup>243</sup> other Commission members sought to create a presumptive sentencing scheme like Minnesota's.<sup>244</sup> The legislation required a judge who imposed a sentence outside the guidelines to provide a written statement explaining the reason for the deviation,<sup>245</sup> thereby suggesting a presumptive effect. However, the term "presumptive" had been removed from the final draft of the sentencing bill. Thus, the statute that gave the PCS its mandate did not settle the issue of the nature of the guidelines the PCS was to create.

The scope of the guidelines also proved to be a problem. Unlike Minnesota's mandate,<sup>246</sup> Pennsylvania's legislation called for guide-

242. Interviews with Judge Richard Conaboy and Albert Pelaez, *supra* note 181.

243. Letter from Anthony Scirica to Richard P. Conaboy (Dec. 4, 1980) (on file with the *Villanova Law Review*). Judge Scirica's letter expressed reservations about the apparently presumptive nature of the initial draft guidelines: "Act 319 [establishing the PCS], I believe, does not mandate presumptive sentences, nor does it grant authority to the Sentencing Commission to impose guidelines in the nature of presumptive sentences." *Id.* at 2. See also Pa. House Leg. J., May 23, 1978, at 1481 (remarks of Rep. Scirica regarding the advisory nature of the guidelines).

244. The October, 1980 Draft Guidelines used presumptive language. When they were strongly criticized, the majority of commission members agreed to alter the language to make the guidelines advisory. A minority argued that the change had the effect of "pulling the teeth out of the guidelines." See Pelaez & Minney, *New Sentencing Guidelines are More Fluff than Substance*, Pittsburgh Post-Gazette, Jan. 28, 1981, at 9, col. 1.

245. 42 PA. CONS. STAT. ANN. § 9721(b) (Purdon 1982). The legislation provides as follows:

The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing . . . . In every case where the court imposes a sentence outside the sentencing guidelines . . . the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines.

*Id.*

246. Minnesota's guidelines cover only felony offenses. For a further discussion of the scope of Minnesota's guidelines, see notes 89-96 & 161-62 and accompanying text *supra*.

lines covering both felonies and misdemeanors.<sup>247</sup> The designers of the guidelines chose to include many crimes that are categorized as misdemeanors, because they are serious offenses and the source of the greatest sentencing disparity in Pennsylvania.<sup>248</sup> However, creating guideline sentences for misdemeanors thrust the PCS into making policy that would directly affect local correctional facilities. The Minnesota Commission had staunchly avoided this role, recognizing the validity of local policies based on different traditions and the conditions in local facilities.<sup>249</sup> The PCS subsequently exacerbated the public's opposition to the guidelines by designating certain situations for which an incarcerative sentence was not to be used. Even though it was common practice not to incarcerate in such cases, it was politically unacceptable to publicly advertise the fact.

### c. The Limits Imposed by the Prison Populations

The prison population issue also created a problem for the PCS. In contrast with Minnesota,<sup>250</sup> there was no legislative mandate instructing the Pennsylvania Commission to consider correctional resources. The PCS accordingly faced a dilemma. Members recognized that many supporters of the bill expected the guidelines to increase both the severity and the certainty of sentences, a result which would necessarily increase prison populations. They also knew that guidelines that greatly increased the number of prisoners and the length of their sentences would overcrowd prisons and might be impossible to implement.

In May 1980, the PCS discussed and rejected a policy that would explicitly limit incarceration to fit existing jail and prison cell space.<sup>251</sup> Several members and the staff insisted that it would be in-

247. 42 PA. CONST. STAT. ANN. § 2154 (Purdon 1981).

248. The Pennsylvania Crimes Code categorizes as misdemeanor I the following offenses that are treated as felonies in other states, including Minnesota: aggravated assault, 18 PA. CONST. STAT. ANN. § 2702(a)(2)-(4) (Purdon 1973); terroristic threats, *id.* § 2706; retail theft of more than \$150 as a first or second offense, *id.* § 3929; theft of trade secrets, *id.* § 3930(b); and theft of \$200-\$2000 by deception, *id.* § 3922; or extortion, *id.* § 3923. Offenders convicted for these offenses may get maximum sentences of up to five years and may be sent to state prison. *Id.* § 1104(1). Additionally, these offenders may be sentenced to pay a fine not exceeding \$10,000. *Id.* § 1101(1).

Therefore, if the guidelines were limited to felonies only, a prosecutor could avoid the constraint of the guidelines by dropping felony charges and seeking conviction on a misdemeanor I or II, which still could result in a state prison sentence.

249. For a discussion of the Minnesota Commission's attitude toward the use of local correctional facilities, see notes 162-63 and accompanying text *supra*.

250. For a discussion of Minnesota's consideration of correctional resources, see notes 113-17 and accompanying text *supra*.

251. Minutes of PCS Meeting, at 8-9 (May 16, 1980). The research methodol-

appropriate for the PCS in establishing “appropriate sentences” to be guided by practical considerations of space rather than by principles of justice.<sup>252</sup> This seemingly-principled stance was also politically expedient: such a limit without legislative mandate was seen as suicidal, making the PCS vulnerable to charges that it was not “tough” on crime. The two Republican legislators, Gekas and McVerry, strongly opposed such a limit, arguing that, while it might be a practical consideration guiding the Commission’s decisions, it should not be stated as public policy. Berson reluctantly agreed in the face of an overcrowded jail in Philadelphia and a politically visible district attorney advocating stiffer sentences.<sup>253</sup>

The absence of a clear policy regarding consideration of the guidelines’ impact on prison population left the PCS subject to enormous pressure to increase sentence severity. It succumbed to that pressure in formulating the January 1981 Proposal.<sup>254</sup> Still, proponents of increased severity were not satisfied that the modified draft guidelines were tough enough. At the same time, the increase in severity undercut support from liberals and moderates, who attacked the proposals as unfeasible and too expensive to implement.<sup>255</sup>

#### d. Research and Research Findings

Research on past practice did not play the significant role in Pennsylvania that it did in Minnesota, and ultimately proved to be a two-edged sword that made clear both the extent and nature of disparity and the drastic change required to eliminate it. The PCS nearly did not conduct a study of past sentencing practice. The Chairperson and several members did not understand the value of such a study, and feared that it could result in “making decisions based on a computer” rather than on the basis of their collective judgment.<sup>256</sup> A vote committing the PCS to undertake a study of past sentencing practice in Pennsylvania was deferred while the staff assertively caucused with several members and pressed successfully for a vote of approval.

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ogy adopted by the PCS provided fairly limited information on prison impact. For a discussion of the PCS research methodology, see notes 256-66 and accompanying text *infra*.

252. Minutes of PCS Meeting, at 8 (May 16, 1980); interview with PCS Executive Director John Kramer, *supra* note 181.

253. Interview with Rep. Norman Berson, *supra* note 181.

254. For a discussion of the increased severity of the January 1981 Guidelines Proposal over the first draft guidelines, see notes 315-23 and accompanying text *infra*.

255. For a discussion of the reaction to the severity of the January 1981 Guidelines Proposal, see notes 334-38 and accompanying text *infra*.

256. Interview with Judge Richard Conaboy, *supra* note 181.



The study of sentencing practices in Pennsylvania that was eventually undertaken provided information on sentence dispositions and durations based on a sample of 2,907 cases, a 12% sample of all cases disposed of in 1977.<sup>257</sup> No data were gathered on actual time served.<sup>258</sup> Since eighty percent of state prisoners serve only their minimum sentence, it was less difficult to project the impact of the guidelines on that population than on the jail population, which may be paroled at any time and for whom data on releasing practices in different counties were not available.<sup>259</sup>

One finding that overshadowed all others—the extent of regional disparity—made designing acceptable guidelines a nearly impossible task. Statewide, 38.9% of all the offenders sentenced in 1977 were incarcerated.<sup>260</sup> Philadelphia and Allegheny counties, which have the highest crime rates and the highest proportion of violent crimes, incarcerated 28.5 and 23.8% of their convicted offenders, respectively. The suburban incarceration rate was 44.1%; in small cities or urban counties the rate was 47.4%; and in rural areas the rate was 54%.<sup>261</sup> Philadelphia judges also gave shorter sentences than suburban and rural judges for the same offenses, particularly for misdemeanors.

The PCS did not develop or adopt Minnesota's sophisticated projection model because members believed projections could be inaccurate. Such projections also seemed unnecessary because policy was not to be based on, or limited by, prison capacity.<sup>262</sup> The staff, however, was able to project the impact of various policies on prison populations by relying on a number of assumptions.<sup>263</sup> These data

257. Pennsylvania Commission on Sentencing, Report on the Potential Impact of the Proposed Initial Guidelines on Incarceration Rates and Incarceration Lengths in Pennsylvania (Nov. 6, 1980) (unpublished report on file with the *Villanova Law Review*) [hereinafter cited as PCS Impact Report, 1980].

258. *See id.* The PCS collected information on a stratified random sample of sentences given in 1977 to assure that all counties would have cases represented in the sample and that the representation would be proportional to the number of sentences given. *Id.* at 2. Data were collected on approximately 100 variables related to each case. These items included information relating to the offenses charged, offenses convicted, sentences given, characteristics of the offense, prior record of defendant, and defendant's socioeconomic background. *Id.*

259. For a discussion of Pennsylvania paroling practices, see notes 36-43 and accompanying text *supra*.

260. PCS Impact Report, 1980, *supra* note 257 (Table 1). For a breakdown by county of the percentage of offenders incarcerated in 1977, see table at note 297 *infra*.

261. PCS Impact Report, 1980, *supra* note 256 (Table 4). For an explanation of the composition of the "suburban," "small cities/urban," and "rural" groups, see table at note 298 *infra*.

262. Interviews with John Kramer, Robin Lubitz, Judge Conaboy, and Albert Pelaez, *supra* note 181.

263. *See* PCS Impact Report, 1980, *supra* note 257, at 2-4. Research was based on 1977 sentences. The staff then estimated the impact of the guidelines by applying

gained from the projections were provided to the PCS at subsequent meetings.<sup>264</sup> Uncertainty about the accuracy of the projections arose due to the absence of data on actual time served, indications that there had been changes in sentence length since 1977, the lack of complete information on the offense severity level of prior convictions, and the less presumptive nature of the guidelines.

A number of policy decisions were made without consideration of the data on past practice or information projecting the impact of such a policy on prison population. For example, where the Minnesota Commission opted to eliminate social status factors from consideration by judges after research results indicated that they had made little difference in previous sentencing decisions,<sup>265</sup> the Pennsylvania Commission decided to eliminate them before analysis of their impact had been completed.<sup>266</sup>

#### e. Public Input and the Lack of Constituency Building

When the question of dealing with the public initially arose, the PCS members were uncertain that they could produce guidelines, and had no clear idea of what they would be like or assurance that they would each personally be able to support them. They were reluctant, therefore, to begin "selling" what they viewed as an unknown product.<sup>267</sup>

In keeping with Pennsylvania's individualistic political culture, members assumed that policymaking should be done less by open discussion with representatives of interested groups than through backroom bargaining.<sup>268</sup> One legislative member maintained that the PCS received technical input from specialists, but that the lack of

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the guidelines to the 1977 data, and measuring the difference in percentage rate of incarceration and average sentence lengths. A key assumption was that there had been no major changes in the Pennsylvania criminal justice system since 1977. *Id.* at 2. The staff commented on the effect of this assumption: "There is some speculation . . . that sentences in Philadelphia and Allegheny Counties have increased in severity since 1977. If this is the case then the estimated impact of the guidelines in these counties will be less than anticipated." *Id.* at 4.

The staff also assumed 100% judicial compliance with the guidelines. This assumption assured that the impact of the guidelines would not be understated in the report. *Id.* at 3.

264. Minutes of PCS Meeting, at 4-11 (July 12-13, 1980).

265. For a discussion of the consideration of social status factors in developing the Minnesota sentencing guidelines, see notes 122-23 and accompanying text *supra*.

266. For a discussion of the debate within the PCS over consideration of social status factors in sentencing, see notes 282-86 and accompanying text *infra*.

267. Interviews with PCS members Norman Berson, James Kelley, and Alfred Pelaez, *supra* note 181.

268. For a discussion of Pennsylvania's individualistic political culture, see note 35 and accompanying text *supra*.

input from interest groups during the process of guideline development was appropriate because public hearings or open meetings would only have politicized the Commission's choices.<sup>269</sup>

Although members were expected to represent the views and interests of their constituent groups in the Commission's deliberations, and to explain the guidelines to these groups once they were designed, this role was not strongly emphasized. Conaboy left the systematic effort to educate interest groups and hear their concerns to the staff, which had little experience with public relations work and initially limited contacts.

The Commission's defense representative took seriously his role as liaison with, and spokesman for, the defense bar, and the judges and legislators informally kept in touch with the local judiciary. However, the Commission's district attorney failed to fulfill the representative role.<sup>270</sup>

The press was also largely ignored until the October 1980 date on which the initial guidelines were presented. While John Kramer, the executive director, was "available," he did not cultivate relations with the media.<sup>271</sup> The Philadelphia and Pittsburgh papers gave editorial support to the preliminary guidelines;<sup>272</sup> the limited press reaction elsewhere in the state was largely negative.<sup>273</sup>

## 2. *Constructing the Guidelines*

The PCS used a matrix format in designing the guidelines. One dimension of the matrix represented the severity of the offense; the other represented characteristics of the individual offender. The "cell" of the matrix which corresponded to the offender and offense scores indicated both the disposition and duration of the guideline sentence.

### a. *Offense Severity Score*

As in Minnesota, Pennsylvania guidelines construction began with the establishment of a "crime designation" subcommittee which

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269. Interview with Sen. James Kelley, *supra* note 181.

270. Robert Colville, the district attorney representative, missed many commission meetings; did not take characteristically prosecutorial stances; and made little effort to contact the district attorney's association to explain the guidelines and mobilize the association's support.

271. Interviews with PCS Executive Director John Kramer, Delaware Cty. District Attorney Frank Hezel, Judge John O'Brien, and PCS member Michael Minney, *supra* note 181.

272. *See, e.g.*, Pittsburgh Post-Gazette, Feb. 23, 1981 (editorial); Philadelphia Inquirer, Jan. 9, 1981, at 18-A (editorial).

273. *See, e.g.*, Harrisburg Patriot, Dec. 14, 1980 (editorial).

was to rank the severity of offenses. This subcommittee, which initially included O'Brien, Carson, Minney, and Berson,<sup>274</sup> ordered offense severity by going through each crime set forth in the Crimes Code without first establishing ranking principles and placing each offense listed in one of ten severity levels.<sup>275</sup> Because of dissatisfaction with the original ranking,<sup>276</sup> the staff reordered the severity level of many offenses. This new ranking was done according to principles adopted by the PCS at the suggestion of Andrew von Hirsch, an expert consultant to the Commission.<sup>277</sup> Further individual ranking changes were made at virtually every subsequent meeting.

The final offense severity rank in both the October 1980 Draft Guidelines and the January 1981 Proposal was to be increased one point for use of a deadly weapon and one point for crimes involving serious bodily injury if neither were an element of the offense of conviction.<sup>278</sup> One point was to be deducted from the offense rank for conspiracies and attempted crimes.<sup>279</sup>

#### b. Offender Score

The offender score provided the second dimension of the guidelines grid. This score considered the number and severity of prior convictions, as well as some juvenile adjudications of the defendant.

The PCS was originally divided with respect to consideration of prior juvenile adjudications. In May 1980, when the rest of the offense history score was constructed, the PCS voted to exclude prior juvenile adjudications. In August, after Judge Conaboy reported strong criticism from judges at the Trial Judges' Association meeting, the issue was reopened.<sup>280</sup> It was resolved in October by including only prior juvenile adjudications for offenses ranked "six" or higher

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274. Berson subsequently left the subcommittee and Professor Albert Pelaez attended the subcommittee's meeting. After Berson left, none of the most influential Commission members were serving on this important subcommittee.

275. Burglary, theft and drug offenses were each broken down into several offense levels.

276. The initial ranking was inconsistent and Judge Scirica strongly objected to the subcommittee's failure to use the statutory classification in ranking the offense severity. Minutes of PCS Meeting (Mar. 13, 1980).

277. Andrew von Hirsch served as a consultant to both the Minnesota and Pennsylvania commissions. At the April 25-26, 1980 PCS meeting, von Hirsch advised against relying exclusively on statutory classifications. Rather, he suggested the PCS should make its own judgments on the gravity of each crime, using statutory classification as guidance. Minutes of PCS Meeting (Apr. 25-26, 1980). The reranking was completed by the staff in May 1980.

278. 10 Pa. Admin. Bull. 4181, 4182 § 303.1(c)-(d) (Oct. 25, 1980).

279. *Id.* at 4182 § 303.1(b).

280. Interview with Judge Conaboy, *supra* note 181.

that occurred on or after the defendant's fourteenth birthday and when the current conviction is for a felony.<sup>281</sup>

The appropriate treatment of social status factors was also a matter of recurrent debate and shifting votes. The Commission's survey of judicial attitudes indicated that more than eighty percent of the judges viewed a defendant's education and employment record as appropriate considerations in sentencing.<sup>282</sup> Pelaez and Minney supported the inclusion of social status factors as one of the few ways to mitigate a sentence.<sup>283</sup> Judge Scirica insisted that its exclusion would be inconsistent with the statutory provision for consideration of "the characteristics of the defendant" in the appellate review of cases.<sup>284</sup> In contrast, Judge Carson adamantly opposed the inclusion, pointing out the "racist implications" of the inclusion of social status considerations.<sup>285</sup> With Berson's reluctant support, Judge Carson's argument finally prevailed.<sup>286</sup> The PCS resolved the issue by not including social status factors in either the criminal history score or the list of aggravating and mitigating circumstances, but made no statement in the draft guidelines with respect to this exclusion.

### c. Constructing the Matrix

Pennsylvania's minimum/maximum sentencing system complicated the task of creating a single set of guidelines. The minimum sentence sets the earliest date at which parole can be, and usually is, granted. The maximum sentence is the length of time the prisoner may be incarcerated if parole is not granted. This system permits a judge to appear "tough" by setting a long maximum while setting the

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281. 11 Pa. Admin. Bull. 463, 465 (Jan. 24, 1981).

282. Pennsylvania Commission on Sentencing, Judicial Response to Questionnaire (1980) (unpublished summary on file with *Villanova Law Review*). Of the responding judges, 89.2% indicated that they considered the defendant's employment record an appropriate factor in sentencing; 84.1% viewed the defendant's education as an appropriate factor. *Id.*

283. Interviews with PCS members Alfred Pelaez and Michael Minney, *supra* note 181.

284. Interview with Judge Anthony Scirica, *supra* note 181 (citing 18 PA. CONS. STAT. ANN. § 1386(d)(1) (Purdon 1983)). The legislation provides that "in reviewing the record the appellate court shall have regard for the nature and circumstances of the offense and the history and characteristics of the defendant." 18 PA. CONS. STAT. ANN. § 1386(d)(1) (Purdon 1983).

285. Interview with Judge Curtis Carson, *supra* note 181.

286. Berson agreed in principle, and believed that his constituents, black Philadelphians, would strongly oppose guidelines that included status factors. His reluctance stemmed from concern that the provision would provoke opposition to the guidelines. Interview with Rep. Norman Berson, *supra* note 181.

minimum well below half the maximum.<sup>287</sup> The PCS opted to create guidelines only for minimum sentences, rather than to establish separate guidelines for minimum and maximum sentences, or to create a matrix for one and make the other a fixed proportion of the first.<sup>288</sup>

Drawing a disposition line that clearly distinguished between sentences to state prison and those to a local jail was also complicated by the existing system which permitted judges to send offenders sentenced to a maximum of between two and five years to either a state or local prison. Those sent to state prison for a maximum of two years must serve at least one year before being eligible for parole; those sent to a local jail on the same sentence are eligible for parole by the judge at any time, and local paroling practices are idiosyncratic. The PCS did not address the disparity that could result from the choice of state or local incarceration or suggest criteria for making that choice.

The PCS drew two disposition lines and established recommended ranges of incarceration during one meeting at which the research findings on past practice were presented. At that meeting, PCS Executive Director Kramer briefly presented the four philosophical models that the MSGC had considered<sup>289</sup> and indicated the implications of each in drawing the disposition line. He noted that historically in Pennsylvania, sentences rested principally on the seriousness of the current offense and only secondarily on prior record, fitting the "modified just desserts model."<sup>290</sup> The Commission quickly adopted a modified just desserts approach that would continue prevailing practices.

The Commission's upper disposition line divided longer sentences, probably resulting in incarceration in a state facility, from those resulting in shorter incarcerations in local facilities. The lower line separated presumptive jail sentences from non-incarceration sentences.<sup>291</sup> Judge Scirica suggested eliminating the lower line, thereby allowing the judge to choose between a non-incarcerative sentence and a jail term for all of these cases. Judge Scirica's suggestion

287. For a general discussion of Pennsylvania sentencing and parole practices see notes 36-42 and accompanying text *supra*.

288. The October, 1980 Draft Guidelines simply made no mention of maximum sentences. See 10 Pa. Admin. Bull. 4181-96 (Oct. 25, 1980). The January, 1981 Guidelines Proposal specified as follows: "The guidelines make no recommendation concerning maximum sentences." 11 Pa. Admin. Bull. 463, 465 (Jan. 24, 1981).

289. For a discussion of the four philosophical models considered by the MSGC, see notes 143-47 and accompanying text *supra*.

290. Minutes of PCS Meeting, at 7-8 (July 12 & 13, 1980).

291. For a copy of the October, 1980 Draft Guideline Sentencing Chart, see 10 Pa. Admin. Bull. 4181, 4185 (Oct. 25, 1980).

was rejected by the members who wanted narrower ranges of judicial discretion and strictly non-incarcerative sentences for some minor offenses.

In drawing the disposition line, the PCS adopted a sixty/forty rule. Matrix cells in which more than sixty percent of the previous cases had resulted in imprisonment were to be above the upper (imprisonment) line; cells with less than a forty percent past imprisonment rate were to be below the lower jail line; the remaining cells were the principal area for dispositional policy choices by the PCS.

In setting sentence lengths, the PCS adopted the principle of non-overlapping terms,<sup>292</sup> with six-month ranges within the upper tier cells, and three-month ranges in the middle tier. When an impact estimate indicated the original dispositions and durations might crowd the jails, the option of non-incarceration was added to a number of the middle tier cells.

#### d. Aggravation, Mitigation and Sentences Outside the Guidelines

The October, 1980 Draft Guidelines set forth exclusive lists of aggravating or mitigating circumstances which permitted judges to increase or decrease sentence lengths without being considered outside the guidelines.<sup>293</sup> In determining a sentence, a judge was to move one cell to the right of the applicable guideline cell for aggravation and one cell to the left for mitigation, (and, in the rightmost and leftmost cells, one cell up for aggravation and one cell down for mitigation). This limited the effect of aggravation and mitigation to an increase or decrease in sentence length of three to six months. These

292. For example, the guidelines set forth separate grid cells for 12 to 18 months, 18 to 24 months, 24 to 30 months, and so forth. Terms in contiguous cells did not overlap.

293. See January, 1981 Proposal, *supra* note 229, § 303.4(c)-(d). Section 303.4(c) provided the following exclusive list of aggravating circumstances: history of violent conduct (exclusive of juvenile conduct); infliction of severe determined cruelty on the victim; knowledge of victim's particular vulnerability due to age, infirmity, or reduced mental or physical capacity; leadership of other participants in the crime; involvement of more than one victim in the crime. *Id.* The above factors warrant an increase in the offender's sentence. *Id.*

Under the January, 1981 Proposal, the following mitigating circumstances would warrant a decrease in the offender's sentence: victim provoked the crime; defendant's conduct did not cause or threaten serious personal or property damage; defendant lacked substantial capacity for judgment at the time of the offense due to youth or physical or mental impairment; defendant compensated or made arrangements to compensate the victim; defendant played a minor role in the offense or participated under duress; defendant cooperated in the apprehension or prosecution of other offenders; or substantial grounds to excuse or mitigate the defendant's conduct or culpability existed. *Id.* Substantially the same list appeared in the October, 1980 Draft Guidelines. See 10 Pa. Admin. Bull. 4181, 4186, § 303.4(c)-(d) (Oct. 25, 1980).

first draft guidelines allowed judges to sentence outside the guidelines only if they had a “compelling reason” for doing so. This set a high standard intended to sharply restrict such deviations.<sup>294</sup>

The question of how to treat white collar crimes, such as drug trafficking, organized crime, and offenses involving abuse of trust, public office, fiduciary obligation, or status, was a source of conflict in the Commission for many months. Berson and Carson pressed for a tough stance on white collar crime.<sup>295</sup> Others wanted to address this issue but resisted making it a reason for going outside the guidelines. The October, 1980 Draft Guidelines considered as an aggravating circumstance a defendant’s use of “his position of trust, public office, confidence, fiduciary obligation, or status to facilitate the commission or the offense.”<sup>296</sup> This was not very meaningful since most of these white collar offenders would still not be incarcerated by the shift of only one cell. Further, classification as an aggravating circumstance made deviating from the guidelines for these offenses more difficult since a compelling reason for deviation would have been required under the initial draft guidelines. Discontent with this solution led to the removal of white collar crime from the list of aggravating circumstances in the January, 1981 guidelines and the addition of a statement suggesting that white collar crime could be a reason for deviation.<sup>297</sup>

#### e. The Projected Impact of the October, 1980 Draft Guidelines

The PCS made estimates of the impact of the guidelines under several assumptions. By its own calculations, assuming 100% compli-

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294. Letter from Anthony Scirica to Richard Conaboy (Dec. 4, 1980) (discussing Scirica’s reservations about requiring a “compelling reason” to move outside of the guidelines). This requirement was deleted from later versions of the guidelines. See note 315 and accompanying text *infra*.

295. Minutes of PCS Meeting, at 7 (Sept. 13, 1980); *id.* at 7-9 (Sept. 28-29, 1980).

296. See 10 Pa. Admin. Bull. 4181, 4186, § 303(c)(6) (Oct. 25, 1980).

297. 11 Pa. Admin. Bull. 463, 467, § 303.6(b) (Jan. 24, 1981). The January, 1981 Guidelines Proposal provided as follows:

The Commission has treated and ranked all crimes, but recognizes the inherent difficulties in setting sentences in certain unusual and atypical cases. These include major drug trafficking, organized crime, and offenses in which the defendant used his position of trust, public office, confidence, fiduciary obligation, or status to facilitate the commission of the offense. In these instances the judge may sentence outside the guidelines to comport with the law and facts of the case.

*Id.* Substantially the same language appears in the final guidelines which were accepted by the Pennsylvania legislature in 1982. However, the final guidelines suggest that “[t]hese crimes may warrant a sentence more severe than otherwise suggested in this chapter.” 204 PA. ADMIN. CODE § 303.1(e) (Shepard’s 1983).



ance with the guidelines, no use of aggravation or mitigation, and the use of probation in cells with an option of non-incarceration in Philadelphia and Allegheny Counties, the total proportion of offenders given incarceration sentences was expected to decrease from 38.9% to 36%. However, the proportions to be incarcerated varied widely by region, increasing the rate at which Philadelphia and Pittsburgh offenders would be incarcerated while decreasing that rate in suburban areas, small cities, and rural counties. The redistribution of offenders was particularly striking for offenders sentenced to twelve months or more. Despite a predicted decrease in the proportion of offenders to be incarcerated, the PCS estimated an overall increase of 16.3 inmate months of incarceration due to the lengths of prison terms. This predicted increase also was geographically unevenly distributed.<sup>298</sup>

298. The following table estimates changes in the incarceration rates which would have occurred under the October, 1980 Draft Guidelines by comparing 1977 data with results under the guidelines. The table assumes 100% compliance with guidelines, and no consideration of aggravating or mitigating circumstances.

	Percent Incarcerated*		Percent Incarcerated		Total Percent Incarcerated	
	Less than 12 Months		12 Months or More			
	1977 Data	Proposed Guidelines	1977 Data	Proposed Guidelines	1977 Data	Proposed Guidelines
Philadelphia County	13.5%	22.2%	15.0%	22.5%	28.5%	44.7%
Allegheny County	10.9	18.6	12.9	11.5	23.8	30.1
Suburban†	29.0	26.8	15.1	8.3	44.1	35.1
Small Cities/ Urban††	28.6	26.0	18.8	6.6	47.4	32.6
Rural†††	32.7	24.4	21.3	4.7	54.0	29.1
TOTAL	22.2%	23.8%	16.7%	12.2%	38.9%	36.0%

\* Assumes an alternative to incarceration sentence when the guidelines sentence allows either incarceration or alternative in Philadelphia and Allegheny Counties, all others give incarceration.

† Suburban Counties include Beaver, Bucks, Chester, Delaware, Montgomery, Washington and Westmoreland.

†† Urban Counties and Counties with small cities include Berks, Blair, Cambria, Cumberland, Dauphin, Erie, Lackawanna, Lancaster, Lehigh, Luzerne, Northampton and York. These are counties with cities with populations in excess of 150,000 or counties deemed 60% urban in the 1970 census.

††† Rural counties are all other counties.

f. Public Hearing on the October, 1980 Draft Guidelines and Final Revisions

The guidelines legislation had been enacted in November, 1978.<sup>299</sup> Five months later, the PCS commenced its work on formulating the guidelines. The delayed beginning and the three-month extension needed to complete the preliminary guidelines resulted in public hearings in October, 1980 and a ninety-day legislative scrutiny period from January 24 to April 19, 1981.

Such timing could hardly have been worse. With the presidential election in 1980 and the Republicans' assumption of control of both chambers of the Pennsylvania General Assembly, a mood of "get tough on crime" pervaded the state legislature. Further, statewide campaigns for the May 1980 primary elections for seven superior court and two supreme court seats were heating up, as candidates called for ever stiffer sentences. Attention was also focused nationally on the problem of violent crime in America. *Time* and *Newsweek* both ran cover stories on violent crime in March 1981.<sup>300</sup> President Reagan was shot in an assassination attempt<sup>301</sup> that critics erroneously stated during debate in the Pennsylvania legislature would have resulted in a sentence of five and one-half to six and one-half years for the assailant.<sup>302</sup> With this growing conservative mood, the chances of developing guidelines that were sufficiently tough, so as to be politically acceptable, sufficiently prescriptive so as to reduce disparity, and also feasible to implement given the existing number of prison and jail cells in the state, grew very slim.

As mandated by law, after publication of the initial draft guidelines in October 1980,<sup>303</sup> four public hearings were held around the state.<sup>304</sup> More than seventy-five persons testified at the hearings, representing the police, prosecutors, the defense bar, the judiciary, the corrections department, probation, parole, and special interest

299. For a discussion of the passage of this law, see notes 182-207 and accompanying text *supra*.

300. Both *Time* and *Newsweek* ran cover stories on the rise of violent crime in America in their March 23, 1981 issues. *The Cause of Violent Crime*, *TIME*, Mar. 23, 1981, at 16; *The Plague of Violent Crime*, *NEWSWEEK*, Mar. 23, 1981, at 46.

301. President Ronald Reagan was shot on March 30, 1981 by John Hinkley, Jr. See *N.Y. Times*, Apr. 1, 1981, § 1, at 1, col. 2.

302. See Pa. House Leg. J., Apr. 1, 1981, at 561 (remarks of Rep. Fryer). During debate in the Senate, however, Senator Gekas correctly pointed out that the proposed guidelines called for a sentence of at least 17 years for Hinkley's offense. Pa. Senate Leg. J., Apr. 8, 1981, at 402-03.

303. The initial draft guidelines were published at 10 Pa. Admin. Bull. 4181-96 (Oct. 25, 1980).

304. The public hearings were held in Scranton, Pittsburgh, Harrisburg, and Philadelphia during December 1980. 11 Pa. Admin. Bull. 463 (Jan. 24, 1981).

groups.<sup>305</sup> The majority strongly criticized the proposed guidelines.<sup>306</sup>

Reflecting on the public reaction at these hearings, one PCS member noted, "the Commission had its figurative finger in a dike for two years," but during the public hearings, the dike broke.<sup>307</sup> Sentencing liberals such as the Pennsylvania Prison Society, which had sought to reduce disparity without increasing severity, expressed disappointment that the guidelines would increase prison terms.<sup>308</sup> The representative of the Defender Association of Philadelphia protested the substantial increases in sentences in his jurisdiction.<sup>309</sup> Several citizen groups expressed concern that a judge had to go outside the guidelines to incarcerate repeat drunk driving offenders unless they had a prior felony record.<sup>310</sup> However, the loudest and most visible opposition came from prosecutors and judges. Prosecutors objected to the leniency of the proposed guidelines sentences, particularly for repeat offenders.<sup>311</sup> Judges' opposition focused on the severe curtailment of their discretion,<sup>312</sup> the costs to the court likely to result from an increased number of trials, and on the problem of crowding in the correctional facilities.<sup>313</sup>

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305. See Pennsylvania Commission on Sentencing, Synopses of Public Hearing Testimony Prepared by the Staff (Dec. 1980) (on file with the *Villanova Law Review*) [hereinafter cited as Synopses of Public Hearing Testimony, Dec., 1980].

306. While the Philadelphia newspapers gave the guidelines editorial support, and at the hearings the guidelines received praise from academicians, the guidelines received criticism from virtually everyone else. See notes 272-273 *supra*.

307. Interview with PCS member George Gekas, *supra* note 181.

308. See Synopses of Public Hearing Testimony, Dec., 1980, *supra* note 305, at 13 (testimony of D. McPherson, Pa. Prison Society).

309. *Id.* at 11 (testimony of John Packel).

310. *Id.* at 19. (testimony of P. Pennington of the Governor's Council on Alcohol and Drug Abuse; P. Leighton of Alcohol and Mental Health Assoc., Inc.; and S. Longenecker of the Pa. Driving Under The Influence Ass'n).

311. *Id.* at 11 (testimony of J. Smyth, District Attorney, Montgomery County; J. Freeman, District Attorney, Chester County).

312. *Id.* at 6, 30 (testimony of Judges Della Porta, Dauer, Tamelia and Rogers). Judge Rogers noted that the guidelines limit only the judge's discretion and not that of the prosecutor. *Id.* at 6 (testimony of Judge Rogers). Criticism of the curtailment of judicial discretion was also made by John Packel of the Public Defender Ass'n of Philadelphia; S. Schmukler of the Pa. Trial Lawyers Ass'n.; J. Freeman, Chester County District Attorney; and L. Zimmerman, Pa. Attorney General. *Id.*

313. *Id.* at 41-42 (testimony of Judges Klein and Bradley). Philadelphia Court of Common Pleas President Judge Edward J. Bradley testified that implementation of the guidelines would result in a 10% increase in defendants' requests for jury trials, thereby costing the state an additional \$1,270,000 per year. He further estimated a 6.5% increase in the state prison population resulting from increased sentences of Philadelphia offenders alone, at an additional cost of \$6,400,000 per year. *Id.* at 41. As a solution, Judge Bradley suggested expanding the range of sentence lengths to provide more flexibility. *Id.* at 41-42. This concern over the potentially great increase in costs to the courts and correctional systems was shared by many others

The nearly universal criticism<sup>314</sup> made it clear that without substantial revision, the legislature was likely to reject the guidelines. Accordingly, the PCS made a number of important changes before submitting the guidelines to the legislature in January 1981. The language implying that the guidelines had presumptive force was removed.<sup>315</sup> The offender score was altered so that either one or two misdemeanor convictions would result in one criminal history point,<sup>316</sup> three or more misdemeanor convictions would result in two criminal history points,<sup>317</sup> and each felony up to four yielded one point,<sup>318</sup> although the maximum of four prior offense points remained.<sup>319</sup> Eight of the thirteen formerly non-incarceration cells in the lower tier were made optional incarceration cells. In the upper tier both the lower and upper sentences were made more severe as the within-cell ranges were generally changed from six to twelve months and an additional six months added to the upper number in each

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testifying at the December, 1980 hearing, including J. Packel of the Public Defender Assn.; J. Freeman, Chester County District Attorney; J. Catalano, Allegheny County Probation Director; and R. Owens, Phila. Sup't. of Prisons. *Id.* at 42-44.

314. Substantial criticism was also made of the inappropriately low offense rank assigned to rape, crimes in which children are victims, and, in general, crimes involving actual or threatened serious bodily injury. *Id.* at 15-16 (testimony of Judge Tamelia; F. Hazel, Delaware County District Attorney; Sen. O'Pake; L. Marks, Women Organized Against Rape; and K. Power, Pa. Coalition Against Rape). Prosecutors criticized the sentences for white collar, political, and drug offenses as grossly inadequate. *Id.* at 17-18 (testimony of M. Kane, Bucks County District Attorney; J. Freeman, Chester County District Attorney; F. Hazel, Delaware County District Attorney; E. Rendell, Philadelphia District Attorney; and L. Zimmerman, Pa. Attorney General).

315. Judge Conaboy indicated in the introduction to the first draft guidelines that in the normal sentencing situation, the judge "*shall* sentence the defendant to the time indicated in the normal guidelines." 10 Pa. Admin. Bull. 4182 (Oct. 25, 1980) (emphasis added). This language was deleted from the introduction to the January, 1981 Guidelines Proposal. 11 Pa. Admin. Bull. 463 (Jan. 24, 1981). The first draft guidelines also indicated that the normal sentence "*must* be imposed unless otherwise provided by this chapter." 10 Pa. Admin. Bull. 4181, 4183 § 303.3(b) (Oct. 25, 1980) (emphasis added). The January, 1981 Guidelines Proposal merely recommended that a particular sentence be imposed. 11 Pa. Admin. Bull. 463, 465 § 303.1 (Jan. 24, 1981).

For a discussion of the ambiguity of the mandate given the PCS regarding the nature of the guidelines, see notes 243-249 and accompanying text *supra*.

316. 11 Pa. Admin. Bull. 463, 464 § 303.2(a)(1) (Jan. 24, 1981). Previously, two or three prior misdemeanor convictions would have resulted in one criminal history point. 10 Pa. Admin. Bull. 4181, 4182 § 303.2(a)(1) (Oct. 25, 1980).

317. January, 1981 Proposal, *supra* note 229, § 303.2(a)(2). Previously, two prior misdemeanor convictions were necessary to get one criminal history point. October, 1980 Draft Guidelines, *supra* note 228, § 303.2(a)(2).

318. January, 1981 Proposal, *supra* note 229, § 303.2(b)(3)(a)-(d). Previously, a maximum of three criminal history points could be added for previous felony convictions. See October, 1980 Draft Guidelines, *supra* note 228, § 303.2(b)(2)(c).

319. Compare January, 1981 Proposal, *supra* note 229, § 303.2(c) with October, 1980 Draft Guidelines, *supra* note 228, § 303.2(c).

cell.<sup>320</sup> The offense severity ranks for rape and assault were increased.<sup>321</sup> And white collar and organized crime were specifically excluded from the guidelines.<sup>322</sup> The proposed increases in sentence severity introduced by various changes in the guidelines meant that the January, 1981 Guidelines Proposal would have increased the total number of inmate months 61.1% statewide, as compared to a statewide increase of 16.3% estimated to result from the initial draft guidelines.<sup>323</sup>

The guidelines' modifications were intended to mollify criticism by increasing severity, allowing greater judicial discretion, and permitting greater allowance for community standards. However, the

320. Compare January, 1981 Proposal Sentence Chart, 11 Pa. Admin. Bull. 466, with October, 1980 Draft Guidelines Normal Minimum Guideline Sentence Chart, 10 Pa. Admin. Bull. 4185.

321. See January 1981 Proposal Offense Rank List, 11 Pa. Admin. Bull. 468-76. Under these guidelines the rank for rape was increased from 8 to 9. See October, 1980 Draft Guidelines Offense Rank List, 10 Pa. Admin. Bull. 4187-96.

322. Compare January, 1981 Proposal, *supra* note 229, § 303.6(b). For a discussion of the Commission's consideration of white collar offenses while drafting the guidelines, see notes 294-96 and accompanying text *supra*.

323. The following table compares the dramatic difference between the effect which the October and January Guidelines would have had on sentence length.

Estimated Percentage Changes in Inmate Months, 1977 Compared with October 1980 and January 1981 Guidelines

	Percentage Change Less than 12 Months		Percentage Change 12 Months or More		Percentage Change Total Inmate Months	
	October 80 Guidelines*	January 81 Guidelines**	October 80 Guidelines	January 81 Guidelines	October 80 Guidelines	January 81 Guidelines
Philadelphia County	+57.2%	+111.9%	+115.3%	+215.2%	+102.4%	+204.9%
Allegheny County	+73.1	+158.6	+ 17.1	+ 98.7	+ 29.3	+117.5
Suburban	+17.9	+ 16.6	- 4.9	+ 18.3	+ 2.9	+ 17.7
Small Cities/ Urban	- 7.6	- 5.0	- 35.6	- 22.5	- 27.1	- 17.2
Rural	-26.1	- 8.2	- 54.2	- 44.1	- 46.2	- 33.8
TOTAL	+14.4	+ 37.8	+ 17.0	+ 68.8	+ 16.3	+ 61.1

\* Assumes Philadelphia and Allegheny Counties comply with minimum of range, others with maximum, and no aggravating or mitigating circumstances. If minimum guideline sentence is an incarceration range beginning with zero, then for Philadelphia and Allegheny Counties incarceration length assigned is 1 month.

\*\* When the guidelines authorize either incarceration or an alternative to incarceration, only those cases which received incarceration sentences in 1977 are assumed to receive incarceration sentences under the guidelines. In these cases the minimum of the guideline range is assumed to be 1 month.

changes undercut the guidelines' initial conceptual integrity. The guidelines had originally been designed by the PCS to be presumptive in force and to narrowly limit sentence ranges, thereby greatly restricting judicial discretion and promoting predictable sentences in a more flexible and far-reaching manner than mandatory minimum sentences. By greatly weakening the presumptiveness and narrowness of the guidelines, the predictability of sentences and the guidelines' ability to provide a politically satisfactory alternative to mandatory minimums were undermined. Further, the effort to make punishment proportional to the seriousness of the current offense and offender's prior record was weakened when one prior misdemeanor was made equal in weight to one prior felony. Finally, by sharply increasing severity, implementation of the January 1981 Guidelines Proposal was likely to produce overcrowded prisons and jails, thereby necessitating some systematic evasion.

### 3. *Legislative Rejection and Subsequent Developments*

#### a. The Legislature's Response

The revised guidelines were published in January, 1981,<sup>324</sup> after which they would become law unless the legislature acted within ninety days to reject them.<sup>325</sup> The PCS had not built a constituency, had no visible supporters, and as a "legislative strategy" had simply expected the Commission's legislative members to prevent resolutions rejecting the guidelines from reaching the floor of both chambers. However, the supporters of mandatory minimum sentences reemerged, submitting several bills for consideration with much fanfare.<sup>326</sup>

In the House of Representatives, Berson could count on the support of the Democratic leadership, but the Republican PCS member, McVerry, a junior representative, failed to make an effort to win the support of the Republican leaders. While personally committed to the guidelines, he was apparently not anxious to extend himself for what seemed to be a lost cause.

The coup de grace was delivered by Representative Lois Hagarty, a Republican former assistant district attorney. Upset at what she viewed as the guidelines' leniency, she was the first to an-

324. 11 Pa. Admin. Bull. 463-76 (Jan. 24, 1981).

325. 42 PA. CONS. STAT. ANN. § 2155(c) (Purdon 1981).

326. Interviews with Rep. Norman Berson and Commission members Sen. George Gekas and Rep. Terrance McVerry, *supra* note 181. For a discussion of the mandatory minimum sentencing legislation which eventually was enacted, see notes 361 & 373 and accompanying text *infra*. See also Franzel, *Implications of Mandatory Minimum Sentencing Act*, 5 PA. L.J. REP. 3 (1982).

nounce plans to submit a resolution to reject the guidelines.<sup>327</sup> Scirica, however, was able to convince her to submit a resolution that merely called for the PCS to revise the guidelines to meet specific criticisms regarding their leniency, and to resubmit them in six months.<sup>328</sup> The Hagarty Resolution “urged and directed” the Commission to increase the upper limit of guideline sentences, give judges greater latitude in sentencing where aggravating and mitigating circumstances were found, eliminate the exclusive list of such circumstances, and increase the severity of sentences for offenses against persons.<sup>329</sup>

The House Republican leaders pressed the Hagarty Resolution through the Rules Committee and onto the calendar for a floor vote with unusual speed, allowing little opportunity for a PCS counteroffensive.<sup>330</sup> In the Senate, Judiciary Committee Chairman Gekas, although a member of the PCS, was under pressure to hold hearings on the mandatory sentencing bills.<sup>331</sup> Finding Senate Republican caucus members privately favorable to the guidelines but unwilling to vote against the Hagarty Resolution,<sup>332</sup> Gekas reported out the resolution, which was adopted by a substantial majority in both chambers.<sup>333</sup>

The Hagarty Resolution pleased virtually everybody. Supporters of the guidelines concept, who had opposed the proposed guidelines for divergent reasons, were glad to have salvaged the guidelines concept and to have another chance to have guidelines adopted. Supporters of mandatory minimum sentences, who saw that the guidelines would not provide the certainty of punishment they desired, gained six months in which to preempt the PCS. Everybody could once again look “tough on crime,” because the resolution called for a revision of sentences upward, while maintaining the status quo until a politically viable compromise could be found.

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327. Interview with Rep. Lois Hagarty, *supra* note 181.

328. *Id.*; interview with Judge Anthony Scirica, *supra* note 181.

329. H.R. Res. 24, 165th Reg. Sess., adopted Apr. 1, 1981. *See* 1 House Leg. J. 566-67 (1981).

330. *See* 1 House Leg. J. 566-67 (1981); interviews with Reps. Terrance McVerry and Norman Berson, *supra* note 181.

331. Interview with Sen. George Gekas, *supra* note 181.

332. *Id.* Interview with PCS Executive Director John Kramer, *supra* note 181.

333. H.R. 24 was passed by the House 157-37 on April 1, 1981, 1 House Leg. J. 566-67 (1981), and by the Senate 34-10 on April 8, 1981, 1 Senate Leg. J. 409 (1981).

b. The Role of Interest Groups in the Rejection of the January 1981 Guidelines

No group had been satisfied with the Commission's proposed guidelines. Although the legislative debate between 1975 and 1978 had revolved primarily around disparity, there had been a second level of discourse which had focused on severity.<sup>334</sup> In the absence of any guidelines, it had been easy to oppose disparity in principle. When the implications of the changes required to reduce disparity became obvious, however, concern over disparity virtually disappeared.

The January guidelines brought to light the fact that geographical disparity could be reduced only through two routes, neither of which was satisfactory. Sentences in Philadelphia and Allegheny Counties could be increased to match those in the rest of the state, but this would result in overcrowding the prisons. Alternatively, sentences outside of Philadelphia and Allegheny Counties could be reduced while increasing the sentences of urban offenders to a state-wide average, thereby filling the state prisons with an even greater proportion of urban offenders than they already held.<sup>335</sup> A third option was to maintain the status quo by proclaiming disparity to be a good thing. This was the least objectionable option to the majority of the participants in the sentencing debate. Sentencing "uniformity" became a negative label; critics opposed "uniformity for uniformity's sake," asserting that each county's own particular problems should be addressed on an individual rather than state-wide basis.<sup>336</sup>

The judiciary had opted for the guidelines legislation rather than mandatory minimums because the former served as a temporizing device and because they saw guidelines as the lesser of two evils. Once the October 1980 Draft Guidelines were published, it became apparent to the judges that these guidelines would actually restrict their discretion to a greater degree than would be true under the proposed mandatory minimums system. Mandatory minimums, if passed, would only tie the judges' hands in a fraction of the cases; the guide-

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334. For a discussion of the Pennsylvania legislative debate between 1975 and 1978 regarding sentencing guidelines legislation see notes 182-207 and accompanying text *supra*.

335. The disparity between sentences in Philadelphia and Allegheny Counties as compared with those in the rest of the state is illustrated in the table presented at note 298 *supra*.

336. Interview with District Attorney Frank Hazel, *supra* note 181. See also Synopses of Public Hearing Testimony, Dec. 1980, *supra* note 305, at 8-9 (testimony of S. Schmuckler, Pa. Trial Lawyers Ass'n; W. Arbuckle, Erie County Public Defender; M. Kane, Bucks County District Attorney; and F. Hazel, Delaware County District Attorney).



lines covered all sentencing decisions, including such crimes as cruelty to animals and disorderly conduct.<sup>337</sup> In Pennsylvania, judges' wide discretion to determine both disposition and minimum time to be served was not something to be given up easily, particularly to an unusual, apolitical body like a sentencing guidelines commission. The judiciary was divided on appropriate severity levels but united in its concern with the retention of judicial discretion and the effects of the guidelines on case processing. Judges predicted a large increase in the number of trials and, as a result, rising cost to the court system.<sup>338</sup>

The Pennsylvania Trial Judges' Association did not take a position, stating that it was improper to publicly oppose legislation that its members might have to execute.<sup>339</sup> It is likely that they were also concerned that formal opposition to the guidelines would open the judiciary to the accusation that it sought to preserve its discretion when abuses of that discretion were the reason for sentencing reform. Instead of taking a unified stance statewide, judges channeled their opposition through their counties' legislative delegations. The Montgomery County bench, of which Judge Scirica was and is a member, sent a unanimous letter calling for support of the Hagarty Resolution to each legislator in the county.<sup>340</sup> Many rural judges, concerned with reduced sentence severity, contacted their legislators, who did not want to be criticized for reducing sentences and who valued the judge's political support.

Prosecutors' reactions to the guidelines were directly related to the guidelines' effect on the level of sentencing severity in their jurisdictions. Only in Philadelphia, Allegheny and Delaware Counties, where the guidelines would have increased both the proportion of offenders to be incarcerated and sentence lengths, were district attorneys favorable to the guidelines. Philadelphia District Attorney Edward Rendell and the president of the district attorneys association, Frank Hazel of Delaware County, were principally responsible for preventing the association from taking a position in opposition to guidelines, recognizing that the guidelines could be useful to them.<sup>341</sup>

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337. The judges' dissatisfaction with the narrow sentence ranges was repeatedly stressed in their testimony at the public hearings held in December, 1980. Synopses of Public Hearing Testimony, Dec. 1980, *supra* note 305, at 6, 27-28 (testimony of Judge Edward Bradley, President Judge, Philadelphia Court of Common Pleas; Judge Richard B. Klein, Philadelphia Court of Common Pleas; and Judge Armand Della Porta, Philadelphia Court of Common Pleas).

338. *See* note 313 *supra*.

339. Interview with District Attorney Frank Hazel, *supra* note 181.

340. Interviews with PCS Executive Director John Kramer and Judge Anthony Scirica, *supra* note 181.

341. Rendell's criticisms and suggested change in the guidelines are set forth in

However, individual district attorneys worked through local networks to oppose the guidelines.<sup>342</sup>

Most district attorneys argued that the guidelines would undermine plea bargaining and increase both the number of jury trials and the workloads of their offices.<sup>343</sup> These arguments were useful in arousing county commissioners' concerns about costs. More important to the district attorneys was the proposed decrease in sentence severity for many offenders, with little "payoff" in terms of increased certainty of imprisonment for the "worst" offenders.<sup>344</sup>

The Commissioner of Corrections, as the governor's appointee, took a very low visibility position. While the October 1980 Draft Guidelines had seemed acceptable to the Bureau of Corrections, the increase in prison population that would have resulted from compliance with the January 1981 Proposal could not have been absorbed by the Bureau's existing facilities. The Commissioner made no public statements of protest but "let the governor's staff know the implications of the legislation."<sup>345</sup> Local corrections departments took positions in terms of the impact of the guidelines on their jails.

Other interest groups that might have taken a position on the guidelines remained silent. No civil rights groups testified at the hearings or took a position, although most black legislators had voted against the Hagarty Resolution. The Pennsylvania Prison Society, having already criticized the severity of the October guidelines, had little more to say, but was clearly more opposed to the increased severity of the January 1981 Proposal. Within the defense bar, only the Public Defender Association of Philadelphia opposed the guidelines. Governor Thornburgh, who had not named the commission members and who had his own criminal justice reform proposals, did not grant the Republican PCS members' request for a briefing.<sup>346</sup>

In the end, even the PCS members disavowed their own product. Chairperson Conaboy did not lobby for the guidelines, perhaps inhib-

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an unpublished manuscript. Philadelphia District Attorney's Office, Problems with the Proposed Sentencing Guidelines (1980) (on file with the *Villanova Law Review*). Although many of Rendell's suggested changes were adopted, the PCS found his support elusive.

342. Interviews with Frank Hazel and Edward Rendell, *supra* note 181.

343. Synopses of Public Hearing Testimony, Dec., 1980, *supra* note 305, at 39-40, 42 (testimony of J. Smyth, Montgomery County District Attorney; M. Kane, Bucks County District Attorney; J. Freeman, Chester County District Attorney; and E. Rendell, Philadelphia County District Attorney).

344. *Id.* at 11-12 (testimony of J. Smyth, Montgomery County District Attorney; J. Freeman, Chester County District Attorney; and F. Hazel, Delaware County District Attorney).

345. Interview with Commissioner Ronald Marks, *supra* note 181.

346. Interviews with Rep. McVerry and John Kramer, *supra* note 181.

ited by personal style, his sense of propriety as a federal judge, and his doubts about the guidelines. PCS members Minney and Pelaez publicly opposed the guidelines as too harsh.<sup>347</sup> Judge Scirica joined his bench in signing a letter supporting the Hagarty Resolution.<sup>348</sup> The legislative members, apparently sensing that the guidelines were going to be rejected, sought to minimize the "loss" by only supporting the guidelines in a restrained way.

### C. *Redesigning the Guidelines—Phase II*

#### 1. *The Mandate and Membership*

With the PCS compelled to revise the guidelines, and since all terms of PCS membership had expired, the Governor exercised his option of making new appointments. He appointed to the PCS Frank Hazel, the District Attorney of Delaware County; Charles Scarlata, a private defense attorney; and Professor David Jones of the University of Pittsburgh School of Law. Each was a Republican and more conservative than his predecessor. All legislative members were reappointed, and the new Chief Justice of the Pennsylvania Supreme Court reappointed three of the judges.<sup>349</sup> He replaced Judge Conaboy, who had become a federal district judge, with Court of Common Pleas Judge Lynne Abraham from Philadelphia, a former prosecutor with a reputation for being tough on crime. Judge Scirica was elected chairperson.

The internal processes in the second phase were smoother than those in the earlier phase. Patterns of communication and relations of trust were already established. The PCS had a clearer legislative mandate, given its task of modifying the guidelines in light of specific criticisms rather than reconceptualizing them. The new members also reduced the friction that in the earlier phase grew from personal and political differences. The change in chairperson appears to have made little difference in the day-to-day working of the PCS or the content of the guidelines. However, Judge Scirica, as a respected former legislator with much political experience, skill, and sensitivity, took a more active role than his predecessor in building bridges and maintaining informal contacts with powerful groups and individuals around the state. In general, PCS members solicited comments and suggestions from their organizations and kept those organizations in-

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347. See Pelaez & Minney, *supra* note 244; interviews with John Kramer, Terrence McVerry, and George Gekas, *supra* note 181.

348. See note 340 and accompanying text *supra*.

349. Chief Justice Samuel J. Roberts reappointed Judge Anthony Scirica, Judge Curtis Carson and Judge John W. O'Brien.

formed of the Commission's activities.<sup>350</sup> Perhaps as a result, organizations that had previously indicated little interest in the development of the guidelines were more interested and involved in this second phase.

## 2. *The Revision Process.*

Initially dispirited and stung by the legislative rejection of the guidelines, the PCS considered several courses of action: disbanding, resubmitting the January, 1981 guidelines, or revising the guidelines as directed.<sup>351</sup> Pressed by the new members, it opted to revise and began by considering each suggestion in the resolution.<sup>352</sup> The PCS also authorized a new study of sentences in Pennsylvania.<sup>353</sup> This research examined 1980 sentences given in twenty-three counties. The 1980 data enabled the Commission to determine the changes in sentencing that had occurred since 1977. It also helped to indicate the potential impact of PCS decisions, and to inform key legislators of the potential impact of the revised guidelines on sentences in their counties.<sup>354</sup> While guided by the specific suggestions included in the Hagarty Resolution, the PCS gradually moved beyond the resolution in its deliberations and adopted changes designed to increase clarity, eliminate inconsistencies, and alter the public perception of the guidelines.

## 3. *Changes in the Guidelines*

The PCS initially modified the format of the guidelines, replac-

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350. For example, newly appointed Commission member Frank Hazel adopted an active role by acting as a representative of the Commission to the District Attorney's Association.

351. Interviews with John Kramer, Judge Anthony Scirica, and Frank Hazel, *supra* note 181.

352. For a list of the directions given to the PCS by the General Assembly, see note 329 and accompanying text *supra*.

353. Pennsylvania Commission on Sentencing, *Estimated Impact of Sentencing Guidelines and Mandatory Sentencing Proposals* (Nov. 4, 1981) (on file with the *Villanova Law Review*) [hereinafter cited as PCS Impact Report, 1981]. The study was based on sentences for felonies other than drug and theft offenses, and on weapons misdemeanors and misdemeanors against persons. *Id.* at 33. The actual 1980 sentences were compared to the recommended sentences under the guidelines and the differences measured. *Id.* The study also estimated the impact of the mandatory sentencing bill alone, and the proposed guidelines and mandatory sentencing together. It concluded that average statewide minimum sentences would be 42% longer if the proposed (Oct. 1981) guidelines were enacted; 72% longer if only the mandatory sentencing bill were enacted; and 99% longer if both were put into effect. *Id.* (preface).

354. *Id.* The new data indicated that a striking increase in sentencing severity had occurred between 1977 and 1980. Consequently, the January 1981 guidelines would not have led to a 63% increase in months of incarceration, but rather would have led to a two percent decrease. Interview with John Kramer, *supra* note 181.

ing the matrix with a chart to simplify calculation and symbolize its willingness to make changes.<sup>355</sup> It altered the offense score by replacing the enhancement points for deadly weapon use, firearms discharge, and serious bodily injury with a provision for a fixed twelve to twenty-four month addition to the sentence for possession of a deadly weapon.<sup>356</sup> The PCS also reranked a number of crimes. In calculating the prior record score, treatment of misdemeanors reverted to the October 1980 weights, and scoring of felonies was redesigned to mirror the mandatory minimum bill proposed by the governor.<sup>357</sup> Prior juvenile record consideration was modified to eliminate the requirement that the current offense be a felony.<sup>358</sup> The aggravating and mitigating circumstances list was eliminated,<sup>359</sup> thereby allowing the court to consider any factor including the history and character of the defendant. The ranges where aggravating or mitigating circumstances apply were expanded to twenty-five percent above the upper term in the normal range and twenty-five percent below the lower normal term.<sup>360</sup> Both severity and discretion were increased by permitting incarceration for all offenses, increasing the width of the range for most felony offenses from twelve to twenty-four months, and increasing the upper limit of the ranges for nearly all offense/offender combinations.<sup>361</sup>

PCS projections of the impact of the draft revised guidelines on prison populations, alone and in combination with the proposed mandatory minimums,<sup>362</sup> indicated that the guidelines were so "tough" that if strictly followed, the guidelines would increase sentence severity for felony convictions not only in Philadelphia and

355. Compare 11 Pa. Admin. Bull. 3604-05 (Oct. 17, 1981) (revised guidelines chart) with 11 Pa. Admin. Bull. 466 (Jan. 24, 1981) (original matrix).

356. Compare January, 1981 Proposal, *supra* note 229, § 303.1(c) with October, 1981 Revised Draft Guidelines, *supra* note 231, § 303.4.

357. 11 Pa. Admin. Bull. 3597, 3598 § 303.6(a)-(b) (Oct. 17, 1981).

The most serious felonies were assigned three points for a prior conviction; all others were assigned one or two points, depending on seriousness. The maximum of six points was retained.

For a discussion of the mandatory minimum sentencing legislation which was eventually enacted, see notes 362 & 374 and accompanying text *infra*.

358. Compare January, 1981 Proposal, *supra* note 229, § 303.2(b)(2) with October, 1981 Revised Draft Guidelines, *supra* note 231, § 303.6(b)(ii).

359. Compare January, 1981 Proposal, *supra* note 229, § 303.4(c)-(d) with October, 1981 Revised Draft Guidelines, *supra* note 231, § 303.3.

360. Compare January, 1981 Proposal, *supra* note 229, § 303.4(e) (Jan. 24, 1981), with October, 1981 Revised Draft Guidelines, *supra* note 231, § 303.8.

361. Compare January, 1981 Proposal, *supra* note 229, § 303.3(h) (guidelines sentence chart) (Jan. 24, 1981) with October, 1981 Revised Draft Guidelines, *supra* note 231, § 303.8(b) (guidelines sentence chart) (Oct. 17, 1981).

362. These mandatory minimums were subsequently adopted as the Act of

Pittsburgh, but across the state.<sup>363</sup>

#### 4. *Public Hearings and Legislative Submission*

Draft revised guidelines were published in October, 1981.<sup>364</sup> The public hearings that followed received little press attention and brought forth only twenty-four witnesses.<sup>365</sup> The severity of the revised guidelines eliminated virtually all complaints of leniency, while the added judicial discretion drew off most judicial opposition. Be-

March 8, 1982, no. 1982-54, 1982 Pa. Legis. Serv. 215 (Purdon), *amending* 42 PA. CONS. STAT. ANN. §§ 9703, 9712-16 (Purdon 1982).

With the possible 24-month enhancement for the use of a deadly weapon, the revised guidelines surpassed the mandatory minimum in average sentence length.

363. *See* PCS Impact Report, 1981, *supra* note 353. The following table illustrates the projected impact of the October, 1981 Revised Draft Guidelines, with and without passage of the mandatory sentencing bill.

Projected Percentage Changes in Total Months of Confinement Sentenced, Draft Revised Guidelines (October 1981) and Proposed Mandatory Minimum Sentencing Bill Compared to 1980 Sentences

Sentencing Option	Philadelphia County*	Allegheny County**	Others***
Mandatory Bill Only	+ 109%	+ 156%	+ 39%
Guidelines Only (12 months for deadly weapon)	+ 95	+ 102	+ 28
Guidelines Only (24 months for deadly weapon)	+ 128	+ 155	+ 50
Mandatory plus Guidelines (12 months for deadly weapon)	+ 169	+ 216	+ 60
Mandatory plus Guidelines (24 months for deadly weapon)	+ 188	+ 241	+ 73

\* All Aggravated Assault (Felony II and Misdemeanor I), Burglary, Murder III, Rape, Robbery (Felony I, II, and III), Voluntary Manslaughter.

\*\* All Aggravated Assault (Felony II and Misdemeanor I), Burglary, Rape, Robbery (Felony I, II, and III), and Firearms (Misdemeanor I).

\*\*\* All felonies (except theft and drug offenses), weapon misdemeanors, and Misdemeanor I's against the person. The counties in this sample are: Beaver, Berks, Blair, Cambria, Centre, Crawford, Cumberland, Dauphin, Delaware, Indiana, Lawrence, Lehigh, Luzerne, Lycoming, Montgomery, Northampton, Perry, Schuylkill, Warren, and Washington.

*Id.*

The mandatory minimum sentencing bill is now the Act of March 8, 1982, no. 1982-54, 1982 Pa. Legis. Serv. 215 (Purdon), *amending* 42 PA. CONS. STAT. ANN. §§ 9703, 9712-16 (Purdon 1982).

364. The October, 1981 Revised Draft Guidelines are printed at 11 Pa. Admin. Bull. 3597-3605 (Oct. 17, 1981).

365. Public hearings were held on the following dates: November 16, 1981, in Harrisburg; November 18, 1981, in Pittsburgh; and November 20, 1981, in Philadelphia. *See* 12 Pa. Admin. Bull. 431 (Jan. 23, 1982). In contrast to the small number of witnesses testifying at the November, 1981 hearings, 75 individuals testified the previous year. *See* note 305 and accompanying text *supra*.

cause the PCS had adhered to the legislative mandate and the legislature had adopted the governor's proposal to expand the state prison system by 2,300 cells,<sup>366</sup> increases in prison population caused little comment or concern. The governor, attorney general, and Commissioner of Corrections offered no testimony. Most of those who did testify—including judges, police officers, district attorneys, citizens, and Representative Hagarty—praised the guidelines.<sup>367</sup> Even opponents to the concept of sentencing guidelines acknowledged that the PCS had responded to the legislative mandate that had reaffirmed support for guidelines.<sup>368</sup>

Following final revisions by the PCS,<sup>369</sup> the guidelines were submitted to the legislature on January 23, 1982.<sup>370</sup> Having anticipated and planned for opposition, the PCS found that there was none.<sup>371</sup> Chairman Scirica had assurance of support from the chairman of the

366. See An Act Providing for the Capital Budget for the Fiscal Year 1981-82, no. 1981-166, 1981 Pa. Laws 558, 563-65. This Act provided for up to \$127,913,000 for state correctional facilities. *Id.* For a discussion of the inadequacy of this increase in facilities to meet the influx of inmates that will result from implementation of the guidelines, see *Sentencing Laws Crowd Prisons, Pa. Panel is Told*, Philadelphia Inquirer, Sept. 2, 1983, at 4B, col. 5.

367. Testimony Abstracts of Harrisburg Hearing (Nov. 16, 1981); Synopsis of Public Testimony in Pittsburgh (Nov. 18, 1981); Synopsis of Public Testimony in Philadelphia (Nov. 20, 1981) (unpublished summaries of the main points of testimony based on notes taken at the hearings, on file with the *Villanova Law Review*). Rep. Hagarty, who had spearheaded the opposition of the January, 1981 Guidelines Proposal, testified in full support of the second draft guidelines. Testimony Abstracts of Harrisburg Hearing, *supra*, at 1 (Testimony of Rep. Hagarty).

368. See, e.g., Testimony Abstracts of Harrisburg Hearing, *supra* note 367, at 5 (testimony of Arthur Goldberg). *But see* Synopsis of Public Testimony in Philadelphia, *supra* note 367, at 18 (testimony of Stanford Schmukler, Pa. Trial Lawyers Ass'n) (expressing the belief that the guidelines merely increased severity in all crime categories and thereby went beyond the legislative mandate).

369. Although the PCS had previously decided to avoid crime-specific matrices in the January, 1982 Guidelines, it subsequently removed Driving Under the Influence of Alcohol or Controlled Substances (DUI) from the general guidelines and set up a special schedule of punishment with a minimum of 30 days incarceration for the second DUI offense. 12 Pa. Admin. Bull. 431, 432-33 § 303.5 (Jan. 23, 1982) codified at 204 Pa. Admin. Code § 303.

Other revisions made in the January, 1982 version of the guidelines were increasing sentences for involuntary deviate sexual intercourse and for certain weapons offenses. 12 Pa. Admin. Bull. 431 (Jan. 23, 1982) (introduction by Chairperson Scirica).

370. 12 Pa. Admin. Bull. 431-40 (Jan. 23, 1982).

371. The only legislative discussion of the guidelines occurred in the Senate Judiciary Committee, with the introduction by Senator Gekas of a resolution to reject the guidelines and the simultaneous announcement that he would oppose the resolution. It appears Gekas was not actually against the guideline. He introduced the resolution to reject the guidelines so as to assure that the guidelines would be discussed by the legislature and to gain control of the Senate debate. Interviews with John Kramer, Judge Scirica and Terrance McVerry, *supra* note 181.

House Judiciary Committee,<sup>372</sup> and, with Representative Hagarty praising the guidelines and all opponents silent, the ninety-day period for legislative rejection passed uneventfully and the guidelines became the law of Pennsylvania.<sup>373</sup>

One very important factor in the revised guidelines' acceptance was the adoption of the mandatory minimum sentencing bill.<sup>374</sup> The statute creating the PCS had been the result of a compromise in which interim sentencing guidelines were established and the PCS created to design presumptive guidelines that could serve as an alternative to mandatory sentences.<sup>375</sup> The submission of the January, 1981 Proposal ended the moratorium and reopened the debate between the two factions with respect to alternative strategies for structuring sentencing discretion. Gradually the "choice" between the two alternatives was redefined. The legislature found complementary what it had previously seen as mutually exclusive options, and enacted both. The mandatory minimums made a "tough" public policy statement but actually affect only about five percent of all sentences; the guidelines give advisory guidance to the court in the rest of the cases.

## V. ANALYSIS

### A. *Addressing the Problems of Disparity, Severity, and Authority*

The ultimate sentencing reforms that were adopted in Minnesota and Pennsylvania were significantly influenced by the way the legislatures and guidelines commissions in each state addressed the questions of disparity, severity, and authority. The handling of these questions was in turn affected by the existing institutional arrangements and distribution of discretion, the extent and nature of the disparity resulting from the existing system, and the ability of the

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372. Interview with Judge Scirica, *supra* note 181.

373. The guidelines became effective July 22, 1982 and apply to all offenses committed on or after that date. *See* 204 Pa. Admin. Code § 303 (Shepard's 1983).

374. Act of March 8, 1982, no. 1982-54, 1982 Pa. Legis. Serv. 215 (Purdon), amending 42 PA. CONS. STAT. ANN. §§ 9703, 9712-16 (Purdon 1982). The bill provided for five-year minimum sentences for offenders found guilty of second or subsequent offenses for murder (third degree), voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery, aggravated assault, arson, and kidnapping, for all first offenders convicted of the above felonies while in possession of a deadly weapon, and for all persons convicted of these violent crimes committed on local transportation.

375. For a discussion of the legislative battle over the enactment of mandatory minimum or guidelines sentencing in Pennsylvania, see notes 182-207 and accompanying text *supra*.



interest groups with a stake in the outcome to mobilize members and exert influence during the development of the sentencing reforms.

In both states the authority to set sentencing policy was delegated by the legislature to a newly created sentencing guidelines commission. However, the reasons for adopting various policies and the impact of the guidelines on existing institutional arrangements differed substantially between the states. In Minnesota, the judiciary was responsible for the disposition decision, while the parole board had authority to decide the duration of prison terms. Although the parole board had developed parole guidelines, the erosion of confidence in rehabilitation and in the MCB's ability to produce equitable punishment had estranged its former supporters. Legislatively fixed sentences came to be seen by many as the only alternative, and would have been adopted but for the stubborn resistance of strategically important opponents of such a change. The proposed alternative, sentencing guidelines for felony offenses, offered a compromise that all parties could accept. Although it was agreed that severity would not increase, law enforcement interests were satisfied with the increased certainty of incarceration and their greater influence in shaping the sentencing decision. The judiciary retained "structured discretion" over sentence lengths. The corrections bureaucracy and defense bar, which were concerned more with increased severity than with discretionary authority, saw the guidelines as more effective than legislative term-setting. Local interests, which played little role in the debate, were subsequently given a financial incentive. Thus, when the guidelines were adopted, everybody had gained something.

In Pennsylvania, the existing institutional arrangements involved a different distribution of discretion and, consequently, a different set of problems. The minimum/maximum sentencing system gave judges wide discretion over both the disposition and duration decisions, while the parole board actually had limited effect on the system. Judges could appease public demands for toughness by setting maximum sentences at or near the statutory maximum while setting relatively short minimums that, in most cases, would be the term actually served. The legislature could posture about getting tough on crime but maintain stable prison populations by merely increasing statutory maximum sentences. The result was both unsystematic disparity within local jurisdictions and patterned regional disparity, as urban judges were more lenient in sentencing offenders than those in rural and suburban areas.

Sentencing reformers in Pennsylvania were united in their desire to limit judicial discretion, but were divided with respect to the other

goals and the means to bring about reform. Those emphasizing deterrence and incapacitation pushed for mandatory minimums for repeat offenses against persons to assure greater certainty and severity of punishment. Others, operating from a retributive perspective, sought principally to reduce disparity by making sentence severity proportional with offense seriousness through uniform sentencing standards without increasing severity. Harsh mandatory minimums at first ran into opposition as too costly to implement and too narrow and cosmetic a reform. Increasing the authority of the parole board was not politically feasible. Consequently, the proposed alternative of a sentencing guidelines commission was adopted. To its advocates it promised a flexible means of reducing disparity throughout the system; to others it offered an opportunity to vote for a sentencing reform bill that deferred costs but increased severity immediately through interim guidelines.

In each state the severity question was linked with fiscal issues. In Minnesota, the legislature opted for fiscal restraint rather than more severe sentences through an alliance between criminal justice liberals and budgetary conservatives. Because the severity issue was resolved, the rhetoric of “getting tough on crime” was not only politically unnecessary but was a threat to the policy. This rhetoric was largely silenced in the legislative debate and, subsequently, by the Commission through its interpretation of the legislative mandate as requiring the guidelines to maintain prison population at the current level.

In Pennsylvania, political rhetoric about “the crime problem” and a rise in crime rates led to intense pressure in the legislature for increased punishment levels. This pressure was countered in part by concern with the costs associated with incarceration. The 1978 legislation that created a sentencing guidelines commission was passed without resolving the severity and cost issues. However, when the Commission’s October, 1980 Draft Guidelines embodied policies of reducing disparity, leveling sentence severity to a statewide mean for each offense, and maintaining the existing level of prison population, the whole severity/disparity/authority debate was reopened as certain interests found those policies insufficient or unacceptable. The debate was finally resolved by opting for token reductions in disparity, vastly greater severity, and increased corrections costs by providing for both mandatory minimums for certain crimes, and sentencing guidelines to limit judicial discretion across the board. These limitations, however, serve largely symbolic political ends by affirming the desirability of a statewide sentencing policy and providing a common

reference point for judges; but due to the wide judicial discretion remaining, they are likely to have little real effect on sentencing outcomes.

### B. *The Legislative Mandate*

The Minnesota Commission's mandate was more limited and specific than that of the Pennsylvania Commission. This difference, combined with existing institutional arrangements, made the development of sentencing guidelines a less complex task than that in Pennsylvania. The Minnesota legislative mandate was shaped with the intent of abolishing the parole board and eliminating the arbitrariness that grew from parole release practices. Only those sentence durations formerly determined by the MCB were to be set by the guidelines. The MSGC was formed to determine the circumstances under which imprisonment is proper and to establish a presumptive fixed sentence for felony offenders based on reasonable offense and offender characteristics. The Commission was directed to consider past practice and correctional resources as the basis for establishing the guidelines. The MSGC exercised its option of not designing guidelines for non-imprisonment felony sentences.

In Pennsylvania, where the parole board had much less power than in Minnesota, the vast discretionary authority of the judiciary was the target of reform. Supporters of mandatory minimum sentences proposed to attack the problem by fettering the judges' authority through harsher, mandatory sentences for a small but highly visible fraction of the offender population. This solution had great political appeal, but failed to satisfy those wanting broader change. The legislation creating the Commission gave it responsibility for developing guidelines for both felony and misdemeanor sentences. This put the Commission in the position of attacking the discretion of the judiciary over a broad range of its decisions.

As a concession to the judiciary, the term "presumptive" was eliminated from the Commission's mandate. The legislation authorized the development of "advisory" guidelines, leaving to the PCS and ultimately to the superior court on appellate review, the determination of how binding the guidelines were to be. Elimination of the presumptive language created two problems. First, it removed the certainty that the law enforcement community desired, and second, without presumptive language, it was very difficult to project the impact of the guidelines.

The legislation did not mention consideration of prison facilities because the severity issue had not been resolved. Justice-model advo-

cates did not expect an increase in severity, while supporters of mandatory minimums expected an increase. Thus a heavy burden was put on the Pennsylvania Commission to address the dilemmas that the legislature had been unable to resolve.

C. *Internal Dynamics: Membership, Leadership, and Staff*

The interpretation of the legislative mandate and the strategy that each commission adopted for addressing policy choices, resolving differences, and dealing with affected interest groups contributed significantly to the viability of the guidelines that each commission produced. The composition of each commission reflected the distribution of influence and political traditions of each state, and affected the reception of the guidelines.

Exclusion of legislators from the Minnesota Commission might have been disastrous but for the appointment of several members with legislative ties and experience. The citizen chairperson proved to be better able to aggressively promote acceptance of the guidelines than a Commission member representing a specific interest group. The inclusion of citizens and exclusion of legislators would not have been in keeping with Pennsylvania's tradition of limited citizen participation. However, the Pennsylvania legislators tended to devote limited time to the Commission's work and were unable to prevent legislative rejection when interest groups actively opposed the guidelines.

Membership for the Commissioner of Corrections and head of the parole board in Minnesota was a concession to these agencies whose activities were to be affected by the guidelines. In Pennsylvania, their counterparts were excluded because their discretionary authority would be unaffected by the guidelines and because these agencies had little political influence. Inclusion of the commissioner in Minnesota had the largely unintended virtue of assuring the presence of a member of the governor's cabinet on the Commission, thereby providing access to the State House and increasing the governor's stake in the outcome.

The leadership, internal dynamics, and staff affected decision-making in each commission and contributed to the content of, and reaction to, the guidelines. Minnesota Chairperson Jan Smaby's consultative leadership style, political skills, and willingness to make the guidelines a personal crusade contributed to their acceptance. The Commission functioned harmoniously for the most part and permitted itself to be guided by its staff. The MSGC staff was able to articulate clearly the complexity of the issues, to focus the Commission's

attention on the policy choices, to provide a bridge between the language and concepts of social science and law in making the research findings accessible to Commission members, and to press the Commission to make decisions.

The PCS original chairperson, Judge Richard Conaboy, was less involved than his Minnesota counterpart in the guideline development process and far more restrained in advocating their acceptance by interest groups and the legislature. In the second phase, the new chairman, Judge Scirica, and the Commission members took a more politically active approach to their work, tasks were more clearly defined, and internal frictions dissipated.

#### D. *Interpreting the Mandate and Designing the Guidelines*

Each commission began by examining the work on descriptive guidelines developed by the Albany Criminal Justice Research Center, and each rejected the notion that the task was simply to model and systematize past practice. Minnesota was the first jurisdiction to break with the descriptive model. The October 1978 staff Concept Paper articulated the range of policy choices implicit in moving from data on past practice to guidelines representing future policy and highlighted the role of values in making these choices. This set the MSGC on an uncharted course, made members actively function as decisionmakers, and altered the criteria for the evaluation of the Commission's work. No longer were the primary questions technical ones of right or wrong models; rather, they involved agreement with, or dissent from, the value choices made by the Commission. The PCS also collected data on past practice, but developed largely prescriptive guidelines going a step farther from the descriptive model, since it was not limited by a requirement to consider past practice or prison populations.

A key to the success of the MSGC in producing feasible guidelines was the interpretation of its mandate to "consider . . . correctional resources" as an absolute limit on future prison populations. This made the MSGC's task one of allocating scarce prison resources. It forced a discipline on the Commission which it subsequently imposed on others and permitted it to act in a responsible and "pragmatic" way. In contrast, the Pennsylvania Commission, without a comparable legislative mandate, but nonetheless concerned about the political consequences of insisting on imposing an allocation restriction on itself, assumed a "principled" stance in determining sanction levels, initially designing presumptive guidelines that held prison population nearly constant. However, when critics of the October,

1980 Draft Guidelines demanded more severe sentencing schedules and less presumptiveness, the PCS yielded. It increased sentence severity and eliminated the presumptive nature of the guidelines, thereby undercutting the integrity of their initial conception. Following legislative rejection, the PCS was given a clear mandate—to further increase severity and widen ranges—to which it responded.

To design a policy that did not overcrowd prisons, it was necessary to project prison populations accurately. To do this the MSGC collected data on past dispositional and durational practices which it then used in an innovative way. Rather than merely seeking to mirror the past, the staff devised a prison population projection model with which to explore the implications of policy options. Policies that would lead to prison overcrowding were rejected, while those that were feasible were considered in terms of both past practice and the values of the Commission members and the concerned interest groups.

The PCS also collected and analyzed data on past practice to inform itself of existing practice and the implications of various policy options. However, without the discipline of the prison population cap, choices were not based as much on data projection. The Pennsylvania projections rested on many assumptions about judicial decisions, and were therefore less reliable. Furthermore, the Pennsylvania Commission's data on 1977 sentences undermined support for the initial guidelines because critics maintained (and subsequent research confirmed) that they understated sentence severity and exaggerated the impact of the guidelines in comparison with 1981 sentencing practices. Moreover, the data indicated the extent to which sentence severity in many counties would be decreased which crystallized opposition to the guidelines.

The MSGC, viewing the construction of the guidelines as a policymaking process, launched a broad campaign to influence groups and individuals who were interested in the guidelines, while the Pennsylvania Commission did not conduct such a campaign. The Minnesota strategy of aggressive constituency-building worked in that state because it was done effectively and because certain preconditions for success were present. First, Minnesota's opinion leaders were generally in agreement on the goal of sentencing reform, thereby permitting discussion to revolve around the means to achieve it. Further, Commission members shared this goal and articulated it to interest group representatives, who sensed that change was coming and agreed to participate in shaping the guidelines to fit their interests. Second, the Commission had a chairperson and members willing to

attend countless meetings and hearings and able to make clear and convincing presentations. Third, the criminal justice community was small enough that it could be reached and induced to participate in the process on a sustained basis.

The Minnesota public relations campaign had several components: 1) initial public hearings to publicize the guidelines; 2) efforts to build good press relations; 3) involvement of Commission members in maintaining close contact with the Commission's constituent groups to ensure both that constituent concerns were presented to the Commission and that these groups were kept informed of Commission decisions; and 4) "hearings" that were held at the annual meetings of the trial judges, county prosecutors, and public defenders associations one month before submission of the guidelines to the legislature. Such a process might have highlighted irreconcilable differences if they had existed, but given the MSGC's relatively clear mandate and the general agreement on the goals of reform, this process led to clarification of the need to compromise in allocating prison space once the "ground rules" established by the Commission were clear and resulted in open negotiation among Commission members representing interest groups.

The preconditions for open debate and constituency building were absent in Pennsylvania. Legislative leaders, divided and ambivalent about the level of severity and about appropriate limits on judicial discretion, had passed off the problem to the Commission. Since the Commission members initially lacked a clear sense of the goals of reform, and the methods to be used to achieve them, public involvement probably would have heightened internal tension and politicized discussion of the issues within the Commission. This, in turn, would have increased the dual pressure for greater severity and more judicial discretion. In addition, the size and geographical dispersion of interest groups which themselves were often divided on issues by regional differences greatly increased the difficulty of communication and negotiation with those groups. Commission members, uncertain of the direction and shape of the guidelines, focused on the guidelines' construction and put aside constituency building.

Although the initial Pennsylvania guidelines were quite similar to those adopted in Minnesota, the effects—a substantial redistribution of prison and jail population around the state and a reduction of sentence severity in suburban and rural jurisdictions—threatened judges, prosecutors, and local corrections officials without offering them any perceptible benefits. Given Pennsylvania's sentencing sys-

tem and political climate, it is questionable whether an aggressive effort to build a constituency for guidelines that would bring substantive rather than symbolic changes would have led to an acceptable compromise. But with limited external input and feedback, the Commission drafted guidelines that were out of touch with the political realities and interests in the state and were therefore met with a barrage of criticism. While all agreed on the principle that the "worst" offenders should go to prison for long terms, when this meant overcrowded county jails and shorter terms for offenders in one's own district, perceived self-interest prevailed. Addressing the crime problem in Pittsburgh and Philadelphia by reducing sentences elsewhere in the state was unacceptable. During the second phase of the guidelines' development, the Commission was more careful to appease the interest groups which, by pushing through the Hagarty Resolution, had already made clear their ability to resist change that was more than cosmetic.

E. *The Product: A Comparison of Minnesota's and Pennsylvania's Sentencing Guidelines*

Minnesota's and Pennsylvania's guidelines are similar in their matrix format and underlying retributive emphasis on current offense rather than prior record. However, they differ significantly with respect to the severity level for felonies, the width of discretionary ranges, and the scope of the guidelines. The differences in statutory definitions, offense severity ranking, and criminal history scoring, and the many possible enhancements of the offender score in Pennsylvania make comparison of sentences for similar crimes difficult. Nevertheless, Table I suggests the differences between the Pennsylvania January, 1981 Proposal, the Pennsylvania guidelines actually adopted, and the Minnesota guidelines with respect to the severity and the width of the normal guidelines range for several crimes.<sup>376</sup>

The treatment of aggravating and mitigating circumstances and deviations from the guidelines in the two states is quite different. In Minnesota the guideline sentence is presumptive. A finding of "substantial and compelling" aggravating or mitigating circumstances, however, permits the judge to deviate from the guidelines and impose

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376. This chart illustrates the difference between the Minnesota guidelines and Pennsylvania's January, 1981 Proposal and the final, adopted guidelines in terms of severity and width of normal guideline range for several crimes.



TABLE I

Crime	PENNSYLVANIA				MINNESOTA			
	January 1981		January 1982		January 1981		January 1982	
	No Priors, Aggravation, or Weapon Use	1 Prior (Same Offense)	No Priors, Aggravation, or Weapon Use	1 Prior (Same Offense)	No Priors	Severity Score	No Priors	1 Prior (Same Offense)
Murder III	48-60	72-84	48-120	72-120	94-100 (62-67)*	9	94-100 (62-67)*	116-122 (77-81)
Rape	36-48	54-66	36-60	54-78	41-45 (27-30)	8	41-45 (27-30)	50-58 (33-39)
Arson I	24-36	42-54	24-48	42-66	23-25 (15-17)	7	23-25 (15-17)	30-34 (20-23)
Simple Robbery	0-6	3-6	0-12	3-12	18**	5	18**	23
Receiving stolen property under \$1,000***	0-3	0-6	0-12	0-12	12	4	12	15

\* Minnesota awards good time at the rate of 1 day off for 2 days of good behavior. Sentences in parentheses represent time to be served with good time reduction (i.e., the likely real term).

\*\* Underlining indicates stayed sentence. Single figure indicates term to be imposed if conditions of stay are violated.

\*\*\* Sentencing for receiving stolen property under \$2,000 in Pennsylvania compared with sentence for receiving under \$1,000 in Minnesota.

or stay any sentence authorized by law provided that the judge gives written reasons for the deviation. The emphasis is on limiting the number of deviations but allowing latitude when compelling circumstances are presented.

Under the Pennsylvania guidelines, the grid sentence is advisory rather than presumptive. In anticipation of more frequent invocation of aggravating and mitigating circumstances, the Pennsylvania Commission focused its efforts on limiting the amount of deviation rather than the frequency. By considering an aggravated or mitigated sentence as being within the guidelines and allowing the judge to move right or left by one cell, the Commission's January, 1981 Guidelines Proposal made it easy to alter a sentence by six months but quite difficult to find additional reasons for going outside the guidelines. This had the disadvantage of limiting sentencing options in sentencing unusual cases. In the version of the guidelines finally adopted, the list of aggravating and mitigating circumstances was eliminated, thereby offering neither guidance nor any effective limitation on judges' discretion regarding when to aggravate or mitigate within the guidelines (by the specified amount) and when to deviate from them.

The scope of the guidelines also differs between the two states. Minnesota's guidelines do not address misdemeanors or the actual sanction for the eighty percent of the felons whose sentences are stayed, since the MSGC did not design non-imprisonment guidelines. The judges, prosecutor, and public defender on the Commission all agreed that a statewide policy for state prisoners was desirable. A statewide policy for other sentences was seen as an undesirable infringement on the community corrections approach and might have created strong opposition to the statewide sentencing guidelines. The guidelines, in essence, were narrowly and very sharply focused on the worst felons.

Pennsylvania's January, 1981 Guidelines Proposal provided recommended sentences for both felonies and misdemeanors, provoking strong protest because they threatened judicial discretion and prosecutorial practices across the board and ignored local customs. By telling judges that they should not lock up minor offenders, even where they tended in existing practice not to do so, rather than focusing on the question of who should go to state prison, the Commission diffused and thereby undercut its effort to introduce meaningful sentencing reform. Forced to retreat, the Commission produced the final version of the guidelines which in essence leaves judicial discretion in sentencing misdemeanants untouched and allows wide discretionary ranges for handling felons.

F. *The Role of Interest Groups*

Both the Minnesota and Pennsylvania guidelines proposed changes in existing policies and practices. The MSGC's guidelines were accepted because the changes they introduced were principled and limited in scope, because they left important areas of discretion untouched, and because they gave more than they took from virtually all affected interest groups. The Commission highlighted the change in principle underlying imprisonment policy, downplayed the regional redistribution of prisoners, and added a number of sweeteners that won the support of the primary interest groups.

The county attorneys were pleased with the right of the state to appeal a sentence, the inclusion of the juvenile record, the elimination of social status factors from consideration in sentencing, and the greater certainty of imprisonment for person offenders. The public defenders viewed as a success their efforts to limit the effects of prior misdemeanors and juvenile adjudications on criminal history scores. The judges were divided and thereby neutralized. The guidelines shifted, rather than diminished, judicial discretion by limiting dispositional authority, while giving judges authority to determine sentence durations. Community Corrections Act counties were given a financial incentive to support the guidelines. The reaction of corrections personnel was mixed. Probation officers were concerned with added responsibilities, but leaders in the Department of Corrections were pleased with increased leverage over prisoners and a predictable prison population. Indian and Black groups, while suspicious of the guidelines, felt they had gained by the prohibition of consideration of social status factors. Feminist groups were pleased with increased sentence severity for sexual offenders. When the guidelines were submitted to the legislature, all organized opposition had been neutralized and key legislators went along with what otherwise was likely to have been a controversial policy.

Pennsylvania's October, 1980 Draft Guidelines would have only modestly increased prison populations, reduced regional disparity by decreasing the number of offenders from small cities, suburban, and rural areas to be incarcerated, and limited judges' discretion in sentencing both misdemeanants and felons. Such a proposal, while arguably equitable and ostensibly responsive to the legislative mandate, was politically unpalatable. The guidelines made mandatory minimum sentences look less inhibiting to judges, more certain to prosecutors, more reasoned to correctional administrators, and less costly to county government officials. When the regional implications of a policy to reduce disparity became apparent, discussion of disparity was

replaced by concern that sentencing "uniformity" would fail to meet each county's unique problems.

Opposition to the January, 1981 Guidelines Proposal led to a reopening of the legislative debate over sentencing reform. Although the Commission salvaged the concept of guidelines, they ceased to be the unique solution and became instead a complementary crime-fighting measure as the legislature also passed a mandatory minimum sentence bill and a revenue measure to increase prison capacity.

The final Pennsylvania guidelines, which further increased sentence severity and broadened the range of judicial discretion, raised virtually no opposition. Technical ambiguities and confusion about complexity had been removed; prosecutors could no longer credibly complain of leniency nor judges of being "fettered." By fulfilling the clarified legislative mandate and establishing general principles without substantially redistributing authority in practice, the guidelines became politically acceptable.

### G. *Conclusion*

Each commission was relatively successful in living up to the expectations of the legislature that created it. In Minnesota there was a consensus favoring presumptive sentences for felonies, elimination of the parole board, and reduction of existing disparities without an overall increase in severity or prison population. The MSGC had a limited mandate, which it fulfilled by providing guidelines with a principled and feasible policy. Interest groups which participated in creating the guidelines gained more than they lost by accepting them. In Pennsylvania, the Commission failed initially to create politically acceptable guidelines and yielded in its principled stance on prison population. However, the PSC may have achieved a latent goal of the Pennsylvania legislature. The Commission bought time and subsequently heightened awareness of the dilemmas and policy choices involved in simultaneously seeking to reduce disparity, increase severity, and hold down prison populations and costs. When the choices became clear, the legislature made a symbolic gesture toward reducing disparity by adopting guidelines with broad ranges and made a real commitment to increased severity and the associated costs of an expansion in prison capacity. Rather than choosing between guidelines and mandatory minimums, it adopted both "reforms."

The contrasting outcomes of the development of sentencing guidelines in the two states caution against generalizing from the experience of a single state. Other jurisdictions considering adopting a guidelines approach cannot simply attempt to duplicate the Minne-

sota Commission's experience. Their success in producing politically acceptable guidelines that introduce a measure of determinacy are likely to be affected by the following factors: the state's political culture; the magnitude and definition of "the crime problem;" the general political climate; the existing distribution of authority; the level of consensus in the legislature about the nature of the desired change and the expression of this consensus in a legislative mandate; the goals and influence of interest groups in bringing about change; and the skills of the guidelines commission both in creating a rational, coherent, feasible, and equitable system, and in enlisting the support of the most powerful interest groups affected by the change.

Finally, adopting a reform measure leaves unanswered questions about its magnitude, impact, and broader implications. Neither Pennsylvania's legislative mandate nor the guidelines went very far in structuring sentencing decisions, reducing disparity, or introducing "determinacy" into that state, either in theory or in practice. Minnesota, in contrast, seems to have adopted a real change, moving from a system resting on indeterminate sentences and utilitarian goals to one in which punishments of determinate length are announced at the time of sentencing and are based on a just desserts model. Still, several caveats are necessary. First, there are numerous avenues for both reintroducing utilitarian considerations in sentencing and altering sentence lengths. Empirical research will have to determine whether the correctional bureaucracy affects time to be served by denying good time; how prosecutors' charge and plea negotiation practices, which are not regulated by the guidelines, affect sentencing outcomes; and the extent to which "like" offenders actually receive like sanctions.

Second, determinate systems are unstable and particularly vulnerable to easy alteration under public pressure for increased sentence severity. Minnesota's guidelines face pressures from four sources that potentially threaten their survival. The legislature may pass legislation that undermines the balance between prison capacity and population. The judiciary may react in either of two ways. It may deviate consistently in the direction of greater severity, increasing population pressure on the prisons. Alternatively, the judges may sentence at or below the guidelines in cases that lead to public outcry over "leniency" that threatens the existing system. The governor may alter the Commission by replacing current members with new members not committed to the current guidelines. Finally, the Commission may alter the guidelines. Thus, whether the coalition of interests that created Minnesota's determinate sentencing system will continue

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to support the guidelines and whether the guidelines will have the desired impact on actual sentencing practices and outcomes, remains to be seen.

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